

## **Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the *Gideon* Right to Counsel**

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In the landmark decision of *Gideon v. Wainwright*,<sup>1</sup> the Supreme Court held that the Sixth Amendment right to the assistance of counsel so fundamentally affected due process rights of criminal defendants that states were constitutionally obligated to provide such counsel to state felony defendants who could not otherwise afford it.<sup>2</sup> While the Supreme Court thereby mandated state provision of indigent defense counsel, however, it did not reach the difficult question of how such counsel rights ought to be administered. The task of operationalizing and giving content to the *Gideon* right to counsel therefore fell upon state and local policymakers. Although some legislative successes followed,<sup>3</sup> political and financial constraints on legislatures<sup>4</sup> often led to the deprioritization and neglect of indigent defense infrastructure and resource levels, resulting in sometimes blatant constitutional violations.<sup>5</sup>

Frustrated with the unresponsiveness of policymakers, indigent defense advocates have increasingly turned to litigative efforts as a means of compelling legislative (or other policymaking) action. Initially, these efforts sought very limited forms of relief, often seeking only to procure individualized retrospective remedies for specific harms. Early civil attacks, for example, took the form of takings claims which sought to vindicate the Fifth Amendment interests of attorneys conscripted by

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>2</sup> The right to counsel had already been established with respect to capital cases in *Powell v. Alabama*, 287 U.S. 45 (1932), and had been extended to federal felonies in *Johnson v. Zerbst*, 304 U.S. 458 (1938). *Gideon* was significant, however, in that it extended the right to indigent defendants accused of *state* felonies (a broad expansion of the counsel right) on grounds that the Sixth Amendment right to the assistance of counsel is essential to a fair trial and, therefore, obligates state as well as federal courts. *Gideon*, 372 U.S. at 342.

<sup>3</sup> See Jan Ackerman, *Public Defenders in ACLU's Sights: Venango Could Face Suit as Allegheny Did*, Pittsburgh Post-Gazette.com, June 10, 2001, <http://www.post-gazette.com/regionstate/20010610publicdefendreg5p5.asp> (quoting Scott Wallace of the National Legal Aid and Defender Association, who suggests that Minnesota, Florida, and San Diego California have successfully instituted systems capable of providing indigent defendants with constitutionally adequate assistance of counsel).

<sup>4</sup> See Ackerman, *supra* note 3 (“Across the nation, providing free legal services to poor defendants is mandated by the law but disdained by taxpayers.”); NANCY ALBERT-GOLDBERG & MARSHALL J. HARTMAN, *The Public Defender In America*, in THE DEFENSE COUNSEL, 67, 81 (William F. McDonald ed., 1983) (“Perhaps in part due to popular sentiment, legal defense systems have long been the stepchild of the criminal justice system in America; they have been said to suffer from financial anemia.”).

<sup>5</sup> See Rodger Citron, *(UN)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 Yale L.J. 481, 485 (1991) (“In some jurisdictions, the lack of adequate funding and resources not only precludes attorneys from thoroughly preparing to assist clients, but also prevents them from accompanying clients during critical stages of the adversary process, despite the Supreme Court’s explicit requirement to the contrary.”).

states and localities to provide indigent defense services in return for limited or no compensation.<sup>6</sup> While there were also many litigative efforts which sought to more directly vindicate the Sixth Amendment interests of indigent defendants, these generally took the form not of civil actions but, rather, of post-conviction claims for ineffective assistance of counsel raised in ongoing criminal proceedings.<sup>7</sup>

After the nationwide economic contraction of the 1980s placed further pressure on indigent defense budgets, however, constitutional deprivations in some state and local systems became so blatant, severe, and systemic that retrospective remedies came to be viewed by defense advocates as insufficient and unsatisfactory.<sup>8</sup> Thus, beginning with *Luckey v. Harris*<sup>9</sup> in 1986, there has been a new reliance on §1983 civil class action suits to seek detailed injunctive orders capable of comprehensively reforming entire local systems.<sup>10</sup>

This paper seeks to trace these changing litigative efforts and to consider their significance in the development of meaningful and practical mechanisms for administering the formal ‘right to counsel’ espoused in *Gideon*. Part I provides a brief historical overview of the growing pressures on state and local indigent defense systems. Part II discusses the changing litigative approaches to reform which have evolved in response to the growing indigent defense crisis. Finally, Part III discusses the use of modern injunction-centered class action suits to generate system-wide reform. After considering a series of case studies, Part III discusses the relative advantages of class actions seeking detailed judicial orders as compared with other forms of litigative reform efforts, such as those seeking judicial declarations of unconstitutionality or narrowly tailored injunctive orders. The appendix to this paper contains a catalog of cases relevant to this area of study.

## **I. The Growing Indigent Defense Crisis**

In recent decades, scholars and commentators have argued that deficiencies in state and local indigent defense systems have reached crisis proportions due to severe underfunding, inadequate oversight, and the failure to adopt adequate policies and procedures.<sup>11</sup> The severe constitutional

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<sup>6</sup> See *infra* Part II.A.1.

<sup>7</sup> See *infra* Part II.A.2.

<sup>8</sup> See *infra* Parts I.C, II.B.

<sup>9</sup> Amended Class Action Complaint, *Luckey v. Harris*, No. C86-297R (N.D. Ga. 1986).

<sup>10</sup> See *infra* Part III.

<sup>11</sup> See Jessa DeSimone, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1480 (2006) (“[T]he word commonly used to describe indigent public defense systems is

deprivations resulting from these perceived inadequacies have increasingly triggered litigative reform efforts. In order to fully understand the current state of indigent defense and indigent defense litigation, it is important to trace the growing pressures on indigent defense systems and the failure of states and localities to adequately respond to these evolving needs.

### **A. The Pre-Gideon Approach to Indigent Defense: Discretionary Appointment and the Burden of the Private Bar**

Informal and formal methods for the administration of counsel rights existed at the state level even prior to *Gideon's* expansive constitutional mandate. The methods utilized, however, reflected the fact that few appointments were actually necessary. Counsel rights in the pre-*Gideon* period were extremely limited, generally entitling indigent criminal defendants to state-provided counsel only in trials for capital crimes.<sup>12</sup> As such, the development of formalized infrastructure for the meting out of counsel rights was largely unnecessary. Rather, in most states, the responsibility for providing indigent defense counsel fell upon the courts, which relied upon either statutory authority or the judiciary's inherent equitable authority to make ad hoc discretionary appointments where necessary to fulfill statutory or constitutional obligations or where otherwise necessary to the fundamental fairness of trial.<sup>13</sup>

In administering counsel rights, courts sought to capitalize upon the philanthropic sentiments of defense attorneys. They did so by promulgating local rules imposing normative duties upon members of the private bar to provide indigent defense and then relying upon attorneys to volunteer to serve as indigent defense counsel as needed.<sup>14</sup> While this method of administering counsel rights tended to be

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'crisis.'"); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an "Ex Ante" Parity Standard*, 88 J. OF CRIM. L. AND CRIMINOLOGY 242, 246 (1997) ("The defense function in the United States is in a permanent state of crisis.").

<sup>12</sup> In 1932, the Supreme Court recognized that all courts (both federal *and state*) were required to appoint counsel for indigent defendants accused of capital crimes. *Powell v. Alabama*, 287 U.S. 45 (1932). While some state statutes provided for counsel in lesser crimes, appointment in non-capital cases was generally left to judicial discretion or otherwise limited. WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS*, 84-85 (1955). See also, ROBERT HERMANN, ERIC SINGLE & JOHN BOSTON, *COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA*, 11 (1977) ("In most jurisdictions, counsel was appointed in none but the most serious cases, often only when the crime was punishable by death.").

<sup>13</sup> ALBERT-GOLDBERG & HARTMAN, *supra* note 4 at 76, 86. Under the ad hoc method, "counsel are appointed on a case-by-case basis rather than in accordance with some organized plan for court appointment." *Id.* at 86.

<sup>14</sup> "A typical rule found in many federal courts stated: 'It shall be the duty of every attorney to act as such without compensation whenever he is appointed by the court to act for any person accused of crime who has no other attorney.'" BEANEY, *supra* note 12, at 30. Similar methods were utilized by state courts. *Id.* at 87. While attorneys

sufficient to attract representation for high profile defendants and for appointments in small, sparsely populated communities, however, it was less successful in larger cities where the greater burden of indigent representation deterred members of the private bar from volunteering for appointments.<sup>15</sup> Where such volunteers were unavailable, courts were forced to compel attorneys to take indigent appointments.<sup>16</sup>

This method of appointment was well rooted in American history, as it was one primarily relied upon in most states since even before the American Revolution.<sup>17</sup> Prior to the twentieth century, most state legislatures were largely uninvolved in the provision of indigent defense counsel. Because the provision of counsel was largely discretionary and only rarely mandated by state statute, counsel was generally expected to provide indigent defense without compensation and, often, without even being reimbursed for expenses incurred in the representation of indigent defendants.<sup>18</sup> As such, legislative appropriation of funds for compensation of indigent defense attorneys or to provide indigent defense resources was, prior to the twentieth century, a nonissue in most states.

The predominance of ad hoc appointment both had negative implications for the quality of indigent defense<sup>19</sup> and imposed burdens on the pool of attorneys from which appointments were made (particularly in those jurisdictions where no compensation was provided). While these perceived inadequacies led to some reforms,<sup>20</sup> however, little progress was made during the first half of the

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were sometimes provided some compensation for appointment to capital cases, other work was generally uncompensated. *Id.* at 213. *See also*, ALBERT-GOLDBERG & HARTMAN, *supra* note 4, at 76.

<sup>15</sup> BEANEY, *supra* note 12, at 213.

<sup>16</sup> *See Id.* at 30 (discussing how courts sometimes “coerce[d] their attorneys.”).

<sup>17</sup> Some state statutes required the appointment of counsel for poor criminal defendants in certain limited situations (usually only trials for capital offenses or treason) since prior to the American Revolution. *Id.* at 16. Even where such appointment was not constitutionally or statutorily required, judges sometimes made appointments when they believed it was necessary to preserve the fundamental fairness of trial. *Id.* at 16. The administration of these limited counsel rights generally depended on ad hoc appointments made under the judiciary’s inherent equitable authority. *Id.* at 16. *See also*, WILLIAM F. McDONALD, *In Defense of Inequality: The Legal Profession and Criminal Defense*, in THE DEFENSE COUNSEL, 13, 23 (William F. McDonald ed., 1983).

<sup>18</sup> ALBERT-GOLDBERG & HARTMAN, *supra* note 4, at 86.

<sup>19</sup> Because of the burden of uncompensated appointment, courts tended to make only a very limited number of discretionary appointments. *Id.* at 76. The attorneys that *were* appointed tended to be young, inexperienced, and had few resources with which to defend. Moreover, the often improvised system of appointing counsel resulted in little scrutiny of qualifications. In fact, appointments often depended on which attorneys happened to be present at the courthouse when a prisoner was arraigned. *Id.* at 77.

<sup>20</sup> A few jurisdictions, during the early twentieth century, adopted government-funded public defender systems. In some other areas, private non-profit legal aid societies arose to bear part of the responsibility for indigent representation. *Id.* at 77. Both types of structures were rare, however, and even where they existed, tended to be severely underfunded and understaffed. HERMANN ET AL., *supra* note 12, at 1.

In some other jurisdictions, reform was even more limited, focusing only on efforts to create more organized methods for appointing counsel in order to more equally distribute the burden of uncompensated indigent representation among members of the private bar. A reform adopted by New Jersey counties in the late 1940s, for

twentieth century. At the start of the 1960s, more than 97 percent of counties continued to rely on appointed counsel (most still utilizing the ad hoc method of appointment), thirty-Eight percent still provided no compensation for appointed counsel and, “although some compensation was provided” in the remaining counties, “a portion of the lawyers’ time was donated under the theory that the representation of indigent defendants was an obligation on the part of the private bar.”<sup>21</sup> Thus at the time *Gideon* was handed down, indigent defense remained “a matter [largely] left for judicial discretion and charitable contributions.”<sup>22</sup>

### **B. *Gideon*’s Expansion of the Right to Counsel and the Precipitation of a Crisis in Indigent Defense**

*Gideon*, in requiring state courts to provide counsel in all felony cases, represented a sudden and severe expansion of the counsel right, imposing what amounted to a tremendous “unfunded mandate”<sup>23</sup> on state courts. As the number of indigent defendants entitled to state-provided counsel increased, there arose a need for state systems designed for the “mass delivery of services” rather than ones relying solely upon “private enterprise” or the “informal charity” of the private bar.<sup>24</sup> Because, at the time *Gideon* was decided, most state courts still relied upon ad hoc appointment methods, however, they were largely ill equipped to implement this mandate.<sup>25</sup>

The newly expanded counsel right thus placed tremendous pressures upon existing state indigent defense systems, precipitating an indigent defense crisis. Just five years after *Gideon*, the President’s Commission on Law Enforcement warned that “[t]he shortage of criminal lawyers, which is already

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example, required that appointments for non-capital cases be made on an organized, rotational basis from an alphabetized roster. This new scheme assured appointed counsel that “the number of periods when. . . income may be lost” would be limited. BEANEY, *supra* note 12, at 215

<sup>21</sup> ALBERT-GOLDBERG & HARTMAN, *supra* note 4, at 79.

<sup>22</sup> *Id.* at 81 (“As with civil legal assistance, providing criminal defense services had been a matter left for judicial discretion and charitable contributions by bar associations.”).

<sup>23</sup> DeSimone, *supra* note 11, at 1482 n.18. Only a year after *Gideon*, one commentator noted that implementation of the *Gideon* mandate would be “an enormous social task.” ANTHONY LEWIS, GIDEON’S TRUMPET 215 (1964), *cited in Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2066 (2000).

<sup>24</sup> HERMANN ET AL., *supra* note 12, at 2.

<sup>25</sup> ALBERT-GOLDBERG & HARTMAN, *supra* note 4, at 80-81.

severe, is likely to become more acute in the immediate future.”<sup>26</sup> What’s more, the expansion of counsel rights did not end with *Gideon*. Rather, such rights continued to expand substantially over the course of the next decade<sup>27</sup> until, in *Argersinger v. Hamlin*, the Supreme Court held that states were constitutionally required to provide counsel for indigent criminal defendants charged with any offense (even misdemeanors) punishable by imprisonment.<sup>28</sup> The steady expansion of the right to counsel from *Gideon* to *Argersinger* increased the number of necessary state court appointments of counsel from several hundred capital cases in 1963 to over *four million* cases in 1973.<sup>29</sup>

In addition to increasing the proportion of indigent criminal defendants entitled to state-provided counsel by increasing the categories of crimes for which indigent defendants were entitled to representation, the rights revolution of the 1960s and early 1970s (of which *Gideon* was a part), further increased the pressure on state-provided counsel in two additional dimensions. First, heightened procedural protections for criminal defendants meant that indigent defendants became entitled to the assistance of counsel over a greater range of proceedings.<sup>30</sup> Second, such heightened protections also meant that state-provided counsel had to struggle with an increasingly complex body of criminal law, which demanded the devotion of more time to each case.<sup>31</sup> Moreover, at the same time that the courts were increasing the procedural protections made available to criminal defendants, the rate of crime was

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<sup>26</sup> PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 370-74 (1968), cited in DONALD A DRIPPS, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 245 (1997).

<sup>27</sup> By 1973, states had been “required to provide counsel for indigent defendants virtually from the time of arrest to release,” including “during . . . interrogation[s] . . . while in custody of the police, at post-charge identification line-ups, arraignments and preliminary hearings, as well as at trial, sentencing and on appeal.” THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY* (1973) (footnotes omitted).

<sup>28</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (“[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”) Prior to *Argersinger*, eleven states recognized no right to counsel in misdemeanor cases while most of the remaining states provided counsel only for misdemeanors punishable by substantial periods of incarceration. See THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION *supra* note 27, at 63.

<sup>29</sup> ALBERT-GOLDBERG & HARTMAN, *supra* note 4, at 78-79. In 1973, more than one-half of all criminal defendants were indigent and entitled to state-provided counsel. See THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION *supra* note 27, at v.

<sup>30</sup> See *supra* note 27.

