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Note

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GIDEON'S PROMISE UNFULFILLED: THE NEED FOR LITIGATED REFORM OF INDIGENT DEFENSE

In Gideon v. Wainwright, [1] the Supreme Court declared it an "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." [2] To ensure the fairness that the Gideon Court sought, however, counsel must be not only present, but also "effective": sufficiently competent to protect zealously a defendant's rights under the Constitution. [3]

Nonetheless, nearly four decades after Gideon, the states have largely, and often outrageously, failed to meet the Court's constitutional command. [4] The widespread, lingering deficiencies in the quality of indigent defense [5] counsel have led some to wonder whether this right, so fundamental to a fair and accurate adversarial criminal process, is unenforceable. [6] The political process failure in this area is unsurprising, for indigent defendants, by definition, lack the financial and political capital necessary to pursue effective reform efforts.

It is more troubling, albeit explicable, that the adversary process that produced Gideon has failed to demand its realization. The natural tendency of litigators to seek to enforce the right to counsel retrospectively and individually--that is, to rectify problems that have already arisen in particular cases--has typically led only to a legal deadend. ***2063** Such claims are difficult to win and getting more so. [7] These lawsuits are hampered by stiff procedural barriers [8] and the near insuperability of the standard governing such claims, which was established in Strickland v. Washington. [9] Even if successful, moreover, these individualized lawsuits offer little hope of bringing about systemic change.

This Note argues that the best short-term means for overcoming this political process failure and improving the quality of indigent defense is litigated reform--institutional change accomplished by obtaining court decrees that require states to provide counsel that meets the Constitution's demand for competence. Strategies used by litigants in other institutional reform efforts have shown great promise as tools to give substantive content to the right to counsel. Institutional reform litigation in this context is a particularly apt solution because of both the political process failure and the high bar of Strickland. This Note thus advocates a systemic and prospective approach to enforcing the mandate of Gideon and Argersinger v. Hamlin. [10] Although such a strategy is not a complete solution, it nevertheless begins to address the fundamental underlying lack of regard for indigent defense.

I. Gideon's Promise Unfulfilled

Although analysts of the criminal justice system may disagree about the best solution to the problems facing indigent defense, [11] there is broad consensus that criminal defense systems are in "a state of perpetual crisis." [12] As two commentators recently noted, "[t]he grave inadequacy of existing systems for serving the indigent is widely acknowledged ***2064** and widely discussed." [13] In fact, since the 1963 Gideon decision, a major independent report has been issued at least every five years documenting the severe deficiencies in indigent defense services. [14] The evidence is unambiguous and telling. Lawyers representing indigent defendants often have unmanageable caseloads that frequently run into the hundreds, far exceeding professional guidelines. [15] These same lawyers typically receive compensation at the lowest end of the professional pay scale. [16] Stories of intoxicated,

sleeping, and otherwise incompetent public defenders are legion,[17] such that it has become trite to lament the sometimes shockingly incompetent quality of indigent defense counsel in America today.

The systemic impact of the poor quality of indigent defense counsel is unfortunately rarely evaluated beyond anecdotal reports of extraordinarily deficient defense counsel performances. A recent study in Harris County (Houston), Texas, however, vividly portrays the inequities of the two-tier system of justice now in place. The 1999 study revealed that of 30,000 felony filings, fifty-eight percent of defendants with appointed counsel were sentenced to jail or prison, compared with twenty-nine percent of defendants represented by private counsel.[18] To control for the severity of the various crimes at issue, the study also examined the single criminal charge of first-offense possession of less than one gram of cocaine. Here too the disparity was significant: fifty-seven percent of indigent defendants ultimately were incarcerated, whereas only twenty-five percent of defendants with private counsel were sentenced to serve time.[19]

***2065** The claim that indigent defense sorely needs reform is neither novel nor controversial. However, two facets of the current crisis bear brief mention to underscore the severity of the problem. First, public attention has focused primarily on the impact of ineffective counsel in the death penalty context.[20] Although this is appropriate,[21] the capital case is the exception, not the rule.[22] Indigent defense in everyday misdemeanor and minor felony cases has received far less attention but is increasingly important.[23] Second, because such a large proportion of criminal defendants are in fact indigent, the low quality of indigent defense fundamentally calls into question the overall fairness of the criminal justice system. According to most estimates, about eighty percent of all criminal defendants are represented by indigent defenders.[24] The skill of indigent defense counsel is thus essential to quality truth-seeking in most criminal cases, and fundamentally affects the legitimacy of the system.

II. The Case for Institutional Reform Litigation

Through the federal courts' active intervention in local education systems to implement its desegregation mandate, Brown v. Board of Education[25] established a model for intensive and comprehensive judicial oversight of public institutions to ensure compliance with constitutional norms. In the four decades since Brown, the nature of adjudication has continued to shift from an adversary model centered on the resolution of private disputes[26] to a more complicated institutional ***2066** model in which courts seek to manage "polycentric and non-legal"[27] policy questions involving the proper structure, activities, and scope of public institutions.[28] Judicial supervision has subsequently extended to remedy conditions in prisons, jails, and mental health institutions;[29] to restructure public school financing in at least seventeen states;[30] and to reform other diverse institutions.[31] Yet surprisingly, in what has been called an "obvious breach,"[32] the judiciary has paid only limited attention to the quality of indigent defense services.[33] Indigent defense services in many jurisdictions, however, fall squarely within the class of problems that could successfully be addressed through public law litigation.

