Winter 2023

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Journal of American Constitutional History


Volume 1, Winter Issue
2023

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## Abstract

Focusing on the efforts of the Southern Center for Human Rights, this article offers a grassroots history of the creation of the first statewide public defender in the State of Georgia in 2003. Whereas federal court litigation to improve indigent defense failed to achieve lasting reform, a shift in tactics toward "rebellious localism," characterized by state court lawsuits against county and city officials, succeeded in prodding lawmakers to create a new framework for delivering legal services to indigent defendants. This model of legal change was effective in documenting structural flaws and creating momentum for reform. Yet other conditions—such as front-end criminal law policies and funding decisions—continued to shape the actual quality of representation received by poor people.


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† Professor of Law and Law Alumni Scholar, Boston University. Thanks to Steve Bright, Norman Fletcher, Sarah Geraghty, and Sara Totonchi for agreeing to interviews about the days of indigent defense reform in Georgia. My appreciation also extends to Catherine MacCarthy and Philipa Yu for their excellent proofreading, and to Stefanie Weigmann for her reliable research support. Finally, I am grateful for the feedback from Eve Brensike Primus, Gerry Leonard, Sara Mayeux, David Schwartz, and JACH's peer reviewers.

https://doi.org/10.59015/jach.YXGV7332

## I. INTRODUCTION

Major structural change of the legal system is difficult even under the best of circumstances, but we can learn something valuable about how it can be accomplished by consulting past efforts at remaking institutions. The key is to harness the peculiar mix of public sentiments and policy priorities that are here today but may be gone tomorrow.

When it comes to the public defender movement in the United States, much of its success came from elites who exploited an internal Cold War consensus. Historian Sara Mayeux explains the rise of the public defender as a distinctive state-building project of the twentieth century—one that overcame initial "preference for private initiative over public provision" and suspicions that a system of taxpayer-funded lawyers for the poor would inevitably become "totalitarian" in nature.[1] Proponents won reforms in jurisdiction after jurisdiction by casting the public defender as an indispensable bulwark of freedom and tethering its function to the protection of constitutional rights, a vision ultimately endorsed by the U.S. Supreme Court in *Gideon v. Wainwright*.[2] As bar associations urged professionalization of the practice of law, it also increasingly made

[1] SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA (2020). In this respect, Mayeux's account mirrors that offered by Mary Dudziak and others. *See* MARY DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2011); ROGERS M. SMITH AND PHILIP KLINKNER, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA (1999); Robert L. Tsai, *Reconsidering* Gobitis*: An Exercise in Presidential Leadership*, 86 WASH. U. L. REV. 363 (2008). Older accounts of the public defender movement include WILLIAM BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955); EMERY A. BROWNELL, LEGAL AID IN THE UNITED STATES (1951).

[2] Gideon v. Wainwright, 372 U.S. 335 (1963). *Gideon* itself did not mandate a public defender system, but affirmed the right of a poor person to a criminal defense lawyer paid by the state. Technically, a state might meet that obligation in any number of ways.

sense to view standardization of legal representation as a solution to inequities in the justice system.

But what happens when an overpowering desire to distinguish one's own institutions from that of totalitarian societies begins to wane, as occurred when the Cold War consensus fractured? Legal reformers must hunt for other events, grievances, and swirling sentiments to leverage in the name of transformation.

The creation of a state-wide indigent defense system in Georgia at the dawn of the twenty-first century offers a tantalizing case study, one that lies just beyond the parameters of Mayeux's own study.[3] It is an experience that suggests America had entered a new phase in the history of the public defender movement, with different reform opportunities and challenges in the age of mass incarceration.[4] Once again, professionalization and reputation mattered. But this time, social justice activists would have to play a more prominent role in mobilizing public sentiment and nudging political insiders to deliver on reform. During these early decades of what would later be known as "mass incarceration," concerned citizens perceived the damaging effects of pro-incarceration policies but lacked already activated terminology. They had to make do with what they knew might rouse their fellow citizens. Rather than measure legal standards against those of an external enemy, advocates for the poor held up a mirror, hoping people would be moved to put greater distance between themselves and the ways of the Old South.

Drawing from interviews with participants in this debate, this article provides a grassroots account of the right to counsel. It credits activists with a significant role in the creation of Georgia's first state-wide public defender for their strategy of "rebellious localism"[5]: litigating cases against cities and counties

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[3] Mayeux ends her study on the cusp of the age of mass incarceration and does not delve into Georgia's role in the public defender movement. She does note in the book's epilogue that the South remained "regionally distinctive in its tenacious commitment to capital punishment," which played a factor in policymakers' support for a "weak infrastructure for indigent defense." MAYEUX, *supra* note 1, at 186. Mayeux briefly mentions that Bright and SCHR shined the light on "a litany of horrific cases in which court-appointed lawyers were useless at best, and drunk or even asleep at worst, during capital trials." *Id*.

[4] For accounts of the modern justice system disfigured by the politics of mass incarceration, see RACHEL E. BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2009).

[5] In *After* McCleskey, 96 SO. CAL. L. REV. (forthcoming 2023), I employ the term "rebellious localism" to characterize SCHR's shift in tactics in response to increasingly negative Supreme Court jurisprudence, especially in formulating equality-based challenges to criminal justice

that did the worst job of delivering legal services to poor people and then stitching instances of procedural injustice into a compelling narrative of a justice system overwhelmed by pro-incarceration policies. Their approach was rebellious in the sense that they refused to accept existing practices in the administration of justice as well as the cramped notions of fairness and equality offered by the U.S. Supreme Court.

Led by the Southern Center for Human Rights (SCHR) based in Atlanta, a coalition of organizations with deep ties to the community argued that pro-incarceration policies had rendered the presumption of innocence a dead letter in many jurisdictions due to uncounseled or hastily arranged plea deals, cursory legal proceedings, and little to no effective representation by overworked defense attorneys. Critics argued that only major reforms, including a state-wide public defender, could slow these ominous trends.

This shift in approach found success through several interlocking dynamics. First, industrious social justice advocates and death penalty abolitionists showcased the many failings of the voluntarist and contract models of delivering legal services. Second, the media provided relentless coverage of embarrassing legal errors. Third, citizens were receptive to perceiving flaws in those cases not as inevitable, isolated mistakes but instead as proof of structural defects. Fourth and finally, a partnership of convenience arose between reform-minded lawyers and leaders of both major parties to ensure that a meaningful correction be made to reverse the corrosive sense of injustice that had taken hold of the political imagination.

## II. EARLY POST-*GIDEON* EFFORTS IN GEORGIA

Whether out of tradition or disposition, Georgians had long resisted reforms deemed fashionable in other parts of the country. With the exception of more populous and wealthier counties like Fulton and DeKalb, legal services for poor people charged with a serious crime had long been provided by court-appointed lawyers drawn from the local bar, handled through a contract system

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policies. The desire to scale legal tactics downward came in response to increasingly negative legal and political developments at the national level, as well as consensus between the two parties on matters of crime and punishment. It also dovetailed with increased litigation in Georgia state courts to try to capitalize on the diversification of Georgia's judiciary, especially its high court, and increased receptivity to state constitutionalism. In *After* McCleskey, I focus mainly on SCHR's efforts in death penalty cases. Here, I expand my analysis of their strategic adjustments to encompass the organization's efforts to improve the quality of indigent defense within the state, a project that recapitulated their intensive localist approach.

in which a few practitioners might handle all of a county's cases involving indigent defendants, or some combination of the two. Under the appointment model, attorneys were conscripted into representing indigent defendants and might resent the time taken away from better paying clients; under the contract model, the right to represent the poor was awarded by a jurisdiction to the lowest bid, thereby reducing the incentive to engage in vigorous advocacy.

Yet the rights revolution spurred by the Warren Court eventually began to chip away at entrenched support for this fractured approach.[6] To those paying attention, the fact that so many defendants wound up in prison without a lawyer or one who scarcely had time or resources to mount a defense was a ticking time bomb. Enhanced rights for defendants meant that more state court convictions would be vulnerable to reversal on appeal because of errors made by incompetent attorneys or not caught in time by competent ones. On the other hand, better representation for the poor could reduce the possibility of costly retrials, and in overwhelmed court systems, perhaps even avoid a takeover by a federal judge. Once the Supreme Court breathed life into the Sixth Amendment right to counsel in *Gideon* in 1963, the state bar convened a committee to investigate the possibility of establishing a state-wide indigent system for the first time.

