Articles

THE PROMISE OF GIDEON:

PROVIDING HIGH-QUALITY PUBLIC DEFENSE IN AMERICA

Anthony C. Thompson

Indigent defense continues to be the proverbial neglected child in the justice system. Fifty years ago, the United States Supreme Court recognized in *Gideon v. Wainwright* that counsel for individuals charged with a crime was not a luxury, but rather a necessity. In that single ruling, the Court announced to the world that justice depended on strong, prepared counsel for both sides. The Court articulated a right to counsel that seemed to set a high bar, but then sadly left the implementation of this vision to the individual states. And, as is too often the case, the states rushed to the bottom, providing the bare minimum and complying with the letter of the rule in *Gideon*, but not its spirit. That has been the state of indigent defense across the nation for the past half century. The indigent defense system has lacked a strong consistent voice, lacked the ability to wield traditional forms of political power, and lacked a political lobby. Of course, given that reality, the indigent defense system that operates across the country is, perhaps

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3. *Id.* at 344.
unsurprisingly, plagued by crippling case overload, inadequate funding, and a pervasive, but false belief that efficiency and effectiveness are functional equivalents. Still, despite these life-threatening deficits, indigent defense has surprisingly managed to survive, and defenders across the country continue to struggle against the odds to provide effective assistance and dignity to their clients with precious few resources and support.

Now after fifty years, the indigent defense system in this country has come of age. Precisely what the next fifty years portend remains a looming and troubling question. On the golden anniversary of Gideon, the legal system needs to do more than simply look back nostalgically, wax poetic about Gideon’s promise and potential, and then denounce its poor upbringing. At the mid-century mark, those who care about individual liberty and justice need to take action that will change the trajectory of indigent defense so that it lives up to the mandate set by the United States Supreme Court. Coming of age means that indigent defense must become a national priority.

That is, of course, easier said than done. The country is in the throes of debating its priorities given the many challenges it faces globally and domestically. The global financial crisis has, among other things, forced the United States to take a long hard look at itself, its values, and its priorities. This national reflection and redirection will not happen in a vacuum. Other governments and global powers will be assessing and reassessing the relative strengths and weaknesses of the traditional superpowers, so the choices the U.S. makes may affect how others view us and our global position. When U.S. politicians bemoan the fact that this country may be in a weakened global position, they tend to focus exclusively on the economic challenges of the United States or political dysfunction. But what they fail to acknowledge is that our failure to address moral issues such as individual rights and justice may also threaten the global luster of the United States. This moral drift is apparent in the neglect—or worse still, contempt—of the rights of individuals charged with a crime. In addition to our tepid defense of individual rights in the day to day criminal justice context, our willingness to suspend civil liberties and human rights in the context of the War on Terror starkly illustrates an unsettling lack of commitment to the Bill of Rights and other constitutional protections.

The U.S. has tolerated erosions in individual rights largely out of fear. Television and the media, along with strict anti-crime policies, have all contributed to the public perception that individuals who
commit crimes are dangerous “others” not deserving of any protection. That misperception has prompted untold spending on law enforcement and corrections, with precious few resources being devoted to services at the front-end of the criminal justice process to safeguard our liberty interests. But as fiscal constraints force states to examine their spending choices and priorities more critically, state and federal governments find themselves looking to find savings that do not compromise safety. Investing in indigent defense—where lawyers have the opportunity to help clients gain access to services and to address conduct decisively, early and economically—may prove to be the answer they seek. Since anniversaries often provide the opportunity for reflection and re-engagement, Gideon’s fiftieth anniversary offers the federal government a long overdue opportunity to take a greater role in supporting, promoting, and enabling indigent defense, thus ensuring that Gideon’s promise is kept.

The federal government has acknowledged that it should play more of a role. In 2010, the indigent defense community experienced a glimmer of hope that the federal government would try to fulfill that promise. Attorney General Eric Holder convened a Symposium on Indigent Defense inviting defenders, advocates, policymakers, and academics to Washington to discuss the current state of indigent defense. Perhaps more importantly, the symposium set as an ambition plotting a strategic course for indigent criminal defense that looked to overcome failings in implementation that had plagued the system historically in order to give meaning to the Gideon mandate. This meeting was not without precedent. Holder’s predecessor Attorney General Janet Reno had made history in such a setting, as the first sitting Attorney General to convene a meeting of this type on indigent defense.

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6. In February of 1999, the DOJ held its first National Symposium on Indigent Defense entitled Improving Criminal Justice Systems Through Expanded Strategies and Innovative Collaborations. As this event, Attorney General Janet Reno stated:

Never before in the history of the U.S. Department of Justice has there been a meeting like this historic national symposium on indigent defense. . . . Our system of justice will only work, and will only inspire complete confidence and trust of the
The hope and anticipation raised by the Reno meeting had been dashed quite soon after it occurred, however, because the Department of Justice failed to engage in follow up or further communications with the defense community to put into action the ideas that had been discussed at that meeting.

Attorney General Holder’s invitation broke the silence. At the 2010 meeting, Holder spoke forcefully about the right to counsel for indigent defendants. He had previously expressed the view that strong indigent defense systems were a critical part of an effective justice system. But in this meeting, Holder went further. Holder specifically suggested that there was a role for the federal government to play in the development of a strong indigent defense system. The author witnessed the audience’s mix of excitement and skepticism. Still, the defenders welcomed the prospect that the federal government would provide leadership to the states in developing more coherent indigent defense systems.

Holder did not make this offer lightly or by accident. While serving as Assistant Attorney General of the United States under the leadership of Attorney General Janet Reno in the Clinton Administration, Holder watched as Attorney General Reno identified the issue of offender reentry as a national priority and proceeded to place it at the center of the national criminal justice policy discussion.

people, if we have strong prosecutors, an impartial judiciary, and a strong system of indigent criminal defense.”


7. Many of the presentations, including Attorney General Holder’s remarks, can be found in C-SPAN’s archived video library. See Dep’t of Justice, Public Defender System, C-SPAN VIDEO LIBRARY (Feb. 17, 2010), available at http://www.c-spanvideo.org/program/id/219743.


conversation on reentry turned as much on process as it had on substance. The range of interests that were assembled to discuss the plight of those individuals returning from custody included judges, prosecutors, defenders, community corrections officials, legislators as well as business groups. Holder held out the hope that a similar assembly of groups could move the issue of indigent defense in positive directions. That movement has yet to occur.

The problems plaguing indigent defense are substantial. Virtually every national organization examining indigent defense has noted the chronic lack of resources, disabling caseloads, and uneven access to services.11 Although the logic of investing in front-end services, such as adequate representation as opposed to paying the back end costs associated with incarceration, probation, and parole should now be apparent, state legislatures have lacked the necessary political will to provide sufficient funding for the defense function. Disturbingly, no entity is held accountable for this failure. Legislators are permitted to underfund indigent defense systems without consequence because the population affected by that political choice is typically (1) poor, (2) charged with crimes, and (3) lacks the ability to vote. Although countless studies and task forces have reached identical conclusions

about the consequences of failing to provide adequate funding to indigent defense systems, the conditions persist.

On this fiftieth anniversary of *Gideon*, in lieu of yet another hollow celebratory promise, this piece will attempt to recognize and articulate the failed path of *Gideon* in its first half century as courts and legislatures have failed to effectuate a durable, strong and effective indigent defense system. It will then propose a course correction where federal involvement could serve as a vehicle through which *Gideon* might be realized more fully. Part One will look at indigent defense as it currently operates and examine efforts by the organized bar to establish basic guidelines for the effective implementation of the *Gideon* mandate. Part One will also examine the fundamental components of a public defender office in the twenty-first century and suggest the basic features that such an office should contain. Part Two will examine the quixotic efforts to bring about genuine reform and, against that backdrop, will propose ways to achieve reform through fiscal, political, and operational changes. Similarly, this Part will examine the ways that legislation has proved ineffective in redressing pervasive and persistent inadequacies in the indigent defense system. Finally, Part Three will examine a role for the federal government in the implementation of indigent defense services. It is my hope that this article will serve as the beginning of a conversation that will lead to fundamental changes as we reimagine indigent defense at the fiftieth anniversary of the landmark decision in *Gideon v. Wainwright*.

I. DECADES OF INADEQUACY AND A MOMENT TO RETHINK THE FUTURE OF INDIGENT DEFENSE

A. A Permanent State of Crisis

Indigent defense in America today bears little resemblance to the noble ideal articulated in the *Gideon* ruling itself. *Gideon* seemed to imagine a world in which well-funded lawyers, adequately trained, and carrying reasonable caseloads, would provide a genuine counterbalance to the immense power of the state, also represented by strong, well-resourced lawyers. But those noble ideals would prove to be the stuff of Hollywood, and seldom the reality. The public defense system that emerged post-*Gideon* is at best a roughly patched quilt of systems with common inadequacies: limited resources and excessive caseloads that compromise the defender’s ability to operate as an individual’s champion against the state. While other players in the criminal justice
system have had the opportunity to reinvent themselves through innovations involving, for example, “evidence-based practice,” and “community-oriented lawyering.”

Gideon’s mandate imposed a burden on states to provide indigent defense services, but did not dictate the model states should use. Consequently, states utilize a variety of forms through which they deliver indigent defense services. Some provide services through a large countywide, city-wide, or statewide institutional defender office. Others employ a contract system, where multiple small to mid-size providers bid for contracts to represent certain numbers of cases for a set price. The result more often than not degenerates into a process of awarding contracts to the lowest bidder. Other jurisdictions employ an assigned counsel system, where the court appoints lawyers from a list on a rotating basis to represent indigent clients charged with crimes. Many jurisdictions utilize a combination of these systems. Jurisdictions that follow a public defender model must also utilize an additional method in order to address potential conflicts of interest. But each system, regardless of the delivery model, has suffered the same problems dating back to the first efforts to give life to the Gideon mandate. The ruling itself articulated the right to counsel and imposed an obligation on states to provide counsel in criminal cases, but it failed to address the essential elements of “a coherent system of representation.” The ruling did not define or even outline what it


13. GIDEON’S BROKEN PROMISE, supra note 11, at 2.

14. Id.


16. GIDEON’S BROKEN PROMISE, supra note 11, at 2.

17. Id.

18. JUSTICE DENIED, supra note 11, at 53.

envisioned as effective representation. It painted a picture of a system with lawyers who had resources that would match those of the prosecution, but the majority opinion in *Gideon* never expressly mentioned cost. Thus, regardless of the system a state chooses to utilize, the pattern remains quite striking and consistent: practice descends to the bottom due to a lack of standards, a lack of training, and a lack of resources. States and the courts have consistently demonstrated a willingness to tolerate this minimal level of representation.

Public defenders themselves bear some of the blame for the state of play in today’s criminal justice landscape. They have largely allowed others to define their role and have done little to articulate and advocate for a role that refuses to be defined by minimal standards. In public battles over funding, their voices, all too frequently, have been silent. Chief public defenders have chosen to fly under the radar in a presumed effort to protect their offices from public scrutiny that could induce governments to further reduce funding for the “undeserving poor” whom defender offices represent. But the choice to remain silent in the face of attack has offered little protection in the public battles over finite government resources.

Unions have also failed to fill this gap. In many jurisdictions, defenders have unionized, which should have been a natural vehicle to champion the cause of better funding and necessary reform to adhere to constitutional demands. Unfortunately, although unions have been a necessary and vital component of the public defender world, they have not, by and large, (1) connected with communities, (2) trumpeted larger indigent defense reforms or (3) sought to participate in criminal justice system conversations. They have instead narrowly focused their role internally and have too often been reduced to defending lawyers who have engaged in questionable conduct. Unions have been instrumental in protecting the employment rights of lawyers who for years had no

1462 (2003).

20. *Id.*

21. *See generally Gideon’s Broken Promise, supra* note 11, at 18–22 (noting, for example, that a chief defender and his deputy began filing motions to withdraw from all new cases and that the chief defender was threatened with a recall election and criminal charges for malfeasance); *Justice Denied, supra* note 11, at 80–81; John Council & Jonathan Fox, *Common Clashes: Politics, Pressure, and the Public Defender’s Office, Texas Lawyer* (July 7, 2008).

22. For example, the Association of Legal Aid Attorneys represents public defenders and other legal aid attorneys in New York. *Association of Legal Aid Attorneys UAW 2325 (AFL-CIO), http://www.alaa.org* (last visited May 18, 2013).
representation, but the future relevance of public defender unions will require a broader definition of their role.

The challenges that exist in delivering public defense services are not new. On the contrary, they date back to the early days of national indigent defense and are well documented. Studies began quite early on to document a disturbing link between chronic underfunding of indigent defense and the failure to provide the quality of representation that Gideon assumed was critical to the proper functioning of the adversary system in the criminal justice system. Inadequate funding has “severely crippled the attempts of indigent defense systems to provide truly effective representation.” These studies further identified and warned that the persistent lack of funding had already led to inadequate case preparation, insufficient consultation with the client, improper plea bargaining, and insufficient input into the sentencing process. The studies not only criticized the resulting inadequacies in individual representation, but also critiqued local government funding schemes that led to and almost encouraged disparate levels of representation statewide in the interest of efficiency. These studies warned state and local governments about their reliance on contract systems because low bid systems posed the danger of ineffective representation by design.

The net result was not only that most public defender offices struggled to survive under the dual pressures of case overload and underfunding, but states adopted practices that inadequately safeguarded the individual charged in the system. For example, many jurisdictions failed to appoint counsel in early stages of criminal proceedings, choosing instead to attempt to secure guilty pleas through the court or with a prosecutor dealing directly with unrepresented individuals. In states with contract or bidding systems, many defense lawyers met their

24. Id. at 663–75.
25. Id. at 675–76.
clients for the first time, and sometimes only time, in the courtroom. Consequently, indigent clients have been saddled with incompetent lawyers, ill-prepared to represent their clients against the state in part because it was not in the lawyer’s financial interest to conduct extensive investigation or to meet regularly with clients.

Even a cursory review of the analyses that accompany each celebration of a significant anniversary for Gideon reveals continual funding problems and resulting inadequacies in service. To commemorate the twentieth anniversary of Gideon in 1982, the American Bar Association (“ABA”) held a series of public hearings to examine whether America had lived up to the “noble ideal” articulated in the 1963 ruling. The 1982 hearings concluded that public defenders had too many cases; indigent criminal defense systems were for the most part inadequately financed; inadequate compensation pressured appointed counsel to enter guilty pleas in cases as quickly as possible; and that, in some areas of the country, indigent defendants were not provided competent counsel. Although the right to counsel was ringing hollow in its implementation, the general public barely noticed When faced with inadequate representation, indigent defendants turned not the national media, but to the courts for relief.

A decade ago, to celebrate Gideon’s fortieth anniversary, the ABA, in another set of hearings concluded yet again that funding for indigent defense services is “shamefully inadequate.” The ABA further concluded, “[t]he fundamental right to a lawyer that Americans assume applies to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.” These findings were hardly groundbreaking. In fact, they echoed conclusions

30. See Dripps, supra note 28, at 255.
32. Lefstein, supra note 29, at 838.
33. Id. at 838 n.15.
34. See Klein, supra note 23, at 630–38.
35. GIDEON’S BROKEN PROMISE, supra note 11, at 38.
36. Id. at iv.
the ABA had reached twenty years earlier. Since Gideon was decided, at least one major independent report has been issued every five years to document the severe deficiencies in indigent defense services, leading some scholars to describe indigent defense as being in “a permanent state of crisis.”

