LITIGATIVE APPROACHES TO ENFORCING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES

RICHARD J. WILSON

INTRODUCTION

The preceding brief history of defense services demonstrates that delivery of a constitutionally adequate criminal defense is a function of both the abilities of the individual defense counsel and the resources and structure of the defense system as a whole. Those resources and structure can render it impossible for even the most competent attorney to effectively defend her client. However, when analyzing the effectiveness of counsel, courts have historically focused almost entirely on the abilities of the individual attorney, without recognizing the constraining impact of systemic limitations.

Some individual lawyers have raised the issue of the effect of systemic inadequacies in the courts, usually in the context of the inadequacy of attorney fees.[1] This approach recognizes the key role which the judiciary can and must play in resolving issues which have been ignored by both the executive and legislative branches. Unfortunately, this strategy can also narrow the scope of issues to be considered. In addition, many courts are troubled or uncertain about the scope of their constitutional or discretionary powers in this area.

Nevertheless, this article argues that the litigator's instinct to seek judicial resolution of systemic inadequacies is sound. Such resolution can be achieved through remedial litigation which addresses the structural shortcomings of systemic limitations that hinder the delivery of defense services. This conclusion is supported by historically successful models of remedial litigation in such areas as prison conditions and voting rights, as well as the few cases which have already adopted this approach to effective delivery of defense services on a systemic basis.[2]

---

1. *See infra* notes 34-39 and accompanying text.

2. The approach suggested is certainly not the only possible direction which should be considered in advocating systemic reform. The judicial approach is simply the least explored and developed arena for resolution of the issue. In fact, I recognize and support efforts to view this problem outside of current constructs, and suggest that more radical restructuring of the system may be necessary. One study which explored alternatives to delivery of counsel in misdemeanor proceedings suggested a need, as yet not seriously considered, to substantially decriminalize morals and drug offenses, reform police power, intervene more strongly at the pretrial stage, use alternative models of adjudication, authorize use of alternative types of representation, and commit new resources to defense services. S. KRANTZ, J. HOFFMAN, P. FROYD, D. ROSSMAN & C. SMITH, THE RIGHT TO COUNSEL: THE IMPLEMENTATION OF *Argersinger v. Hamlin*, AN UNMET CHALLENGE (1974) (available from the Boston University Center for Criminal Justice). While these recommendations may be politically unpalatable, no serious reform of the courts will occur until they are openly and vigorously debated and resolved.

This article suggests responses to the articulated hesitancy of courts to approach issues on a systemic basis. The major focus of the article, however, is an attempt to encourage more remedial litigation by suggesting ways in which these suits can be structured and by discussing issues and problems which arise at some key stages of the litigation. This article, it is hoped, will bring the issue of systemic inadequacies out of the shadows of judicial decision making. Thus exposed, these defects will not survive explicit scrutiny.

I
A SYSTEMIC ANALYSIS OF THE RIGHT TO COUNSEL

Despite pervasive systemic flaws in defense systems, our jurisprudence has focused almost exclusively on the performance of the individual defense attorney, without reference to the system which brings the assigned lawyer and her client together. In the past several Terms, the Supreme Court has displayed its continuing interest in the role of individual, appointed counsel in criminal cases. In two cases decided in the 1984 Term, *United States v. Cronic*[3] and *Strickland v. Washington*,[4] the Court reviewed and approved the performance of appointed counsel in a federal criminal trial and a state capital trial, respectively. The cases enunciated criteria for a determination of ineffective performance by counsel,[5] and the allocation of the burden of proof in that determination.[6]

In each case, the Court reviewed the issue presented in the context of the representation of an individual defendant by an individual attorney. The Court has never reviewed a matter having to do with the delivery of defense services on any other terms. Instead, the Court has based its inquiry on the representation actually afforded to the defendant, without looking behind the individual attorney's performance to the system that provided that attorney.[7]

However, the constraints imposed by the defense system often have a sig-

3. 466 U.S. 648 (1984).

4. 466 U.S. 668 (1984).

5. *Id.* at 687.