In June 1965, the committee tendered a report that included proposed legislation modeled on the American Law Institute's Model Indigent Defense Act. A bill was introduced in 1966, but defeated. After the Court issued *Miranda v. Arizona*[7] that year, the state bar's Board of Governors, now with the support of the Executive Council of the Young Lawyers Section, tried once more. But again, a reform measure went down in defeat.[8]

In 1968, the General Assembly finally enacted a law that obligated the 159 separate counties to provide legal representation for indigent persons. From the standpoint of reformers, this merely restated existing constitutional obligations by passing the buck to the governmental units least capable of raising funds for effective representation of the poor. The law did not establish a state-wide

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[6] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2002); MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1999).

[7] Miranda v. Arizona, 384 U.S. 436 (1966).

[8] Report of the Chief Justice's Commission on Indigent Defense, Dec. 12, 2002, 2, 25; Emmet Bondurant, *The Challenge of Right to Counsel in Georgia*, 3 GA. STATE BAR J. 157, 169 (1966). The commission's final report drew heavily from site work conducted by the Spangenberg Group, started by Robert Spangenberg. As Mayeux notes, it was Spangenberg who, as Director of the Legal Services Institute at Boston University School of Law, sounded the alarm concerns about increasingly indifferent advocacy by public defenders. Mayeux, *supra* note 1, at 150.

system of public defenders, leaving nearly all of the policymaking and funding questions exactly where they had lain for generations: in local hands. In 1979, with reform efforts mostly petering out, the General Assembly created the Georgia Indigent Defense Council (GIDC), whose only responsibility was to administer grants from the state and federal government. That body was neglected and periodically closed up shop because funds would run out.

Yet two decades later, interest in reform of Georgia's patchwork indigent defense system (if it indeed deserved to be labeled a system) reawakened among the citizenry—this time, propelled not by legal insiders but instead by social justice activists. Four major factors played a part in rekindling interest in the public defender as a model for reform. First, mirroring broader trends, incarceration rates and the use of pre-trial detention skyrocketed across the state. The sheer volume of arrests and prosecutions meant that more legal errors were likely to be made. Second, black citizens became visibly overrepresented in the prison and jail population: while black men were 13% of the state's population, they became more than 35% of the prison population.[9] Racial disparities also played out on the state's death row and among those ultimately executed by the state—a fact that abolitionists like Stephen Bright and Bryan Stevenson beat like a drum during their public appearances and in their legal briefs.[10] Third, by this time, roughly half of states in the nation had a state-wide defender system, of which 16 enjoyed "full authority for the provision of defenses services statewide."[11] Fourth, by the closing decades of the twentieth century, advocacy groups were ensconced in Georgia, ready to harness these fresh conditions,

[9] Today, more than a half million Georgians are incarcerated, on probation, or on parole. Georgia tops the list for the highest rate of correctional supervision in the entire nation, 73% higher than second-place Pennsylvania. *See* Alexi Jones, *Correctional Control 2018: Incarceration and Supervision By State*, Prison Pol'y Initiative, Dec. 2018, https://www.prisonpolicy.org/reports/correctionalcontrol2018.html; *Id.*, Georgia profile: https://www.prisonpolicy.org/profiles/GA.html

[10] Racial disparities in Georgia's execution rates came up during William F. Buckley's television show that reunited Bright and Stevenson arguing the anti-death penalty position, where they repeatedly returned to the fact that even though 65% of crime victims in Georgia are African Americans, "16 of the 18 executions have been cases with white victims." A Firing Line Debate: Resolved: That the Death Penalty is a Good Thing, YouTube (May 24, 1994), at https://youtu.be/XBGb2Y8g3Ik (Bright, responding to Assistant Attorney General Susan Boleyn).

[11] Robert L. Spangenberg & Marea L. Beeman, *Indigent Systems in the United States*, 58 L. & CONTEMP. PROBS. 31, 37 (1995).

portray legal errors as unconscionable forms of unfairness and inequality, and mobilize sentiment for legal change.[12]

But even provoking the conversation about what justice required, much less sustaining it in a manner capable of generating credible reform proposals with a shot of being enacted, would be no simple matter. There was nothing resembling a nationwide movement to rethink policing and incarceration policies, certainly nothing on the horizon like Black Lives Matter that might capture the imagination of mainstream voters. Regardless of the epoch, people charged with serious crimes are not a natural constituency for either political party. Disfranchised if found guilty, theirs was not a vote worth paying any heed. It would be hard to generate sympathy for the accused—that is, until the numbers of citizens affected by criminal justice policies were no longer trivial and relegated to largely invisible parts of the community. After a couple of decades of mass incarceration, more citizens could point to a loved one or friend caught up in the legal system or affected by conditions of release, and the political calculus was indeed starting to change. Few would detect any trend at the national level, but people closer to the ground started to take notice.

## III. THE SOUTHERN CENTER FOR HUMAN RIGHTS: DRUM MAJORS FOR JUSTICE

While Mayeux describes the public defender movement as one primarily led by legal insiders, Georgia's experience revealed a stronger grassroots component in driving policy changes. Beginning in the late-1990s, public education and litigation began anew to publicize the breakdowns of the state's patchwork indigent defense system. Social justice advocacy became more urgent and focused, raising the visibility of doctrinal and institutional flaws across the state. Of course, public interest lawsuits to improve the quality of representation had been filed in the past. One high-profile lawsuit against the state even led to a settlement that promised a pot of money for indigent defense. But those funds were rapidly depleted and little of note was done to alter the fundamentals of the state's overall approach to legal services for the poor.[13]

Things began to change in 2001. Employing a strategy that I have called "rebellious localism," SCHR and its allies filed a series of lawsuits challenging

[12] This seemed to differentiate Georgia from nearby Alabama, where activists were focused on other projects rather than improving the quality of indigent reform.

[13] Interview with Stephen B. Bright, Former President and Senior Counsel of Southern Center for Human Rights (Aug. 29, 2020).

the constitutionality of judicial and administrative practices on a county by county basis. Eschewing previous efforts to sue the state directly only to see political energy for reform evaporate as soon as the state's lawyers settled a case, these reformers targeted the worst counties and sued them one by one. Instead of running reflexively to federal court, SCHR attorneys filed these lawsuits in state courts, where they could avoid troublesome issues of federal jurisdiction, such as standing and abstention.[14] They named the individual judges as defendants, forcing them to recuse so that a judge from another county or circuit would have to preside over the lawsuit, thereby improving the odds of success. Yet the goal was not necessarily to obtain ringing judicial decrees, but rather to document inequities and wring policy concessions from their overmatched adversaries.

This would be a more costly and time-intensive strategy. But activists also used these lawsuits as vehicles to dramatize the appalling state of justice for the poor. By exerting maximum pressure on cash-strapped counties, SCHR embarrassed political elites and drew lawmakers gradually into the debate over the requirements of equal justice.[15]

Applying what they had learned from earlier legal actions to improve prisons and jails,[16] SCHR staff wrung concessions from local jurisdictions, and then converted local defendants into grudging allies as a growing coalition invited policymakers to pursue comprehensive reform. Led by then-Director Stephen Bright, SCHR's staff highlighted the plight of poor people trapped in pre-trial detention for weeks or months without seeing an attorney or judge, or processed during assembly-line proceedings to ratify plea deals arranged with minimal contact between lawyer and client.

These lawsuits advanced second-generation understandings of *Gideon*: the mere presence of a human being with a law degree standing next to the accused was not enough to comply with the Constitution's requirements; instead,

[14] The turn toward a localist approach was forced in part by the existence of unfavorable federal case law. Bright was aware of a 6th Amendment case brought against the State of Georgia to improve indigent defense that ended with a federal judge dissming the action on abstention grounds. Harris v. Luckey, 918 F.2d 888 (11th Cir. 1990). By contrast, no federalism concerns were raised by the class actions filed in state court.

[15] Bright gave the keynote address for the 1994 Rebellious Lawyering Conference at Yale Law School, the first year of the student-organized event.

[16] In Bailey v. State, 424 S.E.2d 503 (S.C. 1993), for instance, SCHR successfully challenged, on an as-applied basis, a law that capped fees for capital cases to $ 1,000. *See* email from Stephen Bright to Robert Tsai, July 15, 2022.

lawyers for the poor must be placed within an institutional setting where they could be reasonably effective in representing their clients' interests.[17]

SCHR leveraged media attention lavished upon these suits by lobbying legislators to propose and support large-scale reform. Besides the local coverage in each county, the *Atlanta Journal-Constitution* consistently dedicated space in its pages to stories about Georgia citizens forced to navigate Kafkaesque proceedings with little or no aid from a lawyer.

