NOTE

Funding Indigent Defense: A Judicial Solution to a Legislative Failure

Abigail Hollinger[*]

ABSTRACT

Every defendant in the United States is entitled to effective legal representation when facing a crime punishable by imprisonment. When a defendant cannot afford an attorney, the government is required to provide one. At least, that is what the Supreme Court has said. Reality looks very different. The Justice Department estimates that up to 90% of criminal defendants cannot afford to hire an attorney. But studies show that only about a quarter of indigent defense systems have enough funding to effectively represent assigned defendants.

When systems are underfunded, defendants face long waits before being assigned attorneys. If a defendant decides to stand trial rather than take a plea, the defendant will still have to compete with other clients for time with an attorney once one is assigned. Overworked attorneys will be less able to craft a strong defense, attend to witnesses, and explore leads. Defendants might not even see their attorney before trial, and their cases might be assigned to attorneys who have never handled a criminal case before.

The principle reason for chronic underfunding of indigent defense is known as the political process failure, which occurs when the legislative process fails to protect individual rights. Because legislatures do not have political incentives to protect indigent defendants' right to effective counsel, legislatures do not adequately fund indigent defense. However, the Constitution guarantees a right to effective representation for a fundamental reason: without it, our justice system does not work. Poor defendants no longer "stand[] equal before the law."[1]

In the face of a political process failure, the Supreme Court has recognized the judiciary's heightened responsibility to protect individual rights. Therefore, this Note proposes a judicial remedy to the legislative problem of underfunding indigent defense services by preventing the assignment of indigent defense cases to overburdened attorneys and requiring the release of indigent defendants from jail whose cases are not assigned to counsel in a timely manner. This creates a choice for legislatures: either adequately fund indigent defense services so there is enough

* J.D. Candidate 2021, The George Washington University Law School.

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

money to provide effective representation to every indigent defendant or face public backlash when defendants are released from jail with pending charges. Only by altering the political incentives will the constitutional right to effective representation be protected.

TABLE OF CONTENTS

INTRODUCTION

In 1984, Eddie Joe Lloyd was in a hospital being treated for mental illness.[2] When he heard that a 16-year-old girl had been murdered, he contacted the police providing his suggestions for solving that murder and others.[3] Police then fed him information about the crime and convinced him to confess after making him a prime suspect.[4] With no money to hire his own attorney, Lloyd was at the mercy of the underfunded Detroit indigent defense system.[5] Throughout his defense, Lloyd saw multiple court-appointed

---

[2] *Eddie Joe Lloyd*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/cases/eddie-joe-lloyd/ [https://perma.cc/C23R-2YCP].

[3] *Id.*

[4] *Id.*

[5] *Id.*; *see also* Eli Hager, *One Lawyer. Five Years. 3,802 Cases*, MARSHALL PROJECT (Aug. 1, 2019), https://www.themarshallproject.org/2019/08/01/one-lawyer-five-years-3-

attorneys come and go.[6] His first attorney did not investigate his mental state or the circumstances under which he had allegedly confessed to the crime.[7] His second attorney did not cross-examine the police officer involved in his confession or call any witnesses.[8] After the trial and less than an hour of jury deliberations, Lloyd was found guilty of rape and murder of the young girl.[9] He spent 17 years in Michigan prison before a national organization took up his case and exonerated him in 2002.[10] Lloyd died two years later.[11]

Lloyd's story is not unique; it is the story of indigent defense in the United States. According to the Justice Department, between 60% and 90% of defendants in criminal cases cannot afford their own attorney.[12] Indigent defense systems are responsible for providing attorneys to those people. However, only about a quarter of state indigent defense systems have enough attorneys to meet that need.[13] Lloyd's story is also not new. Indigent defense funding has been inadequate for decades and it continues to be dwarfed by funding for other parts of the criminal justice system, including corrections and police protection.[14]

The right to counsel is mandated by the Constitution in the Sixth Amendment, which the Supreme Court has held to entitle indigent defendants to effective government-provided representation in all criminal cases.[15] However, the Court has failed to provide any guidance on how that

802-cases [https://perma.cc/F98D-H54T] (explaining the state of Detroit's indigent defense system).

6 *Eddie Joe Lloyd*, *supra* note 2.

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 BUREAU OF JUST. ASSISTANCE, U.S. DEP'T OF JUST., CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT 3 n.1 (2000), https://www.ncjrs.gov/pdffiles1/bja/181160.pdf [https://perma.cc/326E-YWSW]. While racial inequities plague the criminal justice system and indigent defense provision is no exception, the role of race in indigent defense provision is not within the scope of this Note.

13 *See* BRYAN FURST, A FAIR FIGHT: ACHIEVING INDIGENT DEFENSE RESOURCE PARITY, BRENNAN CTR. FOR JUST. 1 (2019), https://www.brennancenter.org/sites/default/files/publications/2019_09_Defender%20Parity%20AnalysisV7.pdf [https://perma.cc/7HLU-Z26Z].

14 *See* NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 10, 15 (1982) (analyzing periodic reports on indigent defense systems); JUST. POL'Y INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 6 (2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf [https://perma.cc/EV74-KKGG] [hereinafter SYSTEM OVERLOAD].

15 *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1965); McMann v. Richardson, 397 U.S. 759, 771 (1970).

representation must be provided. As a result, states have struggled to adequately fund indigent defense.[16]

Widespread deficiencies in indigent defense have resulted in legal challenges that have resulted in isolated settlements, judicial remedies, and legislative responses. While these outcomes have made some difference, this Note argues that these one-off remedies have ultimately failed for one reason: they do not permanently alter the political incentives of funding indigent defense services. Indigent defendants do not have the power to pressure legislatures to fund indigent defense, and society at large does not have any interest in taking up the cause on defendants' behalf.[17] The result is an absence of political incentives to protect the rights of indigent defendants. The Supreme Court has recognized that when the political process fails to protect individual rights, a phenomenon aptly named the political process failure, the judiciary must play a heightened role in protecting those rights.[18] Accordingly, this Note proposes a judicial solution to this legislative problem. Courts should implement a three-pronged judicial remedy consisting of (1) a rebuttable presumption that indigent defense representation is ineffective if the indigent defense system is not in compliance with national caseload standards, (2) a prohibition against assigning cases to attorneys above state-specific caseload limits, and (3) mandatory release of indigent defendants who are not assigned counsel within 45 days and the halting of prosecution in such cases.

Part I of this Note examines the development of the right to counsel and the legal challenges brought against deficient indigent defense systems. Part II evaluates the flaws of each attempted solution thus far. Part III proposes consolidating three specific judicial remedies into a single decision to permanently alter the political incentives of funding indigent defense and effectively force legislatures to adequately fund indigent defense services.

I. A BRIEF HISTORY OF INDIGENT DEFENSE: THE SIXTH AMENDMENT AND THE RIGHT TO "EFFECTIVE" COUNSEL

A. The Expansion of the Right to Counsel

The Sixth Amendment of the United States Constitution states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the

16 *See* FURST, *supra* note 13, at 1–2.

17 *See* Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel* 32–34 (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1279185 [https://perma.cc/W4FT-AV7X].

18 *See* United States v. Carolene Products Co., 304 US 144, 152 n.4 (1938); Reddy, *supra* note 17, at 32.

Assistance of Counsel for his defense."[19] Early Supreme Court decisions interpreting the Sixth Amendment held that it did not require access to counsel except in capital offense cases,[20] and eventually in all federal criminal trials.[21] Because counsel was first only required in such a limited subset of cases, courts often resorted to ad hoc appointments of counsel when defendants could not afford their own representation.[22] To ensure compliance, courts also integrated volunteer duties to the private bar or required private attorneys to take appointments if necessary.[23] However, because these appointments were infrequent and were often viewed as volunteer cases, states were not required to appropriate funding for such services.[24]

The Supreme Court dramatically changed the indigent defense landscape with its 1963 seminal decision, *Gideon v. Wainwright*,[25] in which it held that the Constitution guarantees counsel in all criminal cases, including cases under state jurisdiction.[26] Overruling precedent, the Court held:

> [T]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.[27]

Finding the right to counsel to be fundamental, the Court held that it was thus incorporated against the states by the Due Process Clause of the Fourteenth Amendment.[28]

The expansion under *Gideon* was coupled with several other rights-expanding decisions. In 1972, the states became responsible for providing representation whenever the defendant faced jailtime, even if they were only charged with a misdemeanor.[29] In 1977, indigent defendants became entitled to representation for more proceedings, including arraignments and

---

19 U.S. CONST. amend. VI.

20 *See* Powell v. Alabama, 287 U.S. 45, 73 (1932).

21 *See* Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938).

22 *See* Reddy, *supra* note 17, at 3.

23 *See id.* at 3–4.

24 *See id.* at 4.