6. *Id.* at 689-90, 691-96. In other recent cases, the Court has dealt with the scope of liability of appointed counsel for malpractice or other misdeeds, under civil remedies. These cases include Ferri v. Ackerman, 444 U.S. 193 (1979) (attorney appointed to represent defendant charged with federal crimes is not immune from civil malpractice claims); Polk County v. Dodson, 454 U.S. 312 (1981) (public defender does not act "under color of state law" for purposes of jurisdiction under 42 U.S.C. § 1983 when performing a lawyer's traditional functions as counsel to a defendant in state criminal proceedings); and Tower v. Glover, 467 U.S. 914 (1984) (public defenders do not have immunity under section 1983 when an allegation of intentional misconduct, by virtue of conspiratorial actions with state officials, is alleged). Finally, the Court has recently dealt with issues involving the scope of appointed appellate counsel's constitutional duties to raise every non-frivolous issue urged by the indigent client, Jones v. Barnes, 463 U.S. 745, (1983), and the extent to which a defendant is entitled to continuous representation by the initially assigned public defender, Morris v. Slappy, 461 U.S. 1 (1983).

7. The Court, in *Cronic* and *Strickland*, does acknowledge that "constructive" denials of the right to counsel may occur by "various kinds of state interference with counsel's assistance." *Strickland*, 466 U.S. at 692; *Cronic*, 466 U.S. at 658-60. This aspect of the decisions is discussed in the companion article by Professor Suzanne Mounts.

nificant impact on the representation provided in an individual case. For some time the courts have recognized the problems created by excessive caseloads[8] and "horizontal" representation.[9] Moreover, the system's approach to the appointment of separate counsel where there is a potential conflict of interest between codefendants has recently come under scrutiny.[10]

The first case to give full consideration to the systemic dynamic of the effective assistance of counsel was *State v. Smith*.[11] There, the Arizona Supreme Court reviewed an allegation of inadequate assistance of counsel at trial and found that, based on "quality of performance," the conduct of the appointed attorney was satisfactory.[12] On its own motion, however, the court reviewed the Mohave County system for providing counsel, which involved a competitively bid contract for providing defense services.[13] The court concluded that "the system for obtaining indigent defense counsel in Mohave County militates against adequate assistance of counsel for indigent defendants" and violated the defendant's right to counsel and due process of law.[14]

This opinion moved the analysis of the effectiveness of counsel in criminal cases into a new arena, by examining both the attorney's work and the systemic parameters in which that work is performed. It also added to a growing body of case law which demonstrates that the judiciary holds the key to guaranteed enforcement of the constitutional right to counsel, particularly when the legislative branch fails to exercise its fiscal authority. The filing of lawsuits

8. *See, e.g.*, Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978) (public defender delayed five and a half years in filing appellate brief because of a judgment error regarding his caseload which was 600-900 cases per year); Cooper v. Fitzharris, 551 F.2d 1162, 1163 n.1 (9th Cir. 1977), *modified*, 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979) (although counsel was aware of issues involved in admissibility of evidence, she did no legal research and made no objection to its introduction; at the time she was carrying a caseload of approximately 2,000 cases per year); People v. Johnson, 26 Cal. 3d 564, 606 P.2d 738, 162 Cal. Rptr. 431 (1980) (case continued 84 days beyond the statutory speedy trial limit because deputy public defender assigned to the case was unavailable due to trials on other cases).

9. The term "horizontal representation" refers to an arrangement wherein an attorney is assigned to a particular task or courtroom rather than to the case or the client. The result of this arrangement is that the defendant is represented by a different attorney at each stage of the proceedings. *See* Gilboy & Schmidt, *Replacing Lawyers: A Case Study of the Sequential Representation of Criminal Defendants*, 70 J. CRIM. L. & CRIMINOLOGY 1 (1979); *see also* United States *ex rel* Thomas v. Zelker, 332 F. Supp. 595 (S.D.N.Y. 1971) (defendant, who was charged with robbery, was represented by the Legal Aid Society; he was detained in custody for over six months during which time he was "represented" by a half dozen attorneys who conferred with him for approximately one hour; no attorney ever spoke with any of the witnesses whose names the defendant provided).

