

THE THIRD GENERATION OF INDIGENT DEFENSE LITIGATION

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ABSTRACT

For years, scholars have documented the national crisis in indigent defense and its many tragic implications, and yet the crisis persists. Traditionally, the appellate and political processes were the exclusive avenues for indigent defense reform, and each suffered from critical infirmities. By the 1970s, individuals and groups began to seek prospective judicial reform of indigent defense systems. Widely used in other arenas, systemic suits based on the Sixth Amendment have been few in number and, at least in their early form, relatively unsuccessful. Other scholars have provided a descriptive account of structural litigation to improve indigent defense, and this article takes those accounts one step further by distilling from the recent body of suits a model for indigent defense litigation. In particular, this article divides suits of this kind into “first-generation” and “second-generation” suits—a distinction that is largely chronological, but phenomenological to an extent, as well. First-generation suits were reactive and sought limited relief from the courts. In contrast, second-generation suits are marked by their empirical grounding, extensive alliances of support, and requests for sweeping reform. These second-generation suits have been far more successful than their predecessor suits, and this article contends that these suits are emblematic of a model that future suits can replicate. Finally, this article discusses specific issues for litigants of third-generation suits to consider, in particular the pursuit of a federal forum. At the same time, the article recognizes that this type of litigation is neither a panacea nor uniformly available, and the article concludes by offering advice for the individual defense attorney who is working in the midst of a public defense crisis.

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INTRODUCTION

Poor people account for more than eighty percent of individuals prosecuted in this country,¹ and in most instances these indigent defendants receive subpar legal assistance when they receive it at all.² As

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1. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

2. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 16–20 (2004) (attributing inadequate legal representation for indigent defendants to a variety of factors including incompetent and inexperienced lawyers; excessive caseloads; and lack of meaningful contact with clients, investigation, research, and conflict-free representation), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>; Backus & Marcus, *supra* note 1, at 1080–82 (arguing that systemic deficiencies in indigent defense, such as high caseloads, inadequate training and supervision, and insufficient resources, compromise defenders' ethical obligations to clients).

Stephen Bright, founder of the Southern Center for Human Rights, has asserted: “No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.”³ And yet, despite voluminous documentation of the indigent defense crisis, the crisis persists.

In Mississippi, children as young as fourteen are incarcerated with adults and may wait months to speak to a lawyer.⁴ Adult defendants fare no better—in some Mississippi counties, they may wait up to a year to speak to a court-appointed lawyer about their case.⁵ A majority of the people on death row in Alabama were represented by lawyers whose compensation was statutorily capped at \$1000.⁶ In New York, where counties select indigent defense lawyers on a low-bid, flat-fee basis, attorneys are regularly assigned to cases with no regard for their level of training or experience, and the state provides no supervision or monitoring of attorney performance.⁷ In Georgia, the statewide public defense system has faced one financial crisis after another since its 2005 inception.⁸ In January 2009, an indigent capital defendant, who had been without legal representation for eight months, filed suit against public defense administrators seeking immediate representation.⁹ These examples are not outliers. Across the nation—from Maine¹⁰ to Arizona¹¹—many states are facing acute crises in indigent defense.

Inadequate funding is the root cause of the indigent defense crisis.¹² There are other salient attributes to the indigent defense crisis, as the examples above demonstrate, but chronic underfunding is the common

3. Stephen B. Bright, *Turning Celebrated Principles Into Reality*, CHAMPION, Jan.-Feb. 2003, at 6.

4. NAACP LEGAL DEF. & EDUC. FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 6 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ms-assemblylinejustice.pdf>.

5. *Id.*

6. Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 343 (2006).

7. See *Hearing Before the Commission on the Future of Indigent Def. Servs.* 377-78 (N.Y. 2005) (statement of Vincent Warren, Senior Staff Counsel, ACLU National Legal Department), available at http://www.nycourts.gov/ip/indigentdefense-commission/nyc_2-11-05.pdf.

8. See Bill Rankin, *Without a Lawyer, Indigent's Case Stalls*, ATLANTA J.-CONST., Jan. 6, 2009, at C4 (discussing the most recent example of the state's public defense financial crisis).

9. *Id.*

10. See, e.g., Judy Harrison, *Indigent Defense Solutions Sought in Maine*, BANGOR DAILY NEWS, June 21, 2008, at B1 (noting that state earned failing grade on nine out of ten benchmarks that ABA uses to assess delivery of public defense services).

11. See, e.g., Malia Brink, *Indigent Defense*, CHAMPION, May 2007, at 10 (describing fiscal crisis that forced chief defender in Mohave County to withdraw from almost one hundred cases).

12. See David A. Simon, *Equal Before the Law: Toward a Restoration of Gideon's Promise*, 43 HARV. C.R.-C.L. L. REV. 581, 586 (2008).

thread. Without adequate funding, states and counties cannot provide the fundamental elements of an effective, efficient, high-quality, and ethical public defense system.¹³ Such elements include the ability of a state or county to hire or train the appropriate number of defense attorneys, competitively compensate their attorneys, supervise their attorneys and ensure their compliance with ethical and performance standards, and arm defense counsel with the requisite investigative and expert assistance.¹⁴ Under these circumstances, even the most well-intentioned indigent defense lawyer is hard-pressed to provide effective assistance.

Fiscal problems, in general, are legislative problems.¹⁵ And yet, across the country state legislatures have been on notice, sometimes for decades, regarding their state's own indigent defense crisis without taking action.¹⁶ Indigent defendants represent the archetypical "discrete and insular minority,"¹⁷ in that they lack a cohesive and effective voice in the political process. People accused of crimes are often excluded from the electorate because they tend to hail from poor and alienated groups, or have even been barred from voting if convicted of a felony.¹⁸ At the same time, the people who do make up the general electorate often demand that politicians take a "tough on crime" stance.¹⁹ As a result, legislatures have traditionally been unresponsive to the unpopular and largely silent constituency of criminal defendants.²⁰

13. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 8 (2002) [hereinafter THE TEN PRINCIPLES], available at <http://www.abanet.org/legalservices/downloads/sclaid/resolution107.pdf>.

14. These elements of a well-functioning indigent defense system are embodied in the ABA's "The Ten Principles of a Public Defense Delivery System." See *id.* See also discussion *infra* Part II.

15. See, e.g., *La. Mun. Ass'n v. State*, 893 So. 2d 809, 843 (La. 2005) ("The legislative power includes 'absolute control over the finances of the state, except as limited by constitutional provisions.' Moreover, 'it is the legislature that decides how the branches and departments of government shall be funded from the public fisc.'" (citation omitted)).

16. See discussion *infra* Part II (discussing numerous suits filed against counties and states for failing to provide adequate indigent defense services within past ten to fifteen years because of lack of resources for indigent defense).

17. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

18. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 254 (2004).

19. See Ronald J. Tabak, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 295-96 (1994) (describing several noteworthy instances where politicians succumbed to pressure to be perceived as tough on crime).

20. See Wright, *supra* note 18, at 254 ("It is easy to find examples of legislatures that refuse to increase (or even to maintain) funding for criminal defense work, and legislators are none too subtle in explaining that the defense of accused criminals is a low funding priority. . . . [L]egislators interested in their own political careers will see that those who could benefit from government-funded defense lawyers—convicted criminals, accused criminals, and those likely to be accused of crimes—probably cannot help them get re-

In recent years, recognizing this political process problem, advocacy groups have taken the indigent defense crisis to the courts.²¹ This article evaluates that trend by examining recent attempts to use structural litigation to improve indigent defense services. Historically, structural litigation—which has been defined as “a sustained pattern of cases against large power structures invoking the power of the courts to oversee detailed injunctive relief”²²—has been sparingly used in the indigent defense context. It is estimated that no more than ten of these suits were filed between 1980 and 2000.²³ Moreover, early suits seeking to improve indigent defense failed to generate lasting reform.²⁴

In the last ten to fifteen years, however, advocacy groups and private lawyers working in a pro bono capacity have employed a new model of structural litigation that has been more promising for defense advocates. Suits in Pennsylvania and Connecticut prompted a consent decree and a settlement, respectively, while suits in Montana and Massachusetts generated new law regarding indigent defense requirements.²⁵ Other scholars have provided descriptive accounts of some of these suits,²⁶ and this article takes those descriptive accounts as its point of departure. Specifically, this article provides a detailed template for indigent defense structural litigation, while also flagging additional strategies that future litigants need to explore.

This article proceeds in three parts. In Part I, I offer a brief overview of what I call the “first-generation” suits seeking systemic reform of

elected.”). Although Wright discusses the difficulties of legislative advocacy on behalf of indigent defense, he does offer some reasons to pursue defense resource parity despite this traditional legislative reluctance to allocate defense funds.

21. See discussion *infra* Part I.

22. Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 437 (2007). See also JOHN C. JEFFRIES, PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, *CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION* 848 (2000) (noting that suits brought as class actions, typically seeking injunctive relief and reform of government operations, “have come to be known as ‘structural reform,’ or ‘institutional’ or ‘public law’ litigation”).

23. Gideon’s *Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2074 n.93 (2000) [hereinafter *Gideon’s Promise Unfulfilled*].

24. See discussion *infra* Part I.

25. See discussion *infra* Part II.

26. See, e.g., Adele Bernhard, *Take Courage: What Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293 (2002); Rodger Citron, (Un)Luckey v. Miller: *The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481 (1991); *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005) [hereinafter *Effectively Ineffective*]; Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel* (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279185.

indigent defense.²⁷ These first-generation suits were a mixed bag. Some courts were solicitous of the idea that courts had the inherent authority to regulate the administration of justice through effective counsel, while other courts rejected these claims outright and punted on systemic deficiencies.²⁸ In Part II, I describe the suits that I refer to as “second-generation” suits, with an eye toward delineating what has made these suits different and more successful than their predecessors. In Part III, I argue that this new model of litigation can be replicated elsewhere, and I identify jurisdictions ripe for litigated reform. In addition, I suggest several issues for future litigants to consider, including the pursuit of a federal forum. Finally, I offer several specific strategies that individual defense attorneys can pursue to spur systemic reform when litigation is not on the horizon.

I.

STRUCTURAL LITIGATION OF INDIGENT DEFENSE: FIRST-GENERATION SUITS

In this section of the article, I provide a brief overview of the first-generation suits that challenged indigent defense systems, noting the reasons for their failures. Other authors have described some of these suits in detail,²⁹ and I address them here purely for context. Despite the prevalence of structural litigation to address a panoply of social ills,³⁰ early indigent defense advocates rarely employed structural litigation,³¹ and when they did, courts did not know what to do with these first-generation suits. Historically, courts have considered Sixth Amendment challenges to the quality of indigent defense counsel in the context of petitioners’ post-conviction review.³² In that setting, courts apply the test for ineffective

27. My demarcation of first- and second-generation suits is largely chronological. First-generation suits were, for the most part, brought in the 1980s and early 1990s, while second-generation suits were brought in the mid-1990s and continue to the present. However, there are some outliers. For example, a very recent systemic suit challenging indigent defense in Mississippi failed. See discussion *infra* Part II. At the same time, the first- and second-generation descriptive is also a phenomenological qualifier. As I describe in Parts I and II, *infra*, first-generation suits were reactive and sought limited judicial relief, while second-generation suits have been proactive and have sought sweeping reform.

28. See discussion *infra* Part I.

29. See sources cited *supra* note 26.

30. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (citing public law litigation in realms of school desegregation, employment discrimination, prisoners’ or inmates’ rights, antitrust, securities fraud, consumer fraud, housing discrimination, electoral reapportionment, and environmental management). See generally Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004) (providing a more modern account of this type of litigation and defending its efficacy).

31. See Gideon’s *Promise Unfulfilled*, *supra* note 23.

32. See Citron, *supra* note 26, at 486–87.

assistance of counsel that comes from the Supreme Court's decision in *Strickland v. Washington*.³³ The *Strickland* test requires a defendant to demonstrate (1) that her counsel's performance was deficient and (2) that the counsel's deficiency prejudiced the outcome of the defendant's case.³⁴ The *Strickland* test sets an incredibly high standard for defendants to meet.³⁵ Moreover, it is not an appropriate mechanism for raising systemic claims; by definition it focuses a court's attention on the experience of one client with one lawyer.

First-generation suits generally fall into two subcategories: (1) challenges to public defense systems that arose in the context of an individual criminal prosecution and (2) class actions brought to challenge state and county defense systems. With respect to the first subcategory, two patterns emerge. Some courts rejected outright the idea that a defendant could raise the claim of a system-wide indigent defense crisis in the context of an individual case. Others were more open to the claim on theoretical grounds, but the relief they afforded did not create sustainable reform within the indigent defense system.

A. Challenges in the Context of an Individual Case

Early attempts to reform state or county defense systems on Sixth Amendment grounds often arose in the context of an ongoing, individual criminal prosecution.³⁶ The typical scenario entailed a defendant seeking

33. See *id.* at 486–88 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

34. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

35. See Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 19 (“First, the *Strickland* court encourages reviewing courts not to speak of incompetent legal representation in many situations, thereby eliminating an opportunity for courts to discuss and put defense lawyers on notice regarding unacceptable lawyering activities. Second, the Court set in place strong presumptions that unnecessarily favor poor lawyering conduct. Further, as a result of *Strickland*, an ineffective assistance of counsel claim is essentially rendered a viable claim available only to the truly innocent criminal defendant. Finally, a *Strickland* challenge requires the cooperation of the attorney about whom the petitioner complains. Any one of these reasons individually makes bringing a successful ineffective assistance of counsel claim—even where one received deplorable legal assistance—an arduous task. Taken together, they make *Strickland* challenges exceedingly difficult to win.” (citations omitted)); 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, 165 (1995) (“The *Strickland* standard is a farce, but its replacement should be realistic. With the help of competent practitioners, the organized profession could put an alternative to *Strickland* on the table for consideration by the courts or legislatures.”); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 499–507 (1993) (arguing that while the *Strickland* standard is indeed flawed, the solution lies in a stricter definition of competent counsel rather than a revamped standard).

36. This article focuses on litigation that seeks to vindicate the interests of the indigent defendant. Other scholars have noted, however, that even before systemic suits were brought on Sixth Amendment grounds, lawyers brought suits to vindicate their own right to adequate compensation based on the Fifth Amendment Takings Clause. See, e.g., Backus

dismissal of the charges against her or reversal of a conviction based on systemic failures of the public defense system. Alternatively, indigent defense lawyers occasionally challenged a public defense system, arguing that its fee caps or rates of compensation were so low that they either resulted in ineffective assistance of counsel or unconstitutional conflicts of interest. For the most part, state court judges were readily able to dismiss these claims, shunting them into either the appellate or political process.

In *Ex parte Grayson*, the Alabama Supreme Court addressed the question of whether Alabama's compensation of counsel statute denied Grayson, a defendant convicted of capital murder, due process and equal protection of the laws.³⁷ At the time, Alabama's compensation of counsel statute allowed a maximum of \$1000 for the representation of an indigent defendant—even a capital one.³⁸ Grayson argued on appeal that the statutory ceiling prevented him from receiving effective assistance of counsel, and the Supreme Court of Alabama, affirming the court of appeals, rejected the contention outright:

Petitioner bases [his] claim on the dubious ground that \$1000 is enough compensation for defense of non-capital cases, but is insufficient compensation for a capital defense and, therefore, that a capital defendant will not have as effective assistance of counsel as non-capital defendants have. These contentions are made on the premise that lawyers will not provide effective assistance unless paid a certain amount of money. But the legal profession requires its members to give their best efforts in "advancing the 'undivided interests of [their] client[s].'" . . . We reaffirm this belief that attorneys appointed to defend capital clients will serve them well, as directed by their consciences and the ethical rules enforced by the state bar association. The counsel compensation statute, then, does not deprive petitioner of due process and equal protection of the laws.³⁹

While Alabama has increased somewhat its statutory rate of compensation since *Grayson*,⁴⁰ its courts have continued to reject facial

& Marcus, *supra* note 1, at 1116 (describing the "takings" cases as the first wave of litigation seeking remedies for problems plaguing indigent defense systems); Bernhard, *supra* note 26, at 313–15 (describing several state court "takings" cases); Reddy, *supra* note 26, at 10–15 (discussing this litigation and the groundwork it laid for future Sixth Amendment litigation).