25 372 U.S. 335 (1963).

26 *See id.* at 344–45 (overruling Betts v. Brady, 316 U.S. 455 (1942)).

27 *Id.* at 344.

28 *See id.* at 341–44.

29 *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) ("[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.").

interrogation.[30] In addition to expanding the scope of the right, the Court provided substantive clarification that the right to counsel did not merely guarantee the pro forma provision of counsel, but the provision of *effective* counsel.[31] The Court eventually spelled out the test for ineffective counsel in *Strickland v. Washington*,[32] holding that the plaintiff must prove that counsel's performance fell below an objective standard of reasonableness giving rise to a reasonable probability that if counsel had performed adequately, the outcome of the case would have been different.[33]

These rights-expanding decisions had the cumulative impact of enlarging the population of defendants eligible for indigent defense representation, entitling such defendants to representation for a larger portion of their defense process, and creating a constitutional floor for the quality of the defense. The indigent defense systems in place were not equipped to comply with this vastly expanded mandate, and states had to set about developing and funding new systems.[34] While the Court made it clear that states needed to provide these services, it did not specify how the services were supposed to be funded, creating what is now known as an "unfunded mandate."[35] As a result, states set on a course of creating vastly different indigent defense systems.[36]

Scholars have since sorted indigent defense systems into three broad models: (1) the public defender system, in which staff attorneys compose a public or non-profit office that provides legal representation; (2) the assigned counsel model, in which indigent defense cases are assigned to private counsel; and (3) the contract model, in which the jurisdiction contracts with an individual attorney or group of attorneys for a certain number of cases.[37]

---

30 *See* Brewer v. Williams, 430 U.S. 387, 388 (1977).

31 *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.").

32 466 U.S. 668 (1984).

33 *See id.* at 688–90.

34 *See* Reddy, *supra* note 17, at 7.

35 Stephen B. Bright & Sia Sanneh, *Violating the Right to a Lawyer*, L.A. TIMES (Mar. 18, 2013, 12:00 AM), https://www.latimes.com/opinion/la-xpm-2013-mar-18-la-oe-bright-gideon-justice-20130318-story.html (last visited Oct. 5, 2020).

36 *See* Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 419 (2001).

37 *See* Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & CONTEMP. PROBS. 31, 32 (1995). Because this Note covers indigent defense systems across the country, it will refer to attorneys providing indigent defense representation under the umbrella term "indigent defense counsel," rather than "public

While funding for these systems can be provided by states, counties, or a combination of both, the majority of states provide more than 90% of the total indigent defense funding in their jurisdictions.[38]

Despite differences in organizational and funding structures, indigent defense systems have consistently shared one fatal flaw: chronic underfunding. An independent report by the National Legal Aid and Defender Association ("NLADA") issued periodically after *Gideon* has found chronic underfunding of indigent defense systems across the country for decades after the decision.[39] Recent studies indicate that the situation has not improved—indigent defense continues to be chronically underfunded, underresourced, and understaffed.[40] Only "27 percent of county-based and 21 percent of state-based public defender offices have enough attorneys" to meet caseload standards promulgated by the Department of Justice, an indication that those systems do not have the funds to be adequately staffed.[41] Not only are there not enough attorneys, but many states also cap hourly compensation at rates so low that attorneys are incentivized to spend as little time on indigent defense cases as possible.[42]

When there are not enough attorneys to handle cases, qualified attorneys are assigned excessive cases and "forced to choose among their clients."[43] When attorneys are stretched thin, they are unable to provide "competent and diligent representation" to their clients.[44] Consequences of overburdening indigent defense counsel can include limited time with clients, missed evidence, and weaker litigative strategy, among others.[45] Further, when offices cannot afford to pay qualified counsel, clients are often represented by "incompetent or inexperienced counsel."[46] For example, a statewide

---

defenders" or "court-appointed counsel." When a referencing a specific case or study, this Note will use the same terminology as the case or study.

38 CONST. PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 53–54 (2009) [hereinafter JUSTICE DENIED].

39 *See* NAT'L LEGAL AID & DEF. ASS'N, THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY 20 (1973); NAT'L LEGAL AID AND DEF. ASS'N, INDIGENT DEFENSE SYSTEMS ANALYSIS (IDSA) 47 (1978), https://www.ncjrs.gov/pdffiles1/Digitization/43542NCJRS.pdf [https://perma.cc/92QM-EZKF]; LEFSTEIN, *supra* note 14, at 14–15 (discussing the findings of the 1973 and 1978 NLADA reports).

40 *See* FURST, *supra* note 13, at 1.

41 *Id.* (citing LYNN LANGTON & DONALD FAROLE JR., BUREAU OF JUST. STAT, U.S. DEP'T OF JUST., COUNTY BASED AND LOCAL PUBLIC DEFENDER OFFICES 10 (2007), https://www.bjs.gov/content/pub/pdf/clpdo07.pdf [https://perma.cc/7JMP-F3C8]).

42 *See id.* at 1–2.

43 JUSTICE DENIED, *supra* note 38, at 65.

44 ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006).

45 *See* Hager, *supra* note 5.

46 JUSTICE DENIED, *supra* note 38, at 50–52, 7–8, 65–70.

California survey found that the majority of public defender offices required indigent defense counsel to have at least three years of experience to handle felony cases.[47] However, the same survey found that there was a correlation between "having an excessive caseload and using attorneys with less than three years of experience to handle serious felonies."[48] Strained indigent defense offices saddled inexperienced counsel with excessive caseloads.[49]

Additionally, overburdened indigent defense systems may not provide counsel or only provide counsel after defendants suffered long waits in jail.[50] One investigation found that, in such cases, courts often pressured defendants to make decisions without counsel present by telling them that "a request for a lawyer would delay their case or release from jail."[51]

Although studies are mixed on sentencing outcomes, defendants represented by indigent defense counsel fare markedly worse on several metrics. One such metric is pretrial release. Defendants who hire private attorneys are released from jail before trial 79% of the time, compared to only 52% of the time for defendants with indigent defense representation.[52] Prison inmates also had contact with their attorneys earlier and more frequently in their defense process when the inmate had a private attorney.[53] Another study found that 70% of defendants exonerated by DNA were represented by court-appointed attorneys or public defenders.[54] The interplay between these statistics supports the conclusion that a large portion of defendants represented by indigent defense counsel suffer worse criminal justice outcomes than those with private representation.

B. The Corresponding Development of Legal Challenges

The widespread deficiencies in indigent defense services have predictably resulted in legal challenges. Plaintiffs in the 1980s brought post-

---

47 *See* Laurence A. Benner, *The Presumption of Guilt: Systemic Factors that Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 297 (2009).

48 *Id.*

49 *See id.* at 297–98.

50 *See* JUSTICE DENIED, *supra* note 38, at 86.

51 JUSTICE DENIED, *supra* note 38, at 89. "These conclusions were borne out by investigations conducted . . . during 2006 by three experienced criminal justice professionals who visited court proceedings in eight states across the country." *Id.* at 85.

52 *See* CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 5 (2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf [https://perma.cc/EU9R-4FBM].

53 *See id.* at 8.

54 *See* Ellen Yaroshefsky & Ellen Schaefer, *Defense Lawyering and Wrongful Convictions*, *in* EXAMINING WRONGFUL CONVICTIONS: STEPPING BACK, MOVING FORWARD 129 (Allison D. Redlich, James R. Acker, Robert J. Norris & Catherine L. Bonventre eds., 2014).

conviction habeas corpus challenges on the grounds that appointed counsel was ineffective, as defined in *Strickland v. Washington*.[55] *Strickland* requires defendants to prove that their counsel's performance fell below an objective standard of reasonableness and that, but for the ineffective assistance of counsel, there is a reasonable probability that the proceedings would have ended differently.[56] However, it soon became clear that the *Strickland* standard was difficult to meet in these circumstances for several reasons. First, the standard's focus on prejudicial errors emphasizes affirmative errors while discounting the errors of omission often committed by overburdened counsel—in other words, attorneys who fail to do the necessary work rather than actively do something wrong are not implicated by *Strickland*'s standard.[57] Second, *Strickland* requires evidence of "a direct connection between the attorney's error and the defendant's conviction."[58] Because these cases often involve overworked attorneys, the record will likely be sparse, making it difficult to find proof that there were things the attorney missed or did not follow up on.[59]

Struggles to obtain relief under the *Strickland* standard also highlighted a larger issue with individual plaintiff challenges: courts in the 1990s were examining attorney conduct on a case-by-case basis and missing evidence of larger systemic problems. To bring systemic issues of chronic underfunding to light, litigants shifted their strategy in two ways. First, litigants started bringing challenges in the form of class action suits.[60] Second, litigants shifted from seeking post-conviction relief to prospective relief.[61] Prospective relief cases are brought before the potential damage occurs; in other words, people who faced the *prospect* of ineffective indigent

---

55 *See* Reddy, *supra* note 17, at 15.

