

Louisiana's New Public Defender System: Origins, Main Features, and Prospects for Success

I. INTRODUCTION

In 2007, the Louisiana legislature enacted a landmark reform of the state indigent defense system.¹ It established a Louisiana Public Defender Board to enforce statewide performance standards and administer the state indigent defense fund. The legislature has also significantly increased state spending on indigent defense since 2005. These changes were driven by a broad coalition of groups pressing for improved indigent defense, as well as Louisiana Supreme Court decisions mandating better support as a matter of state constitutional law.

Considered in isolation, this may seem like a straightforward victory for equal justice and the rights of criminal defendants. However, the lasting success of these reforms is uncertain. Louisiana has tried several times over the past forty years to put its indigent defense system on a sound footing. At best, each round of reform provided only temporary relief. Effective change was prevented by the legislature's reluctance to fund the system adequately and by a persistent suspicion of centralized state control over local indigent defense.

The campaign to create the new Public Defender Board was carefully crafted to surmount these obstacles, but there is no guarantee they will not return with undiminished force to hinder the new system's implementation. In particular, adequate funding for indigent defense is an inherently fragile achievement, vulnerable to sudden shifts in the political environment. If the new public defender system is eventually starved of money, the Louisiana Supreme Court may have to grapple again with moving the political branches to comply with the constitutional right to counsel. Yet the experience of Louisiana and other states teaches that judicial action alone cannot make up for deterioration in the political coalition supporting reform.

Apart from the funding issue, the Public Defender Board faces an immense organizational task in asserting its control over Louisiana's heretofore radically decentralized system for providing indigent defense. The new statutory scheme is actually an intricate compromise between advocates of state control and defenders of local autonomy. It abolished the local boards that were the

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1. Louisiana Public Defender Act, 2007 La. Acts No. 307, § 1 (codified as amended at LA. REV. STAT. ANN. §§ 15:141-184 (2005 & Supp. 2009)).

foundation of the old indigent defense framework, but it did not establish a consolidated statewide system. Instead, local indigent defense bodies are left in a fundamentally ambiguous status. Local chief defenders have independent local funding and control of everyday operations, but they must now answer to the state board in terms of performance standards and in getting approval for their annual budget. In places where significant vested interests have grown up around the local provision of indigent defense, this may well prove a formula for conflict and resistance to central authority.

The new board may find itself hampered in these disputes by certain features of the statutory scheme. There is a substantial risk of delay as a result of the massive rulemaking task the new board is given. Confusion may also follow from serious statutory ambiguities on the balance of power between the local chief defenders and the new regional offices the board is authorized to create. Finally, the state board's ability to control local defense systems is hindered by the statute's relatively narrow grounds for the dismissal of local chief defenders.

Part II of this article examines the background and origins of the new reform. Part III describes the main features of the bill and the conflicting interests that shaped them. Part IV sets out potential obstacles to its effective implementation and recommends some changes to the statutory scheme that could help alleviate them.

II. BACKGROUND AND ORIGINS OF THE NEW SYSTEM

A. The First Round of Reform: Gideon's Aftermath in Louisiana

In the wake of *Gideon v. Wainwright* making publicly provided counsel for state indigent defendants a federal constitutional right,² Louisiana in 1966 instituted a system of local indigent defender boards to better administer the right to counsel in the state courts.³ Prior to *Gideon*, Louisiana already had a statutory right to counsel for indigent defendants charged with a felony.⁴ Trial judges assigned counsel from an informally kept roster of local lawyers, who generally received no compensation for their work.⁵ However,

2. 372 U.S. 335 (1963).

3. 1966 La. Acts No. 366.

4. See *State v. Blankenship*, 172 So. 4, 5 (La. 1937).

5. Gerald A. Rault, Comment, *Representation of Indigents in Criminal Cases: Guidelines for Louisiana*, 27 LA. L. REV. 592, 600-01 (1967).

under Louisiana's pre-*Gideon* system no legal representation was provided when an indigent defendant chose to plead guilty.⁶

The initial post-*Gideon* system required the district judges in each judicial district to appoint a district indigent defender board.⁷ These boards took over maintenance of the local rosters of appointee lawyers and were given the power to manage their assignments.⁸ They were also charged with administering the first dedicated source of public funding for indigent defense. By state law, a new fee was added to the fines and costs assessed for each criminal conviction in a district court.⁹ The money collected was then transferred directly to the local indigent defense fund.¹⁰ These funds were intended to allow appointed counsels to get some reimbursement for their expenses, making indigent defense less of a burden for the bar.¹¹

These local boards funded by local court fines formed the enduring institutional foundation of indigent defense in the state, surviving basically unaltered until 2007. Despite this longevity, a number of basic inadequacies were apparent from the very beginning. The initial court fines were both too low and too narrowly applied to secure even the limited goal of reimbursing assigned counsel for their expenses.¹² Besides the revenue issue, the lack of any state body overseeing the local boards meant there was no way to ensure that basic standards for providing indigent defense were followed consistently across the state. Funding shortfalls and the lack of central authority were the main impetus for all subsequent efforts at reform.

B. The Second Round of Reform: A New Constitution, Expanded Local Funding, and a Stillborn State Board

In 1974, Louisiana enacted a new constitution that bolstered the right to counsel in the state by enjoining the legislature to "provide for a uniform system for securing and compensating qualified counsel for indigents."¹³ In 1976, the legislature attempted to follow through on this mandate with the Uniform Indigent Defender Act.¹⁴ The Act expanded local court fine

6. State v. Hilaire, 45 So. 2d 360, 362 (La. 1950).

7. 1966 La. Acts No. 366.

8. *Id.*

9. *Id.*

10. *Id.*

11. Rault, *supra* note 5, at 600–01.

12. *Id.*

13. LA. CONST. art. I, § 13.

14. 1976 La. Acts No. 653.

funding by increasing the amount of money that could be collected from each defendant and expanding the range of offenses to which the fine applied.¹⁵ Instead of being limited to criminal convictions in district court, a fee was assessed in all courts of original jurisdiction to all convictions above the level of parking violations.¹⁶ In effect, this meant indigent defense would be largely funded by a charge added onto traffic tickets, since they have long made up the bulk of criminal violations by number.¹⁷

Given the increased income, local systems were able to support delivery methods beyond assigning local attorneys and compensating their expenses. Thus, in the same law, indigent defense boards were given the power to establish public defender agencies staffed by salaried attorneys and managed by a local chief indigent defender. Some years later, the legislature also authorized a third permissible method of delivery: contracts with lawyers in private practice to take on the district's public defense work.¹⁸

In the years since local districts were given the power to choose their mode of operation, almost all have used some mix of these three different methods. There are two broad tendencies. Currently, seven of forty-one judicial districts rely predominantly on public defender agencies with salaried employees.¹⁹ The rest of the judicial districts provide the bulk of their services through contract attorneys.²⁰ Regardless of how it organizes its services, each district retains the power to assign cases to private attorneys whenever the local system has reached the limit of its capacity or when there is a conflict of interests between defendants making it inappropriate for a local public defender office to represent both.²¹

Besides expanding local funding and allowing local boards some choice in their mode of delivery, the legislature in 1976 also tried to add some degree of state oversight to the mix.²² The

15. *Id.*

16. *Id.*

17. NAT'L LEGAL AID & DEFENDER ASS'N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT SERVICES IN LOUISIANA 40 YEARS AFTER GIDEON 23 (2004) [hereinafter PUBLIC ACCESS TO JUSTICE].

18. 1986 La. Acts No. 94.

19. La. Justice Coalition, Louisiana's System: Public Defense in Louisiana Today, <http://www.lajusticecoalition.org/public+defense/louisiana+system> (last visited Mar. 29, 2009).

20. *Id.*

21. LA. REV. STAT. ANN. § 15:165(B)(1) (Supp. 2009). The new reform shifts the power of assignment from the presiding district judge to the local chief defender. *Id.*

22. For an overview of the act and brief discussion of its goals in creating a new board, see Robert Pugh, *The Uniform Indigent Defender Act*, 24 LA. B.J. 137 (1976).

Uniform Indigent Defender Act created for the first time a state board to help manage indigent defense.²³ However, the board's powers were vaguely defined as the authority to "coordinate" and "facilitate" the activities of the local systems.²⁴ Moreover, though it was given the power to award up to \$10,000 in supplementary funds to each indigent defense district,²⁵ the legislature never appropriated the necessary money.²⁶ As a result, the 1976 board was almost entirely dormant during its short lifespan.²⁷ Despite the strong belief among the board's supporters that some central authority was required to make the system effective, the legislature was clearly unenthusiastic from the very beginning. In 1981, the board was formally abolished leaving behind little or no sign it had ever operated.²⁸

Following the second round of reform, Louisiana indigent defense was better funded and had more flexibility, but the same basic inadequacies remained. There was still no oversight at the state level for how local boards ran their systems. As a result, there was no way to guarantee even minimal consistency in the quality of indigent defense throughout the state, despite the 1974 constitution's mandate that the legislature ensure uniformity. In addition, relying mostly upon local traffic fines was a fundamentally unstable arrangement even though the 1976 statutory reform had increased the income obtainable from them. Revenues in a district could rise and fall dramatically depending on local law enforcement's shifting enforcement of highway safety laws.²⁹ Even without any change in enforcement policy, there was no guarantee in any district that the level of traffic fines would track the caseload of felony defendants that make up the bulk of indigent defense work.³⁰ Further, since the local fine money stayed in that area, there was no way to redistribute funds from districts with a surplus to those facing severe shortfalls.³¹

Moving into the 1980s, these pre-existing problems combined with sharply higher crime and incarceration rates to push an already inadequate system into a state of chronic crisis. In Louisiana and across the nation, violent crime and property crime

23. 1976 La. Acts No. 653.