One noteworthy article focused on Samuel Moore, who became the poster child for a broken legal system. Moore had been picked up for loitering and refused to give his name. While he sat in the Crisp County jail for the next 13 months waiting trial, the legal system completely lost track of him. No one came to visit Moore, and no judge appointed a contract defender to represent him until Moore hand-wrote a motion asking for the file in his case—nine months into his ordeal. The District Attorney then quickly dismissed the case. Yet no one told him or the Sheriff, and the contract defender never showed, so Moore remained in jail for four months after the charges were dismissed. In fact, Moore would have stayed in jail even longer had it not been for SCHR intern Atteeyah Hollie, who visited the jail and learned about Moore's situation from another detainee.[18] Someone had to be accountable for this "systemic" breakdown, Bright insisted.[19] Though ultimately freed, Moore had been punished without trial and left to pick up the pieces of his life.

Creating a state-wide public defender became the rallying cry, eventually gaining support from highly influential jurists as well as the Republican governor's office. In broadening their attack on the delivery of indigent legal services, activists focused on complaints of unfairness, lack of transparency, economic inequality, and structural racism outside of the courtroom. Inside the courts,

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[17] In their crusade to expand what it meant for a poor person to have a competent lawyer, they were aided by decisions like Strickland v. Washington, 466 U.S. 668 (1984). But while activists embraced the principle of effective representation, they sought policy reforms that went well beyond what many federal judges, and even the U.S. Supreme Court, were willing to require. The very limitations on judicial relief —namely, that judges rarely overturned convictions due to ineffective assistance of counsel—convinced reformers that more energy had to be put into structural reform of indigent defense systems.

[18] Hollie later became a SCHR staff attorney and currently serves as Deputy Director.

[19] Bill Rankin, *"I Felt Like I Was Just Nothing" Suspect Held Months After Charges Dropped*, ATLANTA CONST., Dec. 20, 2003, at A1, A9. Unfortunately, Moore's case was not an isolated one. At least two others, a woman charged with receiving stolen property and another woman arrested for selling marijuana, spent over six months in Crisp County Jail, Cordele Circuit, before meeting a contract defender. *Id.*

however, they were limited by Supreme Court decisions that restricted racial equality claims to what could be proven as purposeful mistreatment by specific individuals, as well as caselaw that made it difficult, if not impossible, to bring cases alleging economic discrimination.[20]

That is why Sixth Amendment precedent and associated rhetoric became the organizing vernacular of choice. Even though certain juridic forms had lost their power in federal court given the rightward tilt of judicial appointees, the right to counsel had an unusual genesis and continued to have resonance beyond that setting. First, while the Supreme Court had largely shut down structural equality claims in a variety of ways, it was just getting started in exploring what it meant to render effective representation of counsel.[21] Even when federal judges proved unwilling to set aside many convictions for ineffective assistance of counsel, the right to counsel cases still had socio-legal vitality in the political domain.

Second, procedural justice has always been entwined with substantive justice when it comes to the right to counsel. In *Powell v. Alabama*,[22] which *Gideon* helped revive, Justice Sutherland had emphasized how a lawyer can aid "the ignorant and illiterate, or those of feeble intellect" and help ensure that racial minorities, especially individuals who hail from out of state, are not treated "with the haste of the mob."[23] Advocates for the poor could assert the value of

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[20] *See* McCleskey v. Kemp, 481 U.S. 279 (1987); Washington v. Davis, 426 U.S. 229 (1976); Harris v. McRae, 448 U.S. 297, 323 (1980); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 786 (3d ed. 2006) ("poverty is not a suspect classification").

[21] As the indigent defense commission's report noted, as recently as 2002, the U.S. Supreme Court held that the Sixth Amendment right to counsel is violated when a judge imposes a suspended sentence on a misdemeanant who did not have the assistance of counsel and had not waived that right. *See* Alabama v. Shelton, 535 U.S. 654 (2002). In the commission's view, *Shelton* "has the potential for greatly expanding the burden on the already-inadequate Georgia system for the provision of indigent criminal defense. Commission Report, *supra* note 8, at 3.

[22] Powell v. Alabama, 287 U.S. 45, 59, 69 (1932).

[23] *Id*. at 69. The right of counsel is not the only area where jurists have noticed that fairness and equality values overlap. In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Supreme Court struck down an overbroad ordinance that allowed police to arrest "rogues and vagabonds." Although it was struck down on fairness grounds, Justice Douglas noted how doing so served the goals of equality as well, for "the poor among us, the minorities" had an especially difficult time determining what a vague law meant and trying to comply with it. *See generally* ROBERT L. TSAI, PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION 63-73 (2019); Anthony Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

counsel in protecting despised minorities against even the risk of unequal treatment.

Unlike other campaigns aimed at overturning Supreme Court precedent or even to expand it,[24] reformers were under no illusions that justices would endorse broad notions of structural equality or fairness. Instead, theirs was an end-run to take *Gideon* and expand it legislatively, a domain where the precise views of justices currently on the Court are largely irrelevant.

The activism dimension of the story is in part about the value of leadership and coordination—one made possible by the emergence of a non-profit that could broaden the appeal of its advocacy. SCHR was particularly well-placed to engage in rebellious localism. The organization was established by ministers active in the African American civil rights movement who wanted an institutional presence in the region to help prisoners.[25] In Bright, a former legal aid lawyer and public defender, SCHR's founders discovered a Kentuckian who understood the region's unique rhythms of life, someone who could give voice to the desperate people confined in some of the nation's most horrific prisons.

By this point, SCHR had grown from a skeletal staff paid poverty wages to a formidable public interest law firm composed of twenty lawyers, paralegals, and volunteers. They were still drastically underpaid at this point in the organization's history, having to make every dollar stretch. Even so, in Sara Totonchi, SCHR added a public policy director for the first time, enhancing the organization's capacity to convert developments in the lawsuits against local officials into political messages aimed at persuading legislators. The organization would formally separate into two units, one dedicated to capital defense work and another challenging practices in prisons and jails. The latter would eventually expand its traditional activities in improving conditions of confinement to

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[24] *See* MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE (2015); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004); Robert L. Tsai, *Supreme Court Precedent and the Politics of Repudiation*, in AUSTIN SARAT ET AL., LAW'S INFAMY: UNDERSTANDING THE CANON OF BAD LAW 96- 130 (2021). Classic treatments of structural reform strategies in *Brown* and beyond include MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[25] *See generally* ROBERT L. TSAI, DEMAND THE IMPOSSIBLE (forthcoming winter 2024), manuscript on file with author.

challenging pre-trial policies, including bail practices that left racial minorities and poor people to languish in jails awaiting adjudication.[26]

Although SCHR drew staff and volunteers from around all over the country, the kinds of claims made against county officials required significant knowledge of and investment in local communities. SCHR staff had husbanded ties to populations most affected by pro-incarceration policies in the state, as well as a deep sense of the history of judicial practices in a variety of jurisdictions. They were able to capitalize on lessons from a variety of civil rights and death penalty cases throughout the state, plug into local advocacy groups, and gather stories of excessive pre-trial detention and other practices.

## IV. REBELLIOUS LOCALISM UNLEASHED

For Bright, centralization of defense services was essential for two reasons: ensuring that lawyers for the poor could operate in a state of relative independence, unaffected by local officials (including prosecutors and judges swept up in the frenzy of War on Crime politics) and providing predictable access to adequate resources to mount a vigorous defense. He operated from a theory developed during his encounters with the state in death penalty cases: that the power motive, not the profit motive that originally concerned early progressives, exacerbated existing inequities in the quality of representation afforded the poor. Prosecutors who wanted to win reelection and judges who had gotten used to governing their domains like fiefdoms were all invested in a system of unequal legal services.

According to Bright, "the perfunctory trial," once used to maintain strict racial control, had been updated to cast a wider net against undesirables. By describing rushed and spare proceedings as "legal lynchings," Bright fused together older fears of extra-legal justice, which had rightly tarnished the region's reputation, with contemporary concerns that the war on crime had pushed all participants in the criminal justice system to cut corners in the hurry to incarcerate or execute.[27]

This radical critique was also shaped by Bright's earlier experiences as a young lawyer at the legendary Public Defender Service in Washington,

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[26] Interview with Sara Totonchi, Former Executive Director of Southern Center for Human Rights (Mar. 17, 2020); Interview with Virginia Sloan, Former Counsel to the U.S. House Judiciary Committee (Apr. 22, 2020).

