

FUNDING THE PEOPLE'S RIGHT

*Julian Darwall**
*Martin Guggenheim***

INTRODUCTION	620
I. COMMUNICATING WITH A CAUSE OF ACTION	622
A. Remedies, Political Dialogue, and Standoffs	622
B. Incremental Approaches and Political Mobilization	628
II. CRAFTING THE SEPARATION-OF-POWERS NARRATIVE ON INDIGENT DEFENSE	633
A. Lack of Indigent Defense Funding Imperils Courts' Ability to Oversee the Executive Branch	634
B. Lack of Judicial Oversight Increases the Risk of Wrongful Conviction	635
C. Leaving the Executive Without Oversight Impairs the Rule of Law and Allows Unpopular Privacy Intrusions	638
D. Lack of Oversight Encourages Police Corruption..	639
E. Lack of Oversight Fosters Lack of Popular Respect for the Law	640
F. Alternative Methods of Oversight are Ineffective by Themselves	641
G. The Fundamental Structure Narrative Has Broad Appeal	642
III. INTERBRANCH COMMUNICATION AND GENERAL COURT FUNDING	648
A. Impediments to Formal and Informal Communication and a History of Proposals	650
B. Judicial Political Action and Communicating the Judicial-Legislative Partnership	653
IV. CONCLUSION AND RECOMMENDATIONS	660

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** Fiorello LaGuardia Professor of Clinical Law, New York University School of Law. I gratefully acknowledge support from the Filomen D'Agostino and Max E. Greenberg Fund at New York University School of Law.

INTRODUCTION

Courts were established as a check on unilateral state action that would interfere with individual liberty. Essential to their function is the capacity to assess the facts of a case independently from the executive branch. In the context of criminal prosecutions, the judiciary can no longer do what the Constitution requires because three factors have, in combination, stripped courts of their capacity for independent oversight.¹ First, the great majority of people who are charged with crimes are indigent and represented by court-assigned counsel. Second, court-assigned counsel are burdened with caseloads that leave them unable to conduct meaningful investigations of their cases. Third, a very small percentage of cases are resolved by a contested evidentiary hearing.²

In an adversarial system, courts are expected to engage in independent fact finding by weighing two competing accounts of a case. In the criminal context, where the executive branch presents one side of the case, independent judicial oversight depends on a factual investigation by defendant's counsel as a counterweight to the account presented by the state. When the legislature fails to provide adequate funding for indigent defense, it interferes with the essential role of the judiciary to independently oversee executive action. Because this function is essential to the judiciary's role, under these circumstances, the system faces an unconstitutional failure of separation of powers. That is precisely what has happened in the United States.

Nationally, ninety-five percent of cases are adjudicated in state court,³ and the situation in state courts is dire.⁴ Although the U.S. Constitution requires that each state provide free counsel to all indigent defendants who risk the loss of physical liberty,⁵ state legislatures

1. Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2012) [hereinafter *The People's Right*].

2. *Id.*; see also DEBORAH L. RHODE, ACCESS TO JUSTICE 8 (2004); Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 371 (2004).

3. Margaret H. Marshall, Chief Justice, Mass. Supreme Judicial Court, Remarks to the American Bar Association House of Delegates 2–3 (Feb. 16, 2009), available at http://www.ncsconline.org/D_Comm/ThisWeek/Marshall_remarks_021609.pdf.

4. See Daniel J. Hall & Thomas Clarke, *Delivering Judicial Services in Hard Times*, in FUTURE TRENDS IN STATE COURTS 2008 1, 1 (Carol R. Flango et al. eds., 2008), available at http://www.ncsconline.org/WC/Publications/KIS_CtFutuTrends08.pdf; Paul de Muniz, *Overturing Precedent: The Case for Judicial Activism in Reengineering State Courts*, 87 N.Y.U. L. REV. 1, 6–10 (2012).

5. *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963).

get to decide in the first instance how much money to allocate to indigent defense (and, more generally, to state judicial administration).⁶ In the past year alone, forty-two states have reduced court budgets, sometimes by twenty-five percent,⁷ resulting in substantial reductions in personnel and operating hours in the majority of states.⁸ Practitioners and commentators frequently complain about the failure of legislatures to provide sufficient funds for courts to do their constitutional job.⁹

As one of us argued in *The People's Right to a Well-Funded Indigent Defender System*,¹⁰ the Constitution empowers courts to protect their essential judicial roles by ordering legislatures to adequately fund indigent defense.¹¹ The conventional argument against courts ordering funding is based on separation of powers: courts are said to usurp the legislative role when they require funding for a particular program. To the contrary, *The People's Right* argues that separation of powers itself *justifies* court orders to fund the people's right to effective counsel. In many other situations, courts have prevented encroachment on their "essential attributes," "core functions," or "central prerogatives,"¹² and have directly and indirectly required leg-

6. A fully funded court system would require one to two percent of a state's overall budget. ABA TASK FORCE ON PRESERVATION OF THE JUSTICE SYSTEM, CRISIS IN THE COURTS: DEFINING THE PROBLEM 1 (2011) [hereinafter PRESERVATION TASK FORCE REPORT].

7. John D. Minton, Jr., Chief Justice, Ky. Supreme Court, Opening Remarks at the Kentucky Law Journal Symposium on Court Underfunding (Sept. 30, 2011), available at <http://www.abanow.org/2011/09/opening-remarks-to-the-symposium-on-court-underfunding/>; see also PRESERVATION TASK FORCE REPORT, *supra* note 6, at 3 (citing Carol Hunstein, Chief Justice, Supreme Court of Ga., Testimony at Crisis in Court Funding Hearing before the ABA Task Force on Preservation of the Justice System (Feb. 9, 2011)).

8. William Robinson, President, Am. Bar Ass'n, Presidential Speech before the American Bar Association House of Delegates (Aug. 6, 2012), available at <http://www.abanow.org/2012/08/robinson-pushes-for-adequate-funding-of-state-courts-in-federal-presidential-speech/>.

9. See, e.g., NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011).

10. See generally *The People's Right*, *supra* note 1 (manuscript at Part IV).

11. See *id.*

12. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60–61 (1982) (holding in a plurality opinion that Congress does not have the power to remove the essential attributes of judicial power from Article III courts and give those attributes to Article I courts); see also *Stern v. Marshall*, 131 S. Ct. 2594 (2011); *Miller v. French*, 530 U.S. 327, 341 (2000) ("[T]he Constitution prohibits one branch from encroaching on the central prerogatives of another . . ."); *New York v. United States*, 505 U.S. 144, 182 (1992); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850–51 (1986) (finding that an Article I court's constitutional validity may depend on the extent to which it "exercises the range of jurisdiction and powers normally vested only in Article III courts," as well as "the origins and importance of the

islatres to expend funds to protect the judiciary.¹³ Courts are experts in recognizing their own crisis of indigent defense and judicial independence, and the usual considerations of institutional expertise that would otherwise warn against judicial oversight are less relevant. A constitution of cooperating coequal branches should grant initial allocation of judicial resources to the legislature and meaningful review of that decision to the judicial branch. *The People's Right* concludes that courts should recognize a cause of action based on separation of powers that would enable them to command funding for effective indigent defense.

This article raises the practical and political problems that may prevent courts from ordering state legislatures to increase funding for indigent defense and proposes alternative and complementary interbranch communication strategies to overcome those problems. It integrates the ideas of *The People's Right* with current and past national conversations on the underfunding of state courts and interbranch dialogue. Part I describes the promise and pitfalls of calling for a legislative response to inadequate funding with a judicial order. Part II elaborates a new message about the necessity of indigent defense designed to appeal to a broader range of legislators, judges, and stakeholders. Part III considers the importance of emerging methods in engaged political advocacy by judicial officers.

I.

COMMUNICATING WITH A CAUSE OF ACTION

A. Remedies, Political Dialogue, and Standoffs

When courts communicate the need for increased indigent defense funding in the form of a judicial order, they engage in a forceful and risky form of interbranch communication. Issuing such an order means finding that a legislative action, in this case funding legislation, is unconstitutional.¹⁴ *The People's Right* argues for this method of

right to be adjudicated, and the concerns that drove Congress to depart from the requirements of Article III"). See generally *The People's Right*, *supra* note 1.

13. E.g., *People v. Jackson*, 371 N.E.2d 602 (Ill. 1977); *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa. 1971); see also *The People's Right*, *supra* note 1 (manuscript at 50–54) (citing cases relating to expenditure requirements).

14. State courts are empowered to interpret state constitutions, and state constitutional adjudication offers substantial potential for reform. See Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 924 (2011); see also William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 10

judicial communication—ordering that the legislature allocate more funding to the judicial branch—where the court finds that indigent defense funding is inadequate to allow judges to carry out their constitutional duty of independent adjudication.

The notion that courts could demand greater funding through judicial order is not novel. A variety of cases have used the “separation of powers” and “inherent powers” doctrines to protect judicial funding.¹⁵ Commentators have called for the preservation of judicial fund-

(1995); Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 900–01 (1989). Hershkoff and Loffredo and Kaye point out that many of the reasons a federal court might avoid imposing its own judgments are overstated when applied to state courts, which have long used their traditional common law powers to develop an array of rules and standards for critical aspects of social and economic life. Hershkoff & Loffredo, *supra*, at 936; Kaye, *supra*, at 10. Likewise, the abstention and justiciability doctrines that have developed to remedy federalism issues are irrelevant in state courts, though Hershkoff and Loffredo suspect they may continue, inappropriately, to persist in state court decisions. Hershkoff & Loffredo, *supra*, at 975–78.

15. *See, e.g.*, Larabee v. Governor of New York, 860 N.Y.S.2d 886, 894 (2008) (refusal to pass judicial pay adjustments without legislative salary increase violated separation of powers); N.Y. Cnty. Lawyers' Ass'n v. State, 745 N.Y.S.2d 376, 388–89 (2002) (entering a preliminary injunction revising compensation rates for indigent defenders because the inadequate rates created a constitutional imbalance and impaired the judiciary from functioning); Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 196–200 (Pa. 1971); Twenty-First Judicial Dist. Court v. State, 563 So. 2d 1185 (La. Ct. App. 1990) (“Under the doctrine of inherent powers, courts have the power (other than those powers expressly enumerated in the constitution and the statutes) to do all things reasonably necessary for the exercise of their functions as courts. The doctrine is a corollary of the concepts of separation of powers and of judicial independence, in that other branches of government cannot, by denying resources or authority to the court, prevent the courts from carrying out their constitutional responsibilities as an independent branch of government.”) (internal quotation marks and citations omitted); Duncan v. State, 774 N.W.2d 89 (Mich. Ct. App. 2009) (“[j]ust as it is implicit in the separation of powers that each branch of government is empowered to carry out the entirety of its constitutional powers, and only these powers, it is also implicit that each branch must be allowed adequate resources to carry out its powers . . . the people of this state have the right to appropriations and taxing decisions being made by their elected representatives in the legislative branch, they also have the right to a judiciary that is funded sufficiently to carry out its constitutional responsibilities”) (emphasis in original), *rev'd on other grounds*, 784 N.W.2d 51 (Mich. 2010); *see also* Makemson v. Martin County, 491 So. 2d 1109, 1113 (Fla. 1986) (“the courts have authority to do things that are absolutely essential to the performance of their judicial functions”); State v. Bowers, 39 So. 3d 479, 482 (Fla. Dist. Ct. App. 2010) (certifying to the state’s highest court the question of whether legislatively prohibiting “a trial court from granting a motion for withdrawal by a public defender based on ‘conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client,’ is unconstitutional as a violation of an indigent client’s right to effective assistance of counsel and access to the courts, and a violation of the separation of powers” (citing FLA. STAT. § 27.5303 (2012))). *But see* Pillershorf v. Dep’t of Pub. Advocacy, 890 S.W.2d 616, 625 (Ky. 1995) (Brashear, Spec. J., dissenting) (arguing in an indigent counsel rate cap case that “the majority in

ing based on separation of powers principles, although the role of funding public defenders in preserving judicial independence has gone unarticulated.¹⁶

However, history should caution state judiciaries against ordering additional funding from the legislature without first creating conditions for productive interbranch communication. An order requiring funding as a matter of separation of powers is most likely to be effective when there exists a record of the problems of underfunding documented by multiple, politically powerful stakeholders; when there is a documented history of legislative inaction, particularly once the legislature has been permitted to devise its own solution after notice about the unconstitutionality of funding; and when strong judicial leaders have created legislative partnerships and organized constituents.

Before the trend toward centralized state-based funding, state courts had a substantial record of requiring local legislative bodies to

this case implies that the separation of powers doctrine requires us to abdicate wholly to the legislature in the appointment and payment of counsel for accused indigents. In fact, the separation doctrine requires the opposite: it demands that the judiciary maintain the coequal status"); *Metro. Pub. Defender Servs., Inc. v. Courtney*, 64 P.3d 1138 (Or. 2003) (finding that budgetary restrictions did not prevent judicial branch from carrying out core functions, even though budget cuts allegedly precluded appointment of defense counsel for certain types of cases involving indigent defendants).