24. *Id.*

25. *Id.*

26. Interview with James Boren, Board Member, La. Ass'n of Criminal Def. Lawyers (LACDL), in Baton Rouge, La. (Oct. 15, 2007).

27. *Id.*

28. 1981 La. Acts No. 873.

29. PUBLIC ACCESS TO JUSTICE, *supra* note 17, at 24–25.

30. *Id.* at 23–24.

31. *Id.*

rates increased beginning in the mid 1960s, reaching their peak in the early 1990s.³² In reaction, governments in the 1970s and especially the 1980s shifted to substantially more punitive crime control policies across the board, with a special emphasis on the drug offenses perceived to be at the root of the overall crime problem.³³ Between 1970 and 1990, adult drug arrests more than tripled.³⁴ This led to a massive expansion of incarceration. Between 1980 and 1995, the population of state and federal prisons tripled.³⁵ Louisiana more than kept pace with these trends; it currently has the highest incarceration rate in the nation by a substantial margin.³⁶

The combination of more crime and a much harsher response to it produced exploding indigent defense caseloads. Between 1986 and 1992 alone, Louisiana indigent cases rose from 69,000 to 114,000—an increase of more than 60%.³⁷ The funding from local traffic fines did not come close to keeping pace with the increase, so there was usually no way to employ enough attorneys to handle the additional cases.³⁸ As a result, the indigent defense system was near collapse in several parts of the state by the early 1990s.³⁹

32. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME STATE-BY-STATE AND NATIONAL TRENDS, 1960–2007 (2008), <http://bjsdata.ojp.usdoj.gov/dataonline/Search/Crime/State/StatebyState.cfm> (select “Louisiana” and “United States-Total” from menu (a) and “Number of violent crimes” and “Number of property crimes” from menu (b) to get the four relevant tables).

33. See Alfred Blumstein, *Prisons: A Policy Challenge*, in CRIME: PUBLIC POLICIES FOR CRIME CONTROL (James Q. Wilson & Joan Petersilia eds., 2002).

34. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ESTIMATED ARRESTS FOR DRUG ABUSE VIOLATIONS BY AGE, 1970–2006 (2007), <http://www.ojp.usdoj.gov/bjs/> (select “Key Facts at a Glance” link; then “Drug Arrests” under “Crime trends;” then the “Drug Arrests” chart; and then the next “Drug Arrests” chart to get the relevant table).

35. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, ADULT CORRECTIONAL POPULATIONS, 1980–2007 (2008), <http://www.ojp.usdoj.gov/bjs/> (select the Key Facts at a Glance link; then “Corrections Trends;” then “Correctional populations;” and then the “Adult Correctional Populations, 1980–2007” chart to get the relevant table).

36. HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2007 18 (2008), <http://www.ojp.usdoj.gov/bjs/pub/pdf/p07.pdf>. At the end of 2007, Louisiana had 865 prison inmates for every 100,000 residents. Mississippi, the second place state, had 734 prison inmates per 100,000 residents. *Id.*

37. Pascal Calogero, *The Right To Counsel and Indigent Defense*, 41 LOY. L. REV. 265, 273 (1995).

38. *Id.*

39. *Id.*

C. The Third Round of Reform: The Louisiana Supreme Court Tries to Force Change

Faced with an indigent defense system in crisis and no movement in the political branches to address it, the Louisiana Supreme Court, under the leadership of Chief Justice Pascal Calogero, set in motion a new round of indigent defense reform. In doing so, the court had to rely solely on its own authority, without the prospect of support from the United States Supreme Court. In *Strickland v. Washington*, the Supreme Court had held that a claim of ineffective assistance of counsel under the Sixth Amendment of the United States Constitution must demonstrate substandard representation by the claimant's attorney and show a reasonable probability that this failure made a difference in the outcome of the trial.⁴⁰ Not only was this standard extremely hard to reach, it virtually ruled out consideration of the sort of systemic deficiencies that were crippling Louisiana indigent defense.⁴¹ Instead, the inquiry for right to counsel cases under the U.S. Constitution was limited to the conduct of a particular lawyer in a particular case.⁴² Therefore, the judicial effort to address the Louisiana crisis would need to be entirely homegrown, relying on Louisiana law and the Louisiana Constitution.

1. Peart, the Start of State Funding, and a Permanent State Board

The Louisiana Supreme Court first authorized the counsel of the Louisiana Judicial Conference to contract with a national organization, the Spangenberg Group, to conduct a study of Louisiana indigent defense.⁴³ In 1992, the study found systemic and grave deficiencies. It recommended an immediate doubling of indigent funding, a switch to state instead of local funding, and the creation of a state public defender commission to establish and

40. 466 U.S. 668, 687 (1984).

41. Charles M. Kreamer, Comment, *Adjudicating the Peart Motion: A Proposed Standard to Protect the Right to Effective Assistance of Counsel Prospectively*, 39 LOY. L. REV. 635, 635–36 (1994).

42. On the impact of *Strickland* on effective representation claims, see Mary Sue Backus & Paul Marcus, *The Right To Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1087–89 (2006).

43. Walt Sanchez, George Steimel & Jim Boren, *And It Only Took 44 Years: HB 436, the Louisiana Public Defender Board, and the New Structure of Indigent Defense*, THE ADVOCATE (LACDL, Baton Rouge, La.), June 2007, at 19–20, <http://lacdl.org/Newsletters.cfm>.

enforce standards.⁴⁴ The study brought forth no immediate response from the legislature. In 1993, the supreme court handed down *State v. Peart*, in which it found that the Orleans Parish indigent defense system was so overloaded and underfunded as to create a rebuttable presumption that the defendants had received ineffective representation of counsel in violation of article I, section 13 of the state constitution.⁴⁵

The case was brought by a young New Orleans public defender named Rick Teissier, who found himself burdened with a workload of over 400 cases in the first seven months of 1991 alone.⁴⁶ He received essentially no staff or investigative support.⁴⁷ In response, he brought suit in the name of all his current clients, claiming that the conditions of the Orleans indigent defense system denied them effective representation and asking that the Louisiana system of local financing be struck down as a violation the state constitution's mandate that the provision of counsel be "uniform" throughout the state.⁴⁸ The district court judge granted this request, holding the funding system unconstitutional.⁴⁹ He also mandated specific caseload limits for Orleans public defenders.⁵⁰

The supreme court refused to go so far when the case came before it. The majority opinion by Chief Justice Calogero held that the funding system was constitutional, in part because it found that litigants could not claim any individual right from article 1, section 13's requirement that the provision of counsel be uniform across the state.⁵¹ The mandate was held to be directed at the legislature alone. The court also overturned the establishment of caseload limits for the New Orleans system. Refusing to depart so sharply from *Strickland*'s approach, the court held that every determination of ineffective representation must be on an individual basis, defendant by defendant, not for an entire system at once.⁵² Nevertheless, and with a good deal of ambiguity, the court found that trial courts could hear ineffective representation claims based on systemic factors before a trial.⁵³ Moreover, trial courts could consolidate multiple claims in the early stages and make some "global findings" about the conditions of representation, findings

44. Calogero, *supra* note 37, at 274–75.

45. 621 So. 2d 780, 791 (La. 1993).

46. *Id.* at 784.

47. *Id.*

48. *Id.* at 784–85.

49. *Id.*

50. *Id.*

51. *Id.* at 786–87.

52. *Id.* at 788.

53. *Id.*

that presumably were to have significant weight in the individualized determinations of ineffective assistance of counsel.⁵⁴

Yet if the court in *Peart* left some doubt about how trial judges should handle ineffective representation claims based on systemic factors, it was absolutely clear about the result it expected from its decision: political action to reform Louisiana indigent defense. It cited the Spangenberg Group study approvingly and explicitly invited the legislature to take action threatening to impose its own solution otherwise.⁵⁵ Just as important, the remedy it set out for successful *Peart* claims was severe enough to grab the attention of the other branches of government. In the event that a presumption of ineffective representation was established and not rebutted by the state, trial courts were authorized to halt prosecutions until adequate resources for the defense effort were found.⁵⁶ If enough defendants were successful in making claims under *Peart*, the criminal justice process would grind to a halt.