[27] Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," But Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 481-82 (1995).

D.C., where resources for investigation and mitigation were folded into the public defender's budget and thus placed beyond direct interference from prosecutors and judges. To Bright, PDS represented the ideal of public defense, a humane bureaucracy worth emulating.

In this sense, Bright responded to an early criticism of the public defender ideal as threatening the nexus between attorney and client, for he recognized the risks entailed in more centralized funding decisions. Adapting to that critique, Bright insisted upon a proper and complex institutional arrangement that could mediate tensions between money, loyalty, and reawakened concerns about constitutional obligations. By contrast, an assignment or contract-model could never solve deepening inequities, nor could it foster a healthy and productive relationship between lawyer and client. Properly structured, then, a public defender system would not lead to "socialized justice" but instead fulfill the promise of *Gideon v. Wainwright* and reduce existing asymmetries between the state and the individual during the adjudicative process. In the era of mass incarceration, the public defender would be portrayed no longer as a bulwark against totalitarianism, but rather as a way for liberalism to rescue itself from democracy's war-on-crime excesses as states raced to incarcerate.

Drawing upon post-1960s social justice criticisms of bureaucracies, Bright and others decried a byzantine legal system that dehumanized nearly everyone involved. Disfigured beyond all recognition by policies of mass incarceration, the legal system served up "fast-food justice," Bright complained, "and it's no justice at all."[28] That destructive phenomenon extended beyond the client herself, also corrupting the advocates, who were asked to violate their ethical and constitutional duties. In courtrooms overwhelmed by the sheer number of people charged with a crime, this phenomenon turned autonomous and faithful advocates into mid-level bureaucrats, while corroding respect for the rule of law among a widening circle of citizens.

In 2001, SCHR filed its first in a series of structural reform lawsuits, a class action against Coweta County judges and county commissioners. They alleged, among other things, that the Sixth Amendment Right to Counsel was being "systematically denied to poor people" and that "[o]ver half of the poor people found guilty of some offense" in recent years "were not represented by counsel."[29] Instead, many impoverished people were encouraged to speak with

[28] Bill Rankin, *This is Fast-Food Justice, and It's No Justice At All*, ATLANTA J.-CONST., Jan. 25, 1998, at 65; Nat Hentoff, *A New Form of Slavery*, VILLAGE VOICE, Oct. 9, 2001.

[29] Complaint, Bowling et al. v. Lee, Civ. Action No. 2001-V-802 (Super. Ct. of Coweta County, Aug. 2001).

a prosecutor without an attorney and work out a deal, a practice that even led one former prosecutor to question whether "the right to counsel for those defendants on the assembly line is being fully respected."[30] At the press conference announcing the lawsuit to great fanfare, cooperating attorney Ed Garland warned local officials invested in business-as-usual that additional lawsuits were "coming soon to a courthouse near you."[31]

That litigation led to a consent decree in which Coweta officials promised to create a public defender for the county, established certain minimal levels of staffing and caseload limits, and set forth specific rules for any additional contract defenders hired (at salaries no less than $30,000 and 100 felony cases maximum). The decree also created a three-person commission to oversee management of the fledgling public defender's office, forming a buffer between judges and politicians on the one hand, and defense counsel and their clients on the other. The county promised to comply with all constitutional rights of the accused, including promptly informing an indigent defendant of his rights and assigning counsel expeditiously.[32]

Another lawsuit, this time against Fulton County, showed that the movement wasn't just interested in creating public defenders were none had existed. Rather, reformers were broadly concerned about improving the quality of representation regardless where one lived. Were attorneys for the poor, however funding was structured, getting sufficient support staff? What kind of lawyers were offices able to attract? Fulton County had a public defender's office, but its lawyers were deluged by cases. In the end, a settlement in that class action provided for twenty additional public defenders.

A third lawsuit, filed against Sumter County, alleged that judges and prosecutors violated the Sixth Amendment rights of people charged with misdemeanors by not informing them of their right to consult an attorney before demanding that they plead guilty. And in McDuffie County, SCHR went after the contract defender, who had an abysmal record. After the suit was filed, the GIDC threatened to withhold funds to the county that local officials could not do without. As a result, county officials decided to remove the contract defender and institute a full-time public defender.

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[30] Bill Rankin, *Legal Defense for Indigents Faces State Court Challenge*, ATLANTA J.-CONST., Oct. 12, 2001, at 28 (quoting Mercer University law professor Jim Fleissner).

[31] Stephen B. Bright, *Turning Celebrated Principles into Reality*, THE CHAMPION, Jan.-Feb. 2003, at 6.

[32] Consent Decree Resolving Plaintiffs' Claims Against County Defendants, Bowling v. Lee, Civil Action No. 2001-V-802 Class Action (Super. Ct. of Coweta County 2003).

These legal challenges to the inferior quality of local justice served several goals. First, they catalogued the failings of specific actors within the system, from judges who oversaw mass plea deals and rarely appointed competent attorneys to the outrageous caseloads and minimal investigation or advocacy by defense lawyers. Second, these cases built upon existing inequities uncovered by SCHR in capital cases, showing that legal pathologies extended well beyond situations involving the most serious offenses.

In their capital cases, SCHR staff demonstrated that inadequate representation often left racial minorities and people with low IQ or mental illnesses at increased risk of a death sentence because their lawyers failed to get relevant information before a prosecutor, judge or jury in time. High-profile accounts of poor or black citizens put on death row, after being represented by inexperienced court-appointed attorneys, embarrassed members of the state bar and outraged regular citizens. These new lawsuits suggested that such incidents of unequal justice were just the tip of the iceberg.

National civil rights organizations, such as the NAACP and Rainbow-PUSH, also returned to the field of action and helped to bolster the allegations of a broken justice system. Reverend Joseph Lowery, co-founder of the Southern Christian Leadership Conference with Dr. King and founder of the Georgia Coalition for the People's Agenda, called the indigent defense system "a new form of slavery." This incendiary quote was picked up by Nat Hentoff's syndicated column in the *Village Voice*.[33] In his piece, Hentoff mentioned Denise Lockett, a young black woman who had an IQ of 62 and was spending 20 years in prison for killing her baby delivered at the age of sixteen. The autopsy report could not establish that the child "died of any intentional act," but her court-appointed attorneys never mentioned this report. Her overworked lawyers simply recommended that she plead guilty and throw herself on the mercy of the court.

Lockett had been represented by court-appointed attorneys who together "handled more than 650 felony cases" the previous year. Because they were paid a flat fee by the county, there was little incentive to do much work on most cases, including Lockett's, which should have been treated as a trial-worthy case. Hentoff then quoted the *AJC* editorial in which the newspaper called

[33] *See* Hentoff, *supra* note 28. Hentoff compared Mayor Rudy Giuliani's defunding of legal aid in New York City to Georgia's underfunded situation. *Id*. John Cole Vodicka Director of the Prison and Jail Project, said that Lockett was someone "who got put on this assembly line" but was "a graphic example of whiat I see all the time in southwest Georgia." Bill Rankin, *A Case of "Assembly Line" Justice? Lawyers Find Fault with Handling of Teenager Convicted of Killing Her Baby*, ATLANTA J.-CONST., Apr. 15, 2001, at 86.

Lockett "a victim of Georgia's failure to meet its constitutional responsibility to assure equal justice." Parroting the criticisms made by social justice activists, the editorial board noted that "many of Georgia's poor are assigned lawyers who are incompetent, overworked, intimidated by harsh and well-connected judges or simply callous towards their assigned clients. … [T]he kind of justice poor defendants get … is nothing short of a crime."[34] Above the piece, the *AJC* titled the ongoing series: "When Justice is a Crime: First in an occasional series on Georgia's indigent defense system."[35]

Just below the editorial demanding structural change was another editorial calling for "[m]ore money to hire more attorneys—with adequate staff and independent investigators." The piece described a superior court judge who had put a 24-year-old woman who worked as a cook through a "humiliating" series of questions before finally appointing a contract defender in her case. The judge demanded to know "how much did you pay for that gold necklace around your neck?" and told her to sell the $ 16 dollar item "before the taxpayers of Georgia have to pay" for a lawyer. The editorial board concluded that mistreatment of this sort was widespread and that "many of Georgia's poor are assigned inadequate counsel."[36]

Some also still remembered what happened in Hall County in 1985: on the second day of a murder trial, after witnesses identified the person sitting at the defense table as the perpetrator, a spectator pointed out that they had the wrong person on trial. The court-appointed lawyer, who first met his client at an arraignment of some 100 people and had only fleeting contact with him before trial, failed to realize the man sitting beside him was not actually his client. The judge immediately declared a mistrial.[37]

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[34] *Poorest Georgians Get Assembly-Line Defense*, ATLANTA J.-CONST., July 15, 2001, at 34.