37. *Ex parte Grayson*, 479 So. 2d 76, 79 (Ala. 1985).

38. *Id.*

39. *Id.* at 79–80 (second and third alterations in original) (citations omitted).

40. See ALA. CODE § 15-12-21 (Supp. 2008). Effective October 1, 2000, the in-court and out-of-court hourly rates of compensation for court-appointed counsel went from fifty dollars and thirty dollars, respectively, to sixty dollars and forty dollars. At the same time, the statute now imposes no cap on appointed counsel in a capital case, but it does cap the fees for appointed counsel in a Class A felony case at \$3500.

attacks to the indigent defense system based on claims of inadequate attorney compensation.⁴¹

As recently as 2000, in *Webb v. Commonwealth*, a Virginia court of appeals took a similar stance when faced with a constitutional challenge to the state's statutory cap on attorneys' fees.⁴² In 1997 Webb and a codefendant robbed a restaurant and Webb's codefendant shot and killed the restaurant manager.⁴³ As an indigent defendant, Webb was represented by court-appointed counsel.⁴⁴ Prior to Webb's robbery and murder trial, his counsel moved to dismiss the charges against his client, arguing that the Virginia statute governing fees for indigent defense counsel was unconstitutional on its face and as it applied to Webb.⁴⁵

Webb's counsel presented the court with impressive evidence to support his claim that the scheme both created a financial disincentive for zealous advocacy and was unconstitutional. At the time that Webb's lawyer raised this challenge, Virginia law capped the fees for court-appointed attorneys at \$735 for felony cases where the defendant faced more than twenty years in prison and \$265 for all other felony cases.⁴⁶ Webb's counsel also argued that court-appointed attorneys were potentially operating under a conflict of interest: as a result of low fees, court-appointed attorneys for indigent defendants were forced to choose between "not being adequately compensated or not adequately representing [their] client[s]."⁴⁷ Webb's counsel also demonstrated to the

41. See *Gaddy v. State*, 952 So. 2d 1149, 1164–65 (Ala. Crim. App. 2006) (rejecting defendant's claim that his counsel had been ineffective "because of the grossly inadequate compensation set out in Alabama's indigent defense statute"). Note also that Alabama is not unique in its rejection of facial attacks to aspects of indigent defense systems. See, e.g., *Hillsborough County v. Unterberger*, 534 So. 2d 838, 841 (Fla. Dist. Ct. App. 1988) (denying a challenge to statutory process for setting indigent defense attorney compensation rate); *State v. See*, 387 N.W.2d 583, 584–87 (Iowa 1986) (rejecting challenge to process for determining appointed attorney's fees); *State v. Keener*, 577 P.2d 1182, 1185 (Kan. 1978) (denying a due process challenge to public defense scheme that required repayment from defendant).

42. See *Webb v. Commonwealth*, 528 S.E.2d 138, 145 (Va. Ct. App. 2000).

43. *Id.* at 140.

44. *Id.* It is worth noting that Webb's appointed counsel, Steven D. Benjamin, is a highly acclaimed criminal defense attorney and that, in some sense, his very competence may have hampered Webb's assertion that he had received ineffective assistance of counsel. For a biography of Benjamin, see National Association of Criminal Defense Lawyers, Steven D. Benjamin, <http://www.nacdl.org/public.nsf/Leadership/Steven+D.+Benjamin?OpenDocument> (last visited Oct. 7, 2009). To some extent, this paradox provides an additional explanation for the failure of first-generation suits: to the extent that they were mounted by exceptional defense counsel, some defense counsel were arguing a theoretical conflict of interest created by exceptionally low attorney fee compensation rather than an actual conflict of interest experienced by the attorney in that particular case.

45. *Webb*, 528 S.E.2d at 140.

46. *Id.* at 141 n.1.

47. *Id.* at 142. For instance, at the time Webb's counsel filed the motion to dismiss, he had already expended more than ninety hours working on the case, thirty hours more than

court that, at the time, Virginia “ranked fifty-first amongst the states and the District of Columbia for allowable compensation for court-appointed attorneys and that the disparity between Virginia and the other states [was] overwhelming.”⁴⁸ Finally, Webb’s attorney argued that because Virginia’s indigent defense fees were so low and inflexible, the statutory scheme at issue violated Webb’s Sixth Amendment right to counsel and his due process rights.⁴⁹

The court of appeals took notice of the fact that the state ranked dead last in fees for indigent defense counsel. The court also recognized that Webb’s counsel had spent ninety hours preparing for trial. Under the statute in place at the time, Webb’s counsel could earn no more than \$735; ninety hours of work would generate an hourly fee of approximately eight dollars.⁵⁰ Despite its own acceptance of these facts, the court rejected all arguments that the statutory scheme was unconstitutional or that it created a financial disincentive for Webb’s lawyer to provide adequate representation.

Reasoning that, in this case, Webb’s lawyer had prepared an effective representation—even at great personal financial loss—the court saw no basis for the conflict of interest claim.⁵¹ Moreover, the court rejected a facial attack to the statutory scheme, holding: “To the extent Webb claims that the statutory caps for court-appointed counsel fees for indigent defendants are woefully inadequate, redress must come from the General Assembly. On this record, we do not find that the fee schedule is so inadequate as to violate the Sixth or Fourteenth Amendments.”⁵² Thus, *Webb* and *Grayson* demonstrate great judicial reluctance to assume responsibility for systemic reform of indigent defense—or to even acknowledge systemic shortcomings, such as chronic underfunding.⁵³

the time for which compensation was allowed under the statute. *Id.* at 140.

48. *Id.*

49. *Id.* at 143.

50. *Id.* at 140 n.1.

51. *Id.* at 142 (“Although [Webb’s attorney] made a bare claim that this situation creates a potential conflict of interest because an attorney must choose between not being adequately compensated or not adequately representing his client, [his attorney] neither alleged nor presented evidence that he labored under an actual conflict of interest. Understandably, he did not allege that he was unable or unwilling to zealously represent Webb because of financial constraints or considerations.”). In fact, the conflict of interest claims that were raised in *Webb* have persistently failed. *See, e.g., Britt v. State*, 653 S.E.2d 713 (Ga. 2007) (affirming contempt citation for two attorneys who refused to continue representing their indigent client based on the argument that it would be an ethical violation given the compensation scheme at issue and the conflict of interest that it created).

52. *Webb*, 528 S.E.2d at 145.

53. One would hope that, today, a decision like *Webb* in Virginia is less likely. In 2006, Virginia narrowly avoided a lawsuit prepared by lawyers from Covington & Burling LLP, along with support from the National Association of Criminal Defense Lawyers, the Virginia Indigent Defense Coalition, and the American Bar Association, when the state

Not all state court judges have been hostile to these types of claims. For example, some state court judges have recognized that the competence of attorneys representing indigent defendants is within the realm of judicial authority, and on that basis, courts have refused to be bound by a predetermined fee cap for indigent defense services.⁵⁴ Moreover, in three noteworthy cases—*State v. Peart*, *State v. Lynch*, and *State v. Smith*—state court judges took the initiative to address systemic flaws in the context of individual criminal cases.⁵⁵

In *State v. Smith*, the Arizona Supreme Court considered the constitutionality of Mohave County's bid system for providing counsel to indigent defendants.⁵⁶ Under that system, the county solicited sealed bids from practicing attorneys for the representation of indigent defendants; historically the county selected the lowest bids to provide indigent representation.⁵⁷ The Arizona Supreme Court held that the county's bid system violated prevailing professional standards on four counts:

1. The system does not take into account the time that the attorney is expected to spend in representing his share of indigent defendants.
2. The system does not provide for support costs for the attorney, such as investigators, paralegals, and law clerks.
3. The system fails to take into account the competency of the attorney. An attorney, especially one newly-admitted to the bar, for example, could bid low in order to obtain a contract, but would not be able to adequately represent all of the clients assigned

agreed to undertake widespread reform of its indigent defense system. See Malia Brink, *Indigent Defense Reform in Virginia: A Long Road Well-Traveled*, CHAMPION, May 2007, at 10–19 (chronicling the history of the suit and subsequent legislative changes). The suit was designed to challenge the state's then "hard-cap" defense system under which defense attorneys were paid a predetermined amount depending upon the severity of the crime and judges had no latitude to adjust the caps. As a result of legislation passed by the Virginia Legislature in 2007, judges can now waive the fee caps upon a showing of good cause. *Id.* at 18–19.

54. See, e.g., *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986) (finding fee-cap statute unconstitutional as applied because it curtailed inherent judicial authority to ensure adequate representation); *Smith v. State*, 394 A.2d 834, 839 (N.H. 1978) ("Since the obligation to represent indigent defendants is an obligation springing from judicial authority, so too is the determination of reasonable compensation for court-appointed attorneys a matter for judicial determination. The power to regulate officers of the court is a power inherent in the judicial branch. Implicit in that power is the authority to fix reasonable compensation rates for court-appointed attorneys.").

55. See *Effectively Ineffective*, *supra* note 26, at 1735–41 (discussing *State v. Lynch*, *State v. Smith*, and *State v. Peart* as three cases that contributed to indigent defense funding reforms).

56. *State v. Smith*, 681 P.2d 1374 (Ariz. 1984).

57. *Id.* at 1379.

according to the standard of *Watson*.⁵⁸

4. The system does not take into account the complexity of each case.⁵⁹

Moreover, the state supreme court announced that "if the same procedure for selection and compensation of counsel is followed as was followed in this case, there will be an inference that the procedure resulted in ineffective assistance of counsel, which inference the state will have the burden of rebutting."⁶⁰

The Louisiana and Oklahoma Supreme Courts were similarly responsive to challenges to indigent defense systems in the cases of *State v. Peart*⁶¹ and *State v. Lynch*.⁶² In *Peart*, at issue was the constitutionality of New Orleans' public defense system. Peart's counsel had requested relief from the trial court, arguing that because the New Orleans system was so underfunded, he was operating under a workload that deprived his clients of effective representation.⁶³ The Louisiana Supreme Court declined to find the system unconstitutional, but it did declare "because of the excessive caseloads and the insufficient support with which their attorneys must work, indigent defendants in [New Orleans] are generally not provided with the effective assistance of counsel the constitution requires."⁶⁴ To remedy the situation, the court announced a rebuttable presumption, similar to that in *Smith*, "that indigents . . . are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards."⁶⁵

In *Lynch*, when two court-appointed indigent defense counsel challenged statutory fee caps, the Oklahoma Supreme Court took jurisdiction over the issue of funding indigent defense and set guidelines for compensation of counsel until the legislature acted to do so.⁶⁶ The Court cited its "constitutional responsibilities relating to the managerial and superintending control of the district courts and of the practice of law" and "the inherent power of [the] court to define and regulate the practice of law" as the bases of its authority to act.⁶⁷ Moreover, it noted that while "the provision of counsel for indigent defendants, and the compensation of

58. The *Watson* standard for judging a lawyer's competency is "whether under the circumstances the attorney showed at least minimal competence in representing the criminal defendant." *State v. Watson*, 653 P.2d 351, 354 (Ariz. 1982).

59. *Smith*, 681 P.2d at 1381.

60. *Id.* at 1384.

61. *State v. Peart*, 621 So. 2d 780 (La. 1993).

62. *State v. Lynch*, 796 P.2d 1150 (Okla. 1990).

63. *Peart*, 621 So. 2d at 784.

64. *Id.* at 790.

65. *Id.* at 791.

66. *Lynch*, 796 P.2d at 1163.

67. *Id.*

such counsel also lie within the Legislative sphere,” until the legislature took up the issues, the court had a responsibility to address the constitutional claims of the indigent defendants and their lawyers.⁶⁸

Unfortunately, the relief afforded in *Smith*, *Lynch*, and *Pearl* has not been sustained.⁶⁹ Louisiana appellate courts have continued to require individual showings of ineffective assistance of counsel, despite *Pearl*’s establishment of a rebuttable presumption of inefficacy.⁷⁰ In 2007, one New Orleans judge announced he would release inmates and refuse to assign further cases to public defenders based on the system’s unconstitutional nature.⁷¹ In his order, he described the system as follows: “Indigent defense in New Orleans is unbelievable, unconstitutional, totally lacking in the basic professional standards of legal representation and a mockery of what criminal justice should be in a Western civilized nation.”⁷² Similarly, despite the calls to action in *Smith* and *Lynch*, Oklahoma and Arizona continue to grapple with indigent defense funding issues.⁷³ In each of the three states, unsupportive legislatures, subsequent state judges, or both have eviscerated the state supreme court’s initial attempt to improve the public defense system.

Thus, first-generation suits brought in the context of individual cases were either rejected outright by courts or resulted in fleeting relief.

B. Systemic Challenges

There are a few first-generation systemic challenges that did not arise purely in individual defendants’ cases. Rather, these suits looked more like what one thinks of when one envisions impact litigation—a proactive,

68. *Id.* at 1164.

69. *Effectively Ineffective*, *supra* note 26, at 1735–41 (noting that *Pearl* has been an ineffective mechanism for criminal defendants to obtain relief for ineffective assistance of counsel and did not sustain legislative increases in funding; that since *Lynch*, the Oklahoma Indigent Defense System has experienced repeated financial crises; and that after *Smith* the Mohave County defense system experienced tremendous financial strain and unmanageable caseloads). *See also* Backus & Marcus, *supra* note 1, at 1117–21 (discussing the failure of the same three cases to generate lasting reform).

70. *See Effectively Ineffective*, *supra* note 26, at 1737. *See also* State v. Paben, 990 So. 2d 123, 125–26 (La. Ct. App. 2008); State v. Smith, 988 So. 2d 861, 868–69 (La. Ct. App. 2008); State v. Carter, 987 So. 2d 364, 372–74 (La. Ct. App. 2008).

71. Laura Parker, *New Orleans Judge May Free Dozens*, USA TODAY, Apr. 2, 2007, at A3.

72. *Id.*

73. *See Effectively Ineffective*, *supra* note 26, at 1737–40. *See also* Yvonne Wingett & Michael Kiefer, *County Faces Rising Cost of Justice*, ARIZ. REPUBLIC, Aug. 12, 2007, at A1; Robert Boczkiewicz, *Death Row Inmates’ Attorneys Receive Victory*, NEWSOK.COM, Jan. 24, 2006 (describing availability of federal funds for state clemency proceedings where state funds were inadequate), *available at* <http://www.nacdl.org/public.nsf/defenseupdates/Oklahoma001>; *infra* notes 134–39 and accompanying text (describing ongoing low rates of compensation for indigent defense counsel in Oklahoma counties).

organized suit aimed at generating systemic reform.⁷⁴ These suits comprise a second subcategory of what I refer to as first-generation suits, and there are a handful to consider in both state and federal court.

In *Kennedy v. Carlson*, the chief public defender in Minneapolis filed a lawsuit arguing that the state's public defense system deprived his clients of their Sixth Amendment right to counsel.⁷⁵ The court described Kennedy's claim as follows:

[H]is clients have been exposed to the possibility of substandard legal representation due to excessive public defender caseloads. . . . Public defenders cannot refuse to accept new clients under Minnesota law; therefore, Kennedy's attorneys must "plead out" two to four cases each day, making it impossible to spend sufficient time with each individual client. As a result of his office's heavy workload, Kennedy argues that his clients' Sixth Amendment right to effective legal assistance may or will be violated. . . .⁷⁶

Despite the systemic underfunding and excessive caseload problems that Kennedy sought to correct, the court found the cases nonjusticiable because the plaintiffs failed to put on "evidence that . . . clients actually have been prejudiced due to ineffective assistance of counsel."⁷⁷ The *Kennedy* court recognized that state judges had afforded relief in similar cases before, citing *Peart* and *Smith*, but distinguished those cases as ones where the plaintiffs had demonstrated actual harm to the indigent defendant clients.⁷⁸ Consequently, the Supreme Court of Minnesota rejected Kennedy's constitutional challenge as "too speculative and hypothetical to support jurisdiction."⁷⁹

Federal courts, for the most part, have been unavailable to litigants seeking systemic reform of indigent defense.⁸⁰ Perhaps the most well-

74. See JEFFRIES, KARLAN, LOW & RUTHERGLEN, *supra* note 22, at 848-49 (2000) (distinguishing structural reform litigation from a traditional lawsuit).