10. *See, e.g.*, People v. Mroczko, 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983); People v. Barboza, 29 Cal. 3d 374, 627 P.2d 188, 173 Cal. Rptr. 458 (1981) (both cases involved contract defense systems in which there was an economic disincentive to declaring a conflict of interest in multiple defendant cases).

11. 140 Ariz. 355, 681 P.2d 1374 (1984).

12. *Id.* at 359, 681 P.2d at 1378.

13. Competitive bidding for contracts is described in the co-authored introduction to this article, Mounts & Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 199-200 (1986) [hereinafter cited as *Joint Introduction*].

14. *Smith*, 140 Ariz. at 362, 681 P.2d at 1381.

which raise a full range of claims regarding the inadequacies of the system allows the courts to reach issues like those considered in *State v. Smith*.[15]

Unfortunately, judges are sometimes reluctant to consider systemic challenges which might result in the reform of defense systems. Two obstacles commonly invoked to justify this reluctance are the bars' *pro bono* obligation and the doctrine of separation of powers. Both of these obstacles can be overcome by thoughtful and persuasive advocacy.

A. The Pro Bono *Obligation*

Many courts refuse to recognize that the resources available to an appointed lawyer, primarily through fees, affect the quality of the work performed; this is thought to be offensive to professional ideals.[16] The noblest aspirations of the profession, as embodied in the *pro bono* obligation, are marshalled to compel attorney service.

A number of arguments, however, suggest that reliance on the *pro bono* obligation is not appropriate in this context. First, recent scholarship has cast some doubt on the historical roots of an enforceable mandatory *pro bono* obligation for the bar.[17] Second, a distinction should be drawn between the lawyer's duty where a constitutional requirement of compelled provision of counsel exists, and the lawyer's duty where the right is a matter of statutory or judicial discretion.

The Supreme Court has frequently held that an indigent defendant whose liberty is at stake must be provided with an attorney on request, unless this right is knowingly and intentionally waived.[18] Therefore, there is a consititutional mandate, apart from an attorney's *pro bono* obligation, that attorneys be provided in certain situations. Counsel who respond to this "draft" are, in essence, being compelled to serve; they are not choosing to represent such clients as a means of fulfilling their obligation to provide a percentage of their services for free. Therefore, even where a defendant has a constitutional right to counsel, it does not necessarily follow that an attorney has the obligation to accept *uncompensated* service; a judge's invocation of the *pro bono* obligation as a justification for such compulsory service confuses the litigant's right with the attorney's obligation. Courts can compel attorneys to serve; they cannot, however, determine which part of this service will be uncompensated.

Third, the Supreme Court has adopted a standard of performance by

15. *Id.* at 357, 681 P.2d at 1376.

16. *See, e.g.*, United States v. Dillon, 346 F.2d 633 (9th Cir. 1965); Sparks v. Parker, 368 So. 2d 528 (Ala. 1979).

17. Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 N.Y.U. L. REV. 735 (1980). Professor Shapiro's analysis of the contemporary *pro bono* obligation, however, makes no distinction between civil and criminal cases. As the text notes, an analysis of that obligation must be conducted on such a basis, due to the constitutional origins of the right to counsel in criminal cases.

18. Gideon v. Wainwright, 372 U.S. 335, 344 (1963); Von Moltke v. Gillies, 332 U.S. 708 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938).

criminal defense attorneys which requires "reasonably effective assistance" which is "within the range of competence demanded of attorneys in criminal cases."[19] The recognition that performance must be measured by the norms of practice of an increasingly complex specialty supports the notion that a *pro bono* obligation no longer exists in this area.[20] It is unfair to expect any practitioner to provide services, even occasionally, in this extremely complex area without compensation. It is no longer satisfactory to appoint any attorney whose often uncompensated performance merely exceeds a "farce and mockery" of justice.[21]

Fourth, despite the complexity of criminal practice, the Supreme Court has held that, unlike federal prosecutors and judges, appointed counsel in federal courts do not have absolute immunity from state malpractice suits.[22] If the attorney is to be conscripted into service, it is abhorrent to public policy to suggest that she should be saddled with the additional burden of insuring herself against the increased risk.