In response, deliberations began in the legislature about reforming the system. At this point, a fateful divide appeared in Louisiana's criminal defense community. The Louisiana Association of Criminal Defense Lawyers (LACDL), an organization intended to represent all defense lawyers in the state, both in private practice and public employment, pushed for the creation of a consolidated, state-funded system in which a central state office would directly manage all the local systems.⁵⁷ In doing so, the LACDL put itself in line with a longstanding body of opinion in national legal organizations favoring statewide public defender agencies as the surest mechanism for establishing professional, uniform defense representation.⁵⁸ Yet just when this

54. *Id.*

55. *Id.* at 790–91.

56. *Id.* at 791–92.

57. Boren Interview, *supra* note 26; Telephone Interview with Paul Marx, Former Executive Director, La. Pub. Defenders Ass'n (LAPDA), in Baton Rouge, La. (Oct. 30, 2007).

58. See, e.g., MODEL PUBLIC DEFENDER ACT (1970) (recommending creation of statewide defender organization). Nationally, nineteen states currently have pure statewide defender organizations, with full state power and entirely state funding. THE SPANGENBERG GROUP, STATEWIDE INDIGENT DEFENSE SYSTEMS 3 (2005), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/statewideinddefsystems2005.pdf>. Five additional states have state bodies with generally full power but are limited either in their geographic reach or in the types of cases they handle. *Id.* The other twenty-six states either mix state and local power in their funding and control, or they are purely local. *Id.* As discussed *infra* notes 145–171, Louisiana remains a mixed state and local system even after its latest reform.

proposal seemed to be gathering support, fierce opposition sprang up from an unexpected source: the Louisiana Public Defenders Association (LAPDA).⁵⁹

Representing the chief indigent defenders and the other indigent defense attorneys from each district, the LAPDA had only come into being a few years before as a way to provide more specialized and appropriate continuing legal education for its members.⁶⁰ The prospect of a new statewide system triggered its emergence as a political force. The chief local defenders objected to a new centralized system on several grounds.⁶¹ First, it threatened to destroy the significant number of successful local systems that had developed despite adverse conditions. Second, whatever its problems, the system of local funding based on local court fines was at least independent of the annual state budget process and its uncertainties. Finally, giving a state body complete power over the personnel in local systems threatened to make them irresistible targets for political patronage appointments that could destroy their effectiveness.

The conflict between LACDL's centralizing vision and LAPDA's localist resistance effectively doomed any legislative action in 1993. The LAPDA turned to its ready-made network of defenders in each judicial district to turn enough legislators away from the consolidated state organization as a viable reform.⁶² Thus, in the fall of 1993, Chief Justice Calogero recommended to the state judicial conference that the "[Louisiana Supreme] Court find some way to motivate the legislative and executive branches to consider this issue in earnest."⁶³ Deciding to jumpstart the political process rather than attempt a purely judicial solution, he convened a meeting of executive and legislative branch leaders at the supreme court in January of 1994.⁶⁴ This was followed with a statewide consultation process and ultimately by Governor Edwin Edwards appointing a Task Force on Indigent Defense chaired by Calogero and the President of the State Senate.⁶⁵

In May of 1994, the Task Force recommended that the supreme court use its own rulemaking authority to create a statewide board that would establish statewide standards for indigent defense and administer state funding to supplement local indigent defense

59. Marx Telephone Interview, *supra* note 57.

60. *Id.*

61. *Id.*

62. *Id.*

63. Calogero, *supra* note 37, at 275.

64. *Id.*

65. *Id.*

budgets.⁶⁶ It asked the legislature to appropriate \$10 million as an initial state aid for indigent defense.⁶⁷ The supreme court duly created the Louisiana Indigent Defense Board in July of 1994.⁶⁸ The legislature appropriated \$5 million, half of what had been recommended but still the first real state aid for indigent defense.⁶⁹ This increased to \$7.5 million the next year.⁷⁰ The new state board used its budget to set up dedicated funds for capital defense, appellate work, and expert testimony, with the remaining funds available as general subsidy for districts in particular need.⁷¹ State funds supplemented but did not replace the existing system of local funding through fine money.

At the same time it was involved in the political process of creating a new board and securing state funding, the Louisiana Supreme Court was also acting in its judicial capacity to expand the reach of the principles it had announced in *Peart*. In *State v. Wigley*,⁷² the court dealt with the issue of compensation for assigned counsel. As a way to relieve pressure from overburdened indigent defense systems, local courts had relied on their power to assign cases to members of the local bar, who often served with little or no compensation since local indigent funding was exhausted.⁷³ In *Wigley*, several lawyers assigned as defense counsel in capital cases challenged the lack of compensation as a violation of their substantive due process rights under the Louisiana Constitution. The court held that representing indigent defendants without payment was a periodic professional obligation that could be required of all lawyers.⁷⁴ However, it limited this rule significantly by holding that the attorneys had a right to receive repayment of expenses incurred in their service.⁷⁵ In another post-*Peart* case, *State v. Touchet*, the court held that indigent defendants had a right to receive funds for expert testimony upon establishing a reasonable probability that the testimony would assist their defense and that the failure to obtain it would result in an unfair trial.⁷⁶

66. *Id.* at 276.

67. *Id.*

68. *Id.*

69. *Id.*

70. PUBLIC ACCESS TO JUSTICE, *supra* note 17, at 59.

71. Calogero, *supra* note 37, at 277.

72. 624 So. 2d 425 (La. 1994).

73. *Id.* at 427. Assignment was also sometimes ethically necessary when there was a conflict of interest between defendants making it inappropriate for them to be represented by the same defender office.

74. *Id.* at 426, 428–29.

75. *Id.* at 429.

76. 642 So. 2d 1213, 1221–22 (La. 1994).

In 1997, the legislature reauthorized the board and placed it within the executive branch, changing its initial status as part of the judicial branch created by supreme court rule.⁷⁷ It was renamed the Louisiana Indigent Defense Assistance Board (LIDAB). The change resulted in part from the district attorneys' perception that the defense board's location within the judicial branch impaired the courts' impartiality between the prosecution and defendants.⁷⁸ The supreme court itself was also uncomfortable having formal authority over such a large administrative task.⁷⁹ This move did not result in any change in the board's powers or funding.

2. *The Fate of the Peart-Era Reforms*

The round of reform that began to take effect in 1994 ameliorated some of the worst effects of the early 1990s crisis in Louisiana indigent defense. The state funding provided urgently needed help for capital cases, appellate work, and districts facing the most severe burdens. However, it was a failure as a long-term solution. There were two large, interrelated problems with the post-*Peart* system. The state funding was stagnant, and the state board was unable to secure or even demand real compliance with statewide standards in indigent defense provision.

Funding was only increased the second year of state appropriations, from \$5 million to \$7.5 million.⁸⁰ After that it was stagnant at approximately the \$7.5 million level for almost a decade.⁸¹ A flat level of appropriation did not even keep up with inflation, much less the ongoing strain of the caseloads produced by Louisiana's exceptionally punitive criminal justice system.

The funding issue aggravated the weakness of the LIDAB. The board had no regulatory authority over local indigent defense systems. It had the power to create state standards for issues like the proper training for public defenders, but its only effective enforcement lever to secure compliance was to withhold state funds.⁸² The LIDAB never felt it was in a position to use this stick. The funding crisis having been only temporarily abated, withholding any money at all from local systems slipping back into crisis seemed too severe.⁸³

77. LA. REV. STAT. ANN. § 15:146 (2005 & Supp. 2009).

78. Boren Interview, *supra* note 26.

79. Interview with Professor Cheney Joseph, Executive Counsel to the Governor, 1996–2000, in Baton Rouge, La. (Sept. 14, 2007).

80. PUBLIC ACCESS TO JUSTICE, *supra* note 17, at 59.

81. *Id.*

82. *Id.* at 60.

83. *Id.*

Therefore, the same problem that had sparked *Peart*-era reform—caseloads far in excess of the resources to deal with them—returned in full force just a few years later. Meanwhile, the State had made little progress towards establishing any effective statewide standards in the provision of indigent defense. What was the court's reaction? The Louisiana Supreme Court had after all handed down *Peart*, a decision seemingly ready-made to deal with a renewed crisis. Lower courts had been authorized to halt prosecutions upon defendants establishing a presumption that systemic problems like excessive caseloads had denied them effective assistance of counsel. There was nothing in principle that prevented the Louisiana judiciary from bringing criminal prosecutions to a standstill until the legislature created a more effective solution.