75. *Kennedy v. Carlson*, 544 N.W.2d 1, 3 (Minn. 1996).

76. *Id.* at 6.

77. *Id.* at 7. The court cited instead to evidence establishing that the defender office was well respected by trial judges, that it was well funded when compared to other public defender offices, and that its attorneys faced no claims of professional misconduct or malpractice. *Id.*

78. *Id.*

79. *Id.* at 8. See also *Platt v. State*, 664 N.E.2d 357, 363 n.5 (Ind. Ct. App. 1996) (coming to similar conclusions and citing *Kennedy*).

80. See *Bernhard*, *supra* note 26, at 332 ("Federal courts have been prevented largely from engaging in the reform of state indigent defense systems . . ."); *Gideon's Promise Unfulfilled*, *supra* note 23, at 2077 ("A serious obstacle to the future viability of litigated reform . . . is the lack of a federal forum to hear such claims."). But see *Gilliard v. Carson*, 348 F. Supp. 757 (M.D. Fla. 1972) (providing declaratory and injunctive relief to class of indigent defendants); Consent Order at 1-2, *Stinson v. Fulton County Bd. of Comm'rs*, No.

known example of federal public litigation regarding indigent defense is the Eleventh Circuit case of *Luckey v. Miller*, in which the American Civil Liberties Union (ACLU) sought judicial overhaul of Georgia's county-based system for indigent defense.⁸¹ Citing *Younger v. Harris*, in which the Supreme Court held that federal courts should not interfere with ongoing state criminal prosecutions,⁸² the district court in *Luckey* held that the relief plaintiffs had requested would likely require intensive federal judicial oversight of state prosecutions, and that such an outcome was barred by *Younger*.⁸³ In an earlier proceeding, the Eleventh Circuit recognized the theoretical possibility that a defendant could seek to vindicate her Sixth Amendment rights outside the context of *Strickland*,⁸⁴ but at the same time, the court ultimately affirmed dismissal on abstention grounds.⁸⁵ The Second, Fifth, and Sixth Circuits have followed suit when similar claims have been filed.⁸⁶

Despite the unavailability of a federal forum for these claims to date, it is worth noting that *Luckey* did create some good law for indigent defense advocates going forward. Importantly, *Luckey* recognized that a defendant has the right to make a Sixth Amendment challenge outside the context of post-conviction review, reasoning that the right to counsel is

1-94-CV-240-GET (N.D. Ga. 1999) (implementing order mandating Fulton County to achieve certain goals in regards to affording defendants with effective and continuous legal representation). I discuss the basis upon which parties could seek a federal forum in Part III, *infra*.

81. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

82. *Younger v. Harris*, 401 U.S. 37 (1971).

83. *Luckey v. Miller*, 976 F.2d at 677–79.

84. See *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (“[The *Strickland*] standard is inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the ‘ineffectiveness’ standard may nonetheless violate a defendant’s rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively.”)

85. *Luckey v. Miller*, 976 F.2d at 678 (“[T]he relief sought by the plaintiffs would require this Court to force the state to promulgate uniform standards relating to various stages of prosecutions and also to monitor those standards. If the monitoring is to be effective, this Court will have to review ongoing state proceedings and may have to interrupt them if the standards are not being followed. Even if the Court merely required periodic reporting, such action on the part of a federal court strikes at the heart of the prohibitions that are embedded into constitutional law by *Younger* and its progeny.”) (quoting the district court decision)). See also discussion *infra* Part III.A.2 (providing a general overview of abstention doctrine issues in the context of public defense litigation).

86. See *Foster v. Kassulke*, 898 F.2d 1144 (6th Cir. 1990) (rejecting inmate’s challenge to Kentucky public defense system); *Gardner v. Luckey*, 500 F.2d 712 (5th Cir. 1974) (rejecting class action challenging Florida public defense system); *Wallace v. Kern*, 499 F.2d 1345 (2d Cir. 1974) (rejecting class action by inmates to enforce their right to a speedy trial).

more than the right to a certain result.⁸⁷ This part of the *Luckey* decision could be used as leverage by advocates attempting to litigate these claims in federal court, as I discuss, *infra*, in Part III.

These cases provide a flavor of the first-generation suits that sought systemic reform of indigent defense. Some of these suits were brought as defenses to individual prosecutions, while others, in both state and federal court, were externally driven, organized attempts to create new law regarding public defense systems. These first-generation suits were small in number, and they were generally ineffective at generating lasting results. Several factors explain the inefficacy of these suits.

First, with respect to *Grayson* and *Webb*, these cases demonstrate that, unfortunately, in some states, judges have simply been hostile to the idea that indigent defense requires more funding and oversight from the state.⁸⁸ Alabama and Virginia both have poor track records when it comes to protecting the rights of criminal defendants,⁸⁹ and the language of these decisions reveals that history. The *Grayson* court's declaration of its "belief that attorneys appointed to defend capital clients will serve them well, as directed by their consciences and the ethical rules,"⁹⁰ was disingenuous at the time. Only three years after the *Grayson* decision, an independent report on Alabama's indigent defense system found that "there was simply not enough money to meet the demands of the . . . system on a yearly basis" and that "the statutorily created reimbursement rates for appointed counsel were so low that competent attorneys had been steadily driven out of the system of representing indigent defendants."⁹¹ Surely, the Alabama bench was aware of the poor quality of defense advocacy in its courtrooms; the will to change was simply not there.

In some cases, the courts' rejection of requests for systemic relief may be attributed to judicial hostility. After losing his constitutional challenge to the system in *Webb*, Webb's lawyer, Steven Benjamin, continued to make the claim that the state's astonishingly low fee caps created a conflict

87. See *Luckey v. Harris*, 860 F.2d at 1017–18 ("[The *Strickland*] standard is inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment."). See also Citron, *supra* note 26, at 492–94; Reddy, *supra* note 26, at 18.

88. See *supra* notes 37–53 and accompanying text.

89. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ABA, "ALABAMA" INFORMATION SHEET 2 (2004) (citing the "attitude of the judiciary" as a "significant impediment to indigent defense reform in Alabama"), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/downloads/al.pdf>; Brink, *supra* note 53, at 11 (noting that the hard-cap compensation for public defense counsel in Virginia had been in place and had been documented as a problem more than thirty years before legislation improved matters in 2007).

90. *Ex parte Grayson*, 479 So. 2d 76, 80 (Ala. 1985).

91. David Allen Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Towards Change*, 52 ALA. L. REV. 975, 986–87 (2001).

of interest for court-appointed attorneys.⁹² In one instance where Benjamin raised this issue, the presiding judge “responded by ordering Benjamin removed from the case,” until Benjamin’s client begged to have him reinstated.⁹³ Another judge, having heard about Benjamin’s conflict of interest challenge, announced that he would remove attorneys who brought similar challenges from the roster of indigent defense counsel.⁹⁴

But judicial insensitivity alone does not explain the shortcomings of these first-generation suits. Indeed, these suits also shared some strategic weaknesses. With respect to the suits brought in the context of an individual prosecution, they “focus[ed] retrospectively on individual cases rather than looking prospectively to demand reform of the system as a whole.”⁹⁵ Accordingly, they were not a good vehicle for systemic reform. Moreover, in *Smith* and *Lynch*, defense counsel challenged an individual defendant’s conviction and the defense counsel’s compensation, respectively, in individual cases.⁹⁶ Given the procedural posture of both cases, defense counsel in neither case asked for a court order regarding additional defense funding or long-term oversight.⁹⁷ Finally, and perhaps most critically, as the *Kennedy* case demonstrates, a lack of data demonstrating actual harm to clients undermined the plaintiffs’ claims that there were widespread violations of the Sixth Amendment right to counsel.⁹⁸

Thus, for a host of reasons, first-generation challenges to indigent defense systems were not fruitful for the most part. In some cases these suits were dismissed, while in other cases, they resulted in only short-term remedies. The next section of this article turns to more recent and more empirically grounded suits—what I call second-generation suits—and identifies the reasons for their comparative success.

II.

SECOND-GENERATION SUITS

In the last ten to fifteen years, defender organizations, nonprofit organizations, and private lawyers working in a pro bono capacity have pursued indigent defense reform through systemic lawsuits in several states and counties across the country.⁹⁹ One may say that there is now a new

92. Brink, *supra* note 53, at 12.

93. *Id.*

94. *Id.*

95. *Effectively Ineffective*, *supra* note 26, at 1742.

96. *See supra* notes 56–60, 66–68 and accompanying text

97. *Id.*

98. *See Kennedy v. Carbon*, 544 N.W.2d 1, 7 (Minn. 1996); *supra* note 77 and accompanying text.

99. It is fair to say that the ACLU is driving this trend of impact litigation to improve

model for systemic litigation of indigent defense embodied in these lawsuits.¹⁰⁰ While these suits have not been perfect,¹⁰¹ they have been far better prepared and executed than their predecessor suits, and, in some instances, they have created substantive, lasting reform. In this section of the article I first review several second-generation lawsuits to provide an overview of recent and ongoing litigation. Next, I identify what I view as the salient elements of these second-generation suits, with an eye toward creating a template that other advocacy groups can replicate going forward.

A. *The Second-Generation Suit: An Overview of Litigation*

What do these second-generation suits look like? Unlike first-generation challenges to indigent defense systems, these suits are not merely aggregated ineffective assistance of counsel claims.¹⁰² Instead, these suits are primarily state-court class actions, challenging objective criteria, such as excessive attorney caseloads, meager rates of attorney

public defense systems, though the organization is certainly not alone in bringing such suits. I am grateful to the many ACLU attorneys and the attorneys with whom the organization has collaborated on these suits who took the time to speak with me about this litigation, including Robin Dahlberg, Corey Stoughton, Scott Crichton, Vic Walczak, David Carroll of the NLADA, Bob Spangenberg of the Spangenberg Group, and the Honorable Judge Karla Grey.

100. Other scholars have previously sketched out necessary attributes to these systematic litigation suits. See Bernhard, *supra* note 26, at 322 (describing attributes of such suits as “egregious conditions (in other words—a real crisis), allegations of actual injury to clients, litigation support from a law reform organization or bar association, and public favor”); Nicole J. DeSario, *The Quality of Indigent Defense on the 40th Anniversary of Gideon: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 62 (describing “four critical decisions” litigants of these suits must make as where to file, who to sue, who to name as plaintiffs and what to use as evidence). The model I describe herein builds upon these earlier ideas, but offers greater depth and additional elements to the model, largely in light of practitioner interviews and more recent suits.

101. See discussion *infra* Part III.

102. See generally *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); Class Action Complaint, *Rivera v. Rowland*, 1998 WL 96407 (Conn. Super. Ct. Feb. 20, 1998) (No. CV 950545629S) [hereinafter *Rivera* Complaint]; Complaint, *Duncan v. State*, 2009 WL 1640975 (Mich. Cir. Ct. June 11, 2009) (Nos. 278652, 278858, 278860) [hereinafter *Duncan* Complaint]; Amended Complaint, *White v. Martz*, No. C.DV-2002-133 (Mont. Jud. Dist. Ct. Apr. 1, 2002) [hereinafter *White* Complaint]; Class Action Complaint, *Hurrell-Harring v. State*, 883 N.Y.S.2d 349 (App. Div. 2009) (No. 8866-07) [hereinafter *Hurrell-Harring* Complaint]; Third Amended Class Action Complaint, *Doyle v. Allegheny County Salary Bd.*, No. GD-96-13606 (Pa. Ct. C.P. Nov. 21, 1997) [hereinafter *Doyle* Complaint]; Complaint, *Best v. Grant County*, No. 04-2-00189-0 (Wash. Sup. Ct. 2004). One may query my decision to include a 1995 and a 1997 case in the category of second-generation suits. The categorization is only partly chronological; phenomenologically, these two suits fit within this second-generation category. In addition, these earlier second-generation suits, while not as ambitious and streamlined as, say, the *Hurrell-Harring* class action suit pending in New York state today, proved something essential—that systemic challenges to public defense systems could be brought and won.

compensation, a lack of attorney hiring and training criteria, and the absence of an oversight mechanism.

In the 1995 case *Rivera v. Rowland*, the ACLU and the Connecticut Civil Liberties Union brought suit against Connecticut's Governor John G. Rowland, alleging that the legislature's failure to adequately fund the state's indigent defense system was a violation of its clients' Sixth and Fourteenth Amendment rights.¹⁰³ Specifically, the suit challenged excessive attorney caseloads, substandard rates of compensation for attorneys, and a lack of adequate representation for juvenile defendants.¹⁰⁴

After four and a half years of litigation, the law reform organizations were able to bring about a settlement that has offered sustainable improvements to the system. As a result of the settlement, the statewide public defender office saw "a substantial (more than 30%) increase in public defender staffing, and a commensurate reduction in public defender caseloads, along with new practice and caseload guidelines, new training programs and an oversight system for the private 'special' public defenders that complement regular public defender staff."¹⁰⁵

The ACLU described the settlement of *Rivera v. Rowland* as "a model for reform of indigent defense systems around the country."¹⁰⁶ And indeed that has been the case. In the wake of *Rivera*, the ACLU, in collaboration with other defender organizations and private attorneys, has filed similar suits in Pennsylvania, Montana, Massachusetts, and Washington.¹⁰⁷ Today, similar suits are pending in Michigan and New York.¹⁰⁸

For the most part, these suits have been far more successful than their predecessors. The Pennsylvania suit resulted in a consent decree,¹⁰⁹ while

103. See *Rivera* Complaint, *supra* note 102, at 2. See also Reddy, *supra* note 26, at 30–32 (describing suit and process that led to ACLU's withdrawal of suit).

104. *Rivera* Complaint, *supra* note 102, at 15–17. See also Reddy, *supra* note 26, at 30–32.

105. ACLU, Legal Docket Highlights (2001), http://www.acluct.org/legal/2001legal_docket.htm.

106. *Id.*

107. See Reddy, *supra* note 26, at 24–25 (mentioning indigent defense funding suit filed in Pennsylvania by ACLU in conjunction with private attorney). See also *supra* note 102 and accompanying text.

108. See *supra* notes 122–28 and accompanying text. A similar suit was filed in Kentucky. See Brandon Ortiz, *Public Defenders Sue State*, LEXINGTON HERALD-LEADER, July 1, 2008, at A1 (reporting that the Kentucky Department of Public Advocacy filed suit against state because of inadequacies in criminal defense system due to budget cuts). However, it was later dismissed as moot, in light of additional funding that the Governor made available to the public defense system. *Lewis v. Hollenbach*, No. 2009-SC-000164-TG (Ky. dismissed as moot May 13, 2009).

109. See Reddy, *supra* note 26, at 24–30 (describing resolution of suit and court's continuing jurisdiction over case until 2005).

the suits in Montana¹¹⁰ and Massachusetts¹¹¹ actually created new law.