B. The Impact of Failing to Develop National Consistency in Funding

Although Gideon never addressed funding its mandate, it soon became apparent that implementing the ruling would place new financial demands on state governments. Without a specific legal or political mandate regarding funding, indigent criminal defense systems could expect no more than crumbs in the highly charged competition for a limited fiscal pie. It was inevitable that inadequate funding would plague these systems and become the focus of critique and target of attack. Initially, counties within states funded indigent defense programs. This led to a number of legal and political challenges from the counties against the state. It also formed an odd patchwork system of justice with great inequality within states most often between rural and urban counties. In many states where litigation occurred, a state-funded system replaced county funding, with the states covering at least half or more of the costs. Even without such litigation, the majority of states now fund at least 90% or more of their indigent defense systems. Each state provides this funding differently. There is a disturbing lack of consistency in the amounts allocated to indigent defense and the

37. Dripps, supra note 28, at 246 (“The defense function in the United States is in a permanent state of crisis.”); see also generally Bright, supra note 27, at 6.
40. See JUSTICE DENIED, supra note 11, at 54 tbl.1 (For example, West Virginia’s system is 90% or more state-funded, and Kansas’s system is 50% or more, two states where litigation occurred as noted in footnote 39.).
41. Based on numbers from 2005, twenty-eight states fund at least 90% or more of their indigent defense systems. See id. More recent numbers from fiscal year 2008 show that twenty-three states funded 100% of their indigent defense systems, while five other states funded between 85–99% of their systems. HOLLY R. STEVENS ET. AL., THE SPANGENBERG PROJECT, STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES, FISCAL YEAR 2008 5 tbl.2 (Nov. 2010), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf.
services or cases to which that funding is linked. Recent budget woes have forced states and counties to think critically about where they spend money and how to spend it more effectively. Many jurisdictions have been unwilling to provide adequate funding for indigent defense, however, litigation around funding has served as a catalyst to redirect government funds. The permanence of such moves in dire fiscal times remains an open question.

Some jurisdictions have responded to the pressure of litigation in the struggle to provide adequate funding; for example, in response to litigation, Connecticut radically altered its indigent defense system. Connecticut added funding to hire eighty attorneys, support staff, and increase the pay of special public defenders used in conflict cases. Connecticut also revised its methods of evaluating and overseeing attorneys’ work and improved the quality of training. The state agreed to stringent caseload guidelines with caps of no more than seventy-five felonies per year per attorney with death-eligible cases counted as ten felonies. A commission comprised of seven members sets policies, appoints, and oversees compensation in each of the thirteen judicial districts.

Without influential political allies, appropriation of funding is unstable and budget problems continue to threaten the recent reforms. In Connecticut, for example, twelve years after the additional funding for eighty attorneys and support staff, budget cuts forced the state to layoff forty-two public defender employees, including twenty-three lawyers, with the possibility of thirty-three more positions being eliminated in the future. This severely limited the gains made just three years ago. Other states have reacted to the crisis by trying to reinstate flat rates for contracting attorneys. These states are doing this despite the fact that

43. Id.
44. Id.
45. Id.
46. Carroll, supra note 42.
47. Id.
at least two other states have recently banned such measures specifically because they create a direct financial conflict of interest between the attorney and each client.  

A closer look at some current compensation schemes for indigent defense services exposes the low priority that governments give the indigent defense bar. In court, Michigan criminal defense attorneys challenged the fees paid to assigned counsel in Detroit’s Wayne Circuit Court. The chief judge expressed sympathy regarding the fee schedule, which allocated only $250 to investigate and prepare felony cases, but countered that increasing fees to $90 per hour would cost $11 million more—money the court did not have.

Although certainly important for the rights of indigent defendants, Gideon’s implementation was far from ideal. The “[Gideon] Court gave states wide discretion in executing their duty to provide counsel for indigent defendants; discretion that has translated to resistance and indifference in the hands of state legislators.” The combination of fiscal constraints, tough-on-crime rhetoric, and the lack of a forceful constituency advocating on behalf of poor criminal defendants allowed legislators to ignore Gideon’s mandate. Without clear direction from the Court, states were able to establish widely varying definitions of “indigent.” Wisconsin, for example, set its threshold at 33% of the federal poverty guideline, while Florida set its threshold at 250%, and Utah at 150%. Worse yet, the state system provided zero guidelines for providing court-appointed, publicly funded counsel, creating another “county-by-county disparity in the provision of counsel . . . .”


49. Both Iowa and Washington have recently banned such measures. E.g., Carroll, Gideon Alert: Tennessee Supreme Court Proposes Rule Change Allowing Flat-Fee Contracting, supra note 48.

50. Lefstein, supra note 29, at 853.

51. Id.


54. See Velázquez-Aguilú, supra note 52, at 194.

55. Id. at 194–95.
One of the significant analyses of indigent defense funding in the United States was completed by the Spangenberg Group. The report, entitled *State, County and Local Expenditures for Indigent Defense Services: Fiscal Year 2008*, provided a national look at the status of indigent defense funding.⁵⁶ Although reporters gathered the data in 2009, in many states the most devastating recessionary impact was not felt until late 2010. So while the report documented severe funding issues, those problems would soon worsen in most states.

At the end of fiscal year 2008, twenty-three states completely funded their indigent defense system, while nineteen left more than 50% of the funding to their counties—including Pennsylvania, whose indigent defense system was completely county-funded.⁵⁷ A number of states provided particularized funding for capital defense;⁵⁸ many relied on special funding sources, such as increased filing fee assessments, either directly to fund indigent defense or to reimburse counties for their expenditures in that field.⁵⁹ Special funding sources often varied from year to year. In Kentucky, for example, special funding failed to keep the state indigent defense system from sustaining “serious funding shortfalls,” while “the legislature . . . used the existence of [the special funding] revenue[] to justify cutting general fund support for indigent defense.”⁶⁰

A closer examination of indigent defense funding reveals a startling trend: states do not provide a consistent source of revenue to finance indigent defense. For example, in the state of Alabama, the state administers a Fair Trial Tax Fund, designed to collect funds—via filing fees and additional charges added to civil and criminal cases—to reimburse counties for indigent defense costs.⁶¹ The Fund has been insufficient in recent years, however, forcing Alabama to use general funds to reimburse counties in full. In fiscal year 2008, approximately $22 million in indigent defense expenditures came from the Fair Trial Tax Fund, and the remaining $47 million came from the state’s general funds.⁶²

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⁵⁶. STEVENS ET AL., supra note 41.
⁵⁷. Id. at 5 tbl.2.
⁵⁸. For example, Mississippi, id. at 37, and Utah, id. at 62.
⁵⁹. STEVENS ET AL., supra note 41, at 9 (Alabama), 13 (Arizona), 22 (Georgia), 43 (Nebraska).
⁶⁰. JUSTICE DENIED, supra note 11, at 58.
⁶¹. STEVENS ET AL., supra note 41, at 9.
⁶². *Indigent Defense Reform: UNA Economists Propose a Way to Save State Millions,*
Several states are in the process of recommending, drafting, and passing legislative improvements to their indigent defense systems. For example, the Washington Supreme Court seeks to impose new standards on the system that closely reflect the ABA’s *Ten Principles of a Public Defense Delivery System*.63 These standards require defense attorneys to meet minimum qualifications, meet with investigators, maintain contact with their clients and an office to meet them in, and refuse workloads that would interfere with providing quality representation.64 Standards also limit caseloads to 150 felonies or 250 juvenile delinquency cases or 36 appeals or 1 active death penalty case or a proportionate mix.65 Notably, no limit was set for misdemeanors. The caseload standards went into effect January 1, 2013 in Washington State.66

C. Reinvigorated Principled Approach to Indigent Defense

Recently, the award of funding grants to organizations either studying the indigent defense system or implementing indigent defense has been the exclusive mechanism the federal government has used to address the failures of the system. On July 13, 2010, the Department of Justice awarded the ABA a substantial grant to work on its National Indigent Defense Training and Technical Assistance Project.67 The collaboration of the ABA’s Standing Committee on Legal Aid and Indigent Defense with the National Association of Criminal Defense Lawyers and the Spangenberg Project resulted in recommendations for training and technical assistance programs for the indigent defense

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65. Carroll, supra note 63.

66. Id.

system. More recently, on February 4, 2012, Attorney General Eric Holder announced a $2.4 million grant to two Department of Justice programs to help improve indigent defense systems. The National Institute of Justice (NIJ), a part of the Office of Justice Programs, will research “fundamental issues of access to legal services, including the need for quality representation, at the state and local levels.” Furthermore:

The Justice Department’s Bureau of Justice Assistance will solicit applications from state and local jurisdictions for grants that would support on-the-ground efforts to help assure that defendants have access to counsel at the earliest stages of criminal proceedings; provide support for members of the private bar in representing indigent defendants; reduce caseloads; and support oversight of public defender and assigned counsel systems.

Holder promised that up to $1.4 million will be available for this program.

On January 31, 2012, the National Focus Group on Indigent Defense, funded by a grant from the Department of Justice (DOJ), announced its findings to Eric Holder. The Group, consisting of members of the ABA, National Association of Criminal Defense Lawyers, and law professors, identified five core principles that with support from the Department of Justice will improve indigent defense reform efforts. Observing that the problems of indigent defense and criminal justice in general had festered over the decades, the National Focus Group found a number of critical inadequacies. On the national front, the focus group noted with alarm that there simply are too many crimes now. The Group recommended efforts to reclassify offenses and

68. Id.
70. Id.
71. Id.
72. Id.
74. Id. at 37–38.
discourage prosecution of petty, nonviolent crimes.\textsuperscript{75} The Group further noted that “[a]ny solution to the indigent defense crisis in America must focus on the front end of the system, as much as the back end.”\textsuperscript{76} Identifying the need to move cases along more expeditiously, the Group found it imperative to provide counsel at the initial appearance in every situation where a person is criminally charged.\textsuperscript{77} The failure to provide counsel at this stage not only violated the Constitution, but added unnecessary costs to the system: the costs of detaining people who could otherwise be freed had they had the assistance of counsel.

In addition to the structural problems associated with indigent defense, it has become clear that the federal government has not frequently intervened when obvious violations of the Sixth Amendment have occurred. This has left the distinct impression that the Department of Justice has been less concerned with the provision of indigent defense services. Under pressure to reduce budgets, states started to realize the inefficiencies associated with an indigent defense system that fails to protect defendants’ constitutional rights. States have begun to make reforms, but the state of the national economy—and by extension state economies—also threatens the depth and effectiveness of these reforms.

D. Creating a Blueprint for the Public Defender System for the Twenty-first Century

As we look forward to the next fifty years of indigent defense, one must ask the normative question going forward—What would constitute excellence in public defender systems for the twenty-first century? In thinking about this question, I consider my own experiences from a decade working as a public defender. I also take into account almost two decades of collaborations with students and indigent defense providers. This section examines a number of factors that should be explored in building or reforming indigent defense services.

In considering what makes an excellent indigent defense system, the first step is to dispel myths about who chooses to engage in the work. Contrary to popular views, the average public defender is not someone who ends up representing indigent clients because she “could not get a better job in the private sector.” Rather, the typical public defender is a

\textsuperscript{75} Id. at 9, 14–17.
\textsuperscript{76} Id. at 37.
\textsuperscript{77} SCHUMM, supra note 73, at 37.
highly intelligent and highly motivated lawyer committed to her clients and to justice, despite being underpaid and overworked. More often than not, the defender does not view her job as something that is a typical nine to five position. She expects to—and does—work nights and weekends, bringing creativity, passion, and talent to the role. Notwithstanding these common factors, there are many structural impediments to the individual defender’s success.

Of course, when we examine any public service system, there are cultural norms to take into account. In addition, each jurisdiction has some procedural and cultural characteristics that make it unique. I will not attempt to address those. Rather, using anecdotal and empirical data in a wide range of studies, I will attempt to identify some “norms” that might be considered universally necessary to provide the basic minimum quality of representation to which indigent criminal defendants are entitled. Although geography presents some unique issues in providing indigent defense delivery, the distinctions between rural and urban with respect to office design, operations, and culture are perhaps overstated.

An indigent defense provider must model and nurture a learning environment. This means that defender offices must provide both entry-level and in-service training. The importance of intensive and consistent mandatory training is two-fold. First, it fosters an atmosphere of learning and innovation, which has often been missing in public defense culture, but is critical if defenders intend to provide quality representation in a fast changing legal system. Second, regular training disperses the flow of information throughout the office. In a number of offices in the country, specialized knowledge resides in a single or few individuals. A culture of continuous learning would provide mechanisms for that information to be shared. Also, bringing colleagues

together to collaborate about new legal problems could lead to important innovations in the law critical to our evolving sense of justice.

The method of providing funding would need to shift dramatically. Rather than perceiving indigent defense as limited to the cost of an individual trial, the funding decision would need to focus on a budget that included every necessity for quality indigent defense, such as holistic services to enable the client to address the problems that likely brought her into the system. All too often, public defenders receive funding on a per-case basis. This is frequently handled through a bidding system in which offices that bid the lowest dollar amounts per case will be awarded the contract.

This low-bid system creates obvious problems. It establishes a perverse incentive for defender offices, and, therefore, individual defenders, to handle as many cases as quickly as possible. While appearing efficient to the untrained eye, rushing to resolve multiple cases leads to at least two additional long-term problems. First, this type of system militates against comprehensive investigation in cases. With pressure to resolve cases quickly, the lawyer will gravitate toward finding the problem or issue in the case that will motivate the client to resolve the case short of trial rather than looking to unearth the problems that might create a reasonable doubt as to the client’s guilt. Second, large caseloads also impede developing meaningful attorney-client relationships that might help guide cases to their proper disposition, be that trial or plea agreement. There is significant distrust built into a system where the individual charged receives a lawyer whom she has not chosen and does not know. Moreover, the fact that the defender “works for the government” creates worries about divided loyalties and the depth of commitment to the client’s cause.\footnote{See David A. Sadoff, \textit{The Public Defender As Private Offender: A Retreat from Evolving Malpractice Liability Standards for Public Defenders}, 32 AM. CRIM. L. REV. 883, 891–92 (1995).} Overcoming that distrust takes time, and heavy caseloads truncate the time available to spend developing that crucial level of trust.

Funding might also look to encourage collaboration among indigent defense providers, law schools or other public service groups. In the new era of drug courts, problem-solving courts, and community justice, defenders are often better positioned to know and utilize community services that are geared toward addressing clients’ and clients’ families’ issues. We have spent the better part of three decades accepting
skyrocketing recidivism rates as the usual price of doing business. One of the lessons of the reentry movement has been the earlier that we consider reintegration, the more successful we can be in programming.