<sup>31</sup> See THOMAS BYRNE EDSALL AND MARY D. EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS* 45 (1991) (Between 1957 and 1966, the Supreme Court gave criminal defendants “the right to counsel, to silence, to due process, and to a speedy trial” as well as “protections against illegally obtained evidence and against self-incrimination.”) (case names omitted).

itself steadily increasing, resulting in a greater number of criminal defendants and, therefore, a proportionally greater number of indigent defendants entitled to state-provided counsel.<sup>32</sup>

While the Supreme Court, through *Gideon* and its progeny, imposed substantially greater obligations upon state courts to provide attorneys for indigent defendants, it left the decision of how to implement and administer these newly expanded counsel rights to the discretion of states.<sup>33</sup> Most states, in turn, allocated the burden of implementing counsel rights upon counties.<sup>34</sup> The result was a patchwork of approaches to indigent defense which differed substantially from locality to locality.<sup>35</sup> Moreover, indigent defense reform generally suffered from political process failure and, thus, state and local indigent defense systems were largely neglected by state legislatures which failed to increase defense resource levels to keep up with growing caseloads.<sup>36</sup>

Nevertheless, important changes were compelled by the expanding burden of growing counsel rights. First, the changing nature of the obligation to provide indigent defense triggered empirical research into various types of indigent defense systems.<sup>37</sup> This research, in turn, led to the development of national standards for state and local indigent defense systems.<sup>38</sup> These standards would later prove to be important in providing courts with a means of evaluating claims of systemic inadequacies in state indigent defense systems. Second, in light of the “mushrooming legal manpower needs created by the Supreme Court’s mandates and the seriousness with which the high court began to view the right to

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<sup>32</sup> See ALBERT-GOLDBERG & HARTMAN, *supra* note 4, at 79; EDSALL & EDSALL, *supra* note 31, at 113.

<sup>33</sup> Nicole J. De Sario, *The Quality of Indigent Defense on the 40th Anniversary of Gideon: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 50 (2003) (“[S]ince *Gideon* and *Argersinger* did not specify a model for organizing or funding defense systems, each state has defined the right to counsel through its own respective constitutional provisions, judicial opinions, and legislation.”) (internal quotations omitted).

<sup>34</sup> See THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *supra* note 27, at v.

<sup>35</sup> *Id.* at 81.

There are essentially three models for the provision of indigent defense from which jurisdictions may choose some variation: (1) the assigned counsel model, under which courts either make ad hoc appointments on an as-needed basis or have some more systemic method for appointing counsel; (2) the contract model, under which the jurisdiction contracts with “an attorney, a group of attorneys, a bar association, or a private nonprofit organization” that will provide representation in some or all of the indigent cases in the jurisdiction; or (3) the public defender model, under which a public or private nonprofit organization provides indigent defense services. Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32 (1995).

<sup>36</sup> See *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, Note, 113 Harv. L. Rev. 2062, 2062-64 (2000) [hereinafter *Gideon’s Promise*].

<sup>37</sup> For a survey of this empirical research, See Dripps, *supra* note 11, at 246-50.

<sup>38</sup> Such standards, for example, have been promulgated by both the American Bar Association (ABA) and the National Legal Aid and Defender Association (NLADA). See Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1834 (2000).

counsel” the “old notion that defense services to the poor were a matter of noblesse oblige” was no longer workable.<sup>39</sup> Thus, by 1972, every state had enacted statutes providing for the compensation of criminal indigent defense counsel (though not all states compensated all types of indigent defense representation).<sup>40</sup> Moreover, 64 percent of American counties had adopted an organized county defender system<sup>41</sup> and 16 states provided and funded defender systems at the state level.<sup>42</sup> Even those systems which did not adopt the public defender model often shifted from relying upon the traditional ad hoc appointment method largely utilized in the pre-*Gideon* period to instead adopting more organized methods for administering the counsel right, such as a reliance on contract attorneys or lists of appointed attorneys.<sup>43</sup>

Despite the formal adoption of legislation and policies to accommodate the increasing burden of implementing counsel rights for the indigent, however, an extensive empirical survey conducted by the National Legal Aid and Defender Association (NLADA) in 1973 (the first comprehensive nationwide survey of indigent defense systems) concluded that, in practice, “few jurisdictions even approach[ed]. . . national standards in their treatment of the indigent accused” and many failed to “even meet specific constitutional directives of the Supreme Court . . . .”<sup>44</sup> The report cited problems of excessive caseloads, inadequate training, under-compensation, lack of access to experts and investigators, and lack of independence of appointed counsel as the causes of such constitutional inadequacies and warned that many states provided little more than “token representation” for indigent defendants.<sup>45</sup>

### **C. The 1980s and 1990s: The Escalation of the Crisis**

The economic and political climate of the 1980s and 1990s escalated the problem of inadequate indigent defense in two primary respects. First, in the early 1980s a severe economic recession descended over the American economy, placing constraints on state and local budgets and necessitating budget cuts. Because indigent defense did not have a politically strong constituency (particularly in light of long-

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<sup>39</sup> ALBERT-GOLDBERG & HARTMAN, *supra* note 4, at 80.

<sup>40</sup> *Id.* at 81.

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

<sup>42</sup> The NATIONAL LEGAL AID AND DEFENDER ASSOCIATION *supra* note 27, at 13.

<sup>43</sup> Ronald F. Wright, *Resource Parity for Defense Counsel and the Struggle Between Public Choice and Public Ideals*, (Berkley Electronic Press, Working Paper No.68, 2003), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1152&context=expresso>.

<sup>44</sup> The NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *supra* note 27, at 70.

<sup>45</sup> *Id.* at 70, 77.



escalating crime rates),<sup>46</sup> it was highly vulnerable to cuts. This vulnerability was perhaps heightened by conservative tax policy and the Reagan Administration's open hostility to government funding of legal services.<sup>47</sup> As a result of this convergence of factors, indigent defense budgets, during the 1980s, were not merely subject to legislative *neglect* (resulting in the failure of resource levels to advance at a rate comparable to the growing needs for indigent defense services), they were the victims of affirmative budget *cuts*. By 1991, forty percent of American counties with populations exceeding 100,000 had faced substantial budgetary shortfalls and responded by cutting indigent defense budgets.<sup>48</sup> The resulting impact on resource-levels for defense services was severe. In 1986, for example, "the average cost for . . . indigent defense case[s] nationwide. . . hovered below \$250 – barely enough to cover the cost of blood tests, let alone expert witnesses, legal research or attorney fees."<sup>49</sup>

At the same time that economic pressures led to the reduction of defense budgets, the political climate resulted in an increase in indigent defense caseloads. As the country grew more conservative during the 1980s, tough-on-crime policies became more popular and more common.<sup>50</sup> This trend continued into the 1990s with the war on crime and major increases in drug prosecutions.<sup>51</sup> This shift to the right on issues of crime and law enforcement largely corresponded with escalating crime rates, which had grown by 295% between 1960 and 1980.<sup>52</sup> Public sentiment demanded harsher treatment of

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<sup>46</sup> EDSALL & EDSALL, *supra* note 31, at 112.

<sup>47</sup> President Reagan went so far as to appoint as head of the Legal Services Corporation (LSC) a lawyer who had reportedly recommended abolishing the agency the year before. Irvin Molotsky, *Reagan Chooses Lawyer as Chief of Legal Aid Agency for the Poor*, N.Y. TIMES, Jan. 1, 1982, §1 at 8. See also NLADA.org, History of NLADA, [http://www.nlada.org/About/About\\_HistoryNLADA](http://www.nlada.org/About/About_HistoryNLADA) (last visited May 3, 2007) (Upon being elected, Reagan vowed to cut federally funded legal services; in 1981 LSC-funded programs had their budgets cut by one quarter). The LSC is a federal agency which was established in 1974 to act as a conduit for federal funding of civil legal aid programs. See Atlanta Legal Aid Society, About Us: Evolution of a Non-Profit, <http://www.atlantalegalaid.org/aboutus.htm> (last visited May 2, 2007); Legal Services Corporation, What is LSC?, <http://www.lsc.gov/about/lsc.php> (last visited May 2, 2007).

<sup>48</sup> Michael Kroll, Death Penalty Information Center, *Justice on the Cheap: The Philadelphia Story*, (1992), <http://www.deathpenaltyinfo.org/article.php?scid=45&did=546#fnB0>, citing *Budget shortfalls hit nation's largest counties*, National Association of Counties, August 28, 1991. These counties had faced budget shortfalls averaging more than eight million dollars.

<sup>49</sup> *ACLU Files Class-Action Lawsuit Against Pittsburgh Public Defenders for Failing to Counsel the Poor*, ACLU.org, Sept. 18, 1996, <http://www.aclu.org/crimjustice/indigent/10160prs19960918.html> (last visited May 4, 2007).

<sup>50</sup> Dripps, *supra* note 11, at 247-48.

<sup>51</sup> Lemos, *supra* note 38, at 1811.

<sup>52</sup> EDSALL & EDSALL, *supra* note 11, at 113. Violent crime rates grew at an even higher rate, increasing by 367% between 1960 and 1980. *Id.*

criminals<sup>53</sup> and Legislatures responded with stricter criminal laws and more stringent law enforcement, leading to higher rates of imprisonment.<sup>54</sup>

Indigent defense funding, however, failed to keep up with these rapidly growing pressures on state-provided counsel. When considered in fixed-dollar terms, the amount of spending per indigent criminal case declined significantly between the late 1970s and the early 1990s.<sup>55</sup> Moreover, tough-on-crime sentiments not only increased the number of criminal defendants but also led to the widespread adoption of mandatory sentencing laws which simultaneously increased the severity of sentences which could be imposed and restricted judicial discretion over such sentences.<sup>56</sup> Thus, between the 1970s and 1990s, indigent defense counsel were increasingly being asked to do more with fewer resources while simultaneously being placed under the pressure of higher stakes for their clients.

## **II. Evolving Litigative Responses to the Growing Crisis**

Indigent defense litigation largely evolved in response to the growing crisis in indigent defense. As some jurisdictions failed to respond to growing pressures on traditional indigent defense systems by allocating greater funding or resources to the defense function, defense advocates increasingly turned to litigation as a means of compelling legislative action and courts grew more sympathetic of such actions.

### **A. Initial Litigation**

#### **1. Initial Civil Attacks: The Use of Attorneys' Takings Clause Claims to Shift the Burden from the Private Bar to Public Law**

Interestingly, the first civil suits raised to challenge state and local methods for the meting out of counsel rights took the form of Fifth Amendment Takings Clause claims brought on behalf of appointed

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<sup>53</sup> Public opinion polling, for example, indicated that, in 1965, thirty-six percent of survey respondents believed that courts treated criminals “about right” or “too harsh[y],” while forty-eight percent believed that courts were not harsh enough. *Id.* By 1977, however, only eleven percent of respondents believed that courts treated criminals “about right” or “too harsh[y],” while eighty-three percent believed that courts were not harsh enough. There was also a similar rise in public support for capital punishment. *Id.*

<sup>54</sup> *Id.* at 112.

<sup>55</sup> William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 9-10.

<sup>56</sup> EDSALL & EDSALL, *supra* note 21, at 112.

counsel rather than Sixth and Fourteenth Amendment right to counsel claims brought on behalf of indigent defendants.<sup>57</sup>

In the pre-*Gideon* period, there was no general right to compensation for indigent defense services. While most jurisdictions had statutes providing for compensation in certain limited cases (usually capital cases), it was nevertheless well-established that attorneys were “officers of the court”<sup>58</sup> who had an inherent “professional obligation . . . to accept. . . assignment[s]” even where compensation was not provided.<sup>59</sup> After the rights revolution substantially expanded indigent defendants’ entitlement to counsel and other procedural protections, however, both attorneys and courts began to view this obligation differently. What had, in the pre-*Gideon* period been only a minimal burden<sup>60</sup> became a substantial burden following the expansion of counsel rights.<sup>61</sup> In response, individual attorneys began to raise legal challenges to the practice of conscripting lawyers to provide uncompensated (or undercompensated) indigent defense services. These claims proceeded on the theory that representational services were property and that compelled donation of such services was thereby an unconstitutional taking in violation of the Fifth Amendment.<sup>62</sup>

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<sup>57</sup> Mary Sue Backus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1116 (2006) (such suits were the “first wave of litigation”).

<sup>58</sup> *Powell v. State of Alabama*, 287 US 45, 73 (1932).

<sup>59</sup> *State v. Rush*, 46 N.J. 399, 404 (1966).

<sup>60</sup> See *People v. Johnson*, 417 N.E.2d 1062, 1064 (Ill. App. Ct. 1981) (The historical practice of “lawyers furnish[ing] counsel for indigent defendants gratuitously, or for token compensation. . . was established when the volume of cases requiring the appointment of counsel was small and did not result in an unreasonable burden on members of the bar.”)

<sup>61</sup> See *State ex rel. Partain v. Oakley*, 227 S.E. 2d 314, 321 (W.Va. 1976) (“The result of the broadened entitlement to counsel. . . is to . . . require an attorney who is appointed to represent a defendant on a criminal charge to undertake a long-term responsibility or, to require several appointments,” either of which generates “an increased stress on the limited pool of manpower upon which the courts may call for legal services.”).

<sup>62</sup> See *Rush*, 46 N.J. at 399 (attorney was entitled to reimbursement for out-of-pocket expenses; the court will no longer require counsel to absorb the full cost of defense of the indigent); *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. App. Ct. 1972) (attorneys will no longer be required to accept uncompensated appointments); *Partain*, 227 S.E.2d at 314 (same); *State v. Robinson*, 123 N.H. 665 (1983) (authorizing statutory fee limits to be exceeded where the limit results in unfairness); *White v. Board of County Comm’rs*, 537 So. 2d 1376, 1379 (Fla. 1989) (statutory fee cap is “unconstitutional when applied in such a manner that curtails the courts’ inherent power to secure effective, experienced counsel for the representation of indigent defendants in capital cases”); *Arnold v. Kemp*, 813 S.W.2d 770, 774 (Ark. 1991) (unreasonable fee cap created an unconstitutional taking of attorney services, “a specie of property subject to Fifth Amendment protection.”); *State ex rel. Friedrich v. Circuit Court*, 531 N.W.2d 32, 35 (Wis. 1995) (authorizing statutory fee limits to be exceeded where necessary to secure adequate counsel).

Not all of these suits were successful however. See *Sparks v. Parker*, 368 So. 2d 528, 532 (Ala. 1979) (Requiring attorneys to provide uncompensated representation of indigent defendants is not an unconstitutional taking because “the state [is] simply require[ing] an individual to fulfill the commitment he has made” by entering the legal profession knowing that “a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order.”).

These initial attorney challenges were significant for several reasons. First, regardless of whether courts ultimately concluded that the conscription of attorneys to provide uncompensated indigent defense services rose to the level of an unconstitutional taking, many increasingly recognized that the practice raised the important policy question of “whether in fairness the bar alone should be required to discharge a duty which constitutionally is the burden of the State.”<sup>63</sup> These suits were thus important in altering the previously dominant view that indigent defense was merely the responsibility of the private bar. By shifting the focus from the philanthropic duties of appointed counsel to the responsibility of state and local governments to provide indigent defendants with constitutionally protected rights,<sup>64</sup> these suits made all the more blatant the need for reform of traditional indigent defense systems.

Second, these initial attorney suits were also significant in that they sometimes demonstrated the degree to which the Sixth Amendment interests of indigent defendants were intimately connected with the Fifth Amendment interests of their assigned counsel. Some suits incorporated the theory that inadequate compensation for appointed counsel led to inadequate representation of indigent defendants; even where such theories were not advanced by claimants, courts sometimes considered the effect of inadequate compensation on the quality of representational services.<sup>65</sup>

It is true that some courts were reluctant to recognize *any* relationship between attorney compensation and indigent representation, reasoning that the quality of attorney services was driven not by the amount of compensation, but by a sense of professional obligation to the client.<sup>66</sup> Other courts,

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<sup>63</sup> *Rush*, 46 N.J. at 446. See also *Johnson*, 417 N.E.2d at 1065 ([I]ndividual lawyers have been forced to bear the expense of fulfilling an obligation that belongs to the State”); *Robinson*, 123 N.H. at 668 (“A fee for the defense of an indigent criminal defendant. . . should strike a balance between conflicting interests which include the ethical obligation of a lawyer to make legal representation available, and the increasing burden on the legal profession to provide counsel to indigents); *White*, 537 So. 2d at 1379 (Fla. 1989) (“[A]fter *Gideon*, dual obligations arose regarding the representation of indigents in criminal cases: the constitutional obligation of the state created under *Gideon* and the ethical obligation of the attorney that accompanies the profession”; thus, attorneys must provide indigent representation, but the state must reasonably compensate for such services).