In the Massachusetts case, the plaintiffs were indigent criminal defendants who had no attorneys to represent them due to the low rate of attorney compensation authorized by statute.¹¹² They asked the Supreme Judicial Court to declare that trial court judges could increase attorney rates of pay.¹¹³ The court took jurisdiction and held that “the petitioners’ constitutional right to the assistance of counsel [was] not being honored,” and that judicial guidance was required to remedy the chronic unavailability of appointed counsel in the jurisdictions at issue.¹¹⁴ The court held that “no defendant entitled to court-appointed counsel may be required to wait more than forty-five days for counsel to file an appearance,” and that “an indigent defendant who is held in lieu of bail or under an order of preventive detention may not be held for more than seven days without counsel.”¹¹⁵ Not only did the court’s opinion declare the state’s practice an ongoing constitutional violation, but the time limits placed on detainment of indigent defendants prompted the legislature to act. The court’s declaration also may have given lawmakers the political cover necessary to pursue a potentially unpopular increase in defense spending.¹¹⁶

In Montana, plaintiffs were similarly situated indigent defendants. They argued that the state’s delegation to counties of its duty to provide counsel to indigent defendants had resulted in grossly inadequate representation.¹¹⁷ This lawsuit was successful in that it prompted legislative action. First, in 2003, the legislature put together a package to respond to the 2002 suit, but, according to plaintiffs’ counsel, it was “too little, too late.”¹¹⁸ Soon thereafter, the Attorney General approached the

110. *White* Complaint, *supra* note 102.

111. *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004).

112. *Lavallee*, 812 N.E.2d at 899–901 (noting that in a state with the lowest rates of compensation in the nation, there was a void of staff attorneys in the public counsels’ office and a lack of certified bar advocates to whom to assign cases).

113. *Id.* at 900–01.

114. *Id.* at 904–05.

115. *Id.* at 911.

116. See Jeffrey R. Goodwin, *Massachusetts’ Struggle to Adhere to the Gideon Mandate: Will the Lavallee Decision, Coupled with Legislative Reform, Finally Establish a State Indigent Criminal Defense System That Is Constitutionally Sound?*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 77, 100–01 (2006); discussion *infra* Part III.A.1 (regarding “Post-litigation Efforts”). See also The Spangenberg Group, *Major Reform Legislation Passed in Massachusetts*, <http://www.spangenberggroup.com/news/MassReformLegislation.html> (last visited April 5, 2009). But see Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 103 (2007) (noting that within one year legislature reverted on funding priorities which suggests legislative pressure needs to be sustained even after successful suit).

117. See *White* Complaint, *supra* note 102, at 3–4.

118. Telephone Interview with Scott Crichton, Executive Dir., Mont. Am. Civil Liberties Union (Aug. 25, 2008).

ACLU to craft a solution. This was a fortuitous development: the Attorney General was able to appeal to the more conservative members of the lawmaking body and convince them that a legislative solution was preferable to a judicial one.¹¹⁹ In 2005, the state legislature enacted the Montana Public Defender Act.¹²⁰ Although the Montana system is still relatively new, it has already been cited as a model for other states. The new model is widely viewed to have resulted in increased quality and consistency of representation, greater access to counsel, and greater compensation for defense counsel, among other things.¹²¹

The two systemic Sixth Amendment suits currently pending—in New York¹²² and in Michigan—make claims similar to those advanced in the Montana suit. Both suits argue that the state has abdicated its constitutional responsibility to provide indigent defendants with effective representation by delegating this duty to the counties.¹²³ While it is too early to predict how these suits will be resolved, both have recently survived motions to dismiss. In August 2008, Albany Supreme Court Justice Eugene Devine rejected the state's arguments that the named plaintiffs lacked standing and that the relief requested was a legislative function.¹²⁴ Justice Devine wrote:

119. *Id.*

120. MONT. CODE ANN. §§ 47-1-201 to -216 (2009) (outlining state's obligation to create a public defender office, as well as an appellate defender office, and authorizing the chief public defender to hire deputy public defenders, support staff, and a training coordinator).

121. See Zachary Franz, *State's Public Defender Overhaul Earns Kudos*, GREAT FALLS TRIB., July 27, 2008, at 1A.

122. In April 2009, while this systemic public defense lawsuit was pending in the New York state courts, the New York legislature passed a law imposing caseload limits for public defense attorneys in New York City. See John Eligon, *State Law to Cap Public Defenders' Caseloads, but Only in the City*, N.Y. TIMES, Apr. 6, 2009, at A19. Defense reform advocates were optimistic that this legislative move suggested that statewide reform would follow. *Id.* Promptly thereafter, in July 2009, a divided New York appellate court dismissed the pending lawsuit. See *Hurrell-Harring v. State*, 883 N.Y.S.2d 349 (App. Div. 2009). See also Elizabeth Stull, *Defender Suit Heading to New York Court of Appeals*, DAILY RECORD (Rochester, N.Y.), July 23, 2009. Rejecting the plaintiffs' request for systemic relief, the appellate court explained: "In our view, any decisions to address [systemic] 'deficiencies' should be made by the executive and legislative branches of government, and not by the Judiciary." *Hurrell-Harring*, 883 N.Y.S.2d at 351. At the time this article went to press, the status of the lawsuit was unclear. Because the appellate court split 3-2 in its decision, the plaintiffs had an automatic right of appeal to the New York Court of Appeals, the state's court of last resort. See Stull, *supra*. The plaintiffs filed their appeal on September 28, 2009, and the Court of Appeals will likely hear the case sometime in early 2010. See Brief for Plaintiffs-Appellants, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sept. 28, 2009) (on file with author).

123. See *Duncan* Complaint, *supra* note 102, at 2-5; *Hurrell-Harring* Complaint, *supra* note 102, at 5.

124. Joel Stashenko, *Suit Proceeds over Providing Criminal Defense to Poor*, 240 N.Y. L.J. 1 (2008).

“The action primarily seeks a declaration that the State has failed in its constitutional duty to provide meaningful and effective assistance of counsel to indigent criminal defendants. . . . It would not require the judiciary to manage discretionary aspects of an essentially executive function of government. Rather it seeks a determination that the State has or is likely to violate the plaintiffs’ constitutional rights.”¹²⁵

Similarly, in June 2009, the Michigan Court of Appeals affirmed a lower court decision on several issues, thereby allowing the Michigan class action to move forward.¹²⁶ In its decision, the court of appeals rejected the state’s arguments regarding governmental immunity, justiciability, and class certification.¹²⁷ The ability of these suits to make it out of the gates is, in itself, a mark of the success of second-generation suits. Judges are recognizing—and the legislature is being urged to recognize in these jurisdictions¹²⁸—that indigent defense is the state’s responsibility and that the bench need not punt these cases on procedural grounds. Given that these suits have been more successful than their first-generation predecessors, it is important to identify the attributes of these suits that explain their success. That is the aim of the next section of this article.

B. Second-Generation Suits: The New Model for Systemic Sixth Amendment Claims

Based on this body of litigation, one may say that there is a new model for successful systemic litigation of indigent defense. In particular, these suits share five features that are critical for impact lawyers to recognize and replicate in future suits. First, in the jurisdictions where lawyers brought these suits, litigation was a last resort. Second, in all of these suits, the plaintiffs’ attorneys demonstrated actual harm to clients as a result of the defense system. Third, these suits involved strategic procedural decisions. Fourth, plaintiffs’ counsel fleshed out the Sixth Amendment claims in these suits by drawing upon accepted professional standards. And finally, these suits entailed extensive alliances both within and

125. *Id.* (quoting Justice Devine).

126. *Duncan v. State*, Nos. 278652, 278858, 278860, 2009 WL 1640975 (Mich. Ct. App. June 11, 2009). At the time this article went to press, the state had filed leave to appeal this decision before the Michigan Supreme Court. See Email from Jim Neuhard, Michigan Chief Appellate Defender, to author (Oct. 13, 2009, 15:20 EST) (on file with author). The state supreme court hears cases on a discretionary basis, and it may be several months before the parties know whether the suit will move forward. *Id.*

127. *Id.* at *1–2.

128. See generally George Bundy Smith, *Equal Justice for All in New York*, ALB. TIMES UNION, Aug. 12, 2008, at A11 (noting that the chief judge of New York State, Judith Kaye, appointed a commission for the Future of Indigent Defense Services, which then advocated for statewide delivery of defense services with reasonable and adequate standards).

external to the system being challenged. In this section, I address each attribute in turn.

1. Litigation as a Last Resort

Successful second-generation suits were brought in jurisdictions where other efforts had already been made to improve the public defense system and litigation truly was a last resort. This aspect is critical for two reasons. First, advocacy groups have to be thoughtful in where they deploy their resources, and as attorneys experienced with these suits can attest, they can be incredibly protracted and expensive.¹²⁹ It behooves litigants to explore other avenues before taking an indigent defense crisis to the courts.

Second, it is much easier for plaintiffs to convince a state court judge to take jurisdiction over a systemic Sixth Amendment suit when other, non-litigation strategies have already been pursued. For example, in Montana, the complaint documented the defendant state actors' awareness of and indifference to the indigent defense crisis. The 2002 complaint cited to the fact that there had been two statewide studies of indigent defense in 1976 and a legislative report in 1982, all of which found that the mandates of *Gideon* were not being met.¹³⁰ Despite legislative suggestions toward reform, "Twenty years later, State Defendants have failed to implement any of these reforms."¹³¹

Similarly, in the Michigan suit, the 2007 Complaint alleged:

In 1978, 1986, 1992, 2002 and again in 2003, various statewide and local committees and task forces—including a task force appointed by the Defendant Governor herself—have condemned the same deficiencies in Michigan's indigent defense system as those upon which Plaintiffs base this Complaint. Each has recommended the adoption of statewide standards and/or the creation of a statewide indigent defense commission.... Defendants have disregarded each report and set of recommendations.¹³²

129. Telephone Interview with Robin Dahlberg, Senior Staff Attorney, ACLU (June 23, 2008); Telephone Interview with Corey Stoughton, Staff Attorney, N.Y. Civil Liberties Union (June 5, 2008). For example, in 2006, the New York Civil Liberties Union (NYCLU) reported that it had already spent three years investigating statewide public defense problems. See Press Release, N.Y. Civil Liberties Union, New York State Must Reform Indigent Defense or Face Lawsuit, NYCLU Says (June 28, 2006), *available at* <http://www.nyclu.org/node/133>. That threatened lawsuit is pending today, six years after NYCLU lawyers began collecting the data upon which the Sixth Amendment claims were ultimately brought.

130. See *White* Complaint, *supra* note 102, at 46.

131. *Id.*

132. *Duncan* Complaint, *supra* note 102, at 23–24.

This historical context is vital because it allows the state court judge presiding over the case to avoid the temptation to punt the issue and refer the plaintiffs to the political process, as earlier judges did when confronted with systemic claims.¹³³ Faced with the reality that the legislature has been on notice for years and has failed to act, a state court judge is more likely to take action.

2. System-Wide Proof of Actual Harm to Clients

a) Actual Harm

While it may sound elementary, determining whether there is systemic harm to clients of the public defense system is both critical to the success of the second-generation suits and time consuming to determine at the outset. For example, before filing its current suit in Michigan, the ACLU had received complaints regarding the indigent defense system in Oklahoma, and the organization conducted an investigation regarding potential systemic deficiencies.¹³⁴ Under Oklahoma's indigent defense system, in most counties, attorneys are retained on a contract basis.¹³⁵ The ACLU had received complaints that contract attorneys in several counties were required to handle felony cases for a capped fee of \$120.¹³⁶ An investigation revealed that many of these felony cases involved charges of passing bad checks and drug possession.¹³⁷ According to qualified counsel, in some instances, such as where actors within the criminal justice system knew one another and cases could be handled expeditiously, the \$120 fee cap was not unreasonable.¹³⁸ Because the fee cap was not unreasonably low for all felony cases, the ACLU recognized that proving systemic miscarriages of justice would not be feasible in the Oklahoma counties at issue. Successful second-generation suits are not based upon idiosyncratic harms, but rather systematic harms that can be proven at trial.¹³⁹

In contrast to the Oklahoma scenario, when the ACLU sued the state

133. See, e.g., *Webb v. Commonwealth*, 528 S.E.2d 138, 145 (Va. Ct. App. 2000) (reflecting Court's opinion that "redress must come from the General Assembly").

134. Telephone Interview with Robin Dahlberg, *supra* note 129.

135. OKLA. INDIGENT DEF. SYS., ANNUAL REPORT 2 (2008), available at <http://www.ok.gov/OIDS/documents/2008%20Annual%20Report.pdf> (explaining that contract attorneys provide the majority of non-capital indigent defense trial services in fifty-six counties, while staff attorneys do so in nineteen counties). See also OKLA. STAT. ANN. tit. 22, § 1355.8 (West 2003) (describing the contract award process).

136. Telephone Interview with Robin Dahlberg, *supra* note 129.

137. *Id.*

138. *Id.* The decision to not pursue a systemic claim based on these low rates of attorney compensation does not reflect in any way the ACLU's approval of the pay structure. Rather, it reflects the strategic selection of cases that present pervasive miscarriages of justice.

139. *Id.*

of Michigan, its complaint highlighted glaring systemic deficiencies. Having delegated its constitutional responsibility to provide indigent defendants with counsel to Michigan's eighty-three counties, the state provided no oversight of the counties to ensure adequate funding or practice guidelines.¹⁴⁰ In the absence of state funding and state oversight, the complaint documented the crisis that ensued in three counties.¹⁴¹ In all three counties there were no written client eligibility standards; no merit-based attorney hiring and retention programs; no written attorney performance standards; no guidelines for conflict of interest cases; no attorney workload limits; inadequate attorney training; and a lack of independence from the judicial and prosecutorial function.¹⁴² As a result, clients of the system did not confer with counsel before critical stages of the criminal process, and there was a lack of meaningful contact between clients and assigned counsel.¹⁴³ Defense counsel sometimes failed to conduct investigations that could support potential defenses, and failed to prepare adequately for hearings and trial.¹⁴⁴

Similarly, in New York, the complaint¹⁴⁵ came on the heels of Chief Judge Judith Kaye's creation of a commission to study indigent defense reform in the state.¹⁴⁶ The commission's report documented widespread miscarriages of justice and provided essential data that lawyers needed to demonstrate a systemic Sixth Amendment claim in court.¹⁴⁷

Thus, as a threshold matter, a successful systemic suit requires a determination that there are in fact widespread miscarriages of justice occurring within the system.

b) Ability to Prove the Harm

In addition to confirming that an indigent defense system is regularly generating miscarriages of justice, second-generation suits marshal both anecdotal and empirical evidence to prove those miscarriages in an

140. See *Duncan Complaint*, *supra* note 102, at 3.

141. *Id.*

142. *Id.* at 3–4.

143. See, e.g., *id.* at 6–7 (reporting that one class member met his attorney for the first time on the day of his preliminary examination and agreed to a guilty plea after a five-minute conversation with his attorney). Many other instances demonstrating the lack of meaningful contact between clients and assigned counsel are documented throughout the *Duncan Complaint*.

144. See, e.g., *id.* at 9–11 (describing client whose lawyer failed to challenge admissibility of evidence in case involving warrantless search, failed to negotiate plea offer, and failed to prepare for trial).

145. *Hurrell-Harring Complaint*, *supra* note 102.

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

147. *Id.*

adversarial setting.

The anecdotal evidence comes from research on the ground and is essential to the pleadings stage. In the Pennsylvania suit, the third amended complaint described the experience of one of the named plaintiffs, “R.W.”¹⁴⁸ Prior to being committed to a psychiatric institution, R.W. “had three hearings and was represented at each hearing by a different public defender.”¹⁴⁹ Each meeting lasted only a few minutes, and, although R.W. told each attorney that he did not want to be committed, none of the defenders had him independently evaluated.¹⁵⁰ The Michigan complaint alleges that one of the named plaintiffs met with his attorney for “approximately two minutes” at a preliminary examination conference and did not have an opportunity to discuss his valid defenses, despite the fact that he was facing more than twenty years in prison.¹⁵¹ In the Montana suit, the complaint alleged that, in at least one county, the contract for indigent defense counsel “require[d] defense counsel to keep [‘investigative and expert] costs to a minimum.”¹⁵² As a result of this mandate, none of the defense counsel in the county requested investigative or expert services in the two years prior to the filing of the Montana suit.¹⁵³ The same complaint alleged that “County Defendants and district court judges have let it be known that they will deny requests for investigative and expert witness services to minimize County expenses or that they will retaliate against attorneys who do incur such expenses.”¹⁵⁴ The complaints in these cases demonstrate anecdotally the harm that clients are suffering at the hands of a broken defense system.