16. E.g., Laura Abel & David Udell, *If You Gag the Lawyers Do You Choke the Courts?*, 29 *FORDHAM URB. L.J.* 873, 896–903 (2003) (arguing that funding restrictions on legal services lawyers raise separation of powers problems); Bobby R. Baldock et al., *Judicial Independence: A Discussion with Judges of the United States Court of Appeals for the Tenth Circuit*, 74 *DENV. U. L. REV.* 355 (discussing separation of powers and funding); Erin V. Everett, *Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step in to Solve Mississippi's Indigent Defense Crisis*, 74 *MISS. L.J.* 213, 237, 240 (2004) (“[T]he courts possess the inherent authority to protect their own integrity and to make any such orders necessary to ensure that integrity. . . . [T]he right to assistance of counsel can be properly characterized as judicial in nature, placing the State’s indigent defense crisis within the scope of the powers of the courts.”); Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 *MO. L. REV.* 751 (2010); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 *MD. L. REV.* 217 (1993); Symposium, *Justice Unfunded—Justice Undone? Assuring Sustainable Funding for Our Courts*, *PA. BAR ASS’N Q.*, Jan. 2012, at 1; Wayne A. Logan, *Litigating the Ghost of Gideon in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 *MO. L. REV.* 885 (2010); see also Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 *U. MICH. J.L. REFORM* 217, 217–18 (2007) (conceiving of access to justice in terms of access to facts and ability to investigate). Erwin Chemerinsky has also suggested recently that John Hart Ely’s thesis on the “essential functions” of the judiciary, which it may always act to protect, serves as an independent basis for orders demanding more funding. Erwin Chemerinsky, Dean, Univ. Cal. Irvine Sch. of Law, Remarks at University of Kentucky College of Law Symposium on Court Underfunding (Sept. 23, 2011), available at <http://www.abanow.org/2011/09/opening-remarks-to-the-symposium-on-court-underfunding-pt-2/>.

fund courts.¹⁷ For example, in 1971, Philadelphia trial judges brought a mandamus proceeding, *Commonwealth ex rel. Carroll v. Tate*, to compel the Mayor and City Council of Philadelphia to appropriate additional funds for court administration. The Pennsylvania Supreme Court found in favor of the judges, proclaiming that:

[T]he Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent branch of our Government.¹⁸

Relying on cases “throughout our Nation,” that court found that “this principle has long been recognized,” and reasoned that “the deplorable financial conditions in Philadelphia must yield to the [c]onstitutional mandate that the [j]udiciary shall be free and independent and able to provide an efficient and effective system of [j]ustice.”¹⁹

Decisions like *Carroll* contributed to the movement to centralize judicial funding structures at the state level. In addition to allowing central rulemaking, merit selection, and efficiencies of scale, state centralization reduced the local conflicts from which the inherent powers decisions emerged.²⁰ Carl Baar wrote in 1980 that the growth of the inherent judicial power doctrine created a danger that the judicial system might “try to secure its appropriations by mandamus,” to the discredit and embarrassment of both state judiciaries and state legislatures.²¹ Baar’s worry proved relevant in the late 1980s and 1990s.

17. CARL BAAR ET AL., BUREAU OF JUSTICE ASSISTANCE CRIMINAL COURTS TECHNICAL ASSISTANCE PROJECT, FINANCING THE THIRD BRANCH IN LEAN TIMES: PUTTING THE PRESENT FISCAL CRISIS IN PERSPECTIVE 8 (2010) [hereinafter FINANCING THE THIRD BRANCH], available at <http://www1.spa.american.edu/justice/documents/2711.pdf>.

18. *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 196–200 (Pa. 1971) (collecting cases); see also *Carlson v. State ex rel. Stodola*, 220 N.E.2d 532, 533–34 (Ind. 1966) (“It follows that the judicial function may not be controlled by the executive or the legislative branch[.]. . . The security of human rights and the safety of free institutions require freedom of action on the part of the court.”); *Knox Cnty. Council v. State ex rel. Kirk*, 29 N.E.2d 405 (Ind. 1940) (finding a right to order indigent counsel in the face of a legislative refusal to allocate any resources).

19. *Carroll*, 274 A.2d at 197, 199.

20. Gregg G. Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12, 15 (2004), available at http://www.princeton.edu/~kewhitt/inherent_judicature.pdf. By 2004, about seventy percent of the states had trial courts primarily or significantly funded from state sources. John K. Hudzik & Alan Carlson, *State Funding of Trial Courts: What We Know*, JUDGES’ J., Summer 2004, at 11, 11.

21. Carl Baar, *The Scope and Limits of Court Reform*, 5 JUST. SYS. J. 274, 281 (1980).

In 1987, the Pennsylvania Supreme Court declared the state's county-based system of funding the courts unconstitutional and ordered the legislature to establish a state-based funding system instead.²² With government spending constitutionally delegated to the legislature and that system in place for over two hundred years, the outraged legislature ignored the mandate for nine years. In 1996, the Pennsylvania Supreme Court issued a writ of mandamus directing the General Assembly to implement a state-funded court system within two years and appointed a special master to develop a proposed design for the new system and a plan for its implementation.²³ The writ led to a "stand-off" and "constitutional crisis," that resulted in little benefit to the judiciary.²⁴

Another standoff occurred in 1991, when New York Governor Mario Cuomo recommended a ten percent cut from Chief Judge Sol Wachtler's budget request for the state judiciary.²⁵ Judge Wachtler told the press "as far as I'm concerned, [it's] an unconstitutional budget," and legislators negotiated for a budget roughly in between the executive and judicial proposals.²⁶ Judge Wachtler responded to the legislature's action with a lawsuit in state court claiming that the inherent power of the judicial branch allowed it to compel funds for its maintenance.²⁷ Governor Cuomo filed a federal lawsuit seeking to dismiss Judge Wachtler's state court suit.²⁸ Finally, after what a *New York Times* editorial called "intransigence and petulance" on both sides, a settlement was reached that provided for a modest budget increase just before argument was to begin in Wachtler's state court suit.²⁹

At least one chief judge has acted unilaterally to secure supplemental funding, using the controversial method of retaining fees that are initially produced to courts. In 2002, Kansas Chief Judge Kay McFarland proclaimed in her State of the Judiciary Address that "[t]he simple truth is the Judicial Branch cannot perform its constitutional

22. *See* Cnty. of Allegheny v. Commonwealth, 534 A.2d 760, 763–65 (Pa. 1987). *See generally* Dana Stuchell, *Constitutional Crises in Pennsylvania*, 102 *DICK. L. REV.* 201 (1997) (describing the context and legal setting of the Pennsylvania legislature's standoff with the courts).

23. *Ass'n of Cnty. Comm'rs v. Commonwealth*, 681 A.2d 699, 332–33 (Pa. 1996).

24. Webb & Whittington, *supra* note 20, at 15.

25. Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 *PACE L. REV.* 111, 122–35 (1994).

26. *Id.* at 126–28.

27. *Id.* at 128.

28. *Id.* at 130.

29. Webb & Whittington, *supra* note 20, at 16; Editorial, *Wachtler v. Cuomo = Two Losers*, *N.Y. TIMES*, Sept. 27, 1991, at A28.

and statutory duties with such a shortfall in funding,” even though the “courts are the last bulwark of freedom as guaranteed by the Bill of Rights . . . [and though] there are things the people . . . may have to give up in this fiscal crisis, justice cannot and must not be one of them.”³⁰ That year, she instituted an “emergency surcharge” order that court fees be paid into a fund separate from the state treasury and available only to the judicial branch.³¹ Surprisingly, the governor gave the chief justice’s approach “high marks,” and prominent members of the legislature endorsed the action, while the House speaker admitted the futility of challenging the order, stating: “who are we going to appeal to? The supreme court?”³² An advisory opinion by the Kansas Attorney General found that the surcharge was constitutional.³³

The success of this maneuver has been attributed to Chief Justice McFarland’s strong political position, supported by her reputation and lengthy service.³⁴ One commentator even noted that “the legislature appears to view the surcharge as the judicial branch working with them on a difficult problem.”³⁵ Former New York Chief Judge Judith Kaye, a pioneer in state judicial administration, rejects the Kansas approach as going beyond the proper role of the courts, but it remains a part of the national discussion on how to adequately fund the courts.³⁶ This sort of stopgap measure is at the outer edge of the judiciary’s power to take the matter of funding into its own hands and risks entrenching the branches as uncooperative adversaries. On the other hand, it is also a tactic that sends a strong public message about the gravity of underfunding and the necessity of action.

Forceful funding orders, such as those made in New York and Pennsylvania, remain an important bargaining tool even where the executive or legislative branches do not want to cooperate with the judi-

30. Webb & Whittington, *supra* note 20, at 17 (citing STATE OF THE JUDICIARY: ANNUAL REPORT OF THE CHIEF JUSTICE OF THE KANSAS SUPREME COURT 2 (2002) (calling for a direct budget submission was necessary “to safeguard [the judiciary’s] constitutional position from invasion by the Executive Branch”).

31. Kansas Judicial Branch Fiscal Year 2003 Emergency Surcharge, 2002 SC 13 (as amended Mar. 22, 2002).

32. Webb & Whittington, *supra* note 20, at 19; John Hanna, *Supreme Court Goes Around Legislature to Solve Budget Problems*, TOPEKA CAPITAL-JOURNAL, Mar. 14, 2002, http://cjonline.com/stories/031402/bre_supctbud.shtml.

33. Christel E. Marquardt, *Changing the Judicial Budget Process in Kansas*, JUDGES’ J., Summer 2004, at 27, 29.

34. *Id.*

35. *Id.*

36. Judith Kaye, Response at the Panel Discussion on Judicial Underfunding at the ABA Annual Meeting (Aug. 22, 2011), available at <http://www.abanow.org/2011/08/panel-discussion-on-justice-underfunding-features-justice-oconnor-theodore-b-olson-and-david-boies/>.

cial branch because of the political risk of being regarded as unreasonable or unconcerned to act within the law. In addition, Chief Judge of the State of New York Jonathan Lippman regards the New York experience as setting a valuable precedent that the judiciary is willing to defend its status as an independent branch, even if that chills interbranch relations in the short term.³⁷

But as the New York and Pennsylvania examples demonstrate, funding orders should be used with care. Adversarial interbranch relations deflect attention from real needs and the public interest.³⁸ Judges, court administrators, and state budget officials acknowledge that judicial grandstanding or threats to impose court orders without documentation and discussion of the issue are counterproductive.³⁹ Invoking the inherent powers of the courts risks a politically charged analysis by other stakeholders of whether all court operations are constitutionally mandated.⁴⁰ Legislators, the press, and those who lose out in the budget process may question, for example, whether judicial travel and support staff are also constitutionally required for an independent judiciary and may offer public testimony at budget hearings on the impact of cuts to their own services. Innovative approaches like problem-solving drug and mental health courts are vulnerable to legislative criticism that they are beyond the core functions of the judicial branch and inflate judicial budgets.⁴¹ Even if the legislature complies with the order, the judiciary risks budgetary micromanagement and future inflexibility by the other branches if the funding order is seen as unwarranted.⁴²

B. *Incremental Approaches and Political Mobilization*

Judicial orders may also call for more incremental change by adopting judicial orders with a limited scope. Such orders may be more likely to productively engage legislators and result in productive change in situations where a specific command would be met with outright resistance. For example, a judicial order may call for the legislature itself to attempt to create a constitutionally permissible situation within a flexible set of parameters. Or an order may lead to

37. Jonathan Lippman, *New York's Efforts to Secure Sufficient Court Resources in Lean Times*, JUDGES' J., Summer 2004, at 21, 22.

38. John K. Hudzik, Introduction, *Judicial Independence, Funding the Courts, and Interbranch Relations*, JUDGES' J., Summer 2004, at 1.

39. *Id.* at 10.

40. Dennis B. Jones, *Potential Court Responses to Budget Reductions*, JUDGES' J., Summer 2004, at 19.

41. See Lippman, *supra* note 37, at 23.

42. Jones, *supra* note 40, at 19–20.

increased participation by judicial administrators or their allies in the legislative process.⁴³

In one recent example, a court attempted to take a more minimalist approach by finding a constitutional failure in funding for the judiciary, but leaving the solution in the legislature's hands.⁴⁴ In the New York judicial salaries case, *Maron v. Silver*,⁴⁵ the New York Court of Appeals issued a declaratory judgment that the repeated failure to increase judicial salaries violated the New York Constitution's separation of powers doctrine. But instead of imposing coercive relief, the decision articulated a presumption that "[w]hen this Court articulates the constitutional standards governing state action . . . the State will act accordingly" and with "appropriate and expeditious legislative consideration."⁴⁶ By requiring that "any judicial salary increases will be premised on their merits" rather than "unrelated policy initiatives and future budget deliberations," the decision "aim[ed] to strike the appropriate balance between preserving the independence of the Judiciary and avoiding encroachment on the budget-making authority of the Legislature."⁴⁷

After the February 2010 *Maron* opinion, the New York legislature made no attempt to address its constitutional obligation. Family court judges in the related *Larabee* case sought to induce lawmakers to reconsider salaries by moving for reargument or remand on the issue of damages resulting from the legislative violation of separation of powers.⁴⁸ By the end of 2010, the legislature created a Commission on Judicial Compensation, composed of members appointed by each branch and tasked to submit recommendations to the governor, the legislature, and the chief judge, which have the force of law unless modified or abrogated by the legislature.⁴⁹ The Commission adopted

43. Webb & Whittington, *supra* note 20, at 45. For an unsuccessful recent attempt, see *Baxter v. New Hampshire*, No. 217-2010-CV-00683, slip op. at 1–10 (N.H. Super. Ct. Oct. 29, 2010) (dismissing a suit filed by a former New Hampshire Supreme Court justice against the state and its treasurer, seeking restoration of \$4 million to the New Hampshire judiciary and a permanent injunction requiring adequate funding for the state's civil court docket).

44. Karissa M. Schwartz, Note, *Sound the Alarm: The Constitutional Crisis of Judicial Compensation*, 2012 CARDOZO L. REV. DE NOVO 101, 117 (2012), available at http://www.cardozolawreview.com/content/denovo/SCHWARTZ_2012_101.pdf.

45. 925 N.E.2d 899 (N.Y. 2010).

46. *Maron*, 925 N.E.2d at 915. *Maron* affirmed the ruling in *Larabee v. Governor of State*, 880 N.Y.S.2d 256 (App. Div. 2009).

47. *Maron*, 925 N.E.2d at 917.

48. Joel Stashenko, *Judges Ask Court to Enforce Directive for Review of Pay*, N.Y. L.J., Nov. 19, 2010, at 1.

49. Joel Stashenko, *Legislation Creates Judicial Pay Commission*, N.Y. L.J., Dec. 1, 2010, at 1.

the first judicial pay raise in thirteen years as a part of the 2012–2013 New York state budget.⁵⁰

Many judges viewed the increase as inadequate, having calculated that the purchasing power of their salaries had declined by forty percent during their period of underpayment.⁵¹ Accordingly, plaintiffs in *Larabee* renewed their motion for summary judgment, alleging that a retroactive payment of approximately \$50,000 above the pay raise would be required to adequately compensate them. That application was denied at the trial court level when Judge Richard Braun of the New York State Supreme Court concluded that the Court of Appeals had left the responsibility of addressing a judicial salary adjustment to the legislature, and that he was bound to follow that directive absent further clarification from a higher court.⁵²

We see in this example the utility and the danger of an incremental approach. It may be the case that the “weak” order offering the legislature substantial control over setting judicial pay was more effective than telling the legislature the exact salary figure required to remedy a separation of powers violation. The Court of Appeals’ *Maron* decision resulted in a stronger political position for the judiciary because it led the legislature to create the Special Commission, and the Special Commission in turn recommended a substantial increase in judicial salaries. However, the *Maron* decision left enough confusion over whether the legislature had actually abided by its terms that unsatisfied plaintiff judges renewed their summary judgment motion. The flexibility of a weak order may substantially increase the amount of legal work and time put into the issue and may leave injured parties unsatisfied with the result. But because the weak order may strike a mutually acceptable balance between judicial independence and legislative budget-making authority, it may more readily induce change.