<sup>64</sup> See *Robinson*, 123 N.H. at 669 (1983) (“The public has the responsibility to pay for the administration of criminal justice, and the legislature or the courts have no right or legitimate reason to attempt to spare the public the expense of providing for the costs associated with the defense of an indigent by thrusting those expenses upon an individual citizen who happens to be an attorney.”).

<sup>65</sup> See *Rush*, 46 N.J. at 406 (1966); *Sparks v. Parker*, 368 So.2d 528, 530 (Ala. 1979).

<sup>66</sup> See *Rush*, 46 N.J. at 406 (“A lawyer needs no motivation beyond his sense of duty and his pride.”); *Sparks*, 368 So.2d at 528 (citing *Rush* approvingly on the matter of attorneys’ ethical obligations to provide adequate assistance of counsel even absent compensation); *Ex Parte Grayson*, 479 So.2d 76, 79-80 (Ala. 1985) (rejecting the “premise that lawyers will not provide effective assistance unless paid a certain amount of money” in light of the fact that “the legal profession requires its members to give their best efforts in advancing the undivided interests of their clients”) (quotation marks omitted).

however, recognized the practical reality that, although attorneys were always under an ethical obligation to provide adequate representational services, inadequate compensation could impact both their willingness and their ability to provide adequate assistance of counsel to indigent defendants.<sup>67</sup> Several courts, for example, noted that, where attorneys are not compensated for indigent representation work, they may be tempted or feel forced to reduce the amount of time they spend on assigned indigent cases in order to earn sufficient income from more remunerative private defense work.<sup>68</sup> Others suggested that, even assuming attorneys didn't attempt to adjust their time-allocation in this manner, a state's failure to provide the necessary 'tools of defense' could render adequate assistance of counsel difficult or even impossible to provide,<sup>69</sup> fostering a conflict of interest between attorney and client.<sup>70</sup> The position of these courts made the prospect of relying solely upon the charity of the private bar appear to be an increasingly untenable means of delivering constitutional counsel rights to indigent defendants. As such, at the start of the 1980s, "the clear trend [was] for both courts and legislatures to alleviate the financial burden previously placed upon individual lawyers by providing adequate compensation for services rendered to indigent defendants."<sup>71</sup>

Finally, attorney takings clause claims were also significant due to the remedies they sometimes generated. In response to such claims, the high courts of several states reasoned that they had inherent authority "to define, supervise, regulate, and control the practice of law" within the state.<sup>72</sup> Such inherent

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<sup>67</sup> *White*, 537 So. 2d at 1380 ("The relationship between an attorney's compensation and the quality of his or her representation cannot be ignored."); *Madden v. Township of Delran*, 126 N.J. 591, 607 (1992) ("[F]inancial pressures on unpaid counsel can affect their performance.").

<sup>68</sup> *See White*, 537 So. 2d at 1380 (inadequate compensation may lead an attorney to spend less time on indigent cases or to accept plea offers even where not in the best interests of an indigent client); *Okeechobee County v. Jennings*, 473 So.2d 1314, 1318 (Fla. Dist. Ct. App. 1985) ("[I]t would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated."); *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W.Va. 1989) (despite the professionalism of attorneys, "it is unrealistic to expect *all* appointed counsel with office bills to pay and families to support to remain insulated from the economic reality of losing money each hour they work.")

<sup>69</sup> *See Robinson*, 123 N.H. at 669 ("The right to counsel. . . would be meaningless if counsel for an indigent defendant is denied the use of the working tools essential to the establishment of a tenable defense because there are no funds to pay for these items.").

<sup>70</sup> *Maynard*, 383 S.E.2d at 538.

<sup>71</sup> *People v. Johnson*, 417 N.E.2d 1062, 1065 (Ill. App. Ct. 1981).

<sup>72</sup> *Partain*, 227 S.E.2d at 320. *See also Rush*, 46 N.J. at 447 ("[I]t is the. . . exclusive responsibility of the judiciary to determine the obligation of the legal profession in [the] area" of indigent defense); *White*, 537 So. 2d at 1378 (Florida trial courts have the inherent power to exceed statutory fee caps where necessary to provide a reasonable level of compensation for appointed counsel); *State ex rel Friedrich v. Circuit Court for Dane County*, 531 N.W.2d 32, 36 (Wis., 1995) (Though courts often follow statutory fee schedules, "courts retain the ultimate authority to

authority, these courts reasoned, rendered them capable of granting relief in matters relating to indigent counsel assignments and fees. In at least one case, *State v. Lynch*, the court utilized this broad inherent authority to dictate specific reforms which were to remain in effect during the period between the court's declaration of unconstitutionality of the state's fee structure and the date the legislature enacted its own reforms.<sup>73</sup>

Most courts, however, remained reluctant to invade the province of the legislature and, thus, took care to shape relief in a form which minimized the perceived interference with legislative prerogatives. These courts thus declined to compel any specific means of reform, instead issuing general declarations of unconstitutionality to the effect that attorneys could no longer be compelled to accept assignments for the provision of uncompensated (or undercompensated) indigent defense services.<sup>74</sup> Rather than adopting their own reforms to remain in place during the interim as did the court in *Lynch*, these courts instead delayed the imposition of such declaratory rulings in order to give legislatures time to respond with reform.<sup>75</sup>

Thus, though these initial takings claim attacks resulted in reforms, the nature of these reforms was largely left to the discretion of state legislators, who usually sought only to temporarily increase compensation rates for indigent representation in order to respond to the specific constitutional deficiency identified in a given declaration of unconstitutionality.<sup>76</sup> Even where the suits triggered broader reforms,

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determine the amount of compensation for court-appointed counsel necessary to ensure effective administration of justice.”)

This authority was often also explicitly included in the state constitution. *See State v. Lynch*, 796 P.2d 1150, 1163 (Okla. 1990); *Partain*, 227 S.E.2d at 319.

<sup>73</sup> *See Lynch*, 796 P.2d at 1161. The Oklahoma Supreme Court established guidelines which “tie[d] the hourly rates of [appointed counsel] to the hourly rate of the prosecutor/district attorney and the public defenders.” The court also established a procedure for appointed attorneys’ reimbursement for out of pocket expenses incurred in the course of representation. *Id.* at 1161-62.

<sup>74</sup> *See Partain*, 227 S.E.2d at 323 (discussing a number of alternative means of providing indigent defense but ultimately deferring to the legislature on the selection of the means and concluding that “the appropriate remedy is to order only that lawyers. . . may no longer be required to accept appointments as in the past”). *Bradshaw v. Ball*, 487 S.W.2d 294, 300 (holding that attorneys are not entitled to compensation from the state but will no longer be required to take indigent defense cases; acceptance of such cases will be purely voluntary).

The effect of such rulings was to force the hand of policy-makers: the failure to compensate attorneys meant that attorneys could no longer be conscripted into service; however the government still had an obligation to provide adequate assistance of counsel to indigent defendants within a given jurisdiction. States and localities thus had to fashion some governmental solution.

<sup>75</sup> *See Partain*, 227 S.E.2d at 323 (almost one year delay); *Bradshaw*, 487 S.W.2d at 299-300 (ninety day delay).

<sup>76</sup> *See Citron*, *supra* note 5, at 500.

This approach was also taken in response to the judicial remedy instituted in more recent litigation challenging pay rates for appointed counsel in New York. In 2002, the New York County Lawyers’ Association (NYCLA) brought a civil class action suit challenging the adequacy of statutory pay rates for appointed counsel,

they were often not sustained. *State v. Lynch*, for example, triggered the legislature's creation, in 1991, of a statewide public defender system to replace the interim reforms dictated by the court.<sup>77</sup> Nevertheless, by 1994, the legislature began contracting funding for the system and, by 1997, the system "again suffered a funding crisis."<sup>78</sup>

## 2. Initial Defendant Centered Litigation: The Inadequacy of Criminal Post-Conviction Relief Claims

Initial defendant-centered suits generally<sup>79</sup> took the form not of civil attacks but, rather, of criminal post-conviction relief claims, seeking to procure individualized retrospective remedies for specific instances of ineffective assistance of counsel.<sup>80</sup> In *Strickland v. Washington*, the United States Supreme Court set forth a stringent standard for ineffectiveness, requiring that a defendant demonstrate both (1) that counsel's performance was so deficient as to fall outside "the wide range of reasonable professional assistance" and (2) that the ineffective assistance was prejudicial in that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>81</sup>

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which had not been increased in seventeen years. *See New York County Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 415 (N.Y. Super. Ct. 2003). In 2003, the court concluded that existing rates of pay were constitutionally inadequate and instituted a permanent injunction ordering that attorneys be paid at rates of ninety dollars an hour until the legislature acted to institute its own reforms. *Id.* at 419. The legislature acted immediately by increasing compensation rates but set these rates at "more than 30% less than what plaintiffs had sought." *See DeSimone, supra* note 11, at 1494.

<sup>77</sup> *See DeSimone, supra* note 11, at 1493; OKLAHOMA INDIGENT DEFENSE BOARD, OKLAHOMA INDIGENT DEFENSE SYSTEM REPORT FOR FISCAL YEAR ENDING JUNE 30, 2006, 1, (2006) available at <http://www.ok.gov/OIDS/documents/2006%20Annual%20Report.pdf>.

<sup>78</sup> OKLAHOMA INDIGENT DEFENSE BOARD, *supra* note 77, at 2-3. "Many deficiencies in OIDS delivery of services were [also] identified" by 1997. *Id.* at 3.

<sup>79</sup> Suits seeking retrospective remedies for ineffective assistance of counsel, though the primary type of defendant-centered litigation instituted during this period, was certainly not the only approach taken. In 1972, for example, immediately after *Argersinger* had been handed down, indigent defendants brought a class action of consolidated habeas cases, alleging that the state had systemically refused to appoint counsel in accordance with its *Argersinger* duty. *Gillard v. Carson*, 348 F. Supp. 747 (M.D. Fla., 1972). The court responded by issuing an injunction prohibiting the state from prosecuting any indigent defendant of an offense punishable by imprisonment without first providing the indigent defendant with counsel. *Id.* The court concluded that such "equitable, prospective relief" was warranted because the alternative remedy of allowing each individual defendant to file a petition for a writ of habeas corpus after being confined unlawfully and thereby sustaining irreparable damage was manifestly inadequate. *Id.* at 762.

<sup>80</sup> The Supreme Court did not formally recognize that the right to counsel included the right to "effective assistance of competent counsel" until 1970. *See McMann v. Richardson*, 397 US 759, 771 (1970). Nevertheless, even in the pre-*Gideon* period, the right to counsel had "implicitly. . . include[d] the right to effective counsel." *See De Sario, supra* note 33, at 46.

<sup>81</sup> *Strickland v. Washington*, 466 US 668, 669 (1984).

The *Strickland* standard has been widely criticized as an inadequate means of vindicating defendants' Sixth and Fourteenth Amendment interests in light of systemic deficiencies in indigent defense services. Many argue, for example, that *Strickland* establishes a "highly deferential" standard under which it is extremely difficult for defendants to prevail on ineffectiveness claims.<sup>82</sup> Because *Strickland* requires that the existence of prejudice be evaluated on the face of the record, it targets only errors of commission, ignoring the reality that ineffectiveness is more likely to result in errors of omission (such as failure to investigate).<sup>83</sup> Moreover, because judges are willing only to "stop the aberrations," in indigent defense provision, they implicitly "allow the legislature, through funding choices, to set the average for criminal defense" and "then apply the minimum standards in light of that average."<sup>84</sup> Thus, "the funding available for indigent defense constrains the standards used to evaluate [counsel's] work" rather than judicial standards dictating some minimum level of legislative funding.<sup>85</sup> Along the same lines, because *Strickland* only allows for a case-by-case inquiry, it prevents courts' consideration of systemic failures resulting from underfunding.<sup>86</sup> As such, it disables courts from providing any meaningful remedy even where the stringent standard is met. The grant of a new trial, for example, may be of limited benefit in an overburdened indigent defense system where a defendant faces the risk of being assigned to yet another overworked attorney who again finds it difficult to provide effective assistance.<sup>87</sup>

As these and other inadequacies relating to retrospective post-conviction inquiries into ineffectiveness became increasingly apparent to commentators, the need for prospective remedies confronting the *causes* of the crisis rather than merely the effects became more clear.

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<sup>82</sup> The standards in place prior to *Strickland* were equally stringent, refusing to allow courts to intervene absent a showing that "the purported representation. . . was such as to make the trial a farce and a mockery of justice." *United States v. Wight*, 176 F.2d 376 (2d Cir. 1949). See also *Baretta v. California*, 422 US. 806, 813 n.8 (1975) (in California, representation must be so deficient as to render the trial "a farce or sham.") (internal quotation marks omitted).

The general reluctance of courts to grant relief for ineffective assistance of counsel claims may be rooted in any of several factors, including the belief that such claims are generally meritless last-ditch efforts to avoid punishment for wrongdoing, a fear that "lawyers might make deliberate errors in weak cases," a realization that granting relief in all cases involving ineffectiveness would result in an overwhelming number of reversals of convictions and, perhaps most importantly, a realization that "a lawyer's performance probably stems from the nature of the defense lawyer's job" which involves tremendous discretion. HERMANN ET AL., *supra* note 12, at 19.

<sup>83</sup> See Citron, *supra* note 5, at 487.

<sup>84</sup> Wright, *supra* note 43, at 20.

<sup>85</sup> *Id.*

<sup>86</sup> See Citron, *supra* note 5, at 500.

<sup>87</sup> Lemos, *supra* note 38, at 1822 (prevailing under the *Strickland* standard is a "hollow victory").



## **B. The 1980s: The Heightening of the Indigent Defense Crisis and Judicial Authorization of Prospective Judicial Relief**

The cumulative effect of reductions in defense budgets combined with an increase in the need for appointed counsel escalated the defense crisis during the 1980s.<sup>88</sup> Realizing the constitutional implications of such deficient systems and recognizing that the political process failure meant that legislatures would not act, some courts exhibited a stronger inclination to move from retrospective to prospective remedies. For example, in the 1984 case of *State v. Smith*, the Arizona Supreme Court, while reviewing a post-conviction ineffective assistance claim for a single indigent defendant, *sua sponte* took up consideration of system-wide deficiencies and ultimately created a rebuttable presumption of ineffectiveness which it ordered to be applied prospectively by Arizona courts if the legislature failed to make reforms to bring the Mohave County indigent defense system into conformity with NLADA and ABA standards.<sup>89</sup>

Perhaps sensing the courts' increasing willingness to issue prospective remedies relating to constitutional deprivations resulting from the inadequate provision of indigent defense, the Georgia chapters of the NACDL and the ACLU joined forces with the NLADA to file in federal court a bilateral class action suit which challenged the Georgia system on behalf of indigent defendants and their attorneys.<sup>90</sup> Plaintiffs requested that the court issue a detailed injunctive order requiring greater funding

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<sup>88</sup> See *supra* Part I.C.

<sup>89</sup> See *State v. Smith*, 681 P.2d 1374 (Ariz. 1984). See also *Gideon's Promise*, *supra* note 36, at 2070.

The Louisiana Supreme Court created a similar rebuttable presumption in 1993. See *State v. Peart*, 621 So.2d 780 (La. 1993). There, the lower court had mandated caseload reductions and ordered the legislature to provide funds for additional facilities, attorneys and staff. The Louisiana Supreme Court reversed the lower court order but nevertheless established a rebuttable presumption "that indigents. . . are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards." *Id.* at 791.

While both *Smith* and *Peart* generated legislative funding increases, however, neither has secured sustained reform. Shortly after *Smith* for example, the county adopted a new indigent defense system with substantially greater funding levels. Backus, *supra* note 57, at 1118. A 1993 study, however, found wide ranging noncompliance with the NLADA caseload standards which *Smith* required the county to observe. *Id.* Similarly, *Peart* also led to greater legislative funding; such funding increases, however, failed to keep up with growing caseloads. *Id.* at 1120-1121.

<sup>90</sup> See Amended Class Action Complaint, *Luckey v. Harris*, No. C86-297R (Dist. Ct. N.D. Ga. 1986).