A. Political Process Failure

One commentator has observed that "[a]s a matter of fundamental structure, even where a constitutional violation has been found, a court cannot legitimately resolve such a problem unless the political bodies that ordinarily should do so are in such serious and chronic default that there is realistically no other choice."[34] In the case of indigent defense, however, the political process has led states to default on their obligation. Prior to Gideon, indigent defense was not a political priority and few jurisdictions had organized public defender or assigned counsel systems on their own initiative.[35] Anthony Lewis observed shortly after Gideon that implementing the decision's holding would be "an enormous social task."[36]

***2067** The political branches in many jurisdictions have substantially resisted that task.[37] Thirteen years after Gideon was decided, for example, the Georgia District Attorney's Association described a bill that proposed a statewide public defender system as "the greatest threat to the proper enforcement of the criminal laws of this state ever presented."[38] Two decades later, opposition to indigent defense in some places remained intense: in 1995, the South Carolina Attorney General decried attorneys representing death row inmates in federal habeas corpus cases as "lobbyists whose only goal is to stop executions at any cost."[39] The politics surrounding criminal justice during the last two decades have clearly prioritized zealous law enforcement

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over defendants' procedural rights, including the right to counsel. Concerned by the forty-percent reversal rate of state capital judgments by federal habeas courts,[40] Congress in 1995 entirely eliminated funding for organizations that represented death row inmates on collateral federal habeas corpus review.[41] Some jurisdictions at the state and local levels have also recently sought to decrease, in either real or effective terms, the resources devoted to indigent defense.[42] Absent a massive shift in long-held attitudes about criminal defense, political reform seems unpromising at best.[43]

Criminal defendants comprise a political constituency with little, if any, leverage; indeed, many felony convicts are formally disenfranchised. ***2068** [44] Public choice theory clearly predicts, and experience demonstrates, that indigent defense will be undersupported.[45] The longevity and severity of this political process failure should lead courts to cast off important but inapplicable doubts about the judicial supervision of government functions.

B. The Futility of Retrospective Appeals

Hope for reform through retrospective litigation under Strickland may be even more misguided. Most challenges to the quality of indigent defense counsel arise in the context of direct or collateral review of a criminal conviction; strong interests in finality, however, have led the Supreme Court to hold that "[j]udicial scrutiny of counsel's performance must be highly deferential."[46] It is thus exceedingly difficult to win such a claim under the standard established in Strickland,[47] which holds trial counsel's performance to be constitutionally adequate unless it can be shown to have been deficient and to have prejudiced the defense.[48] The stringent definition of both of these terms in Strickland forecloses relief on most such post-conviction claims.[49]

Post-conviction relief became even more difficult after recent changes to federal habeas corpus procedure.[50] Unforgiving procedural default rules require that ineffective assistance claims be raised in state court or else be barred from collateral federal review.[51] The Supreme Court has also held that there is no right to counsel after this first appeal,[52] thus often leaving indigent defendants to fend for themselves ***2069** unrepresented on state and federal post-conviction review.[53] Given the importance of preserving claims on state collateral review and the complexity of federal habeas corpus doctrine, this is tantamount to extinguishing any valid claims that might survive. Petitioners in post-conviction cases, moreover, do not have standing to challenge the overall fairness of the system due to the individualized nature of the prejudice inquiry. Thus, "[i]ndigent defense systems seem ripe for judicial reform."[54]

III. The Opportunities for Litigated Reform of Indigent Defense

Given the limitations of other potential avenues of reform, there have been surprisingly few efforts over the past two decades to improve the quality of indigent defense counsel through institutional reform lawsuits.[55] Three cases, though, have led to significant and far-reaching reforms: the high courts of Arizona, Louisiana, and Oklahoma have all found their state indigent defense systems constitutionally deficient.[56] Additionally, two recent lawsuits in Pennsylvania and Connecticut have achieved substantial reform through pre-trial settlements.[57] Along with two other less successful cases in Minnesota and ***2070** New Jersey,[58] these cases--although certainly important theoretically and often important practically--have received little or no sustained scholarly attention.[59] Not only may litigated reform be the only practical vehicle for short-term improvement in indigent defense systems, but litigated reform also offers important benefits in its own right. This Part examines the opportunities that these creative and unusual public law cases present.

A. Development of Substantive Sixth Amendment Standards

A significant advantage of litigated reform is the opportunity it affords to infuse the Sixth Amendment guarantee of effective assistance of counsel with independent substantive content. In McMann v. Richardson,[60] the Supreme Court clarified that the right to counsel necessarily entails "the effective assistance of competent counsel."[61] Indeed, even the much-criticized Strickland opinion embraced the idea that counsel should be more than just formally present, but should actively fulfill "the role necessary to ensure that the trial is fair."[62] An exclusive focus on prejudice, however, engenders Sixth Amendment analysis

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that is merely an ex post check on the accuracy of outcomes, rather than construing its guarantee as a threshold process right with independent meaning.

A prospective Sixth Amendment claim, then, offers the opportunity to escape the restrictive, individualized Strickland inquiry and instead establish, ex ante, a standard with content. In State v. Smith, [63] the Arizona Supreme Court took precisely such an opportunity. Its unique context makes Smith a difficult case from which to draw broad conclusions; remarkably, the Arizona Supreme Court addressed the county-wide deficiency of indigent defense sua sponte when reviewing ***2071** a single inmate's ineffective assistance of counsel claim. [64] The opinion is important, however, inasmuch as the Smith court clearly recognized that the prospective inquiry whether a state has met its constitutional burden is both different from the retrospective fairness inquiry and also necessary for compliance with the Sixth Amendment. [65]

In Luckey v. Harris, [66] the Eleventh Circuit Court of Appeals was even more clear on this point. A § 1983 class action brought on behalf of all indigent indictees in Georgia, [67] Luckey bounced back and forth between the district court and the court of appeals [68] before ultimately being dismissed for reasons of federalism and comity. [69] In the first appellate consideration of the case (Luckey I), however, the court held the Strickland standard inapplicable to prospective Sixth Amendment claims, [70] and rejected the district court's holding that to prevail, plaintiffs must establish the inevitability of ineffective assistance of counsel under Strickland for every member of the class. [71] Instead, the court held that the proper burden is for plaintiffs to prove "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." [72] The Eleventh Circuit rejected the district court's standard because "[t]he sixth amendment protects rights that do not affect the outcome of a trial." [73]

Thus, litigants seeking prospective relief should urge courts to follow Smith and Luckey I and advocate the approach that "[prospective relief] . . . can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial." [74] Certainly, this kind of rights enforcement is unusual in our constitutional order, ***2072** which generally consists of outcome-oriented review of negative rights. [75] However, the right to counsel for the indigent is one of the few positive rights in our system and "cuts sharply against the grain of the Constitution, which generally treats economic differences as inevitable and beyond constitutional purview." [76]