Although Carl Baar cautions that invoking the judiciary’s inherent powers is a better “last resort” than “opening gambit,”⁵³ the *Maron* example reveals the potential of flexible court orders to initiate a dialogic, iterative political process to protect judicial independence. As Helen Hershkoff and Stephen Loffredo have recently explained, dialogic judicial methods may be effective in supporting a variety of

50. 2012–2013 New York State Budget, 44TH STREET BLOG (Apr. 6, 2012, 12:19 PM), <http://www.nycbar.org/44th-street-blog/2012/04/06/2012-2013-new-york-state-budget/>.

51. Joel Stashenko, *State Judges Lose Bid for Retroactive Pay*, N.Y. L.J., Sept. 17, 2012, at 4.

52. *Id.*

53. FINANCING THE THIRD BRANCH, *supra* note 17, at 8; *see also* FELIX F. STUMPF, *INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY* (1994).

socio-economic rights, including indigent defense.⁵⁴ Many adjudicative strategies can induce productive interbranch dialogue, including the sort of “weak form” judicial review that Mark Tushnet and others have described.⁵⁵ Weak form judicial review, such as a declaratory judgment or an injunction calling for further legislative action, may assess the constitutionality of legislation without immediately imposing a strict requirement for relief.⁵⁶ Such an opinion may also leave room for a legislative majority to displace the judicial interpretation of the state constitution, although a court may indicate that a stronger approach will be taken if legislation remains unsatisfactory.⁵⁷

Weak form judicial review has similarities to the “experimentalist model” of judging, which is also instructive here.⁵⁸ That pragmatic model argues for separate branches of government to jointly engage in policy experimentation, public-private collaboration to develop and interpret shared data, and malleable boundaries between decentralized government institutions.⁵⁹ For Charles Sabel and William Simon, in particular, courts should act as “disruptive” or “destabilizing” factors that upset majority decisions and continually renew the political process.⁶⁰ Courts are engines that generate new government strategies, continually shaking up the form that policies would take under en-

54. Hershkoff & Loffredo, *supra* note 14, at 938; *see also* Sanford Levinson, *A View from American States*, 59 U. KAN. L. REV. 791, 828 (2011) (suggesting that “dialogue may be far more likely with regard to state constitutions and the meanings assigned to those constitutions by state judiciaries than is the case if we focus only on federal courts”).

55. *See generally* MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008) [hereinafter *WEAK COURTS, STRONG RIGHTS*].

56. *See generally id.*

57. Hershkoff & Loffredo, *supra* note 14, at 938; *see also* Mark Tushnet, *State Action, Social Welfare Rights and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT’L L. 435, 447 (2002) (In weak review, “a judicial determination of what the constitution requires is explicitly not conclusive on other political actors, who can respond to the court’s decision through ordinary politics.”). *See generally* *WEAK COURTS, STRONG RIGHTS*, *supra* note 55.

58. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 399–400 (1998) (discussing “experimentalist” review); James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 270–83 (2003) (discussing a new-governance approach); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1067–73 (2004). These should be distinguished from minimalist models, e.g. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999), but have more in common with Neal K. Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998).

59. *See, e.g.*, Dorf & Sabel, *supra* note 58, at 314–23.

60. *See, e.g.*, Sabel & Simon, *supra* note 58.

trenched majority rule. Experimentalism conceives of courts as coordinating and defining policy experimentation, both by ensuring that legislative and administrative actions align with authorizing statutes and by elaborating the content of individual rights.

Experimentalist “weak review” may be an impetus for productive, formal interbranch communication through a strategy of destabilizing the status quo to generate experimentation, instead of issuing overly prescriptive, detailed, “command-and-control” orders that might re-entrench the positions of each branch. The pragmatic themes of public-private information sharing and experimentation are present in the actions recommended in Parts III and IV for judicial officers who lobby legislatures for adequate funding.⁶¹ An experimentalist judicial order might lay out data gathered and interpreted by public and private actors with the aim of triggering political reaction rather than forcing a particular result. The *Maron* order bears some resemblance to this model. A judge taking an experimentalist approach to a funding order for indigent defense would marshal a greater range of public and private data on the crises in indigent defense; describe findings and studies on the positive effects of strong indigent defense; and would order that the legislature take it into account to devise a new funding strategy.

Weak form review may be effective either where it promises to take a stronger, specific form in the absence of substantial action, or where the interbranch dialogue it initiates is carried forward by the strong public position of the judiciary and its supporters. What is clear is that both highly prescriptive and more flexible judicial orders require judicial officers to establish a working environment with other political branches in which the orders will be effective. Before issuing forceful orders that prescribe a specific result, the judiciary must consider whether other government actors are likely to comply. The calculation should consider several factors, including the strong position of the judicial branch, public scrutiny or other political pressures on the particular issue, and whether the court has allies in the legislature who are willing to enforce the order. Weak orders may be more promising where the problem requires action but has not been extensively documented or negotiated with legislators, or where legislators are likely to be resistant for other reasons. A weak order is likeliest to be effective when legislators who are convinced that a strong need for action exists carry out the political debate and policy experimentation. A third alternative for judges is to avoid issuing orders and work en-

61. See *infra* Parts III, IV.

tirely through the political process. Each option requires the judiciary to communicate the gravity of judicial underfunding in compelling terms.

II.

CRAFTING THE SEPARATION-OF-POWERS NARRATIVE ON INDIGENT DEFENSE

A judicial order demanding more funding is not the only method to protect funding for the judiciary and the indigent defense services crucial to properly functioning courts. Judges may instead choose to remain within the state budget process. Regardless, the judicial branch and its allies must play a more proactive political role in calling for adequate state judicial budgets. Our focus in this Part is on inadequate expenditures for indigent defense, but the suggestions we make here and in Part III are relevant to many other issues impacting judicial budgets. We begin with a focus on narrative, something to which all good advocates sensibly pay careful attention. What messages should judicial leaders deliver to protect judicial independence by funding indigent defense? For one thing, as Theodore Olson emphasizes, those speaking out about judicial underfunding need to understand “it’s not about lawyers—it’s about constituents and the courts.”⁶²

Underfunding of indigent defense should be addressed in terms that go beyond the lawyer’s familiar focus on fairness and due process. The due process narrative unavoidably draws the legislators’ attention to the accused and their rights. But legislators have learned quite well that any appearance of supporting the rights of criminals can endanger their reelection. Lobbying to increase legislative spending on indigent defense must overcome the twin obstacles of asking legislators to spend additional money and to spend it on a disliked, and politically unimportant, constituency: criminals or, what many Americans see as practically the same thing, poor people accused of being criminals.

Increased funding for indigent defense is not just about defendants and their lawyers. Rather, adequate indigent defense is necessary to the very structural underpinnings of constitutional government, which, in turn, benefits everybody.⁶³ The failure of the judiciary to serve as a meaningful check on executive power harms everyone in society, including those who will never even be arrested. We call this

62. See Theodore B. Olson, Panel Discussion on Judicial Underfunding at the ABA Annual Meeting (Aug. 22, 2011), available at <http://www.abanow.org/2011/08/justice-underfundin-panel-features-justice-oconnor-theodore-b-olson-and-david-boies/>.

63. See generally *The People’s Right*, *supra* note 1.

the “fundamental structure” narrative on adequate indigent defense funding.

This narrative tells a story about indigent defender systems that can persuade a greater range of stakeholders. It aligns the interests of legislators with the courts in the interbranch struggle against an overreaching executive. It ties the problems of an unmonitored executive branch to the increased likelihood of wrongful conviction and other harms to citizens that occur in a system driven by plea bargaining outside the shadow of trial and under conditions of substantial police illegality.

A. *Lack of Indigent Defense Funding Imperils Courts’ Ability to Oversee the Executive Branch*

The first crucial point to develop is that courts, not the police, keep the rule of law intact. Judicial officers must convey to legislators the reality of lawlessness in the executive branch—an issue that persists as a matter of policy or custom rather than an example of a few bad apples.⁶⁴ Thus, when courts are unable to hold them accountable, police officers responsible for ferreting out crime will routinely break the law governing searches and seizures, and are more likely to engage in additional misconduct.⁶⁵ Judicial officers must make clear the legislative and public stake in preventing police illegality. And they must demonstrate how, in the adversarial system, adequate indigent defense is fundamental to the courts’ crucial oversight role. Even legislators who have recognized the issue of police misconduct are unable to serve this oversight function themselves: no legislative commission, internal police complaint process, or citizen review board can alone prevent police from harming individuals with illegal acts.

Judges need to convince their colleagues in the legislative branch that when the indigent defense bar is unable to investigate the cases filed in lower criminal courts, the judicial branch is incapable of performing its independent role. Since judges are forbidden by well-established constitutional rules from actively investigating cases themselves, they depend on lawyers to do whatever investigation

64. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U. L. REV. (forthcoming) (manuscript at 33–34) (discussing the role that judicial oversight plays in controlling unlawful behavior because it causes police to consider what a neutral decision maker would think about their investigations). Bar-Gill and Friedman base certain of their conclusions on the work of Philip E. Tetlock. E.g. Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERSONALITY & SOC. PSYCH. 632 (1989).

65. See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 82 (1968).

needs to be done.⁶⁶ When defense lawyers do not investigate, the only facts that reach the court come from the prosecutorial investigation.

Public defenders in far too many states lack sufficient funds to carry out the rudimentary tasks essential to the job.⁶⁷ Staff attorneys who are saddled with triple-digit caseloads and required to be in the courtroom every day just to be able to process their cases simply cannot track down witnesses, go to the scene of the crime, take photos of material events, or hire independent experts, among many other tasks. As a result, whatever the police tell the prosecutor and whatever the prosecutor writes down on the charging instrument commonly constitutes the culmination of the entire investigation into the case.⁶⁸ Cases are investigated by executive branch officials alone. No system based on the rule of law and protection of basic liberties can afford to consider only the police's version of events, and one that does imperils the entire society.⁶⁹

B. *Lack of Judicial Oversight Increases the Risk of Wrongful Conviction*

The issue is compounded by a forced reliance on the practice of plea bargaining, which ensures that the police investigation at the heart of the state's case almost never receives scrutiny at a trial. Ninety-five percent of cases in the United States are settled by plea bargain.⁷⁰ At the very least, the threat of being held accountable at trial or by prepared opposing counsel has the effect of inducing police officers to question their actions and anticipate being required to ex-

66. See, e.g., Jay Tidmarsh, *Pound's Century, and Ours*, 81 NOTRE DAME L. REV. 513, 584 (2006) (describing the role of the counsel and the role of the courts in the adversarial system).

67. For illustrative statistics on one state's inadequate system of public defense, see COMM'N ON THE FUTURE OF INDIGENT DEFENSE SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 17–19 (2006).

68. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2122 (1998).

69. See, e.g., Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 880 (1997).

70. See *The Plea*, FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/plea/faqs/> (last visited Sept. 28, 2012); see also MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER CRIMINAL COURT* 9 (1979) (reporting that nobody among more than 1,500 defendants in a New Haven, Connecticut criminal court invoked their right to a trial); RICHARD SOLARI, NATIONAL JUDICIAL REPORTING PROGRAM, 1988 47 tbl. 4.2a (U.S. Dep't of Justice Bureau of Justice Statistics eds., 1992) (reporting that ninety-three percent of felony defendants plea out in state courts).

plain those actions.⁷¹ Ideally, it protects against executive branch lawlessness.

Plea bargaining has been described, like other legal settlements, as striking a fair bargain in the shadow of expected trial outcomes,⁷² but this model has rightly been met with strong criticism.⁷³ For one thing, rational innocent defendants are readily induced to plead guilty when a prosecutor with a factually weak case offers a sufficiently light plea settlement as compared to a much worse potential outcome at a trial, even if conviction would be improbable.⁷⁴ That basic problem is compounded by a thicket of structural impediments and pressures that lead to unjust sentences that have been well elaborated in the literature.⁷⁵ Together, these pressures allow the executive branch to ensure that its actions go unseen by a judge.

When the threat of trial is virtually nonexistent, as it is in almost every United States urban area today,⁷⁶ the restraints on lawless official power, so essential to the Founders' understanding of a necessary ingredient for freedom, disappear. Montesquieu warned that, above all else, a free society needs to ensure that official power is regularly checked in a meaningful way.⁷⁷

71. See generally sources cited *supra* notes 64 & 65.

72. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 *YALE L.J.* 1969, 1975–78 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1961 (1992).

73. See, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STAN. L. REV.* 989, 1025–28 (2006).

74. Alschuler, *supra* note 65, at 60; Josh Bowers, *Punishing the Innocent*, 156 *U. PA. L. REV.* 1117, 1133 (2008) (discussing process costs of trial); John H. Langbein, *Torture and Plea Bargaining*, 46 *U. CHI. L. REV.* 3 (1978). For suggestions to solve this problem, see Oren Gazal Ayal, *Partial Ban on Plea Bargains*, 27 *CARDOZO L. REV.* 2295 (2006); Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 *J. L. & ECON.* 353 (2006); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 *TUL. L. REV.* 1237 (2008).

75. E.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to a Trial: Alternatives to the Plea Bargaining System*, 50 *U. CHI. L. REV.* 931 (1983); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2463 (2004); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 *YALE L.J.* 1979 (1992).

76. Ninety-seven percent of federal criminal defendants waive all trial rights and plead guilty. *United States v. Booker*, 543 *U.S.* 220, 289 (2005) (Stevens, J., dissenting).

77. CHARLES DE MONTESQUIEU, *THE SPIRIT OF LAWS* 157 (Anne M. Cohler et al. eds. & trans., Cambridge University Press 1989) (1748) (“Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.”).