[35] Martha Ezzard, an editor of the AJC, would later win awards for the "When Justice is a Crime" series. *See*, *e.g.*, SPJ Names 2002 Green Eyeshade Winners, June 11, 2002 (announcing 1st place for Ezzard's work in the category of editorials); 2002 National Headliner Awards, https://www.headlinerawards.org/2002-printphoto/ (2d place to Ezzard's series for editorial writing).

[36] Editorial, *Indigent Defendants Can Find Process Humiliating*, ATLANTA J.-CONST., Jul 15, 2001, at 34.

[37] Joe Dolman, *Georgia's System of Justice Shortchanges the Penniless*, ATLANTA J.-CONST., Nov. 22, 1985, at A31. At the time, the *AJC* pointed to the case as evidence that "a public defender's office might be necessary." *Id.* The right man was later tried for murder. Nguyen later argued that this second trial violated the ban the rule against double jeopardy because the first trial had gotten to the point that witnesses had already identified the wrong defendant as the perpetrator. The Georgia Supreme Court rejected the claim in cursory fashion, but the high-profile mistake was embarrassing. A justice who dissented called it "a comedy of errors created by the State."

But that legal travesty back in the 1980s had merely led to short of burst of coverage and then disappeared from view. By contrast, the media played a sustained role in the debate over the quality of indigent defense only after SCHR embarked upon its new strategy. The press not only amplified social activists' detailed criticisms of the justice system across the state, but also reduced the costs of civic mobilization. Newspapers quoted SCHR staff, mentioned their indigent reform lawsuits, and quoted from their press releases and reports.[38] Persistent coverage of "Georgia's dysfunctional indigent defense system" and the push for legal reform created a feedback loop, bringing people negatively affected by the legal system to SCHR's attention.[39] In turn, these citizens and their families became the best spokespeople for reform, putting human faces to the stories of suffering.

## V. THE ROLE OF THE JUDICIARY

Agitation without defined goals dissipates political energy and wears out the political community. By contrast, targeted activism with a consistent message can win the support of allies who possess the power to translate sentiment into action. As activists began to settle upon a state-wide public defender as the prize for their labors, rebellious localism needed to attract the attention of elites with the formal power to redesign the system.

Around the same time SCHR ramped up its advocacy strategy, the State Bar's legislative advisory committee, led by Emmet Bondurant, enacted a twelve-point resolution calling on the General Assembly to pay all costs of indigent defense, ensure parity of resources for prosecutors and defenders, and establish uniform standards to measure effectiveness of representation for the poor. A group of trial judges resisted the resolution, but their alternative proposal was voted down.[40]

Influential members of Georgia's apex court soon got involved, sensitive to

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Nguyen Ngoc Tieu v. State, 257 Ga. 281, 287 (1987) (Smith, J., dissenting); *see also* Dudley Clendinen, *Race and Blind Justice Behind Mixup in Court*, N.Y. TIMES, Nov. 3, 1985, at 26; *Case With Wrong Defendant Tops High Court's Calendar*, MACON TELEGRAPH, May 30, 1987, at 2B.

[38] *See*, *e.g.*, Editorial, *In Coweta, Poor Give Up Rights Behind Closed Doors*, ATLANTA J.-CONST., July 18, 2001, at A14; Editorial, *Ruling Guaranteeing Lawyers Can't Be Ignored*, ATLANTA J.-CONST., July 8, 2002, at A9.

[39] Bill Rankin, *Legislature 2003: Indigent Defense Bill Beats the Odds*, ATLANTA J.-CONST., Apr. 27, 2003, at C9.

[40] Bill Rankin, *Busy Barristers; Caseloads Swamp Public Defenders Throughout the State*, ATLANTA J.-CONST., Aug. 13, 2001, at B4.

the public criticism that Old South forms of justice could still be meted out within the state. As early as 1991, Chief Justice Harold Clarke had begun to sound the alarm about the state of indigent defense. State funding of indigent defense "continues to be woefully inadequate," he told the State Bar. Exploiting the people's desire to keep the death penalty, he said, "Sooner or later ineffective assistance is put in issue in almost every death penalty case" so "it just makes sense" for a fully funded resource center to provide post-conviction counsel for the condemned.[41]

In his 1992 State of the Judiciary Address, Chief Justice Clarke sent the same message to the state legislature that "indigent defense must not be seen as solely a lawyer problem any more than health care for the poor is seen as solely a doctor problem." The state "must provide both of these because it is right to do it." On top of that, funding indigent defense adequately was required if we wanted to preserve the principle of presumed innocence. "If the poor lose the presumption of innocence," he said eloquently, "then all will lose the presumption of innocence."[42] A year later, he declared that "one-half justice must mean one-half injustice, and one-half injustice is no justice at all."[43] At the time, however, Chief Justice Clarke's orations alone could not budge the legislature.

Clarke's successor, Robert Benham, took a decisive step by forming a blue ribbon commission to study indigent defense, acting upon the request of Democrat Governor Roy Barnes.[44] At the time, Benham urged the commission to identify the "best legal system possible" for representing the poor.[45] As his tenure came to an end, Benham asked Justice Norman Fletcher to take over this responsibility.[46]

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[41] *State of the Judiciary: Address By Chief Justice Harold G. Clarke to the State Bar of Georgia*, June 14, 1991, reprinted in GEORGIA STATE BAR J., Aug. 1991, at 70.

[42] *Money vs. Justice in Georgia: Clarke Urges Lawmakers to Allocate Vision as Well as Dollars*, FULTON CNTY. DAILY REP., Jan. 22, 1992, at 8.

[43] Chief Justice Harold G. Clarke, *Annual State of the Judiciary Address*, reprinted in FULTON COUNTY DAILY REP., Jan. 14, 1993, at 5.

[44] Despite sensing a problem, Gov. Barnes himself believed in imposing a statewide mandate on attorneys to handle indigent defense cases, saying that "simply throwing money at a problem does not make it go away." Bill Rankin, *Defending the Poor: Part Three: Other States Offer Lessons in Reform*, ATLANTA J.-CONST., Apr. 23, 2002, at A1, A6.

[45] Bill Rankin, *Overhaul Seen in State's Indigent Defendant Program; Court-Appointed Commission Will Tackle Low Budgets, Poor Handling of Cases*, ATLANTA J.-CONST., Feb. 4, 2001, E4. The commission was made up of judges, lawyers, and business leaders.

[46] Interview with Norman Fletcher, Retired Georgia Supreme Court Justice (Mar. 16, 2020).

Fletcher was born in Fitzgerald, Georgia, and lived in the state all his life. Although he had little criminal practice experience before he ascended to the bench, he was a quick learner and open to adjusting his values based on new evidence. He became visibly ashamed by what he discovered about his state's treatment of poor people. In particular, he credited the work of SCHR, whose staff set an exemplary model for legal representation. Unlike some elites who might be repelled by social movements, Chief Justice Fletcher became increasingly receptive to the structural critique of the criminal justice system made by activists.[47]

Chief Justice Fletcher threw himself into the commission's work for the next two years, helping to bring the state bar and the state judiciary together to advance legislative reform. During his speech to the General Assembly in January 2002, he echoed Chief Justice Clarke's diagnosis that representation for the poor remained "woefully inadequate."[48]

Behind closed doors, Chief Justice Fletcher tried to persuade Republican Governor Sonny Perdue and Democratic Speaker of the House Terry Coleman that bipartisan reform of the indigent defense system represented smart politics and would enhance respect for the rule of law. Fletcher made public comments to "box the governor in" and encourage him to take ownership of reform or, at the least, to not seek to actively block it. In his view, the new governor did not have much of an agenda, and he tried "to help him have a cause" and build a legacy of which Georgians could be proud.[49]

Predictably, some state court judges opposed any reduction of their traditional influence over the local bar, saying that centralizing of legal services would not lead to better outcomes. Walter McMillan, Jr., who presided over the Eighth Judicial Circuit, asked, "Why should we give … thousands of dollars

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[47] *Id*. In 2015, after he had retired from the bench, Fletcher gratefully accepted the Gideon's Promise Award from SCHR "for his heroic efforts to create a public defender system in Georgia and his continued work to ensure the realization of the constitutional promise of *Gideon v. Wainwright*." Press Release, *SCHR to Honor Legal Champions Former Chief Justice Fletcher, Mawuli Davis, and Larry Bracken at* Justice Taking Root, https://www.schr.org/files/post/media/events/jtr_2015/Press%20Release%20-%20SCHR%20Justice%20Taking%20Root.pdf, last visited Jan. 17, 2023. For an account of how judges become receptive to social movement appeals, see Robert L. Tsai & Mary Ziegler, *Abortion Politics and Movement Jurists*, manuscript on file with author.