Finally, an attorney who shirks an ethical obligation may be subject to appropriate professional discipline. But the courts should not enforce the obligation on a selective basis by compelling a small segment of qualified attorneys to represent particular clients. While a court may exercise its appointment power, it should not compel the attorney to accept an appointment over her objection. A court must allow the attorney to make a good faith judgment of her personal skills and abilities. The attorney cannot and should not accept a client unless she concludes that:

1) She possesses "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation;"[23]

2) The representation will not be materially limited by "the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interest;"[24]

3) Representing the client is not likely to result in an unreasonable financial burden on the lawyer;[25] and

19. *Strickland*, 466 U.S. at 687 (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)).

20. As the court in State *ex rel.* Partain v. Oakley, 159 W. Va. 805, 227 S.E.2d 314 (1976), observed:

> Today, the defense lawyer in a criminal case is confronted with a myriad of fine points with which he must deal. The modern criminal lawyer must engage in complicated and detailed pre-trial discovery, analysis of involved issues of search and seizure, occasional scientific jury selection, elaborate rules relating to conspiracy, and in addition he must be conversant with the forensic sciences, medicine, psychiatry and other disciplines unrelated to the practice of law. Not only is the lawyer currently required to deal with these convoluted and diverse legal and non-legal matters but the prospects for additional intricacies in the future are almost inescapable.

21. Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 352 U.S. 889 (1945).

22. Ferri v. Ackerman, 444 U.S. 193 (1979).

23. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1983).

24. *Id.* at Rule 1.7(b).

25. *Id.* at Rule 6.2(b).

4) The lawyer/client relationship will not be impaired by personal repugnance of either the client or the cause.[26]

If the attorney's own assessment of these factors is to be second-guessed by the court, the attorney/client relationship is doomed. Attorneys must be free to make these judgments, subject only to disciplinary proceedings for failure to comply.

B. Separation of Powers Issues

There is significant division among the state and federal courts as to what effect the separation of powers theory has on the scope of judicial authority. Some courts maintain that they have no power to act to improve the quality of representation of the indigent without legislative authorization through statute or appropriation.[27] Other courts perceive this authority to be implicit in the court itself, stating that a court may "remove all obstructions to its successful and convenient operation."[28]

The litigator should explore the extent to which precedent may cause the chosen court to consider itself constrained by separation of powers doctrine. It may be helpful to review decisions in which the court's own operations are threatened or curtailed. By ordering, or declining to order, an expenditure of public funds in such circumstances, the court is revealing its view of how limiting the doctrine is. For example, one court declared that the power to determine reasonable compensation flows from the same source as the judicial power to ensure legal representation for indigent criminal defendants.[29] In such a jurisdiction, a separation of powers argument may overcome legislative limitations on fees or even appropriation levels.

Despite these judicial obstacles, certain suits mounting systemic challenges have been successful. For example, lawsuits challenging jail or prison conditions under the eighth amendment generally have been very successful.[30] The Bill of Rights, as well as parallel or more expansive provisions of state constitutions,[31] can provide a means for judges to exercise broad supervisory powers by active intervention or by the appointment of a master.[32] At times,

---

26. *Id.* at Rule 6.2(c).

27. *See, e.g.*, State *ex rel.* Wolff v. Ruddy, 617 S.W.2d 64, 65 (Mo. 1981) (en banc); State v. Ruiz, 269 Ark. 331, 334, 602 S.W.2d 625, 627 (1980).

28. Millholen v. Riley, 211 Cal. 29, 33-34, 293 P. 69, 71 (1930); *see* C. Safer, Attorney's Fees and Expenses in Criminal and Quasi-Criminal Matters: A Guide for Appointed Defense Counsel and Their Clients 9-16 (Sept. 15, 1984) (National Legal Aid and Defender Association draft) (on file at offices of New York University Review of Law & Social Change).

29. *See* Smith v. State, 118 N.H. 764, 769-70, 394 A.2d 834, 838-39 (1978).