But to expect this was to have misread *Peart* itself, which was intentionally crafted to be more of an exceptional prod to the political branches than a routine tool of judicial intervention. After all, *Peart* drew a strong dissent from Justice Dennis precisely on the grounds that it provided a poor foundation for future judicial development of the right to counsel.⁸⁴ On the one hand, it was too cautious. The trial court in the early stages of the litigation had not only declared Orleans Parish's indigent defense system unconstitutional, it had provided clear and precise standards for how it was to be repaired, including rules on permissible caseloads per attorney.⁸⁵ The supreme court majority eschewed anything so absolute preferring instead a general call for legislative action.⁸⁶ It also refused to allow the state constitution's mandate for a "uniform" system of indigent defense to be the ground of an individual cause of action.⁸⁷

On the other hand, the *Peart* majority was, in a way, too radical. The only remedy it allowed was stopping prosecutions of indigent defendants entirely, which meant much of the justice system would grind to a halt. The dissent by Justice Dennis argued for other remedies, like making systemic indigent defense shortcomings a possible ground for vacating a conviction but allowing the state to argue in opposition that the error was harmless.⁸⁸ Since this approach would have allowed the criminal justice process to go forward, it was better suited to actually being used, as opposed to just threatened. By contrast, the *Peart*

84. 621 So. 2d 780, 792–93 (La. 1993) (Dennis, J., dissenting).

85. *Id.*

86. *See supra* note 55 and accompanying text.

87. *See supra* notes 51–52 and accompanying text.

88. *Peart*, 621 So. 2d at 795–96 (Dennis, J., dissenting).

majority's remedy required an indigent defense lawyer not only to bring proceedings to a halt, but also to leave his client in limbo. While proceedings were stopped, a defendant was effectively barred from asserting his right to a speedy trial under Louisiana law since the Code of Criminal Procedure requires a defendant to assert he is ready for trial before enforcing that right.⁸⁹ The entire point of a motion under *Peart* was to show the defendant is not ready for trial because conditions in the indigent defense system have left his lawyer unable to provide effective assistance. It is therefore little wonder that *Peart* motions were relatively rare in practice.

However, an unfulfilled threat that sparked legislative action instead of judicial development was precisely what *Peart* was designed to be, and the lower courts usually acted accordingly when *Peart* was raised by litigants. Even as the indigent system drifted back into crisis, courts frequently bent over backwards to avoid actually using *Peart* to stop or overturn prosecutions, often taking advantage of the ambiguities in the opinion's language to argue that something like the *Strickland* showing of individualized harm that changed the trial outcome was necessary.⁹⁰ There was more evidence of an impact in the capital defense context, particularly where the *State v. Touchet* companion case on funds for expert testimony was also involved.⁹¹ However, the wider indigent defense system was generally unaltered by what had seemed to be a revolutionary decision. The supreme court itself was largely silent, perhaps waiting for a politically more opportune moment to reenter the fray.

D. The Current Round of Reform: National Attention, a Renewed Push by the Louisiana Supreme Court, and Hurricane Katrina

Given the disappointing results of the *Peart*-era changes, Louisiana indigent defense seemed at a low point as the new century began. Yet the seeds of a new round of reform were already being planted. The foundation for the current Louisiana reform effort was laid in part by the increased activities of national advocacy groups since 2000 to spotlight inadequate indigent defense across the entire country. In 2002, the American Bar Association promulgated its Ten Principles of a Public Defense

89. LA. CODE CRIM. PROC. ANN. art. 701(D)(1) (2003 & Supp. 2009). See also Kreamer, *supra* note 41, at 654.

90. See, e.g., *State v. Matthews*, 756 So. 2d 440, 443 (La. App. 1st Cir. 1999); *State v. Hughes*, 653 So. 2d 748, 751 (La. App. 4th Cir. 1995).

91. See *State v. Jeff*, 761 So. 2d 574 (La. App. 1st Cir. 1999).

System setting out model standards for public defender organization, training, caseloads, and performance.⁹² These became a widely cited guidepost for evaluating the health of indigent defense systems. They also provided a map of what reform should accomplish. At the same time, other national groups, such as the National Legal Aid and Defender Association (NLADA) and the National Association of Criminal Defense Lawyers (NACDL), stepped up their work on this issue by publishing studies of local systems in crisis and by offering guidance for local reform campaigns in both the courts and state legislatures.⁹³

Indigent defense groups in Louisiana began to consult formally with representatives of these national organizations in 2002 and 2003.⁹⁴ These local groups then banded together and formed the Louisiana Justice Coalition to work for an effective and sustainable reform of indigent defense.⁹⁵ The backbone of the coalition was the common participation of both the Louisiana Public Defenders Association (LAPDA) and the Louisiana Association of Criminal Defense Lawyers (LACDL). This was crucial because friction between the LACDL's centralization goal and the LAPDA's attachment to local autonomy had almost crippled reform efforts after *Peart*.⁹⁶ Although these two groups formed the core of the coalition, a number of other social reform groups were also members including the Louisiana Interchurch Conference and the Louisiana branch of the ACLU.⁹⁷

The coalition pursued a multi-part strategy for reform, drawing on both successful efforts in other states and the lessons from past failures in Louisiana. Efforts to address the ineffectiveness of the 1994 *Peart*-era reforms had typically floundered on the aforementioned conflict between the LAPDA and LACDL, the

92. AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), <http://www.abanet.org/legal/services/downloads/sclaid/indigent-defense/tenprinciplesbooklet.pdf> [hereinafter TEN PRINCIPLES].

93. See the activities described at NLADA: Defender Legal Services, <http://www.nlada.org/Defender> (last visited Mar. 29, 2009) and National Association of Criminal Defense Lawyers (NACDL), <http://www.nacdl.org/public.nsf/freeform/publicwelcome?opendocument> (last visited Mar. 29, 2009), respectively.

94. Email Interview with David Carroll, Director of Research & Evaluations, Nat'l Legal Aid & Defender Ass'n, in Baton Rouge, La. (Oct 15, 2007). See also David Carroll, *Sounding Gideon's Trumpet, The Right to Counsel Movement in Louisiana*, 9 LOY. J. PUB. INT. L. 139 (2008).

95. Boren Interview, *supra* note 26.

96. See *supra* notes 57–62 and accompanying text.

97. See La. Justice Coalition, Members and Partners, <http://www.lajusticecoalition.org/about/members> (last visited Mar. 29, 2009).

suspicion of the Louisiana District Attorneys' Association, and widespread indifference to indigent defense in the legislature.⁹⁸ The coalition therefore emphasized maintaining unity among the reform groups and reaching out to consult with groups that had historically been suspicious of reform, such as the district attorneys and conservative Republicans in the legislature.⁹⁹ To combat legislative indifference to the issue, the coalition began a campaign of public education centered on the ABA's Ten Principles and the concrete ways in which Louisiana failed to live up to them.¹⁰⁰ An important part of this effort was commissioning studies of indigent defense across the State, in order to counter the idea that the crisis was just a New Orleans problem.¹⁰¹

Yet alongside these efforts at persuasion, the coalition also pursued the possibility of direct action through the courts. In cooperation with national organizations, local Louisiana groups began to mount litigation efforts to revive *Peart* and have dysfunctional Louisiana indigent defense systems declared unconstitutional.¹⁰² Suits were filed in different areas focusing on unique problems with the current system. A suit in Shreveport focused on the lack of independence local defense boards had from the judiciary.¹⁰³ A sweeping class action suit filed in Calcasieu parish attacked the lack of dependable financing and the overwhelming caseloads.¹⁰⁴

In late 2003, these efforts had early success in the form of resolutions of the Louisiana Legislature recognizing the need for reform and setting up a Louisiana Indigent Defense Task Force to study proposals for change.¹⁰⁵ In 2004, the studies of local indigent defense systems began to be published. Especially comprehensive was a report on the Avoyelles Parish system overseen by the research arm of NLADA.¹⁰⁶ It found deep deficiencies in both funding and organization that effectively denied indigent defendants their constitutional rights. Studies of Calcasieu Parish, Caddo Parish, New Orleans, and the Monroe area reached similar conclusions.¹⁰⁷

98. Boren Interview, *supra* note 26.

99. *Id.*

100. *Id.*

101. Carroll Email Interview, *supra* note 94.

102. SANCHEZ ET AL., *supra* note 43, at 19.

103. *Id.*

104. *Id.*

105. H.R. Res. 151, Reg. Sess. (La. 2003); S. Res. 112, Reg. Sess. (La. 2003).

106. PUBLIC ACCESS TO JUSTICE, *supra* note 17.

107. NICHOLAS L. CHIARKIS, D. ALAN HENRY & RANDOLPH N. STONE, AN ASSESSMENT OF THE IMMEDIATE AND LONGER TERM NEEDS OF THE NEW

In addition, the litigation strategy began to bear fruit. Apart from the broader class action case, another suit out of Calcasieu Parish dealt with a specific emergency in which the indigent defender office had no money to reimburse the expenses of attorneys who had been judicially assigned to represent conflict of interest defendants in several capital cases. In 2005, the Louisiana Supreme Court handed down its *State v. Citizen* decision finding this failure unconstitutional.¹⁰⁸ In doing so, it reaffirmed and extended *State v. Wigley*, the companion case to *Peart* that had held assigned counsel must be reimbursed for their reasonable expenses.¹⁰⁹ *Citizen's* extension of *Wigley* also explicitly authorized courts faced with such a funding shortfall to apply the *Peart* remedy of stopping a prosecution.¹¹⁰ As in *Peart*, the court coupled this threat with a direct call for legislative action on indigent defense reform.¹¹¹