56 *See* Strickland v. Washington, 446 U.S. 668, 688–89, 694 (1984).

57 *See* Rodger Citron, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 487 (1991).

58 *Id.*

59 *See id.*

60 *See, e.g.*, Settlement Agreement, Best v. Grant Cty., No. 04-2-00189-0 (Wash. Super. Ct. Nov. 2, 2005) (Civil Rights Litigation Clearinghouse, University of Mich. Law School) [hereinafter Settlement Agreement, *Best v. Grant Cty.*]; Consent Order, Stinson v. Fulton Cty. Bd. of Comm'rs, No. 1-94-CV-240-GET (N.D. Ga. 1999) (Civil Rights Litigation Clearinghouse, University of Mich. Law School) [hereinafter Consent Order, *Stinson v. Fulton Cty. Bd. Of Comm'rs*]; Settlement Agreement, Doyle v. Allegheny Cty. Salary Bd., No. GD-96-13606 (Pa. Ct. C.P. May 15, 1998) (Civil Rights Litigation Clearinghouse, University of Mich. Law School) [hereinafter Settlement Agreement, *Doyle v. Allegheny Cty. Salary Bd.*]; Rivera v. Rowland, No. CV-95-0545629S, 1996 WL 636475 (Conn. Super. Ct. Oct. 23, 1996) (Civil Rights Litigation Clearinghouse, University of Mich. Law School).

61 *See* Settlement Agreement, *Best v. Grant Cty.*, *supra* note 60, at 2; Consent Order, *Stinson v. Fulton Cty. Bd. Of Comm'rs*, *supra* note 60, at 1; *see also* Reddy, *supra* note 17, at 19.

representation started bringing claims. One certified class of note was composed of indigent defendants with felony cases pending who had not been convicted, and another class was made up of defendants facing non-homicide felony offenses who had not yet been assigned counsel.[62] In these prospective relief cases, the classes alleged that the challenged systems systemically denied effective counsel, resulting in ineffective counsel for the entire class. A national overview of indigent defense systems found 38 cases challenging systemic indigent defense deficiencies between the *Strickland* decision in 1984 and March 2017.[63]

While the Supreme Court has yet to weigh in on whether the *Strickland* standard for ineffective counsel applies in challenges to systemic indigent defense deficiencies, many lower courts have held that it does not. In *New York Lawyers' Association v. State*,[64] the New York Superior court held that, because the *Strickland* standard was developed to assess criminal convictions, it was "inappropriate in a civil action that seeks prospective relief" due to systemic deficiencies which subject "children and indigent adults to a severe and unacceptable risk of ineffective assistance of counsel."[65] In *Luckey v. Harris*,[66] the Eleventh Circuit similarly held that, because the *Strickland* standard was used to determine "when counsel has rendered ineffective assistance," it could only logically be applied retrospectively in cases in which the assistance had already been provided.[67]

Finding *Strickland* inappropriate in prospective relief cases, lower courts have been forced to develop other standards against which to measure alleged systemic indigent defense deficiencies. The court in *New York Lawyers' Association* held that "threatened injury" was sufficient to allow plaintiffs to seek injunctive relief.[68] The Eleventh Circuit in *Luckey* held that, because prospective relief cases intended to "avoid future harm," plaintiffs had the burden of showing "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law."[69] Other courts

---

62 *See* Settlement Agreement, *Best v. Grant Cty.*, *supra* note 60, at 2, 17 (involving a class composed of persons charged with felonies, but who have not plead guilty or been convicted); Consent Order, *Stinson v. Fulton Cty. Bd. Of Comm'rs*, *supra* note 60, at 2 (involving a class composed of persons charged with non-homicide felonies). This Note will refer to these classes as the "plaintiffs" when referring to civil prospective relief cases, though the plaintiffs are indigent defendants.

63 *See* Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV., 89, 94–95 (2018).

64 745 N.Y.S.2d 376 (N.Y. Sup. Ct. 2002).

65 *Id.* at 384.

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

67 *Id.* at 1017.

68 745 N.Y.S.2d at 384.

69 *Luckey*, 860 F.2d at 1017 (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)).

have found that many of the deficiencies alleged in these suits—failure to communicate with clients, failure to represent clients during critical stages, among others—pose constitutional questions regarding whether counsel was even provided, not whether counsel was effective.[70] Therefore, rather than debating whether to apply *Strickland* or another ineffective counsel test, those courts have measured whether the deficiency resulted in nonrepresentation.[71]

The split over the appropriate standard in these cases aside, legal challenges have been met with some success. Many courts have found for plaintiffs and held that the indigent defense system was providing ineffective counsel,[72] and other cases have ended in settlements with promises of improvement in indigent defense representation.[73] Other cases have spurred voluntary legislative increases in indigent defense funding.[74] However, for the reasons discussed below, these outcomes have not resulted in lasting and meaningful change for indigent defendants.

II. SETTLEMENTS, ISOLATED JUDICIAL REMEDIES, AND LEGISLATIVE RESPONSES HAVE FAILED TO FORCE LEGISLATURES TO ADEQUATELY FUND INDIGENT DEFENSE SERVICES

Despite legal challenges to failing indigent defense systems, indigent defense continues to be chronically underfunded. Solutions to chronic underfunding of indigent defense have failed thus far for a specific reason—a phenomenon known as the political process failure.[75] The failure occurs when those interested in legislative reform to protect individual rights "lack

---

70 *See, e.g.*, Pub. Def., 11th Judicial Circuit of Fla. v. State, 115 So. 3d 261, 265, 278 (Fla. 2013); Wilbur v. City of Mt. Vernon, 989 F. Supp. 2d 1122, 1123–24 (W.D. Wash. 2013).

71 *See Pub. Def., 11th Judicial Circuit of Florida*, 115 So. 3d at 278 ("[T]he circumstances presented here involve some measure of non-representation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment."); *Wilbur*, 989 F. Supp. 2d at 1123, 1127 ("It is the lack of a representational relationship that would allow counsel to evaluate and protect the client's interests that makes the situation in Mount Vernon and Burlington so troubling and gives rise to the Sixth Amendment violation in this case.").

72 *See* Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895, 904–05 (Mass. 2004); State v. Peart, 621 So. 2d 780, 791 (La. 1993).

73 *See* Settlement Agreement, *Best v. Grant Cty.*, *supra* note 60; Settlement Agreement, *Doyle v. Allegheny Cty. Salary Bd.*, *supra* note 60.

74 *See, e.g.*, Notice of Settlement, *Rivera v. Rowland*, No. CV-95-0545629S (Conn. Super. Ct. 1999) [hereinafter Notice of Settlement, *Rivera v. Rowland*] (noting a voluntary increase in funding for support staff and compensation rates paid to special public defenders).

75 *See* Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense Source*, HARV. L. REV. 2062, 2066–68 (2000) [hereinafter *Gideon's Promise*].

the financial and political capital necessary" to achieve it.[76] The Supreme Court first identified the political process failure in the famous footnote four of *United States v. Carolene Products Co.*,[77] and noted that in such cases, the judiciary must play a heightened role to protect individual rights.[78]

The political process failure is particularly acute in the context of indigent defense. The faction hurt most by inadequate defense is the indigent defendants themselves, a group that lacks both financial capital and political capital.[79] Since indigent defendants do not have the power to pressure legislatures on their own, their only hope is that others will demand reform on their behalf. However, because voters are "fearful of crime" and there are finite government resources, voters generally support funding prosecution over indigent defense.[80] In the absence of political pressure, public choice theory suggests that "rational legislatures [and policy makers] have every political incentive to shortchange indigent defense."[81]

This Part reviews why legal challenges thus far have failed to solve the political process failure. Outcomes of legal challenges against indigent defense systems can be divided into three categories: (1) settlements, (2) isolated judicial remedies, and (3) legislative responses.[82] In the settlements category, plaintiffs and the government actor responsible for the challenged indigent defense system agree to a set of improvements in order to settle the suit. Common settlement provisions include commitments to prevent caseloads from exceeding specified standards or quantities,[83]

---

76 *Id.* at 2062.

77 304 US 144, 152 n.4 (1938).

78 *See id.*

79 *See* George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of* Infamia, 46 UCLA L. REV. 1895, 1898 (1999) (discussing felon disenfranchisement); *Indigent*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/indigent [https://perma.cc/EZ6Q-P5UG].

80 Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 (I997); Reddy, *supra* note 17, at 32.

81 Dripps, *supra* note 80, at 244.

82 This Note will review cases brought both by individual plaintiffs and by certified classes. It will also review cases brought by indigent plaintiffs who have yet to be charged but who would need indigent defense representation if they were charged, those who have been charged but have yet to be tried, and those who have been convicted.