In addition to this powerful anecdotal evidence, successful second-generation suits are marked by collaboration with research groups that can empirically document the details of an indigent defense crisis. In particular, the National Legal Aid and Defender Association (NLADA), a policy group that advocates for equal access to justice, and the Spangenberg Group, a research and consulting firm that specializes in improving justice programs, have been instrumental to the success of these more recent systemic suits.¹⁵⁵ For example, in the pending New York suit, NLADA has generated “report cards” on nine of New York’s counties,

148. *Doyle* Complaint, *supra* note 102, at 3–4.

149. *Id.* at 4.

150. *Id.*

151. *Duncan* Complaint, *supra* note 102, at 16–17.

152. *White* Complaint, *supra* note 102, at 42 (second alteration in original).

153. *Id.*

154. *Id.*

155. For general information regarding the NLADA, see Nat’l Legal Aid & Defender Assoc., <http://www.nlada.org/> (last visited Oct. 7, 2009), and for information regarding the Spangenberg Group, see George Mason Univ., The Spangenberg Project, <http://tsp.gmu.edu/> (last visited Oct. 7, 2009).

evaluating the counties' defense services in light of the American Bar Association's (ABA's) "Ten Principles of a Public Defense Delivery System" (Ten Principles).¹⁵⁶ Prior to the ACLU's filing suit, the Spangenberg Group generated a statewide evaluation for Judge Kaye's commission.¹⁵⁷ By evaluating the systems in a professional, systematic manner and documenting the indigent defense crisis empirically, these groups have laid the groundwork for clear and convincing proof of systemic constitutional violations at trial. In fact, when asked how she explains the more recent wave of successful indigent defense litigation, one attorney involved in this type of litigation answered simply, "Bob Spangenberg."¹⁵⁸

3. Strategic Procedural Decisions

Litigants in successful second-generation suits have carefully addressed and strategically handled recurring procedural issues. First, there is the challenge of selecting the parties in these suits. As a threshold matter, where a class action certification is sought, the suit must assert that named plaintiffs in the suit will "fairly and adequately protect the interests" of the class of plaintiffs.¹⁵⁹ Above and beyond that, successful second-generation suits include named plaintiffs who are "run of the mill" and who "the average person on the street can relate to."¹⁶⁰ Ideal named plaintiffs are defendants who have been charged with nonviolent crimes, such as a DUI or a nonviolent property crime.¹⁶¹ Individuals charged with violent crimes or sex offenses are not well suited as named plaintiffs, for the obvious reason that it is difficult to engender public sympathy for these defendants.¹⁶² The named plaintiffs cannot represent outlier cases; they must be emblematic of systematic deprivations of the right to counsel.

Equally important, the named plaintiffs must address any potential concerns implicated by the Supreme Court's ruling in *Los Angeles v. Lyons*.¹⁶³ In *Lyons*, the plaintiff brought a civil rights action against the city of Los Angeles, alleging that he had been subjected to an illegal

156. See, e.g., NAT'L LEGAL AID & DEFENDER ASSOC., PUBLIC DEFENSE REPORT CARD, JEFFERSON COUNTY, available at http://www.nysda.org/08_NYJeffersonCounty.pdf (last visited Oct. 7, 2009).

157. THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK (2006), available at <http://www.courts.state.ny.us/ip/indigentdefense-commission/SpangenbergGroupReport.pdf>.

158. Telephone Interview with Corey Stoughton, *supra* note 129 (referring to founder of the Spangenberg Group).

159. See, e.g., *Duncan* Complaint, *supra* note 102, at 20.

160. Telephone Interview with Robin Dahlberg, *supra* note 129; Telephone Interview with Corey Stoughton, *supra* note 129.

161. Telephone Interview with Robin Dahlberg, *supra* note 129.

162. *Id.*

163. *Los Angeles v. Lyons*, 461 U.S. 95 (1983).

chokehold during a routine traffic stop.¹⁶⁴ The Supreme Court held that the plaintiff could not seek injunctive relief in federal court because he failed to adequately state a case or controversy: “The plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’”¹⁶⁵ Accordingly, the Court found that while Lyons may have suffered at the hands of illegal police conduct and could be entitled to damages, that fact “does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.”¹⁶⁶ Thus, *Lyons* stands for the proposition that plaintiffs seeking injunctive relief in federal court must assert an ongoing violation or one that is likely to occur again in the future.

In the Sixth Amendment setting, *Lyons* suggests that plaintiffs need to allege ongoing deprivation of the right to counsel, rather than isolated instances of ineffective assistance of counsel that occurred in the past. For example, in the Allegheny County suit, one of the named plaintiffs was described as someone who had a history of mental illness and homelessness, and was “likely to be the subject of involuntary commitment proceedings in the future.”¹⁶⁷ Further, the complaint alleged, “Because of the long-standing nature of the Public Defender program’s lack of resources and systemic deficiencies, he will again be deprived of effective assistance of counsel or subject to the real and immediate threat of such an injury.”¹⁶⁸ Addressing the *Lyons* issue is closely tied to the first attribute of successful suits: proving that the right to counsel has been historically denied. The longer a system has been in crisis, the easier it is to argue that clients of the system are likely to suffer ongoing constitutional violations.¹⁶⁹

Equally, it is important that the named plaintiffs are individuals whose cases may have turned out differently had counsel been competent. For

164. *Id.* at 97–98.

165. *Id.* at 101–02.

166. *Id.* at 105.

167. *Doyle* Complaint, *supra* note 102, at 4.

168. *Id.* See also *id.* at 5–6 (describing a juvenile who remained in detention, without a delinquency hearing and without objection from her public defender, past the allowable statutory period).

169. On a related note, because criminal prosecutions are not necessarily stayed when civil Sixth Amendment challenges are mounted, plaintiffs’ counsel need to argue that the class certification remains appropriate even as the named plaintiffs move through the criminal justice system. See, e.g., *Duncan v. State*, Nos. 278652, 278858, 278860, 2009 WL 1640975, at *43 (Mich. Ct. App. June 11, 2009) (finding class certification appropriate notwithstanding the fact that “class members constitute a fluid class and the attendant criminal proceedings will continually be in flux”).

example, the Montana suit named as one of its plaintiffs a woman whose attorney chronically failed to return her phone calls and keep her apprised of basic information regarding her case.¹⁷⁰ Because her attorney neglected to tell her of two pending court appearances, a bench warrant was issued for her arrest.¹⁷¹ The Michigan complaint named as one of its plaintiffs a woman who faces charges of solicitation of murder and conspiracy to commit murder.¹⁷² Even though she had no prior criminal record and claims that these charges stem from “threats made against her and her young daughter by a neighbor’s boyfriend,”¹⁷³ her attorney has not had significant contact with her and has not discussed the facts of her case or any potential issues to investigate. As a result, at the time the complaint was filed, she had languished in jail for several months.¹⁷⁴ Suits of this kind need to deploy this type of outcome-determinative evidence in order to persuade courts that conditions are dire.

Successful suits have confronted both political and legal issues when selecting the named defendants. For example, because second-generation suits have been brought in state court, the most recent suits have named the state itself as the defendant—a tactic not available in federal court due to sovereign immunity issues.¹⁷⁵ At the same time, it may behoove litigants to name several relevant state officials, even if those parties are ultimately sympathetic to the cause of indigent defense reform.¹⁷⁶ Named defendants have an obvious incentive to encourage settlement of the case.

Another example of careful procedural decision making involves the choice of where to file suit. In two systemic indigent defense cases in Massachusetts, plaintiffs sought relief not at the trial court level, but in the state’s highest court, successfully arguing that the court had the discretionary power to review inferior state court proceedings.¹⁷⁷ This move, where possible, may provide quicker relief for the class of criminal defendants at issue, while also saving the group bringing suit years of litigation and untold resources.¹⁷⁸

170. *White* Complaint, *supra* note 102, at 11.

171. *Id.*

172. *Duncan* Complaint, *supra* note 102, at 15.

173. *Id.*

174. *Id.*

175. *See Alden v. Maine*, 527 U.S. 706, 727–30 (1999) (discussing the textual and structural basis for the doctrine that states cannot be sued in federal court without their consent).

176. *See, e.g., White* Complaint, *supra* note 102, at 1 (naming as defendants Governor Martz, the state Supreme Court Administrator, a district court judge in one of the named defendant counties, and several other officials).

177. *See Arianna S. v. Commonwealth*, No. SJ-2004-0282 (Mass. dismissed as moot Oct. 30, 2007); *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 907–08 (Mass. 2004).

178. Interview with Robert L. Spangenberg, President, The Spangenberg Group (June

4. Reference to Accepted Professional Standards

Second-generation suits rely upon accepted professional standards both to measure the shortcomings of a system and to craft the remedies sought.¹⁷⁹ Despite the Supreme Court's mandate in *Gideon v. Wainwright* that poor people have access to counsel when they are "haled into court,"¹⁸⁰ the *Gideon* Court did not announce what the states must do to satisfy this right.¹⁸¹ And yet, for judges to assess complaints regarding attorney caseloads and other systemic flaws, they need benchmarks against which to measure complaints. In recent years, the defense community has created these benchmarks, and the second-generation suits have benefited accordingly.¹⁸²

In particular, these suits draw upon the ABA's "Criminal Justice Standards,"¹⁸³ the NLADA's "Performance Guidelines for Criminal Defense Representation,"¹⁸⁴ the NLADA's "Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services,"¹⁸⁵ and the ABA's Ten Principles.¹⁸⁶ Promulgated in 2002, the Ten Principles include: (1) independence of the defense function, (2) a caseload management system, (3) prompt screening for and assignment to indigent defense counsel, (4) adequate time and space for counsel to meet with defendants, (5) workload controls to ensure adequate representation, (6) training and experience requirements for attorneys, (7) continuous representation throughout a defendant's case, (8) resource parity between the defense and prosecution functions, (9) continuing legal education for defense counsel, and (10) supervision and review of defense counsel's

20, 2008).

179. See sources cited *infra* notes 183–85.

180. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

181. See generally Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461 (2003) (discussing in detail the *Gideon* decision and the issues it left unanswered, including what would be required of states to implement the newly-recognized right to counsel or at what point the right attached).

182. See, e.g., Bernhard, *supra* note 26, at 335–40 (discussing attorney eligibility and performance standards, as well as standards for the administration of a defense system); Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245, 252 n.13 (2004) (identifying professional standards for defense lawyers developed over the last three decades).

183. ABA, Criminal Justice Standards, <http://www.abanet.org/crimjust/standards/home.html> (last visited Oct. 7, 2009).

184. Nat'l Legal Aid & Defender Assoc., Performance Guidelines for Criminal Defense Representation, http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines (last visited Oct. 7, 2009).

185. Nat'l Legal Aid & Defender Assoc., Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts (last visited Oct. 7, 2009).

186. THE TEN PRINCIPLES, *supra* note 13.

performance.¹⁸⁷

These principles reflect two interrelated, overarching goals: (1) to provide the client with a lawyer who is equipped with the skills, time, and resources to handle the client's case; and (2) to ensure that the lawyer has the requisite training, background, support, and oversight to provide effective representation.

These standards are beneficial to litigants because they allow plaintiffs' counsel to measure the system's shortcomings against an objective predetermined index of factors, and because they assist courts and legislative bodies in crafting appropriate remedies. In the New York suit, discussed earlier in this section, the NLADA has provided report cards that are expressly based upon the ABA's Ten Principles for nine of New York's counties.¹⁸⁸ Similarly, the complaint for the suit pending in Michigan cites the Ten Principles as reflecting "a national consensus regarding the prerequisites for constitutionally adequate indigent defense."¹⁸⁹ Once there is consensus in a jurisdiction that reform is required, the Ten Principles provide a template for that reform effort. Montana's public defense bill, for example, was the first passed in the nation that was specifically "crafted with the intent of addressing the 'Ten Principles.'"¹⁹⁰ Thus, the development of substantive standards that define the right to counsel in practical terms has enhanced the likelihood of success in second-generation suits.

5. Alliances Within and External to the System Being Challenged

The second-generation suits have demonstrated that, in order for the litigation to get off the ground and to generate lasting results, allies in the process are essential. Ideally, there need to be allies both within and external to the system being challenged. For example, in some systems, the public defense administrators may aspire to provide better services but simply need more resources. In that case, the chief public defender or a similar official may be an ally in the reform effort.¹⁹¹ At the same time, rank and file public defenders can be a vital source of information.¹⁹² Other than the clients of the system, these defenders are the best source of information regarding attorney-client contact, continuity of representation,

187. *Id.* at 3–6.

188. *See supra* note 156 and accompanying text.

189. *Duncan* Complaint, *supra* note 102, at 22.

190. Press Release, ACLU, ACLU Hails Montana's Public Defense Bill as Leading National Trend (June 8, 2005), *available at* <http://www.aclu.org/crimjustice/indigent/10248prs20050608.html>.

191. Telephone Interview with Robin Dahlberg, *supra* note 129.

192. Telephone Interview with Witold "Vic" Walczak, Legal Dir., Amer. Civil Liberties Union of Pa. (Aug. 13, 2008).

and investigative resources.¹⁹³

Likewise, those who hold elected positions can be powerful allies in the reform process. State judges who have witnessed Sixth Amendment violations in their courtrooms for years may be advocates for change. In New York, as discussed in the next section of this article, former Chief Judge Judith Kaye was instrumental in laying the groundwork for the ACLU's current suit.¹⁹⁴ Retired judge George Bundy Smith has also been a vocal proponent of a legislative solution to New York's indigent defense crisis.¹⁹⁵ A supreme court justice in Nevada has been active in seeking indigent defense reform,¹⁹⁶ while in Massachusetts, two former attorneys general were involved in crafting a solution to the defense funding crisis.¹⁹⁷ Once individuals with "power and clout" are involved, the reform process moves faster and, at the same time, reform efforts may garner more media attention.¹⁹⁸ This is vital. As one ACLU attorney noted, educating the public on the facts of an indigent defense crisis is a necessary step toward reform, and, as a result, these reform attorneys "litigate as much in the media as they do in court."¹⁹⁹

C. Assessing Second-Generation Litigation

Reflecting upon the body of second-generation suits, one may say that there is a new model for structural litigation of indigent defense. The model is based on careful preparation and empirical evidence gathering, strategic procedural decision making from the outset, reference to existing professional standards, and reliance upon the support of powerful allies within a criminal justice system.

This is not to say that the model is static. Two issues are worth noting. First, a review of the second-generation suits reveals some evolution. Lawsuits have evolved to target states, rather than counties, and advocates

193. *Id.* Impact litigation attorneys working with a public defender's office in preparation for a lawsuit need to be mindful of the ethical rules implicated by such communication. See MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2002) ("[T]his Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."). Accordingly, investigating attorneys may not speak with policymakers within the defense function without telling them that they are being sued.

194. See *infra* Part III.B.1.

195. See Smith, *supra* note 128.

196. Press Release, Nev. Supreme Court, Nevada Supreme Court Commission to Examine Indigent Defense (Apr. 13, 2007), available at <http://www.nevadajudiciary.us/index.php/supnews/216-nevada-supreme-court-commission-to-examine-indigent-defense.html>.

197. Interview with Robert L. Spangenberg, *supra* note 178.

198. *Id.*

199. Telephone Interview with Witold "Vic" Walczak, *supra* note 192.

have reached outside their jurisdictions for models of reform. For example, while the Pennsylvania suit targeted Allegheny County as the provider of county defense services,²⁰⁰ the more recent lawsuits in Montana, New York, and Michigan have argued that the state has abdicated its Sixth Amendment obligations to indigents by requiring counties to pay for public defense.²⁰¹ Today, many experts in this field agree that a statewide public defense system is the best kind of system,²⁰² and the most recent suits are attempting to create law that places the burden of *Gideon*'s mandate squarely on the state.²⁰³ To date, no suit has resulted in a judicial judgment that the state cannot delegate the funding of the public defense function to its counties, and advocates may continue to seek such a ruling.