An additional feature leading to excellence is caseload caps. In jurisdictions such as the District of Columbia, the legislature controls caseloads for the public defender. Caseload caps, while difficult to manage and enforce, accomplish three important goals. First, they guarantee that lawyers have the ability to develop client relationships, which allows the lawyer to develop trust that will enable the client to participate more fully in their case. Second, they allow lawyers to investigate cases comprehensively. Caseload caps thus improve the ability of public defenders to prepare for trial, and, more often, to help resolve the case in an appropriate manner. Finally, caseload caps allow lawyers to make strategic and tactical decisions based on an individual case’s merits rather than sheer caseloads. Lawyers with reasonable caseloads will identify the best issues to litigate and arguments to proffer on behalf of their clients, while lawyers with exorbitant caseloads tend to look for the single issue that they can exploit to convince the client to plead guilty. Although resolving a large number of cases superficially seems like a good idea, case overloads can lead to wrong decisions about which cases should be litigated and which cases should be resolved—an innocent individual can be coerced into pleading with little independent investigation. Providing lawyers with the time and resources to make judgments about each individual case is ultimately efficient in that the cost to the system is greater with assembly-line justice.

Another feature for the twenty-first century public defenders’ office is that defenders themselves actively play a role in defining excellence in representation. At a minimum, individual representation should mean vertical representation, a scheme of representation in which the same lawyer represents the client from start to finish. It should also include provisions for early representation—even prior to the client’s arrest—to enable the client to have her interests protected against the intrusive power of the state. But, in addition to engaging in zealous individualized representation, defenders need to recognize that they must play a broader, community-based and political role. Public defenders have other responsibilities aside from standing next to a client in court. Because few other groups, agencies or legislative bodies do it, public defenders must also be active within the communities where they
practice. Defenders should be aware of legislative initiatives that will adversely affect clients, and must be armed with the social justice as well as the fiscal arguments that spur policy reform in today’s legislative world. Defenders have begun to involve themselves in everything from acquisition of bail to an intimate knowledge of programs in the community.

The best public defenders, from entry-level misdemeanor lawyers to experienced supervisors, understand the need to be intricately enmeshed in the fabric of the county, city, town or state in which they practice. For generations, defenders have often pointed to massive caseloads, inadequate funding, and poor training as impediments to being more involved in their communities. In today’s criminal justice landscape, however, these are no longer “either-or” choices. Lack of serious involvement in the community and political forces often result in poor funding allocations for defenders. Recently, we have seen some offices and some chief public defenders succeed in broader participation in the political process. For instance, the Neighborhood Defender Service of Harlem, Bronx Defenders, Dade County (Miami), Defender Association of Seattle, and San Francisco, have managed to secure funds beyond the individual cases and have found ways to secure a voice in shaping the criminal justice policy agenda.82

80. This is not to say that only the chief defender must be active, but the chief defender must maintain a presence. In addition, it benefits individual defenders to be active in the communities in which they practice.


82. See NEW YORK FOUNDATION, Racial Equity, http://www.nyf.org/taking-risks-100/special/racial-equity (last visited June 13, 2013) (listing the Neighborhood Defender Service of Harlem as an organization that the New York Foundation supports); Winnie Hu, In South Bronx, Legal Aid and Shoulders to Lean On, N.Y. TIMES, Feb. 27, 2013, at A24, available at http://www.nytimes.com/2013/02/28/nyregion/bronx-defenders-a-legal-group-open-reception-center-in-melrose.html?r=0 (stating that since 2010, the Bronx Defenders has received over $500,000 from the federal government to train defender offices across the country in holistic representation); Robin Steinberg, Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm, 70 WASH. & LEE L. REV. 961, 1006 (2013) (executive director of Bronx Defenders arguing that defender offices should seek outside funding in addition to government funding to support their work); NATIONAL LEGAL AID & DEFENDER ASSOCIATION, SUCCESSFUL GRANT APPLICATIONS BY STATE AND LOCAL DEFENDERS FOR FEDERAL GRANT FORMULAS, http://www.nasams.org/Defender/Defender Funding/Successful (last visited June 13, 2013) (listing the Miami-Dade County Public Defender’s Office Juvenile Sentencing Project as a program that created a successful federal government grant application); Kim Taylor-Thompson, Taking It to the Streets, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 180 (2004) (discussing how the Seattle Defender office received a $146,000 grant from the federal
II. LIMITATIONS OF THE TRADITIONAL TOOLS TO ACHIEVE TRUE PUBLIC Defender Reform in the Twenty-First Century\textsuperscript{83}

A. Focus on Past and Ongoing Efforts: The Inadequacy of Litigation and Legislation

Public defense reform has struggled in both flush economies (where the tendency is to incarcerate individual offenders with little if any regard for the future consequences or collateral costs) and in faltering economies (where the inclination is to defund the public defense function). Today, we need to recognize that legislation and lawsuits, while part of the answer, cannot be the only answer to inadequate representation. We need to recognize that \textit{Gideon}, as a mature fifty-year-old, can no longer be a feisty outsider challenging authority. Rather, \textit{Gideon} at fifty must be accepted as an internal part of the criminal justice system. \textit{Gideon} must be viewed as adding value to society’s discussions about fiscal and public safety concerns. At fifty, \textit{Gideon} must be a recognized (and expected) consideration in the day-to-day operational, budgetary and policy process. Courts, legislatures, and finance executives should expect and value that quality indigent defense is critical to a just, safe system of criminal justice.

Over the past thirty years, a number of state courts have gone to great lengths to protect the indigent defendant’s constitutional right to counsel.\textsuperscript{84} These courts have created remedies to push local legislatures to reform their broken indigent defense systems or at times courts have elected to take matters into their own hands. These state courts recognize that where the legislature has failed to act, the courts have the authority and duty to intervene.\textsuperscript{85} The Louisiana Supreme Court in \textit{State v. Peart} and the Arizona Supreme Court in \textit{State v. Smith} both adopted government to establish a Racial Disparity Project in 1999); \textsc{San Francisco Public Defender, Achievements and Awards}, http://sfpublicdefender.org/about/achievements-and-awards/2/ (last visited June 13, 2013)(stating that the San Francisco Public Defender Office established a “Children of Incarcerated Parents” program in 2004 with the support of the Zellerbach Family Foundation).

\textsuperscript{83} The cases and litigation in the following Section are some examples of successes or failures in the state and federal systems. For a comprehensive review, see \textsc{Securing Reasonable Caseloads, infra} note 239; \textsc{Justice Denied, supra} note 11; and \textsc{Gideon’s Broken Promise, supra} note 11.

\textsuperscript{84} \textsc{See Cronic v. U.S}, 466 U.S. 648, 656–57 (1984) (an important function of the judiciary is to ensure that the 6th Amendment right to counsel is implemented).

\textsuperscript{85} \textsc{Justice Denied, supra} note 11, at 130–31.
presumptions of ineffective counsel for every such claim filed until it deemed the legislature had fixed those systems. The Florida Supreme Court even threatened the state legislature with releasing prisoners if the appeals process was not fixed within a certain period. The New Mexico Supreme Court took the unusual step of issuing a stay in a capital case until funds were appropriated for the defense or the death penalty was taken off the table. The Oklahoma Supreme Court held that it had the inherent power to regulate the compensation paid to court-appointed attorneys. The New Hampshire Supreme Court declared the compensation of all court-appointed attorneys a judicial matter. Further, other state courts found compensation and flat fees unconstitutional because of the conflict of interest such arrangements created.

However, some state courts refuse to construct these remedies and, instead, defer to the legislature, particularly on financial matters. In the Florida case referenced above, the Florida Supreme Court stated:

"It is true that the legislature’s failure to adequately fund the public defenders’ offices is at the heart of this problem, and the legislature should live up to its responsibilities and appropriate an adequate amount for this purpose, it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of the government is a legislative function. . . . ‘‘[T]he judiciary cannot compel the Legislature to exercise a purely legislative prerogative.’’"

A lower court in Florida recently used this language to dismiss a claim against the indigent defense system. Other courts have placed restrictions on when it can force the legislature to appropriate funds.

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91. See infra notes 218–222.
92. In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Pub. Defender, 561 So. 2d at 1136 (quoting in part Dade County Classroom Teachers Ass’n v. Legislature, 269 So.2d 684, 686 (Fla. 1972)).
93. See infra notes 218–222.
94. See State ex rel. Metro. Pub. Defender Servs. v. Courtney, 64 P.3d 1138, 1139 (Ore. 2003) (requiring a showing that the judiciary was prevented from carrying out its core functions before it would order the legislature to appropriate funds).
Both state and federal courts have heard these cases through litigation by indigent defendants themselves or lawyers appearing on behalf of indigent defendants.

Litigation brought by indigent defendants has generally come in one of three forms. First, indigent defendants often challenge their counsel’s performance post-trial on direct appeal or in post-conviction proceedings. Second, indigent defendants or organizations suing on their behalf have pursued class action pre-trial and collateral lawsuits to remedy the failures of the indigent defense system. Finally, prisoners have sued public defenders and their counties for their wrongful convictions.

1. Ineffective Assistance of Counsel

Much of the litigation brought by indigent defendants occurs after conviction. Defendants have alleged that systemic failures of the indigent defense system made their counsel ineffective in violation of their Sixth Amendment rights. In 1984, Strickland v. Washington\(^95\) made this a more difficult claim and provided courts an easy way to avoid addressing the systemic issues. Strickland requires that a defendant seeking post-conviction relief for ineffective assistance of counsel show that his or her counsel’s representation was not reasonably competent and that the defendant was prejudiced because of counsel’s deficient performance.\(^96\) The prejudice prong of the test, a high standard, applies to determine whether a defendant is entitled to relief because the result of the defendant’s trial is now unreliable due to his or her lawyer’s subpar representation.\(^97\)

In Cronic v. United States,\(^98\) the U.S. Supreme Court detailed three circumstances that give rise to a presumption of ineffectiveness without the specific showing of prejudice Strickland requires. A defendant may be entitled to this presumption if the defendant did not have counsel at a critical stage of the proceedings; if counsel entirely failed to combat the prosecution’s case; or if there is a strong likelihood that any lawyer could not have provided effective assistance.\(^99\) If a defendant’s claim

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\(^96\) Id. at 686.
\(^97\) Id.
\(^99\) Id.
does not fall within these three exceptions, the defendant still has to prove prejudice as a part of any ineffective assistance of counsel claim.\(^\text{100}\) This burden is very difficult to meet. Courts have found counsel effective when lawyers have been drunk,\(^\text{101}\) asleep,\(^\text{102}\) and unknowledgeable.\(^\text{103}\) Courts have even found effective assistance of counsel when an attorney admits to not spending as much time on a case as he would have had the client been wealthy\(^\text{104}\) or admits to failing to pursue any witnesses because of case turnover and an excessive workload.\(^\text{105}\) Essentially, any “lawyer with a pulse will be deemed effective.”\(^\text{106}\)

A claim with the greatest chance of success in post-conviction proceedings must demonstrate one of the presumptions of prejudice under \textit{Cronic}. Defendants have argued that such a presumption applies because their lawyers’ performances were so deficient, that even the most experienced attorneys could not have provided adequate

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\(^{100}\) See Hudson v. State, 675 S.W.2d 320, 323 (Tex. 1984). This case was peculiar in that the same counsel who represented the client at trial represented his client on appeal and argued his own ineffectiveness at trial. \textit{Id.} at 322. The court addressed his assertion about the wealth of his client in a footnote, stating that it could not go unchallenged and that “[w]e need not elaborate the damage to our system of justice caused by such assertions. Instead, we invite these assertions to the attention of the appointing judge for appropriate disciplinary action.” \textit{Id.} at 323 n.1.

\(^{101}\) People v. Garrison, 765 P.2d 419, 440–41 (Cal. 1989) (holding counsel effective even though he was an alcoholic and had been arrested during trial for driving to the courthouse drunk). In this case though, the defendant did insist on continuing with his counsel. \textit{Id.} at 440.

\(^{102}\) McFarland v. State, 928 S.W.2d 482, 505–06 nn.19–20 (Tex. Crim. App. 1996) (holding that a 72-year-old lawyer in capital case who said he “customarily tak[e] a short nap in the afternoon” and fell asleep during trial was not ineffective where napping might have been a “strategic” move to generate jury sympathy and where co-counsel remained awake), \textit{abrogated on other grounds} by Mosley v. State, 983 S.W.2d 249 (Tex. Crim. App 1998).

\(^{103}\) See, e.g., Paradis v. Arave, 954 F.2d 1483, 1490–91 (9th Cir. 1992) (permitting defendant to be represented at capital trial by lawyer who had passed bar six months earlier, had tried no criminal cases, and had not taken any courses on criminal law, criminal procedure, or trial advocacy), \textit{vacated for other reasons}, Arave v. Paradis, 507 U.S. 1026 (1993).

\(^{104}\) \textit{Hudson}, 675 S.W.2d at 323.

\(^{105}\) Wade v. Armontrout, 655 F. Supp. 1420, 1422–24 (E.D. Mo. 1987) (the court found that the lawyer made a decision not to interview a particular witness and that this decision was proper, despite the fact that she had made a motion for a continuance for more time to read through discovery as well as talk to witnesses and made similar arguments about her lack of preparation due to her caseload).

In essence, defendants attempt to phrase the argument in terms of the third exception listed in *Cronic*. The defendant in *Conner v. Indiana*, for example, made such an argument in his post-conviction proceeding. At the time, political parties appointed indigent defense counsel in Indiana, and there was a lack of trained staff and resources. The Indiana Supreme Court held that the defendant failed to adequately prove any systemic deficiencies and that the defendant failed to demonstrate those deficiencies in his individual case.

2. *Caseload Litigation*

Courts have found failing indigent defense systems to be relevant when considering the adequacy of counsel at trial. In *State v. Smith*, a defendant claimed on appeal, among other things, ineffective assistance of counsel because his attorney spent only two to three hours interviewing him and only six to eight total hours on the case because of his “shocking, staggering, and unworkable” caseload. His caseload was a product of Mohave County’s system for providing indigent defendants with counsel that allowed attorneys to bid for cases, accepted the lowest bid, and did not place any caseload or hour restrictions on the attorneys. Additionally, there were no criteria to evaluate counsel for indigent defendants, no support personnel for those attorneys, and no extra pay promised. The court held that Mohave County’s system failed to conform with national standards for four reasons: (1) it did not take into account time the attorney expected to spend on a case; (2) it did not provide for support costs; (3) it failed to take into account the relevant experience and competency of the attorney; and (4) it ignored the complexities involved in each individual case. The court held that this militated in favor of a finding of inadequate counsel. In that particular case, however, the state had rebutted the inference and the

111. *Id.* at 1379–81.
112. *Id.*
113. *Id.* at 1381.
court found that the counsel was adequate. Nevertheless, the court stated that its rule had prospective application. Defendants in the past had to prove ineffective assistance of counsel, but if the system remained unchanged, the court would infer ineffective assistance of counsel, and place the burden of rebutting this inference on the state.

3. Extraordinary Relief

Another way defendants have challenged the system is to petition the state court for extraordinary relief in the form of a writ of mandamus. One defendant in Florida, convicted of murder, filed such a petition to force the public defender and the state to review his files for appeal. For a court to issue the writ there must be a showing of a clear legal right to performance by a public official of a clear legal duty and a complete lack of other remedies available to the petitioner. The Florida Supreme Court held that the public defender, overburdened by the system, had not provided effective representation. The court issued the writ ordering the public defender to evaluate the circumstances surrounding the appeal, and if he did not file briefs within thirty days, the public defender could file a motion to withdraw because of a conflict created by his excessive caseload.