83 *See* Consent Order, *Stinson v. Fulton Cty. Bd. Of Comm'rs*, *supra* note 60; Settlement Agreement, *Best v. Grant Cty.*, *supra* note 60, at 7; Stipulation and Order of Settlement, Hurrell-Harring v. State at 7–8, No. 8866-07, (N.Y. Sup. Ct. 2014) [hereinafter Stipulation and Order of Settlement, *Hurrell-Harring v. State*]; Consent Decree at 4, Flournoy v. State, No. 2009CV178947 (Ga. Sup. Ct. 2011) [hereinafter Consent Decree, *Flournoy v. State*]; Settlement Agreement, *Doyle v. Allegheny Cty. Salary Bd.*, *supra* note 60, at 15–16.

mandatory increases in numbers of attorneys and support staff,[84] and mandatory training and qualifications for attorneys.[85] In the isolated judicial remedies category, the legal challenge ends with a court-issued remedy. Courts have issued diverse remedies in these cases, including raising the hourly fees for indigent defense attorneys,[86] imposing a limit on the length of time that defendants can be denied counsel before the state must drop the prosecution,[87] and enjoining the trial court's appointment of counsel to cases without considering counsel's ability to take on more cases.[88] A third, and rarer, outcome is voluntary legislative action as a response to the threat of suit or in order to get plaintiffs to drop an ongoing suit. This has occurred in Connecticut and New York, where each state increased indigent defense funding during the pendency of a suit.[89]

A. Failures of Settlements

Legal challenges against deficient indigent defense systems have resulted in settlements with policy makers and agencies. While these settlements include various provisions aimed at improving indigent defense services, several important pitfalls ensure that improvement efforts are short-lived.

Most importantly, settlements are temporary by nature. Settlement agreements generally include time-limited terms or a clause that states the agreement expires after a certain number of years.[90] Even when agreements

---

84 *See* Settlement Agreement, *Best v. Grant Cty.*, *supra* note 60, at 10; Consent Decree, *Flournoy v. State*, *supra* note 83, at 5–6; Stipulation and Order of Settlement, *Hurrell-Harring v. State*, *supra* note 83.

85 *See* Settlement Agreement, *Best v. Grant Cty.*, *supra* note 60, at 5; Stipulation and Order of Settlement, *Hurrell-Harring v. State*, *supra* note 83, at 10; Consent Decree, *Flournoy v. State*, *supra* note 83, at 5–6; Settlement Agreement, *Doyle v. Allegheny Cty. Salary Bd.*, *supra* note 60, at 9–10.

86 *See* New York Cty. Lawyers' Ass'n v. State, 745 N.Y.S.2d 376, 388–89 (N.Y. Sup. Ct. 2002).

87 *See* Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895, 909–11 (Mass. 2004).

88 *See* State *ex rel*. Missouri Pub. Def. Comm'n v. Waters, 370 S.W.3d 592, 597–598 (Mo. 2012) (en banc).

89 Notice of Settlement, *Rivera v. Rowland*, *supra* note 74; Joint Motion for Approval of Withdrawal of Action, Rivera v. Rowland, No. CV-95-0545629S, 1996 WL 636475 (Conn. Super. Ct. Oct. 23, 1996) [hereinafter Joint Motion, *Rivera v. Rowland*]; William L. Leahy, *The Right to Counsel in the State of New York: How Reform Was Achieved After Decades of Failure*, 51 IND. L. REV 145, 150 (2018) (describing the New York state legislature's reform efforts in response to a court finding that indigent counsel's "compensation rates violated their clients' constitutional rights to effective assistance of counsel").

90 In *Stinson v. Fulton County*, a case brought in 1999 in Georgia, the ultimate settlement did not state a term of years. *See* Consent Order, *Stinson v. Fulton Cty. Bd. Of Comm'rs*, *supra* note 60. Many of the settlement's terms stated that they would only remain

do not explicitly expire, long-term judicial supervision is often beyond the practical ability of the courts.[91] To some degree, courts can attempt to mitigate the effects of expiration by including a provision that once a case challenging the indigent defense system is moved to the court's inactive docket, plaintiffs retain the right to sue to hold the county in contempt of court if the county stops complying with the settlement's terms.[92] Even though some settlement agreements last relatively long, their expiration eliminates oversight and hinders systemic change.[93]

Once the terms of time-limited settlements expire, there is nothing preventing the indigent defense system from reverting to its status quo. This has occurred in several jurisdictions. For example, Fulton County, Georgia agreed to a settlement in 1999 directing the County to provide the public defender's office with greater personnel, facilities, and equipment.[94] Despite these terms, the public defender budget for Atlanta, Fulton County's largest city, was cut less than 10 years later in 2008.[95] The Southern Center for Human Rights has since found that public defenders in the Fulton County system handle up to 1,000 cases a year—well above national guidelines—resulting in attorneys spending "so much time in court that they aren't able to investigate or file motions on their clients' behalf."[96]

---

in effect for three years after signing. *See id.* Notably, the judicial oversight provision, which required the county to file status reports with the court containing data on caseloads, only lasted for three years. *See id.* at 7. The *Best v. Grant County* settlement reached in Washington in 2005 stated that the agreement would last for six years but could be terminated after five years if Grant County had fully complied. *See* Settlement Agreement, *Best v. Grant Cty.*, *supra* note 60, at 17. The *Flournoy v. State of Georgia* settlement, signed in 2011, only remained in effect until March 2014 or until the defendants had remained in "substantial compliance" for at least one year, whichever came later. *See* Consent Decree, *Flournoy v. State*, *supra* note 83, at 13.

91 *See, e.g.*, Verizon Communications v. Law Offices of Curtis Trinko, 540 U.S. 398, 414–16 (2004) (discussing the difficulty of continuing supervision by courts over highly detailed decrees).

92 The *Doyle v. Allegheny County Salary Board* settlement in Pennsylvania, signed in 1998, stated that it would remain active until 2003. *See* Settlement Agreement at 2, 15–16, *Doyle v. Allegheny Cty. Salary Bd.*, *supra* note 60.

93 The *Hurrell-Harring v. State* settlement in New York went into effect in 2014 and expires after 7.5 years, meaning it is currently still in effect. *See* Stipulation and Order of Settlement, *Hurrell-Harring v. State*, *supra* note 83, at 23.

94 *See* Consent Order, *Stinson v. Fulton Cty. Bd. Of Comm'rs*, *supra* note 60, at 6.

95 *See 'Crisis' in Georgia as Public Defense Budget is Cut*, INNOCENCE PROJECT (June 11, 2008), https://www.innocenceproject.org/crisis-in-georgia-as-public-defense-budget-is-cut/ [https://perma.cc/BSQ2-98BM].

96 Arielle Kass, *Some Fulton Public Defenders Given 1,000 Cases a Year, Group Complains*, ATLANTA J.–CONST. (July 13, 2018), https://www.ajc.com/news/local-govt—politics/some-fulton-public-defenders-given-000-cases-year-group-complains/AzpXu8N63AD309rPcgLdfP/ (last visited Oct. 10, 2020).

Similarly, a settlement reached with Allegheny County, Pennsylvania included a clause allowing plaintiffs to file against the County for contempt if indigent defense services fell below constitutional requirements.[97] Despite the fact that the American Civil Liberties Union ("ACLU") filed for contempt in 2003, court monitoring of the settlement terminated in 2005, meaning the action had little effect.[98] A 2008 report commissioned by Allegheny County found that "[d]efenders [did] not meet their clients after they [were] booked into the jail," and that "there [was] an unacceptable period of approximately four months, between the pre-trial conference and the preliminary hearing of a case, when jailed offenders [did] not see their lawyer."[99] The ACLU also conducted a year-long investigation and reported finding serious issues, including that training was severely lacking.[100]

In another case brought by the ACLU, Grant County, Washington reached a settlement in 2005 after a judge found that the county "overworked its lawyers, failed to provide effective supervision, and allowed the prosecutor's office to interfere with funding for expert witnesses and investigators."[101] After seven years of court-ordered monitoring, the ACLU was satisfied with the effects of the settlement.[102] A 2013 review of the county's progress found that caseloads were manageable and the number of motions filed and investigators used had increased, a possible indication that attorneys were doing a more thorough job when representing their clients.[103] While the progress is encouraging, there is no current data available to determine whether the county has remained in compliance with the settlement terms since judicial oversight ceased.

Though vagueness is not central to why settlements are an inadequate solution, it is another common shortcoming. Instead of establishing numeric caps on caseloads or requiring concrete increases in funding, settlement provisions often use nebulous standards that are susceptible to vastly different interpretations. The Fulton County settlement required the County to make "good-faith efforts" to provide timely pretrial service interviews and

---

97 *See* Settlement Agreement at 16, *Doyle v. Allegheny Cty. Salary Bd.*, *supra* note 60.