Other cases met with initial success in the lower courts. The suit in Caddo Parish challenging excessive judicial influence over local indigent defense systems fought off a standing challenge and an exception of no cause of action to proceed to trial on the merits.¹¹² The Calcasieu class action challenging the inadequate funding structure also proceeded to trial, though not before being transferred to East Baton Rouge Parish on the grounds that this was the proper venue for a challenge to the entire state system.¹¹³ In Rapides Parish, the local public defender office filed *Peart* motions in several cases arguing that they were unable to provide constitutionally adequate representation to the clients because of inadequate funding.¹¹⁴ The trial courts granted these motions and,

ORLEANS PUBLIC DEFENDER SYSTEM (2006); MICHAEL KURTH & DARYL BURKEL, DEFENDING THE INDIGENT IN SOUTHWEST LOUISIANA (2004); STACY MOAK & ROBERT S. NOAL, II, INDIGENT DEFENSE IN NORTHEAST LOUISIANA: A STUDY OF THE PUBLIC DEFENSE SYSTEMS OF THE THIRD, FOURTH, FIFTH, AND SIXTH JUDICIAL DISTRICTS (2004), <http://www.lajusticecoalition.org/doc/ULAM-Northeast-Louisiana-Study.pdf>; BERNADETTE JONES PALOMBO & JEFFREY SADOW, THE PROVISION OF THE RIGHT TO COUNSEL IN CADDO PARISH, LOUISIANA (2004).

108. 898 So. 2d 325, 338 (La. 2005).

109. *State v. Wigley*, 624 So. 2d 425, 429 (La. 1993).

110. *Citizen*, 898 So. 2d at 338–39.

111. *Id.* at 337.

112. *Walker v. State*, 917 So. 2d 1229 (La. App. 2d Cir. 2005), *writ denied*, 927 So. 2d 296 (La. 2006).

113. *Anderson v. State*, 916 So. 2d 431, 439 (La. App. 3d Cir. 2005), *writ denied*, 929 So. 2d 1243 (La. 2006).

114. Boren Interview, *supra* note 26. See the Rapides Parish cases cited in PUBLIC TO JUSTICE, *supra* note 17, at 3 n.9.

as a remedy, assigned outside counsel from the local bar.¹¹⁵ This set up future litigation on the issue of adequate reimbursement for these attorneys in light of the *Citizen* holding.

Given all these developments, legislative action on indigent defense might have seemed inevitable. However, significant reform did not take place immediately. The Indigent Defense Task Force, under the leadership of its chairman Senator Lydia Jackson, decided in 2005 that the time was right only for a limited legislative package of increasing the court fines paid into local indigent defense funds and imposing more formal caseload reporting requirements on local systems.¹¹⁶ While some sort of broader reform would likely have passed eventually, it almost certainly would not have been so sweeping without a major catalyzing event: Hurricane Katrina.

Hurricane Katrina energized the indigent defense reform movement in two ways. First, it made the plight of indigent defendants in Louisiana vastly more salient and concrete in public awareness. The New Orleans public defender program essentially collapsed in the wake of the storm.¹¹⁷ Numerous indigent defendants were evacuated to prisons across the state, out of reach of any lawyer, or indeed of any basic knowledge of why they had been held in the first place, leading to the phenomenon of protracted detention without charge known as “doing Katrina time.”¹¹⁸

Katrina’s other effect was less visible. It forced Louisiana’s various competing criminal justice interest groups to cooperate. This first occurred in drafting legislation for emergency sessions of court, which put in place procedures for the administration of criminal justice in the event of another mass disaster.¹¹⁹ Representatives from Louisiana defense groups, the District Attorneys association, the District Judges Association, various local officials, and several academics formed an informal deliberative body that crafted and then pushed for the passage of the emergency court session legislation.¹²⁰ Once created, this “big tent” coalition could readily take on the problem of indigent defense reform that Katrina had so starkly highlighted.¹²¹

115. Boren Interview, *supra* note 26.

116. *Id.* This proposal eventually became law, enacted as 2005 La. Acts No. 323.

117. See Brandon Garret & Tania Tetlow, *Criminal Justice Collapse: The Constitution after Hurricane Katrina*, 56 DUKE L.J. 127 (2006).

118. See Pamela R. Metzger, *Doing Katrina Time*, 81 TUL. L. REV. 1175 (2007).

119. Interview with Greg Riley, Counsel, La. House of Representatives, Admin. of Justice Comm., in Baton Rouge, La. (Oct. 2, 2007).

120. *Id.*

121. *Id.*

A drafting process for new indigent defense litigation began in the spring of 2006, centered on the coordinating efforts of Greg Riley, counsel to the House Committee on the Administration of Criminal Justice. An email list of approximately thirty-five participants was created, and the text of the proposed bill was sent out and commented upon, a process that went through seventeen drafts.¹²² Finally in late 2006, consensus was reached on a bill text.¹²³ In 2007, the bill was shepherded through the legislature by House Criminal Justice chairman John Martiny largely without alteration and without even much controversy, given the diverse coalition that had been formed behind it.¹²⁴ In July of 2007, the bill passed the House with only one opposing vote and with only seven in the Senate.¹²⁵

III. THE NEW STATUTORY SCHEME FOR LOUISIANA INDIGENT DEFENSE

The main features of the new indigent defense structure are the product of the deliberations and compromises among the groups that helped draft it before it was introduced in the legislature. Where appropriate, I will take note of the influence of various groups on specific provisions.

A. The New Public Defender Board and Its Powers

The statute transforms the LIDAB into the Louisiana Public Defender Board. The old board's membership is transferred to the new one, but much of its role will now be supervising an extensive and statutorily mandated executive staff.¹²⁶ The new framework provides for a State Public Defender, meant to be the effective CEO of the state indigent defense system.¹²⁷ Under the State Public Defender are two deputy public defenders in charge of training and juvenile defense, along with four officers with responsibility over the budget, technology and management, trial performance compliance, and juvenile defense compliance, respectively.¹²⁸ The Louisiana statutory scheme is unusual both in the number of positions that are statutorily mandated and in the

122. *Id.*

123. *Id.*

124. SANCHEZ ET AL., *supra* note 43, at 19–20.

125. G. Paul Marx, *Act Takes La. Into 21st Century*, THE ADVOCATE (Baton Rouge, La.), July 6, 2007, at B6.

126. LA. REV. STAT. ANN. § 15:146(A) (2005 & Supp. 2009).

127. *See id.* § 15:152.

128. *Id.* § 15:150(A).

detail with which their duties are delineated.¹²⁹ The specific provision for compliance officers is not merely unusual, but unique.¹³⁰

Apart from selecting a staff, the board also has a statutory duty to undertake a massive rulemaking task, promulgating state standards for indigent defense in terms of workload limits, prompt communication with clients, overall case performance, defender qualifications, defender training, ethical obligations, and defender compensation.¹³¹ In addition, the board must set up procedures to collect data, monitor performance, and sanction shortcomings.¹³² The workload rules are particularly important, given that they are the clearest available metric for determining that a system does not have the resources to meet its obligations. Since 1973, national organizations like the ABA have used a rule advising that in any given year no attorney should handle more than 150 felonies, 400 misdemeanors, 200 juvenile cases, or 25 appeals.¹³³ Each of these categorical limits stands for a year of full-time work by itself,¹³⁴ so if a lawyer split his time half and half between felony and misdemeanor work, the recommendation would be that he handle 75 felonies and 200 misdemeanors during the year. These limits have been criticized as both arbitrarily chosen and far too rigid for diverse criminal justice contexts across the country.¹³⁵ Of course, even the advocacy groups present the limits as more of a rough benchmark than a precise rule, and the old LIDAB, in crafting what turned out to be its purely advisory standards, set caseload limits as ranges: for example, a lawyer is supposed to handle a maximum of between 150 and 200 non-capital felony cases per year.¹³⁶

The new statutory scheme requires the reconstituted state board to go further and rethink the limits from the ground up, explicitly adjusting them for different contexts. Section 15:148B(1)(a) mandates the creation of “an empirically based case weighting system that . . . denotes the actual amount of attorney effort needed

129. Carroll Email Interview, *supra* note 94.

130. *Id.*

131. LA. REV. STAT. ANN. § 15:148.

132. *Id.*

133. See PUBLIC ACCESS TO JUSTICE, *supra* note 17, at 33 n.108; TEN PRINCIPLES, *supra* note 92, at 5 n.19.

134. See PUBLIC ACCESS TO JUSTICE, *supra* note 17, at 33 n.108.

135. Telephone Interview with G. Pete Adams, Executive Director, La. District Attorney's Ass'n, in Baton Rouge, La. (Oct. 9, 2007).