The Florida Supreme Court also heard a claim on February 9, 2012 related to its misdemeanor plea and waiver of counsel process. Eric Edenfield pled no contest to a misdemeanor DUI and claims he received insufficient information that influenced him and others to accept pleas too quickly. In Florida misdemeanor courts, a blue form given to each defendant contains the plea entry on it, maximum and minimum...

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115. Id. at 1383. It is important to note that neither Strickland nor Cronic applied to Smith because it was decided approximately six weeks before these Supreme Court cases.

116. Id. at 1384.

117. Id. at 1383–84.


119. Id. at 563.

120. Id. at 565.

121. Id.


penalties, and information on a defendant’s right to counsel.\textsuperscript{124} A judge explains the right to counsel and dangers of self-representation in a video the defendants watch before entering the courtroom; the defendants then submit their pleas in front of the judge.\textsuperscript{125} Edenfield alleged that the judge should have made a thorough inquiry into his age, mental condition, education, and experience in the proceedings before finding his waiver of counsel to be knowing, informed, and intelligent.\textsuperscript{126} Similarly, Alabama faced a lawsuit based on claims from its plea bargaining system,\textsuperscript{127} but the plaintiffs dropped it in September 2011 after the state legislature passed reforms to Alabama’s system that June.\textsuperscript{128}

4. Class Action Suits

Class actions have become useful for defendants and civil rights organizations seeking system-wide changes to the indigent criminal defense system. Generally, these actions have been successful, although most are currently ongoing. Usually, the lawsuits are brought pre-trial or on behalf of future indigent defendants.\textsuperscript{129} The downside to these lawsuits is that they often take years to complete, and even longer to

\textsuperscript{124} Id. As the ACLU pointed out in its amicus brief, this information did not include a financial waiver required for the court to appoint an attorney that defendants charged with felonies receive when they arrive at court. Id.

\textsuperscript{125} Id.

\textsuperscript{126} Blankenship, supra note 123.

\textsuperscript{127} Lance Griffin, Suit Claims Local Indigent System Fails Defendants, DOTHAN EAGLE (Aug. 23, 2011, 5:55 PM) http://www.dothaneagle.com/news/article_68e1424b-6053-5517-ba47-40db92472f06.html. (Two indigent defendants—illegal immigrants, a fact the press focused on—filed suit on August 17, 2011 in U.S. District Court against Alabama’s Houston County, the governor of Alabama, the director of Alabama’s Administrative Office of Courts, Houston County’s presiding circuit judge and members of Houston’s indigent defense commission; the indigents made pleas without being adequately explained the sentencing range, and one spoke no English; the suit alleged that the attorneys do not have enough time to meet with clients before critical stages of proceedings, file the necessary pre-trial motions or challenges to evidence, and the attorneys rarely ask for additional funds in the contract system).


\textsuperscript{129} It is unclear whether Strickland and Cronic extend to any pre-trial motions by indigent defendants. See JUSTICE DENIED, supra note 11, at 112.
implement any remedies. Class actions have been brought by or on behalf of indigent defendants in Connecticut, Georgia, Maryland, Massachusetts, Michigan, New York, and Washington. The ACLU filed suit on behalf of all public defenders’ clients against the Governor of Connecticut in 1997 for not providing sufficient funding for its public defense services. The case went on for two years, and the parties settled in 1999 agreeing to dismiss the litigation. During the four years before the settlement, Connecticut had provided additional funding to hire eighty more attorneys and support staff, and to increase the wages for special public defenders used in conflict cases. Connecticut revised its methods of evaluating and overseeing attorneys’ work and improved the quality of training. Finally, Connecticut developed stringent caseload guidelines.

Class actions have also challenged delays in the system. A Georgia class-action lawsuit brought on behalf of nearly 200 indigent convicted offenders sought court-appointed appellate counsel for the defendants. The Georgia Public Defender Standards, created in 2003 to fix the piecemeal system previously in place, appointed attorneys for appellate proceedings from the same public defender offices that represented defendants at trial. The class action addressed Georgia’s policy regarding the appointment of appellate attorneys for ineffective assistance of counsel claims. The indigent defendants argued it created a conflict of interest and that they were waiting too long for appointments. The lawsuit sought specific changes by having outside lawyers paid on hourly basis and putting in place a requirement for a

131. Carroll, supra note 42.
132. Id.
133. Id.
136. Id.
137. Id.
138. Id.
minimum level of experience. 139 The class was certified in February 2010, and the judge issued a pre-trial writ of mandamus demanding the appointment of counsel for indigent defendants within thirty days of a request while limiting each attorney to twenty-five appeals per year. 140 The State tried to appeal, but the Georgia Supreme Court unanimously declined to hear the case. The case settled in December 2011 after a judge said it would go ahead to trial. 141 The settlement required hiring seven additional appellate attorneys and implementing a system to monitors caseloads. 142 It also created a process for hiring that requires a lawyer’s qualifications to be reviewed before appointment. 143

In Maryland, the Court of Appeals recently upheld a decision in favor of indigent defendants in a class action lawsuit. Indigent defendants filed suit in DeWolfe v. Richmond, 144 seeking declaratory relief proclaiming that they are entitled to counsel at a bail hearing based on the Maryland Public Defense Act—a legislative act earlier recognized by the court as broader than the Sixth Amendment right to counsel. 145 The court upheld the circuit court’s judgment for the plaintiffs, holding that defendants are entitled to counsel at the hearing. 146 The court flatly rejected the Public Defenders’ Office’s arguments that the court could not issue a decision without addressing the budgetary and practical implications of the decision. The court stated that “the budgetary concerns of the Public Defender never have played a role in Maryland appellate decisions involving defendants’ statutory right to counsel.” 147 The Maryland Court of Appeals court explicitly relied on the New York Supreme Court’s reasoning in Hurrell-Harring v. State. 148

Similarly, indigent defendants sued Massachusetts for failure to

139. Joyner, supra note 135.
140. Id.
142. Lawsuit Over Appeals by Indigent in GA Settled, supra note 141.
143. Id.
145. Id.
146. Id. at *13–15.
147. Id. at *14.
provide them counsel at arraignment, alleging that chronic underfunding of the system resulted in an insufficient number of attorneys willing to take assignments at the current pay rates.\footnote{Lavallee v. Justices in Hampden Super. Ct., 812 N.E.2d 895, 889–900 (Mass. 2004).} The Massachusetts Supreme Judicial Court found that the ongoing harm of depriving the defendants of counsel warranted relief, and the court did not require a showing of harm to each individual indigent defendant.\footnote{Id. at 911.} The court was unwilling to increase the assigned counsel salary rates, but did order relief.\footnote{Id. at 910–11.} Any incarcerated defendant had to be released after seven days if no counsel was appointed, and any pending case would be dismissed after forty-five days if no attorney filed a court appearance in such time.\footnote{Id.}

In Michigan, the ACLU and its coalition partners filed a class action lawsuit, \textit{Duncan v. Granholm}, against the state seeking to fix the indigent defense system.\footnote{Duncan v. State, 774 N.W.2d 89, 99–100 (Mich. Ct. App. 2009) aff’d on other grounds, 780 N.W.2d 843 (Mich. 2010), reconsideration granted, order vacated, 784 N.W.2d 51 (2010), order vacated on reconsideration, 790 N.W.2d 695 (Mich. 2010) and order reinstated, 790 N.W.2d 695 (Mich. 2010) and revid, 784 N.W.2d 51 (Mich. 2010), order vacated on reconsideration, 790 N.W.2d 695 (Mich. 2010).} The State asked the court to dismiss the suit, contending that the counties—and not the state—were responsible.\footnote{Id. at 97.} A circuit court judge rejected this motion and certified the class action stating that the state was responsible for ensuring constitutionally adequate criminal defense.\footnote{Id. at 97–98.} The Michigan Court of Appeals affirmed.\footnote{Duncan, 774 N.W.2d at 97–98.} In April of 2010, the Michigan Supreme Court allowed the case to proceed to trial,\footnote{Duncan v. State, 780 N.W.2d 843 (Mich. 2010).} but reversed itself in July, dismissing the lawsuit as non-justiciable.\footnote{Id. at 51 (“[W]e REVERSE the June 11, 2009 judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion.”)} In dismissing the suit, the court incorporated by reference the dissent in the Court of Appeals case,\footnote{Duncan, 774 N.W.2d at 153 (Whitbeck, J., dissenting).} a dissent maintained that there was no constitutional precedent specifying how a state should provide adequate counsel for indigent defendants.\footnote{Duncan, 774 N.W.2d at 153 (Whitbeck, J., dissenting).} Further, the dissent found that the judiciary could not interfere with
funding for legal services and the indigent defense system; therefore, there was no remedy for the court to mandate.\textsuperscript{161} That, however, was not the end of the suit. In December 2010, the Michigan Supreme Court reinstated the original order allowing the case to proceed to trial.\textsuperscript{162}

One of the most important class action suits is currently underway in New York.\textsuperscript{163} Twenty indigent criminal defendants brought a class action seeking declaratory and injunctive relief against the state for violation of their Sixth Amendment right to counsel.\textsuperscript{164} On appeal from the denial of the defendant’s motion to dismiss, the New York Supreme Court, Appellate Division held that the claims were not justiciable, finding no cognizable claim for ineffective assistance of counsel in any setting other than post-conviction relief.\textsuperscript{165} The court held that a collateral civil proceeding could not vindicate a defendant’s right to counsel, especially where the object of the collateral actions was to compel additional allocation of public resources, a legislative prerogative.\textsuperscript{166}

The indigent defendants appealed, and the New York Court of Appeals reinstated the action with substantial limitations upon its scope. The court held that although \textit{Strickland} controls the case, the \textit{Strickland} Court premised its decision on the “supposition that the fundamental underlying right to representation under \textit{Gideon} has been enabled by the State in a manner that would justify the presumption that the standard of objective reasonableness will ordinarily be satisfied.”\textsuperscript{167} The claim could not stand if it stated that the defendants have not been given

\begin{footnotesize}
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\item 161. \textit{Id}. at 153–54.
\item 165. \textit{Id}. at 88.
\item 166. \textit{Id}. at 87–90.
\end{itemize}
\end{footnotesize}
meaningful and effective representation, but the court held that this claim stood because the defendants based their claims on a complete lack of counsel.\textsuperscript{168} Further, the defendants’ complaint pled allegations sufficient to justify the inference that the deprivations may be illustrative of significantly widespread practices.\textsuperscript{169} It meticulously set forth the factual bases of the individual claims and linked each claim to broad systemic deficiencies.\textsuperscript{170}

Washington State and a county within the state have also faced two class action lawsuits. In 2005, the ACLU and Columbia Legal Services filed a class action on behalf of all future felony defendants in Grant County with the goal of declaratory and injunctive relief.\textsuperscript{171} The complaint alleged that the system, run through a public defender office and contracts, had inadequate funding, excessive caseloads, no oversight, no independence, and defendants were regularly deprived of investigators and experts.\textsuperscript{172} In October of 2005, a judge held that the defendants had a well-grounded fear of losing their right to effective counsel.\textsuperscript{173} The parties then reached a settlement where the county agreed to reduce caseloads, guarantee qualified attorneys, and fund expert witnesses and investigators for indigent defendants.\textsuperscript{174}

Recently, three indigent defendants filed suit against Washington State alleging that the cities of Mt. Vernon and Burlington failed to provide meaningful assistance of counsel to indigent persons facing criminal charges in municipal court.\textsuperscript{175} The defendants cited a failure to

\textsuperscript{168} \textit{Id.} at 222–24. Ten of the twenty defendants did not have counsel at arraignment and others never had contact with their attorney during the critical investigation stage before trial. \textit{Id.} at 219.

\textsuperscript{169} \textit{Id.} at 227.

\textsuperscript{170} See \textit{id.} at 220–28.


\textsuperscript{172} \textit{Id.} at 1–25.


impose a reasonable caseload limit, failure to monitor the system, and failure to fund it adequately. The lawsuit is currently pending in the U.S. District Court in Seattle. Two attorneys in these cities handled more than 2,100 misdemeanor cases in 2010. Mt. Vernon and Burlington extended contracts with these attorneys despite numerous complaints against them. The lawsuit alleges that the failures of these attorneys deprived defendants of meaningful representation in considering their guilty pleas.

5. Wrongful Conviction Lawsuits

At least two defendants have been successful in suing public defender offices or individual public defenders after their wrongful convictions. In Washington State, a public defender’s client received a $2.9 million settlement for legal malpractice after he was wrongfully convicted of sexual assault. The public defender admitted wrongdoing, stating that he was grossly inexperienced at the time that he had been assigned this client, and that this lack of experience led to mistakes with his defense strategy. The wrongly convicted man originally sued the county, city, police department, the attorney himself, and others in federal court, but the court dismissed the case in 2003.

A defendant wrongfully convicted of murder in Nevada had more success with his initial suit. Based on § 1983 claims, he sued the public defender appointed to him, the head of the public defender office, and the county. The court dismissed his claims against the public defender, but his claims against the head of the office and the county were allowed to proceed. The Court of Appeals for the Ninth Circuit stated that the complaint’s allegations were sufficient to create a claim of

176. Id.
178. Carroll, supra note 175.
179. Id.
180. Id.
181. Id.
182. Id.
183. Id.
185. Id. at 471.
“deliberate indifference to constitutional rights” for failing to train lawyers to represent clients accused of capital crimes. In 2007, the case settled for $5 million. An Ohio case followed the Ninth Circuit’s reasoning, and allowed a case to proceed when indigent defenders sued their county and the public defender office for not informing them adequately about fines they had to pay that resulted in the indigent defendants’ incarceration.

B. Overwhelmed and Under-Resourced: Litigation by Defenders

1. Standard Judicial Response: Deference to the Legislature

Public defenders have tried to change the indigent defense system through their own litigation. Initially, their efforts took the form of motions for continuances of trials and for withdrawals from trials. Now public defenders also make motions (1) to stop the overwhelming intake of defendants, (2) to seek additional funds, and (3) to abolish certain fee limitations and other restrictive measures harmful to the indigent defense system. Public defenders have had limited success in pursuing these measures. Sometimes they face an issue with standing because they are suing on behalf of future defendants. Other times, the court simply refuses to fashion a remedy because those decisions are legislative.