98 *See* AM. CIVIL LIBERTIES UNION OF PA., A JOB LEFT UNDONE: ALLEGHENY COUNTY'S FORK IN THE ROAD 3 (2011), https://www.aclupa.org/sites/default/files/OPDReportfinal.pdf [https://perma.cc/667W-7JM6] [hereinafter A JOB LEFT UNDONE].

99 INST. FOR L. AND POL'Y PLAN., ALLEGHENY COUNTY OFFICE OF THE PUBLIC DEFENDER ASSESSMENT, FINAL REPORT 10–11 (2008).

100 *See* A JOB LEFT UNDONE, *supra* note 98, at 5.

101 *See Grant County Public Defense Suit Ends with Major Improvements*, ACLU (June 11, 2013), https://www.aclu-wa.org/news/grant-county-public-defense-suit-ends-major-improvements [https://perma.cc/WSS7-8ZMZ]; *see* Settlement Agreement, *Best v. Grant Cty.*, *supra* note 60.

102 *See id.*

103 *See id.*

achieve caseload standards.[104] Separately, one New York settlement provides that the state must make "good faith efforts to begin implementing the [agreed upon] plan, subject to legislative appropriations."[105] The Allegheny County settlement required the county to employ "sufficient" attorneys and support staff, "adequately" supervise attorneys, and maintain "adequate policies" for professional services and training.[106]

To understand the impact of vague language in settlements, it is helpful to look to the similar use of vague language in legislation. Legislators often agree to vague language because ambiguity "facilitates compromise" in the face of "competing . . . constituencies."[107] In the context of settlements, the competing parties are the plaintiffs seeking improvements in indigent defense services and the challenged government actor. While vague language facilitates compromise, it comes at the expense of clear expectations. Therefore, unlike numerical caseloads that are easy to monitor by the court, vague language makes it easier for indigent defense systems to get away with interpreting nebulous terms in a way that avoids making improvements.

The use of time-limited and vague terms means that settlements may simply go from ineffective while in force to unenforceable once expired. Once settlements expire, political incentives revert to their status quo and the pressure to adequately fund indigent defense subsides.

B. Failures of Isolated Judicial Remedies

The second category of outcomes includes cases that end with judicial action. This Note will examine three remedies that courts have used: (1) a rebuttable presumption that indigent defense representation is ineffective if it does not improve after having been found ineffective, (2) a prohibition against assigning cases to attorneys above specified caseload limits, and (3) mandatory release of indigent defendants from jail whose cases are not assigned counsel in a timely manner. Each of these remedies is intended to help secure indigent defendants' right to effective counsel. However, when implemented in isolation, each remedy has failed to permanently alter the incentives for legislatures to adequately fund indigent defense.

---

104 Consent Order, *Stinson v. Fulton Cty. Bd. Of Comm'rs*, *supra* note 60, at 4, 6.

105 Stipulation and Order of Settlement, *Hurrell-Harring v. State*, *supra* note 83, at 5.

106 Settlement Agreement, *Doyle v. Allegheny Cty. Salary Bd.*, *supra* note 60, at 15.

107 Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 630, 633 (2002).

1. A Sua Sponte Rebuttable Presumption of Ineffectiveness

A rebuttable presumption is an initial assumption made by a court that is accepted unless it is disproven.[108] A court implements a rebuttable presumption sua sponte when it does so without a request from either party.[109] In indigent defense cases, courts have used the rebuttable presumption to shift the initial burden from the plaintiff-indigent-defendant needing to prove the system is *ineffective*, to the indigent defense system needing to prove that the system is *effective*.

The Arizona Supreme Court sua sponte implemented a rebuttable presumption of ineffectiveness in 1984 in *State v. Smith*.[110] In that case, defendant Joe Smith—who had been convicted and found guilty of burglary, sexual assault, and aggravated assault—appealed his conviction on several grounds, including a claim that he had received ineffective assistance of counsel.[111] Mohave County, Arizona, operated the indigent defense system at issue, and it contracted with attorneys for indigent defense services based on lowest annual fee.[112] It then assigned attorneys to cases without considering their experience or workload and placed no cap on attorney caseloads.[113] At the time of the trial, Smith's attorney was juggling 149 felonies, 160 misdemeanors, 21 juvenile cases, and 33 other types of cases over an eleven month period.[114] Smith alleged that due to his heavy caseload, his attorney had spent just two to three hours interviewing him and only six to eight hours preparing his defense.[115] The court found that both the county's process for selecting attorneys and the attorney's caseload violated national guidelines on indigent defense contracts promulgated by the National Legal Aid & Defender Association ("NLADA").[116] Using the NLADA standards as a proxy for the Sixth Amendment right to effective counsel, the court found the county's procedure "violate[d] the right of a defendant to due process and right to counsel as guaranteed by the . . . United States Constitution."[117] The court ordered the county to implement changes to come into compliance and held that a rebuttable presumption of

---

108 *See Rebuttable Presumption*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/rebuttable_presumption [https://perma.cc/8EB9-YJFS].

109 *See Sua Sponte,* CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/sua_sponte [https://perma.cc/33QA-N2V2].

110 *See* State v. Smith, 681 P.2d 1374, 1376 (Ariz. 1984) (in banc).

111 *See id.* at 1376.

112 *See id.* at 1376, 1379.

113 *See id*. at 1376, 1379–82.

114 *Id.* at 1380.

115 *See id.* at 1378–79.

116 *See id.* at 1379–82.

117 *Id.* at 1381.

ineffectiveness would remain in effect as long as the county did not improve its process and standards for indigent defense services.[118]

The Supreme Court of Louisiana adopted the same rebuttable presumption several years later in *State v. Peart.*[119] In that case, defendant Leonard Peart's attorney, Richard Teissier, had petitioned a lower court for a Motion for Relief to Provide Constitutionally Mandated Protection and Resources due to his overwhelming caseload.[120] In reviewing the motion on appeal, the Supreme Court compared the city's system for assigning cases to criminal justice standards promulgated by the American Bar Association, national standards similar to the NLADA guidelines used in *State v. Smith*.[121] The court found that requirements under the city's system violated multiple standards, including caseload size, initial contact with client, and investigation of all facts relevant to the case.[122] Accordingly, it found that the city's system resulted in indigent defendants "receiving assistance of counsel not sufficiently effective to meet constitutionally required standards."[123] The court then held that a rebuttable presumption that the system was ineffective would remain in effect "so long as there [were] no changes in the workload and other conditions" of the system.[124]

This rebuttable presumption removes a procedural roadblock from potential challenges to indigent defense systems. However, it does not place a cap on caseloads or require an indigent defense system to restructure. Instead, it is intended to act merely as a procedural recognition of likely deficiencies before the court arrives to the merits (at which point, the court would institute other remedies like an injunction).[125]

2. Prohibition Against Assignment of Cases to Overburdened Indigent Defense Counsel

The American Bar Association's standards for indigent defense require attorneys to decline case assignments when they do not feel they can

---

118 *See id.* at 1384 ("As to trials commenced after the issuance of [this decision's] mandate, 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.").

119 621 So. 2d 780 (La. 1993).

120 *See id.* at 784.

121 *See id.* at 789–91.

122 *See id.*

123 *Id*. at 791.

124 *See id.*

125 Because the rebuttable presumption is generally implemented alongside other remedies and is not intended to address the broken system in isolation, this Note does not review how the presumption has failed on its own.

competently represent more clients.[126] In many jurisdictions, this guideline is also integrated into the jurisdiction's administrative rules.[127] While this standard relates to the indigent defense counsel's professional duty, its logical corollary is that attorneys should not be *assigned* cases when they are already at capacity with their current assignments.

In 2012, the Missouri Supreme Court heard *Missouri v. Waters*,[128] in which the Missouri Public Defender Commission challenged the assignment of new cases to an attorney despite the notification to presiding judges that the attorney's district was "unavailable to accept any additional cases" due to excessive caseloads.[129] The trial court held that the Sixth Amendment required it to appoint counsel "regardless of the public defender's ability to provide competent and effective representation."[130] On appeal, the Supreme Court of Missouri held the opposite: not only is the judge *allowed* to consider whether the public defender will be able to provide competent and effective representation, she *must* do so.[131] If the judge finds that "for whatever reason, counsel is unable to provide effective representation to a defendant," the judge is prohibited from appointing counsel to the indigent defendant's case.[132] The court then found the Missouri Public Defender Commission's caseload standard protocol to be a workable proxy to ensure the Sixth Amendment right to effective counsel and held that the trial court was prohibited from assigning cases above the protocol's limits.[133] The court also held that that the trial court was required to vacate the appointment and that ultimately it was "incumbent on judges, prosecutors and public defenders to work cooperatively to develop solutions . . . to avoid the scenario that occurred."[134]

A similar case was decided by the Florida Supreme Court one year later.[135] In that case, a Miami-Dade Public Defender declined new

---

126 *See* AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002) ("Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.").