The state of Georgia, under the Georgia Indigent Defense Act, O.C.G.A. 17-12-30, *et seq.*, had delegated all responsibility for indigent defense to county governments. The counties thus adopted a variety of approaches and the state provided no funding assistance, oversight, or quality control of these county systems. *Id.* at 16. Plaintiffs alleged that this approach had amounted to "a statewide systemic failure to provide constitutionally adequate criminal defense services for indigents" in violation of the state's duties under the United States Constitution. *Id.* at 7.

and the adoption of uniform state-wide standards and that the court further monitor and ensure implementation of the standards throughout the state.<sup>91</sup>

The district court initially dismissed the suit on grounds that Plaintiffs failed to meet the ineffective assistance of counsel standard set forth in *Strickland* because they did not establish “an across-the-board future inevitability of ineffective assistance” for each class member.<sup>92</sup> On appeal, however, the Eleventh Circuit held that the *Strickland* standard, established in the context of a criminal post-conviction relief claim, was “inappropriate for a civil suit seeking prospective relief.”<sup>93</sup> This was so, the court reasoned, because the “powerful considerations” favoring deferential scrutiny of a counsel’s performance in the post-trial context do not apply when only prospective relief is sought.<sup>94</sup> The Eleventh Circuit thus held that the proper burden to place on plaintiffs was to show “the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.”<sup>95</sup> On a subsequent appeal of the case to the Eleventh Circuit, however, the court authorized abstention<sup>96</sup> and the district court ultimately disposed of the case on abstention grounds.<sup>97</sup>

Although the suit ultimately ended in abstention, *Luckey v. Harris* was important in that it established that *Strickland* was no longer a bar to civil suits for prospective relief and that individuals could therefore launch prospective attacks on indigent defense systems.<sup>98</sup> Although the Eleventh Circuit decision was not binding on other circuits, as the first decision on the issue, it was strongly persuasive. The opinion thus opened the floodgates to civil class action litigation seeking detailed injunctive orders to reform state and local systems for the provision of indigent defense services.<sup>99</sup>

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<sup>91</sup> *Id.* at 21.

<sup>92</sup> See *Luckey v. Harris*, 860 F.2d 1012, 1016-17 (11th Cir. 1988).

<sup>93</sup> *Id.* at 1017.

<sup>94</sup> *Id.* These “powerful considerations” include “concerns for finality, concern that extensive post-trial burdens would discourage counsel from accepting cases, and concern for the independence of counsel.” *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See *Luckey v. Miller*, 929 F.2d 618 (11th Cir. 1991).

<sup>97</sup> See *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992) (affirming District Court’s dismissal of suit on *Younger* abstention grounds).

<sup>98</sup> In subsequent suits seeking prospective system-wide reform, courts authorizing such relief have dealt with the *Strickland* standard in one of two ways: some courts “broadly interpret *Strickland* to hold that prejudice can be presumed collectively and prospectively” while others follow the Eleventh Circuit’s approach by holding that *Strickland* is simply “inapplicable to system-wide challenges to indigent defense.” De Sario, *supra* note 33, at 47.

<sup>99</sup> *Luckey* was also significant in that it indicated that civil class action suits seeking structural injunctions for indigent defense reform ought to be brought in state court where the means of avoiding the constitutional issue through abstention is not readily available as it is in federal court. Since 1992 when the 11th Circuit abstained in *Luckey v. Harris*, only one class action which challenged a state indigent defense system (surprisingly in Georgia)

### III. Modern Injunction-Centered Class Action Litigation and Attempts to Generate System-Wide Reform

Indigent defense advocates reacted strongly to the Eleventh Circuit's authorization of prospective attacks on the adequacy of indigent defense. *Luckey* was followed by a wave of injunction-centered §1983 civil class action lawsuits seeking broad reform of entire state and local indigent defense systems. Such suits, instituted in Georgia,<sup>100</sup> Connecticut,<sup>101</sup> Pennsylvania,<sup>102</sup> Mississippi,<sup>103</sup> Montana,<sup>104</sup> Washington,<sup>105</sup> Louisiana,<sup>106</sup> and Michigan,<sup>107</sup> alleged that indigent defendants were systemically denied constitutionally adequate assistance of counsel due to a number of deficiencies, including excessive caseloads, a lack of resources and support staff, inadequate facilities, a lack of standards, and a lack of oversight. While none of these suits have thus far resulted in the issuance of a detailed injunctive order by a court, several suits have been successfully resolved through settlement.<sup>108</sup> Many of these settlements, moreover, have included provisions for limited judicial oversight of the implementation of the terms of the settlement. It is instructive to examine a few examples of such litigation.<sup>109</sup>

#### A. Case Studies:

##### 1. Fulton County, Georgia: The Use of Litigation as a Tool to Spur Policy-Makers into Action

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has been filed in federal court. See *Stinson v. Fulton County Bd. of Comm'rs*, No. 1-94-CV-240-GET (D. N.D. Ga. 1999).

<sup>100</sup> *Stinson v. Fulton County Board of Commissioners*, No. 1-94-CV-240-GET (D. N.D. Ga. 1999).

<sup>101</sup> *Rivera v. Rowland*, No. CV-95-0545629 S (Conn. Super. Ct. 1997).

<sup>102</sup> *Doyle v. Allegheny County Salary Board*, No. GD-96-13606 (Penn. Ct. Com. Pl. 1997).

<sup>103</sup> *Quitman County v. State of Mississippi*, 910 So. 2d 1032 (Miss. 2005).

<sup>104</sup> *White v. Martz*, No. C DV-2002-133 (Mont. Dist. Ct. 2002).

<sup>105</sup> *Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. 2004).

<sup>106</sup> *Anderson v. State*, No. 2004-005405 (La. Dist. Ct. 2004).

<sup>107</sup> *Duncan Et. Al. v. State of Michigan*, (Mich. Cir. Ct., 2007), available at [http://www.aclu.org/images/asset\\_upload\\_file244\\_28623.pdf](http://www.aclu.org/images/asset_upload_file244_28623.pdf).

<sup>108</sup> See *Stinson v. Fulton County Board of Commissioners*, No. 1-94-CV-240-GET (D. N.D. Ga. 1999); *Rivera v. Rowland*, No. CV-95-0545629 S (Conn. Super. Ct. 1997); *Doyle v. Allegheny County Salary Board*, No. GD-96-13606 (Penn. Ct. Com. Pl. 1997); *Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. 2004).

<sup>109</sup> See *Stinson v. Fulton County Board of Commissioners*, No. 1-94-CV-240-GET (D. N.D. Ga. 1999); *Doyle v. Allegheny County Salary Board*, No. GD-96-13606 (Penn. Ct. Com. Pl. 1997); *Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. 2004).

One of the first of the wave of class action challenges to state and local indigent defense systems was filed in Fulton County, Georgia in 1994. That suit, *Stinson v. Fulton County*, was filed by the Southern Center for Human Rights (SCHR) and private attorney, Bruce Malloy, and sought declaratory and injunctive relief against the County's practice of denying counsel to indigent criminal defendants while they were "bound over" (i.e. incarcerated) in the county jail during the period between a bond hearing and the subsequent indictment or arraignment.<sup>110</sup>

Upon filing the suit, Plaintiffs recognized that Eleventh Circuit law was not particularly favorable to the claim, especially in light of the Eleventh Circuit's recent authorization of abstention in *Luckey*. Plaintiffs feared that, even if they were able to secure a favorable judgment at the district court level, there was a substantial risk of reversal by the Eleventh Circuit.<sup>111</sup> Nevertheless, Plaintiffs felt it was worthwhile and necessary to file the suit. Recognizing that defense advocates were "always playing a weak hand," Plaintiffs sought to use litigation not only to obtain the requested judicial relief but also to prompt the responsible county officials to remedy the severe deficiencies in the indigent defense system through voluntary efforts.<sup>112</sup>

Plaintiffs recognized that they had a sympathetic case. Because of the County's refusal to provide counsel until the point of indictment, many defendants (particularly misdemeanor defendants) had "remained in jail without counsel for periods longer than could have been imposed if they had been convicted and sentenced to the maximum penalty for the offense."<sup>113</sup> Additionally, indigent defense in Fulton County had been under scrutiny for years<sup>114</sup> and there had been widespread suspicion that officials

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<sup>110</sup> See Consent Order, 1-2, *Stinson v. Fulton County Bd. of Comm'rs*, No. 1-94-CV-240-GET (D N.D. Ga., 1999) [hereinafter *Stinson* Consent Order].

The suit was filed on behalf of "all persons charged with non-homicide felony offenses within Fulton County who are not released on bond but who, instead, are incarcerated at the Fulton County Jail, and who, during the period up to, but not including, indictment or arraignment, are denied access to counsel." *Id.* The plaintiff class alleged that this practice denied them rights guaranteed by the Sixth Amendment, the Due Process Clause, the Equal Protection Clause, and the Georgia Constitution. *Id.*

<sup>111</sup> See Telephone Interview with Robert E. Toone (April 10, 2007) [hereinafter Toone Interview].

<sup>112</sup> See *Id.*

<sup>113</sup> THE SPANGENBERG GROUP, EXECUTIVE SUMMARY STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART I, 80, (2002). This situation was made worse by the poor state of the jail system itself which often subjected inmates to substandard jail conditions. *Id.* at 78. See also Toone Interview, *supra* note 111.

<sup>114</sup> THE SPANGENBERG GROUP, *supra* note 113, at 78.

within the Public Defender's Office were subject to undue influence by the County.<sup>115</sup> These realities painted a troubling picture of the County's indigent defense system, both making local judges sympathetic to the plight of those affected and exposing the County to a risk of fallout from the media attention which a full trial in federal court would surely generate.<sup>116</sup> Thus, in an attempt to procure summary dismissal of the suit, the County voluntarily adopted a Pre-Trial services program consisting of officers responsible for assigning counsel to indigent defendants.<sup>117</sup> After the limited reform failed to secure dismissal on procedural grounds, however, the County agreed (at the urging of the district court judge)<sup>118</sup> to settle the case rather than taking it to trial.<sup>119</sup>

Under the terms of the judicially enforceable<sup>120</sup> 1999 Consent Order, Fulton County agreed to continue to maintain and adequately fund the Pre-Trial services program; to ensure that individuals met with a Pre-Trial services officer within one business day of arrest; to ensure that individuals were provided with legal advice within two business days of meeting with the Pre-Trial services officer; to provide adequate resources to the public defender program; and to make good-faith efforts to ensure that Defender's Offices reduced their caseloads according to a detailed schedule set forth in the Consent Order.<sup>121</sup>

Following the *Stinson* settlement, the SCHR and others threatened to file suit in other Georgia counties in an attempt to generate more widespread reform.<sup>122</sup> Partially in response to these litigative efforts, in 2003, the Georgia State Legislature passed the Georgia Indigent Defense Act, creating a

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<sup>115</sup> There had been rumors, for example, that members of the Public Defender's office were pressured by County officials to refrain from complaining about resources or fully spending their allocated budgets. *See* Toone Interview, *supra* note 111.

<sup>116</sup> *See Id.*

<sup>117</sup> *See Stinson* Consent Order, *supra* note 110, at 4.

<sup>118</sup> The judge played a important role in the settlement process, urging both parties to settle. *See* Toone Interview, *supra* note 111.

<sup>119</sup> *See* Center Obtains Order Requiring Lawyers for Poor People Accused of Crimes in Atlanta, SCHR.org, [http://www.schr.org/news/news\\_fultoncounty.htm](http://www.schr.org/news/news_fultoncounty.htm) (last visited May 6, 2007) ("After the district court certified the plaintiff class and denied the county's motion for summary judgment, Fulton County finally agreed to a *Consent Order* in May 1999.")

<sup>120</sup> The County was required to periodically file with the court status reports concerning implementation. Upon discovery of noncompliance with the terms of the order, Plaintiffs would be permitted to file for contempt or seek other appropriate relief from the court. *See Stinson* Consent Order, *supra* note 110, at 4-8.

<sup>121</sup> *Id.* at 4-6.

Though some problems with the state of pre-trial representation in Fulton County remained, the *Stinson* consent order has been praised as having "a positive effect. . . on felony representation of indigent defendants in the county." *See* THE SPANGENBERG GROUP, *supra* note 113, at 79.

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

statewide indigent defense system in Georgia.<sup>123</sup> *Stinson* was thus able to help procure broad remedies not only in Fulton County, but throughout Georgia more generally.

## **2. Grant County, Washington: The Use of Litigation to Take Advantage of a Climate for Change.**

In April 2004, Columbia Legal Services, together with the American Civil Liberties Union and two private law firms filed *Best v. Grant County*, a class action lawsuit, on behalf of three indigent defendant plaintiffs and one taxpayer plaintiff.<sup>124</sup> The suit alleged that the state of indigent defense services in Grant County, Washington was so deficient that it exposed clients to “a continuing risk that their constitutional rights [would] be violated” and, further, “constitute[d] a misuse of taxpayer funds.”<sup>125</sup>

The state, at the time, delegated all responsibility for the provision of indigent defense services to localities, providing neither funding assistance nor oversight of county systems. Grant County responded to this delegation of authority by utilizing a contract system under which it contracted with a single attorney or law firm to process all indigent defense services in Grant County Superior Court; the contracting attorney or firm was then permitted, at their discretion, to delegate cases to other attorneys.<sup>126</sup> Between 1996 and 2000, the indigent defense contract was awarded to the law firm of Earl & Earl, P.S, which delegated most cases to Thomas Earl or Guillermo Romero. Moreover, in 2000, the county issued Earl an exclusive five year public defense contract.<sup>127</sup>

Though the Grant County system had long been deficient, a variety of factors converged to make the prospect of litigative success likely in 2004. First, in the years preceding the lawsuit, individual post-conviction cases began “bubbling up out of Grant County,” demonstrating the severity of constitutional

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<sup>123</sup> *See Id.*

The Act also created the Georgia Public Defender Standards Counsel (GPDSC) with responsibility for promulgating standards for indigent defense systems throughout the state. Because “the Georgia Indigent Defense Act and the standards adopted by the Public Defender Standards Council provide[d]. . . more comprehensive and specific requirements regarding the initial appointment and performance of counsel,” the parties to the *Stinson* suit, in 2005, amended the consent order to conform to the standards. *See* Motion to Amend Consent Order to Conform to Georgia Indigent Defense Law and Standards, *Stinson v. Fulton County Board of Commissioners*, No. 1-94-CV-240-GET (D. N.D. Ga.. 2005).

<sup>124</sup> *See* Complaint for Injunctive and Declaratory Relief, 5, *Best v. Grant County*, No. 04-2-00189-0 (Wash. Super. Ct. 2004) [hereinafter *Grant County* Complaint].

<sup>125</sup> *Id.* at 22, 25.

<sup>126</sup> *Id.* at 8.

<sup>127</sup> *Id.* at 8-9.

deprivations which took place in the county system.<sup>128</sup> At least four courts, for example, found that either Earl or Romero had failed to provide adequate felony representation to their indigent clients.<sup>129</sup> Moreover, between 2001 and 2003, the Washington State Bar Association held a number of disciplinary hearings against Earl and Romero and ultimately recommended that both be disbarred. Despite these proceedings, however, the County refused to terminate the exclusive public defense contract it held with Earl<sup>130</sup> and failed even to “make reasonable provision for indigent defense services in the event of Earl’s suspension.”<sup>131</sup> As such, when the Supreme Court ultimately ordered Earl to be immediately suspended in 2004, the Grant County system was “thrown into chaos.”<sup>132</sup> These realities demonstrated the “willful refusal [of the County] to create an adequate indigent defense system,”<sup>133</sup> and created a “climate for change”<sup>134</sup> by generating both judicial support for reform and widespread media attention to prevailing deficiencies.<sup>135</sup>

In response to longstanding problems, various organizations joined together to form a taskforce to address the deficiencies in Grant County and to use the Grant County case to push for further reforms throughout Washington.<sup>136</sup> These groups initially sought to use threats of litigation to attempt to negotiate reform within Grant County; when this failed, suit was filed in *Best v. Grant County*.<sup>137</sup>

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<sup>128</sup> See Telephone Interview with Patricia J. Arthur (April 11, 2007) [hereinafter Arthur Interview]. See also Patricia J. Arthur, *Civil Litigation to Improve Public Defense Systems*, National Juvenile Defender Center: 19th Annual Summit, Oct. 27-29, 2006, [http://64.233.167.104/search?q=cache:TISmm2GbiGIJ:www.youthlaw.org/fileadmin/ncyl/youthlaw/events\\_training\\_s/Civil\\_Litigation\\_to\\_Improve\\_Public\\_Defense\\_Systems.ppt+patricia+J.+Arthur+indigent+defense&hl=en&ct=clnk&cd=1&gl=us](http://64.233.167.104/search?q=cache:TISmm2GbiGIJ:www.youthlaw.org/fileadmin/ncyl/youthlaw/events_training_s/Civil_Litigation_to_Improve_Public_Defense_Systems.ppt+patricia+J.+Arthur+indigent+defense&hl=en&ct=clnk&cd=1&gl=us) [hereinafter Arthur PowerPoint] (“Individual post-conviction challenges to public defense representation in Grant County. . . helped lay the groundwork for class action litigation to redress systemic deficiencies in public defense systems throughout Washington state.”).