2. Motions for Continuances

Motions for continuances usually resolve little for overburdened public defenders. In Ungar v. Sarafite, the Supreme Court held that although trial courts do indeed have broad discretion concerning requests for continuances, “a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend
with counsel an empty formality."\textsuperscript{192} Despite this statement, initially, numerous motions for continuances from public defenders were denied by trial courts and upheld on appeal. For example, a trial judge denied a motion for continuance made by defense counsel who stated that he would remain silent if placed on the case.\textsuperscript{193} A trial judge also denied a motion when defense counsel just finished two trials and asked for a continuance because he was unprepared.\textsuperscript{194} Similarly, a judge denied a continuance in a trial that resulted in the imposition of the death penalty when a defendant’s counsel asked for more time because he did not know anything about the prosecution’s case.\textsuperscript{195} Finally, the Eighth Circuit remanded a case because the trial court denied an attorney’s motion for a continuance even after she informed the court that she was not prepared because she had visited with the defendant only once, had not interviewed any of the state’s witnesses, and had not visited the scene of the alleged offense.\textsuperscript{196}

\textit{3. Motions for Withdrawal or Similar Relief}

Since their caseloads started to become unbearable, public defenders have started utilizing motions for withdrawal to lighten their workload. Florida has seen a number of withdrawal cases since the 1980s and provides an interesting case study. At first, Florida appellate courts and the Florida Supreme Court upheld many public defender motions for withdrawal. In \textit{Escambia County v. Behr},\textsuperscript{197} the Public Defenders for the First and Eleventh Judicial Circuits filed motions to withdraw in several cases, citing excessive caseload.\textsuperscript{198} The Florida Supreme Court found that, contrary to the position taken by the county, the public defender is not charged with the duty to represent all indigent defendants charged with a felony; rather Florida’s statutory framework provides an alternative: the appointment of private counsel.\textsuperscript{199}

\begin{footnotes}
\item 192. \textit{Id.} at 589.
\item 195. \textit{Aldrich v. Wainwright}, 777 F.2d 630, 632–33 (11th Cir. 1985).
\item 197. \textit{Escambia Cnty. v. Behr}, 384 So. 2d 147 (Fla. 1980).
\item 198. \textit{See id.} at 147–49.
\item 199. \textit{See id.} at 149–50.
\end{footnotes}
In *Skita v. State*, a public defender moved to withdraw from representation of twenty-nine indigent defendants, and the Second District Court of Appeal of Florida denied the motion. The Florida Supreme Court held that the public defender presented sufficient grounds to be permitted to withdraw from representation of the twenty-nine appellate clients, due to a severe case backlog. In *Day v. State*, the First District Court of Appeal of Florida considered a motion to withdraw from 300 current and future cases filed by a public defender to alleviate a backlog of appeals. The court initially granted permission to withdraw from the 100 current appeals, and stated it would entertain the 200 other requests. The legislature appropriated more funds to the public defender, and the court ordered her to show cause as to why its order should not be modified. After the public defender showed cause, the court found that the initial withdrawal in the 100 cases was justified, but it requested that the public defender provide a detailed plan as to how the appropriated funds, authorized positions, and an authorized salary rate would be applied toward addressing the backlog. The court then authorized the withdrawal in 100 additional appeals, but denied the motions with respect to the remaining 100 appeals.

The Florida Supreme Court did not hesitate in two other cases to allow the withdrawal of public defenders overburdened by the appeals process. First, the court, in *In Re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, modified the procedure to be followed in court orders prohibiting the appointment of the public defender from future appeals cases. The court held that a public defender must be appointed to the cases, but can then apply to withdraw from them. The court also pleaded for the legislature to take action:

201.  *Id.* at 102.
202.  *Id.* at 104.
204.  *Id.* at 138.
206.  *Id.*
207.  *Id.* at 1005.
209.  *Id.* at 1138.
210.  *Id.*
This situation demands immediate resolution; the constitutional rights of these indigent appellants are being violated. These delinquent appeals must be briefed promptly. We believe this situation can only be resolved by massive employment of the private sector bar on a “one-shot” basis. In this regard, the legislature is best able to address this emergency situation. The legislature, therefore, should appropriate sufficient funds so that private counsel may be appointed to brief and pursue these appeals forthwith.\(^\text{211}\)

The court then went on to threaten the legislature, stating that if such action was not taken within sixty days, it would entertain writs of habeas corpus filed by inmates whose appeals were more than sixty days delinquent, and grant release of those prisoners.\(^\text{212}\) The court recognized that its measures would not fix the situation, but that it would stop constitutional violations against those individuals.\(^\text{213}\)

Following that decision, in *In Re Public Defender’s Certification of Conflict*,\(^\text{214}\) a public defender filed motions to withdraw from 248 cases due to excessive caseload; by the time the Florida Supreme Court heard the argument, the number of delinquent cases exceeded 640.\(^\text{215}\) The court held that this public defender office could not accept further appellate cases, and that the chief judges of five other circuits must appoint qualified attorneys to represent indigent defendants’ appeals.\(^\text{216}\) The backlog of cases created a problem of constitutional magnitude in the circuit courts. The court stated:

> We strongly believe that there needs to be a long-term as well as a short-term solution, and, in this regard, we would encourage the creation of a special committee or commission by the legislature to examine the structure and funding of indigent representation in criminal cases. We firmly believe that this type of delay in the criminal justice process, as illustrated in this case, can be eliminated by a joint effort of all interested parties. This Court is very willing to participate and provide necessary resource assistance to develop a viable solution to this ongoing problem.\(^\text{217}\)

The court requested that the legislature immediately consider

\(^{211}\) *Id.* at 1138–39.

\(^{212}\) *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1139.

\(^{213}\) *Id.*

\(^{214}\) See *In re Pub. Defender’s Certification of Conflict*, 709 So. 2d 101 (Fla. 1998) (per curiam).

\(^{215}\) *Id.* at 102.

\(^{216}\) *Id.* at 103–04.

\(^{217}\) *Id.* at 104.
creating an emergency fund for the fourteen counties affected by its order. These two cases are illustrative of the lengths Florida’s Supreme Court was willing to go to protect the constitutional rights of indigent prisoners.

In one case, the Miami-Dade Public Defender filed motions seeking relief from its statutory obligation to represent indigent defendants in noncapital felony cases claiming a lack of funding, which led to excessive caseloads, prevented the defenders from carrying out their legal and ethical obligations. The circuit court denied the State standing to oppose the motion, allowed the public defenders to decline all future representation of indigent defendants charged with third-degree felonies, and ordered another office that dealt with conflicts of interest to represent the affected defendants. The State, however, appealed and the Florida Court of Appeals sided with the State, reasoning that the Office of Criminal Conflict and Civil Regional Counsel for the Third District was required to prove prejudice or conflict, separate from excessive caseload, on an individual case-by-case basis, in order to be relieved of any duty to represent indigents. The court explicitly responded to the funding concerns, stating:

We understand the difficulties faced by the Public Defender District 11. With an ever-increasing quantity of cases and a tight budget, their important task is certainly made more difficult. The office-wide solution to the problem, however, lies with the legislature or the internal administration of [Public Defender District 11], not with the courts.

In support of this statement, the court cited *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, but declined to address these concerns in the same way. The public defenders appealed this decision and the Florida Supreme Court granted review of the case. The court held oral arguments on June 7, 2012. The court in somewhat of a surprise, issued a decision

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218. *In re Pub. Defender’s Certification of Conflict*, 709 So. 2d at 104.
220. *Id.*
221. *Id.* at 806.
222. *Id.* at 805–06.
224. *See* Florida Supreme Court Docket, Case No. SC09–1181, *available at*
supporting the issues raised by the office of the public defender. The decision remanded the case for consideration of “whether the circumstances still warrant granting the Public Defender’s motion to decline appointments in future third degree felony cases...”\(^{225}\)

In other states, including Louisiana and Arizona, public defenders have filed motions seeking relief or withdrawal from cases. Louisiana public defender Rick Teissier filed a “Motion for Relief to Provide Constitutionally Mandated Protection and Resources,” and the trial court held hearings on the state of the indigent defense system.\(^{226}\) The trial judge found that, due to his caseload, Teissier could not provide adequate assistance of counsel to his clients, and the whole system of indigent defense in New Orleans was unconstitutional.\(^{227}\) He ordered Teissier’s caseload reduced, and then ordered the legislature to provide funds for additional attorneys, secretaries, paralegals, law clerks, investigators, and expert witnesses.\(^{228}\)

The Louisiana Supreme Court overruled the trial court, yet held that from then on, in Teissier’s court subdivision known as Section E, there would be a presumption that indigent defendants were receiving ineffective assistance of counsel.\(^{229}\) The presumption applied prospectively to (1) the defendants represented by Teissier when he filed the original motion, (2) other defendants who had not yet gone to trial, and (3) to all indigent defendants in his section who had attorneys appointed to represent them after the court’s decision.\(^{230}\) The court then stated:

If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.\(^{231}\)


\(^{226}\) State v. Peart, 621 So. 2d 780, 784–85 (La. 1993).

\(^{227}\) Id. at 784.

\(^{228}\) Id. at 785.

\(^{229}\) Peart, 621 So. 2d at 791.

\(^{230}\) Id.

\(^{231}\) Id.
The court remanded the case for individual hearings on each defendant’s claim of ineffective assistance of counsel before trial.\footnote{232} A subsequent Louisiana case, State v. Reeves, clarified the limits of Peart by holding that to establish an ineffective assistance of counsel claim, there must be sufficient evidence of an excessive caseload similar in nature to the evidence before the court in Peart.\footnote{233} In Reeves, there was not enough evidence suggesting that the caseload was excessive, and the attorney himself admitted that his caseload did not exceed the ABA’s guidelines.\footnote{234}

In Arizona, the Public Defender of Mohave County sought to withdraw from a number of felony cases.\footnote{235} The trial judge allowed him to withdraw from thirty-nine cases and further declared that the court would grant withdrawals “until the court is convinced the reasons for doing so no longer exist.”\footnote{236} The court noted that not granting the motion would have been unethical.\footnote{237} It left the logistics to the county to figure out, stating it “cannot concern itself with the financial or fundamental implications of its ruling on the motions to withdraw.”\footnote{238} The prosecutor did not appeal, and the county appropriated funds to cover its responsibility.\footnote{239}

Aside from seeking actual withdrawal, several public defenders in Kentucky, Tennessee, and Missouri sought to stop intake of new cases. These measures have not been successful. In Missouri, a public defender’s office sought writs to prevent judges from assigning the defenders to a particular class of felony cases based upon a case-limiting regulation formulated by the public defender commission.\footnote{240} The court

\begin{footnotes}
\item[232] Id.
\item[233] State v. Reeves, 11 So. 3d 1031, 1076–77 (La. 2009).
\item[234] Id. at 1076.
\item[236] Id. at 122.
\item[237] Id.
\end{footnotes}
held the part of the regulation that allowed public defenders to refuse certain categories of cases was invalid because it was contrary to the enabling legislation.\textsuperscript{241}

In Kentucky, the Department of Public Advocacy (“DPA”), with support of its oversight commission, sent letters to trial court judges informing them that the agency would reduce services to achieve ethically permissible caseloads for its lawyers as of July 1, 2008.\textsuperscript{242} The DPA filed for a declaratory judgment against various legislative and executive branch defendants.\textsuperscript{243} The lawsuit requested the court to declare that the DPA’s budget was insufficient, and to grant the attorneys authority to decline appointments.\textsuperscript{244} The court granted the defendants’ motion to dismiss, finding that the claims were not ripe for adjudication because it was speculative as to whether the DPA would actually run out of funds.\textsuperscript{245}

In March of 2008, an elected Tennessee public defender from Knox County filed a “Sworn Petition to Suspend Appointment of the District Public Defender to Defendants in the Knox County General Sessions Court, Misdemeanor Division.”\textsuperscript{246} A hearing was held in June 2008 in front of all five of the county’s misdemeanor judges.\textsuperscript{247} The court issued a delayed, cursory three-page denial of the petition on February 20, 2009 stating:

From the review of pleadings and evidence presented and the record as a whole, we find that the attorneys in the Public Defender’s Office carry caseloads that exceed national criminal justice standards and goals. This court does not conclude that the case load is a [sic] such a level as to violate the right to competent counsel under either the United States Constitution or the Constitution of Tennessee.\textsuperscript{248}

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\textsuperscript{241} Id. at 890.
\textsuperscript{242} SECURING REASONABLE CASELOADS, supra note 239, at 176.
\textsuperscript{243} Id. at 177.
\textsuperscript{244} Id.
\textsuperscript{245} Id. (citing Lewis v. Hollenbach, Civil Action No. 08-CI-1094, slip op. at 2 (Franklin Cir. Ct. Mar. 10, 2009)). A month after the court dismissed the lawsuit, the Governor appropriated $2 million to the indigent defense budget for the rest of the year. SECURING REASONABLE CASELOADS, supra note 239, at 178.
\textsuperscript{246} Id. at 168.
\textsuperscript{247} Id.
\textsuperscript{248} Id. at 171 (quoting In re Petition of Knox Cnty. Pub. Defender, General Sessions Court for Knox County, Tennessee, Misdemeanor Division, Docket No. Not Assigned, Order, at 2, Feb. 20, 2009).
\end{flushright}
The decision was reviewed pursuant to a writ of certiorari by a single judge and relief was denied.\textsuperscript{249} The court held it could not make an aggregate determination as to the whole office; rather the determinations had to be made on an individual basis with respect to each lawyer.\textsuperscript{250}

4. Litigation Concerning Financial Constraints

Public defenders and other attorneys have sought to challenge directly both the sufficiency of appropriated funds and their specific wages. Initially, these claims involved challenges to pay schemes that simply failed to compensate attorneys or paid them at flat rates. Counties also brought claims aimed at state procedures, which forced county governments to pay for certain court costs. Individual public defenders and court-appointed attorneys brought challenges against these compensation systems and statutes.

The Louisiana Supreme Court held that attorneys can be required to represent indigent defendants without pay as a professional responsibility, but they must be able to recover overhead and out-of-pocket expenses from the court.\textsuperscript{251} As the court stated, “budget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys’ professional responsibilities.”\textsuperscript{252} The Alaska Supreme Court and the Oklahoma Supreme Court disagreed. In Alaska, attorneys must be compensated at the market rate.\textsuperscript{253} In Oklahoma, the court ruled that the compensation of court-appointed defense counsel in capital cases would be equal to the compensation provided to prosecutors.\textsuperscript{254}

\textsuperscript{249} SECURING REASONABLE CASELOADS, supra note 239, at 171.
\textsuperscript{250} Id.
\textsuperscript{251} State v. Wigley, 624 So. 2d 425, 429 (La. 1993). The Louisiana Supreme Court altered the procedures for appointing attorneys. Originally, it fell on the trial judge to not appoint an attorney if sufficient funds could not be found, but now an attorney is appointed, he can then make a motion for funds and if he cannot receive them then he can make a motion to halt the prosecution of the case. State v. Citizen, 898 So. 2d 325, 338–39 (La. 2005).
\textsuperscript{252} Wigley, 624 So. 2d at 429.
\textsuperscript{253} DeLisio v. Alaska Superior Court, 740 P.2d 437, 443 (Alaska 1987) (holding that court-appointed attorneys’ services were property and have to be fairly compensated under state constitution’s takings clause; lawyers cannot be required to accept cases pro bono; and compensation must reflect the open market rate).
\textsuperscript{254} State v. Lynch, 796 P.2d 1150, 1161, 1164 (Okla. 1990) (holding that compelling lawyers to represent indigent defendants without providing funding violated the due process of law under the state’s constitution; statutory fee limits provided inadequate compensation; fees for court-appointed defenders should be tied to hourly rates of prosecutors and public
Iowa, Florida, New York, and Washington have all declared capped salaries for public defenders to be unconstitutional facially and/or contrary to public policy.\textsuperscript{255} Courts in Alabama and Mississippi refused to find such pay schemes unconstitutional, but these courts forced the legislature to cover overhead costs and examine public defenders’ wages.\textsuperscript{256} Seeking similar relief in a New Mexico capital case, a public defense team filed a motion to be compensated at an hourly rate, to be allowed to withdraw and to have the death penalty taken off the table.\textsuperscript{257} The lawyers argued they would require $100,000 in additional funds to effectively represent the capital defendant.\textsuperscript{258} The New Mexico Supreme Court agreed the defendants’ attorneys’ pay was inadequate under the circumstances and stayed the prosecution until either additional funding became available or the death penalty was no longer pursued.\textsuperscript{259}

County public defenders and court-appointed attorneys in Kansas and West Virginia successfully challenged county-based systems based on equal protection violations stemming from procedural and administrative inconsistencies between rural and urban counties.\textsuperscript{260}

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\textsuperscript{255}See also Hulse v. Wifvat, 306 N.W.2d 707, 711–12 (Iowa 1981) (interpreting a statute that invariably increased compensation for lawyers representing indigent defendants by providing for “reasonable compensation,” which the court interpreted to mean compensation for the hours and fees associated with the case).