136. LA. PUB. DEFENDER BD., LOUISIANA STANDARDS ON INDIGENT DEFENSE: CHAPTER 12: STANDARDS RELATING TO WORKLOAD FOR COUNSEL PROVIDING DEFENSE SERVICES TO INDIGENTS (2006), <http://www.lapdb.org/Acrobat%20files/Chapter%2012.PDF> [hereinafter PERFORMANCE STANDARDS].

to bring a specific case to an appropriate disposition.” In crafting this case weighting system, the board is enjoined to consider “the variation . . . in rural, urban and suburban jurisdictions;” differences across districts in prosecutorial, judicial, and sentencing practices, differences in trial rates, the “extent and quality of supervision” for public defenders, the relative availability of support staff like investigators, and specific client characteristics that can require more work on an particular case, such as a mental health handicap. This mandate is a clear advance over flat rules unadjusted for context, but it also requires an exceptionally complex rulemaking process. Even measuring some of the statutory factors will be difficult, let alone determining a specific weight for them.¹³⁷ To take one at random, how will “judicial processing practice” be determined for a particular district? Reformulating the caseload limits is a worthwhile enterprise, but it promises to strain the board’s own workload capacity, even apart from the numerous other rulemaking tasks the legislature has required.

Forming performance standards for other aspects of indigent defense will not be as complicated. Indeed, these rules would be already partially complete if the board was allowed to enforce regulations previously promulgated by the LIDAB. These include an elaborate set of performance standards based on those adopted in Georgia, setting forth the duties a defender should fulfill at each stage of the case.¹³⁸ These rules were passed in accordance with the Louisiana Administrative Procedure Act, so there is no doubt about their validity on that front. Nevertheless, the board is required to reenact the regulations in every area, even though the statute goes on to require that the new standards be “based” upon the preexisting rules.¹³⁹ Perhaps since the board now has power to force compliance with its rules, the legislature believed that a fresh rulemaking process was necessary, given that otherwise interested parties may not have paid attention to the earlier creation of what were mere unenforced guidelines.

137. For a discussion of the issues involved in case weighting and caseload measures for indigent defenders generally, see U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, KEEPING DEFENDER WORKLOADS MANAGEABLE (2001), <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

138. See generally LA. PUB. DEFENDER BD., LOUISIANA STANDARDS ON INDIGENT DEFENSE (2006), <http://www.lapdb.org/standards.htm>. For the Georgia standards, see GA. PUB. DEFENDER STANDARDS COUNCIL, STATE OF GEORGIA PERFORMANCE STANDARDS FOR CRIMINAL DEFENSE REPRESENTATION IN INDIGENT CRIMINAL CASES (2004), <http://www.gpdsc.com/cpdsystem-standards-main.htm>.

139. LA. REV. STAT. ANN. § 15:148(B)(1)(f) (2005 & Supp. 2009).

Besides its power to create binding standards for the local districts, the board also has a significant degree of direct management power over them. The old foundation of local control, the district indigent defense boards, is abolished by the new statutory scheme. This step was a key demand of groups insisting on effective central authority, such as the LACDL. The local boards were seen as fatally compromising the independence of indigent defense since they were appointed by local judges and perceived as being improperly influenced by them.¹⁴⁰ They were also often found to be dysfunctional in practice, abdicating their management responsibilities to the local chief defenders and in some cases failing to meet or keep records for long stretches of time.¹⁴¹ The new state board now absorbs much of their formal management authority. Thus, in those judicial districts currently without a chief public defender, the board has authority to either hire a public defender or assign a public defender to it from another contiguous district.¹⁴² For all existing districts, the board has the power, after a hearing and in accordance with applicable statutory standards, to change the mode of delivery or terminate the current local defender.¹⁴³ It is also given the authority to review and approve the annual budget from each district.¹⁴⁴

B. The Survival of Local Autonomy

So far this seems an unambiguous centralizing reform. However, advocates of decentralization, such as the LAPDA, also made an impact on the bill. The local funding system based on local fines, a target of so much criticism over the years, is retained.¹⁴⁵ The funds raised in each locality remain in each district's indigent fund, despite suggestions that it would be more equitable for local fees to be paid into a common statewide account and then distributed to each district according to need. Thus, state funding remains a supplement to the local fine money.¹⁴⁶ Furthermore, despite the extensive powers the board is given over them, the local defenders are not consolidated into a statewide organization. They are not state employees; even without the local

140. Boren Interview, *supra* note 26.

141. *Id.*

142. LA. REV. STAT. ANN. § 15:161(I) (Supp. 2009).

143. *Id.* §§ 15:165, 170.

144. *Id.* § 15:155.

145. *Id.* § 15:168.

146. However, after the recent funding increases the level of state spending is now close to that derived from local fines. *See infra* notes 177–178 and accompanying text.

boards they still constitute a sort of local political subdivision.¹⁴⁷ The legislature reinforced this conclusion in 2008 by passing an amendment explicitly declaring that employees of an indigent defense district are local, not state, employees.¹⁴⁸ In addition, the statutory scheme admonishes the board to respect local diversity in indigent defense, sets up a presumption that a preexisting local method of delivery is adequate until shown otherwise, and holds that local chief defenders employed by January 2007 shall continue in office with undiminished salaries and benefits.¹⁴⁹

Even where new powers have been clearly granted to the state board, they are often hedged with procedures that preserve local influence. The mechanism for hiring a new district chief defender is an apt example. For a new district defender to be hired, a selection committee is appointed comprised of three attorneys domiciled in the district, one appointed by the local chief district judge, one by the Louisiana Bar Association, and one by the state public defender.¹⁵⁰ This committee submits a list of three names to the state board, which then chooses one to be the new district defender.¹⁵¹ The separation of the hiring process into a nomination stage weighted towards local influence and an appointment stage controlled by the state board represents a hard fought compromise between the LACDL, who wanted hiring to be a purely state power, and the LAPDA, who wanted it to remain entirely local.¹⁵²

Another indication of the conflict between consolidation and localism is the extraordinarily complicated use of the “region” device in the statute. Following recent reforms in Georgia and Montana, an early draft of the bill foresaw the consolidation of the forty-one local indigent defense districts into eleven regions.¹⁵³ The regional offices would have directly managed the operations in each district, reporting directly to the state board.¹⁵⁴ They would also have consolidated several human resources functions for greater efficiency, as well as providing regional services in specialized areas like appellate work or capital defense. However,

147. Marx Telephone Interview, *supra* note 57.

148. 2008 La. Acts. No. 2 (codified as amended at LA. REV. STAT. ANN. § 15:147(E) (2005 & Supp. 2009)).

149. LA. REV. STAT. ANN. §§ 15:142(B)(3), (F), 161(H), 165(C) (Supp. 2009).

150. *Id.* § 15:162.

151. *Id.*

152. Riley Interview, *supra* note 119.

153. *Id.*

154. *Id.*

the LAPDA objected to this as stripping too much power from the local level.¹⁵⁵ As a result, the statute uses “region” in three ways.

First, the statute still gives the state board power to create up to eleven “service regions,” but the decision to create them and the exact number created is left discretionary, so long as no one district has more than 500,000 inhabitants.¹⁵⁶ Each service region would be headed by a regional director chosen by a regional selection committee composed of three representatives from each judicial district in the region.¹⁵⁷ For each district, one representative each would be appointed by the local bar association, the local chief district judge, and the state board.¹⁵⁸ As with the district selection committees, three nominees would be submitted to the state board, from which it would choose the regional director.¹⁵⁹

Even if they are established, the managerial power of the service region office over the districts is unclear. They would coexist with the chief defenders for each local system. The regional director and local defenders are each given a list of powers, but the local defender’s list is longer and more explicit. The regional directors are allowed to build their own staffs and provide regional services, presumably in areas like appellate practice or capital defense.¹⁶⁰ The directors are also given general authority to “supervise” indigent defense services within each district that forms a part of their regions, as well as specific authority to oversee the local chief defenders’ decisions on complying with state standards and making contracts for services in the district.¹⁶¹ They also have power to change the method of delivery in a district after a consultation process with the local defenders and the state board.¹⁶²

The local chief defenders are, by contrast, given authority to “manage and supervise” services in their districts.¹⁶³ Alongside the contracting and compliance responsibilities that the regional directors would supervise, local defenders are given specific power to hire and fire district personnel, with no mention of regional oversight.¹⁶⁴ On budgetary affairs, the statutory scheme is ambiguous. On the one hand, regional offices are given

155. *Id.*

156. LA. REV. STAT ANN. § 15:159.

157. *Id.* § 15:160(D).

158. *Id.*

159. *Id.* § 15:160(F)–(H).

160. *Id.* § 15:160(B).

161. *Id.*

162. *Id.*

163. *Id.* § 15:161(E).

164. *Id.*

supervisory power over “budgetary” matters.¹⁶⁵ On the other, the district chief defenders are enjoined to deal directly with the state budget officer in formulating their annual spending proposals, with no mention of a regional intermediary.¹⁶⁶

That these apparent limits on the regional director’s authority are real is confirmed by the second sense in which “region” is used. Section 15:163 authorizes the state board to “regionalize” indigent defense services in a district under one of three circumstances: sustained failure of the local district to comply with state standards, a request by the district public defender himself for regionalization, or a natural disaster that prevents the local office from functioning. This step can only take place after a public hearing. Once regionalized, a local district will be run from a regional office, assuming one has been established. The regional director will be “manager and supervisor” of the district, as opposed to the limited supervisory power he has over a non-regionalized system.¹⁶⁷ The chief defender of a regionalized district becomes an “employee of the region,” as compared to his previous quasi-independent status. Logically, this gives the regional director all the former power of the local defender.¹⁶⁸ Thus, only after an additional “regionalization” process allowed only under limited circumstances would a service region in Louisiana have the same power it automatically has in state systems like Georgia or Montana.