Developing an ex ante Sixth Amendment standard is particularly important because so few criminal cases are actually litigated. Strickland cases only address the quality of counsel in the small segment of cases that are tried and appealed, but the vast majority of a defense attorney's work consists of pre-trial motions and investigation that position cases for resolution through plea bargaining. Changing the focus of Sixth Amendment inquiry from an ex post review of counsel's performance to an ex ante standard would thus greatly affect the nature of legal counsel most defendants actually receive. A retrospective inquiry does not examine counsel's failure to consider filing a bail motion, for example, whereas a prospective approach allows evaluation of such important aspects of representation. [77]

B. The Appropriateness of Judicial Supervision

Judges must often supervise institutions about which they have little personal knowledge, such as schools or jails. Indeed, such inexperience has been the source of a powerful critique of litigated reform of governmental institutions. [78] In contrast, judges are intimately acquainted with the functions of attorneys and the practical implications of caseloads, support services, research facilities, and other resources for effective representation. [79] The language used by courts that have issued decrees about indigent defense counsel demonstrates the impact of judges' personal experience on their decisionmaking capability. For instance, the Smith court-- in terms rarely found in appellate opinions--noted that "we do not base our opinion on the standards alone, . . . but also on our own experience as attorneys." [80] Thus, whatever ***2073** doubts might exist about judicial supervision of other institutions, as a practical matter, judges are well suited to oversee indigent defense systems. [81]

At least in state court litigation, the responsibility that a court bears to supervise both the courts and the practice of law also supports judicial policymaking in this realm. The Oklahoma Supreme Court in State v. Lynch, [82] for example, premised its authority for its broad remedial decree in part on "the inherent power of this court to define and regulate the practice of law." [83]

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C. Remedial Choices

Judicial supervision of indigent defense systems is also viable because the kinds of standards judges would be asked to establish are straightforward and administrable. One promising remedial option is the judicial establishment of a presumption of ineffective assistance in jurisdictions that violate basic objective standards, such as caseload guidelines. [84] This kind of declaratory remedy offers important advantages. First, indigent defense institutional reform cases--like all public law litigation--raise significant concerns of institutional role and separation of powers. A presumption of ineffective assistance appropriately reserves the thorniest questions of funding and institutional design to the political branches. Second, arriving at such a presumption requires little judicial inventiveness or lawmaking. By adopting ABA caseload guidelines, or some minimal requirement of investigative or administrative resources, this kind of relief would require little ongoing judicial management and, as a rebuttable presumption, would retain flexibility in individual cases.

The remarkable case of State v. Peart [85] best illustrates the advantages of such declaratory relief. Unlike Smith, Peart was carefully planned by the litigator, Rick Teissier, one of two public defenders in a section of the New Orleans Criminal District Court. [86] In the case of ***2074** Leonard Peart, who was charged with robbery, rape, and first degree murder, Teissier filed a "Motion for Relief to Provide Constitutionally Mandated Protection and Resources." [87] At the time, Teissier had seventy active felony cases; in the first seven months of 1991, he represented 418 defendants, had one serious case set for trial for every trial date during that period, had no funding for expert witnesses, and had access to only three investigators, who were responsible for rendering assistance in 7000 cases annually. [88] In holding the Orleans Parish Indigent Defender Program (OIDP) unconstitutional, the trial court concluded that "[n]ot even a lawyer with an 'S' on his chest could effectively handle this docket." [89] The Louisiana Supreme Court modified the trial court's ruling but nonetheless adopted the presumption that defendants in Teissier's section of court were not receiving constitutionally adequate counsel. This step prompted the Louisiana legislature to increase indigent defense funding by $5 million over the next two years. [90]

Given the widespread history of political process failure in indigent defense provision, declaratory relief might nonetheless be insufficient. A lawsuit currently pending in Mississippi illustrates this point: despite the passage of a statewide public defender act in 1998, the legislature has refused to appropriate funds to implement the act's mandate. [91] Even in such cases, more intrusive structural injunctions might still be relatively administrable. For example, courts might impose caseload limits on indigent defenders; require a basic level of investigative, research, and support services; abolish low-bid contracting systems; or establish minimum salary rates to ensure competent assigned counsel. [92]

IV. Challenges to Future Reform Litigation

Despite the pressing need for reform of indigent defense systems, the apparent strengths of a litigation strategy, and the demonstrated success of the technique in a few dramatic cases, reform litigation to this point has been relatively infrequent. [93] This Part examines the ***2075** hurdles, both institutional and doctrinal, that may be slowing such reform efforts and proposes some solutions.

A. Choice of Litigators

A question critical to the success of litigated reform is who litigates the case. The most egregiously inadequate indigent defense typically exists in jurisdictions where there is no public defender office and cases are assigned or contracted to private attorneys. [94] These attorneys are particularly unlikely to bring suit challenging the sufficiency of resources allocated to indigent defense, however, both because they face a collective action problem and because they are dependent on the assigning or contracting court for their livelihood. This reasoning further assumes, of course, that these lawyers, themselves the subject of ineffectiveness concerns, recognize the situation as problematic.