\textsuperscript{256}See May v. State, 672 So. 2d 1307, 1308–09 (Ala. Crim. App. 1993) (Alabama refused to declare the $1,000 fee cap unconstitutional, but held attorneys were entitled to reimbursement for overhead expenses at a presumed rate of $30/hour); Wilson v. State, 574 So. 2d 1338, 1341 (Miss. 1990) (Mississippi did the same thing, but declared overhead at $25/hour).

\textsuperscript{257}State v. Young, 172 P.3d 138, 139 (N.M. 2007).

\textsuperscript{258}Id. at 140.

\textsuperscript{259}Id. at 141–43.

\textsuperscript{260}See Stephan v. Smith, 747 P.2d 816 (Kan. 1987) (where court-appointed attorneys
Increased compensation was part of the remedy for the equal protection violations.²⁶¹ Twenty-six counties in Florida were also successful in challenging a state mandate demanding that county systems cover the costs of outside counsel for conflict cases.²⁶² The court found no basis for this mandate and ruled that the costs of the indigent defense system lay primarily with the state—not the counties.²⁶³

A taxpayers’ rights case in Mississippi brought by Quitman County was not as successful. In Mississippi, the counties were responsible for financing indigent defense.²⁶⁴ Quitman County sued on the basis that the state was in breach of its Constitutional duties by failing to fund the system.²⁶⁵ The court affirmed the lower court’s decision, finding Quitman County had not met its burden of proving that the funding mechanism led to systemic ineffective assistance of counsel.²⁶⁶

Aside from the Hurrell-Harring lawsuit, New York faced two challenges to its indigent defense system. A plaintiff-attorney brought an action seeking declaration that various sections of the assigned counsel plan in Onondaga County were invalid.²⁶⁷ The county adopted a bar association plan that rotated services of private counsel, coordinated by an administrator, with compensation fixed by the trial court judge.²⁶⁸ The New York Supreme Court Appellate Division held the court was without power to order any changes in compensation because that was the responsibility of the legislature.²⁶⁹ Further, the plaintiff did not have standing to assert claims concerning criminal defendants’ deprivation of

²⁶¹. See supra note 260 and accompanying text.
²⁶³. Id. at 781.
²⁶⁴. Quitman Cnty. v. State, 910 So. 2d 1032, 1034 (Miss. 2005).
²⁶⁵. Id.
²⁶⁶. Id. at 1048.
²⁶⁸. Id. at 420–21.
²⁶⁹. Id. at 421.
counsel. The court found that one cause of action was valid, holding that the section prohibiting attorneys from representing non-incarcerated criminal defendants prior to a determination of their eligibility violated their constitutional right to counsel. Similarly, Colorado faced a federal lawsuit challenging one of its misdemeanor statutes, which states “application for appointment of counsel and the payment of the application fee shall be deferred until after the prosecuting attorney has spoken with the defendant.” The statute remains on the books as of the publication of this article.

The New York County Lawyers’ Association challenged New York City’s proposed plan for indigent defense services—a plan that would allow appointment of institutional providers for conflict cases. The plaintiffs alleged that the new plan would place an even greater financial and administrative burden upon the institutional providers and private attorney panel. The city sought to dismiss the case for lack of standing, and the court dismissed the petition as to the remaining claims. Only one part of the plan, which altered the compensation for court-appointed 18B attorneys, was held invalid. The city dismissed the remaining claims, noting that whether the system would prove unconstitutional remained to be seen.

Cases brought by public defenders are often flawed given their claims are usually speculative in nature. A recent U.S. Supreme Court case, Kowalski v. Tesmer, found that public defenders did not have enough of a relationship with “hypothetical” future indigent clients to support Article III standing. The public defenders challenged the constitutionality of a Michigan statute that denied appellate counsel to indigent defendants who had pled guilty. The Court held that the
attorneys had other means of disputing the statute, such as leave to challenge denial of counsel in the Court of Appeals through the U.S. Supreme Court, or by state or federal collateral review.\textsuperscript{281} Similarly, in Minnesota, a public defender filed a claim stating that insufficient funds for his office could result in Sixth Amendment violations for his clients.\textsuperscript{282} The Minnesota Supreme Court held that the harm was too speculative and hypothetical.\textsuperscript{283} In addition, high caseloads were not prima facie evidence of ineffective assistance of counsel because of the lack of resulting prejudice.\textsuperscript{284}

Litigation addressing the systemic failures of the indigent defense system—from excessive caseloads to inadequate funding—has seen its highs and its lows. Courts are willing to go to extra lengths to protect the constitutional right to counsel, but most of the time these remedies are temporary and not forceful enough. Courts recognize that this is an area that state legislatures are failing to address through legislation. Courts, however, are ill-equipped to make the ultimate funding decisions necessary to make real changes. The outcome of the New York and Michigan cases may provide a stepping stone for the next generation of indigent defense litigation, but without any assistance from the legislatures, such reforms may never be realized.

5. Federal Litigation

In addition to state court litigation, there have been a number of relatively recent cases in federal court. In \textit{Hill v. Lockhart},\textsuperscript{285} the U.S. Supreme Court held that \textit{Strickland} applied to ineffective assistance of counsel claims stemming from the plea process.\textsuperscript{286} The deficiency prong of \textit{Strickland} remains unchanged, but the prejudice prong focuses on whether the deficient performance would have influenced the outcome of the guilty plea.\textsuperscript{287} The Court held that receiving incorrect information about the possible amount of time in jail before being parole-eligible did not amount to ineffective assistance of counsel because it failed to meet

\begin{thebibliography}{9}
\bibitem{} Id. at 126.
\bibitem{} Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn. 1996).
\bibitem{} Id. at 8.
\bibitem{} Id. at 5.
\bibitem{} 474 U.S. 52 (1985).
\bibitem{} Id. at 57–58.
\bibitem{} Id. at 59.
\end{thebibliography}
the prejudice prong of the *Strickland* test. The U.S. Supreme Court affirmed this principle in *Padilla v. Kentucky*, applying the modified *Strickland* test to a defendant’s claim of ineffective assistance of counsel at the plea stage. The defendant claimed his attorney did not inform him of the deportation consequences that would result from entering a guilty plea. The Court found such counsel constitutionally deficient, but remanded on the issue of prejudice. The Kentucky Court of Appeals found this omission was prejudicial, and vacated the defendant’s sentence.

The U.S. Supreme Court decided two cases in 2012 addressing the issue of guilty pleas, *Lafler v. Cooper* and *Missouri v. Frye*. In *Cooper*, the defendant brought a federal habeas challenge to his state conviction after trial, on charges of assault with intent to murder, that resulted in a 185 to 360 month-long jail sentence. The defendant rejected a guilty plea to assault with intent to murder that would have resulted in a sentence between 51 and 85 months. His attorney erroneously advised him that because he shot the victim below the waist, the prosecution could not prove intent to kill, and without intent to kill, the defendant could not be guilty of assault with intent to murder. His attorney advised him he would receive a lower sentence by going to trial. The case proceeded to the Supreme Court with the parties conceding that counsel’s performance had been deficient.

In *Cooper*, the Supreme Court addressed an issue of first impression: what must a defendant prove when he or she rejects a guilty plea and then claims ineffective assistance of counsel? The Court held the defendant must show that, but for the ineffective advice of counsel, there was a “reasonable probability” that the offer would have been presented to, and accepted by, the court—thus providing the defendant

288. *Id.* at 60.
290. *Id.* at 1478.
291. *Id.* at 1486–87.
293. 132 S. Ct. 1376 (2012).
296. *Id.*
297. *Id.*
298. *Id.*
with a less severe sentence. In *Cooper*, the Supreme Court found that the defendant had met this burden: but for the deficient performance of his counsel, the defendant and the court would have accepted the plea, and the sentence he received after the trial was far greater than his exposure under the plea bargain.

The Supreme Court then devised a procedure to remedy these types of claims based on the severity of the constitutional injury. In some cases, the Court held that it is appropriate to remand for re-sentencing and an evidentiary hearing. In other cases—particularly where the defendant would have pled to a lesser included offense or where a mandatory sentence binds the court—the state may be forced to reoffer the deal, and the trial judge could decide whether to vacate the sentence or let the conviction stand. The Court ordered the State to reoffer the plea deal in Cooper’s case and remanded it to the lower court.

In *Frye*, the defendant drove with a suspended license and the prosecutor offered two different plea deals. One of those deals would have resulted in a 90-day jail sentence. The public defender received the plea deal but never communicated it to Frye. The judge sentenced Frye to three years imprisonment. The Supreme Court held that attorneys have an obligation to convey plea deals to their clients and not doing so is ineffective assistance of counsel. The Supreme Court found counsel in Frye’s case constitutionally ineffective and remanded the case for a determination as to prejudice pursuant to the framework laid out by the Court in *Cooper*.

Defendants can also bring § 1983 actions against the state for Sixth Amendment violations. This strategy has been used both to expand access to counsel and to define when it is required. It was also used in the wrongful conviction cases discussed above. The defendant in

300. *Id.* at 1385.
301. *Id.* at 1391.
302. *Id.* at 1389.
304. *Id.* at 1391.
306. *Id.*
307. *Id.*
308. *Id.* at 1404–05.
310. *Id.* at 1411.
311. *See supra* notes 185–188 and accompanying text.
Rothgery v. Gillespie County used this method. In that case, the U.S. Supreme Court held the right to counsel attaches at the “initial appearance before a judicial officer, where [the defendant] learns the charge against him and his liberty is subject to restriction” as this marks the start of the adversarial process, triggering the Sixth Amendment.

C. Legislative Inaction

1. Examples of Legislatures Failing to Respond to the Courts

Even when called to action by the courts, state legislatures have repeatedly failed to address the problems within their indigent defense systems. Mississippi has one of the worst defender systems in the nation. It continues to operate a county-by-county funding system, with no financial support from the state, except for capital cases. Its indigent defense system has been criticized as having “no standards for representation, no centralized oversight, and no State funding.” In response to a 2005 lawsuit filed by a county that had been forced to borrow $150,000 and increase taxes to fund defense costs in a quadruple homicide, the Mississippi Supreme Court ruled that the statutorily established county-by-county system was constitutional.

Missouri, like Mississippi, has repeatedly demonstrated an unwillingness to make the fundamental changes necessary to provide adequate indigent defense services. Although there has been litigation, Missouri’s Supreme Court has, on multiple litigations, deferred to the legislature to come up with a permanent solution to the state’s indigent defense funding crisis. The legislature, in turn, has acknowledged the public defender system at least twice since the most recent case in 1981, but indigent defense remains in crisis.

313. Id. at 213.
314. Erin V. Everett, Salvation Lies Within: Why the Mississippi Supreme Court Can and Should Step In to Solve Mississippi’s Indigent Defense Crisis, 74 Miss. L.J. 213, 224 (2004); see also STEVENS ET AL., supra note 41, at 5 tbl.2 (listing Mississippi as one of the states with 50% or more funding from counties as of the fiscal year in 2008).
315. Id. at 216.
316. Quitman Cnty. v. State, 910 So. 2d 1032, 1048 (Miss. 2005).
317. Sean D. O’Brien, Missouri’s Public Defender Crisis: Shouldering the Burden Alone, 75 Mo. L. Rev. 853, 860–71 (2010) (the most recent decision was State ex rel. Wolff v. Ruddy 617 S.W.2d 64 (Mo. 1981)).
318. Id. at 863–64.
The Missouri system routinely sees high caseloads and turnovers coupled with low salaries and morale. Attorneys have complained that cases are not adequately investigated, and in some cases have threatened to stop accepting cases entirely.\textsuperscript{319} Although the Missouri Supreme Court has expressed concern about how excessive caseloads affect attorney competence, its “analysis of the plight of defenders and their clients [has been] constricted by Missouri’s statutory framework for delivering indigent defense services.”\textsuperscript{320}

Virginia enacted legislation in 2007 that made court-appointed counsel fee caps waivable, upon a showing of good cause, allowing an opportunity for judges to strike the hard cap payments of $120 for court-appointed counsel on a misdemeanor charge, $445 for a felony charge with a sentence of up to 20 years, and $1,235 for a felony charge with a sentence of more than 20 years.\textsuperscript{321} The legislation allowed for significantly increased funding for public defenders, created an independent oversight commission for indigent defense services, and adopted performance standards for indigent defense attorneys.\textsuperscript{322} Notwithstanding the new legislation, a 2010 report showed that Virginia continued to see one of the nation’s lowest public defender starting salaries ($37,000), one of the highest attrition rates (24%), and the lowest average attorney length of service (three years).\textsuperscript{323}

The fortieth anniversary of \textit{Gideon} saw the first anniversary of the Texas Fair Defense Act. In 2000, Texas had no state funding for indigent defense: most attorneys were not paid, and there were no standards set for the appointment of counsel.\textsuperscript{324}


\textsuperscript{320} O’Brien, \textit{supra} note 317, at 871 (For example, Missouri has “rejected the suggestion that the state public defender had the statutory authority to appoint members of the bar to work for free, thus closing the door on the [Missouri Public Defense Commission’s] attempt to devise a regulatory remedy for the workload crisis.”).


\textsuperscript{322} \textit{Id.} at 18–19.


\textsuperscript{324} Rodney Ellis & Hanna Liebman Dershowitz, \textit{Gideon’s Promise: The Texas Story}, \textit{CHAMPION}, Apr. 2003, at 62. The Act, passed partly in reaction to mounting media criticism in 2002, mandated that counsel appointment be made promptly and neutrally from lists of
2. Initial Responses, then Failing to Continue Programs

Lawsuits aimed at reforming state indigent defense systems have been successful in court, particularly in Arizona, Oklahoma, and Louisiana, although judicial pronouncements alone have not sufficed to bring enduring structural change to these systems. In addition, some lawsuits, viewed as victories for *Gideon*, ultimately faltered for lack of enforcement. For example, a lawsuit by the ACLU over problems with staffing, expertise, and professionalism in the Allegheny County, Pennsylvania Public Defender’s Office, led to a 1998 consent decree—and then a new suit in 2003 when the ACLU sought to hold the county in contempt for failing to actually implement the consent decree. Court supervision was not terminated until 2005; even then, an ACLU representative warned that there was a serious risk of backsliding in the face of budget-cutting political pressure. Similarly, although the Georgia Indigent Defense Act of 2003 was hailed as a national model for overhauling a patchwork defense system, it suffered from budget cuts, and the Southern Center for Human Rights filed suit in 2008, challenging the system’s director’s scaling back of programs, firing of staff members, and closing of an office.