[48] *Georgia Supreme Court Justice Advocates Better Indigent Care in Annual Address*, ACCESSWDUN, Jan. 18, 2002.

[49] Fletcher interview, *supra* note 46.

and … pass it on to a bureaucrat?"[50] A few judges reminisced about the good old days when they could get training representing a person, knowing absolutely nothing about criminal law. Others, such as Judge Earnest H. Woods III, Chief Judge of Mountain Judicial Circuit, said that "our judges need to let go" and accept that the state needed "to take a more active role."[51]

The Association of Superior Court Judges vigorously opposed reform. Some judges also objected to visits to their courtrooms and insisted on advance notice. In response, SCHR staff identified the families of incarcerated people and asked them to telephone legislators and urge them to support the bill. SCHR also organized people to testify before the commission about their experiences in court. They played video testimony of formerly incarcerated people and relatives who were scattered around the state and could not travel to appear live before the blue ribbon commission. One witness, Julian McDaniel, testified while his mother looked on. He told the commission that the Greene County contract defender advised him to plead guilty to drug charges even though he insisted upon his innocence. "I wanted a jury," McDaniel testified. But his own court-appointed lawyer had told him he should take a deal because he "looked like" he was guilty.[52]

Appearing before the commission, Bright described what it was like to see individuals dealt with in assembly-line fashion: they were processed "like a hamburger at a fast-food restaurant," he told the body. "You don't need a bar card to do that." As state court judges looked on, Bright asserted that judges themselves had impeded enforcement of the *Gideon* decision. He urged them "to get on the right side of history."

A number of judges not only opposed reform for threatening control of their courts but bristled at the criticism levied by activists. Superior Court Judge Lawton Stephens, for instance, found the accusation "that a judge would intentionally appoint an incompetent attorney" to be "ludicrous." Bright fired back: "It may be ludicrous, but it happens all the time."

Once the Chief Justice's Commission on Indigent Defense concluded its two-year process of taking testimony and visiting courtrooms in the state, it issued a report. Paul Kurtz, a law professor at the University of Georgia, served as reporter for the commission. The published report painted a devastating portrait of the state's justice system in crisis. As of October 2002, "well more than half (59%) of the inmates in the state were arrestees awaiting trial," with some

[50] Rankin, *supra* note 44, at A6.

[51] Rankin, *supra* note 40, at B3.

[52] *Id.*

arrestees held "for periods longer than the maximum sentence that could be imposed' if adjudged guilty as charged.[53]

Full-time public defenders were employed in only twenty-one counties, while seventy-six counties used court-appointed panels of private lawyers and fifty-five counties assigned contract defenders to represent the indigent. Georgia's existing programs for serving poor people charged with crimes were "failing the state's mandate under the federal and state constitutions to protect the right of indigents." As a result, the system exposed innocent people to a heightened risk of being wrongfully convicted.

In addition, acknowledging that SCHR's resort to rebellious localism had "yielded piecemeal reform by consent decree," the commission's report predicted that "[f]urther litigation is being contemplated and likely will occur." Urging the General Assembly to take decisive action, Chief Justice Fletcher's commission argued that "[t]horough, carefully considered reform … by the appropriate legislative and executive policy makers is far preferable to reform by litigation in the state and federal courts."[54]

Because the state contributed only 12% of all indigent defense expenditures, the Commission called on legislators to fully fund the system by July 1, 2005. The commissioners concluded that an infusion of money was "absolutely necessary," but not sufficient to meet the state's constitutional obligations. An institutional overhaul was essential to ensure "quality, uniformity, and accountability." [55] The report recommended specific changes that would "deliver indigent legal services at the circuit level, rather than the county level," "presumptively deliver services through a full-time public defender with appropriate staff," and establish a "statewide board charged with the responsibility and power to operate the entire system."[56]

Totonchi couldn't quite believe that their hard work in the trenches was paying off—until she passed by a newspaper box on December 12, 2002, and

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[53] Executive Summary: Report of the Chief Justice's Commission on Indigent Defense 47-48, S. Ctr. Hum. Rts. (Dec. 12, 2002), https://www.schr.org/files/post/media/Blue%20Ribbon%20Commission%20Report.pdf.

[54] *Id*. at 5.

[55] *Id*. at 6-7. Pay disparities, even in jurisdictions with a public defender, contributed to adversarial imbalance. Among the Spangenberg Group's findings: "a striking 34% salary gap between District Attorneys and Public Defenders" throughout the state, with only a single county providing "salary parity" between the prosecutor's office and the public defender's office. *Id*. at 47.

[56] *Id*. at 5.

her eyes locked onto the *AJC* headline, "Indigent Defense Rates F."[57] The paper of record described the Chief Justice's document as "a sternly worded report that condemns many aspects of the system" and calls for "dramatically overhaul[ing] the system's structure."[58] By gaining the support of the state judiciary and state bar, rebellious localism had gained potent allies. Their interventions lent activist complaints gravitas and objectivity, while magnifying their structural perspective. Most important: the commission's report endorsed the core of grassroots argument that local defects in the delivery of defense services transgressed the state's constitutional obligations and required a commensurate remedy.

## VI. BIPARTISAN REFORM

At that point, Georgia lawmakers drafted a bill, working from the supreme court commission's report. During the Progressive era two generations before, concerns that public funding would degrade the quality of representation might have prevailed. But everyone now knew the legal system was under siege. Thus, squabbling over control of available funds became the defining issue, one through which traditional concerns over power and prerogative played out.

Outflanking pending lawsuits was plainly on the minds of legislators. At one point, during legislative debate over the bill, Representative Tom Bordeaux held up the legal complaint filed by SCHR in its lawsuit against Cordele Judicial Circuit, warning his colleagues that if the legislature did not act right away to improve the state of indigent defense, there would be more lawsuits of that sort.[59]

Lawmakers worked from the Supreme Court Commission's proposals. Yet a last-minute idea almost scuttled the entire bill: House Speaker Terry Coleman wanted public defenders to stand for election just like D.A.'s. Worried this approach would politicize public defender's offices and prevent zealous advocacy for the poor, activists kicked into high gear. Totonchi and her colleague Alex Rundlet called a press conference for the 40th anniversary of the *Gideon* decision. They arranged for a number of prominent civil rights leader to attend and demand that the legislature enact the Indigent Defense Act without requiring that

[57] Bill Rankin, *Indigent Defense Rates F*, ATLANTA J.-CONST., Dec. 12, 2002, at A1; Sara Totonchi email to Robert Tsai, Nov. 18, 2022.

[58] Rankin, *id*., at A1.

[59] Email from Steve Bright to Robert L. Tsai, June 13, 2022.

public defenders be elected.[60] SCHR staff also pointed out that in small counties, most lawyers were judges or prosecutors, leaving few if any private attorneys willing to run to become a public defender.

Hearings were held on the proposal to subject public defenders to democratic election, and the Legislative Black Caucus came out in opposition to the idea. At that juncture, Coleman backed off his proposal and went along with selection of public defenders by local committees.[61]

His turnabout cleared the way for a rare legislative achievement. On April 26, 2003, the General Assembly enacted the Indigent Defense Act,[62] by a landslide 160-14 margin in the House and unanimously, 45-0 in the Senate. Representative Dubose Porter, a Democrat, hailed it as "a landmark piece of legislation." Republican Senator and chief sponsor Chuck Clay said he was satisfied that his colleagues met their "moral obligation" by "giving meaning to the Constitution." When he signed the bill, Governor Perdue described it as "much needed reform" to "uphold our moral obligation of providing criminal defendants with adequate legal counsel." Chief Justice Fletcher, who had appeared at the statehouse during final negotiations, called the landmark law "a great step forward toward ensuring equal justice for all."[63]

The momentous law required the creation of a selection panel for every judicial circuit in the state that would appoint a full-time circuit public defender. Each public defender had the power to hire at least one assistant public defender as well as support personnel, and must run the office according to state-wide standards.[64] Any of the single-county circuits could opt out of the new system, but would have to show that its method of providing counsel for the poor met or exceeded certain performance standards. The 2003 law also created the Office of the Georgia Capital Defender, whose lawyers were authorized to "undertake the defense of all indigent persons charged with a capital felony for which the death penalty is being sought" anywhere in the state.[65]

Despite the law's promises, the legislature had punted on the question of how to fund the improvements to indigent defense, estimated to cost at least $

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[60] Totonchi email, *supra* note 57.