The model described in this section is dynamic in another way. As the suits around the nation have demonstrated, sometimes reform in one state can trickle into the next state, sparking reform without a lawsuit. This has definitely been the case in Montana and its neighboring states. The Montana legislature's passage of the Public Defense Bill has already generated reform in North Dakota,²⁰⁴ and Idaho appears poised to move toward Montana's model.²⁰⁵ Increasingly, impact litigation attorneys are recognizing that they can achieve *regional* reform by selectively targeting one state.²⁰⁶ While there appears to be a template to follow in structuring reform efforts, it is nonetheless a dynamic one.

A second issue worth noting is that even when litigants have followed the model described herein, not all efforts have been successful. The recent suit in Mississippi might be seen as the outlier case. In *Quitman County v. State*, Quitman County sued the State of Mississippi, arguing that the state had abdicated its constitutional responsibility to provide for

200. See Doyle Complaint, *supra* note 102.

201. See Duncan Complaint, *supra* note 102; White Complaint, *supra* note 102; Hurrell-Harring Complaint, *supra* note 102.

202. See, e.g., THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS 5 (2006) (describing the different funding systems in the various states and endorsing full state funding, with a few exceptions); Simon, *supra* note 12, at 592-94 (comparing Minnesota's and Mississippi's indigent defense funding systems and concluding that statewide funding systems are superior, but also noting that findings based on these two states are not necessarily representative of other states with similar systems).

203. Telephone Interview with David Carroll, Dir. of Research & Evaluation, Nat'l Legal Aid & Defender Ass'n (Aug. 26, 2008). Mr. Carroll noted that those involved in these suits have recognized that suits like the ones in Allegheny County, Pennsylvania are not as effective at generating system-wide reform and that the more recent suits seek statewide reform.

204. See Press Release, ACLU, *supra* note 190 (noting the spill-over effect from reform in Montana to reform in North Dakota).

205. Telephone Interview with Carroll, *supra* note 203.

206. *Id.*

the defense of indigent state defendants.²⁰⁷ Under the Mississippi State Constitution, counties were responsible for the provision of indigent defense services.²⁰⁸ The county sought a declaratory judgment ruling that the county-funded system was unconstitutional and that the state must provide a statewide, state-funded indigent defense system.²⁰⁹

In many ways the *Quitman* suit comported with the model of second-generation litigation that I have described in this section. Litigation was indeed a measure of last resort, as the state's defense shortcomings had been documented for years yet little was done to remedy them.²¹⁰ The attorneys involved in the suit made strategic procedural decisions, most notably in selecting Quitman County as the plaintiff and Mississippi as the defendant. In Mississippi, there is no state court class action mechanism,²¹¹ and naming the county as the plaintiff addressed that hurdle. The suit made reference to deficiencies in ensuring adequate representation according to general professional standards²¹² and drew upon powerful allies. The law firm of Arnold & Porter provided pro bono legal services, and numerous amicus parties supported the cause.²¹³ And yet, the suit failed.

After surviving a motion to dismiss the county was required on remand to prove beyond a reasonable doubt "the cost of an effective system of indigent criminal defense, the county's inability to fund such a system, and the failure of the existing system to provide indigent

207. *Quitman County v. State*, 910 So. 2d 1032, 1034 (Miss. 2005).

208. MISS. CONST. art. XIV, § 261 ("The expenses of criminal prosecutions shall be borne by the county in which such prosecution shall be begun . . ."). See also MISS. CODE ANN. § 25-32-7 (West 2003) (detailing county funding requirements for public defender offices).

209. *State v. Quitman County*, 807 So. 2d 401, 403 (Miss. 2001).

210. See 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, 217-29 (2004) (advocating judicial reform as a response to the legislature's history of failing to address the ongoing indigent defense crisis). See generally NAACP LEGAL DEF. & EDUC. FUND, *supra* note 4.

211. See MISS. R. CIV. P. 23. See also Howard M. Erichson, *Mississippi's Class Actions and the Inevitability of Mass Aggregate Litigation*, 24 MISS. C. L. REV. 285, 285-87 (2005) (discussing the state's lack of a class action mechanism and arguing for its adoption).

212. Complaint at 4-6, *Quitman County v. State*, No. 99-0126 (Miss. Cir. Ct. Nov. 10, 2003), available at <http://clearinghouse.wustl.edu/detail.php?id=10068>.

213. See, e.g., Brief for the Mississippi Ass'n of Supervisors as Amicus Curiae Supporting Defendant-Appellee, *Quitman County v. State*, 910 So. 2d 1032 (Miss. 2005) (No. 2003-SA-02658); Brief for NAACP Legal Defense & Education Fund, Inc. et al. as Amici Curiae Supporting Plaintiff-Appellant, *Quitman County*, 910 So. 2d 1032 (No. 2003-SA-02658); Brief for National Legal Aid & Defender Ass'n as Amicus Curiae Supporting Plaintiff-Appellant, *Quitman County*, 910 So. 2d 1032 (No. 2003-SA-02658). All amicus briefs in this case can be found through the Civil Rights Litigation Clearinghouse site. See Civil Rights Litigation Clearinghouse, Home, <http://clearinghouse.wustl.edu/> (last visited Oct. 7, 2009).

defendants in Quitman County with the tools of an adequate defense.”²¹⁴ The county failed to do this. Dismissing the suit, the circuit judge noted:

“The County alleged that there have been numerous post-conviction challenges to the adequacy of counsel provided to indigent defendants tried for felonies in Quitman County. However, the County presented *no evidence to the Court of any post-conviction proceedings* which challenged the effectiveness of appointed counsel. The County did not present proof from any defendant who claimed to have received ineffective assistance, nor did they identify any single case where ineffective assistance was alleged. *No proof was presented that any case has ever been overturned in Quitman County because of ineffective assistance.*”²¹⁵

The state supreme court affirmed dismissal of the suit.²¹⁶

The failure of the *Quitman* case demonstrates two important points. First, empirical and anecdotal evidence of actual harm to *clients* due to the system is imperative for a successful suit. In *Quitman*, while the county attempted to demonstrate the shortcomings of the system through expert testimony, it failed to offer testimony from actual clients of the system—precisely those individuals who were in a position to speak from personal experience regarding issues such as perceived pressure to plea, contact time with their attorney, and other factors relevant to the court’s ultimate decision.²¹⁷ Second, the case suggests that a federal forum may be required to hear suits of this kind. In Mississippi, because there is no state class action mechanism, the model described in this section can only be pursued effectively in federal court.²¹⁸ In other states, it may be a hostile bench, and not the absence of a procedural tool, that bars the model of suit described in this section. In the next section of the article I address the question of how future litigants may bring such a suit in federal court.

Even if one recognizes that this model of litigation is an evolving one, and that it is not a guarantee for success, it nonetheless represents a vast improvement upon earlier, reactive suits challenging indigent defense systems. I contend that defense advocates can and should draw upon this model in future litigation efforts. Going forward, it is worth asking what the third generation of structural litigation to improve indigent defense

214. *Quitman County*, 910 So. 2d at 1037.

215. *Id.* (quoting the lower court’s opinion) (internal quotation marks omitted).

216. *Id.* at 1048.

217. See Brief for Appellee at 12–13, *Quitman County*, 910 So.2d 1032 (No. 2003-SA-02658) (discussing the county’s decision to put on three public defense experts rather than actual clients of the system). See also *id.* at 27–31 (discussing some of the inherent limitations in relying upon defense experts).

218. See Erichson, *supra* note 211.

may look like. The next section of the article takes on that question.

III.

THE THIRD GENERATION OF INDIGENT DEFENSE LITIGATION

As the previous section of this article identified, there is now a robust model for successful litigation of indigent defense issues, and impact lawyers can replicate that model elsewhere going forward. Future suits will benefit not only from the template for strategic litigation discussed in Part II, but also from a “traction” factor. As more of these suits are filed, and in particular, where they generate the creation of new law, especially through judicial opinions, courts are more apt to be receptive to the underlying sentiment of these suits—the idea that courts have the ability, and in fact, the responsibility, to ensure effective representation for indigent defendants.

There is good reason to think that there will be a third generation of indigent defense litigation. First, the indigent defense crisis persists in many pockets across the country.²¹⁹ Second, as litigation becomes an increasingly refined and more successful tool, it may become the preferred alternative to a prolonged legislative campaign.²²⁰ Where may this litigation occur? There are several jurisdictions that may be ripe for the third generation of indigent defense litigation.

First, given that experts agree that a statewide system is preferable to a patchwork county-based system, those states with no state funding or with a majority of county-based funding may face lawsuits. These jurisdictions include Pennsylvania and Utah, where counties provide 100% of indigent defense funds, as well as states such as South Carolina, Texas, Idaho, and Nebraska, where counties provide more than 50% of defense monies.²²¹ Second, a number of jurisdictions are dealing with immediate funding crises that may prompt litigation, including Florida, Missouri, and Georgia.²²² Finally, while many people assume that the indigent defense crisis is largely a southern crisis, experts in the field of indigent defense note that the so-called “Rust Belt” states suffer from equally dire indigent

219. See *supra* notes 4–11 and accompanying text.

220. See Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (describing the public defense crisis and citing lawsuits pending in several states that would allow defenders to turn down cases).

221. THE SPANGENBERG GROUP, *supra* note 202, at 5.

222. See Susannah A. Nesmith, *Dade Public Defender: Caseload Is Untenable*, MIAMI HERALD, July 31, 2008, at 1B; Greg Bluestein, *Ga. Public Defenders Reluctantly Agree to Cuts*, INT’L BUS. TIMES, Sept. 26, 2008, <http://www.ibtimes.com/articles/20080926/ga-public-defenders-reluctantly-agree-to-cuts.htm>; Barb Shelly, *Missouri Is Ducking Its Responsibilities to Fund Public Defenders*, KANSASCITY.COM, Aug. 3, 2008, <http://voices.kansascity.com/node/1780>.

defense conditions.²²³ As a result, systemic litigation in Illinois, Indiana, and Ohio—all states where the counties shoulder more than 50% of the defense burden²²⁴—may be on the horizon. For these reasons, this article proceeds on the assumption that there will be a third generation of indigent defense litigation.

With that in mind, this section of the article has two goals: (1) to identify issues for future litigants of these systemic suits to consider and (2) to describe steps that the individual defense attorney can take when she is working in the midst of an indigent defense crisis and systemic litigation is not on the horizon.

A. Future Litigation: Additional Strategies

Despite the success of the second-generation model relative to its first-generation predecessors, it is worth considering what can be done to further improve third-generation suits seeking reform of indigent defense. Recognizing that litigation will always be an “imperfect tool,”²²⁵ how can the next generation of suits better tackle some of the issues that continue to plague indigent defense systems? In this section of the article, I discuss two specific issues for future litigants to consider: (1) post-litigation activism and (2) pursuit of a federal forum.

1. Planning Post-litigation Efforts

Future litigants of these types of suits need to go into the process cognizant of the fact that the suit is often just the beginning of a long-term advocacy effort. A successful settlement or the passage of good legislation needs to be sustained with (1) a politically independent oversight commission, (2) adequate funding, and (3) an organized and vocal defense bar.

a) Establishing a Politically-Independent Oversight Commission

Independent research of defense systems nationwide demonstrates the importance of a politically independent oversight commission.²²⁶ A recent report from the Spangenberg Group explains that “there has been a clear trend among the states toward the creation of a state body to be responsible for the delivery of indigent defense services throughout the state.”²²⁷ An effective statewide commission can perform a number of necessary functions: it can protect the defense function from political and

223. Telephone Interview with David Carroll, *supra* note 203.

224. THE SPANGENBERG GROUP, *supra* note 202, at 5.

225. Telephone Interview with Robin Dahlberg, *supra* note 129.

226. See THE SPANGENBERG GROUP, *supra* note 202.

227. *Id.* at 18.

judicial interference; it can provide accountability and oversight; it can compile accurate statistical information so that the health of a defense system can be monitored; it can set performance standards and other policies for the defense system; and it can advocate for adequate defense funding.²²⁸ Accordingly, future litigants need to seek the creation and implementation of a statewide oversight body.

b) Securing and Protecting Funding for the Defense System

Most experts agree that, while funding is certainly not the only implementation challenge for a public defense system, it is the most intractable one.²²⁹ A lack of adequate funding can hamper even the best plan for the delivery of defense services.

When the suit was filed in Montana challenging the state's delegation of the defense function to the counties, funding was a key aspect of the complaint.²³⁰ Montana legislation provided that "the State will only reimburse to the extent funding is available and that '[i]f money appropriated for [indigent defense expenses] is insufficient to fully fund those expenses, the county is responsible for payment of the balance.'"²³¹ As a result, counties were more concerned about "minimiz[ing] their financial exposure" than providing constitutionally adequate indigent defense services.²³² In order to avoid a dynamic that enables both state and county actors to shirk responsibility, third-generation litigants need to seek full state funding of the defense function. Today, twenty-eight states have fully state-funded indigent defense systems,²³³ so there is strong evidence for the claim that full state funding is the mainstream choice, as well as the choice supported by experts in the field.

Georgia provides a good example of the harm that can result when the state and counties share funding responsibilities. In 2003, the Georgia General Assembly passed the Georgia Indigent Defense Act,²³⁴ ushering in a centralized body to oversee indigent defense services in the state: the Georgia Public Defender Standards Council.²³⁵ This council was charged with creating public defender offices throughout the state, setting quality standards for defense services, and monitoring the administration of these

228. *See id.*

229. *See, e.g.,* Simon, *supra* note 12, at 586 ("Inadequate funding is the primary source of the systemic failure in indigent defense programs nationwide.").

230. *See White Complaint, supra* note 102, at 3 ("The State permits the Counties to underfund their indigent defense services to the point where the lack of financial resources impedes the delivery of representation."). *See also id.* at 32-33.

231. *Id.* at 33 (alterations in original).

232. *Id.*

233. THE SPANGENBERG GROUP, *supra* note 202, at 5.

234. GA. CODE ANN. §§ 17-12-1 to -128 (2008 & Supp. 2009).

235. §§ 17-12-1 to -14.

services.²³⁶ In addition, under the Act, the state was required to provide counsel in all capital cases through the newly created Georgia Capital Defender Office.²³⁷ Funding for the state's new scheme was addressed in subsequent legislation.

In the 2004 legislative session, a funding bill, HB 1EX, was passed, creating additional fees and surcharges specifically earmarked to fund the new indigent defense system. There was an increase of fifteen dollars in the filing fee in all civil actions, a ten percent surcharge on criminal fines, a ten percent surcharge on bails or bonds with a fifty-dollar cap, and a newly created fifty-dollar waivable application fee for indigent defendants. The collection from these fees/fines was anticipated to reach \$32.1 million in fiscal year 2005 and \$42.08 million in fiscal year 2006. Of the fees imposed, the counties keep the revenue generated from the fifty-dollar application fees collected by the lower courts, and *all other fees are remitted to the State treasury*.²³⁸

Because the majority of the collected fees for the system are remitted to the state treasury, the funding bill provides little protection for the stability and adequacy of indigent defense services.²³⁹ In recent years, the statewide defense system in Georgia has faced several fiscal crises and has had to repeatedly request emergency appropriations to stay afloat.²⁴⁰

Prior to the lawsuit in Massachusetts described, *supra*, in Part II, a similar statutory provision allowed the Massachusetts state legislature to starve the defense system of necessary funds. Under Massachusetts law, the Committee for Public Counsel Services (CPCS) had the authority to “establish rates of compensation payable, *subject to appropriation*, to all counsel who are appointed or assigned to represent indigents.”²⁴¹ In 2002, CPCS set the following rates of compensation for private counsel who accepted public defense appointments: “sixty dollars an hour for District Court cases, ninety dollars an hour for cases ‘not within the final jurisdiction of the District Court,’ and one hundred twenty dollars an hour

236. § 17-12-1.

237. § 17-12-6.

238. See THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2005, at 10 (2006), available at http://www.abanet.org/legalservices/sclaid/defender/downloads/FINAL_REPORT_FY_2005_Expenditure_Report.pdf (emphasis added).