The South Carolina State Bar Association asked the state supreme court to issue a mandate effectively limiting attorneys’ public service responsibilities to fifty hours a year. Ten years later, and after at least one scathing report highlighted deficiencies in the state’s indigent defense system, the state created in 2007 a new, unified system. The law resulted from a series of state senate-chaired hearings aimed at completely overhauling the state’s existing public defender system, which at the time consisted of thirty-nine separate non-profit qualified attorneys. *Id.* In addition to promulgating regulations of attorney reimbursement and assessment of need, the Act established a statewide agency to develop further standards and monitor counties’ performance. It also put state money—to the tune of $12 million a year—into indigent defense for the first time. *Id.*


327. See *id.* at 959.

328. *Id.*


corporations with methods of compensation that varied “widely from county to county.” South Carolina adopted a new unified system for public defense that aimed to create a uniform, circuit-based public defender system. The legislature appropriated $7.3 million extra to fund the new system in its first year, and even approved a student loan reimbursement program for assistant solicitors and public defenders.

The system has since faltered due to lack of funding: defenders are partially funded by the county they represent, but rely on a state commission on indigent defense to provide the majority of their budgets. By April 2011, although county-level funding had “stayed fairly constant, . . . circuits [had] seen state funding slashed by at least half over two fiscal years,” even as defenders saw an alarming increase in caseload.335 There, too, defenders are familiar with overwhelming caseloads (on average 467 in the 2007–10 fiscal year, up 22% from 2007–08).

In 2003, a New York Superior Court judge agreed with the New York County Lawyer’s Association that the county’s rates for assigned counsel ($40 an hour in-court and $25 an hour out-of-court, last raised seventeen years prior) were so low they precluded effective representation: “This is a direct result of the Legislature’s failure to provide adequate compensation to assigned counsel.”337 Despite recognizing that it did “not have the capacity or the resources, nor [was] in the best position to provide a . . . solution to the present crisis,” given that the executive and legislature branches were best suited to dealing with the “complex societal, political, economic and governmental issue” of expending and providing funding for indigent defense, the court decided to do so “with limited judicial precision and minimal intrusion into the Executive and Legislature’s province.”338

331. Id.
332. Id.
333. Id. at 18.
335. Id.
336. Id.
338. Id. at 410.
The legislation provided for a task force to review pay rates for assigned counsel—but no one was appointed to the task force, and no report was issued, leaving the rates the same despite inflation and an increased cost of living.\textsuperscript{340} Worse yet, because the NYCLA decision only raised compensation for appointed counsel, some jurisdictions simply began to rely more heavily on public defenders; this forced the Legal Aid society to lay off a quarter of its support staff in 2004.\textsuperscript{341}

Prospective judicial reform was similarly stymied in Massachusetts because of legislative underfunding. In 2004, the Massachusetts Supreme Judicial Court held that the state had violated indigent defendants’ constitutional rights because the state’s extremely low pay rates made lawyers reluctant to serve as court-appointed counsel.\textsuperscript{342} Although the court did not raise appointed attorneys’ hourly rates, it ordered that defendants would be released if they were not provided counsel within seven days of their arrest.\textsuperscript{343} A year after the decision, the Massachusetts legislature raised attorneys’ rates by $7.50; a year after that, the state’s indigent defense commission was in the red, and legislators were attempting to cut the new funding.\textsuperscript{344} Despite the legislature’s actions, there still remains a shortage of lawyers for indigent defendants.\textsuperscript{345}

In several states, the success of legislative overhauls has been dependent on funding that has been slow to accumulate. Although Minnesota originally funded indigent defense on a county-by-county basis, in the 1980s and ‘90s, it shifted slowly to a statewide system, assuming responsibility for organizing indigent defense and providing services at the same time as it shouldered the concomitant financial burden.\textsuperscript{346} State reimbursements peaked at $68 million in 2009, but have since declined.\textsuperscript{347} The state has experimented with varying levels of

\begin{itemize}
  \item \textsuperscript{339} Adam M. Gershowitz, Raise the Proof: A Default Rule for Indigent Defense, 40 CONN. L. REV. 85, 102 (2007).
  \item \textsuperscript{340} See id.
  \item \textsuperscript{341} Id. at 102–03.
  \item \textsuperscript{342} Id. at 103.
  \item \textsuperscript{343} Gershowitz, supra note 339, at 103.
  \item \textsuperscript{344} See id.
  \item \textsuperscript{345} See id.
  \item \textsuperscript{346} Susan Herlofsky & Geoffrey Isaacman, Minnesota’s Attempts to Fund Indigent Defense: Demonstrating the Need for a Dedicated Funding Source, 37 WM. MITCHELL L. REV. 559, 568–92 (2011).
  \item \textsuperscript{347} Id. at 587.
\end{itemize}
copayments for indigent defense services, as well as with a temporary increase in attorney license fees; and still public defenders are overburdened, in some cases resorting to waitlists in an attempt to make their workloads more manageable.\footnote{348 Id. at 587–92.}

Louisiana’s faith in its legislature also proved to be misplaced.\footnote{349 Gershowitz, supra note 339, at 103–05.} Shortly after the \textit{Peart} decision, the state boosted public defender funding by $5 million and created a task force.\footnote{350 Id. at 104.} Since then, the legislature has not been very motivated to continue increasing funding to compensate for inflation and the defenders’ “continually increasing caseloads.”\footnote{351 Id.} \textit{Peart}’s creation of a rebuttable presumption of ineffective assistance of counsel “failed to set forth any standards to give the legislative and executive branches guidance in bringing the system into constitutional compliance,” as one of the decision’s dissenting justices had originally complained.\footnote{352 State v. Peart, 621 So. 2d 780, 795 (La. 1993) (Dennis, J., dissenting).} Despite widespread frustration with the continual lack of funding, in 2005, the state supreme court again held that the courts lacked authority to order funding increases, overturning a trial court decision ordering a parish to set aside hundreds of thousands of dollars for indigent defense.\footnote{353 Gershowitz, supra note 339, at 105.} This time, the court threatened to allow defendants to file motions to halt prosecution and even go free if adequate funding failed to be appropriated.\footnote{354 Id. at 103.} But, as one critic noted, the “threat to allow trial judges to halt prosecutions is a flawed remedy because it shifts the burden onto trial judges to analyze individual cases, rather than creating a sufficient incentive for the legislature to act.”\footnote{355 Id.}

Oklahoma and Arizona have seen similar developments. After 1990’s \textit{State v. Lynch},\footnote{356 State v. Lynch, 796 P.2d 1150 (Okla. 1990).} in which the Oklahoma Supreme Court held that a fee cap for appointed counsel violated the state constitution, and increased appointed counsel fees to be consistent with those of prosecutors.\footnote{357 Id. at 1161, 1163.} The legislature initially appropriated more funding and created a supervisory indigent defense board.\footnote{358 Gershowitz, supra note 339, at 105.} Soon, though, the
legislature started using a bidding process for its indigent defense system, and funding to the supervisory board began to wane: “the [Lynch] decision inspired change, [but] it was unable to sustain it.” 359 Although Arizona’s State v. Smith ruled that one overwhelmed contract attorney’s caseload was excessive and unconstitutional under both the state and U.S. Constitutions, the presumption it established—that indigent defendants represented by low-bid contract lawyers had received ineffective assistance of counsel—had only a fleeting impact on the legislature’s actions. 360 Although the Smith ruling spurred a new system for hiring and compensating lawyers, “the benefits were ephemeral, with caseloads rising and attorney compensation remaining stagnant in subsequent years.” 361

III. DEVELOPING A TWENTY-FIRST CENTURY PUBLIC DEFENSE CULTURE

Much of the difficulty in the funding and delivery of innovative indigent defense services stems from a lack of consensus about who bears responsibility for funding new approaches. The federal government has historically and routinely refused to provide additional indigent defense funding to state providers to engage in innovative experiments because federal authorities did not want to “relieve” state government of its obligation to fund indigent defense. 362 While this perspective has perhaps some surface appeal, it is dangerously short-sighted. Government has, by and large, never been in the business of innovation. Funders, both public and private, can and should, participate in funding experiments with socially and politically connected public defender offices. Those funders could establish demonstration projects that could serve as a “glide-path” to state government funding for innovative work.

State and federal government funders in today’s fiscal climate must look for the most efficient ways to provide necessary criminal justice services for defendants and communities while at the same time, maintaining high levels of public safety. Preventive services are widely

359. Id.
360. See id. at 106.
361. Id.
recognized to be a cheaper and longer lasting remedy than incarceration for a number of criminal defendants.\textsuperscript{363} The reality is that defenders are often better positioned to affect funding; however, the government views the investment in defenders as only a necessary evil. But legislators must come to see that defenders, by virtue of their work with clients and communities, are often uniquely aware of programs and services in the communities in which they work. In addition, relationships with families, clients, and service providers routinely enable defenders to take a holistic approach with their clients. This requires, however, that jurisdictions begin to think differently about how they fund public defense. Sources of funding should expand beyond the current “dollars-for-cases” mentality that leads to quick pleas and high recidivism. Rather, city managers, county administrators, and statewide budget directors should come to know the range of work that defenders can do (and often are already doing) to provide better use of taxpayer dollars.

Defenders, too, must think differently about their work. Too often, chief defenders have operated more as followers than as leaders in the political process. Indigent defense systems still tend to promote or select chief defenders based on seniority or trial prowess rather than political, financial, and leadership skills. Defenders must leave the confines of their offices and the courtroom, and venture into the community. No longer can they wait to work with political officials when it comes time to request or defend a budget. Instead, public defenders must forge relationships with city and county councilmembers, state representatives, and federal officials in an ongoing effort to bring a more comprehensive understanding to criminal justice policy formation. In addition, stronger efforts must be made to develop relationships with those in charge of agency funding. Engaging in outreach and education must become regular parts of the job for all public defenders.

Office-wide relationships with the clergy (beyond testifying at bail or sentencing hearings) are also crucial. If defenders can develop a rapport with those individuals in their cities, counties, and catchment areas, then defenders will be seen as a central part of the socio-political

and cultural landscape. This, in turn, will help with fundraising and lobbying.

Public defender unions must also reassess their role in the community. Unions play a significant political role in today’s society. Nationally, however, there has been little communication among public defender unions, teacher unions, and other public service workers. Unions must see their role as more than mere arbiters of contracts, and must demonstrate their value on a larger scale in the national public defender movement.

Litigation will continue to be a part of the process by which we spur legislatures and judiciaries to implement the mandates of Gideon. Continuing to collaborate with the local bar, the ABA, and other national organizations, will provide much needed political allies. Research and empirical data will also help. Other than case statistics to support the dollars-for-cases funding regime, defenders have not, by and large, partnered with universities and research institutions or examined other services that these universities and institutions can provide. Public defenders have also failed to use research and empirical data to evaluate their success in providing other services to their clients, such as their ability to get clients more access to programs, visitation rights, and employment. Defenders are often the primary catalyst when clients make the leap from the unemployment line to lives as working, tax-paying members of society. Defenders are often instrumental in helping with the reentry process for previously incarcerated clients.\(^{364}\) While not part of their primary mission, these are nonetheless critical community activities.

A. A Federal Role in Indigent Defense

Just as defenders may have important non-legal roles in the twenty-first century, the federal government also needs to reassess its role in guaranteeing effective counsel to indigent defendants. To ensure more effective intervention to improve indigent defense, the federal government will need to implement simultaneous policy changes with regard to sentencing, tough-on-crime rhetoric, and the portrayal of criminal defendants. By changing the context for criminal justice policy-

making, federal government involvement may have a more meaningful and lasting effect. There is precedent for such an approach. Reentry, the reintegration of the formerly incarcerated, is perhaps one of the best examples of a federally-implemented policy that continues to enjoy widespread success. Reentry efforts began with changing the conversation around ex-offenders returning to their communities. Against that backdrop, the federal government led efforts that have survived transitions from Democratic and Republican administrations, as well as the economic downturn in the first decade of the twenty-first century. But federal efforts specifically focused on indigent defense have not fared as well. One need only look at the “Access to Justice” initiative and its utter failure to see the recent shortcomings of federal intervention.365

There are steps that the federal government can and must take. First, the Department of Justice and the White House should organize and host a national conversation on Gideon and indigent defense. Second, professional standards, high caseloads, and budgeting issues must be central topics in this discussion. Third, the Department of Justice should serve as a forum for discussion with private sector charitable organizations (such as the MacArthur Foundation, the Ford Foundation, the PEW Foundation, and the Open Society Foundation) to devise and implement a strategy to ensure counsel for the indigent (and indirectly affect mass incarceration in the United States). Finally, the Department of Justice should open the National Advocacy Training Center annually to train public defenders just as it allows prosecutors to use the center for training.

Typically, the federal government plays little, if any, role in the administration and delivery of indigent defense services. There are obvious reasons for this: the complex bureaucracy, the highly political environment, and constant media scrutiny. That said, in areas such as training, pilot project development, and practice innovation, there can be a role for the federal government. Recent history, however, illustrates the problems with federal participation.

1. **Reentry: A Model for Future Federal Intervention**

Much like the conversations around offender reentry, any lasting change in providing indigent defense services must include the broader

365. See discussion infra notes 368–390 and accompanying text.
community. Since the inception of *Gideon*, there has not been a comprehensive discussion about what *Gideon* really means and how states should honor it. Although we have seen some promise in various holistic and evidence-based analyses, more discussion and research is needed to find the best way to provide access to services while reducing recidivism.

In the 1980s, Fred Friendly implemented a series of public roundtables on issues of public concern. Those conversations led to policy recommendations at the local, state, and federal levels. This same methodology was implemented by the federal government when Attorney General Janet Reno called for an examination of what we, as a nation, were doing to prepare individuals for release from prison. The Justice Department, the Counsel of State Governments, the Pew Foundation, the Urban Institute, and many other prominent organizations engaged both the public and private sector in a number of discussions concerning reentry. We have witnessed labor groups, educators, elected officials, social workers, vocational experts, psychologists, and others involved in discussions around the country speak about what might work. These conversations resulted in an even broader discussion, and even the drafting of legislation.

Given the currently poor financial climate and the lack of a consensus with respect to federal involvement, now is a good time to extend the conversation to even more groups and entities. As we have begun to re-examine the war on drugs with its tremendous financial and social costs, groups and individuals, including the Attorney General of the United States, are urging for more discussion and research on making America’s criminal justice system run fairly and effectively.