30. *See, e.g.*, E. KOREN, J. BOSTON, E. ALEXANDER & D. MANVILLE, A PRIMER FOR JAIL LITIGATORS 1983 (American Civil Liberties Union Foundation, National Jail Project) [hereinafter cited as JAIL PRIMER]. *See generally* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION (1979).

31. *See infra* text accompanying notes 48-52.

32. Masters have been used in prison reform litigation, via FED. R. CIV. P. 53. *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265, 1389-90 (S.D. Tex. 1980), *aff'd in part, vacated in part,*

the strength of the factual allegations alone can be compelling enough to induce favorable settlements and consent decrees, circumventing the need for a full trial.[33]

Furthermore, case law on compensation for services by assigned counsel is replete with decisions which examine compensation claims for representing a single individual.[34] Several such cases have had dramatic impact, direct or indirect, on the structure and funding of state defense systems. For example, the New Jersey Supreme Court's 1966 decision in *State v. Rush*[35] led to a revamping of the New Jersey system and the creation of one of the strongest public advocacy departments in the country.[36] Similar restructuring followed decisions in Kentucky,[37] West Virginia,[38] and Iowa.[39] In each of these cases, the court discussed the system's deficiencies as they related to individual lawyer complaints and individual client representation. Thus, courts have demonstrated their willingness to reach beyond the facts before them to address systemic failures to provide counsel.[40]

The issues of systemic inadequacy could be put before the courts in a broader and more organized fashion. However, historical, legal, and political factors conspire to limit such presentations. Indifference or hostility to criminal practice and its constituents characterize the majority attitude of the private bar. For those who do take cases, it is simply easier to remove their names from the voluntary list for appointments than to mount a costly and time-consuming systemic challenge.

In defender offices, overwork in defense of individual criminal cases

---

modified in part, appeal dismissed in part, 679 F.2d 1115, 1159-63 (5th Cir. 1982), *amended in part, vacated in part, reh'g denied in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

33. In the State of Washington, for example, the Spokane County Public Defender Office filed suit in Federal Court under 42 U.S.C. § 1983, seeking an injunction to compel local judges to appoint private counsel until the caseload of the office could be reduced to manageable proportions. Alternatively, the suit sought an order to the county commissioners to adequately fund the Public Defender Office. Doe v. Spokane County, No. C-83-406-RJM (E.D. Wash. filed June 10, 1983). In one month, the office had received a settlement which included four new attorney positions, one investigator, one secretary/receptionist, and one office assistant, as well as new equipment. Letter from Richard L. Cease to Richard J. Wilson (July 12, 1983) (on file at the offices of New York University Review of Law & Social Change); *see also* BIP Litigation Files, *infra* note 44.

34. *See, e.g.*, People v. Johnson, 93 Ill. App. 3d 848, 417 N.E.2d 1062, *aff'd*, 87 Ill. 2d 98, 429 N.E.2d 497 (1981); Hulse v. Wifvat, 306 N.W.2d 707, 709-12 (Iowa 1981); State v. Boyken, 196 Mont. 122, 637 P.2d 1193 (1981).

35. 46 N.J. 399, 217 A.2d 441 (1966).

36. N.J. STAT. ANN. §§ 158A-1 to 25 (West 1967).

37. Bradshaw v. Ball, 487 S.W.2d 294 (Ky. Ct. App. 1972); K. REV. STAT. §§ 31.010 to .170 (1972).

38. State *ex rel.* Partain v. Oakley, 159 W. Va. 805, 227 S.E.2d 314 (1976); W. VA. CODE §§ 29-21-1 to 22 (West Supp. 1985).

39. Hulse v. Wifvat, 306 N.W.2d 707 (Iowa 1981); IOWA CODE ANN. § 602.11101(6) (West Supp. 1984).

40. *See, e.g., Oakley*, 159 W. Va. at 822, 227 S.E.2d at 323 (the court went so far as to mandate the state legislature to examine the issue and produce remedial legislation).

sometimes keeps the staff from seeing or challenging the systemic failures, which require extensive time and energy to adequately document and prove.[41] Fear of political recrimination and real or perceived legal limitations on resources may make the defender office reluctant to pursue such remedies.[42] Those with the technical skills to bring law reform suits usually are not found on defender staffs, which are trained in the defensive posture of criminal litigation, not in seeking civil remedies as a plaintiff.