Public defender organizations may also be an inappropriate party to initiate reform litigation. There are, admittedly, certain advantages to defender-initiated suits--particularly the ability to use office records to document in detail the need for reform. [95]

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Such suits might even be ethically advisable for defenders because they obviate the Hobson's choice of how to allocate limited time among an overabundance of clients, necessarily denying adequate assistance to some. [96]

The same institutional predicaments that impede assigned and contract counsel from initiating reform litigation, however, also affect public defenders. Although public defenders might more plausibly bring a lawsuit against their funding agency, they are still beholden to it. Moreover, the chief defender, who would likely have to approve such an action, typically serves at the will of that agency. [97] Professor ***2076** Klein notes that intuitive concerns about political retaliation against public defenders who bring structural reform cases are "not merely imaginary." [98] He recounts political attacks on the Los Angeles County Public Defender Office after it brought lawsuits aimed at reforming jury selection, addressing the conditions of juvenile pretrial detention, and preventing county sheriffs from reading jailed clients' attorney mail. [99] A defender-initiated reform lawsuit to address caseload and resource issues thus also raises serious ethical concerns. By exposing itself to political assault, the public defender office risks its ability to perform its core, constitutionally-mandated mission of effective representation in future cases. [100]

Independent interest groups can initiate institutional reform cases less problematically. The American Civil Liberties Union (ACLU), for instance, in conjunction with local groups, recently brought two ambitious cases in Connecticut and Allegheny County (Pittsburgh), Pennsylvania. Both cases ended in pretrial settlements that produced important improvements; both present a model for how such litigation might be brought in the future. [101] In each case, the national group worked closely with local affiliates in developing strategies to gain public support. [102] For example, in Allegheny County the case took the form of a civil rights class action brought in state court under 42 U.S.C. § 1983 against the county and the public defender by the class of individuals represented by the public defender. The complaint alleged violations of the Sixth and Fourteenth Amendments, as well as various state constitutional and statutory provisions. [103] The settlement agreement provided for a doubling of attorney staffing and a tripling of support staffing in the public defender office. [104]

***2077 B. Forum Selection**

A serious obstacle to the future viability of litigated reform of the indigent defense is the lack of a federal forum to hear such claims. Given the failure of the political process to improve indigent defense and the current politics surrounding criminal justice, elected state courts may be particularly inhospitable fora. Recent commentary has documented the increasing effect of hot-button political issues--notably, the death penalty and criminal justice-- on once-sleepy state judicial elections. [105] These statistics do not inspire confidence that elected state supreme courts will be willing to forge new law in creating prospective standards for the Sixth Amendment. Moreover, although the supervisory responsibility of state high courts imbues such courts with authority to issue sweeping relief, it also makes them a potential target of lawsuits seeking reform, possibly leading to a defensive reaction.

More worrisome obstacles lie in the path of a successful federal claim, however. Despite the appeal of a federal forum in these cases, it may be that the few cases in this area have been filed in state court due to litigants' fears of failure in federal court, [106] primarily rooted in federalism doctrines. [107] Both reported cases of litigated reform brought in the federal courts were dismissed for reasons of federalism and comity.

Wallace v. Kern [108] was a § 1983 action on behalf of incarcerated indictees that challenged the provision of indigent defense in Brooklyn, New York in the early 1970s. [109] The trial court held that the class was not receiving effective assistance of counsel and issued a preliminary injunction limiting trial counsels' caseload limit, [110] but the Second ***2078** Circuit Court of Appeals overturned it for a lack of state action. [111] The Second Circuit subsequently twice overturned district court relief under the abstention doctrine of Younger v. Harris. [112] The Eleventh Circuit rejected Luckey, the second such case, on Younger grounds as well. [113]

V. Conclusion: Changing the Terms of the Debate

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Litigated reform of indigent defense systems shows great promise, as the recent successful settlements in Allegheny County and Connecticut demonstrate. In Connecticut, for example, the settlement provided for the creation of fifty-four new permanent positions statewide and budget increases of $6.8 million over two years. [114] Despite the apparent need for these lawsuits, they nonetheless remain a method of last resort, as the failure of cases in Minnesota and New Jersey indicate. The rhetoric of both courts was clear and impatient: the situation may not be optimal, the courts said in effect, but do not force us to act unless there is really a crisis. [115] In Kennedy, the Minnesota Supreme Court--comparing the status of indigent defense there to Arizona's situation in Smith--found no "injury in fact" because the claims of attorney overwork were "too speculative and hypothetical." [116]

A systemic reform mandate requires courts to develop a complex and intrusive remedial scheme, and thus necessitates a significant expense of judicial capital. It may well be that courts will only be willing to take such measures in the face of broadly perceived crisis. As Feeley and Rubin noted in their recent study of judicial policymaking and prison reform litigation, courts will take such extreme steps only "when confronted with a practice that violates a widely held principle of social morality" [117] and "when motivated by strong moral sentiments ***2079** of the community." [118] Because the politics surrounding criminal justice affect judicial outcomes, the best strategy to achieve successful litigated reform is perhaps to choose cases exceedingly carefully and to follow an aggressive public strategy to legitimize judicial intervention.

Thus, those who seek to improve the quality of indigent defense counsel through the courts must also simultaneously pursue a strategy of creating an atmosphere in which judicial intervention in this field is rendered acceptable and comprehensible to the community at large. In Connecticut, for example, the reformers garnered extensive and positive press coverage of the indigent defense crisis and the subsequent lawsuit. [119] An important lesson of litigated reform of indigent defense so far has been that a subtle interrelationship exists between public attitudes about indigent defense and the efficacy of reform lawsuits.

The challenges of implementing a judicial mandate for reform highlight this interrelationship. Regardless of the standard sought in a successful prospective suit for relief--caseload caps, a parity standard, or something more complex--vigorous, proactive, defender managers must be able and willing to implement a judicial mandate. As Professor Kim Taylor-Thompson has observed, though, many lawyers who choose careers in indigent defense maintain a "lone wolf," anti-establishment orientation. [120] This bias--as well as unquestioned acquiescence to the enduring second-class status of indigent defense--may prevent defender managers from taking advantage of reform opportunities that may arise. Even more unfortunately, if the quality of indigent defense is substantially deficient, then simply an influx of resources--without new and capable leadership--may mean very little.

Ultimately, an aggressive public approach to indigent defense reform litigation may have the salutary long-term effect of changing the widely held attitudes that make these reform cases necessary in the first place. Until such a time, though, institutional reform litigation remains an important model deserving more attention by courts and litigators who seek to ensure the integrity and accuracy of the criminal justice system. [121]

Footnotes

1 372 U.S. 335 (1963).