239. *Id.* See also NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED 57–58 (2009) (describing the redirection of funds in Georgia originally raised for the benefit of indigent defense), available at <http://www.tcpjusticedenied.org/>.

240. See, e.g., Bill Rankin, *Public Defender Panel Balks on Budget*, ATLANTA J.-CONST., Aug. 29, 2008, at D1 (discussing the fact that the legislature allocated to the public defense system five million less than the fees collected explicitly for the system).

241. *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 901 (Mass. 2004).

for murder cases.”²⁴² Yet, when the Supreme Judicial Court considered this issue in 2004, the rates appropriated by the legislature for private counsel were “thirty dollars an hour for a District Court case, thirty-nine dollars an hour for a Superior Court case other than a homicide case, and fifty-four dollars an hour for a homicide case.”²⁴³ These rates had basically been unchanged since 1986, and at the time, they were among the lowest in the nation.²⁴⁴

In future suits, the revenue source allocated for the defense function needs to be adequate in theory,²⁴⁵ and it needs to be protected in the political process. As I have discussed in this section, the consensus among experts is that full state funding is the most stable way to fund a defense system, and this should be sought by litigants. Whether or not the state fully funds the defense function, the statewide commission needs to press for “lock box” measures that will protect the funding earmarked for public defense.²⁴⁶ Otherwise, legislative tampering with earmarked funds, as the Massachusetts and Georgia cases demonstrate, is likely to ensue.

c) Organizing the Defense Bar

In addition to being involved in long-term funding issues, litigants of third-generation suits need to advocate for an organized and vocal defense bar.²⁴⁷ For example, where a lawsuit results in the creation of new public defender positions, lawyers involved in the litigation can urge these attorneys to become dues-paying and active members of the state defense bar.²⁴⁸ In doing so, litigants can help expand and enhance the voice of the defense community in the political process.

Finally, as much as third-generation litigants need to collaborate in the post-litigation efforts I have described in this section, impact attorneys also need to be prepared to return to court where states fail to uphold their

242. *Id.* at 900–01.

243. *Id.* at 900.

244. *Id.* (citing THE SPANGENBERG GROUP, *supra* note 238).

245. For example, the defense system cannot depend upon an arbitrary and unreliable source of revenue. In New Orleans, parking tickets were the primary source of revenue for the indigent defense system. As a result, when Hurricane Katrina destroyed the city, the already unstable revenue source was eliminated and thousands of people languished in jail—sometimes for months without even being charged. See Henry Weinstein, *2500 Arrested Before Katrina Are Still in Limbo*, L.A. TIMES, Nov. 20, 2005, at A38.

246. *Cf.* Social Security and Medicare Lock-Box Act, H.R. 4338, 110th Cong. (2007) (introduced, but never enacted, this bill that would have established a procedure to safeguard surplus funds from Social Security and Medicare), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=h110-4338>.

247. A vocal and organized defense bar can promote the quality of public defense services in a number of critical ways. Such a bar can (1) gather and disseminate data regarding best practices; (2) educate the public regarding indigent defense services; and (3) educate and, where necessary, lobby the executive and legislative bodies.

248. Telephone Interview with Scott Crichton, *supra* note 118.

end of the bargain.²⁴⁹

Thus, even where litigation is successful and generates either good case law or new legislation, impact attorneys need to be prepared to monitor the implementation of public defense improvements. Under the best case scenario, future litigants need to remain involved in long-term advocacy—including creating a politically independent oversight commission, lobbying for adequate funding, and organizing the defense bar. Under the worst case scenario, plaintiffs' counsel need to be prepared to return to court. As impact attorneys consider where to deploy their resources, they need to anticipate that with systematic litigation, the suit is often just the beginning.

2. *Creating a Federal Forum*

Another issue that future litigants of these suits need to consider is the appropriateness and availability of a federal forum.²⁵⁰ Thirty-nine states elect some or all of their judges.²⁵¹ Moreover, in some jurisdictions, judges must actively run for reelection.²⁵² If these judges are in jurisdictions where the populace is more concerned about victims' rights than defendants' rights, there is good reason to think that these judges are subject to the same pressure to be perceived as "tough on crime" as politicians often are.²⁵³ And in fact, scholars have documented numerous instances where elected judges have lost their seats because of unpopular decisions, particularly those involving the death penalty.²⁵⁴ Federal judges, insulated from this pressure, may be better suited to hear a systemic Sixth Amendment claim.²⁵⁵

249. See, e.g., Reddy, *supra* note 26, at 27–30 (noting that the ACLU filed contempt motions twice in the wake of its Pennsylvania suit to enforce terms of the consent decree). Mr. Crichton explained that part of the Montana settlement agreement was the ability for the ACLU to return to court if the state did not meet its commitment to create a new public defense system. Telephone Interview with Scott Crichton, *supra* note 118.

250. I have advanced this idea elsewhere in a slightly different form. See Cara H. Drinan, *Toward a Federal Forum for Systemic Sixth Amendment Claims*, WASH. U. L.R., Oct. 22, 2008, <http://lawreview.wustl.edu/slip-opinions/toward-a-federal-forum-for-systemic-sixth-amendment-claims/>.

251. ABA, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, *available at* http://www.abanet.org/leadership/fact_sheet.pdf (last visited Oct. 7, 2009).

252. *Id.*

253. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 727–29 (1995).

254. See John D. Fabian, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155, 156–58 (2001). See also Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1074–75 (2002) (discussing interest groups' "illegitimate outcome-oriented evaluation" of judges).

255. In Mississippi, the state's lack of a class action mechanism provides another reason to pursue a federal forum. See *supra* note 211 and accompanying text.

While the federal courts historically have been a refuge for discrete and insular minorities,²⁵⁶ to date, a federal forum has not been available to indigent defendants seeking to vindicate their Sixth Amendment right to counsel on a systemic basis.²⁵⁷ Federal courts that have considered challenges to indigent defense systems have declined to award injunctive relief to plaintiffs, citing principles of comity and federalism.²⁵⁸

In *Luckey v. Miller*, the Eleventh Circuit rejected the plaintiffs' request for a court order mandating an overhauled indigent defense system in Georgia. The *Luckey* Court held that *Younger v. Harris*²⁵⁹ required the federal courts to abstain from interfering with ongoing state criminal prosecutions to protect the "vital consideration of comity between the state and national governments."²⁶⁰ The Second Circuit took a similar position when considering a class action challenge to the indigent defense system in Kings County, New York.²⁶¹ Despite evidence of systemic deficiencies, including excessive attorney caseloads, excessive delays in bringing cases to trial, and excessive bail, the Second Circuit denied injunctive relief.²⁶² The court explained: "This is not the proper business of the federal courts, which have no supervisory authority over the state courts and have no power to establish rules of practice for the state courts."²⁶³ The Fifth and Sixth Circuits reached the same conclusion in similar cases.²⁶⁴

These federal courts have erred in refusing to hear these cases on federalism grounds, and, where litigants have the resources to do so, they should make that argument in federal court. *Younger* should not apply to

256. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (striking down a gender-based statute as a violation of the Equal Protection Clause); *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing minimal procedural safeguards for custodial criminal investigations); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that racial segregation of public schools violates the Equal Protection Clause).

257. See *Gideon's Promise Unfulfilled*, *supra* note 23, at 2077 ("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."). See also *Bernhard*, *supra* note 26, at 332-33.

258. See *infra* notes 275-277 and accompanying text.

259. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

260. *Luckey v. Miller*, 976 F.2d 673, 676 (11th Cir. 1992).

261. See *Wallace v. Kern*, 499 F.2d 1345 (2d Cir. 1974).

262. See *id.*

263. *Id.* at 1351.

264. See *Foster v. Kassulke*, 898 F.2d 1144, 1146-47 (6th Cir. 1990) ("In seeking injunctive relief in her section 1983 action, she is attempting to obtain federal review of state court procedures in a criminal case before the state court has had the opportunity to decide them finally. Federal review should be given in the context of a federal habeas proceeding following the appropriate exhaustion of state remedies, where concerns of equity, comity, and federalism—concerns that *Younger* teaches require abstention—are accommodated."); *Gardner v. Luckey*, 500 F.2d 712, 715 (5th Cir. 1974) ("It is clear from the face of their complaint that our appellants contemplate exactly the sort of intrusive and unworkable supervision of state judicial processes condemned in *O'Shea*.").

these prospective Sixth Amendment claims, but even if it does, the doctrine's exceptions should permit the federal courts to hear these cases.

First, the *Younger* abstention doctrine itself should not bar a federal court from hearing a suit in which a class of indigent defendants seeks prospective, injunctive relief.²⁶⁵ The *Younger* doctrine is based on two rationales: (1) "the basic doctrine of equity jurisprudence that courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief," and (2) the notion of comity, which the Court described as "Our Federalism."²⁶⁶ Neither rationale should preclude a suit designed to install *future* improvements to a state's public defense system. A federal court could declare that funding indigent defense is the state's responsibility, it could establish hiring and training guidelines for defense counsel, and it could announce attorney caseload guidelines without "restrain[ing] a criminal prosecution."²⁶⁷

Moreover, federal courts can and have in the past addressed state criminal process failings without stalling the state's prosecutorial function. In *Gerstein v. Pugh*, Florida prisoners brought a class action claiming a constitutional right to a judicial hearing on the issue of probable cause for pretrial detention and requesting declaratory and injunctive relief.²⁶⁸ The Supreme Court held that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."²⁶⁹ In doing so, the Court affirmed the district court's position that the prisoners' request for relief was not barred by *Younger*.

The District Court correctly held that respondents' claim for relief was not barred by the equitable restrictions on federal intervention in state prosecutions. The injunction was not directed at the state prosecutions as such, but only at the legality

265. See Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 290-300 (1976). See also Citron, *supra* note 26, at 494-96.

266. *Younger v. Harris*, 401 U.S. 37, 43-44 (1971) (explaining "Our Federalism" in the following way: "The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States."). See also Citron, *supra* note 26, at 494-95.

267. *Younger*, 401 U.S. at 43.

268. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

269. *Id.* at 114.

of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.²⁷⁰

Thus, the *Gerstein* court protected a constitutional right even in the face of ongoing state criminal proceedings.²⁷¹

And *Gerstein* is not an outlier case. Whenever a federal court dismisses a state criminal proceeding on the basis of a criminal defendant's right to a speedy trial, the court ostensibly interferes with ongoing state criminal proceedings.²⁷² For that matter, one could argue that the entire application of the exclusionary rule to the states interferes with ongoing state criminal proceedings to the extent that the rule deprives prosecutors of necessary, inculpatory evidence in pending cases. And yet, in these instances, the federal courts have placed greater priority on protection of individual constitutional rights than deference to the state criminal process.

For example, in *Mapp v. Ohio*, where the Supreme Court held that all evidence obtained by searches and seizures in violation of the Constitution was inadmissible in a state criminal trial,²⁷³ the Court recognized that its prior decision not to apply the exclusionary rule to the states had been a mistake. As the Court described: "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest."²⁷⁴ In the body of criminal procedure law, there is ample precedent for a federal court to protect a defendant's prospective Sixth Amendment right to the effective assistance of counsel without offending principles of federalism.

Yet, to date federal courts considering systemic indigent defense claims have not relied upon these cases to circumvent abstention doctrine. The Eleventh Circuit in *Luckey* affirmatively rejected the *Gerstein* comparison.²⁷⁵ In dismissing a class action challenging a state public defender office, the Fifth Circuit noted that the appropriate remedy for indigent defendants was to "challenge the legality of their custody via federal habeas corpus, subject, of course, to prior exhaustion of state

270. *Id.* at 108 n.9 (citations omitted).

271. *See* Citron, *supra* note 26, at 494 n.98 (citing *Gerstein* as precedent on which federal courts can rely in these cases).

272. *See* *Kloper v. North Carolina*, 386 U.S. 213 (1967) (holding that Sixth Amendment right to speedy trial applies to states). *See also* *Dickey v. Florida*, 398 U.S. 30 (1970) (reversing state conviction on speedy trial grounds); *Smith v. Hooey*, 393 U.S. 374 (1969) (holding that speedy trial duty applies to states even when a defendant is in federal prison).

273. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

274. *Id.* at 660.

275. *Luckey v. Miller*, 976 F.2d 673, 678-79 (11th Cir. 1992).

remedies.”²⁷⁶ Similarly, when the Sixth Circuit abstained from hearing a civil rights action challenging the indigent defense system in Kentucky, the court referred the petitioner to the appellate and habeas process: “Federal review should be given in the context of a federal habeas proceeding following the appropriate exhaustion of state remedies, where concerns of equity, comity, and federalism—concerns that *Younger* teaches require abstention—are accommodated.”²⁷⁷

Suggestions of this kind in the indigent defense context are disingenuous. Not only does a state habeas claim depend upon a well-preserved trial record (something unlikely to exist when one has received ineffective assistance, if any assistance, at trial), but also, in some of the most egregious ineffective assistance of counsel cases, the record is irrelevant because it is precisely what counsel has *failed* to do that is the essence of the claim. To add insult to injury, in some jurisdictions, the state does not guarantee post-conviction representation.²⁷⁸ Indigent defendants seeking prospective, injunctive relief do not have an adequate remedy at law in state court, nor can they raise systemic issues, like excessive caseloads that compromise the quality of their own representation, in the course of their own defense. *Younger*, then, should not bar federal courts from hearing a prospective suit seeking reform of a public defense system. Second, even if *Younger* applies to these suits, there is at least one line of “exception” cases that may defeat the application of *Younger* abstention in this context.

While the exceptions to the abstention doctrine announced in *Younger* itself are incredibly narrow and are not especially useful in this context,²⁷⁹ subsequent federal court decisions have announced procedural exceptions that may provide leverage for litigants in third-generation indigent defense suits.²⁸⁰ For example, in *Mannes v. Gillespie*, petitioner Mannes sought federal habeas relief when a state prosecutor refiled murder charges against her that a judge had previously dismissed.²⁸¹ The Ninth Circuit held that the district court was not required under *Younger* to abstain from hearing her claim while the state charges were pending.²⁸²

276. *Gardner v. Luckey*, 500 F.2d 712, 714 (5th Cir. 1974).

277. *Foster v. Kassulke*, 898 F.2d 1144, 1146–47 (6th Cir. 1974).

278. See Sarah L. Thomas, *A Legislative Challenge: A Proposed Model Statute to Provide for the Appointment of Counsel in State Habeas Corpus Proceedings for Indigent Petitioners*, 54 EMORY L.J. 1139, 1140 (2005).

279. *Younger v. Harris*, 401 U.S. 37, 46–49, 53–54 (1971) (limiting the exceptions to cases of immediate “irreparable injury” and a showing of “bad faith and harassment”).

280. See Daniel Jordan Simon, *Abstention Preemption: How the Federal Courts Have Opened the Door to the Eradication of ‘Our Federalism,’* 99 NW. U. L. REV. 1355, 1364–65 (2005) (discussing an exception to *Younger* where the constitutional injury is procedural in nature).

281. *Mannes v. Gillespie*, 967 F.2d 1310 (9th Cir. 1992).

282. *Id.* at 1312.

The court explained:

The Fifth Amendment's protection against double jeopardy—"nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb"—"is not against being twice punished, but against being twice put in jeopardy." Because full vindication of the right necessarily requires intervention before trial, federal courts will entertain pretrial habeas petitions that raise a colorable claim of double jeopardy.²⁸³

If the *Mannes* court had abstained from hearing the plaintiff's petition on *Younger* grounds and required her to stand trial again before she could return to the federal courts for habeas relief, her request for relief would have been moot by the time she made it back to federal court. Mannes would have already suffered the procedural harm of being put in jeopardy twice, regardless of whether she was convicted twice.