We know that wrongful convictions of innocent citizens occur routinely.⁷⁸ The use of plea bargaining as the dominant method of resolving cases means that, at best, only a small percentage of cases will be contested. But it isn't the failure to go to trial in a critical mass of cases that creates the real danger. It is the knowledge by the police that the likelihood of anyone even investigating the matter is virtually nonexistent. Articles, studies, legal decisions, and investigative commissions have detailed problems of police misconduct and falsifications.⁷⁹ These include police perjury, when police officers attempt to cover the tracks of their misconduct.⁸⁰ But illegal police practices that set innocent citizens up for guilty pleas outside the threat of trial are also common. Police officers frame suspects by planting drugs on them or fabricating evidence; assault individuals and then cover their crimes by arresting the victims and falsely accusing them of crimes; and arrange to have evidence falsified in crime laboratories.⁸¹ For

78. Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1342–58 (1997); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 L. & CONTEMP. PROBS. 125, 129–33 (1998); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1158–63 (2005); see also Steven A. Krieger, *Why Our Justice System Convicts Innocent People, and the Challenges Faced by Innocence Projects*, 14 NEW CRIM. L. REV. 333, 337–39 (2011); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739 (2006); Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 ALB. L. REV. 1465 (2011).

79. CITY OF NEW YORK COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, COMMISSION REPORT (1994), available at http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf; see also Michael J. Wilson, *Due Process for the Past Due: A Legal Aid Attorney's Account of the Indigent Experience in Today's Criminal Justice System*, 1 DEPAUL J. FOR SOC. JUST. 29 (2007).

80. Carol A. Chase, *Policing the Criminal Justice System: Rampart: A Crying Need to Restore Police Accountability*, 34 LOY. L.A. L. REV. 767, 769 (2001); Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 248 (1998); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1312 (1994); Alan Dershowitz, *Is Legal Ethics Asking the Right Questions?*, 1 J. INST. STUD. LEG. ETHICS 15, 16 (1996); Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 391 n.3 (1999); Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 40, 42; Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1044 (1996); Steven Zeidman, *Policing the Police: The Role of Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 323 (2005).

81. See Paul Giannelli, *Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997); see also Kenneth Adams, *Measuring the Prevalence of Police Abuse of Force*, in POLICE VIOLENCE 52, 52–94 (William Geller & Hans Toch eds., 1996) (reviewing empirical studies of police violence); ANDREA J. RITCHIE & JOEY L. MOGUL, IN THE SHADOWS OF THE WAR ON TERROR: PERSISTENT POLICE BRUTALITY AND ABUSE OF PEOPLE OF

these reasons, where indigent defense is underfunded, more plea deals are likely to be cut in which the defendant is factually innocent. The problem of factually innocent citizens pleading to sanctions for low-level crimes they did not commit should sway legislators who care about fair play.

The hard question, however, is how to convince legislators that they should act on the issue, particularly given that inadequate indigent defense is most likely to victimize constituents who are not substantial campaign donors. The generality of the problem is elaborated in this article as a matter of fundamental government structure. But it should also be noted that wrongful conviction is a problem that extends beyond those accused of crimes. Where police are primarily concerned with making sure they are able to pin a crime on someone, rather than finding actual wrongdoers, too many people who have committed crimes will remain free to commit more crimes. Where evidence is falsified, not only are innocent people convicted more often, but wrongdoers are more likely to get away.

C. Leaving the Executive Without Oversight Impairs the Rule of Law and Allows Unpopular Privacy Intrusions

The independent role of courts in checking executive power sets the American vision of government apart from totalitarian regimes, which typically stifle demonstrations against those in power. However, in practice, the auditing power of courts has been crippled by indigent defense underfunding. Judicial officers need to explain why our structure of separated powers is so important—not merely as a matter of high theory, but also in everyday terms that translate to designing a system that advances everyone’s interests and values. To do this, judges should identify unpopular areas of executive branch overreaching, such as invasive technological surveillance, and explain why robust separation of powers is essential to preventing such abuses. The same conditions that allow targeting of minority groups for low-level drug crimes are also likely to allow persistent unconstitutional surveil-

COLOR IN THE UNITED STATES (2007); U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011) (detailing profound structural deficiencies and misconduct); DAVID WEISBURD ET AL., POLICE FOUND., THE ABUSE OF POLICE AUTHORITY: A NATIONAL STUDY OF POLICE OFFICERS’ ATTITUDES 14 (2001) (officers believed it was not unusual for police to ignore improper conduct by their fellow officers).

lance practices by the police, even in the face of Supreme Court doctrine attempting to impose safeguards for individual rights.⁸²

Moreover, properly articulated, legislators can be persuaded that supporting this kind of oversight is popular with constituents. The overwhelming majority of voters maintain a keen concern for privacy and personal liberty issues that are threatened by unchecked policing practices. For example, when polled about whether the police must obtain a warrant before placing a GPS tracking device on a suspect's car, the overwhelming majority of voters preferred that a warrant be required.⁸³ Voters polled agreed that "the car is private property. Police need permission from the owner, or from a judge, to put a tracking device on personal property."⁸⁴ The relatively uniform apprehension among voters about new types of police intrusion into areas of private life offers ripe ground for judicial officers to make the case on the basic importance of judicial checks on police overreaching to legislators.

D. *Lack of Oversight Encourages Police Corruption*

The failure to check police excesses in the court system facilitates a variety of forms of police lawlessness, which puts all citizens at risk. Police officers who are confident that their conduct will not come under scrutiny from courts or defense attorneys may develop a sense that they are free to go outside legal boundaries and that laws do not apply to them. Where police are able to conduct illegal searches and seizures without judicial oversight, the effect of exclusionary rules applying to all citizens is undermined.⁸⁵ But it also must be true that police officers who feel they can routinely ignore the law are likelier to begin patterns of abuse that lead to crimes by police officers.

These experiences have been repeatedly exposed throughout the United States.⁸⁶ Atlanta's "Red Dog Unit," created in the 1980s to combat drug crimes, became notorious for citizen complaints. Before

82. See Bar-Gill & Friedman, *supra* note 64 (manuscript at Part I) (describing the Fourth Amendment exclusionary rule, among other Supreme Court checks on police investigations, and discussing their ineffectiveness).

83. Press Release, Fairleigh Dickinson Univ., High Court Agrees with Public in *U.S. v. Jones*: Electronic Tails Need a Warrant (Jan. 23, 2012), available at <http://publicmind.fdu.edu/2012/tailling>.

84. *Id.* at 1–2.

85. Perhaps this has contributed to Christopher Slobogin's finding that exclusionary rules often fail to deter police illegality. See, e.g., Christopher Slobogin, *An Empirically-Based Comparison of American and European Regulatory Approaches to Police Investigation*, 22 MICH. J. INT'L L. 423, 432–37 (2001) (examining empirical studies on the effect of the exclusionary rule).

86. See *The People's Right*, *supra* note 1 (manuscript at 40–41).

it was disbanded in 2011 after a lawsuit, it conducted an abusive warrantless raid targeting a gay bar in 2009, and gunned down a ninety-two-year-old woman in an illegal drug raid on her home, after which officers planted drugs in the home to cover their tracks.⁸⁷ In 2004, a Chicago South Side tactical unit called the Skullcap Crew repeatedly brutalized and sexually abused a fifty-year-old woman and her teenage child, even after she filed multiple complaints.⁸⁸ These types of scandals are persistent in the face of internal inquiries and have a corrosive impact on communities. Public police scandals and more private disrespectful behavior towards citizens erode the perceived legitimacy of both the police and the law.⁸⁹

E. Lack of Oversight Fosters Lack of Popular Respect for the Law

Where people and communities believe they do not have access to fair processes, they are less likely to have respect for the law and feel less compelled to obey it. People are simply more likely to comply with the law and uphold its norms when they feel that legal authorities afford them voice and participation, demonstrate neutrality, treat them respectfully, are trustworthy, and care about the right outcome.⁹⁰ The courts' failure to act as a check on the police is contrary to legislators' interests because it fosters disrespect for the law, which affects all constituents and legal compliance generally.⁹¹ Plea bargaining without the real possibility of trial, court and public defender understaffing, court delay, and police misconduct all contribute to a general sense in many communities that the rule of law does not matter.⁹²

87. See Sarah Geraghty & Melanie Velez, *Bringing Transparency and Accountability to Criminal Justice Institutions in the South*, 22 STAN. L. & POL'Y REV. 455, 466–68 (2011).

88. Craig B. Futtnerman et al., *The Use of Statistical Evidence to Address Police Supervisory and Disciplinary Practices: The Chicago Police Department's Broken System*, 1 DEPAUL J. FOR SOC. JUST. 251, 251 (2008); see also H.R. REP. NO. 102-242(I), at 136 (1991) (concluding that widespread police crimes persisted in major urban centers); Timothy Maher, *Cops on the Make: Police Officers Using Their Job, Power, and Authority to Pursue Their Personal Sexual Interests*, 2007 J. INST. JUSTICE & INT'L STUD. 32.

89. Tom Tyler, *Public Trust and Confidence in Legal Authorities: What do Majority and Minority Group Members Want from the Law and Legal Authorities?*, 19 BEHAV. SCI. & L. 215 (2001).

90. TOM TYLER, *WHY PEOPLE OBEY THE LAW* 23 (2006); Tom Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988).

91. Jeffrey Fagan, *Introduction*, 6 OHIO ST. J. CRIM. L. 123 (2008).

92. See, e.g., RACHEL PORTER, *PROCEDURAL FAIRNESS IN CALIFORNIA: INITIATIVES, CHALLENGES, AND RECOMMENDATIONS* (2011), available at http://www.courts.ca.gov/documents/Procedural_Fairness_In_California_May_2011.pdf; Nourit Zimmerman &

When the only process indigent defendants ever see is that they are persuaded by court-assigned counsel to plead guilty without their lawyers even bothering to investigate the facts, both the defendants and their loved ones lose faith in the judicial process and respect for the law.⁹³

F. Alternative Methods of Oversight are Ineffective by Themselves

The police have proven unable to police themselves effectively, and criminal prosecution of police officers is an exceedingly rare occurrence.⁹⁴ Confronted with the issue of police misconduct, a number of legislatures have taken some oversight actions, but have generally been unable to create lasting reform.⁹⁵ Three main legislative oversight options have been attempted: “blue ribbon commissions,” targeted legislative investigations, and legislatively established civilian oversight boards.⁹⁶ These may all be helpful to some extent, but they are no substitute for independent judicial adjudication of individual cases.

Unfortunately, legislative commissions are limited by their advisory function, even though they have assisted in identifying problems, defining standards, and providing guidance.⁹⁷ Following the “Serpico” police corruption scandal in the 1960s, the New York City Knapp Commission helped push for reforms.⁹⁸ However, by the 1980s, the

Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 *FORDHAM URB. L.J.* 473 (2010).

93. Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 *GA. L. REV.* 407 (2008).

94. See *The People’s Right*, *supra* note 1 (manuscript at 41).

95. Mary M. Cheh, *Legislative Oversight of Police: Lessons Learned from an Investigation of Police Handling of Demonstrations in Washington, DC*, 32 *J. LEGIS.* 1 (2005); Stephen Clarke, *Arrested Oversight: A Comparative Analysis of How Civilian Oversight of the Police Should Function and How It Fails*, 43 *COLUM. J.L. & SOC. PROBS.* 1 (2009); Samuel Walker & Morgan McDonald, *An Alternative Remedy for Police Misconduct: A Model State “Pattern or Practice” Statute*, 19 *GEO. MASON U. C.R. L.J.* 479, 479 (2009).

96. INDEP. COMM’N ON THE L.A. POLICE DEP’T, REPORT (1991); PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967); PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE POLICE (1967); see also AM. BAR ASS’N, STANDARDS RELATING TO THE URBAN POLICE FUNCTION (1973); NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, POLICE (1973). Consent decrees arising from Department of Justice lawsuits brought under Section 14141 of the 1994 Violent Crime Control Act have had some successes in particular areas, and tort litigation is generally considered to have some deterrence effect.

97. Walker & McDonald, *supra* note 95, at 498.

98. THE KNAPP COMM’N, REPORT ON POLICE CORRUPTION (1970). Officer Frank Serpico testified before the Commission about rampant police corruption after a period of feeding information to the *New York Times* in the late 1960s.

subsequent Mollen Commission found that the reforms had collapsed because “no institutional mechanism was ever put in place to enforce [them].”⁹⁹ Relatedly, no study has found persuasive evidence that civilian oversight review boards substantially deter practices of police misconduct, although these may help by increasing attention on particular instances of misconduct.¹⁰⁰

There can be no doubt that police misconduct is an issue that must be addressed by a number of actors—no exclusionary rule can fully deter police illegality.¹⁰¹ Legislatures must be made to recognize that a functional indigent defense system and the threat of trial are necessary partners in regulating executive action.

G. *The Fundamental Structure Narrative Has Broad Appeal*

Our “fundamental structure” narrative on indigent defense funding is palatable to a wider political range of legislators for reasons illuminated by political psychologists. The significance of “framing” a choice, first identified by psychologists Amos Tversky and Daniel Kahneman as the tendency of people to prefer one presentation of a risky option to another presentation of the same option, has become well known in legal scholarship.¹⁰² Legal advocacy often involves contesting frames explaining a particular event or issue. Researchers suggest that even when multiple explanatory factors are at play, most

99. See Walker & McDonald, *supra* note 95, at 533; see also MILTON MOLLEN, THE CITY OF N.Y. COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, COMMISSION REPORT 75 (1994), available at http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf.

100. Walker & McDonald, *supra* note 95, at 499 (citing SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 117–78 (2001)); see also Stephen Clarke, *Arrested Oversight: A Comparative Analysis of How Civilian Oversight Should Function and How it Fails*, 43 COLUM. J.L. & SOC. PROBS. 1 (2009); Debra Livingston, *The Unfulfilled Promise of Civilian Review*, 1 OHIO ST. J. CRIM. L. 653 (2004).

101. See Stephen Schulhofer, Tom R. Tyler & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335 (2011) (encouraging positive motivation for police compliance).