2. Problems with Federal Involvement: The Tribe Dilemma

In February of 2010, it became clear that Harvard Professor Laurence Tribe’s widely speculated-upon move to the Department of Justice would result in his appointment as Senior Counselor for Access to Justice, a position created especially for him. Tribe was chosen to

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367. This author conducted a number of these Socratic Dialogues for the Department of Justice and numerous foundations on Reentry Policy.

lead the new Access to Justice Initiative of centralizing America’s indigent criminal and civil justice systems—specifically, improving indigent defense, enhancing the delivery of legal services to the poor and middle class, and identifying and promoting alternatives to litigation.\textsuperscript{369} Tribe was to be a “primary liaison” to the federal judiciary, and he was to work with federal, state, and tribal judiciaries towards promoting fair, impartial, and independent adjudication.\textsuperscript{370}

The announcement brought optimism to those concerned with indigent defense, but the choice of a Harvard Law professor with little if any practical experience seemed unusual. Others at Harvard, including Charles Ogletree, Carol Steiker, and James Baker, would have brought significant practical experience to the job.\textsuperscript{371}

Tribe began his official duties on March 1, 2010.\textsuperscript{372} By April 10, 2010, it was clear that he was operating with “a small staff, a limited budget, little concrete authority and a portfolio far less sweeping than the one he told friends he had hoped to take on in Washington.”\textsuperscript{373} His tenure in the position—which ended before the year was over\textsuperscript{374}—was marked by minimal changes, but a focus on information-gathering and bridge-building.

Among his successes, Tribe partnered with the National Institute of Justice to request a grant towards expanding access to justice-related...
In September 2010, the initiative helped facilitate the deployment of broadband technology in Washington State and North Carolina to make vital resources and services, including legal services, accessible to those living in impoverished and/or rural areas. The federal government chose to focus on these types of endeavors. Concerns about the scope and quality of indigent defense services were left unaddressed. Attorney General Eric Holder touted the establishment of more statewide Access to Justice Commissions, expanded access to domestic violence, wage theft, foreclosure and child dependency programs, along with reforms to legal education, at an October 2010 awards dinner.

Attorney General Holder also credited the initiative for creating a new Department of Labor (“DOL”) and ABA partnership to help workers resolve complaints before the DOL’s Wage and Hour Division by using a new toll-free number, as well as a collaboration between the Department of Veterans Affairs and the Legal Services Corporation to connect fifty veteran centers with local legal aid offices. Those types of collaborations, Holder noted, characterized the type of work Tribe was doing through the initiative: meeting with judges, attorneys, community groups, and politicians to identify and implement projects focusing on “community-based solutions.” The initiative had called for additional research into effective ways to deliver legal services, particularly for individuals living on Indian reservations and in rural areas, and to enact rules meant “to avoid ‘worst case scenarios’ when a lawyer cannot be afforded.” The initiative also sent a letter to courts

379. Holder, supra note 378.
380. Id.
across the country, citing specific failures regarding language barriers for limited-proficiency speakers, as they related to Title VI of the Civil Rights Act.\textsuperscript{381}

Holder’s praise for these minor steps highlighted the problems with the effort—its inability to acknowledge and address the deep-seeded problems plaguing indigent defense. The initiative made little if any progress. The effort immediately focused on issues that were being reported in the news. For example, in conjunction with Housing and Urban Development, Access to Justice issued a November report on strategies for strengthening foreclosure mediation programs, including a list of potential models based upon those used in some jurisdictions.\textsuperscript{382}

Although the initiative addressed some high profile civil justice issues, it took fewer steps toward enacting changes in America’s criminal justice system. In Chicago, it worked with several groups, including the Chicago Police Department, the Office of the State Attorney, and other organizations to implement a deferral program for first-time, non-violent drug offenders.\textsuperscript{383} In New Orleans, the initiative focused on the “expensive” system of jailing many defendants before trial, and offered to work with city officials to create a pretrial evaluation and services program.\textsuperscript{384} Later, it conducted a parish-wide study analyzing the size of correctional facilities.\textsuperscript{385}

Professor Tribe left the Department of Justice on December 3, 2010, for medical reasons.\textsuperscript{386} He expressed satisfaction with the way the initiative had been able “to create a much more energized network, even though the problems are pervasive and cannot be transformed overnight.”\textsuperscript{387} He also expressed frustration about the initiative’s inability to provide significant aid in drafting meaningful legislation.\textsuperscript{388}

Tribe’s replacement, Mark Childress, formerly a partner at Foley Hoag LLP, was sworn in as senior counselor for Access to Justice on

\begin{itemize}
\item \textsuperscript{382} See Levine, supra note 378.
\item \textsuperscript{383} See Holder, supra note 378.
\item \textsuperscript{384} Laura Maggi, Bail Overhaul Urged for New Orleans, TIMES-PICAYUNE (July 15, 2010), http://www.nola.com/crime/index.ssf/2010/07/bail_overhaul_urged_for_new_or.html.
\item \textsuperscript{386} Savage, supra note 374.
\item \textsuperscript{387} Id.
\item \textsuperscript{388} Id.
\end{itemize}
June 2, 2011. Childress, like Tribe, assumed the position with an impeccable resume, but little practical experience. His arrival received little fanfare, and since then, the Access to Justice Initiative’s only announcement has been a notice discussing the Initiative’s involvement in training more attorneys to help litigation fraud victims. In addition, in the continuing round of musical chairs that the position has become, Deborah Leff is now the acting senior counsel.

B. Rethinking the Criminal Process

In addition to the issue of resources, there is also room for a national discussion on sentencing practices in the last twenty years. Sentencing policy reform is an area that uniquely positions the Department of Justice, the Attorney General, and the President to lead the discussion. “Tough-on-crime” policies throughout the past two decades have contributed to both a front-end problem with ensuring defense services, as well as a back-end problem with prisoner reentry. Previously, social justice arguments about the failure of such sentencing policies had fallen on deaf ears.

It has taken the economic downturn to convince state legislatures that it would be prudent not to incarcerate non-violent offenders. Texas, for example, closed a 1,100-bed facility in Sugarland, and began to place non-violent offenders into drug treatment programs. The state also expanded its number of reentry programs in hope that this investment would decrease recidivism rates. Texas taxpayers have realized hundreds of millions of dollars in savings while the state has enjoyed the lowest crime rate in thirty years. Other states, including South Carolina, Kentucky, Arkansas, and Ohio, have engaged in some form of

392. Id.
393. Id.
criminal justice reform.\textsuperscript{394} Crime rates have fallen to forty-year lows, and the fiscal realities have resulted in more than a dozen states moving to reduce costs of incarceration.\textsuperscript{395} The federal government has also joined in this massive sentencing overhaul by reducing the sentencing disparity between powder and crack cocaine.\textsuperscript{396} The federal sentencing commission also voted to make some of the crack cocaine sentence reductions retroactive.\textsuperscript{397} Some states had already begun to explore alternatives to the mandatory minimum sentences of the 1980s and 1990s. California (through referendum) and New York (through the legislative process) looked to drug treatment and softening of the Rockefeller Drug Laws as alternatives.\textsuperscript{398} California continues to grapple with the costs of maintaining its “three-strikes” law in the face of a court-order to reduce the number of inmates in its severely overcrowded prisons.\textsuperscript{399}

C. Right on Crime

“Right on Crime” purports to apply conservative principles to criminal justice policy with the ultimate aim of “achieving a cost-effective system that protects citizens, restores victims, and reforms wrongdoers.”\textsuperscript{400} The organization advocates cutting crime rates and “costly” incarceration rates at the same time, pointing to seven states—Maryland, Nevada, New Jersey, New York, North Carolina, South Carolina, and Texas—that have accomplished this feat in the last decade.\textsuperscript{401}

\begin{itemize}
\item \textsuperscript{394}Id.
\item \textsuperscript{395}Savage, supra note 391.
\item \textsuperscript{396}Id.
\item \textsuperscript{397}Id.
\item \textsuperscript{398}Id.
\item \textsuperscript{399}Brown v. Plata, 131 S. Ct. 1910, 1947 (2010).
\item \textsuperscript{400}Statement of Principles, RIGHT ON CRIME (last visited Mar. 12, 2013), http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/.
\item \textsuperscript{401}Reduce Costs, RIGHT ON CRIME (last visited Mar. 12, 2013), http://www.rightoncrime.com/the-conservative-case-for-reform/reduce-costs/. As Right on Crime unveiled its website in December 2010, Texas Public Policy Foundation President Brooke Rollins spoke on a conference call about how Texas “saved billions while its crime rate declined 9 percent,” by 2010 hitting its lowest crime rate since 1993. See Kyle Mantyla,
The organization has gained steady traction. Prominent conservatives have expressed their support: on Right on Crime’s website, Rick Perry urges states to “focus more resources on rehabilitating those offenders so we can ultimately spend less money locking them up again,” and Bobby Jindal advocates for an offender reentry program that can “curb the cycle of repeat offenders and thereby reduce the burden on our prisons and help offenders create a place in society that adds value to their lives while keeping our communities safe for our families.” Newt Gingrich and Pat Nolan, two early signatories, wrote a laudatory Washington Post editorial about the organization.

Right on Crime formally launched an Oklahoma initiative, with the support of its state Speaker of the House, in March 2011. Two months later, the ACLU joined forces with Right on Crime, district attorneys, and the CEO of a faith-based prison ministry to speak about the urgent need for criminal justice reform, in support of a new American Bar Association initiative. Its proposals have not been universally welcomed, however; in September 2011, despite former Governor, Jeb Bush’s endorsement (Bush, a signatory to the “Right on Crime” statement of principle), the Orlando Sentinel reported that

Conservatives Seeks [sic] to Reform Justice System to Lock Up Fewer Criminals, RIGHT WING WATCH (Dec. 15, 2010), http://www.rightwingwatch.org/content/conservatives-seeks-reform-justice-system-lock-fewer-criminals. A bipartisan consensus began developing on the state’s criminal justice system in 2005, and reflected the ideas that imprisoning non-violent offenders for technical violations wasted money, and that rehabilitation and restitution should play larger roles in the criminal justice system. Grover Norquist of Americans for Tax Reform noted that much conservative interest in rehabilitation and prison reform started with faith-based organizations. The state soon adopted an approach that emphasized controlling criminal justice costs by focusing on incarcerating only the most dangerous and violent offenders. See Savage, supra note 391.

although the Florida legislature had begun considering implementing some of the organization’s reforms, legislators had balked at potentially being seen as soft on crime.406

This movement was created to make the “conservative case for reform.”407 What has traditionally been the exclusive province of liberal Democrats has now moved into discussions amongst mainstream Republicans. A number of voices have noted the political shift, including Adam Gelb, the director of a corrections policy project at the Pew Center on the States. Gelb states: “Over the last few years there has been a dramatic shift in the policy and political landscape on the incarceration issues, and momentum is building.”408 Pew Center for the States has been a leading voice in criminal justice reform.

In addition to somewhat conservative coalitions, the federal government brings other resources to the table. In recent years, the Department of Justice, in conjunction with Equal Justice Works, had helped to fund a series of fellowships for young aspiring public defenders.409 Although this partnership with DOJ has ceased, it represents a new approach to training and placing young public defenders. In addition, we have seen wonderful new initiatives like the Southern Public Defender Training Center, which is run by Professor Jonathan Rapping, an alumnus of the Public Defender Service for Washington, D.C.410 These collaborations are an excellent start, but hardly make up for generations of neglect towards the national indigent defense system.

407. The Conservative Case for Reform, RIGHT ON CRIME, http://www.rightoncrime.com/the-conservative-case-for-reform/ (last visited Mar. 12, 2013); Republican affiliates of the group include: “former House Speaker Newt Gingrich; Grover Norquist, an antitax activist; Asa Hutchinson, a former director of the Drug Enforcement Administration; and William J. Bennett, a former White House ‘drug czar.’” Savage, supra note 391.
408. Savage, supra note 391.
The Department of Justice should develop a comprehensive plan to address the glaring inequities in public defense. Focusing investigative resources and exploring lawsuits against the states that most routinely violate defendants’ Sixth Amendment rights would send a clear message to states that they must be serious and active in providing indigent defense services. Recently, we have witnessed the power of the DOJ in its negotiated consent decree with the New Orleans Police Department. 411 The Department of Justice’s focus on law enforcement agencies in Oakland and Seattle also sets the stage for improving the criminal justice systems in these jurisdictions. 412

In addition to litigation, the Department of Justice has the resources to fund research and innovation in the delivery of indigent defense. Focusing Bureau of Justice Assistance and National Institute of Justice funding towards research, as well as collaborating with Health and Human Services and other federal agencies, would bolster Department of Justice efforts. In addition to litigation, the Department of Justice has the resources to fund research and innovation in the delivery of indigent defense. Focusing Bureau of Justice Assistance and National Institute of Justice funding towards research, as well as collaborating with Health and Human Services and other federal agencies, would bolster Department of Justice efforts. The Attorney General should also articulate a clear mandate to provide parity in funding for prosecutors and defenders where the functions are the same: For example, there should be parity of funding for training in both prosecution and defense funding. In addition, there should be parity of salary for both defenders and prosecutors and resources for investigators and other support personnel where appropriate should be equal.

Finally, involving the private sector, state and federal non-profits, along with educational institutions would further aid in addressing this important issue.


412. See Michael E. Ross, The Epidemic of Police Brutality, ROOT (Dec. 26, 2011), http://www.theroot.com/views/epidemic-excessive-force-police?page=0,0 (detailing the DOJ investigation in Seattle and noting that the Department of Justice Civil Rights Division opened at least 17 investigations into police departments); see also Terry Collins, Oakland Police Reach Deal, Avoid Federal Takeover, HUFFINGTON POST (Dec. 6, 2012), http://www.huffingtonpost.com/2012/12/06/oakland-police_n_2252963.html (The Oakland Police Department is attempting to settle with the Department of Justice).
IV. Conclusion

America’s public defense system is collapsing under the weight of mass incarceration, a lost war on drugs, and a lack of organization. The patchwork system of funding, training, and provision of services cannot continue. The financial strain on the states, counties, and cities has become a crisis. The lack of adequately funded public defender offices screams for a national conversation on criminal justice policy and the proper implementation of constitutional protections. Many of the recommendations and proposals in this piece focus on a new role for defenders and defender unions; however, there is also room for the federal government to become more directly involved.

Although there has traditionally been no obvious role for the federal government in providing state-based indigent defense, the current reduction in crime, fiscal crisis, and general dissatisfaction with criminal justice policy suggest the need for an important leadership role on the part of Washington. The federal government can and should participate in the re-organization of America’s public defense system. There should be a call for participation in a national discussion on crime, poverty, and the mandates of the Gideon decision. One only need look to the states to justify federal intervention.

Courts have been reluctant to tread on what they see as the legislature’s function of funding and organizing effective indigent representation; they have cited constitutional as well as logistical concerns while they have simultaneously acknowledged their frustration at legislative inertia. Leaving change to the legislatures has been a continual source of disappointment. Without any sort of impetus, state legislatures have repeatedly dropped the baton the judiciary keeps handing off to them. In some cases, this has led to a cycle of lawsuits and a jurisprudence of stagnation.

I have been privileged to teach and mentor a generation of young lawyers who want nothing more than to work in what they consider the civil rights issue of their generation: criminal justice. To provide adequate funding and training, as well as reasonable caseloads and sensible criminal justice policy, will ensure that Gideon’s importance will resonate for another fifty years.