2 Id. at 344.

3 See McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970).

4 See infra pp. 2063-65. This Note addresses only the quality of counsel in state criminal courts. The federal system is centrally managed by the Administrative Office of the U.S. Courts and has generally been well supported. See Inga L. Parsons, "Making it a Federal Case": A Model for Indigent Representation, 1997 Ann. Surv. Am. Law. 837, 842-55 (comparing the federal and local defender systems in New York).

5 When referring to the provision of criminal defense to the indigent accused in general, this Note uses the term "indigent defense." Jurisdictions provide indigent defense through one or more of three methods: public defender systems, in

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which institutions employ full-time attorneys with support staff; assigned counsel systems, in which judges appoint and compensate counsel on a case-by-case basis; and contract systems, in which private attorneys contract (often through low-bidding) with a jurisdiction to represent a certain set of clients for a predetermined fee. For an overview of these three possible structures for indigent defense, see Robert L. Spangenberg & Marea L. Beeman, Indigent Defense Systems in the United States, 58 Law & Contemp. Probs. 31, 32-41 (1995).

6 See, e.g., Stephen B. Bright, Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 Ann. Surv. Am. L. 783, 793 [hereinafter Bright, Neither Equal nor Just].

7 See Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard, 88 J. Crim. L. & Criminology 242, 280-82 (1997) (discussing the "general futility" of collateral attack based on ineffective assistance of counsel); William S. Geimer, A Decade of Strickland 's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 Wm. & Mary Bill Rts. J. 91, 147-61 (1995).

8 Such doctrines include the almost complete bar on pursuing procedural claims defaulted in state courts, see Wainwright v. Sykes, 433 U.S. 72, 91 (1977), and the one-year statute of limitations on federal habeas corpus claims, see 28 U.S.C. §§2244(d)(1), 2255 (1994 & Supp. IV 1998).

9 466 U.S. 668 (1984); see id. at 687-96 (discussing the deference to be accorded trial counsel performance).

10 407 U.S. 25 (1972) (extending the right to counsel to all defendants in cases that carry a possible sentence of incarceration).

11 Compare, e.g., Stephen J. Schulhofer & David D. Friedman, Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants, 31 Am. Crim. L. Rev. 73, 96-122 (1993) (advocating free-market reforms to the provision of indigent defense counsel), with Frank H. Easterbrook, Plea Bargaining as Compromise, 101 Yale L.J. 1969, 1974 (1992) (advocating fee awards for defendants who prevail in criminal cases as a means of attracting more highly qualified counsel).

12 Schulhofer & Friedman, supra note 11, at 74-75 ("[E]xisting indigent defense methods are often abysmal and ...the need for effective reform is acute."); see also Dripps, supra note 7, at 245 (documenting the "permanent crisis" in indigent defense).

13 Schulhofer & Friedman, supra note 11, at 74.

14 See David Cole, No Equal Justice: Race and Class in the American Criminal Justice System 64, 95 n.2 (1999); see also Norman Lefstein, Criminal Defense Services for the Poor 15 (1982) (reviewing 37 evaluations of indigent defense systems and finding "an exceedingly depressing picture").

15 See Bright, Neither Equal nor Just, supra note 6, at 816.

16 See, e.g, Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992) (Higginbotham, J.) (noting appointed counsel's compensation of $11.84 per hour and concluding that "the justice system got only what it paid for"). Such low compensation rates occur when counsel are constrained by maximum-hour caps or flat-fee reimbursement rates that result in sub-minimum wage rates if counsel work the hours required to litigate the case zealously. See Bright, Neither Equal nor Just, supra note 6, at 818-19.

17 See, e.g., People v. Garrison, 765 P.2d. 419, 440-41 (Cal. 1989) (discussing undisputed evidence that the defendant's attorney drank heavily each day of trial and was arrested for drunk driving en route to jury selection with a blood-alcohol content of .27); Jeffrey L. Kirchmeier, Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement, 75 Neb. L. Rev. 425, 455-63 (1996) (discussing mental illness of and drug abuse by defense attorneys); Deborah Tedford, Condemned Man Wins Ruling on Dozing Lawyer, Houston Chron., Sept. 30, 1999, at 1, 1999 WL 242561971999 WL 24256197 (discussing Joe Frank Cannon, a Houston indigent defender alleged to have slept during the bulk of a capital trial).

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18 See Bob Sablatura, Study Confirms Money Counts in County's Courts, Houston Chron., Oct. 17, 1999, at 1, 1999 WL 24259732Bob Sablatura, Study Confirms Money Counts in County's Courts, Houston Chron., Oct. 17, 1999, at 1, 1999 WL 24259732.

19 See id.

20 See, e.g., Alan Berlow, The Wrong Man, Atlantic Monthly, Nov. 1999, at 66 (discussing the likelihood of innocent defendants being convicted of capital crimes); Dirk Johnson, Shoddy Defense by Lawyers Puts Innocents on Death Row, N.Y. Times, Feb. 5, 2000, at A1.

21 See, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978) (Burger, C.J.) (stating that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

22 In 1996, for example, 1,041,809 individuals were convicted of felonies, see Jodi M. Brown & Patrick A. Langan, U.S. Dep't of Justice, Felony Sentences in the United States, 1996, at 1 (1999), but only 317 of those individuals received capital sentences, see Tracy L. Snell, U.S. Dep't of Justice, Capital Punishment 1998, at 13 (1999).

23 For example, "three strikes" sentencing regimes, which now exist in many states, amplify the collateral consequences of many cases. See Sonia Y. Lee, Comment, OC's PD's Feeling the Squeeze--The Right to Counsel: In Light of Budget Cuts, Can the Orange County Office of the Public Defender Provide Effective Assistance of Counsel, 29 Loy. L.A. L. Rev. 1895, 1897 n.8, 1908-10 (1996). The 1996 immigration reform laws also have expanded the collateral effects of criminal matters on alienage status. See Nancy Morawetz, Rethinking Retroactive Deportation Laws and the Due Process Clause, 73 N.Y.U. L. Rev. 97, 107-14 (1998).

24 See Steven K. Smith & Carol J. DeFrances, U.S. Dep't of Justice, Indigent De-fense 1 (1996) (reporting that "nearly 80% of local jail inmates indicated that they were assigned an attorney").