To complicate matters further, “region” is used in another sense besides “service region” and “regionalization.” The statutory scheme allows for an entirely separate third entity called “regional defense service centers.”¹⁶⁹ This device is actually a holdover from pre-2007 Louisiana indigent defense law. With approval of the state board, local districts can agree among themselves to create a regional service center to pool resources for certain specialized uses like appellate work, capital defense, or certain administrative functions.¹⁷⁰ However, these service centers are forbidden by statute from taking on functions beyond what the component districts originally assigned to them.¹⁷¹ Thus, despite the nomenclature, a regional service center apparently could not serve as the office of a service region, and therefore also could not be used to “regionalize” a local district.

165. *Id.* § 15:159(C).

166. *Id.* § 15:161(E)(2).

167. *Id.* § 15:163(A).

168. *Id.*

169. *Id.* § 15:164.

170. *Id.*

171. *Id.* § 15:164(F).

The fractured use of “region” in the statute is one of the clearest monuments to the resilience of local autonomy in the midst of a centralizing reform. Whereas other states have used regions as the building blocks for unambiguous advances in state power, their future use is far more uncertain in Louisiana. Only “regionalization” would bring the independent power of local chief defenders fully under control. Moreover, the use of “regional service centers” offers a way for local districts to get some of the benefits of service regions, like help in capital defense cases, without the loss of any authority at all.

C. Other Features of the New Structure

The new statutory scheme explicitly and at length denies that it is creating any new private statutory right of action for indigent defendants to demand improved representation.¹⁷² This was included at the express insistence of the Louisiana District Attorneys’ Association, which was concerned that the creation of new standards by the board would lead to new challenges by defendants to their convictions in areas where the standards had not previously been met.¹⁷³ Though that certainly does not prevent the Louisiana Supreme Court from interpreting the state constitution as providing an expanded private right of action, the statutory scheme at least seems to foresee enforcement of improved standards as exclusively a matter for the board itself.

Finally, the new system is notable for the long deadline the legislature has allowed for it to become fully operational: August 15, 2011, over four years after the reform’s enactment.¹⁷⁴ By this, the legislature seemed to recognize what a large regulatory and organizational task it had given to the new board.

IV. OBSTACLES TO EFFECTIVE OPERATION OF THE NEW SYSTEM AND RECOMMENDATIONS FOR DEALING WITH THEM

A. Future Funding Shortfalls and the Possible Judicial Response

Clearly the most significant obstacle to the new system’s success is uncertain funding in the future. The fact that the local systems are still partially reliant on local court fines means the legislature may be tempted in the future to return to an era of flat or declining state funding, using the excuse that the local systems

172. *Id.* § 15:173.

173. Adams Telephone Interview, *supra* note 135.

174. 2007 La. Acts No. 307.

can survive on their own funds. The experience of other states shows again and again that no amount of structural reform can make up for funding shortfalls. Even though a single state defender organization may be preferred on the grounds of unity and equity, such systems have repeatedly fallen into crisis where state funding has declined.¹⁷⁵ Funding is also the easiest method of assuring state control. Rather than having to order and directly coerce local systems to comply, ample funding allows a state board to let local systems become dependent on state funds and then use the possibility of withdrawal to ensure compliance with far fewer enforcement headaches.¹⁷⁶

It may be that funding does not become a problem. The legislature this time may keep its commitment to adequately fund indigent defense and provide healthy increases as time passes. The last few years have seen a remarkable growth in state spending on indigent defense. State funding was doubled in 2006 to \$20 million¹⁷⁷ and given another substantial increase in 2007 to \$28.6 million.¹⁷⁸ However, the experience of both Louisiana and any number of other states shows that funding usually dries up, and it can do so quite quickly. Indigent defense is rarely going to be a popular election year spending item in any state.¹⁷⁹

Even when a political coalition for greater support has been formed, it is highly vulnerable to changes in the political and legal environment. Thus, while the state of Georgia increased aid to indigent defense with bipartisan backing in 2003, the state system was thrown into crisis in 2007 by the large financial strains of a single case, the defense of Brian Nichols against capital murder charges stemming from a highly publicized courthouse shooting that killed a judge and several employees.¹⁸⁰ The legislature refused to make up the shortfall turning against the Georgia board

175. Consider Missouri, which has a model statewide form of defender organization, but which has funding that gives it among the lowest per capita rates of spending in the nation. Douglas Copeland, *Missouri's Public Defender Program*, 62 J. MO. B. (Jan.–Feb. 2006), available at <http://www.mobar.org/c5a77d59-7f2c-4634-bada-93ac6962678c.aspx>.

176. PUBLIC ACCESS TO JUSTICE, *supra* note 17, at 24.

177. LA. OFFICE OF PLANNING & BUDGET, LOUISIANA STATE BUDGET, FISCAL YEAR 2006–2007 2R (2006).

178. LA. OFFICE OF PLANNING & BUDGET, LOUISIANA STATE BUDGET PART 1, FISCAL YEAR 2007–2008 2gg (2007). The 2008–2009 budget saw a relatively modest increase to approximately \$29.5 million. LA. OFFICE OF PLANNING & BUDGET, LOUISIANA STATE BUDGET, FISCAL YEAR 2008–2009 58 (2008).

179. Riley Interview, *supra* note 119.

180. Shaila Dewan & Brenda Goodman, *Capital Cases Stall as Costs Grow Daunting*, N.Y. TIMES, Nov. 3, 2007, http://www.nytimes.com/2007/11/04/us/04penalty.html?pagewanted=1&_r=1.

on the basis of what was perceived as overly lavish spending on a clearly guilty defendant.¹⁸¹ In protest, the chief of the state capital defense section resigned.¹⁸² The board was forced to make severe cutbacks in other areas, putting recent improvements under threat.¹⁸³

Given that funding shortfalls are likely to reoccur, what recourse would the Louisiana reform community have in dealing with them? One option is a revival of the litigation campaigns to secure better support. If so, the Louisiana Supreme Court would once again have to consider the best method of moving the political branches. Of course, the question of funding rarely comes to a court directly in an indigent defense case. Rather, the funding issue arises because of the presence of its symptoms: unsustainably heavy caseloads for public defenders, little or no resources for expert witnesses or investigators, and inadequately compensated attorneys. Litigation seizes on these conditions as a way to force improved funding.

The Louisiana Supreme Court's approach so far in *Peart* and *Citizen* has been to recognize such systemic deficiencies without providing clear standards for what would count as a constitutionally adequate system of indigent defense. Instead, the legislature has been encouraged to craft its own solutions, while the court threatens to authorize the halt of prosecutions in the absence of improved support.¹⁸⁴ As discussed, the combination of vague principles with a fairly drastic remedy has meant public defenders have been wary of bringing such challenges and lower courts have sometimes been reluctant to grant those that have been brought.¹⁸⁵ This meant the *Peart* ruling was rarely enforced before the flurry of litigation preceding the new reform, litigation that benefited immensely from the expertise, resources, and independence of the national and state organizations involved. The average public defender confronting systemic deficiencies will not have anything like the same advantages.¹⁸⁶

Are there alternative paths the court could take that could make its interventions in this area more easily enforced and effective? Courts in other states have tried a variety of other approaches. In *State v. Smith*, the Arizona Supreme Court actually mandated the

181. Patrik Jonsson, *On Trial in Atlanta: Cost of Justice*, CHRISTIAN SCI. MONITOR, Oct. 29, 2007, <http://www.csmonitor.com/2007/1029/p02s01-usju.html?page=1>.

182. *Id.*

183. *Id.*

184. See *supra* notes 55–56 and accompanying text.

185. See *supra* notes 84–89 and accompanying text.

186. Boren Interview, *supra* note 26.

adoption of specific service standards congruent with contemporary ABA guidelines on indigent defense.¹⁸⁷ Under this approach, private litigants would be able to make a prima facie showing of inadequate assistance of counsel if, for example, caseloads rise above a certain level. This would provide a clear guide for what has been an unexceptionally indeterminate area of the law.

The court could also vary its stance of the proper remedy for systemic problems in indigent defense. One way would be to mandate certain financial remedies. In *State v. Lynch*, the Oklahoma Supreme Court directly required the state to raise attorney compensation across the state to a certain level.¹⁸⁸ An alternative remedy strategy would be to take the route urged by Justice Dennis' dissent in *Peart*. This would attempt to make the *Peart* and *Citizen* remedy more effective by, paradoxically, making it less drastic. Rather than stopping prosecutions altogether, a finding of inadequate representation produced by systemic deficiencies would shift the burden to the prosecution to show that these deficiencies were harmless error that did not affect the outcome.¹⁸⁹ It would be harder to sustain convictions under this approach, but the criminal justice system would not grind to a halt.