102. Daniel Kahneman, *Maps of Bounded Rationality: A Perspective of Intuitive Judgment and Choice*, in THE NOBEL PRIZES 2002 449, 456 (Tore Frängsmyr ed., 2002) (“Framing effects in decision making arise when different descriptions of the same problem highlight different aspects of the outcomes.”), available at http://www.nobelprize.org/nobel_prizes/economics/laureates/2002/kahnemann-lecture.pdf; Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981); see also Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 VA. L. REV. 1341 (1995).

people gravitate toward one frame in particular as they reach decisions.¹⁰³ Specific analogies, “stock stories,” stereotypes, or archetypal scripts help convey frames, which are made salient through both controlled, conscious mental processes and more automatic or implicit ones.¹⁰⁴ An important question when seeking to convince people with different perspectives is how to frame an issue in a way they may find accessible.

Separation of powers is an accessible narrative to a variety of people. Moreover, it is one that satisfies the pervasive motivation, discussed below, to uphold and justify the status quo in matters of public policy. Separation of powers is designed to protect against overreaching by one branch, and is thus a force to maintain stability in government. It is a classic American ideal taught in civics classes and marshaled to support a range of political arguments by both conservative and liberal commentators. We are taught that maintaining three separate branches is business as usual for a well-functioning American government: it is a default mode that keeps our Constitution intact and in good health through new choices and changes.

One of the major findings of political psychology over the last two decades has been the pervasive influence of the motivation to justify the status quo.¹⁰⁵ Leading political psychologists such as John Jost and Mahzarin Banaji, who have demonstrated the strength of the phenomenon using dozens of different methodologies, dub the motivation one of “system justification.”¹⁰⁶ System justification is understood as a motivation that competes and interacts with motives of self-justification and group-justification. In many cases, as in the case of poor con-

103. Gary Blasi & John Jost, *System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice*, 94 CALIF. L. REV. 1119, 1150 (2006).

104. *Id.* at 1151. For a discussion of controlled and implicit mental processes, see DANIEL KAHNEMAN, *THINKING: FAST AND SLOW* (2011).

105. See, e.g., John Jost et al., *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 POL. PSYCHOL. 881, 881–913 (2004) (finding that there is a general ideological motive to justify the existing social order); John Jost & Jojanneke van der Toorn, *System Justification Theory*, in *HANDBOOK OF THEORIES OF SOCIAL PSYCHOLOGY* 313 (Paul van Lange et al. eds., 2012) (finding that people are motivated to defend, bolster, and justify prevailing social, economic, and political arrangements). Scientific research on system justification has theoretical roots in “cognitive dissonance” theory. See, e.g., LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957). It also has roots in “just world” theory. See, e.g., MELVIN LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980). See generally John Jost & Orsolya Hunyady, *The Psychology of System Justification and the Palliative Function of Ideology*, 13 EUR. REV. SOC. PSYCHOL. 111, 114–16 (2002).

106. John Jost & Manzarin Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRITISH J. SOC. PSYCHOL. 1 (1994).

servatives who would individually and collectively benefit from redistributive economic policies, system justification is thought to help explain the rejection of self-interest in favor of upholding the current distribution.¹⁰⁷

It has also been found repeatedly that people tend to manifest increased system justification motivations when they perceive a threat to a prevailing social system or practice, much in the way people often “become defensive” when they perceive a threat to their own self-esteem.¹⁰⁸ Generally, threats to the status quo tend to increase negative affect and anxiety, and provoke both protective and retaliatory responses to defend the traditional system.¹⁰⁹

In their advice to lawyers making policy arguments, Jost and law professor Gary Blasi suggest accounting for the system justification motive by framing issues as a matter of self, group, or system according to the desired effect on the audience.¹¹⁰ For most political conservatives, who are not traditionally advocates for indigent defense, poor people accused of crimes occupy out-group status and are generally regarded as disrupting the social order. The “fundamental structure” narrative may thus have more traction with conservatives than the traditional due process narrative because it accords with the system justification motive, rather than requesting help for an out-group perceived as undermining the system.

Preserving a basic pillar of traditional American government is fertile motivational territory, especially for conservatives who might be unmoved by a plea to protect indigent people accused of crimes. The system justification motive has considerable pull with conservatives, who are likely to desire preserving traditional institutions.¹¹¹ Traditional theories of conservative ideology often stress self-preserving and self-justifying motivations, such as individual needs for stabil-

107. See, e.g., John Jost et al., *Fair Market Ideology: Its Cognitive-Motivational Underpinnings*, 25 RES. ORGANIZATIONAL BEHAV. 53 (2003); John Jost et al., *Social Inequality and the Reduction of Ideological Dissonance on Behalf of the System: Evidence of Enhanced System Justification Among the Disadvantaged*, 33 EUR. J. SOC. PSYCHOL. 13 (2003); Aaron Kay et al., *Inequality, Discrimination, and the Power of the Status Quo: Direct Evidence for a Motivation to See the Way Things Are as the Way They Should Be*, 97 J. PERSONALITY & SOC. PSYCHOL. 421 (2009).

108. See, e.g., Blasi & Jost, *supra* note 103, at 1123.

109. See *id.*

110. *Id.* at 1149.

111. See, e.g., John Jost et al., *Political Conservatism as Motivated Social Cognition*, 129 PSYCHOL. BULL. 339, 343 (2003) [hereinafter *Political Conservatism*]; John Jost & David Amodio, *Political Ideology as Motivated Social Cognition: Behavioral and Neuroscientific Evidence*, 36 MOTIVATION AND EMOTION 55 (2012).

ity, security, hierarchy maintenance, and obedience.¹¹² Conservatives tend to rate highly on measures of social dominance orientation, such as belief in law and order and belief that existing social structures are just ones.¹¹³ Moreover, there is substantial evidence of correlation between fear of threat or loss and political conservatism.¹¹⁴ Indeed, studies from neuroscience and genetics suggest that conservative orientation is associated with greater neural sensitivity to threat and larger amygdala volume than liberal orientation.¹¹⁵ Thus, the conservative sensitivity to threat would seem to render the system justification motive a relatively salient and strong one, particularly when considering an argument based on a threat to a fundamental government structure.

These canonical findings of political psychology match a massive new study by leading political psychologist Jonathan Haidt. In a number of studies reporting hundreds of thousands of participant surveys, Haidt and his colleagues have classified sets of moral intuitions that are remarkably consistent in their application either to politically conservative or liberal individuals.¹¹⁶ They identify six “foundations” of moral intuition that predict and shape liberal and conservative policy orientations: (1) fairness and cheating; (2) care and harm; (3) loyalty and betrayal; (4) liberty and oppression; (5) authority and subversion; and (6) sanctity and degradation.¹¹⁷ Haidt conceives of these intuitions as “taste receptors” defining political orientation, and these categories tend to group predictably among political liberals and conservatives, who rely on them in different ways and to different degrees.

In their arguments and appeals to voters, political conservatives build more easily on *authority*, while the left more often favors subverting hierarchy.¹¹⁸ The right more easily builds on national *loyalty*,

112. *Political Conservatism*, *supra* note 111, at 352.

113. *Id.* at 344.

114. *Id.* at 363; *see also* John Jost et al., *Exceptions that Prove the Rule: Using a Theory of Motivated Social Cognition to Account for Ideological Incongruities and Political Anomalies*, 129 *PSYCHOL. BULL.* 383 (2003).

115. *See generally* Jost & Amodio, *supra* note 111.

116. Jesse Graham et al., *Liberals and Conservatives Use Different Sets of Moral Foundations*, 96 *J. PERSONALITY & SOC. PSYCHOL.* 1029 (2009); Jesse Graham et al., *Mapping the Moral Domain*, 101 *J. PERSONALITY & SOC. PSYCHOL.* 366 (2011); Jesse Graham & Jonathan Haidt, *Sacred Values and Evil Adversaries: A Moral Foundations Approach*, in *THE SOCIAL PSYCHOLOGY OF MORALITY: EXPLORING THE CAUSES OF GOOD AND EVIL* (P. Shaver & M. Mikulincer eds., 2011); JONATHAN HAIDT, *THE RIGHTEOUS MIND* (2012); Jonathan Haidt & Sara Kesebir, *Morality*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 797, 822 (Susan Fiske & Daniel Gilbert eds., 5th ed. 2012).

117. HAIDT, *supra* note 116, at 128.

118. *Id.* at 142.

while the left tends to value universalism over nationalism.¹¹⁹ Both sides focus on *fairness*, but the left is moved by concerns of equality and social justice, generally believing that the wealthy exploit those at the bottom without paying their fair share of the tax burden.¹²⁰ While the left views fairness as a matter of equality, the right tends to view fairness as a matter of proportionality—that people should be rewarded in proportion to what they contribute. The conservative fairness narrative appeals to those concerned that money is being taken from hardworking people to support undeserving people on welfare or unemployment, or illegal immigrants who reap benefits without paying taxes. While both the left and right value *liberty* from oppression, the left is more likely to apply this foundation in service of the underdogs—no one is free while others are oppressed—while conservatives are “more parochial” and concerned in particular with groups of which they are a part.¹²¹ Finally, the left relies more heavily on the moral foundation of universal *care* and compassion than conservatives, who tend to understand care as a matter of local loyalty as demonstrated by investment in or sacrifice for a particular group.¹²²

Haidt observes that when compared with the conservative appeal to all six foundations, the liberal message has been too narrow and focused only on the three foundations of care/harm, liberty/oppression, and fairness/cheating.¹²³ The liberal message has centered heavily on helping victims and fighting for the rights of the oppressed, and liberals have too often failed to make a range of appeals likely to attract those for whom the other foundations are also persuasive. Haidt is confident that the narrowness of their campaigns explains Democratic difficulties in connecting with voters, particularly rural voters and members of the working class who vote conservative, even against their economic self-interest.¹²⁴ Advocates who must convince a spectrum of legislators that indigent defense is worth funding must appeal to the range of moral foundations that guide such actors.¹²⁵

119. *Id.* at 138.

120. *Id.* at 134.

121. *Id.* at 170.

122. *Id.* at 131.

123. *Id.* at 156.

124. *Id.*

125. Haidt reminds us correctly that willingness to understand, find common agreement, and offer arguments within the foundations of another viewpoint is crucial to actual dialogue and persuasion in a political climate that has become Manichaeian and deadlocked. *Id.* at 310–17; see also ANTHONY AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 135–36 (2001) (discussing the importance of the audience’s identity when framing arguments and noting that “the most critical aspect of fitting a story to an audience is . . . *entering into dialogue* with them.”).

They cannot simply wait for people unmoved by certain arguments to make wholesale reversals. When we consider the narrative of *The People's Right* against well-established findings on conservative motivation and ideology and in light of the political foundations observed in Haidt's study, we see the broader accessibility of the separation of powers message.

The separation of powers narrative offers an alternative for an audience that rejects subversion of *authority*, by focusing on strengthening a traditional pillar of government. The goal is preserving the *sanctity* of that institution—keeping the court itself from crumbling—not only protecting the accused.¹²⁶ Rather than a plea to protect a group who is suspected of seeking to undermine the social order, the separation of powers narrative appeals to the system justification motive in that it argues for supporting the classic structure of government. It frames the issue in terms of security and protecting the system from loss under conditions of threat.

The separation of powers narrative sounds in both the liberal and conservative glosses on *fairness*—not only is it about individual citizens being given the same opportunity for counsel (equality), but the purpose of indigent defense is also to ensure that courts and people are *given their due* by the other branches (proportionality). The court has had resources taken from it by the unfair encroachment of the other branches, and the resources must be restored in order for courts to carry out their constitutional function. Likewise, the violation of separation of powers has created a situation in which members of one's group no longer are given their right in the measure due to them by the Constitution. Under this narrative, indigent defense is no longer simply about shielding those who are suspected of unfairly riding on the hard work of others by imposing criminal costs on society.

As the people's—*our* shared constitutional right—is not *someone else's* right, it fulfills not only the liberal version of liberty for underdogs, but also the conservative inclination to claim *one's own* liberty against oppression. The people's right is framed as a matter of *loyalty* to fundamental national institutions. The “fundamental structure” narrative communicates a new set of values that may appeal, alongside the usual due process fairness narrative of care for the underdog, to a broader range of legislators.

126. On the likelihood of accused persons being understood in terms of Haidt's “degradation” pair to “sanctity,” and the importance of rejecting laws based on disgust in a politically liberal society, see MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 321–22 (2004).

It is important to remember that these intuitions are not simply “conservative” ones, though conservatives predictably rely on certain of them in their political judgments. National loyalty, for example, may be more at home in the conservative mind and more consistently tapped by the right wing, but is certainly not limited in its appeal to conservative voters. The message of this article is just one example of how the ideas of the left can be reworked to reach a diverse legislative, judicial, and public audience.

III.

INTERBRANCH COMMUNICATION AND GENERAL COURT FUNDING

Part I of this article explored potential pitfalls for judicial funding orders and the variety of ways in which they may be used. Part II laid out the reasons indigent defense is crucial not only to those accused of crimes, but to the government and public generally. Courts can use these reasons to support and justify a judicial funding order or to smooth interbranch communication in the political process. Part III now explains why and how judges should set the stage for effective judicial orders and other forms of interbranch dialogue by developing a position of political strength.

Political engagement by judicial officers should be considered a necessity. For nearly a century, commentators have recommended increased contact between the judiciary and the legislature.¹²⁷ Then-Judge Benjamin Cardozo, for example, observed that the judiciary and the legislature have too often stood “proud and in silent isolation from one another.”¹²⁸ Others have complained that judges and legislators “do not know how to talk to one another,”¹²⁹ that the branches do not understand each other’s “constraints, limits, incentives, motivation and attributes,” and that judges and legislators shy away from interbranch political involvement.¹³⁰

127. See, e.g., Deanne Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO L.J. 279 (1991).

128. Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113 (1921).

129. Shirley S. Abrahamson & Gabrielle Lessard, *Interbranch Communications: The Next Generation*, in CONFERENCE ON ASSESSING THE EFFECTS OF LEGISLATION ON THE WORKLOAD OF THE COURTS 11, 11 (A. Fletcher Mangum ed., 1995) [hereinafter ASSESSING EFFECTS].