[61] Bill Rankin, *supra* note 39, at C9.

[62] O.C.G.A. § 17-12-8 (2003).

[63] Bill Rankin, *Public Defender System's Approval Called "Giant Step,"* ATLANTA J.-CONST., Apr. 26, 2003, at G4; Bill Rankin, *Indigent Defense Gets Force But Needs Funds*, ATLANTA J.-CONST., May 22, 2003.

[64] O.C.G.A. §§ 17-12-27, 17-12-29.

[65] *Id*. at 17-12-121.

31 million a year. On January 16, 2004, Chief Justice Fletcher gave a speech urging lawmakers to deal with unfinished business. Legislators had already done "the right thing, both morally and constitutionally," Justice Fletcher told a joint session of the House and Senate.[66] "The only thing remaining to be done in order to 'finish the drill' and claim the victory is to fund the program."[67] He again raised the specter of lawsuits leading to indigent defense "managed by an outside court-appointed auditor, rather than having this great system designed by you, led by our people an operated by public defenders locally selected who are part of the community."[68]

In the next session, legislators agreed on a scheme that would fund indigent defense by adding $ 10 to the filing fee for civil lawsuits, increasing fines and bail bonds, and requiring poor people to pay a $ 50 application fee to defray administrative costs in appointing a lawyer.

The bickering over money soon boiled over. On the very last day of the next legislative session, Governor Perdue instructed his people not to let the funding bill pass after a struggle over who would control any excess monies collected. The governor's people wanted any windfall to go to the state's coffers, while reformers insisted that all of the fee-generated funds go towards shoring up legal services.[69] Democrats called the governor's effort to control the judiciary's budget a power grab, one they believed violated the principle of separation of powers.[70]

A budget passed without anything for indigent defense. After some nudging, Governor Perdue called a special session to deal with the leftover issue. A compromise was reached allowing the governor to review and comment on the public defender funding request without unilateral authority to reject it. That allowed the General Assembly finally to pass the measure funding the indigent defense system strictly out of court fees and fines.

Since financial support would not come from the state's general funds, but had to be raised separately by the courts, counties would have to deal with any shortfall.[71] Others concerns swirled: how much accountability could be exerted

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[66] Bill Rankin, *Top Justice: Find Funds for Indigent*, ATLANTA J.-CONST., Jan. 17, 2004.

[67] *Id.*

[68] *Id.*

[69] Bill Rankin, *Legal Issues Unresolved in Session's Closing Hours*, ATLANTA J.-CONST., Apr. 8, 2004, at C4.

[70] Bill Rankin, *Indigent Defense is Back on Rails*, ATLANTA J.-CONST, May 2, 2004, at A1, A4.

[71] Bill Rankin, *Indigent Defense Funding Wins House Passage*, ATLANTA J.-CONST., May 5, 2004.

on wayward counties? What would happen if a county ran out of money to fund lawyers for the poor? Would existing safeguards be enough to protect public defenders from political interference?

Still, for the first time in Georgia's history, there would be a public defender in each of the state's forty-nine judicial circuits. Equalization of salaries between prosecutors and defenders would also be a new norm. Bipartisan reform is never easy, but they had done it. As House Judiciary Committee Chairman Tom Bordeaux observed, "It's like finding a porcelain doll in the rubble of a wartorn battlefield."[72]

Georgia law now established performance standards for court-appointed attorneys and a ceiling on caseloads. It also established a mental health division and a separate office with expertise in death penalty cases, which could intervene earlier in murder cases and perform the investigation into a defendant's background in order to present relevant mitigation evidence. Legislators had created an eleven-member board appointed by the governor, lieutenant governor, and House speaker to oversee the Georgia Public Defender Standards Council (GPDSC). Reformers eyed this last development warily—where legislators envisioned a mechanism for ensuring accountability, advocates for the poor worried about the potential for political interference.

Even so, as with any major legislative feat, compromise was unavoidable and some hard questions would have to be deferred for another day. Pushing an unpopular cause, one having no political constituency, had led to a landmark piece of legislation. Through persistence, imagination, and coalition-building, indigent defense emerged as an uncontroversial concept.

But even that would not be the end of the story. For example, a single high-profile death penalty case delayed other capital trials by threatening to bankrupt the funding mechanism.[73] Then there were concerns about implementation of the Indigent Defense Act. Institutional change can certainly change culture, but significant cultural change usually takes more time and sustained effort.[74] Take Cordele Circuit. As Bright observed ten years later, "our expectations were dashed when the new office turned out to be more of a locker room than a law

[72] Rankin, *supra* note 61, at C9.

[73] Jenny Jarvie, *Georgia Public Defender System on Trial*, L.A. TIMES, Mar. 30, 2007.

[74] On the culture of indifference that afflicts many indigent defense delivery systems, see Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769 (2016).

office."[75] The head of the office faced sexual harassment allgations.[76] A five-person office dwindled to three overworked public defenders juggling 567 cases each, helped by a single investigator.[77] Local officials also failed to establish a dedicated juvenile division required by state law, with over 90% of juvenile cases resolved without defense lawyers. At one point, the county commissioners stopped funding the office entirely, forcing the office to cut two lawyers and an investigator.

Back to court marched SCHR lawyers—not only to enforce the earlier decree, but also to add First Amendment claims against two of the counties' judges and sheriffs for keeping courtrooms closed to media and concerned citizens while defendants were processed. Despite the enactment of the reform law, the plaintiffs described the right to counsel as still "a hollow formality in the Cordele Judicial Circuit."[78]

In 2015, legislators tried to alter the state's standard requiring that an accused be assigned counsel within three days of an arrest. The U.S. Department of Justice eventually filed a statement of concern in the case, indicating their interest in protecting the rights of juveniles.[79] Ultimately, the litigants reached

[75] Marc Bookman, *This Man Sat in Jail for 110 Days—After He Already Did His Time*, MOTHER JONES (Aug. 6, 2015), https://www.motherjones.com/politics/2015/08/public-defender-cordele-georgia-eric-wyatt/.

[76] Bill Rankin, *Defender Office Gets New Leader*, ATLANTA J.-CONST., Dec. 6, 2014, at B1.

[77] Letter from Sarah Geraghty of SCHR to Stefan Ritter, Georgia Attorney General's Office, Jan. 25, 2010 (informing the state that the Cordele Circuit Public Defender is "significantly understaffed" and "has more cases than its attorneys can handle consistent with ethical guidelines"); *see also* Interview with Sarah Geraghty, Former Senior Counsel, Southern Center for Human Rights (Mar. 18, 2020).

[78] Bill Rankin, *No Defense for Poor, Suit Alleges*, ATLANTA J.-CONST., Jan. 8, 2014, at B1.

[79] Statement of Interest of the United States, N.P. et al. v. Georgia, No. 2014-CV-241025, (Ga. Super. Ct. Mar. 13, 2015) ("[T]he United States maintains that children, like adults, are denied their right to counsel not only when an attorney is entirely absent, but also when an attorney is made available in name only."). The United States argued that "faced with severe structural limitations, even good, well-intentioned, lawyers can be forced into a position where they are, in effect, counsel in name only. For example, if they do not have the time or resources to engage in effective advocacy or if they do not receive adequate training or supervision because their office is understaffed and under-resourced, then they will inevitably fail to meet the minimum requirements of their clients' right to counsel." *Id*. at 15.

another settlement agreement that doubled the number of public defenders and promised training for any lawyers responsible for juvenile cases.[80]

## VII. LINGERING QUESTIONS

As Georgia's experience demonstrates, structural change is indeed possible in the age of mass incarceration. One way to unsettle entrenched practices is through rebellious localism, especially when national reform appears out of reach due to unfavorable federal law or a federal judiciary that is hostile toward structural reform litigation.[81] SCHR's model of litigation points the way. Harnessing public support for rights-based constitutionalism and outrage at the variety of inhumane incidents of individuals trapped by incarceration policies, activists characterized the decentralized indigent system as a crisis of legal liberalism.[82] They elevated the public defender as a potential solution to everything from overly aggressive pretrial detention to inaccurate trial and sentencing outcomes.[83] But embarking upon a grand experiment of institutional redesign meant that certain hard questions were put off. And to achieve bipartisan support for change, some who voted for the new system almost certainly wished to take structural criticisms off the table while continuing pro-incarceration policies.