127 *See, e.g.*, State *ex rel*. Missouri Pub. Def. Comm'n v. Waters, 370 S.W.3d 592, 597 (Mo. 2012) (en banc).

128 State *ex rel*. Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012) (en banc).

129 Relators' Statement, Brief and Argument at 10, State *ex rel*. Mo. Pub. Def. Comm'n v. Waters 370 S.W.3d 592 (Mo. 2012) (No. SC91150), 2011 WL 5118554, at *.

130 *Waters*, 370 S.W.3d at 597.

131 *See id.* at 607.

132 *Id.*

133 *See id.* at 599, 612.

134 *Id.* at 612.

135 Pub. Def., 11th Jud. Cir. of Fla. v. State, 115 So. 3d 261 (Fla. 2013).

assignments, claiming that "excessive caseloads caused by underfunding meant the office could not carry out its legal and ethical obligations to [indigent] defendants."[136] One analysis at the time of the suit found that the average Miami public defender was handling 500 felonies and 2,225 misdemeanors a year.[137] The State appealed the question of whether counsel was allowed to decline cases to the Florida Supreme Court.[138] Finding the *Strickland* standard inappropriate because it requires a case-by-case analysis of actual harm done to defendants, the Florida Supreme Court instead looked to the standard in *Luckey v. Harris,* which requires plaintiffs to prove the "likelihood of substantial and immediate irreparable injury."[139] Under the *Luckey* standard, the court ultimately found that "prospective withdrawal" is permissible "when necessary to safeguard the constitutional rights of indigent defendants to have competent representation" and that the Circuit Public Defender Office had provided sufficient cause for withdrawal.[140]

It is important to note the difference between these two decisions. The Missouri Supreme Court *prohibited* lower courts from assigning cases to overburdened attorneys while the Florida Supreme Court merely held that assigning judges were *allowed* to withdraw cases from overburdened attorneys.[141] Unfortunately, not even the stronger Missouri remedy worked. In 2017, the ACLU filed a federal class-action suit in Missouri on behalf of all indigent adults and juveniles charged with an offense punishable by incarceration, claiming the state's indigent defense system violated the Sixth Amendment.[142] The ACLU's brief on appeal noted that the state's indigent defense budget was "shockingly inadequate,"[143] ranking forty-ninth out of fifty states per capita, resulting in "overstretched and underresourced" attorneys who were "forced to handle far too many cases and to devote far too few hours to each case."[144] The weaker 2013 Florida decision also failed to create lasting change. Miami-Dade still does not have enough attorneys to

---

136 *Id.* at 265.

137 *See* GIDEON'S ARMY (HBO 2013); *see also* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), https://www.nytimes.com/2008/11/09/us/09defender.html [https://perma.cc/C67P-GYGT].

138 *See Pub. Def., 11th Jud. Cir. of Fla.*, 115 So. 3d at 265–66.

139 *See id.* at 276 (quoting Luckey v Harris, 860 F.2d 1012, 1017 (11th Cir. 1988)).

140 *Id.* at 270, at 279. In cases of withdrawal, Florida law requires the appointing court to appoint other counsel. FLA. Stat § 27.5303(1)(a) (2019).

141 *Compare* State *ex rel*. Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592, 607 (Mo. 2012) (en banc), *with Pub. Def., 11th Jud. Cir. of Fla.*, 115 So. 3d at 279 (Fla. 2013).

142 *See* Brief for Plaintiffs-Appellees at 1, 7, Church v. Missouri, 913 F.3d 736 (8th Cir. 2019) (No. 17-2857), 2018 WL 625496, at *1, *7.

143 *Id* at 6.

144 *Id.* at 6–7.

handle all of their indigent defense cases.[145] The Chief Assistant State Attorney, urging the Florida Legislature to increase funding, recently said that pay at the county's public defender offices has "reached a crisis level" and "low salaries are resulting in some exorbitant attrition numbers" for the public defender office.[146] The state of affairs in Missouri and Florida demonstrate that case assignment prohibitions alone have failed to result in permanent pressure on legislatures to adequately fund indigent defense.

3. Mandatory Release of Indigent Defendants From Jail

A third remedy courts have instituted is prohibiting the prosecution of indigent defendants whose cases have not been assigned to counsel in a timely manner. The weaker version of this remedy is the recognition that the judicial branch has the power to halt prosecution in the event that indigent defendants have not been afforded the right to counsel. The stronger version of this remedy is the requirement that indigent defendants whose cases have not been assigned to counsel in a timely manner be released from jail.

The Supreme Court of Louisiana implemented the weaker version of the remedy in *State v. Citizen*,[147] a case in which several defendants accused of murder were denied counsel because of funding issues.[148] The court held that, while the funding structure was a legislative issue and thus outside of judicial control, the court had the "constitutional and inherent power and supervisory jurisdiction . . . to take corrective measures to ensure that indigent defendants are provided with their constitutional and statutory rights."[149] Accordingly, the court held that trial courts had the power to halt prosecution of cases until there were sufficient funds for indigent representation.[150] While this decision seems similar to the prohibition of assignment of cases to overburdened attorneys discussed above, it is slightly different because it halts prosecution altogether. Therefore, the indigent defense system cannot move forward with the case until the judge is satisfied it can adequately represent defendants.[151]

---

145 *See* David Ovalle, *'We Are In Crisis': Low Pay Spurs Exodus Among Miami Prosecutors, Public Defenders*, MIAMI HERALD (Mar. 27, 2019, 3:24 PM), (last visited Oct. 11, 2020).

146 Jesse Schekner, *Pay for State Attorney Office Called 'Crisis* Level', MIAMI TODAY (Feb. 5, 2019), https://www.miamitodaynews.com/2019/02/05/pay-for-state-attorney-office-called-crisis-level/ [https://perma.cc/FRS2-G6SQ].

147 898 So. 2d 325 (La. 2005).

148 *See id.* at 327–29.

149 *Id.* at 336.

150 *See id.* at 339.

151 *See id.*

The issue with this weaker version is that halting prosecution alone is not necessarily helpful to the defendant. Important questions can be left unanswered: How long will the prosecution be halted? What happens to the defendant in the interim? The Supreme Court of Massachusetts avoided these questions by issuing a stronger version of the remedy in *Lavallee v. Justices in Hampden Superior Court*.[152] In Hampden County, Massachusetts, low compensation of indigent defense counsel created a shortage of attorneys and huge caseloads for the available counsel.[153] As a result, many indigent defendant cases were simply not being assigned to anyone.[154] This meant that defendants who were unable to afford bail or were ineligible for bail were being held in jail without counsel.[155] The court held that given the "importance of prompt pretrial investigation and preparation," this deprivation resulted in "petitioners' constitutional right to the assistance of counsel . . . not being honored."[156] The court thus required defendants who were held for more than seven days without appointed counsel be released from jail on personal recognizance.[157] The court also held that felony cases that had not been assigned to counsel within forty-five days had to be dismissed without prejudice until counsel was available.[158]

Despite the strong holding in *Lavallee*, underfunding remained an issue in Hampden County and was brought to the court's attention again in a recent class action.[159] In that case, the plaintiff class alleged that there continued to be a shortage of indigent defense counsel in Hampden County due to low wages.[160] In its amicus brief, the Boston Bar Association argued that the *Lavallee* decision had failed to address underfunding.[161] It found that while the legislature raised hourly rates immediately following the decision, rates had remained virtually stagnant since the initial increase and had "not kept close to the rate of inflation."[162]

Like the settlements, legislative actions, and isolated judicial remedies discussed above, release of defendants is only a partial remedy. Even if

---

152 812 N.E.2d 895 (Mass. 2004).

153 *See id.* at 899–900.

154 *See id.* at 900.

155 *See id.*

156 *Id.* at 904–05.

157 *Id.* at 912.

158 *See id.*

159 *See* Carrasquillo v. Hampden Cty. Dist. Courts, 142 N.E.3d 28 (Mass. 2020).

160 *See* Brief for Petitioners-Appellants at 7, 11, Carrasquillo v. Hampden County Dist. Courts, 142 N.E.3d 28 (Mass. 2020) (No. SJC-12777), 2019 WL 4736685, at *7, *11.

161 Brief of Amicus Curiae—Boston Bar Association at 8–9, Carrasquillo v. Hampden County Dist. Courts, 142 N.E.3d 28 (Mass. 2020) (No. SJC-12777), 2019 WL 5566066, at *8–9.