130. Robert A. Katzmann, *Summary of Proceedings*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 162 (Robert A. Katzmann ed., 1988) [hereinafter JUDGES AND LEGISLATORS]; see also ROBERT A. KATZMANN, *COURTS & CONGRESS* 82 (1997) [hereinafter COURTS & CONGRESS]; Frank M. Coffin, *The Federalist Number 86: On Relations Between the Judiciary and Congress*, in JUDGES AND LEGISLATORS, *supra*, at 28, 30 (suggesting “softening the edges where the judiciary and

When judges do not communicate adequately with legislators, judicial administration budgets suffer more heavily. A recurrent challenge for court administrators is securing from the legislative branch an amount of funding sufficient for judges to perform their constitutional role. The problem is so serious that in 2010 the American Bar Association (ABA) created a Task Force on Preservation of the Justice System, co-chaired by David Boies and Theodore Olson.¹³¹ In 2011, at its Annual Meeting, the ABA convened a special session devoted to the recommendations of the Task Force and the attendant problems resulting from underfunding of the judiciary.¹³² The Task Force concluded that communication between the different branches of government was crucial to resolving the crisis.¹³³ Members of the judicial branch must learn to persuade both legislators and executive branch officials, who commonly have considerable authority to assign or withhold discretionary funds that could be allocated to courts. The Task Force reported, for example, that “virtually all witnesses in the Task Force hearings mention the importance of improved [inter-branch] communications.”¹³⁴ With this in mind, the ABA House of Delegates resolved to “establish a means of communicating the importance of the justice system to the public and political decision makers.”¹³⁵

At the 2011 ABA Annual Meeting, former Justice Sandra Day O'Connor, the keynote speaker, urged lawyers and judges to speak with legislators directly about the under-met needs of the judiciary. In her words, lawyers need to “get busy and start advocating . . . you need to have access to legislative leaders on both sides of the aisle . . . [and] [y]ou need to have one-on-one contact.”¹³⁶ Such exhortations are, of course, insufficient to get the job done, but the national focus on the issue is encouraging. However, as Former Chief Judge Kaye, who led a decade-long, but mostly unsuccessful, effort to persuade

[legislatures] rub” to allow for greater participation and communication between branches); Robert A. Katzmann, *Building Bridges: Courts, Congress, & Guidelines for Communications*, BROOKINGS REV., Spring 1991, at 42, 42–49, available at <http://www.unz.org/Pub/BrookingsRev-1991q2-00042>.

131. PRESERVATION TASK FORCE REPORT, *supra* note 6, at 17.

132. *Id.* at 6–7.

133. *Id.* at 9–10 (recommending, among other things, simplified judiciary budget requests).

134. *See generally id.*

135. *Id.* at 8.

136. Sandra Day O'Connor, Panel Discussion on the Judicial Underfunding at the ABA Annual Meeting (Aug. 22, 2011), available at <http://www.abanow.org/2011/08/justice-underfundin-panel-features-justice-occonnor-theodore-b-olson-and-david-boies/>.

New York's co-branches of government to be more generous to the judiciary, remarked after hearing Justice O'Connor's advice, "If we knew what to do, don't you think we would have done it?"¹³⁷

A. *Impediments to Formal and Informal Communication and a History of Proposals*

For many reasons, judges have long felt somewhat uneasy about performing tasks outside of their principal role of deciding cases.¹³⁸ This hesitancy is especially acute when it comes to playing a role in the political process. Writing in 1997, Robert A. Katzmann observed that judicial reticence in the political domain applies "even in matters strictly confined to the operations of courts."¹³⁹ He attributed the judicial caution to the prohibition on advisory opinions and the related perception that remaining aloof from the legislative process enhances judicial legitimacy.¹⁴⁰

Although judges may be hesitant about the impropriety of acting as an interest group, inordinate adherence to separation of powers principles endangers those very principles. Judges who are afraid of encroaching into the affairs of another branch's proper responsibilities must nonetheless become confident that when they do so to educate the other branch of the judiciary's needs to perform its responsibilities, they are advancing separation of powers values. In short, no branch should remain silent when its officials honestly believe their core functions are being impeded by another branch. When the executive

137. Kaye, *supra* note 36.

138. This uneasiness can be seen in the dialogue around "judicial lobbying." See, e.g., Andrew D. Christie & Nancy C. Maron, *Find a Better Way to Work With the Legislature*, JUDGES' J., Summer 1991, at 15, 17; Henry Glick, *Policy-Making and State Supreme Courts: The Judiciary as an Interest Group*, 5 L. & SOC'Y REV. 271 (1970); see also CARL BAAR, WHEN JUDGES LOBBY: CONGRESS AND COURT ADMINISTRATION 4 (1969); COURTS & CONGRESS, *supra* note 130, at 85-92 (proposing guidelines for judicial-legislative communication); Shirley Abramson, *Remarks of the Hon. S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 ST. JOHN'S J. LEGAL COMMENT. 69 (1996); Tracy Lightcap, *Issue Environments and Institutionalization: Structural Change in U.S. State Judicial Institutions, 1975-1995*, 24 JUST. SYS. J. 183 (2003) (proposing a model of institutional change in the judiciary); Hans A. Linde, *Observations of a State Court Judge*, in JUDGES AND LEGISLATORS, *supra* note 130, at 117 (comparing judicial lobbying to an executive official speaking out on legislation); *Lobbying for Court Reform*, in MANAGING THE STATE COURTS (Susan B. Carbon et al. eds., 1977); Maeva Marcus & Emily Field Van Tassel, *Judges and Legislators in the New Federal System, 1789-1800*, in JUDGES AND LEGISLATORS, *supra* note 130, at 31 (arguing that the framers expected interbranch communication); Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279 (1991).

139. COURTS & CONGRESS, *supra* note 130, at 85.

140. See *id.*

branch believes this is happening because of legislative action, we comfortably accept that it acts properly when it lobbies legislators or when it sues to secure judicial support for its position.

Although they are also judges, administrators of the court system also possess these same options. Because of ethical concerns about judges conducting their business in the light of day, communications by judicial officers ordinarily ought to be along formal channels.¹⁴¹ The Model Code of Judicial Conduct recognizes the propriety of such communications by authorizing judges to:

[A]pppear at a public hearing before, or otherwise consult with, an executive or a legislative body or official . . . in connection with matters concerning the law, the legal system, or the administration of justice [or] in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties.¹⁴²

However, judges must be aware of the rules governing their political activity, in particular if they wish to solicit private partners to fund judicial programs or raise funds for organizations offering services related to the courts.¹⁴³

Ways to increase formal interbranch communication on court funding have been discussed for many years. For example, in his 1972 address on the state of the judiciary, Chief Justice Warren Burger called for a requirement that every bill contain a statement of impact

141. See, e.g., CODE OF CONDUCT FOR U.S. JUDGES, Canon 2A ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities."), available at <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx>.

142. See MODEL CODE OF JUDICIAL CONDUCT R. 3.2 (2007); see also Barry Schaller, *Ethical Aspects of Political Dilemmas Faced by Appointed Judges*, 30 YALE L. & POL'Y REV. INTER ALIA 101 (2012).

143. See MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(4) (2007) (a judge may not, *inter alia*, solicit funds for a political organization); see also *id.* R. 4.1, cmt. 3 ("[P]ublic confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence."). Innovative courts, such as drug courts, are often funded in part through special grants or private contributions. In certain instances, judges have been prohibited by informal or advisory ethics opinions from certain desired fundraising activities in connection with court-related programs. Judges have been disallowed from soliciting private funds for a judicial education program, which was deemed to be improper fundraising for a civic organization; disallowed from writing a letter on behalf of a mental health center in the context of a federal grant application for a juvenile truancy program; and prohibited from soliciting the local bar for funding for a judicial portrait. However, judges have been allowed in another state to use their judicial titles when writing letters to fundraise for a teen traffic school to members of a local city council. See Marla N. Greenstein, *Can Judges Raise Funds for the Courts?*, JUDGES' J., Summer 2004, at 46, 46.

on the judiciary, as a tool to assist in exposing burdens on state and federal courts.¹⁴⁴ In the 1970s, several comprehensive research projects on judicial impact were initiated at the state and federal levels. These languished at the federal level, however, after a major study by the independent Panel on Legislative Impact on Courts concluded that requiring across-the-board data-based forecasting of judicial impact was unachievable.¹⁴⁵ In the 1990s, a Federal Office of Judicial Impact Assessment was created in the Administrative Office of the judicial branch,¹⁴⁶ and the ABA called on Congress to establish mechanisms in the budgeting process to assess impact on state and federal courts.¹⁴⁷ In the states, even though across-the-board judicial impact statements are regarded as untenable, judges continue to conduct qualitative and empirical evaluations of the effect of legislation on courts and attempt to convey these assessments to legislatures.¹⁴⁸

In the early 1990s, the National Center for State Courts and the National Conference of State Legislators co-sponsored conferences and studies focused on legislative-judicial partnership and interbranch communication on budgeting.¹⁴⁹ The recommendations arising from these have a familiar ring: (1) judicial testimony before legislative committees;¹⁵⁰ (2) legislative involvement in planning long-term court improvement; (3) educational programs for legislators on court system

144. A. Fletcher Mangum, *Background*, in *ASSESSING EFFECTS*, *supra* note 129, at 5, 6.

145. *Id.* at 5; *see also* Janet McLane, *Status of Judicial Impact Notes in Washington State*, in *ASSESSING EFFECTS*, *supra* note 129, at 11, 11 (recounting obstacles of judicial impact assessment).

146. The Office of Judicial Impact Assessment arose out of a Federal Courts Study subcommittee proposal by Judge Richard Posner. *See* Charles Gardner Geyh, *Overcoming the Competence/Credibility Paradox in Judicial Impact Assessment*, in *ASSESSING EFFECTS*, *supra* note 129, at 79, 82–87.

147. Mangum, *supra* note 144, at 6.

148. *See, e.g.*, CORIE MARTY, JUDICIAL IMPACT STATEMENT ON HOUSE BILL 10 (2009), available at http://www.ohiojudges.org/_cms/tools/act_Download.cfm?FileID=2916&/HB%2010%20Judicial%20Impact%20Statement%20FINAL%20_2_.pdf; *see also* Linde, *supra* note 138, at 117 (suggesting that state court judges are more likely to participate in the policy process because they are elected, less likely to consider themselves above the fray, and are closer to state capitals); Susan M. Olson, *Judicial Impact Statements for State Legislation: Why So Little Interest?*, 66 *JUDICATURE* 147 (1982).

149. Mangum, *supra* note 144, at 7; *see also* Thomas A. Henderson et al., *The Impact of National Legislation on State Courts*, in *ASSESSING EFFECTS*, *supra* note 129, at 105.

150. *See* Harvey Rishikof & Barbara Perry, *Separateness but Interdependence, Autonomy but Reciprocity: A First Look at Federal Judges' Appearances Before Legislative Committees*, 46 *MERCER L. REV.* 667 (1995) (analyzing appearances of federal judges before Congress).

issues; (4) judicial liaisons to the legislature;¹⁵¹ (5) legislative-judicial representation on task forces and committees; (6) state and regional conferences on legislative-judicial relations; (7) requiring judicial impact statements in legislation; and (8) ground rules for interbranch communication.¹⁵² Commentators also suggested establishing interbranch entities, with court staff acting to provide information from court records and technical evaluation and assistance.¹⁵³ Proposals for formal and informal interbranch communication, then, have been around for some time, but many court administrators continue to believe that the judicial branch is significantly underfunded in part because of a failure of dialogue.

B. *Judicial Political Action and Communicating the Judicial-Legislative Partnership*

There are signs that judicial reticence may be giving way in a number of states to the active approach advocated by, among others, the ABA Task Force. Judicial officers recognize that their leadership is crucial to capturing public, stakeholder, and legislative attention.¹⁵⁴ Judicial leaders in many states are vocal about the crises in judicial funding in testimony to legislatures during state budgets hearings, in annual addresses on the state of the judiciary, in letters and materials accompanying budget requests, and in the press.¹⁵⁵ Chief Justice Carol

151. In the early 1990s, around half of the states had a member of the judicial branch serving as a liaison to the legislature. Abrahamson & Lessard, *supra* note 129, at 22. 152. See LINDA K. RIDGE ET AL., LEGISLATIVE-JUDICIAL RELATIONS: SEEKING A NEW PARTNERSHIP: A GUIDEBOOK FOR LEGISLATIVE-JUDICIAL RELATIONS 22 (1992); available at <http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1128>.

153. See Abrahamson & Lessard, *supra* note 129, at 15, 23. Some of these interbranch institutions focus only on statutory revision.

154. See ALEXANDER B. AIKMAN, THE ART AND PRACTICE OF JUDICIAL ADMINISTRATION 15 (2007) (discussing characteristics of judicial leadership); *id.* at 293–335 (discussing legislative funding relationships and communicating with the bar and the public); Sue Faerman et al., *Judicial Leadership in Court Management*, in HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT 183, 186, 197 (Steven W. Hays & Cole Blease Graham, Jr. eds., 1993) (describing the judicial leadership of Sol Wachler and Judith Kaye and their perspectives on petitioning for resources from the legislature and educating the community); see also Judith Kaye, *Shaping State Courts For the New Century: What Chief Judges Can Do*, 61 ME. L. REV. 355 (2009); Jonathan Lippmann, *Chief Judge Judith S. Kaye: A Visionary Third Branch Leader*, 84 N.Y.U. L. REV. 655, 655 (2009).