<sup>129</sup> See *Grant County* Complaint, *supra* note 124, at 9.

<sup>130</sup> *Id.* at 11. In fact, although the Supreme Court, on February 12, 2004, ordered that Earl be immediately suspended, the County allowed him to continue making court appearances on behalf of clients as late as February 17, 2004. *Id.*

<sup>131</sup> *Id.* at 12.

<sup>132</sup> *Id.* at 12 (“Matters [had] gotten so bad that judges on the Grant County Superior Court . . . issued a plan to conscript attorneys – including [many] with no criminal defense experience – to” provide felony indigent defense representation.”).

<sup>133</sup> See Arthur Interview, *supra* note 128. The County’s acts and omissions had “boarder[ed] on malfeasance.” *Id.*

<sup>134</sup> See Arthur PowerPoint, *supra* note 128.

<sup>135</sup> Investigative reporters for The Seattle Times, for example, conducted a multipart investigative report of the indigent defense system. See Ken Armstrong, Florangela Davila, and Justin Mayo, *An Unequal Defense: The Failed Promise of Justice for the Poor*, The Seattle Times, April 4, 2004, available at <http://seattletimes.nwsource.com/news/local/unequaldefense/>.

<sup>136</sup> This taskforce included Columbia Legal Services, the Federal Public Defender, the Washington Defender Association, the ACLU, private law firms, and criminal law experts. Arthur PowerPoint, *supra* note 128.

<sup>137</sup> See Arthur Interview, *supra* note 128.

The suit triggered limited legislative reforms which the County sought to use to procure dismissal of the lawsuit on summary judgment. Instead, the court, in an October 2005 ruling, granted partial summary judgment in favor of the *plaintiffs*, noting that existing deficiencies gave indigent defendants “a well-grounded fear of immediate invasion of the right to effective assistance of counsel” and concluding that limited improvements made by the County while the suit was pending failed to sufficiently remedy the situation.<sup>138</sup> In November 2005, weeks after the ruling and shortly before the trial date, the parties entered into a detailed, court-enforceable settlement which imposed upon the County obligations to limit caseloads, heighten compensation rates, provide funding for defense resources and support staff, and adopt policies in accordance with national and State Bar standards.<sup>139</sup> The settlement also provided for a court appointed monitor with “wide-ranging powers to investigate, oversee, and direct county compliance with the settlement agreement.”<sup>140</sup> As a unique incentive for compliance, the settlement required the county to pay Plaintiffs \$1,100,000 in attorneys’ fees and court costs and provided that, for each of the six years the county engaged in full compliance with the settlement, \$100,000 of the fee award would be forgiven.<sup>141</sup> Although many efforts to comply with elements of the settlement agreement were thereafter undertaken, a dispute arose in 2006 over the question of whether “substantial compliance” had occurred or whether the county would instead have to pay the \$100,000 penalty.<sup>142</sup> A court ruling on the matter is currently pending.<sup>143</sup>

### **3. Allegheny County, Pennsylvania: The Importance of an Enforcement Mechanism to Compel Implementation of Promised Reforms**

In 1996, the National and Pittsburgh chapters of the ACLU in conjunction with private attorney, Claudia Davidson, filed a lawsuit, *Doyle v. Allegheny County Salary Board*, in the Court of Common

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<sup>138</sup> See David F. Taylor, Don Scaramastra, and Beth Colgan, *Making Gideon Real: Washington Counties and the Duty to Provide Effective Assistance of Counsel*, Washington State Bar Association, 2007, <http://www.wsba.org/media/publications/barnews/colgan-feb07.htm>.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> David Cole, *Grant County Claims Compliance with Public Defender Settlement: Commissioners Working to Meet ACLU Conditions*, Columbia Basin Herald Online, Feb. 9, 2007, <http://www.columbiabasinherald.com/articles/2007/02/09/news/news05.txt>. After the County filed for a waiver in Kittakas County Superior Court, the ACLU announced concerns over whether the County complied with the caseload limits imposed in the settlement agreement. *Id.*

<sup>143</sup> See David Cole, *Grant County Public Defense is Improving*, Columbia Basin Herald Online, May 1, 2007, available at <http://www.columbiabasinherald.com/articles/2007/05/01/news/news02.txt>.



Pleas of Allegheny County, Pennsylvania.<sup>144</sup> The suit was filed on behalf of all present and future indigent criminal defendants in the jurisdiction and sought to bring the Allegheny County system of indigent defense into compliance with existing statutory and constitutional obligations.<sup>145</sup>

At the time the suit was filed, Allegheny County operated under a public defender model, which it had adopted shortly after *Gideon*.<sup>146</sup> In Pennsylvania, responsibility for implementing, controlling, and funding public defender offices was delegated to bodies of elected county commissioners.<sup>147</sup> The state thus provided no funding or oversight of the Allegheny County system<sup>148</sup> which had historically been subject to underfunding by the county commission.<sup>149</sup> An American Bar Association study, for example, found that, in 1995, the Allegheny County system was one of the most deficient in the nation in terms of resource levels.<sup>150</sup> Despite the already low level of funding, however, in 1996, a newly elected administration of county commissioners chose to cut the office's budget by almost twenty-eight percent,<sup>151</sup> causing it to fall below even 1995 levels<sup>152</sup> and triggering the institution of the lawsuit.<sup>153</sup>

In an already strained system,<sup>154</sup> the budget cuts resulted in a tremendous reduction in staff and resources.<sup>155</sup> Moreover, at the same time that budgets were cut, the burdens upon public defenders increased as the result of recently enacted tough-on-crime legislation.<sup>156</sup> The convergence of these factors led to the filing of the lawsuit which alleged that the County had failed to abide by its duties under the

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<sup>144</sup> See Third Amended Class Action Complaint, 12-13, *Doyle v. Allegheny County Salary Bd.*, No. GD-96-13606 (Penn. Ct. Comm. Pl. Nov. 21, 1997) [hereinafter *Allegheny County Complaint*].

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 10-11.

<sup>147</sup> *Id.* at 10-11, 14.

<sup>148</sup> Justice in Crisis: Venango County Pa's Indigent Defense System Fact Sheet and Report Synopsis, ACLU, June 7, 2001, <http://www.aclu.org/crimjustice/indigent/10293prs20010607.html>.

<sup>149</sup> *Allegheny County Complaint*, *supra* note 144, at 16.

<sup>150</sup> *Id.* at 18.

<sup>151</sup> *Id.* at 18. See also, Lillian Thomas, *Revival of Public Defender Ends Court Fight Begun in '96*, Pittsburgh Post-Gazette.com, April 6, 2005, available at, <http://www.post-gazette.com/pg/05096/483472.stm>.

<sup>152</sup> Jon Delano, *Allegheny County Public Defender's Office Struggles with Heavy Work Load; Department's Budget Remains Below 1995 Levels*, Pittsburgh Business Times, Feb. 13, 1998, available at <http://www.bizjournals.com/pittsburgh/stories/1998/02/16/smallb2.html>.

<sup>153</sup> The ACLU had monitored the situation in Allegheny County for years but refrained from taking action until the 1996 budget cuts. See Telephone Interview with Claudia Davidson (April 20, 2007) [hereinafter Davidson interview]. See also, Delano, *supra* note 152.

<sup>154</sup> Even prior to the budget cuts, caseloads had already exceeded national standards. *Allegheny County Complaint*, *supra* note 144, at 19.

<sup>155</sup> The cuts "resulted in the immediate dismissal of 15. . . attorneys, approximately 20% of the clerical staff, the complete social work staff, and the complete investigative staff" and, further, led to the dismantling of the Pre-Trial Division. *Id.* at 18.

<sup>156</sup> For example, newly enacted Act 33 (42 Pa. Cons. Stat. S6322) required juveniles charged with certain classifications of crimes to be tried as adults unless their counsel could persuade the court otherwise. *Id.* at 19.

state and federal constitutions and existing state statutes in that it allowed the public defender system to devolve into one with unmanageable caseloads, inadequate resources and facilities, deficient policies and procedures (including the lack of standards and oversight), and inadequate training.<sup>157</sup>

The plaintiffs sought declaratory and injunctive relief to remedy the deficiencies alleged.<sup>158</sup> Though the suit was set to go to trial in May 1998, the parties, on the eve of trial, agreed to settle.<sup>159</sup> There were several factors which converged to encourage settlement. First, initial procedural attacks by the state failed to generate a dismissal of the suit. After losing its motion for summary judgment (just two months prior to the trial date),<sup>160</sup> the state was faced with the prospect of a long and expensive trial.<sup>161</sup> Moreover, the sudden budget cuts, had already resulted in substantial media attention and criticism and a prolonged trial would surely generate even greater media interest. As such, regardless of the prospects for success on the merits, it was more politically attractive for the county (and the elected county commissioners) to settle the suit rather than take it to trial.<sup>162</sup> Another important factor in the settlement process was the degree of judicial support for settlement. Having witnessed the extent to which severe underfunding had overburdened the public defense system, the judge was reasonably supportive of the suit and played an important role in pressuring the parties to reach a settlement agreement.<sup>163</sup> Finally the parties' special accommodation of concerns held by the public defenders themselves was also critical to the ultimate settlement. Settlement negotiations involved not only counsel for the two parties (the indigent plaintiffs and the County) but also union representation for the public defenders.<sup>164</sup> While the public defenders were generally supportive of the lawsuit,<sup>165</sup> the one main source of tension revolved

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Thomas, *supra* note 151.

<sup>160</sup> See Order of the Court Denying Defendants' Motion for Summary Judgment, *Doyle v. Allegheny County Salary Bd.*, No. GD96-13606, (Penn. Ct. Comm. Pl, March 19, 1998).

<sup>161</sup> See Davidson interview, *supra* note 153.

<sup>162</sup> *Id.*

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

<sup>164</sup> The public defenders were represented by the United Steelworkers of America which agreed not to intervene in the lawsuit in exchange for the parties' recognition of the union as the defenders' duly certified collective bargaining representative. See Side Agreement Between the Parties and the Union, 1-2, *Doyle v. Allegheny County Salary Bd.*, No. 96-13606, (Penn. Ct. Comm. Pl. May 14, 1998) [hereinafter *Allegheny County Side Agreement*].

<sup>165</sup> Such support was possible in light of the fact that Plaintiffs proceeded on the theory that the source of deficiencies in the county system was not incompetence on the part of public defenders but, rather, inadequate resources which left defenders overwhelmed and without the tools (such as investigators and experts) which were necessary to provide adequate assistance of counsel. See Davidson interview, *supra* note 153. See also, *Allegheny County Complaint*, *supra* note 144, at 1.

around the question of whether, under the terms of the settlement, public defenders ought to be allowed to continue to have private practices in addition to their public defense work.<sup>166</sup> While the public defenders felt that reliance on such private practice was important as a form of supplemental income, Plaintiffs' counsel worried that it might lead to conflicts of interest as attorneys had to allocate their time between working on the cases of their indigent clients and engaging in more remunerative private defense work.

The parties accommodated this disagreement through a series of compromises. First the parties adopted a settlement term which prohibited private practice among new hires but grandfathered in current public defenders.<sup>167</sup> Second, in conjunction with the adoption of the Settlement Agreement, the parties entered into a side agreement with the union whereby the parties recognized the obligation of the County to engage in collective bargaining regarding all “terms and conditions of employment,”<sup>168</sup> including the private practice provision. Finally, the private practice provision did not actually come into effect until, subsequent to the adoption of the Settlement Agreement, the parties and the union reached a compromise whereby the union agreed to the prohibition of private practice among new hires in the Public Defender's Office in return for starting salary parity with new hires at the Prosecutor's Office.<sup>169</sup>

The signing of the settlement did not itself end the story, however. The power to seek judicial assistance in *enforcing* the settlement agreement proved important in *Allegheny County*. Under the terms of the settlement, the County agreed to increase funding and staffing levels, adopt policies and procedures (including practice standards modeled after national standards and mechanisms for oversight), adopt and expand training programs, and temporarily guarantee approximate resource parity between the County Public Defender's Office and the County District Attorney's Office.<sup>170</sup> Rather than merely leaving the operationalization and implementation of these policy changes to the County and the Public Defenders' Office, however, the plaintiffs took care to draft the settlement agreement in such a way as to interpose

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<sup>166</sup> See Davidson interview, *supra* note 153.

<sup>167</sup> See Settlement Agreement, 6, *Doyle v. Allegheny County Salary Bd.*, No. 96-13606 (Penn. Ct. of Comm. Pl. May 14, 1998) [hereinafter *Allegheny County Settlement Agreement*].

<sup>168</sup> See *Allegheny County Side Agreement*, *supra* note 164.

<sup>169</sup> See Memorandum of Understanding, 1, *Doyle v. Allegheny County Salary Bd.*, No. 96-13606 (Penn. Ct. Comm. Pl. June 29, 1998) (“[T]he starting salary of Assistant Public Defenders who are newly hired after December 31, 1998 shall be identical to the existing starting salary of newly hired, first year assistant district attorneys as defined in the Collective Bargaining Agreement or any succeeding collective bargaining agreement.”). See also Davidson interview, *supra* note 153.

No provision was ever made, however, to proscribe the ability of the 20 “grandfathered” public defenders to continue to engage in private practice. See Thomas, *supra* note 151.

<sup>170</sup> *Allegheny County Settlement Agreement*, *supra* note 167. The settlement agreement provided that the resource parity stipulation needed to be observed only until June 30, 2000. *Id.* at 12.

themselves in the implementation process. First, the agreement itself specified how implementation ought to be carried out by including clear deadlines for the achievement of specific goals.<sup>171</sup> Second, the settlement agreement also provided for a court-appointed consultant responsible for aiding in the administration of the agreed-upon reforms and filing periodic written reports discussing efforts undertaken by the County and the extent of compliance with the terms of the agreement.<sup>172</sup> Finally, the agreement provided for the court's retention of continuing jurisdiction over the case until December 31, 2003 and stipulated that, even after the case was thereafter transferred to the court's inactive docket, the County retained certain continuing obligations to maintain an adequate indigent defense system.<sup>173</sup> The agreement specified that, if noncompliance arose, Plaintiff's counsel would be entitled to seek a finding of contempt or other appropriate relief whereby the court's continuing jurisdiction could be extended.<sup>174</sup>

Initial efforts by the County to implement the terms of the settlement agreement appeared to be promising. The County complied with its funding obligations<sup>175</sup> and the Public Defender's Office not only drafted many of policies and procedures required under the Settlement Agreement but also adopted

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<sup>171</sup> For example, the Agreement provided a schedule under which staffing had to be increased to certain numerical levels by specified dates. *Id.* at 2-6. It also stipulated minimum amounts of funding which must be adopted in connection with certain reforms. *Id.* at 13 ("the County must provide the Office with seventy-five thousand dollars. . . per year for purposes of securing professional services").

Even where such numerical specifications of goals were not possible, however, the Agreement still provided solid deadlines for the achievement of specified goals. The creation of policies and procedures relating to job descriptions and job qualifications, for example, were required to be developed and posted within six months of the Court's approval of the settlement agreement. *Id.* at 7. Moreover, at least with respect to practice standards, the plaintiffs were able to impact the substantive content of the standards by stipulating that they be modeled after national standards, such as those adopted by the National Legal Aid and Defender Association or other entities. *Id.* at 8.

<sup>172</sup> *Id.* at 14-15. This provision was significant for two primary reasons. First, it generally promoted information sharing concerning the implementation process. Second, the Plaintiffs were ultimately able to procure the appointment of the Spangenberg Group (a trusted consultant with substantial experience in the area of indigent defense reform) which itself made faithful implementation of the terms of the Settlement Agreement more promising.