25 349 U.S. 294, 301 (1955).

26 The classic account of this model is found in Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv. L. Rev. 353 (1978) (originally written and circulated in 1957).

27 William A. Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635, 696 (1982).

28 A rich scholarship developed to describe and to justify what has come to be called "public law" or "institutional reform" litigation. See, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281 (1976); Owen Fiss, The Supreme Court, 1978 Term--Foreword: The Forms of Justice, 93 Harv. L. Rev. 1 (1979); Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374 (1982). For a brief overview of this trend, see Margo Schlanger, Beyond the Hero Judge: Institutional Reform Litigation as Litigation, 97 Mich. L. Rev. 1994, 1994-96 (1999) (book review).

29 See Schlanger, supra note 28, at 1995 nn.6-8 (collecting cases).

30 See Molly S. McUsic, The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation, in Law and School Reform: Six Strategies for Promoting Educational Equity 88, 138 n.8 (Jay P. Heubert ed., 1999).

31 See Schlanger, supra note 28, at 2035 & n.184 (discussing litigation to remedy conditions at nursing homes, police departments, public housing, and juvenile correctional facilities).

32 Marc. L. Miller, Wise Masters, 51 Stan. L. Rev. 1751, 1791 (1999) (book review).

33 See id. ("In the thirty-seven years since Gideon, and the fifteen years since Strickland, federal courts have not conducted judicial policy making with respect to defense services.").

34 Fletcher, supra note 27, at 696.

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35 See William M. Beaney, The Right to Counsel in American Courts 210-21 (1955). In 1955 only six states were reported to have public defender systems. See id. at 217-18.

36 Anthony Lewis, Gideon's Trumpet 215 (Vintage Books 1989) (1964).

37 For a general discussion of the inhospitable climate facing indigent defense and the ongoing "steer[ing of] resources toward law enforcement and away from indigent defense," see Kim Taylor-Thompson, Effective Assistance: Reconceiving the Role of the Chief Public Defender, 2 J. Inst. Stud. Legal Ethics 199, 200-02 (1999).

38 Bright, Neither Equal nor Just, supra note 6, at 787 (internal quotation marks omitted).

39 Roscoe C. Howard, Jr., The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel, 98 W. Va. L. Rev. 863, 913 (1996) (internal quotation marks omitted).

40 See James S. Liebman, More Than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in Teague v. Lane, 18 N.Y.U. Rev. L. & Soc. Change 537, 541 n.15 (1991) (reviewing 361 capital cases between 1976 and 1991).

41 See Howard, supra note 39, at 912-14. The law's two congressional sponsors attacked the resource centers as "one of the major reasons that justice is being frustrated in capital cases." Id. at 914 (internal quotation marks omitted).

42 The recent infusion of federal and local funding to support law enforcement and prosecutorial efforts has led to effective resource reductions through steeply rising caseloads. See Bright, Neither Equal nor Just, supra note 6, at 820-21. Additionally, "[e]ven though funding for indigent defense programs has long been recognized as inadequate, some jurisdictions have reduced funding." Id. at 817 (citing examples).

43 Another potential strategy for political reform of indigent defense consists of strikes or boycotts by indigent defenders to secure greater resouces. In FTC v. Superior Court Trial Lawyers' Ass'n, 493 U.S. 411 (1990), however, the Supreme Court held that the "social justifications" motivating such a boycott do not constitute a defense to antitrust charges of illegal restraint of trade. Id. at 423-24.

44 See George P. Fletcher, Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia, 46 UCLA L. Rev. 1895, 1898 (1999) (discussing felon disenfranchisement and its role "as a technique for reinforcing the branding of felons as the untouchable class").

45 See Dripps, supra note 7, at 244 ("[R]ational legislatures have every political incentive to shortchange indigent defense.").

46 Strickland v. Washington, 466 U.S. 668, 689 (1984).

47 See id. at 693-94; Dripps, supra note 7, at 284 ("Under Strickland, ineffective assistance is easily alleged but almost impossible to prove.").

48 See Strickland, 466 U.S. at 687.

49 See Cole, supra note 14, at 78 ("The Strickland standard has proved virtually impossible to meet.").

50 See Anne M. Voigts, Note, Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel, 99 Colum. L. Rev. 1103, 1111-13 (1999).

51 See Wainwright v. Sykes, 433 U.S. 72 (1977) (establishing standards for procedural default for federal habeas corpus review).

52 See, e.g., Murray v. Gianatarro, 492 U.S. 1, 10 (1989) (holding that there is no right to counsel in state post-conviction review of capital convictions); Ross v. Moffitt, 417 U.S. 600, 616 (1974) (holding that indigent defense counsel is

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not constitutionally mandated in discretionary review of criminal convictions). Douglas v. California, 372 U.S. 353 (1963), decided the same day as Gideon, established that in a first appeal of a criminal conviction as of right, indigent appellants are entitled to counsel. See id. at 357.

53 Inmates must first surmount the hurdle of state post-conviction review, for which counsel is similarly not guaranteed. Five states with death penalty laws do not appoint counsel in these proceedings, despite the critical role of these hearings (for procedural default purposes) in subsequent federal collateral review. See Clive A. Stafford Smith & Rémy Voisin Starns, Folly By Fiat: Pretending That Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings, 45 Loy. L. Rev. 55, 56 (1999).

54 Miller, supra note 32, at 1789. An ex post inquiry may be incapable of remedying defective assistance of counsel. Even if the Strickland standard were more searching, an appellate court's inability to evaluate the subtlety of trial dynamics may render the effort inherently futile. See Dripps, supra note 6, at 283.