We should be realistic in assessing the effects of reform. While raising expectations as to improved outcomes, even such a significant bureaucratic shift was never going to solve all the problems faced by poor people charged with crimes. Reorganizing the mechanisms for delivering legal services is primarily

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[80] Press Release, U.S. Department of Justice Office of Public Affairs, Justice Department Applauds Settlement to Improve Juvenile Right to Counsel in Georgia, Apr. 22, 2015; Carrie Johnson, *Georgia Settles Case Alleging Assembly-Line Justice for Children*, NPR, May 2, 2015.

[81] Indeed, while the mainstream newspapers turned to covering the twists and turns of political maneuvers over indigent defense reform, the main legal periodical in Fulton County, *The Daily Report*, acknowledged the success of rebellious localism. The paper credited Bright for being "the most implacable and visible crusader for better defense of the poor" in the state through "unrelenting agitation" over a period of years. Trisha Renaud, *Angry Man of Indigent Defense*, DAILY REP., Dec. 3, 2003.

[82] LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1998); ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW (1990): Mark Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).

[83] On the history and practice of plea bargaining, see John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & Soc. Rev. 261 (1979), as well as CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL (2022); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2013).

a procedural solution rathern than a substantive one. It aims to solve the information deficit faced by ordinary people who alone cannot appreciate the law's complexity and navigate it effectively. An advocate with sufficient resources who can intervene at the earliest possible point in the criminal process can indeed help preserve the pillars of the justice system: the promise of individualized justice plus adversarial testing of the state's evidence. By these lights, the capital defender's office was perhaps the most successful aspect of the story of reform. Bringing legal and medical expertise to bear in cases at an early stage of the proceedings, lawyers helped lift the quality of representation in most capital trials and reduce the overall number of death sentences.[84]

But a change in framework, even when it is beneficial, would still have to be followed up with periodic adjustments as criminal policies change.[85] And the jury is still out as to whether it is more effective to create an overarching statewide framework first and deal with other issues later or whether it is better to create a series of discrete, well-functioning offices and work incrementally toward centralization.[86]

In non-capital cases, challenges remained regarding adequate funding, training, independence, recruitment, and caseloads. As Bright and his co-author Lauren Sudeall later acknowledged, individual counties were still paying 60% of the costs of indigent defense, the quality of representation for the impoverished remained inconsistent across the state, and the Director of the GPDSC, who served at the pleasure of the governor, wound up being a timber lawyer and mule trader "with no prior background in the representation of poor people" beyond handling a few court-appointed cases. Perhaps more important, the use of flat-fee contracts to keep costs low did not end with the Indigent

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[84] *See*, *e.g.*, Bill Rankin, Death Penalty on the Wane in Georgia, ATLANTA J.-CONST., Jan. 11, 2019, at ("it's all but certain that the state with go at least five years without a death sentence"),https://www.ajc.com/news/local/death-penalty-the-wane-georgia/25R8g9dc5Hx5mZCmAjEAjO/, last visited Jan. 18, 2023; Bill Rankin, *Georgia Executions Rise in 2015*, ATLANTA J.-CONST., Dec. 16, 2015, at B2 (nothing that no death sentences were imposed in the state in 2015, with 29 cases resolved without a death sentence).

[85] As Spangenberg and Schwartz observe, "limited resources available to the criminal justice system have been used to place more police officers on the street and to build more prisons, ignoring the effects that these policies have on other components of the system—prosecution, the courts, and public defense." Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9 CRIM. JUST. 13 (1994).

[86] I thank Eve Brensike Primus for pressing this point in correspondence. In Michigan, activism led to the creation of an indigent defense commission empower to increase the number of public defender offices, but the compromise law prohibited the creation of a statewide public defender agency, which has apparently blunted progress.

Defense Act, but increased with a vengeance in conflict cases. Such practices make it difficult to attract competent, much less zealous, advocates.[87]

It is also worth keeping in mind that for most people, lawyers enter the equation only after an arrest has been made. Improving defense services is a downstream fix. Other kinds of reforms will arguably have a greater effect in reducing the harms of mass incarceration: transforming how judges and prosecutors are selected, reconsidering substantive offenses and sentencing practices, imposing limits on police discretion or charging decisions, reducing collateral consequences, or eliminating procedural hurdles to legal remedies. Abolishing the death penalty would also save monies that could be devoted to other social needs.

In 2007, Louisiana reorganized its public defender system based in part on Georgia's reforms.[88] To a greater extent than Georgia, Louisiana's system continues to be plagued by concerns over funding and accountability.[89] Here and there, organizing on a local basis has yielded some positive changes in the gaps left by statewide reform. For example, in August 2020, the City of New Orleans enacted an ordinance ensuring that the public defender's office would be funded at 85% of the district attorney's budget.[90]

For good or ill, taking a leadership role on indigent defense reform seems to have transformed SCHR's own agenda, particularly in the wake of its staff's realization that a statewide public defender would not solve the problems created by mass incarceration. Originally focused on filing suits to ameliorate harsh conditions inside prisons, like those brought by the ACLU's Prison Project, SCHR began to devote more resources to reforming abusive pre-trial practices, such as exploitative cash bail systems, as well as excessive court fines and costs

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[87] Stephen B. Bright and Lauren Sudeall Lucas, *Overcoming Defiance of the Constitution: The Need for a Federal Role in Protecting the Right to Counsel in Georgia*, AM. CONST. SOC'Y, Sept. 2010, at 7; Bill Rankin, *Lawyers to Defend Indigent Now Scarce*, ATLANTA J.-CONST., Sept. 19, 2022, at A1.

[88] G. Paul Marx, *Public Defender Reform Act of 2007: The Process of Reform*, 56:1 LOUISIANA BAR J. 12, 13 (2008).

[89] Not only is funding still the responsibility of local goverments in New Orleans, the practice relies on traffic tickets, an uneven source of revenue.

[90] Nick Chrastil, *City Council Passes Ordinance Bringing Public Defender's Budget Closer to D.A.'s Office*, THE LENS, Aug. 20, 2020. Until some other method of stabilizing resources emerges or front-end criminal justice policies shift dramatically to ease the pressure, disparities in the quality of representation between wealthier counties and poorer ones will surely exist.

that can leave even innocent people trapped in debt.[91] Under Sarah Geraghty's leadership, the prison litigation unit capitalized upon a newfound desire in the state to give nonviolent offenders an automatic shot at parole. SCHR represented one man who was not permitted to use the law, arguing that his life sentence without parole for a nonviolent crime constituted "cruel and unusual punishment" in light of the state's dramatic shift toward a policy of rehabilitation.[92] The organization also helped end the practice in Bainbridge, Georgia, of jailing or immediately ordering probation for people who cannot pay a fine right away.[93]

Whatever the longterm solutions are to unequal access to justice, reformers must guard against a vision of justice in which the carceral state remains every bit as aggressive in its pursuit of offenders as it has been in the recent past, so long as proceedings are more procedurally acceptable. Of course, it is easier to read the past than predict the future. Increasing the number of lawyers for the poor could expose additional inequities and prompt meaningful changes to incarceration policies or else their actions might simply facilitate more effective delivery of harsh justice.

[91] *See, e.g.*, Gracie Bond Staples, *How a $ 900 Court Fine Forced a Woman Out of Her Home*, ATLANTA J.-CONST., Apr. 3, 2020; Richard Fausset, *Bail Was $ 500, Money He Didn't Have. Atlanta Faces Calls for Change*, N.Y. TIMES, Jan. 11, 2018, https://www.nytimes.com/2018/01/11/us/atlanta-bail-courts-reform.html.

[92] Saul Elbein, *How Georgia's Criminal Justice Reform Law Almost Left Former Inmate Aron Tuff Behind*, ATLANTA MAGAZINE, Apr. 24, 2019, https://www.atlantamagazine.com/news-culture-articles/how-georgias-criminal-justice-reform-law-almost-left-former-inmate-aron-tuff-behind/.

[93] Lisa Riordan Seville, *Georgia Town Settles Suit Over Private Probation "Ransom*," NBC NEWS, Sept. 21, 2015.