<sup>173</sup> Here, however, there are no standards specified for the determination of when the system may be deemed 'adequate.' Thus, after the expiration of the court's continuing jurisdiction, the County largely reacquires the privilege to determine what constitutes 'adequate' indigent defense. While the County must still comply with statutory and constitutional obligations, courts, in determining whether such compliance exists, are likely to largely defer to the County's opinion.

<sup>174</sup> *Allegheny County Settlement Agreement*, *supra* note 167, at 16.

<sup>175</sup> ACLU Asks Court to Hold Allegheny County in Contempt for Failing to Improve Public Defender's Office, ACLU.org, June 26, 2003, <http://www.aclu.org/crimjustice/indigent/10107prs20030626.html> (last visited May 4, 2001) ("The county's failure to implement the consent decree does not result from a lack of funds. . . [T]he Public Defender's Office has actually underspent its budget by about \$300,000.") (quoting Claudia Davidson, a plaintiffs' attorney in the Allegheny County suit).

certain measures which were not technically required by the terms of the Agreement.<sup>176</sup> Nevertheless, as late as 2003, the year the court's continuing jurisdiction was due to expire, the ACLU continued to receive complaints from a number of indigent clients awaiting trial in the Allegheny County Jail.<sup>177</sup> These clients complained that they often met with counsel for the first time only minutes before court appearances, that counsel failed to investigate or prepare for hearings,<sup>178</sup> and that counsel, without having met with the client, arranged plea agreements or waived defendants' rights to preliminary hearings.<sup>179</sup>

In response to these deficiencies, Plaintiffs filed a motion for contempt, alleging that the failure of the Public Defender's Office to require attorneys to adhere to written practice standards, to model practice standards after national standards, to provide proper training and adequate support staff, and to implement a system of oversight and supervision had both left the County in noncompliance with the terms of the Settlement Agreement and left the Public Defender's Office unable to deliver adequate representation to its clients.<sup>180</sup> Although the County filed responsive papers denying the allegations, it ultimately decided to forgo litigation on the merits of the motion and agreed to instead extend the court's continuing jurisdiction, by consent, for an additional two-year period.<sup>181</sup> The court's jurisdiction was thereby extended until 2005.<sup>182</sup> Thereafter, getting out from under the consent decree became a priority for the County, which began making further improvements.<sup>183</sup> Although Plaintiffs' counsel continued to receive complaints from jail inmates and, therefore, filed a second contempt motion in 2005, the County this time chose to litigate the matter on the merits and won a finding that it was in "substantial compliance" with

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<sup>176</sup> See First Report to the Court by The Spangenberg Group, 4, 9-11, *Doyle v. Allegheny County Salary Bd.*, No. 96-13606 (Penn. Ct. of Comm. Pl. May 8, 2003) [hereinafter *Allegheny County Report to Court*]. For example, the Office developed a merit hiring policy and also converted many of its part-time attorneys to full-time status though neither change was a term of the Settlement. *Id.* at 9-11.

<sup>177</sup> See Motion Requesting that Defendants Either be Directed to Comply with the Terms of the Consent Decree Issued in this Case or be Held in Contempt, 6, *Doyle v. Allegheny County Salary Bd.*, No. 96-13606 (Penn. Ct. Comm. Pl. June 25, 2003) [hereinafter *Allegheny County Contempt Motion*]. See also Davidson Interview, *supra* note 153.

<sup>178</sup> See *Allegheny County Contempt Motion*, *supra* note 177, at 6-7.

<sup>179</sup> Jim McKinnon, *ACLU, County Still at Odds Over Public Defender's Office*, Pittsburgh Post-Gazette.com, June 27, 2004, <http://www.post-gazette.com/localnews/20030627defendersreg1pl.asp>.

<sup>180</sup> See *Allegheny County Contempt Motion*, *supra* note 177, at 6-7.

<sup>181</sup> See Davidson Interview, *supra* note 153.

<sup>182</sup> Thomas, *supra* note 151.

<sup>183</sup> For example, "County Solicitor Michael Wojcik said that when Dan Onorato became chief executive [in 2004], he made getting out from under the consent decree a priority." *Id.* Along the same lines, Michael Machen, who was appointed as Chief Public Defender in 2004, stated that one of his "goals [upon appointment] was settlements of all issues related to the decree and to go even further." *Id.*

the terms of the Settlement Agreement.<sup>184</sup> The court's jurisdiction over the case thus finally ceased in 2005.<sup>185</sup>

#### **4. Connecticut: The Use of Litigation to Compel Prioritization of Indigent Defense Reform and to Encourage Cooperation Building**

While many of the modern civil class action attacks on state indigent defense systems ended in court-enforceable settlements, *Rivera v. Rowland*, brought in 1995<sup>186</sup> to challenge the Connecticut indigent defense system, did not. Rather than require a court enforceable settlement, the plaintiffs there used the pending litigation to pressure the state to act (and in fact entered into settlement negotiations to influence the changes made) and, once the state responded and made substantial improvements, agreed to withdraw the suit without imposing any formal continuing obligations upon the state.

At the time the suit was brought, Connecticut utilized a statewide indigent defense system operated by the Public Defender Services Commission. *Rivera*, brought by the national and Connecticut chapters of the ACLU, alleged that the system was so underfunded that it systematically deprived indigent clients of effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution, the Connecticut Constitution, and various state statutes.<sup>187</sup> Plaintiffs sought declaratory relief and an injunction requiring the state to adopt uniform caseload limits, uniform standards governing representation, an adequate rate of compensation for public defenders, adequate support staff, and adequate facilities.<sup>188</sup>

Shortly after the suit was filed, the litigation took on a strongly adversarial nature, making settlement seem unlikely. As a preliminary matter, for example, the Attorney General's Office (which represented the state) challenged the ability of Plaintiffs' counsel to speak with any employee of the Public Defender's office without a member of the Attorney General's Office present, on the theory that

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<sup>184</sup> See Davidson Interview, *supra* note 153.

<sup>185</sup> See Thomas, *supra* note 151.

<sup>186</sup> The First Class Action Complaint was filed in 1995. See Memorandum of Decision on Defendants' Motion to Dismiss Dated April 13, 1995, 1, *Rivera v. Rowland*, No. CV-95-0545629 (Superior Court, Judicial District of Hartford – New Britain at Hartford, 1996).

<sup>187</sup> See Second Amended Class Action Complaint, 6, 9-15, *Rivera v. Rowland*, No. CV-95-0545629 (Conn. Super. Ct. 1997) [hereinafter *Rivera* Complaint]. Specifically, Plaintiffs complained of unmanageable caseloads, inadequate compensation (and the failure to reimburse attorneys for out-of-pocket expenses), a failure to provide sufficient resources (including support staff and adequate office space), and the absence of standards for adequate representation. *Id.*

<sup>188</sup> *Id.*

the Attorney General represented each individual public defender.<sup>189</sup> Although the court ultimately allowed Plaintiffs' counsel the freedom to speak with any but the highest level officials within the Public Defender's Office, Plaintiffs' counsel was required to first inform the public defenders that they were not obligated to speak with Plaintiffs' counsel without a representative of the Attorney General present.<sup>190</sup> The requirement of this disclaimer (as well as the fact that the Attorney General had raised the challenge in the first place) had a substantial "chilling effect" on the public defenders, making them weary of the consequences of speaking or cooperating with Plaintiffs' counsel.<sup>191</sup> Ultimately, Plaintiffs' counsel was able to successfully navigate this difficulty by using depositions rather than informal interviews to speak with public defenders.<sup>192</sup> Nevertheless, this preliminary battle seemed to presage "bitter litigation."<sup>193</sup>

The initial shift toward settlement negotiations was motivated almost entirely by the urgings of the judge who requested that the parties engage in mediation.<sup>194</sup> While Plaintiffs were happy to discuss settlement, they were not optimistic that settlement could actually be reached in light of the adversarial nature the litigation had thus far assumed. Specifically, Plaintiffs entered the mediation process intent on accepting settlement only if it included some mechanism for judicial enforcement of the state's continuing obligation to provide adequate indigent defense. Plaintiffs believed that this would be the ultimate obstacle to successful settlement as the state would never agree to any continuing obligation enforceable in court.<sup>195</sup>

Over the course of the extended period during which settlement negotiations took place, however, the parties began to agree on the scope of the problem and the need for reform.<sup>196</sup> A "certain amount of

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<sup>189</sup> See Telephone Interview with Ann Parrent (April 14, 2007) [hereinafter Parrent Interview].

<sup>190</sup> *Id.* (The disclaimers were almost reminiscent of Miranda warnings).

<sup>191</sup> *Id.*

<sup>192</sup> The use of depositions made the process of speaking with Plaintiffs' counsel a bit easier on the public defenders in light of the fact that they were subpoenaed and were under oath. They thus did not have to fear that they would appear to be voluntarily cooperating with Plaintiffs' counsel contrary to the implicit wishes of the state. *Id.* However, sole reliance on depositions also made it more difficult for Plaintiffs' counsel to get information out of the public defenders. *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

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

<sup>196</sup> See *Settlement Reached in ACLU's Class-Action Lawsuit Alleging Inadequacy of CT Public Defender System*, ACLU.org, July 7, 1999, <http://www.aclu.org/crimjustice/gen/10138prs19990707.html> [hereinafter *Settlement Reached*] ("Once we agreed on the scope of the problem, we put our heads together to focus on how the system could be improved and came up with a plan that meets all of our objectives.") (quoting former Connecticut Civil Liberties Union staff attorney Ann Parrent).

trust [thereby began to build up] on both sides.”<sup>197</sup> This movement towards cooperation was due both to the persistence of the mediator and to the efforts of upper management of the public defender system who participated in the negotiations and ultimately proved to be supportive of reform.<sup>198</sup> In late 1997, the state began to make significant improvements to the Connecticut public defender system by increasing funding, staff levels, and resources,<sup>199</sup> and thereby securing a forty percent reduction in attorney caseloads.<sup>200</sup> In 1999, the state further reached a settlement with Plaintiffs whereby the state agreed to invest additional funds for the improvement of training, supervision, and monitoring of attorneys, to increase compensation rates for special public defenders, and to appoint a Director of Special Public Defenders to manage the system.<sup>201</sup> In exchange, the Plaintiffs agreed to withdraw the suit (subject to the Court’s approval). In light of the trust the Plaintiffs developed in the state and the public defender leadership, they felt confident that pending reforms would be carried out and implemented reforms would be maintained following withdrawal of the suit.<sup>202</sup> They thus agreed to settlement without any formally enforceable continuing obligation on the part of the state or any provision for monitoring by the court.<sup>203</sup>

#### **B. Litigative Approaches to Indigent Defense Reform Compared: The Relative Advantages of Class Actions in Generating Sustained Improvements.**

“Political process failure” acts as the primary barrier to indigent defense reform through the legislature.<sup>204</sup> Public choice theory suggests that, given popular support for allocating scarce resources to the prosecution function rather than the defense function and the reality that indigent defendants are a politically weak constituency,<sup>205</sup> “rational legislatures [and policy-makers] have every political incentive to shortchange indigent defense.”<sup>206</sup> Thus, the primary utility of litigative attacks on state and local indigent defense systems is as a tool to overcome political process failures. Litigation can help overcome

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<sup>197</sup> See Parrent Interview, *supra* note 189.

<sup>198</sup> *Id.*

<sup>199</sup> See Notice of Settlement, *Rivera v. Rowland*, No. CV-95-0545629S (Conn. Super. Ct. 1999) [hereinafter *Rivera* Notice of Settlement].

<sup>200</sup> See *Settlement Reached*, *supra* note 196.

<sup>201</sup> See *Rivera* Notice of Settlement, *supra* note 199; *Settlement Reached*, *supra* note 196.

<sup>202</sup> See Parrent Interview, *supra* note 189.

<sup>203</sup> See *Rivera* Notice of Settlement, *supra* note 199.

<sup>204</sup> See *Gideon’s Promise*, *supra* note 36, at 2062.

<sup>205</sup> *Id.* at 2062, 2067.

<sup>206</sup> Dripps, *supra* note 11, at 244. See also Parrent Interview, *supra* note 189 (suggesting that legislators do not want to appear to be supporting criminals).



such failures in two distinct ways. First litigation has the potential to *override* political process failures by securing judicial remedies which *require* the legislature to act. This result is secured, for example, where courts issue injunctive remedies or declare a given practice unconstitutional. Alternatively, litigation can be used to *alter legislative incentives* and, thereby, to create a climate in which reform is in the best interest of policy-makers. This result is achieved, for example, where litigation fosters (or takes advantage of existing) public support for reform.

While all types of litigative attacks have the potential to trigger action by state and local policy-makers, civil suits brought by individuals seeking only declarations of unconstitutionality or narrow injunctive remedies (such as increases in assigned-counsel compensation rates) have historically been criticized as generating only limited, short-term successes which ultimately fail to be sustained into the future.<sup>207</sup> This result flows largely from the fact that such suits rely almost exclusively upon the coercive potential of litigation. While these suits work to secure judicially ordered relief compelling legislative action, they fail to do anything to make policy-makers themselves supportive of such reform by tying long-term improvements to the self-interest of legislators and policy-makers.<sup>208</sup> The ultimate success of such suits thus depends almost exclusively on the breadth of the resulting judicially ordered relief, as policy-makers will likely do little more than is necessary to meet their obligations under the terms of the court-ordered remedy.<sup>209</sup> Concerns with the separation of powers and the potentially anti-democratic nature of judicially created institutional reforms, however, generally result in judicial remedies which are narrowly crafted or ultimately difficult to enforce.<sup>210</sup> As such, legislatures retain ultimate control over the extent and practical effectiveness of reforms.

The limited utility of such judicial remedies becomes even more apparent upon recognition that, in the context of indigent defense reform, political process failures tend to occur at *two* levels. The first failure occurs at the *policy-making* stage, resulting in the failure of states and localities to enact reform

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<sup>207</sup> See Backus, *supra* note 57, at 1117 (though “litigation may have a significant role to play in precipitating change,” litigative remedies are “limited in their long-term impact”).

<sup>208</sup> See Citron, *supra* note 5, at 500 (“[T]he court, possessing only the formal power to coerce and the informal influence of moral legitimacy, lacks the tools to induce bureaucratic change and to garner political support for institutional reform.”) *citing* PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 167-69 (1983).

<sup>209</sup> See discussion in *supra* notes 76-78, 89 and accompanying text.

<sup>210</sup> See DeSimone, *supra* note 11, at 1493 (“[C]ourts typically hand down very narrow holdings, and if litigants actually succeed in compelling the legislature to act with short-term additional funding, the courts are unable to enforce the funding in the long-term.”). See also *supra* notes 72-78 and accompanying text.

legislation in the first place. As a result, the system stagnates under old funding levels and outdated policies and, thus, fails to keep pace with evolving needs in indigent defense.<sup>211</sup> Even where existing policy is adequate or new reforms are enacted, however, a second political process failure sometimes occurs at the *policy-implementation* stage as state and local governments fail to fully implement or maintain formally adopted reforms.<sup>212</sup> Suits which procure narrowly crafted judicial remedies but fail to generate any alteration of legislative incentives tend to fall victim to a ‘re-deprioritization’ of indigent defense upon the release of judicial pressure and thus face failures at *both* stages of the policy process. The limited reforms compelled by the court order soon fall out of date and legislatures fail to update them or adopt new reforms.<sup>213</sup> Moreover, even where legislatures initially respond to judicial orders with apparently broad reforms, such advances may soon stagnate or reverse upon the release of judicial or political pressure.<sup>214</sup> While this result may be secured through the explicit dismantling of reform infrastructure, it is more likely to be achieved through the less overt means of chronic underfunding<sup>215</sup> and the exertion of political pressures on the institutions created to oversee defense systems (such as indigent defense commissions).<sup>216</sup>

Modern class action lawsuits seeking detailed injunctive remedies, however, have a unique capacity to generate sustained reforms by preventing political process failures at both the policy-making

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<sup>211</sup> Recall, for example, that attorney compensation rates had not been increased in New York for seventeen years prior to the institution of litigation in *New York County Lawyers Ass’n v. State*, 745 N.Y.S. 2d 376 (N.Y. 2002). See *supra* note 76. Similarly, compensation rates had not been increased in Connecticut for twelve years prior to litigation in *Rivera v. Rowland*, No. CV-95-0545629 (Conn. Super. Ct. 1995). See *Rivera* Notice of Settlement, *supra* note 199.