55 See Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1869 (1994) ("There have been few systematic challenges to the inadequacy of legal representation for the poor ...."). A handful of cases following Gideon addressed the right to counsel prospectively, but only as it relates to attorney compensation. An important question after Gideon was whether the state could coerce attorneys, as part of their professional obligation, to assume indigent defense responsibilites. In the leading case, State v. Rush, 217 A.2d 441, 445-46 (N.J. 1966), the New Jersey Supreme Court held that such conscription would in fact be an unconsititutional taking of private property. This holding ensured that the responsibility for providing indigent defense counsel would shift from the private bar to the state. See also Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972); State ex rel. Partain v. Oakley, 227 S.E.2d 314 (W. Va. 1976). Although these cases did not address the quality of representation directly, they were significant in forcing initial legislative action to implement Gideon's mandate. See Richard J. Wilson, Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases, 14 N.Y.U. Rev. L. & Soc. Change 203, 209 (1986).

56 See State v. Smith, 681 P.2d 1374 (Ariz. 1984); State v. Peart, 621 So. 2d 780 (La. 1993); State v. Lynch, 796 P.2d 1150 (Okla. 1990).

57 See American Civil Liberties Union, Doyle v. Allegheny County Salary Board: Fact Sheet on Settlement Agreement, http:// www.aclu.org/news/n051398b.html (May 13, 1998) [hereinafter Fact Sheet]; Dana Tofig, ACLU Drops Public-Defender Suit, Hartford Courant, July 8, 1999, at A5, 1999 WL 199393871999 WL 19939387.

58 See Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996); Madden v. Delran, 601 A.2d 211 (N.J. 1992). Additionally, there have been two notable lawsuits in the federal system. In Wallace v. Kern, 392 F. Supp. 834 (E.D.N.Y. 1973), the plaintiffs unsuccessfully challenged the indigent defense system in New York City, and in Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988) [hereinafter Luckey I], plaintiffs lost a similar challenge in Georgia.

59 See Miller, supra note 32, at 1791 (noting that institutional reform lawsuits of indigent defense have, "to this point, largely been ignored."). Discussion of some of these cases, or the issues they present, can be found in Richard Klein, The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel, 68 Ind. L.J. 363, 408-31 (1993); Wilson, supra note 55, at 210-19; and Rodger Citron, Note, (Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services, 101 Yale L.J. 481 (1991).

60 397 U.S. 759 (1970).

61 Id. at 771 n.14 (emphasis added).

62 Strickland v. Washington, 466 U.S. 668, 685 (1984).

63 681 P.2d 1374 (Ariz. 1984).

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64 See id. at 1378 ("Smith challenged his conviction based on the allegation that his defense counsel spent "possibly" six to eight hours preparing his defense to burglary and sexual assault charges.").

65 See id. ("The focus is on the quality of the performance, not on the effect of that performance on the outcome of the proceeding ...."). Although Smith was decided shortly before Strickland, this point was in fact grounded in Arizona law. See id.

66 860 F.2d 1012 (11th Cir. 1988).

67 See id. at 1013.

68 See Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992) [hereinafter Luckey IV] (per curiam) (affirming the district court's dismissal on Younger abstention grounds); Luckey v. Miller, 929 F.2d 618, 622 (11th Cir. 1991) [[hereinafter Luckey III] (holding that the law of the case did not preclude the district court from considering abstention questions); Luckey v. Harris, 896 F.2d 479 (11th Cir. 1989) [hereinafter Luckey II] (per curiam) (denying en banc review of Luckey I).

69 See Luckey IV, 976 F.2d at 677.

70 See Luckey I, 860 F.2d at 1017 ("This standard [Strickland] is inappropriate for a civil suit seeking prospective relief.").

71 See id. at 1016.

72 Id. at 1017 (quoting O'shea v. Littleton, 414 U.S. 488, 502 (1974)) (internal quotation marks omitted).

73 Id.

74 Id.; cf. Gerstein v. Pugh, 420 U.S. 103, 118-19 (1975) (holding that pretrial detention without a probable cause determination violates the Fourth Amendment, despite not being grounds for an automatic reversal of conviction).

75 See, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989) (holding that the Due Process Clauses "generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests"); see also Isaiah Berlin, Two Concepts of Liberty 7-19 (1958) (elaborating on the distinction between positive and negative freedoms).

76 Cole, supra note 14, at 69; see also Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (stating that differences in wealth are "contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion").

77 See Luckey I, 860 F.2d at 1018. Defendants unable to secure bail face significant impediments to preparing and winning their cases. For example, a bailed defendant may personally secure the testimony of exculpatory witnesses that his lawyer cannot.

78 See, e.g., Peter H. Schuck, Suing Government: Citizen Remedies for Official Wrongs 154-61 (1983).

79 See Citron, supra note 59, at 499-500.

80 State v. Smith, 681 P.2d. 1374, 1380-81 (Ariz. 1984).

81 A stronger version of this argument may also be true: that judges are best suited to supervise indigent defense. Unlike most legislators or executive officials, judges have both legal training and an acute sense of the importance of the role

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of counsel. Moreover, as the indirect beneficiaries of an improved indigent defense system, judges have an interest in the quality of lawyering in their courtrooms.

82 796 P.2d 1150 (Okla. 1990).

83 Id. at 1163. Although the Lynch court "invite[d] legislation" on the issue, it did not completely defer to the legislature but rather established an "interim" remedy of parity in compensation between prosecutors and indigent defenders. Id. at 1161.

84 The American Bar Association (ABA) advisory guidelines, for instance, establish mutually exclusive limits for public defenders of 150 felony cases, 300 misdemeanors, 200 juvenile cases, 200 mental commitment cases, or 25 appeals per year. See American Bar Ass'n, Criminal Justice in Crisis 42-43 (1988).

85 621 So. 2d 780 (La. 1993)

86 See id. at 784-85.

87 Id. at 784.

88 See id.

89 Id. at 789 (internal quotation marks omitted). The trial court ordered Teissier's caseload reduced, and instructed the legislature to augment the OIDP's resources. See id. at 784-85.

90 See Miller, supra note 32, at 1795.

91 See Complaint, Van Slyke v. Mississippi, No. 00-0013-GN-D (Miss. Ch. Ct. Forrest County filed Jan. 12, 2000); see also Emily Wagster, Suits Seek Public Defender Funds, Clarion-Ledger (Jackson, Miss.), Dec. 17, 1999, http://clarionledger.com/news/9912/17/17defend.html.