Yet debate about alternative paths the court could pursue obscures the reality that litigation driven reform has been fragile virtually everywhere, regardless of how the judicial decisions mandating change have been written. In Arizona, *State v. Smith* resulted in the end of a low bid system for county indigent defense that ratcheted down funding to crisis levels. But funding and workload problems were still pervasive a few years after *State v. Smith* despite its specific mandate of national service standards.¹⁹⁰ Recently, some counties in the state have been thrown into crisis by the strain of rising numbers of capital cases.¹⁹¹ In Oklahoma, *State v. Lynch* sparked increased state financing and the adoption of a statewide system run by a central board.¹⁹² However, in recent years funding cuts have devastated this office.¹⁹³ In short, different

187. 681 P.2d 1374, 1381–82 (Ariz. 1984).

188. 796 P.2d 1150, 1161 (Okla. 1990).

189. See *supra* notes 88–89 and accompanying text.

190. Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1741 (2005).

191. Jahna Berry, *Ending Jam of Capital Cases to Cost "Millions"*, THE ARIZ. REPUBLIC (Phoenix, Ariz.), Mar. 8, 2007, <http://www.nlada.org/DMS/Documents/1173372091.75/0308deathpenalty0308.html>.

192. *Effectively Ineffective*, *supra* note 190, at 1739.

193. OKLA. INDIGENT DEF. SYS., 2006 ANNUAL REPORT 4 (2006), <http://www.ok.gov/OIDS/documents/2006%20Annual%20Report.pdf> (“While

judicial approaches have not spared numerous other jurisdictions the same experience Louisiana had after *Peart*: an initial burst of reform triggered by a court decision, followed by stagnation, reversals, and a return to inadequate funding and crisis.

Some scholars believe that the somewhat disappointing results of the litigation campaigns so far only show that no state court has been sufficiently bold. The adoption of new techniques, like appointing a special master to oversee a ruling's implementation over the long term, would allow courts to force improved support even in an adverse political environment.¹⁹⁴ The perceived success of several federal district courts in improving prison conditions is pointed to as a model.¹⁹⁵ However, these more intrusive steps would all have the effect of making the judiciary the direct manager of indigent defense agencies for indefinite periods of time. There is every reason to believe this will rarely if ever be acceptable to the courts.

Aside from the natural reluctance of courts to undertake complicated administrative functions, perhaps surmountable by itself, having the judiciary running a protracted reorganization of one side of the adversarial criminal justice process would raise questions about the courts' impartiality that would be at best uncomfortable and at worst politically explosive. Even if a court involved itself so deeply, the central question of funding would still remain out of its direct control. It could attempt to order certain levels of spending, but its recourse in the event of noncompliance would only be some version of halting prosecutions or reversing convictions leaving it in precisely the same place as the Louisiana Supreme Court after *Peart*.

The best conclusion to draw from this is that what really matters is the stability and strength of the political coalition backing indigent defense reform, as opposed to the doctrinal stance of the court decisions mandating it. Judicial victories are valuable insofar as they help gather political and administrative support for change, but they have only limited effect on their own. Indeed, some of the more successful litigation campaigns for indigent defense have stopped short of a final decision on the merits.¹⁹⁶

the reduction-in-force hindered the agency's ability to effectively represent its clients, the lack of adequate funding left it with no viable alternatives.").

194. *Effectively Ineffective*, *supra* note 190, at 1750.

195. See generally Adele Bernhard, *Take Courage: What the Courts Can Do To Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293 (2002).

196. In Connecticut, a lawsuit filed by the ACLU triggered negotiations with legislative and executive leaders, resulting in a 1999 settlement that has so far

The genius of the reform effort that produced the new Louisiana system was that it proceeded on multiple tracks. Alongside the litigation strategy, there was constant work to educate the public at large and to persuade interested organizations that they each had a stake in the reform. Sustaining adequate funding will depend on sustaining the broad coalition that produced the new system. Nothing could be more detrimental to success than for any part of the reform community to believe they can achieve their goals outside the political process through judicial fiat. Rather, interested groups must maintain both their engagement on the issue and a united front. The Louisiana State Bar Association's sustained involvement with the issue is particularly important since it offers a neutral, profession-wide ground of support for reform, independent of any particular political fracture. The ongoing involvement of the LAPDA and LACDL defense organizations is not in question, but what is crucial is that they maintain their newfound unity and not return to the infighting that crippled earlier reform efforts.

That is not to say that litigation has no place at all in future efforts to ensure adequate funding and support. Clearly, both the *Citizen* decision and the court cases still ongoing at the time the legislature acted had a substantial impact. Advocates of reform were able to argue that the legislature had to act quickly before the courts imposed their own solution.¹⁹⁷ But this only emphasizes that judicial action will be most effective where such threats do not have to be followed through upon. In this respect, to the extent that the form of decisions matter at all, the path chosen by the Louisiana Supreme Court in *Peart* and *Citizen* seems as good or better than any of the proposed alternatives. The threat of stopping prosecutions was severe enough to focus attention, and the refusal to impose specific guidelines meant the political process was not prevented from making its own innovations or pushed into active resistance by a solution it could not accept.¹⁹⁸ Indeed, after a

provided sustained increased support for the state public defender system. CONN. DIV. OF PUB. DEFENDER SERVS., THIRTY YEARS IN REVIEW (2005), <http://www.ocpd.state.ct.us/Content/30years.htm>. The ACLU launched similar litigation in Montana, only to withdraw it in 2005 after the legislature passed a reform establishing a new state system. See the ACLU efforts discussed at Am. Civil Liberties Union: Criminal Justice: Right to Counsel, <http://www.aclu.org/crimjustice/indigent/index.html> (last visited Mar. 29, 2009).

197. Riley Interview, *supra* note 119.

198. If the court, for example, had imposed specific caseload limits, the legislature might have been deterred from mandating that the new state board come up with a new, more context driven set of limits.

careful review of the alternatives, the Massachusetts Supreme Judicial Court recently took the same approach of holding that prosecutions could be quashed, while at the same time refusing to order a specific solution in reaction to a pay crisis for assigned counsel.¹⁹⁹ The main limitation of this stance is that for it to be most effective, courts must exercise a delicate prudential judgment on the question of when to act.

B. Building Institutional Capacity and Exercising Authority over the Local Districts

Besides maintaining funding and political support, reform advocates will also have to pay close attention to the practical implementation of the new system. Indeed, the two broad issues are closely intertwined. Just as adequate state funding is crucial for the board's ability to push through reform in the local systems, the effective establishment and operation of the system is essential for reinforcing political support and the willingness to fund the system. A system that is laggard, inefficient, or conflict ridden in its administration will quickly lose legislative backing.

In this respect, there are two main dangers. First, the scale of the new board's workload in hiring and rulemaking, along with the extensive public hearing requirements in the bill, threaten to cause long delays in its effective operation. Second, the ambiguities in the statute on the borderline between local and state authority threaten to spark conflict as the new board tries to produce change.

In each of these areas, relatively small changes in the underlying statutory scheme could alleviate some of the problems. The new law mandates a long list of offices with fairly specific duties. It would be more convenient to give additional flexibility to the board on whom it must hire for what tasks. The law could specify required functions without making each and every one a required position. On rulemaking, the new board should be allowed whenever possible to simply enforce the rules crafted by the old LIDAB, rather than having to reenact through the same Louisiana Administrative Procedure Act rulemaking process that it has already gone through once.

In terms of local authority, one clear ambiguity is the power of supervision a service region office has over a local district that has not been regionalized. The statute gives overlapping and vaguely detailed lists of duties to each, particularly on budget issues. Some clarification of the statutory language could prevent protracted

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

disputes when and if regional offices are established. Also, the power of the board to terminate a local defender after a hearing is largely limited by the statute to instances of “willful” failure or refusal to conform to various standards.²⁰⁰ The “willful” language, if read literally, would prevent dismissals even in the case of severe incompetence so long as some good faith effort to comply is shown. This has the potential to hinder the board’s ability to improve services in severely underperforming local systems. The standard could be amended to clearly provide for incompetence-based terminations without giving the board the unbounded firing power the local defenders fear.

V. CONCLUSION

The new public defender system is a substantial achievement after such a long and tortured record of failed reforms in Louisiana indigent defense. It offers the first real hope in decades that indigent criminal defendants will receive effective representation. However, that same troubled history should prevent us from being complacent about the new system’s prospects. Ongoing political mobilization of support and concentrated work on the details of implementation are both essential to any lasting success.

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200. LA. REV. STAT. ANN. § 15:170 (Supp. 2009). By contrast, protected civil service employees can be terminated for “cause,” defined as any “conduct which impairs the efficient or orderly operation of the public service.” LA. CIV. SERV. RULES 12.2(b), 1.5.2.01 (2008).

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