Similarly, federal courts have allowed exceptions to *Younger* in order to protect a defendant's right to a speedy trial. For example, in *Braden v. 30th Judicial Circuit Court*, the Supreme Court allowed a habeas petition by an Alabama prisoner who claimed that he had been denied his right to a speedy trial on a pending charge in Kentucky.²⁸⁴ Even though the petitioner had not been tried on his Kentucky indictment and the Court could have ordered him to raise his speedy trial argument as a defense to that prosecution, the Court explained why federal jurisdiction was proper: "Petitioner does not . . . seek at this time to litigate a federal defense to a criminal charge, but only to demand enforcement of the Commonwealth's affirmative constitutional obligation to bring him promptly to trial."²⁸⁵ Again, if the federal court had abstained and required the petitioner to await a trial on Kentucky's timeline, it is quite likely that he would have suffered the harm of unreasonable delay between indictment and trial that the Constitution protects against. At that point, even if petitioner returned to federal court seeking habeas relief, he would have been able to seek dismissal of any conviction, but he would not have been able to protect the other interests that the right to a speedy trial safeguards (namely, the right not to be incarcerated for an unnecessarily long time and the anxiety posed by a prolonged period of accusation).²⁸⁶ Thus, some federal courts have recognized instances where, notwithstanding the *Younger* abstention doctrine, immediate action by a federal court is required to prevent a party from suffering a procedural harm that the Constitution prohibits.

A class action claim by indigent defendants seeking prospective

283. *Id.* (citations omitted). See also *Sprague v. Oregon*, Civ. No. 06-1277-TC, 2007 WL 1138462, at *3 (D. Or. Apr. 16, 2007) (discussing the double jeopardy exception).

284. *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973).

285. *Id.* at 489-90.

286. See *Doggett v. United States*, 505 U.S. 647, 654 (1992).

improvements to the state defense function fits squarely within this line of procedural exception cases. The Sixth and Fourteenth Amendments protect a person from being prosecuted by the state without the *effective* assistance of counsel.²⁸⁷ Moreover, as the Eleventh Circuit explained, “The sixth amendment protects rights that do not affect the outcome of a trial.”²⁸⁸ Without the safeguard of effective assistance at trial, the criminal process is fundamentally unfair and may generate inaccurate results. In jurisdictions where indigent clients are not guaranteed effective assistance, allowing the state trial to go forward is in itself a violation against which the Constitution protects. The defendant may be wrongfully convicted, she may receive a harsher sentence than competent counsel could have secured, and she may not have a well-preserved record for the appellate and habeas process.

Just as the criminal defendants in *Mannes* and *Braden* were not required to exhaust state legal remedies before seeking federal relief, so too should defendants seeking prospective improvement to a defense system be given a federal forum. If they are not, and the federal court relegates a defendant to the habeas process and requires a defendant to exhaust state legal remedies, the court overlooks the defendant’s right to vindicate her Sixth Amendment right to effective counsel on a prospective basis. Moreover, by the time the defendant returns to federal court the constitutional harm that the Sixth Amendment protects against—the deleterious effects of ineffective assistance of counsel—has already been suffered by the defendant, and the federal court in a habeas posture is too late to remedy that harm. If the procedural exceptions announced in the speedy trial and double jeopardy settings are to have any meaningful application elsewhere, they should apply to prospective Sixth Amendment claims.

Third, there are other doctrines that, like the abstention doctrine, limit the remedial power of the federal courts on federalism grounds—for example, sovereign immunity and exhaustion—and these doctrines similarly permit exceptions.²⁸⁹ By analogy, indigent defendants seeking prospective, injunctive relief should have access to the federal courts notwithstanding the abstention doctrine.²⁹⁰

287. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).

288. *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988).

289. *See generally* *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (describing sovereign immunity doctrine and its exceptions); *Daniels v. Area Plan Comm’n*, 306 F.3d 445, 456–58 (7th Cir. 2000) (describing and applying futility exception to exhaustion requirement).

290. It is important to acknowledge what informal conversations with practitioners have conveyed: the creation of a federal forum on the basis of the arguments I set out in this section is an ambitious undertaking. Federal judges may be reticent to take the kind of action I suggest herein for fear that such action provides no limiting principle, thereby opening the door to exactly the type of federal intrusion into state court criminal

Finally, abstention is a prudential doctrine²⁹¹ and federal courts should not allow a state to invoke federalism as a shield with which to deflect its constitutional responsibility to provide effective representation for its poor citizens. At some point, the principles of equity and comity must yield to the Sixth Amendment itself. Could a state require its counties to provide indigent defense representation and then stand by while the counties refused to do so? In some states, like Mississippi, something very close to that scenario is the status quo.²⁹² Accordingly, where plaintiffs can demonstrate systematic deprivations of the right to counsel, injunctive relief should be available in federal court.

Some may wonder why a plaintiff would want to be in federal court given its current composition and orientation towards federalism.²⁹³ Others may argue that the federal courts have not been very effective at overseeing social policy reform through structural injunctions in the past.²⁹⁴ In addition to the evidence I have already offered that suggests state court judges may be disinclined to address systemic deficiencies in a criminal defense system,²⁹⁵ I offer three responses to these concerns. First, regardless of whether one thinks that federal judges have been effective at instituting reforms like desegregation or improving prison conditions, there is good reason to think that these judges would be uniquely skilled at overseeing the implementation of a revamped public defense system.²⁹⁶ While a judge may know very little about education policy, she certainly knows a great deal about lawyering—what counts as good lawyering and what resources a good lawyer needs at her disposal. Second, there is reason to think that federal courts may not be hostile to class action Sixth

proceedings barred by *Younger*. In light of that reality, practitioners may be best served by making the case for a federal forum in a jurisdiction where the plaintiffs can argue that the public defense system is such a shambles that there is a constructive absence of counsel. See, e.g., Amended Complaint, *Stinson v. Fulton County*, No. 1:94-CV-75 (N.D. Ga. May 1, 1994) (arguing that defendant class members had no representation at critical stages of the state's prosecution of their case and resulting in consent decree to improve conditions).

291. See *Adibi v. Cal. Bd. of Pharmacy*, 461 F. Supp. 2d 1103, 1111 (N.D. Cal. 2006) (explaining that *Younger* abstention is not based upon lack of jurisdiction in federal court, but rather upon principles of comity that suggest a federal court should give deference to state court proceedings in some factual scenarios).

292. See *supra* notes 4–5 and accompanying text.

293. See, e.g., *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441–42 (2004) (enforcing a district court judge's consent decree, but discussing the danger that "enforcement of consent decrees can undermine the sovereign interests and accountability of state governments"). See generally Lino A. Graglia, Lopez, Morrison, and Raich: *Federalism in the Rehnquist Court*, 31 HARV. J.L. & PUB. POL'Y 761 (2008) (describing shift from Supreme Court's New Deal era decisions to federalism focus of the Rehnquist court).

294. See generally ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE* (2003).

295. See *supra* notes 37–53 and accompanying text.

296. See, e.g., Citron, *supra* note 26, at 499 ("[J]udges have the knowledge and experience to evaluate the efficiency of indigent defense systems.").

Amendment suits. Even the most devout federalist judge may very well be equally committed to textual integrity and rule of law. Where states blatantly fail to safeguard the Sixth Amendment—a right that has been deemed essential to safeguarding all others²⁹⁷—even conservative federal judges may be willing to step in.²⁹⁸ Third, even if the current federal bench does not seem likely to offer a sympathetic ear to indigent defendant plaintiffs, its composition is neither static nor permanent.

In some jurisdictions, a federal forum may be required to bring about lasting reform of public defense services. In the third generation of indigent defense litigation, plaintiffs' counsel should consider whether they are in a jurisdiction where the federal bench may be amenable to the arguments identified herein. If so, they should argue that federal judges should not shy away from the responsibility to hear these cases on abstention grounds, especially where plaintiffs can demonstrate historical and ongoing miscarriages of justice.²⁹⁹

Having identified issues for impact litigation attorneys to consider in future suits of this kind, I now turn to discussing steps that the individual practitioner can take when she is working in a jurisdiction where litigation is not imminent and the defense system is failing.

B. Strategies for the Individual Defense Attorney

There are some jurisdictions where there simply is no organization that can or will bring suit to improve indigent defense services. Individual defense attorneys working in the midst of an indigent defense crisis—where caseloads are excessive, resources are scarce, and training is nonexistent—must be able to take some steps to improve the quality of the representation they provide. In this part of the article, I outline several steps that these individual defense attorneys can take when working in the midst of such a crisis.

297. *Maine v. Moulton*, 474 U.S. 159, 169 (1985) (“[T]he right to counsel safeguards the other rights deemed essential for the fair prosecution of a criminal proceeding.”)

298. Justice Scalia's opinion in *Kyllo v. United States*, 533 U.S. 27 (2001), may offer a useful analogy. While one does not usually think of Justice Scalia as sympathetic to the interests of criminal defendants, in *Kyllo* he wrote for the majority, rejecting the state's warrantless use of a thermal-imaging device to detect marijuana within the home. In that case, Scalia's opinion emphasized the Court's historical protection of the home from warrantless searches—that is, historical accuracy trumped the concerns of law and order that pressed for increasingly technological warrantless search methods. *See id.* at 40. By analogy, one can envision a conservative judge emphasizing textual integrity and rule of law over a state's vague claims of prosecutorial interference.

299. In light of the roadblocks to securing a federal forum for these suits, direct legislative action may be necessary. *See* Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Indigent Defense Crisis* (Soc. Sci. Research Network Working Paper Series, 2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448058.

1. Remind State Judges of Their Inherent Authority

Even a state court judge who is reluctant to order sweeping relief may be willing to assert her authority over her own courtroom, and defense attorneys can remind judges that they can dramatically improve the quality of indigent defense services by asserting that authority. Specifically, defense attorneys can request that judges simply not allow underfunded cases to move forward. In Georgia and New Mexico judges have recently done just that.³⁰⁰

In addition, a judge can grant caseload relief to an overworked individual defense attorney. A recent ABA Ethics Opinion advises indigent defense counsel to refuse to accept new cases or to withdraw from existing ones when their excessive caseload prevents them from providing effective representation.³⁰¹ Citing this Ethics Opinion, a judge can relieve a defense attorney of cases, thereby increasing the chances that defense counsel can provide effective representation to her remaining clients. As solutions go, this one is certainly imperfect. First, in some jurisdictions where all the defense counsel are seriously overworked, there may be no available replacement counsel. In such a case, a separate ethical issue is implicated: continuity of representation.³⁰² Second, an excessive caseload may not be the only hindrance to effective representation. It is entirely possible that a judge may provide caseload relief, only to realize that defense counsel's performance is still significantly hampered by a lack of investigative and expert assistance, training and experience. Despite that, caseload relief is consistent with the recent ABA Ethics Opinion, and at the very least, it may draw attention to the wider array of indigent defense issues.

Finally, defense counsel can ask state court judges to document the crisis in their courtrooms and across the state. For example, in 2005, New York's Chief Judge Judith S. Kaye created a Commission on the Future of Indigent Defense Services, widely known as the Kaye Commission, to

300. See, e.g., Greg Land, *Judge Confronts State over Nichols Funding*, DAILY REPORT (Fulton County, Ga.), Oct. 11, 2007, at 1 (describing judge's position that unless legislature provides adequate funds for public defense, capital case will not move beyond voire dire phase); Scott Sandlin, *Death Penalty Out in Guard Killing*, ALBUQUERQUE J., Apr. 4, 2008, at C1 (documenting New Mexico trial judge barring state from seeking death penalty citing inadequate funds from legislature).

301. ABA Standing Comm. on Legal Aid & Indigent Defendants, Formal Opinion 06-441 (2006) (describing ethical obligations of lawyers who represent indigent criminal defendants when excessive caseloads interfere with competent and diligent representation). For an analysis of this Ethics Opinion and its consequences, see Jessica Hafkin, *A Lawyer's Ethical Obligation to Refuse New Cases or to Withdraw from Existing Ones When Faced with Excessive Caseloads That Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants*, 20 GEO. J. LEGAL ETHICS 657 (2007).

302. See THE TEN PRINCIPLES, *supra* note 13, Principle 7 (requiring that "[t]he same attorney continuously represent[] the client until completion of the case").

evaluate the state's indigent defense system and make reform recommendations.³⁰³ The Commission's final report, submitted to Chief Judge Kaye in June 2006, concluded that "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused."³⁰⁴ The report has been a critical piece of empirical evidence in the systemic litigation currently pending in New York regarding the lack of a statewide public defender system.³⁰⁵

Similarly, Nevada Supreme Court's Chief Justice William Maupin took action to study and implement much-needed indigent defense reforms in the state by creating the Commission on Indigent Defense.³⁰⁶ Justice Michael Cherry, who was appointed chair of the Commission, noted that reforming indigent defense in the state was in the interest of all citizens, not just the clients of a public defense system: "[W]hen court appointed attorneys are ineffective or inadequate, it sometimes results in cases being reversed and new trials ordered. That is costly for taxpayers and an additional burden on the court system. The best solution is to have competent, experienced, and effective attorneys available to represent indigent defendants."³⁰⁷ Other state court judges can begin to follow in this path by documenting the indigent defense crisis so that it can be addressed in a productive, holistic manner.

2. Remind State Judges of Their Authority to Order Adequate Funds

Defense counsel working in the midst of a fiscal crisis also may seek a judicial order requiring the legislature to allocate sufficient funds to the defense function. State supreme courts often have statutory and constitutional authority to supervise lower courts and to oversee the implementation of the right to counsel.³⁰⁸ Defense counsel can remind state judges of the sweeping authority that these provisions provide. For example, in the *Lavallee* case discussed, *supra*, plaintiffs' counsel relied upon a Massachusetts law that granted:

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to

303. COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., *supra* note 146.

304. *Id.* at 15.

305. See *Hurrell-Harring* Complaint, *supra* note 102, at 61–67.

306. See Press Release, Nev. Supreme Court, *supra* note 196.

307. *Id.* (quoting Justice Cherry).

308. See Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 2 KY. L.J. 979, 1017–19 (2004) (discussing expanding power, including supervisory powers, of state courts).

corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.³⁰⁹

While recognizing that the Court's "discretionary power of review" under Massachusetts law was "extraordinary," and "available only in the most exceptional circumstances," the Court invoked this power in *Lavallee*.³¹⁰ Thus, litigants can direct state court judges to state law and state constitutional provisions that grant extraordinary power for unusual circumstances. On this authority, defense counsel can ask state judges to order the legislature to allocate sufficient funds for the defense system by a certain date.³¹¹

Thus, even the individual defense attorney can take steps to address an ongoing crisis when systemic improvements are not on the horizon. Each piecemeal action that a state judge takes to address a crisis may be helpful in an individual case and can draw the legislature's attention to flaws in the defense system.

CONCLUSION

The indigent defense crisis must be addressed as a matter of fairness and constitutional accuracy, but also as a matter of community safety and sound resource management. Not only does poor quality representation result in wrongful convictions, but also overturned convictions, costly retrials, and unprosecuted criminals on the street. As this article describes, recent suits designed to improve indigent defense systems have enjoyed greater success than their predecessors, and there is good reason to think that future litigants bringing the third generation of these suits can capitalize—and even improve—upon these recent suits. In the short term, the best case scenario for impact litigation attorneys may be the success of a regional approach, whereby successful suits in one state prompt legislative action in neighboring states. In the long run, the best outcome the defense community can hope for is the creation of well functioning, fair, and effective indigent defense systems that render obsolete the need for this kind of systemic litigation altogether.

309. MASS. GEN. LAWS ANN. ch. 211, § 3 (West 2005). See also *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 900 (Mass. 2004).

310. *Lavallee*, 812 N.E.2d at 902 (internal quotation marks omitted).

311. It is worth noting that some may raise a separation of powers objection to the courts directing the legislature to allocate funds. Scholars have noted that state courts can and have done this in the past without offending separation principles. See *Effectively Ineffective*, *supra* note 26, at 1745 ("One way in which courts have justified ordering legislatures to expend funds is by asserting that the provision of indigent defense, and therefore the compensation of attorneys providing that service, is a judicial function; it then follows that by underfunding indigent defense, the legislature infringes upon the judiciary's powers, which flips the separation of powers argument entirely.").