92 See, e.g., State v. Lynch, 796 P.2d 1150, 1161 (Okla. 1990).

93 Although it is impossible to know precisely how many such cases have been filed because of unreported settlements, reported cases and interviews with litigators suggest that the number filed since 1980 likely does not exceed approximately 10 cases. Cf. Miller, supra note 32, at 1801 ("[T]he counsel systems cases have languished, isolated but provocative illustrations of what judicial policy making might do to fix the sorry state of indigent defense.").

94 A number of factors account for this phenomenon: public defenders, unlike assigned counsel, develop expertise in criminal matters; assigned or contract counsel often end up accepting indigent clients because they are unable to secure better-paying work; and assigned or contract counsel do not benefit from the shared knowledge and collective support of a public defender office. See Bright, Neither Equal nor Just, supra note 6, at 821-28.

95 See Klein, supra note 59, at 419-20 (noting the benefits for case preparation of defender-initiated suits). However, discovery motions would likely accomplish the same goals. See, e.g., First Protective Order, Rivera v. Rowland, No. CV-95-545629 (Conn. Super. Ct. Dec. 17, 1996), 1996 WL 753941, at *1.

96 See Martin Guggenheim, Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney, 14 N.Y.U. Rev. L. & Soc. Change 13, 14-15 (1986). Indeed, the ABA Standards for Criminal Justice dictate that "[c]ourts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations." Standards for Criminal Justice Standard 5-5.3 (A.B.A. 1992).

97 See Klein, supra note 59, at 419 (offering reasons why "[l]itigation brought by the public defender office itself has been extremely rare"). In jurisdictions such as Florida and Tennessee, however, public defenders are elected in a process parallel to the selection of local prosecutors. Such independent authority might free these public defenders to pursue

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creative litigation strategies. Cf. Bennett H. Brummer, Keynote Speech, Independent, Professional Judgment: The Essence of Freedom, 10 St. Thomas L. Rev. 607, 617-18 (1998).

98 Klein, supra note 59, at 421-22.

99 See id. at 422. The litigation eventually forced the resignation of the chief public defender. See id.

100 Cf. Charles J. Ogletree & Randy Hertz, The Ethical Dilemmas of Public Defenders in Impact Litigation, 14 N.Y.U. Rev. L. & Soc. Change 23, 24 (1986) (observing that public defender impact litigation "creates an inherent potential for ethical conflicts" because of the differing interests of clients).

101 In addition to their independence, such groups bring their considerable expertise in civil rights litigation to what are likely to be civil cases. Criminal justice advocacy organizations, defender associations, or even human rights groups are all possible litigators.

102 See Telephone Interview with Robin Dahlberg, Counsel, ACLU (March 23, 2000).

103 See 3d Amended Complaint PP103-118, Doyle v. Allegheny County Salary Bd., No. GD-96-13606 (Pa. Ct. C.P. filed Nov. 21, 1997). The complaint alleged both the general harm of violating national guidelines, as well as the specific harms in the cases of the named plaintiffs. See id.

104 See Fact Sheet, supra note 57.

105 See, e.g., Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 734 (1995) (indicating "that judicial elections are more and more often high-salience events" and citing an increasing number of judges who lose high-profile retention elections in which criminal justice issues figure prominently).

106 See Interview with Robin Dahlberg, supra note 102.

107 Another possible obstacle, sovereign immunity, is less problematic because these lawsuits fall squarely within the exception of Ex parte Young, 209 U.S. 123 (1908). Litigants can bring suit against the state officers responsible for administering the indigent defense program and demand injunctive relief. A remedial order would undoubtedly require a considerable expenditure of state resources, but "an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex parte Young." Edelman v. Jordan, 415 U.S. 651, 668 (1974); see also Luckey I, 860 F.2d. 1012, 1014 (11th Cir. 1988).

108 392 F. Supp. 834 (E.D.N.Y. 1973).

109 The class action alleged that, because trials were regularly delayed about two years due to caseload burdens, indictees were effectively denied their right to counsel. See id. at 835-36.

110 See id. at 849.

111 See Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973) (per curiam). Because New York's Legal Aid Society is a private, nonprofit organization, the Second Circuit found it was not acting under color of state law as required by §1983. See id.

112 See Wallace v. Kern, 520 F.2d 400, 409 (2d Cir. 1975); Wallace v. Kern, 499 F.2d 1345, 1351 (2d Cir. 1974). The Second Circuit held that this principle of equitable restraint forbids interference with the provision of counsel in state criminal proceedings. See Wallace, 520 F.2d at 405.

113 See Luckey IV, 976 F.2d at 676-79.

114 See Connecticut Div. of Pub. Defender Servs., The 1999 Annual Report of the Chief Public Defender 25 (2000).

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115 See Kennedy v. Carlson, 544 N.W.2d 1, 8 (Minn. 1996); Madden v. Delran, 601 A.2d 211, 219 (N.J. 1992).

116 Kennedy, 544 N.W.2d at 8; see also Madden, 601 A.2d at 219 (finding alleged deficiency in counsel insufficiently "frequent" or "substantial").

117 Malcom M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons 161 (1998).

118 Id. at 148. See also Interview with Robin Dahlberg, supra note 102 (noting that some degree of public outrage, or at least attention, may be a necessary precondition to a successful indigent defense reform case).

119 See, e.g., Editorial, Public Defenders are Overloaded, Hartford Courant, Jan. 10, 1995, at A10, 1995 WL 5318983;Editorial, Public Defenders are Overloaded, Hartford Courant, Jan. 10, 1995, at A10, 1995 WL 5318983; Lynne Tuohy, CCLU Suit Lays Bare a Public Defender System in Crisis, Hartford Courant, Jan. 8, 1995, at A1, 1995 WL 53156121995 WL 5315612.

120 See Taylor-Thompson, supra note 37, at 209-13.

121 As one experienced litigator in this area noted, her perception of the ultimate success of litigated reform has varied widely by jurisdiction. See Interview with Robin Dahlberg, supra note 102.

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