162 *Id.* at *8–9.

release is required when counsel is not provided, indigent defense systems can get around the prohibition by assigning cases to overburdened counsel if the court does not mandate strict adherence to caseload limits. Though there is no data indicating whether defendants were released after *Lavallee* or if they were in fact assigned to overburdened attorneys, the fact that indigent defense funding has remained stagnant indicates that pressure on the legislature to adequately fund indigent defense was insufficient and did not last.

C. Failures of Legislative Responses

Because default incentives lead legislatures to underfund indigent defense, legislatures often will only increase funding when their incentives have been altered.[163] One mechanism for altering incentives is the threat of legal action—legislatures might recognize that a protracted trial resulting in a legal settlement or judicial sanction could look bad and spark public scrutiny, and thus decide to avoid such consequences by voluntarily increasing funding.

In *Rivera v. Rowland*,[164] plaintiffs brought suit against Connecticut's indigent defense system for systematically depriving defendants of their right to effective counsel as a result of inadequate funding.[165] During settlement negotiations, Connecticut decided to increase funding, staff levels, and resources to indigent defense services.[166] The cumulative impact of the improvements was to drastically reduce caseloads of indigent defense attorneys.[167] As a result of the improvements, plaintiffs agreed to withdraw the suit in 1999.[168] In the *New York County Lawyers' Association* litigation, New York City appealed the injunction issued against the state directing higher pay for assigned counsel.[169] However, during the appeal process, the state passed a new law which "increased assigned counsel rates, established

---

163 *See* Leahy, *supra* note 89, at 150 (noting that in reaction to a lawsuit challenging the indigent defense system, the first action the New York legislature took to alleviate the crisis was to increase assigned counsel compensation rates). Legislatures have also increased funding without the threat of legal action. While those instances are outside of the scope of this Note, which is cabined to cases with a judicial element, those increases have failed to create lasting systemic change.

164 No. CV-95-0545629S, 1996 WL 636475 (Conn. Super. Ct. Oct. 23, 1996).

165 *See id.* at 1.

166 *See* Notice of Settlement, *Rivera v. Rowland*, *supra* note 74, at 1.

167 *See id.*

168 *See* Joint Motion, *Rivera v. Rowland*, *supra* note 89.

169 *See* Brief for City Defendant-Appellant, New York Cty. Lawyers' Ass'n v. State, 759 N.Y.S.2d 653 (N.Y. App. Div. 2003), 2002 WL 34363076; New York Cty. Lawyers' Ass'n, 745 N.Y.S.2d 376, 389 (N.Y. Sup. Ct. 2002) (issuing an injunction directing the city to pay assigned counsel at higher rates until modification by the legislature or further court order).

a revenue stream for limited state funding of indigent defense, and created an Indigent Legal Services Fund (ILSF) from which to distribute those funds to the counties and New York City."[170] As a result, the appellate court dismissed the case as moot.[171]

While in both of these cases indigent defense services briefly improved, the legislative momentum to fund indigent defense eventually waned. For some time after the *Rivera* suit was withdrawn in 1999, critics agreed that Connecticut's system was doing an adequate job of providing indigent defendants with appropriate representation.[172] However, in 2011 budget cuts forced the Connecticut Public Defender's office to lay off 42 public defender employees, including 23 attorneys.[173] According to the Deputy Chief Public Defender at the time, "some public defenders' caseloads [were] already at or above state guidelines set in 1999 in response to [the *Rivera*] lawsuit," and he predicted the situation would only worsen after the layoffs.[174] Despite the 2003 legislation in New York, many reports have documented the ongoing failures of indigent defense in the state.[175] A 2006 report commissioned by the Chief Judge of New York State catalogued the state's deficiencies, including excessive caseloads, inability to hire full-time defenders, lack of adequate support services, lack of adequate training, and minimal client contact and investigation.[176]

The impact of legislative action is likely to be short-lived because the impetus for the action, the threat or pendency of a lawsuit, does not fundamentally alter the incentives for funding indigent defense. Rather, the lawsuit temporarily makes it more politically expedient to adequately fund indigent defense in order to avoid litigation costs and negative publicity.

---

170 Leahy, *supra* note 89, at 150.

171 *See* New York Cty. Lawyers' Ass'n v. State, 759 N.Y.S.2d 653 (N.Y. App. Div. 2003).

172 *See* Nat'l Legal Aid & Def. Ass'n, *Gideon Alert: Connecticut Backslides on Right to Counsel* (Jul. 27, 2011, 9:46 AM), http://www.nlada.net/jseri/blog/gideon-alert-connecticut-backslides-right-counsel (perma unavailable - add date).

173 *See id.*

174 *CT Public Defenders Feel Budget Squeeze*, HARTFORD BUS. J. (July 11, 2011), https://www.hartfordbusiness.com/article/ct-public-defenders-feel-budget-squeeze [https://perma.cc/6ST9-URQ6].

175 *See* A Record of Failure in New York State, N.Y. CIV. LIBERTIES UNION, https://www.nyclu.org/en/record-failure-new-york-state [https://perma.cc/TYA5-B723] (cataloging reports of failure in New York State's public defense system between 1973 and 2007).

176 *See* COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, 15–20 (2006), https://www.ils.ny.gov/files/Kaye%20Commission%20Report%202006.pdf [https://perma.cc/BH66-K8K3].

Once pressure from the lawsuit and public scrutiny lets up, the political incentives revert back to their status quo.

III. PROPOSAL: A JUDICIAL SOLUTION TO THE POLITICAL PROCESS FAILURE

Each of the attempted solutions to address systemic indigent defense deficiencies has failed thus far. Settlements have been either officially or effectively temporary and often riddled with vague language. Judicial remedies have been incomplete, addressing one part of the problem but not another—picture *Whac-A-Mole*. Legislative action has come as a result of legal action, but once pressure subsides, funding reverts to insufficient levels.

While each solution has had its respective defects, they all share the same fundamental flaw: they do not permanently alter the political incentives of funding indigent defense. This Note argues that courts can and should alter those incentives through the combination of three judicial remedies: (1) a rebuttable presumption that indigent defense representation is ineffective if the system is not in compliance with national caseload standards, (2) a prohibition against assigning cases to attorneys above national caseload limits, and (3) mandatory release of indigent defendants whose cases are not assigned to counsel within 45 days.

A. The Responsibility of the Judiciary

Before arriving at this remedy's components, it is important to acknowledge an argument implicit in this proposal: courts *can*, and more importantly, *must*, alter political incentives to fund indigent defense. Courts have debated whether intervening in institutional reform cases contravenes the doctrine of separation of powers.[177] On the one hand, inadequate indigent defense stems from the underfunding of indigent defense, and funding of government services is firmly within the legislative domain.[178] One judge put the issue succinctly: "The underfunding of the public defender system may be beyond the competence of this Court in the sense that the role of this Court is to decide cases—not fix problems."[179] On the other hand, underfunding results in constitutional violations, and the judicial branch is responsible for protecting constitutional rights.[180] Thus, some courts have

177 *See Gideon's Promise*, *supra* note 75, at 2072–73.

178 *See* U.S. CONST. art. I, § 8, § 9, cl. 7.

179 State *ex rel*. Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592, 616 n.3 (Mo. 2012) (Fischer, J., dissenting).

180 *See* Lucas, *supra* note 63, at 109.

articulated strong arguments for judicial intervention. In *State v. Young*,[181] the New Mexico Supreme Court held that courts have the power to intervene because courts "serve as the ultimate guardians of an indigent defendant's constitutional rights."[182] In *State v. Peart,* a case reviewed above, dissenting Judge Dennis argued that, when constitutional violations occur, it may be necessary for courts to "fashion judicial remedies to afford immediate protection for the rights of persons in criminal judicial proceedings and to encourage and assist the legislature in the enactment of corrective legislation."[183] Justice Lemmon agreed, asserting that the legislature should have been judicially mandated to "enact supplemental funding."[184]

Not only have courts asserted that they have the authority to intervene to protect indigent defendants, but some have in fact *ordered* legislatures to increase indigent defense funding. In *State v. Quitman County*,[185] the Supreme Court of Mississippi did just that, explaining:

> [W]hile the three branches of government should remain separate and co-equal, where the Legislature, in its allocation of funds to the judicial branch, 'fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional mandate, and the Judicial branch has the authority to see that courts do not atrophy.'[186]

Similarly, in *State v. Lynch*,[187] the Oklahoma Supreme Court ordered an increase in compensation for indigent defense counsel, holding the arguable encroachment into legislative territory was justified because "the practice of law [is] so intimately connected and bound up with the exercise of judicial power in the administration of justice."[188]

There is ample support for the view that courts can force legislatures to increase indigent defense funding. However, it remains a particularly intrusive method of intervention—the judicial branch effectively hijacks the legislative branch's job of determining the budget for government services. For that reason, a more traditional judicial remedy is appropriate. While the impact is effectively the same, this Note's proposal still leaves the funding decision up to the legislature. Because this proposal is more confined to a traditionally judicial role, it is less likely to face judicial or legislative criticism on separation of powers grounds.