155. Letter from Lorie S. Gildea, Minn. Chief Judge, to Tim Pawlenty, Office of the Governor (Oct. 14, 2010), available at http://www.briggs.com/files/upload/Magnuson_Roundtable_12.pdf; see also *An Act Concerning Funding for the Judicial Branch: Hearing on H.B. 5148 Before the Judiciary Comm.*, 2010 Leg., Feb. Sess. (Conn. 2010) (testimony of Hon. Barbara M. Quinn, Chief Court Administrator) [hereinafter Testimony of Barbara M. Quinn], available at http://www.jud.ct.gov/external/news/testimony/TestimonyonHB5148_JudgeQuinn.pdf; Ronald M. George,

W. Hunstein of the Georgia Supreme Court was quoted in *The New York Times* as saying that “[funding] has gotten to the point where it is difficult to say that we are delivering the constitutionally required judicial system.”¹⁵⁶ The Connecticut judiciary has been a national leader in taking on administrative responsibility in partnership with the legislature.¹⁵⁷ In California, Chief Justice Tani Cantil-Sakauye has sparred publicly with lawmakers on the issue of judicial budget administration, framing the issue as one of separation of powers. She has also forcefully advocated for adequate funding in California’s first-ever State of the Judiciary address and worked to gain allies in the state senate and executive branch.¹⁵⁸

The recent New York State judicial budget experience demonstrates the potential of the governor as an ally. In 2010, Governor David Paterson complained that the judiciary was conducting “business as usual” in the face of statewide cutbacks elsewhere, and in 2011, Governor Andrew Cuomo accused the judiciary of not doing its part to address a multibillion dollar state budget shortfall and warned the judiciary that it faced deep cuts and layoffs.¹⁵⁹ In New York, even when the state is not in financial turmoil, executive comments on judiciary budgets are generally neutral at best.¹⁶⁰

The leaders of the state judiciary took heed. In her remarks at the Joint Legislative Session in January 2012, Chief Administrative Judge A. Gail Prudenti emphasized a willingness to share the pain in difficult economic times, but also stressed the constitutional mandate of

Chief Justice of Cal., State of the Judiciary Address to a Joint Session of the California Legislature (Feb. 23, 2010), *available at* <http://www.courts.ca.gov/7886.htm>; John Minton, Jr., Chief Justice of Ky., 2011 State of the Judiciary Address, Testimony before the Interim Joint Committee on Judiciary (Dec. 9, 2011), *available at* http://courts.ky.gov/NR/rdonlyres/C726580B-D6FA-4C46-AAEF-0C62BF6AFF30/0/ChiefJusticeMinton_StateoftheJudiciary_12911.pdf.

156. John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 27, 2011, at A18.

157. *See generally* Testimony of Barbara M. Quinn, *supra* note 155.

158. *See, e.g.*, David Siders, *California Chief Justice Avoids Controversy, Warns that Budget Cuts Could Imperil Judiciary*, SACRAMENTO BEE, Apr. 12, 2012, <http://www.sacbee.com/2012/03/20/4350929/california-chief-justice-avoids.html>; *see also* Cheryl Miller, *Committee to Put Trial Court Funding Act Under Microscope*, THE RECORDER (Oct. 15, 2012), <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202575046837> (describing how the judiciary has joined with the governor to create a ten-member committee charged with evaluating the state’s progress in complying with a prior legislative act requiring, *inter alia*, adequate court funding).

159. *See* John Caher & Joel Stashenko, *Governor Reacts Positively to Judiciary’s Spending Plan*, N.Y. L.J., Jan. 18, 2012, at 1 (discussing the 2012 budget negotiation in light of the recent past).

160. *See id.*

the judiciary and its need to continue to perform essential duties.¹⁶¹ Judge Prudenti expressed her desire to listen to and form relationships with legislators, identified the range of effective steps the judiciary already had taken as a partner in efficient budgeting, and clarified the effects of shortfalls on the judiciary, and, particularly, the impact of failure to provide adequate indigent defense.¹⁶² Judge Prudenti noted that she had contacted “as many legislators as possible” and expressed her desire to “continue [the] conversation here today—to working closely with you and getting to know each of you and learning your particular concerns,” with “an open mind, and an attentive ear” and “partnering with you” on the “historic endeavor” of “transform[ing] our court system for the better.”¹⁶³ She emphasized the variety of ways in which the judiciary had considered legislative interests, from achieving a negative-growth budget even while substantial funding increases for indigent defense were proposed, to making the funding proposal itself shorter, more transparent, and easier to understand in response to concerns that legislators raised at prior hearings.¹⁶⁴

While Judge Prudenti emphasized that funding was necessary to “fulfill [the judiciary’s] constitutional mission” and assure “fair and equal access to justice,” she also argued that indigent counsel increased court efficiency, reduced social services costs, and even served the interests of the business community, which prefers to litigate against represented parties rather than pro se litigants.¹⁶⁵ When Judge Prudenti was finished, and after she presented her budget to the legislature, Governor Cuomo publicly praised the judiciary’s no-growth budget, which provided for a twofold increase in the state legal services budget allocation.¹⁶⁶ The Governor’s comments were a sign that the judiciary had communicated its request as a co-equal partner working toward a common goal, albeit with separate constitutional duties: “The budget submitted by the Chief Judge recognizes the ongoing budgetary pressures the State faces, addressing fiscal reality while supporting the courts’ ability to uphold their constitutional duty.”¹⁶⁷

161. *Joint Legislative Hearing on the 2012–2013 Judiciary Budget*, 2012 Leg. Sess. 1–9 (N.Y. 2012) (remarks of A. Gail Prudenti, Chief Administrative Judge), available at <http://www.nysenate.gov/files/Gail%20Prudenti.pdf>.

162. *Id.*

163. *Id.*

164. *Id.* at 1–6.

165. *Id.* at 8–9.

166. ANDREW M. CUOMO, COMMENTARY OF THE GOVERNOR ON THE JUDICIARY (2012), available at <http://publications.budget.ny.gov/eBudget1213/agencyPresentations/pdf/Commentary.pdf> (transmitting the governor of New York’s comments on the judiciary’s 2012–13 budget request).

167. *Id.*

The Governor commended the judiciary for “examining their operations” so that courts continue to “work better and smarter.”¹⁶⁸ The judicial budget was passed as submitted on April 30, 2012 as a part of “one of the smoothest” budget negotiations in years.¹⁶⁹

The New York experience embodies the recommendation offered by National Center for State Courts President Mary McQueen: “If we don’t come as true partners with an appreciation for the economic challenges that are facing legislatures, it sounds like we’re just whining.”¹⁷⁰ She challenged, “can we come with suggestions rather than [asking] how deep [the legislature is] going to cut?”¹⁷¹ The judiciary should endeavor to come to the table not only asking for funding, but prepared to demonstrate the positive work it has done in areas of mutual interest.¹⁷² McQueen cited the example of Utah’s judiciary, which participated in a successful budget process after it reduced its court reporting budget with technology improvements.¹⁷³ Court administrators themselves need to clarify their essential functions and to strive to meet them within the budget approved by the legislature.¹⁷⁴

As Judge Prudenti’s experience demonstrates, the judiciary must make politically salient arguments for adequate court and indigent defense funding, and must offer solutions that cultivate partners in other branches of government. In doing so, judges should emphasize the costs of an ineffective court system. For example, the ABA Task Force observed that delay or denial of effective judicial action results in harm to those who need prompt and fair resolution of their disputes,

168. *Id.*

169. Thomas Kaplan, *New York State’s 2012 Budget Sails Through Albany*, N.Y. TIMES, Mar. 30, 2012 at A16.

170. Mary McQueen, Panel Discussion on Judicial Underfunding at the ABA Annual Meeting (Aug. 22, 2011), available at <http://www.abanow.org/2011/08/justice-underfundin-panel-features-justice-oconnor-theodore-b-olson-and-david-boies/>; see also Marcus W. Reinkensmeyer, *Court Budget Strategies: Stewardship, Accountability, and Partnership in Maricopa County*, JUDGES’ J., Summer 2004, at 38, 38–41 (describing budget savings measures taken in Maricopa County); Rhonda Van Dyke, *Cutting Costs Through Collaboration and Competition*, JUDGES’ J., Summer 2004, at 41 (describing cost-cutting achieved through consolidated service provision between agencies and strategic procurement strategies).

171. McQueen, *supra* note 170.

172. See Steven Hays, *The Traditional Managers*, in COURT ADMINISTRATION 224–30 (discussing the role of the chief judge in policy-making); William J. Pammer, Jr. & Judith A. Cramer, *Pygmalion in Judicial Responsibility: Toward a Management Ethos Among Judges*, in COURT ADMINISTRATION 205–18 (1993); see also Testimony of Barbara M. Quinn, *supra* note 155, at 2 (emphasizing partnership with the Executive and Legislative Branches in saving money “wherever practical and possible”).

173. McQueen, *supra* note 170 (describing, for example, court reporting automation).

174. See generally Lippman, *supra* note 37.

in overimprisonment and overcrowding, in threats to public safety, and in harm to families separated by delay.¹⁷⁵ In Florida, the quantifiable costs of court delays in foreclosure cases alone were estimated at \$10 billion per year.¹⁷⁶ In California, hundreds of millions of dollars in cutbacks increased court delay, and the resulting expenses were estimated by economists to greatly outweigh the “savings” created by the initial budget cuts.¹⁷⁷ California’s Administrative Office of the Courts has also funded empirical research on how a lack of procedural fairness, including delay, creates distrust of legal authorities, which is likely to have substantial costs for society.¹⁷⁸

Judicial officers may also be able to find ways to simultaneously increase funding for both the courts and other branches. In Michigan, the judiciary proposed and lobbied for bills that allowed the courts in 2004 to set up restricted funds for certain initiatives that would not be affected if another tax revenue shortfall forced further reduction to general appropriations.¹⁷⁹ These restricted funds were financed in part by increased court filing fees, which also partially benefitted other stakeholders, including state police budgets, local governments, and

175. PRESERVATION TASK FORCE REPORT, *supra* note 6, at 1. Ronald Overholt, Chief Deputy Director of California Courts, put it thusly:

When the legislature and the governor say, ‘Well, you know, you don’t have one-time money anymore, you just need to downsize the courts,’ the logical question is, ‘Who doesn’t get justice now?’ And is it the—the domestic violence victims? Is it children in foster care? Is it child custody and visitation issues? Do we let criminals loose? Who is it that we should not allow into the courts anymore? . . . We are a branch of government that provides the most basic rights of a civilization, and that’s access to justice.

Ronald Overholt, Testimony before the American Bar Association’s Task Force on Preservation of the Justice System (Feb. 9, 2011), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1300285174transcript_of_ga_hearing_020911.pdf; *see also* ABA COMMUNICATIONS AND MEDIA RELATIONS DIVISION, THE GROWING CRISIS OF UNDERFUNDING STATE COURTS (2011), *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/1300287161court_funding_crisis_background.pdf.

176. WASHINGTON ECON. GRP., THE ECONOMIC IMPACTS OF DELAYS IN CIVIL TRIALS IN FLORIDA’S STATE COURTS DUE TO UNDER-FUNDING I (2009).

177. PRESERVATION TASK FORCE REPORT, *supra* note 6, at 5 (citing WEINSTEIN & PORTER, ECONOMIC IMPACT ON THE COUNTY OF LOS ANGELES AND THE STATE OF CALIFORNIA OF FUNDING CUTBACKS AFFECTING THE LOS ANGELES SUPERIOR COURT 2 (2009)).

178. PORTER, *supra* note 92; *see also* KEVIN BURKE & STEVE LEBEN, AM. JUDGES ASS’N, PROCEDURAL FAIRNESS: A KEY INGREDIENT IN PUBLIC SATISFACTION (2007), *available at* <http://aja.ncsc.dni.us/htdocs/AJAWhitePaper9-26-07.pdf>; E. ALLEN LIND ET AL., THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Zimmerman & Tyler, *supra* note 92, at 507.

179. *See* Maura D. Corrigan, *Finding Revenue in Hard Times: The Michigan Judiciary’s Approach*, JUDGES’ J., Summer 2004, at 24, 24.

legislative retirement plans.¹⁸⁰ This combination of shared benefits allowed the Michigan judiciary to induce legislators to create safeguards for the funding of key justice system improvements.¹⁸¹

Legislative-judicial partnership can also be strengthened by including legislators in court observation, budgeting discussions, and planning, including particular initiatives or pilot projects. Justice O'Connor proposes asking for funding for particular projects instead of general budget increases, and emphasizes, as do surveys of judicial officers, the importance of developing personal relationships with legislators.¹⁸² Bringing legislators into specific efforts that they can identify with and learn about through "ride-along" observation programs or task force involvement has been helpful, particularly at a time when few legislators are lawyers and have little understanding of courts.¹⁸³

Increased contact at the statehouse is also important. In Massachusetts, budget cuts in 2001 prompted the state Bar Association to organize a "Court Funding Lobby Day" at the state legislature and that helpful campaign has continued.¹⁸⁴ In 2003, the Chief Justice of the Florida Supreme Court asked every lawyer in the state to contact their legislators to seek the restoration of cuts to the judiciary's budget.¹⁸⁵

Judges should also remember to advocate for budget procedures likely to influence funding allocations for adequate counsel. For example, restrictions on the power of the executive branch in the budget

180. *Id.* at 25.

181. *Cf.* John M. Greacen, *Working with the Legislature During the Court Appropriations Process*, JUDGES' J., Summer 2004, at 30, 32 (discussing the risks of relying on fees, and opining that increasing a previous fee is preferable to imposing a new one). Of course, if these fees impose too great a burden on litigants, they may have the negative effect of closing the courthouse doors.

182. *See* O'Connor, *supra* note 136. Surveys of judicial officers have repeatedly highlighted the importance of personal relationships with legislators, especially in the context of fundraising for particular projects. *See* James W. Douglas & Roger Hartley, *Making the Case for Court Funding: The Important Role of Lobbying*, JUDGES' J., Summer 2004, at 35, 36; James W. Douglas & Roger E. Hartley, *State Court Strategies and Politics During the Appropriations Process*, 21 PUB. BUDGETING & FIN. 35 (2001).

183. *See, e.g.,* *Legislators Ride-Along with Judiciary*, JUSTICE MATTERS (Md. Judiciary), Nov. 2003, at 1, 8, *available at* <http://www.courts.state.md.us/publications/justicematterspdfs/nov03jm.pdf>; Nick Yulico, *Legislators Learn About Court System in 'Day on the Bench' Program*, METROPOLITAN NEWS-ENTERPRISE, Dec. 10, 2001, at 5; *see also* Chemerinsky, *supra* note 16 (observing that legislatures have very few lawyers); Minton, *supra* note 155.

184. *See, e.g.,* *MBA and BBA Lead Lobby Day for Court Funding*, LAWYER'S E-JOURNAL (Mar. 22, 2012), <http://www.massbar.org/publications/e-journal/2012/march/03-22/court-advocacy-day>.