<sup>212</sup> This tendency is, perhaps, made most blatant by the observation that many of the civil §1983 class actions which have been instituted in recent years have alleged not only constitutional deprivations, but also the violation of existing state statutes and local ordinances governing the provision of indigent defense. See *supra* Part III.A. The case of *Quitman County v. Mississippi*, 807 So. 2d 401 (Miss, 2001), is illustrative. In 1998, the Mississippi legislature enacted the Mississippi Statewide Public Defender Act “which called for numerous reforms, including state-funded, district defender offices.” See *News from Around the Nation*, THE SPANGENBERG REPORT (The Spangenberg Group), March 2000, at 6. Despite the adoption of this apparently broad reform, however, the legislature provided only “minimal first year funds” and thereafter refused to appropriate *any* funds for the reforms, triggering a lawsuit in 2000. *Id.* The relief Plaintiffs sought was a court order compelling the state to fund a statewide public defender system like the one called for in the 1998 Public Defender Act. *Id.*

<sup>213</sup> This seemed to occur, for example, with the legislative response to *State v. Lynch*, and *State v. Smith*. See *supra* note 89.

<sup>214</sup> This seemed to occur, for example, with the legislative response to *State v. Lynch*. See *supra* notes 77-78 and accompanying text.

<sup>215</sup> See *supra* notes 77-78 and accompanying text.

<sup>216</sup> See De Sario, *supra* note 33, at 53 (“Perhaps due to political pressure, the [Montana] Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, created by [the adoption of certain ABA standards], has not been active in monitoring and removing certifications for capital cases.”) (footnote omitted).

and policy-implementation stages. One reason for this is because such lawsuits not only tap into the coercive potential of litigation, but also give policy-makers a vested interest in successful reform. Class actions, for example, can be used to educate the public concerning existing deficiencies in indigent defense systems and can thereby generate public support for legislative reform.<sup>217</sup> Where successful in such efforts, class actions can foster sustained public support for indigent defense and thereby make successful reform a politically valuable undertaking.<sup>218</sup> The capacity of class actions to garner publicity, moreover, also allows defense advocates to use such suits to focus the media spotlight on prevailing deficiencies and help spur broader reform efforts.<sup>219</sup> Once such a spotlight is shone on existing deficiencies, policy-makers have a new incentive to undertake reforms which will genuinely remedy existing deficiencies in order to deflect national criticism.

Another reason for the greater success of class-action lawsuits is the fact that the potential embarrassment and public criticism generated by publicity<sup>220</sup> (together with a desire to keep matters of public policy within one's own control)<sup>221</sup> tends to encourage states and localities to resolve cases by

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<sup>217</sup> Class actions are particularly capable of serving this function because they tend to garner tremendous publicity. The concept of a class action lawsuit itself conveys the notion of system-wide deficiencies affecting a large group of individuals which can capture headlines in a way that other types of suits or legislative lobbying efforts do not. Moreover, class actions tend to have greater resources behind them because they are backed by advocacy groups. These resources uncover solid examples of deficiencies, which tend to get picked up in the media. By thus promoting genuine public support for reform, class actions can help create a climate in which it is in the best interests of the state or locality to enact and properly implement reforms. *See supra* Part III.A.2. (discussing the Grant County, Washington experience).

<sup>218</sup> Commentators, for example, have suggested in recent years that the extent of public antipathy toward indigent defense reform is overstated. *See* Wright, *supra* note 43, at 4; DeSimone, *supra* note 11, at 1488-89. These commentators point, for example, to recent polling data which suggests that the public is generally supportive of expanded Sixth Amendment rights and the use of government funding to promote these rights. *See* Backus, *supra* note 57, at 1038. In the views of these scholars, then, a primary factor contributing to the absence of more vocal public support for indigent defense reform may lie with the public's lack of knowledge concerning the extent of deficiencies plaguing some state and local systems. *Id.* at 1045 ("All too often, the discussion among non-criminal justice professionals begins with the expression of surprise that there are any serious problems with the constitutional guarantee."). This information problem is perhaps heightened by the fact that many states and localities have in place formal policies and laws for the meting out of adequate indigent defense; it is only in practice that these policies fail. As one scholar suggests "the legislature often adopts symbolic legislation to add to the criminal code, because a non-attentive public[, though favoring tough-on-crime legislation] is not likely to insist on crime legislation that is[, in practice,] used effectively and extensively." Wright, *supra* note 43, at 31 n.105. A similar tendency to adopt largely symbolic legislation has been exhibited in the context of indigent defense. Class action suits can thus play an important role in demonstrating to the public that existing Sixth Amendment safeguards are not practically effective.

<sup>219</sup> Toone Interview, *supra* note 111. *See also, supra* Part III.A.1 (discussing the Fulton County, Georgia experience).

<sup>220</sup> *See Id.*

<sup>221</sup> *See* DeSimone, *supra* note 11, at 1500.

agreeing to enter into detailed (and often court-enforceable) settlement agreements.<sup>222</sup> Such settlement agreements provide substantial advantages for the potential success of resulting reforms. While other litigative approaches often trigger legislative responses, the resulting reforms are normally shaped by policy-makers alone, which means that they are left vulnerable to political process failures at both the policy-making and the policy-implementation stages. The modern class action, however, by virtue of generating settlement agreements, tends to give defense advocates a seat at the table at *both* the policy-making *and* the policy-implementation stages, allowing them to ensure that adopted reforms are substantial and that they are actually carried out. Moreover, because resulting settlement agreements generally provide for enforcement of the terms for a period of some years and provide for limited monitoring by the court, they make sustained reform (at least for the term of the agreement) more likely. Where full compliance is not achieved, plaintiffs are allowed to secure judicial remedies in ongoing enforcement proceedings rather than having to institute an entirely new lawsuit.<sup>223</sup> Moreover, by securing sustained reform for the number of years dictated by the settlement agreement, such suits may ultimately foster genuine support for reforms, making them likely to be maintained even after the formally enforceable period of the settlement agreement expires. The fostering of such genuine support is also made more likely for another reason. Because in order to reach a settlement agreement, the parties must confer and compromise with one another, settlement negotiations provide a unique opportunity for cooperation-building between apparently adverse parties.<sup>224</sup> Successful cooperation building, in turn, can foster genuine state support for improvements to indigent defense, making proper implementation and maintenance of adopted reforms more likely.

## VI. Conclusion

In light of the historical reluctance of state and local policy-makers to reform indigent defense systems to keep up with ever-changing needs, litigation has played an important role in compelling

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<sup>222</sup> See DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE, A CONFERENCE REPORT, 8 (2000), *available at*, <http://www.ojp.usdoj.gov/indigentdefense/symposium.pdf> (noting that, where class actions “have survived pretrial motions, they generally have resulted in favorable settlement. . . since states and counties. . . may wish to avoid a public spotlight on the problems in their criminal justice systems.”).

<sup>223</sup> The plaintiffs in both *Best v. Grant County*, and *Doyle v. Allegheny County*, for example, took advantage of such enforcement mechanisms. See *supra* Part III.A.2–3.

<sup>224</sup> Such cooperation building was effectively achieved, for example, in Connecticut. See *supra* Part III.A.4.

legislatures and other policy-makers to take action. The form this litigation has taken has largely evolved with the growing indigent defense crisis. In light of the severe deficiencies which arose in many systems over the course of the 1980s and 1990s, advocates have increasingly made use of complex litigation in an attempt to generate system-wide reform. While these suits have not generally resulted in formal judicial relief (in the form of detailed injunctive orders), defense advocates *have* been able to take advantage of such litigation to procure leverage for an otherwise weak constituency. By taking advantage of the unique capacity of class action lawsuits to generate widespread publicity, defense advocates have used such suits not only to secure broad reforms but also to foster the public and legislative support necessary to ensure that such reforms are actually implemented and maintained. Modern class action lawsuits are thus a powerful tool with which political process failures can be overcome and lasting reforms can be generated.

**APPENDIX: CATALOG OF RELEVANT CASES**

		<b>Trial Court Information</b>	<b>Parties</b>	<b>Lawyers &amp; Groups</b>	<b>Documents</b>	<b>Outcome</b>
<b>(1) FLORIDA</b>	<b>Gillard v. Carson</b>  (Federal Court)	Civ. A. Nos. 71-28-Civ-J, 71-70-Civ-J and 71-148-Civ-J.  US DC for M.D. Florida, Jacksonville Division  Class Action			<i>Gillard v. Carson</i> , 348 F. Supp. 757 (1972, M.D. Fla.). (issuing injunctive order; exception to <i>Younger</i> bar Applies).	<b>Injunction Issued.</b>  (Enjoined from depriving any indigent facing prosecution for offense punishable by imprisonment of his right to counsel; if fail to appoint such indigent counsel, are enjoined from prosecuting for offense punishable by imprisonment.)
<b>(2) ARIZONA</b>	<b>State v. Smith</b>  (State Court - Arizona)  (Criminal Case)	TC: Cause No. CR-5177.  In SC: No. 6027-PR  No. 1 CA-CR 8452  Mohave County Superior Court (Ct that entered conviction)	<u>State</u>  <u>Crim Defendant:</u> Joe U. Smith	<u>State:</u> Robert K. Corbin, Atty. Gen. by William J. Schafer, III & Georgia B Ellexson.  <u>Crim Defendant:</u> Wayne A. Dirst, Kingman (Law Offices of H. Louis Hiser).  <u>Amicus Curiae:</u> Pima County Public	<i>State v. Smith</i> , 140 Ariz. 355 (4/13/ <b>1984</b> ) (en banc) (declaring indigent defense sys unconstitutional and setting forth injunctive order).	While considering post-conviction motion for ineffective assistance of counsel, <b>court sua sponte creates rebuttable presumption of ineffectiveness if county fails to take account of NLADA and ABA standards; state reacted w/ greater funding.</b>

				<p>Defender (by Lawrence H. Fleischman, Deputy Public Defender of Tucson).</p> <p>Mohave County (William J. Ekstrom, Jr., Kingman).</p> <p>State Bar of Ariz (Davis, Siegel &amp; Gugino by Michael L. Piccarreta, Phoenix).</p> <p>Maricopa County Public Defender (Ross P. Lee, Maricopa County Public Defender by Bedford Douglass, Deputy Pulic Defender, Phoenix).</p> <p>National Legal Aid and Defender Ass'n (Malcolm C. Young, Washington D.C.)</p>		
<b>(3) GEORGIA</b>	<b>Luckey v. Harris</b>  (Georgia)  (Federal Court)	Appellate Docket: C86-297R  D.C. Docket: 4:86-CV-297	<u>Ps:</u> 4 Indigent Crim Ds (on behalf of all GA indigent crim Ds and attorneys who represent)	Eric C. Kocher (Georgia Association of Criminal Defense Lawyers)	Amended <b>Complaint</b> – Class Action ( <b>1986</b> )  <i>Luckey v. Harris</i> , 860 F.2d 1012 (11th	<b>Dismissed</b> on <i>Younger</i> abstention grounds.

		US D.C. for the Northern District of Georgia, Rome Division.  Class Action	5 Attorneys  <u>Ds:</u> Ga Governor, Joe Frank Harris.  Chief judge of Douglas Judicial Circuit, Robert J. Noland.  Chief judge of Clayton Judicial Circuit, Joe C. Crumbley.	John L. Cromartie, Jr. (President, National Legal Aid and Defender Association)  Robert B. Remar (President), David A. Webster, & Don Keenan (American Civil Liberties Union of Ga.)  Roger J. Dodd (President) & Edward D. Tolley (Past President) (Ga. Association of Criminal Defense Lawyers)	Cir. 11/23/1988) (holding D.C. <b>should not have required proof of “inevitability of ineffective assistance”</b> ; Remand to D.C.).  <i>Harris v. Luckey</i> , 918 F.2d 888 (11th Cir, 1990) (court wd have granted D’s MTD but for belief that abstention doctrine wasn’t available; so denied D’s MTD).  <i>Luckey v. Miller</i> , 929 F.2d 618 (11th Cir. 1991) (D.C. wrong in belief that couldn’t dismiss on <i>Younger</i> abstention grounds).  <i>Luckey v. Miller</i> , 976 F.2d 673 (11th Cir. 1992) ( <b>Affirming</b> D.C.’s grant of Ds’ MTD on <i>Younger</i> <b>abstention</b> grounds).	
<b>(4) FEDERAL</b>	<b>Federal Defenders of San Diego, Inc. v. U.S. Sentencing Commission</b>		<u>Ps:</u> Organizers of Federal Public Defenders:		Memorandum Opinion and Order of District Court: <i>Federal Defenders</i>	<b>Dismissed in 1988 for lack of standing.</b>



	(Federal Court)		Federal Defenders of San Diego  Federal Public Defender for the Middle District of Tennessee		<i>of San Diego, Inc. v. U.S. Sentencing Comm'n</i> , 680 F.Supp. 26 (D.D.C. 2/22/1988). (D.C. opinion granting D's MTD; Ps don't have standing despite powerful prudential reasons in favor of allowing suit; was too general a claimed injury – was no different an injury than that suffered by other participants in criminal justice system; D who wants to challenge constitutionality of sentencing guidelines wd have to do so in criminal proceedings – could not do so in civil proceedings)	
<b>(5) LOUISIANA</b>	<b>State v. Peart</b>  (Louisiana)  (State Court)  (Criminal Case)	Nos. 92-KA-0907, 92-KD-1039  (Habeas Consolidated for Appeal in <i>State v. Peart</i> ).  Orleans Parish Criminal District	State  Crim D: Leonard Peart.	<u>State</u> : Richard P. Ieyoub (AG), Harry F. Connick (Dist. Atty.); Jack Pebbles & Barbara B Rutledge (Asst. Dist. Attys.), L.J. Hymel; Jack Yelverton.  <u>Crim Defendant</u> :	La SC <b>opinion establishing rebuttable presumption</b> of ineffectiveness: <i>State v. Peart</i> , 621 So. 2d 780, 791 (La. 7/2/1993). (Rev'd TC's holding that City of New Orleans	<b>Rebuttable presumption</b> of ineffectiveness of indigent defense in Section E of Orleans Parish Criminal Court.