---

181 172 P.3d 138 (N.M. 2007).

182 *Id.* at 142 (quoting State v. Brown, 134 P.3d 753, 759 (N.M. 2006)).

183 State v. Peart, 621 So. 2d 780, 793 (La. 1993) (Dennis, J., dissenting).

184 *Id.* at 792 (Lemmon, J., dissenting).

185 807 So. 2d 401 (Miss. 2001).

186 *Id.* at 409–10 (quoting Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988)).

187 796 P.2d 1150 (Okla. 1990).

188 *Id.* at 1163.

B. The Three-Pronged Remedy

Indigent defense systems are set up in myriad ways. Each system serves a specific jurisdiction, which vary in size, volume of cases, type of cases, among other variables. Therefore, while the three specific judicial remedies should be consolidated into a singular decision, this Note does not provide details on how the judicial remedy should look in every jurisdiction. This proposal recognizes that the specific contours of each remedy will depend on the indigent defense system at issue and proposes a general framework for courts to utilize.

The first prong of the proposal is a rebuttable presumption of ineffectiveness. Thus far, courts have used national caseload standards as a yardstick for determining whether the challenged indigent defense system is operating effectively. However, after finding that the system is not in compliance with the standards and thus deeming it ineffective, courts have not required the system to come into compliance with the referenced standards. Rather, courts have merely held that if the system continues to operate in the same way, it will continue to be presumptively ineffective. While this version of the presumption is somewhat helpful, a stronger version that ties the rebuttable presumption to those caseload limits would be more effective. In this case, if the system is challenged in court again, the government must overcome the presumption by showing that the indigent defense system has not only improved, but has actually come into compliance with national caseload limits.[189] This is distinct from the outcome in *Peart*, in which the court held that the system in place was unconstitutional and would be held as such until some changes were made, rather than providing a tangible standard that needed to be met.[190]

The next prong of the proposal is substantive: state supreme courts should issue administrative orders prohibiting case assignments to attorneys above state-specific caseload limits.[191] The only national caseload limit guidelines were promulgated in 1973 by the National Commission on Criminal Justice Standards and Goals.[192] Since 1973, extensive scholarship

---

189 The next paragraph, which discusses the proposed prohibition of assignment of cases to attorneys above certain limits, includes a discussion of which caseloads limits courts should use.

190 State v. Peart, 621 So. 2d 780, 791 (La. 1993).

191 *See, e.g.*, *Public Defense improvement Program*, WASH. ST. OFF. OF PUB. DEF. (June 23, 2016), https://opd.wa.gov/index.php/program/trial-defense/12-pd/163-faq-standards2015#FAQ-S7 [https://perma.cc/S98S-UXNW] (outlining Washington State's defined caseload limits for public defense attorneys and assigned counsel).

192 NAT'L ADVISORY COMM'N ON CRIMIN. JUST. STANDARDS & GOALS, REPORT ON COURTS 276 (1973), www.nlada.net/sites/default/files/nac_standardsforthedefense_1973.pdf

has shown that a more useful metric for limiting caseloads can be established by evaluating the amount of hours various types of criminal cases take in the jurisdiction at issue.[193] Michigan, for example, developed such state-specific standards in 2017, when the Michigan Indigent Defense Commission sought assistance from RAND Corporation to determine maximum caseload standards for indigent defense providers.[194] RAND conducted three data collection efforts. First, it conducted an eight-week time study of Michigan indigent defense attorneys "intended to describe the average amount of time such counsel [spent] on trial court-level criminal matters within various case type categories."[195] Second, it presented the results of the time study to criminal defense attorneys in the state and respondents provided their opinions on the findings.[196] Lastly, RAND held a conference that brought together experienced criminal defenders to consider the various sources of guidance already available on indigent defense provision.[197] RAND used its findings to inform its recommendations for maximum caseload standards in its final report.[198] Other state supreme courts should rely on state-specific research and findings to inform their caseload limits. While many states may find it difficult to engage in a process that is as thorough and expensive as Michigan's, supreme courts should at the very least rely on state-specific guidelines that are informed by the experiences of attorneys and experts within their state.

The benefits of instituting caseload limits by way of a judicial order preventing assignments, rather than a settlement or legislative action, are twofold. First, the binding effect of the prohibition does not expire (as settlements often do) or depend on potential public pressure from a threatened or ongoing suit (as legislative action often does). Second, rather than dealing with over-assignment ex post—for example, forcing defendants

(recommending annual maximums of 150 felonies, 400 misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, and 25 criminal appeals).

193 *See* FURST, *supra* note 13, at 8.

194 NICHOLAS M. PACE, DULANI WOODS, SHAMENA ANWAR, ROBERT GUEVARA, CHAU PHAM, & KARIN LIU, RAND CORP., CASELOAD STANDARDS FOR INDIGENT DEFENDERS IN MICHIGAN: FINAL PROJECT REPORT FOR THE MICHIGAN INDIGENT DEFENSE COMMISSION iii (2019), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2900/RR2988/RAND_RR2988.pdf [https://perma.cc/DPG5-VZAZ].

195 *Id.* at 2, 27.

196 *Id.* at 48.

197 *Id.* at 62.

198 *Id.* at 72–73 (recommending a maximum of 15 murder or manslaughter cases, 23 criminal sexual conduct (first, second, or third degree) cases, 37 class A offense cases, 46 "other high severity felonies", 74 "low-severity felonies and two-year high court misdemeanors," 232 one-year misdemeanors, 265 93-day misdemeanors, 530 probation violations, and 619 "other adult criminal indigent defense trial court-level matter[s]").

to go to court to challenge assignment of their case to an overburdened attorney or forcing attorneys to go to the court to ask to have their caseloads reduced—this remedy avoids the issue ex ante by prohibiting such assignments.

The last prong requires the release of defendants who are not assigned counsel within 45 days and the halting of their prosecution. The second and third prongs are only effective in tandem. When one is implemented without the other, courts fail to protect the rights of indigent defendants. In *Waters*, the Missouri Supreme Court implemented only the second prong when it required judges to take into account excessive caseloads before assigning more cases.[199] Despite that ruling, the ACLU found that, five years later, indigent defense counsel remained "overstretched and underresourced."[200] In *Lavallee*, the Massachusetts Supreme Court required the release of defendants without counsel.[201] However, the court did not institute a prohibition against assigning cases to counsel above any specific threshold, resulting in a situation that would conceivably allow assignments to overburdened attorneys to avoid the issue of defendant release.[202] Only when the two remedies are combined are defendants truly protected. To further protect indigent defendants, courts should order mandatory suspension of prosecution of indigent defendants that have not been assigned to counsel within forty-five days, as Massachusetts did in *Lavalee*.[203] This portion of the remedy is intended to prevent indigent defense systems from keeping defendants perpetually charged and on probation, even if defendants are not kept in jail.

When these three judicial remedies are implemented together, legislatures will be faced with a choice. Legislators can decline to meet Constitutional obligations, thus sending suspects and criminals onto the street, enraging the public. Or legislators can adequately fund indigent defense so that attorneys do not have to take on such a vast number of cases that makes effective client representation impossible. Most legislatures would likely find adequate funding for effective representation to be the clear choice.

---

199 *See* State *ex rel*. Mo. Pub. Def. Comm'n v. Waters, 370 S.W.3d 592, 607 (Mo. 2012) (en banc).

200 Brief for Plaintiffs-Appellees at 6, Church v. Missouri, 913 F.3d 736 (8th Cir. 2019) (No. 17-2857), 2018 WL 625496, at *6.

201 *See* Lavallee v. Justices in Hampden Sup. Ct., 812 N.E.2d 895, 911–12 (Mass. 2004).

202 *See id.*

203 *See id.*

CONCLUSION

Today, indigent defendants across the United States are being denied their constitutional right to effective legal representation, and legislatures are not doing anything about it. This means indigent defendants are sitting in jail for months awaiting representation, and once a defendant's case is assigned to an attorney, the attorney does not have enough time to effectively defend them. In the worst-case scenarios, like the case of Eddie Joe Lloyd, the denial of adequate counsel means innocent people are convicted and imprisoned.[204]

The judicial branch has a right and a responsibility to step in and protect constitutional rights when the legislature refuses to do so, especially when the consequences are dire. This Note's proposal neither allows the judiciary to abrogate its duty, nor requires it to overstep into the legislative domain. By instituting a rebuttable presumption, mandating caseload limits, and preventing defendants from being held in jail without representation, this proposal alters the political incentives for legislatures to adequately fund indigent defense.

204 *Eddie Joe Lloyd*, *supra* note 2.