185. FRANCES KAHN ZEMANS, *COURT FUNDING* 12 (2003), *available at* http://www2.americanbar.org/committees_migrated/judind/PublicDocuments/courtfunding.pdf.

process weigh in favor of judicial independence.¹⁸⁶ New York and Kansas, for example, both require that the governor submit the judicial budget proposal directly to the legislature without revision.¹⁸⁷ Maintaining flexibility over funding allocation within the judicial branch is also especially important to protecting funding for indigent representation.¹⁸⁸ Judge Cantil-Sakauye's tangle with lawmakers for state-level control of the judicial budget offers another example of strengthening the judicial bargaining position through advocacy on related issues, as state-level budget centralization tends to assist judicial funding requests.¹⁸⁹ Some commentators have also suggested lobbying for long-term grants or state constitutional funding guarantees.¹⁹⁰

Judges are experts in both the constitution and the operation of the courts, but they must also enlist the help of credible stakeholders in proving their case. Analyzing interbranch communication about funding, Charles Geyh clarified that "the judiciary is well situated to furnish the other branches with accurate information" helpful to legislation affecting the courts, but that issues of competency and credibility make partnership difficult.¹⁹¹ He compared the process to a highway guardrail installation by (legislative) experts at the top of a cliff, with (judicial) workers cleaning up debris after accidents. The cleaners are "in a unique position to tell [the experts] about where and why [debris] keeps falling,"¹⁹² even though they are not engineers, and the engineers may be wary that they have motivations such as a desire to make their work easier, rather than proper design.

Continuing with the metaphor, Geyh opined that while the judiciary is in sole possession of information critical to intelligent legislative decision making, it risks being ignored if it appears self-interested, which suggests a need for a trusted intermediary who can pass on the cleaner's observations to the builders. Judges should make

186. *Id.* at 17.

187. *See generally* Caher & Stashenko, *supra* note 159; *see also* KANSAS JUDICIAL BRANCH, BUDGET ANALYSIS REPORT 1615 (2011), *available at* <http://skyways.lib.ks.us/ksleg/KLRD/BudgetBookFY11/2011BudgetAnalysisRpts/JudicialBranch.pdf>.

188. PRESERVATION TASK FORCE REPORT, *supra* note 6, at 9–10.

189. *See* Patrick McGreevy, *Chief Justice Lobbies California Lawmakers on Court Spending Bill*, POLITICAL (Mar. 8, 2012, 12:57 PM), <http://latimesblogs.latimes.com/california-politics/2012/03/chief-justice-lobbies-california-lawmakers-on-spending-bill.html>; Dan Morain, *Tani Cantil-Sakaye Pleads Her Case, Fights Calderon Bill*, THE SWARM (Jan. 26, 2012, 1:53 PM), http://blogs.sacbee.com/the_swarm/2012/01/tani-cantil-sakauye-pleads-her.html; *see also* Geoffrey C. Hazard, Jr. et al., *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286 (1971–72).

190. Chemerinsky, *supra* note 16; *see also* James Podgers, *Sustaining Justice: 10 Experts Tell How Courts Can Do More with Less*, A.B.A. J., June 2011, at 35.

191. Geyh, *supra* note 146, at 80.

192. *Id.*

all attempts to enlist private studies and audits of the effects of indigent defense on the courts, and bring together a range of voices from the bar, business groups, litigants, social service agencies, task forces, social scientists, and technical assistance groups to document their case and help convey it to the legislature, including legislative campaign contributors and constituents.¹⁹³

Lastly, judicial leaders not only need to educate legislators and the public about how the role of indigent defense is essential to the judicial branch, but must also protect judicial independence by educating the judiciary itself. Too many judges appear to misunderstand their proper role in criminal cases, which is to check executive action, not simply to resolve the most cases in the least amount of time. Leadership in educating judges not only develops a united front for advocacy, but also helps judges focus on the other safeguards important to fair trials in their courtrooms.¹⁹⁴ The budget process itself can serve a teaching function, and preliminary budget discussions are a chance for stakeholders and judicial officers to discuss allocation, and for judicial leaders to emphasize the role of indigent defense.¹⁹⁵

IV.

CONCLUSION AND RECOMMENDATIONS

Having considered the tools available, we conclude with recommendations for judicial officers and those who seek to preserve the independence of the state courts. Three basic strategies have been articulated: political engagement, minimal judicial orders intended to initiate political processes, and specific judicial orders that seek to impose a clear requirement that the legislature adequately fund indigent defense or the courts more generally. Where the legislature would be ambushed and resist such a decision, some history of political engagement may be required to effectively issue a forceful funding order. Where political stakeholders would carry forward the process initiated by a less forceful funding order, these actors must be supported and engaged by judicial branch officers.

As described throughout this article, judicial officers should take every opportunity to educate stakeholders on the fundamental importance of indigent defense as a matter of due process and in the separation of powers terms we have set out. Engaging the other branches of government and political stakeholders lays the groundwork for any

193. Chemerinsky, *supra* note 16.

194. BAAR ET AL., *supra* note 17, at 14 (describing how discussion helps the judiciary “speak with one voice”).

195. *Id.* at 9.

action by the judiciary. The “fundamental structure” narrative of *The People’s Right*, for the reasons discussed, has the potential to reach a new variety of stakeholders. New York Chief Judge Lippman’s recent advocacy on indigent defense has initiated this sort of broad-based message. As Chief Judge Lippman explained, “the lack of adequate legal representation for low-income New Yorkers [is] the greatest threat to the continued legitimacy of our justice system” and “ensuring meaningful representation goes to the very heart of [the courts’] constitutional mission.”¹⁹⁶

We offer six policy recommendations on judicial political engagement for the states, informed by Chief Judge Lippman’s work in New York. We covered the most basic recommendation in Part III: the judiciary should seek and create opportunities to bring stakeholders together to discuss the reasons indigent defense is of fundamental importance to the courts and the public and to develop personal relationships among stakeholders. These fora may include standing addresses, hearings, conferences, commissions, and reports, and should include newly created opportunities for those affected by the issue to be heard. Judges should seek to involve legislators in these fora to the extent possible. The governor should recognize that his colleagues in the judiciary have been speaking on the issue for a long time, and that they have shown persistent attention to the issue.¹⁹⁷ Throughout these efforts, judges should bring the “fundamental structure” narrative on indigent defense to the foreground.

Next, the judiciary should play a lead role in documenting and analyzing the problems associated with lack of indigent defense. The New York Judiciary, led by Chief Judge Kaye, had established a Commission on the Future of Indigent Defense Services in 2004 that was comprised of lawyers, judges, and legal academics.¹⁹⁸ The Commission issued a report in 2006, which was the companion to a study by

196. Jonathan Lippman, Keynote Address, Padilla *and Beyond: The Future of the Defense Function*, 39 *FORDHAM URB. L.J.* 29, 34, 35 (2011).

197. Consider the acknowledgement by New York Governor Andrew Cuomo that “Judge Lippman has been working on . . . [indigent defense funding] for some time, and I think he’s right.” Jacob Potent, *Lippman: Fix “Fundamental Failure” in NY Court Rooms*, *THE LEGISLATIVE GAZETTE*, May 9, 2011, <http://www.legislativegazette.com/Articles-c-2011-05-09-77152.113122-Lippman-Fix-fundamental-failure-in-NY-court-rooms.html>.

198. *COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK* (2006), available at http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

the Spangenberg Group.¹⁹⁹ Judges should be aware of the data that are available already and consider how they might better track existing or new data.²⁰⁰ They should also help document related issues that illustrate the need to adequately fund indigent defense, such as the rate of wrongful convictions, police misconduct, or illegal search and seizure practices by police officers.²⁰¹

When documenting underfunding, the judiciary should involve not only public defender organizations and civil rights groups, but also members of the executive and legislative branches. The New York judiciary has worked on just such an interbranch analysis on the issue of wrongful convictions.²⁰² A small number of jurisdictions have taken steps in this area, either with research commissions or policy guidelines, but New York's judiciary is the only one to have established a permanent body to address the issue.²⁰³ In May 2009, Judge Lippman announced the creation of a New York State Justice Task Force, which is a permanent, independent group of defense attorneys, prosecutors, lawmakers, police officials, scientists, judges, and academics who analyze the causes of wrongful convictions by reviewing individual case records and working to develop systemic remedies.²⁰⁴ The diverse staffing of the body ensures rigorous debate and the potential for collaboration on developing systemic responses to the problem. The Task Force's findings have highlighted the role of police and

199. *Id.*; SPANGENBERG GRP., STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES (2006), available at <http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf>.

200. Norman Lefstein and Barry Scheck have both spoken out on how helpful basic time tracking by public defenders would be to demonstrating the issue of underfunding. See Joel M. Schumm, *Conference Report: Padilla and the Future of the Defense Function*, 39 FORDHAM URB. L.J. 3, 24–26 (2011) (describing remarks by Norman Lefstein and Barry Scheck).

201. See Press Release, The Bronx Defenders Marijuana Arrest Project, The Bronx Defenders Marijuana Arrest Project Announces Preliminary Review of Data Reflecting Ongoing and Systemic Constitutional and Evidentiary Problems in Marijuana Arrests by NYPD (Apr. 2, 2012), available at <http://www.bronxdefenders.org/press/bronx-defenders-marijuana-arrest-project-announces-preliminary-review-data-reflecting-ongoing-> (surveying 500 clients arrested for low-level marijuana possession in 2011 and finding that almost half of cases present clear constitutional and evidentiary problems stemming primarily from unconstitutional searches and seizures and improper charging of clients by the New York Police Department).

202. Jonathan Lippman, *Judiciary Examines Causes of Wrongful Convictions*, CRIM. JUST., Fall 2011, at 5.

203. *Id.*; see also N.Y. STATE BAR ASS'N TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT 74–80 (2009), available at <http://www.nysba.org/Content/Content/Folders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf> (discussing efforts in a few other states).

204. Lippman, *supra* note 196, at 36.

prosecutor malpractice and the inability of defense counsel to investigate facts contributing to wrongful convictions.²⁰⁵ Judge Lippman reports that the recommendations of the Task Force are already being incorporated into practices of both prosecutors and law enforcement agencies and that a package of legislative proposals has been introduced that, if enacted, will significantly reduce the risk of wrongful convictions.²⁰⁶ This unique type of judicially-created body, composed of individuals from a variety of branches, has the potential to be replicated to document other issues related to the underfunding of indigent defense.

Third, the judiciary should understand the political levers it can create unilaterally, including via the power to issue rules governing the courts. As seen in the Kansas experience, the judiciary may retain fees that would typically reach general state coffers. More indirectly, the judiciary can institute a court rule on public defender caseload caps. If a caseload cap is in place, especially for an extended period, it is easier for judges to suggest to legislators that a basic element of the legal system is underfunded. Recently, the New York State judiciary adopted court rules providing for a four-year phase-in of caseload caps in New York City that will take effect in 2014, and will limit attorneys to handling no more than 400 misdemeanors or felonies in a twelve-month period.²⁰⁷

Fourth, the judiciary should negotiate with its other branches to have judicial officers placed in new positions of political power, including in interbranch or other entities that address court funding. In New York, the judiciary was able to gain broad statutory powers to improve indigent defense services through the legislative establishment *within* the executive branch of an indigent legal services board in 2010.²⁰⁸ The board cannot include in its membership any prosecutor or police official, and must include the chief judge as chair, an additional judge, one experienced public defender appointed by the governor, and appointees made by the governor on recommendation of top

205. See, e.g., N.Y. STATE BAR ASS'N TASK FORCE ON WRONGFUL CONVICTIONS, FINAL REPORT 19 (2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/TFWrongfulConvictionsreport.pdf> (finding that in a sample of wrongful convictions “government practices, by police or prosecutors, were possible causes of the wrongful convictions in over 50% of the cases”).

206. JONATHAN LIPPMAN, STATE OF THE JUDICIARY 2012 6–7 (2012), available at <http://www.nycourts.gov/admin/stateofjudiciary/SOJ-2012.pdf>.

207. Lippman, *supra* note 196, at 32–33.

208. *Id.* at 34–36.

legislative officials, the state bar association, and county governments.²⁰⁹

Fifth, judges should seek to bolster their power to independently request and allocate current funding to areas that the judiciary determines are necessary to its core mission, so that the judiciary may by itself direct available funding to indigent defense. In the budget process, governors should have minimal involvement in the line item appropriations sought and should be restricted to offering general comments, if anything, on the budget. Judges should also seek to maximize their power to determine the allocation of the judicial budget and transfer expenses along line items in the overall budget. Greater flexibility allows the judiciary a greater chance to fulfill its constitutional mandate without additional funding and may allow the judiciary to unilaterally increase the amount spent on indigent defense.

Sixth, judges should go beyond making funding requests from inside the political process and should instead use their power to order that the courts and indigent defense be adequately funded. At a minimum, a court must be able to call before it those responsible for developing the judiciary's budget and to require an explanation for failures to allocate sufficient funds for a functioning justice system.²¹⁰ In instances where legislators are likely to completely resist a specific funding order by the judiciary, a weak form funding order may be effective by allowing legislators a first pass at making a budget allocation constitutional. However, if judges deem it possible under the circumstances, they should avoid weak forms of action to remedy their own constitutional emergency, particularly in the area of funding for indigent rights. As in *Maron*,²¹¹ allowing the legislature an initial chance to comply with a flexible order makes it hard for plaintiffs to contest legislative decisions and offers little instruction for a lower court required to decide whether a legislature has failed to comply. Specific funding orders should be considered a real option and should embrace the rationale offered in this article and *The People's Right*, bolstered by a detailed factual documentation of the problem and previous attempts to remedy the issue. Powerful judicial leaders assist in this process, as does a record of data, reports, and budgetary requests, which may help justify to legislators why their response is required and why the judiciary saw fit to use the powerful mechanism of constitutional adjudication.

209. N.Y. EXEC. LAW § 833 (McKinney 2011).

210. *The People's Right*, *supra* note 1 (manuscript at 69).

211. *See supra* notes 45–47 and accompanying text.

As former Chief Judge Kaye articulates, the challenges are deep rooted because the state courts are “devalued,”²¹² and judicial officers are likely to encounter resistance. State courts must value themselves, their truth-seeking function, and the litigants before them when they command funding remedies from the legislature, work to support their power to do so, or render funding orders unnecessary through effective interbranch communication. The judiciary cannot always accomplish this change in an order alone, and former Justice O’Connor is right to call on every attorney to support state judiciaries. Successful judicial leadership and interbranch communication is a shared endeavor in which the broader legal community must participate. The judicial power to create a constitutional allocation of power between co-equal branches is amplified when the community advocates, lobbies, and educates the public. State judiciaries should communicate to legislatures that the current crisis in indigent defense makes it impossible for courts to perform the constitutional role that legislators should want them to be performing.

212. Kaye, *supra* note 36.