		Court, Section E.		<p>Richard C. Teissier, Dwight M. Doskey, John Holdridge, Donald A. Hyatt.</p> <p><u>Amicus Curiae:</u> National Legal Aid Defense (Jane L. Johnson, Charles D. Weisselberg, Michael J. Brennan, Dennis E. Curtis).</p> <p>Public Defender for 9th Judicial Court (Kenneth P. Rodenbeck)</p> <p>Public Defender for 19th Judicial Court (David W. Price).</p> <p>NACDL (James E. Boren, David L. Lewis).</p> <p>Public Defender for 15th Judicial Court (Marx G. Paul)</p> <p>Louisiana State Bar Ass'n (Harry Simms Hardin, III).</p> <p>Jefferson Parish (Louis G. Gruntz, Jr.; Debra G. Miller).</p> <p>La. Dist. Attys.</p>	<p>system for securing and compensating qualified counsel was unconstitutional; but services in Section E do not always meet constitutionally mandated standards)</p>	
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				Ass'n (Ellis P. Adams).		
<b>(6) GEORGIA</b>	<b>Stinson v. Fulton County Board of Commissioners</b>  (Georgia, Fulton County)  (Federal Ct)  <b>(Filed 1994?)</b>	1:94-cv-240-GET  U.S.D.C.N.D.Ga (Atlanta Division) (Filed 1/28/1994)  Class Action	<b>P:</b> Indigent Crim D (on behalf of all persons charged w/ non-homicide felony offenses who are held incarcerated rather than released on bond).  <b>Ds:</b> Fulton County  State of Georgia (Dropped as D in 1994)  Mitch Skandalakis (Chairman of Board of City Commissioners)	Lisa Ann Curia, W. Bruce Maloy (Maloy & Jenkins)  Robert Fredrick Bensing, Robert Earl Toone, Jr., Stephen Brooks Bright (Southern Center for Human Rights)	<b>Consent Order</b> (1999)  Ps' Motion to Amend Consent Order to conform w/ Ga Indigent Defense Act of 2003 and standards. (7/2005)  Ds' Response to Ps' Motion (No Objection) (7/2005)  <b>Order Granting Ps' Motion to Amend Consent Order.</b> (7/2005)	<b>Settled</b> (Consent Order) in 1999. (Fulton County ordered to maintain/adequately fund Pre-Trial Services Program; Provide Defenders w/ sufficient level of resources to ensure client consultations w/in 2 days after counsel appt.).  <b>Consent Order Amended in 2003 to conform to Ga Indigent Defense Act of 2003</b> (Ga. Ann. 17-12-1 <i>et seq.</i> ) and the Standards promulgated by Public Defender Standards Counsel.
<b>(7) CONNECTICUT</b>	<b>Rivera v. Rowland</b>  (Connecticut)  (State Court)	CV-95-0545629 S  Connecticut Superior Court - District of Hartford  Class Action	<b>Ps:</b> 8 Indigent Crim. Ds (on behalf of all indigent crim Ds), including Carlos Rivera.  <b>Ds:</b> Connecticut	Philip D. Tegeler, (Connecticut Civil Liberties Union.)  Robin L. Dahlberg & Reginald T. Shuford (American Civil Liberties Union)	Opinion (Of Superior Ct of Conn) denying Ds MTD: <i>Rivera v. Rowland</i> , 1996 WL 636475 (Conn. Super., 10/23/1996).	<b>Settled.</b>

			<p>Governor John Rowland;</p> <p>Public Defender Services Comm'n;</p> <p>Indiv mbrs of Comm'n.</p>		<p>Memo of Decision on Ps' Motion for Class Certification; Also on Westlaw: <i>Rivera v. Rowland</i>, 1996 WL 677452 (Conn. Super., 11/8/1996).</p> <p>Allowing Ps to amend complaint to separate the COAs: <i>Rivera v. Rowland</i>, 1996 WL 745877 (Conn. Super., 12/13/1996)</p> <p>Granting in part/Denying in Part Ds' Motion for protective order: 1996 WL 753941 (Conn.Super. 12/17/1996).</p> <p>Memo of Decision on Ds' 1995 MTD: <i>Rivera v. Rowland</i>, 1996 WL 753943, (Conn. Super., 12/17/1996).</p> <p>2nd Amended Class Action <b>Complaint</b> (1/22/<u>1997</u>)</p> <p>Ruling on Discovery Disputes, <i>Rivera v. Rowland</i>, 1997 WL 403138</p>	
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					<p>(Conn. Super., 7/3/1997)</p> <p>More info needed to evaluate D's Motion to Strike and/or Dismiss: <i>Rivera v. Rowland</i>, 1998 WL 61351 (Conn. Super., 1/23/1998).</p> <p>Briefs need to be filed on Ds' pending Motion to Strike/Dismiss: <i>Rivera v. Rowland</i>, 1998 WL 96407 (Conn. Super., 2/20/1998).</p> <p>Notice of <b>Settlement (1999)</b></p>	
<b>(8) PENNSYLVANIA</b>	<p><b>Doyle v. Allegheny County Salary Board</b></p> <p>(Pennsylvania, Allegheny County)</p> <p>(State Ct)</p>	<p>Case No. GD-96-13606</p> <p>Court of Common Pleas of Allegheny County, Pennsylvania (Civil Division)</p> <p>Class Action</p>	<p><u>Ps:</u> 6 Indigent Crim. Ds.</p> <p><u>Ds:</u> Allegheny County Salary Board and mbrs (including Chief Public Defender)</p> <p>Allegheny County</p>	<p>Witold J. Walczak (ACLU/Greater Pittsburgh Chapter)</p> <p>Claudia Davidson (Healey, Davidson &amp; Hornack)</p> <p>Jere Krakoff</p> <p>Robin Dahlberg (ACLU)</p>	<p>Answer &amp; New Matter (12/1996)</p> <p>Third Amended Class Action <b>Complaint</b> (11/1997)</p> <p>Order Denying Ds' Motion for SJ (3/1998)</p> <p>Memorandum of Understanding b/t the Chief Public Defender and the</p>	<b>Settled.</b>

					Union (5/1998)  Side Agreement b/t the Parties and the Union (5/1998)  <b>Settlement</b> Agreement (5/1998)  <b>Consultant's First</b> <b>Report</b> to the Court (5/2000)  <b>Contempt Motion</b> (6/2003)	
<b>(9) MISSISSIPPI</b>	<b>Jefferson County v. State</b>  (Mississippi, Jefferson County)  (State Court)	Cause No. 99-0169  Circuit Court of Jefferson County (1999)				
<b>MISSISSIPPI</b>	<b>Noxubee County v. State</b>  (Mississippi, Noxubee County)  (State Court)	Cause No. 99-0136  Circuit Court of Noxubee County (1999)				
<b>MISSISSIPPI</b>	<b>Van Slyke v. State</b>  (Mississippi, Forrest County)  (State Court)	Cause No. 00-0013-GN-D  Chancery Court of Forrest County (1999)		Steve Hanlon, Leo Rydzewski (Holland & Knight)  NAACP Legal Defense Fund		Voluntarily dismissed in 2001 after Van Slyke resigned as public defender.

				Arnold & Porter		
<b>MISSISSIPPI</b>	<b>Quitman County v. State of Mississippi</b>  (Mississippi, Quitman County)  (State Ct)	2000-IA-01477  2003-SA-02658-SCT  Circuit Court of the Eleventh Judicial District	<u>P:</u> Quitman County, Mississippi  <u>Ds:</u> State of Mississippi  Haley Barbour (Governor)  Jim Hood (Attorney General)	Robert McDuff.  Dennis C. Sweet, III.  William H. Voth, Alexander H. Southwell, Beth R. Kallet, Kathleen A. Behan, Donna K. Normal, John A. Freedman, Erica Taylor McKinley (Arnold & Porter)	<i>State v. Quitman County</i> , 807 So. 2d 401 (Miss. 2001) (aff'ing circuit ct's denial of St's MTD for failure to state claim; County has standing to sue)  <i>Quitman County v. State</i> , 910 So. 2d 1032 (Miss. 2005) (aff'ing circuit ct's judgment, after trial, for D; County didn't prove County-based/funded sys resulted in systematic ineffective assistance of counsel).	<b>Verdict for State.</b>  (Circuit Ct refused State's MTD for failure to state a claim; State filed interlocutory appeal to Miss SC which affirmed and remanded; After trial, Circuit Ct entered judgment for State on grounds that County failed to prove that the county-based system led to systemic ineffective assistance of counsel; County appealed to Miss SC which affirmed verdict for State.)
<b>(10) NEW YORK</b>	<b>New York County Lawyers Ass'n v. State</b> , 745 N.Y.S.2d 376 (2002).  (State Court)  <b>Filed 4/3/2000</b>	Supreme Court, New York County, New York.	<u>P:</u> N.Y. County Lawyers' Association.  <u>Ds:</u> State of New York City of New York	<u>Ps Counsel:</u>  Frank S. Mosely (Davis Polk & Wardwell)  <u>D</u> Eliot Spitzer, AG (Carolyn Cairns Olson of counsel) – (For NY State).	Supreme Court, New York County, New York Opinion: Denying Ds MTD (Ps State a Claim): <i>New York County Lawyers' Ass'n v. Pataki</i> , 727 N.Y.S.2d 851 (N.Y.Sup., 1/16/2001).	Ct granted <b>preliminary injunction</b> which <b>raised the hourly fees</b> for indigent defense lawyers in NYC family and criminal courts.  Then Granted <b>Permanent</b>

				<p>Michael A. Cordozo, Corporation Counsel (Jonathan Pines of Counsel) – (For City of NY).</p>	<p>Supreme Court, New York County, New York <b>Opinion Issuing <u>Preliminary Injunction</u>: <i>New York County Lawyer's Ass'n v. State</i>, 745 N.Y.S.2d 376 (N.Y.Sup., 5/3/2002).</b></p> <p>NY Supreme Court, Appellate Division, First Department, New York's Opinion Affirming of denial of D's MTD (standing, ripeness exist for this declaratory judgment action): <i>New York County Lawyers' Ass'n v. State</i>, 742 N.Y.S.2d 16 (N.Y.A.D. 1 Dept., 5/0/2002).</p> <p>Supreme Court, New York County, New York Opinion Issuing <b><u>Permanent Injunction</u></b>: <i>New York County Lawyers' Ass'n v. State</i>, 763 N.Y.S.2d 397 (N.Y.Sup., 2/5/2003).</p>	<b>Injunction.</b>
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					<p>NY Supreme Court, Appellate Division, First Department, New York Opinion: Dismissing Appeal from the order of the Superior Court, New York County as moot: <i>New York County Lawyers' Ass'n v. State</i>, 759 N.Y.S.2d 653 (N.Y.A.D. 1 Dept., 5/22/2003).</p> <p><b>Withdrawal of Appeal</b> by stipulation of the parties (court approved): <i>New York County Lawyers' Ass'n v. State</i>, 767 N.Y.S.3d 603 (N.Y.A.D. 1 Dept. 12/2/2003).</p>	
<b>(11) MONTANA</b>	<p><b>White v. Martz</b></p> <p>(Montana, 7 Counties)</p> <p>(State Court)</p> <p><b>(Filed 2002)</b></p>	<p>C DV-2002-133</p> <p>Montana First Judicial District Court, Lewis and Clark County</p> <p>Class Action.</p>	<p><u>Ps:</u> 15 Indigent Crim Ds.</p> <p><u>Ds:</u> <u>State Ds:</u> Judy Martz (Governor); Rick Lewis (Supreme Court Administrator); Indiv mbrs of Appellate Defender Commission</p>	<p>Ronald F. Waterman (Gough, Shanahan, Johnson &amp; Waterman)</p> <p>Beth Brenneman (ACLU of Montana)</p> <p>Robin L. Dahlberg &amp; E. Vincent Warren (ACLU)</p> <p>Julie A. North</p>	<p><b>Amended Complaint</b> (2/2002)</p> <p>Opinion re MTD (7/2002).</p> <p>NACDL Ethics Advisory Committee Opinion (1/2003)</p> <p>Assessment of Indigent Defense</p>	<p>ACLU of Montana agreed to postpone lawsuit so state could seek legislative solution; state passed Montana Public Defender Act; Litigation withdrawn.</p>

			<u>County Ds:</u>	(Cravath, Swaine & Moore)	Services in Montana (Submitted in White v. Martz) (8/2004)	
(12) MICHIGAN	<b>In re: Wayne County Criminal Defense Bar Association v. the Chief Judges of the Wayne County Circuit Court, No. 122709 (Mich. S. Ct. filed Nov. 12, 2002).</b>	Appeals Docket #: 122709	<u>Ps:</u> Wayne County Criminal Defense Bar Association  Criminal Defense Attorneys of Michigan  <u>D:</u> Wayne Circuit Court	<u>Ps' Attorney:</u> Frank D. Eaman  <u>D's Attorney:</u> Peter H. Ellsworth	<b>Complaint</b> (11/8/2002)  Memo in Support of Complaint (11/8/2002)  Affidavit of Robert Spangenberg (11/11/2002)  Affidavit of Matt Evans (11/11/2002)  <i>Wayne County Criminal Defense Bar Ass'n v. Chief Judges of Wayne Circuit Court, 659 N.W.2d 239 (Mich., 3/31/2003)</i> (Mich. SC order granting motion to add Wayne County as party)  Ps Reply Memo in Support of Request for Writ of Superintending Control (5/6/2003)  Brief of Amicus Curiae, NACDL	<b>Ps Lost on Merits</b>

					(5/8/2003)  <i>Wayne County Criminal Defense Bar Ass'n v. Chief Judges of Wayne Circuit Court</i> , 663 N.W. 2d 471 (Mich., 6/27/2003) (Mich. <b>SC order denying relief</b> ; didn't prove fee schedule provides for inadequate compensation).	
(13) <b>WASHINGTON</b>	<b>Best v. Grant County</b>  (Washington, Grant County)  (State Ct)  <b>(Filed 4/5/2004)</b>	No. 04-2-00189-0  Superior Court of Washington for Kittitas County	<u>P</u> s: 3 Indigent crim Ds 1 Taxpayer P  <u>D</u> : Grant County	Pat Arthur & Joe Morrison (Columbia Legal Services)  Nancy Talner (ACLU of Washington)  (On Behalf of ACLU of Washington, Gary Dale Hutt & Greg Hansen)  Lori Salzarulo, Don Scaramastra, Justin Donal (Garvey Schubert Barer)	Order Granting Class Action Certification (8/2004)  <b>Complaint</b> (2005)	<b>Settled.</b>

				David F. Taylor & Breena M. Roos (Perkins Coie LLP)  (On behalf of indigent Ds)		
(12) MASSACHUSETTS	<b>Lavallee v. Justices in Hampden Superior Court,</b>  (Filed 5/6/2004)  (State Court)	SJC-09268	<u>Ps:</u> Indigent Crim Ds w/ no attorneys to represent them b/c of shortage in Hampden County Bar Advocates program.	Committee for Public Counsel Services  ACLU of Mass.  <u>Amici:</u>  Mass Bar Assn  Hampden County Bar Ass'n  Boston Bar Ass'n  Bristol County Bar Ass'n  Briston County Bar Advocates  Mass Ass'n of Crim Defense Lawyers  William C. Flanagan and Edward J. Barshak  Arnold R.	<i>Lavallee v. Justices in Hampden Superior Court</i> , 812 N.E.2d 895 (Mass. 7/28/2004). (cannot hold indigent D w/out counsel for more than 7 days and cannot prosecute after 45 days).	Court imposed limit on length of time indigent D could be denied counsel; if limit surpassed, prosecution could not continue.

				Rosenfeld.		
<b>(13) LOUISIANA</b>	<b>Anderson v. State</b> (Louisiana; Calcasieu Parish)  (State Court)	2004-005405 Div F  14th Judicial District Court, Parish of Calcasieu, State of Louisiana.  Class Action.	<u>Ps:</u> 9 Indigent Crim Ds (all crim Ds entitled to appointed counsel).  <u>Ds:</u>  Kathleen Blanco (Governor of La)  Louisiana State Legislature  State of Louisiana	Hamilton P. Fox, III & Rawn M. James, Jr. (Sutherland Asbill & Brennan LLP)  William H. Jeffress, Jr. & Frank Rambo (Baker Botts LLP)  David L. Hoskins.  (Complaint on La Justice Coalition Website).	<b>Complaint</b> (2004)  <i>Anderson v. State</i> , 916 So. 2d 431 (La. App. 3 Cir., 2005)(D.C. erred in denying Ds' exception of venue; although Ps named only class of indigent Ds in County, requested injunction has statewide impact and thus must be brought in the Nineteenth Judicial District where State Capital is located)	Will be heard in Baton Rouge but is pending writ on various issues before Louisiana SC
<b>(14) LOUISIANA</b>	<b>Walker v. State</b> (Louisiana, Caddo Parish)  (State Ct.)  <b>Filed 2004</b>	No. 40, 402-CW  TC No. 481701	<u>P:</u> Henry C. Walker (a Shreveport Attorney; former IDB member).  David Ray Wammack (?)  <u>Ds:</u> State through La Legislature and the Judges of First Judicial District in official capacity.	Pamela R. Jones  (Opinion posted on La Justice Coalition Website).	<i>Walker v. State ex rel. Louisiana Legislature</i> , 917 So. 2d 1229 (2nd Cir. 12/21/2005). (affirm: attorney had standing to challenge constitutionality of statutes governing establishment of IDB; attorney had right of action for reappointment)	Second Circuit for Louisiana ruled case has standing and should proceed.
<b>(15) MICHIGAN</b>	<b>Duncan Et. Al. v. State of Michigan</b>	Circuit Court for the County of	<u>Ps:</u> Christopher lee Duncan, Billy Joe	<u>Ps Attorneys:</u>	<b>Complaint</b> (2/22/2007)	(New Case – Pending)

	(Michigan)  (State Ct.)  <b>Filed 2007</b>	Ingham	Burr, Jr., Steven Connor, Antonio Taylor, Jose Davila, Jennifer O'Sullivan, Christopher Manies, and Brian Secrest (on behalf of those similarly situated)  <u>Ds:</u>  State of Michigan  Jennifer M. Granholm, (Governor, sued in official capacity)	ACLU Fund of Michigan (Michael J. Steinberg, Kary L. Moss, Mark P. Fancher)  Frank D. Eaman PLLC (Frank D. Eaman)		