This article is an attempt to alert attorneys interested in litigating systemic questions to some of the issues necessary to perform that work.[43] It is based on limited experience because, as noted above, relevant reported cases of the style or dimension proposed are rare. However, drawing from what exists[44] and from similar legal claims, these issues can be raised effectively.

II
FILING A SYSTEMIC LAWSUIT

A. Threshold Decisions

The choice of forum, jurisdiction, choice of parties, and remedy sought necessarily have a significant limiting impact on the facts which must be proved. Therefore, an analysis of those issues is offered prior to discussion of possible claims, fact-gathering to support them, and other necessary background preparation.

1. Choice of Forum

A suit raising claims regarding systemic inadequacies can be filed in either state or federal court.[45] The strongest factor determining choice of fo-

41. For this reason, defenders should consider enlisting the assistance of a third party organization with the resources and experience to undertake remedial litigation. Civil legal services programs are sometimes willing to help. The American Civil Liberties Union has also been available to assist. See, e.g., Gaines v. Manson, 194 Conn. 510, 481 A.2d 1084 (1984), in which the Connecticut Civil Liberties Union represented seven inmates in state habeas corpus proceedings, arguing that the Connecticut Public Defender's Office had unreasonably delayed the processing of their appeals. (The CCLU's participation is not acknowledged in the opinion, but appellant's counsel Martha Stone was a CCLU employee at the time.)

42. See, e.g., State v. Evans, 129 Ariz. 153, 629 P.2d 989 (1981) (Attorney General and County Attorneys sought to prohibit county public defenders from pursuing federal habeas corpus on behalf of clients under death sentences, arguing that such action exceeded statutory authority. On appeal, it was determined that the Attorney General and County Attorneys lacked standing to challenge representation in the consolidated cases.); Mounts, *Public Defender Programs, Professional Responsibility and Competent Representation*, 1982 WIS. L. REV. 474, 504-07.

43. Not all commentators agree that litigation is an effective means to address systemic deficiencies. *See, e.g.*, N. LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 16 (1982).

44. During the past two years, I have, assisted by funding from the American Bar Association's Bar Information Program of the Standing Committee on Legal Aid and Indigent Defendants, collected pleadings and opinions in several cases which raise systemic issues regarding defense systems. The collection includes nearly 20 cases and will be referred to hereinafter as BIP Litigation Files.

45. Extensive discussion of pendant claims issues, the law of which has been obscured by

rum should be where the broadest enforceable remedy can be obtained. Traditional wisdom has held that the federal forum is preferable because of its familiarity with federal constitutional issues and because of a perception that it is more hospitable to substantive and procedural claims.[46] Federal judges, in many instances, have been perceived to be more enlightened and "liberal" than state court jurists. Moreover, the Constitution ensures federal judges that an unpopular decision will not jeopardize their positions. Federal courts also have statutory authority to award attorney's fees to the prevailing party.[47]

This article and other recent literature[48] suggest that conventional wisdom may no longer be viable. Federal courts, guided by the Supreme Court, have eroded many of the fundamental concepts of sixth amendment construction and criminal procedure. This is nowhere better exemplified than in the *Cronic* and *Strickland* decisions, which inform this article.[49] State constitutional claims, raised and resolved solely on state grounds, may present a viable way to "bypass" the risk of the federal courts entirely.[50] This does not mean that federal court should not be used, but only that caution should be exercised in the choice of forum.

On the other hand, a state forum should be avoided if it:

1. imposes burdensome pleading requirements;
2. applies an unfairly short statute of limitations;
3. refuses to acknowledge the importance of class actions;
4. fails to afford broad discovery;
5. imposes archaic notions of immunity, especially executive immunity;
6. applies technical evidentiary rules in civil cases; and
7. fails to provide for an award of attorney's fees in appropriate circumstances.[51]

The litigant, when comparing state and federal venues, should also consider which judge will be presiding. Issues relevant to this evaluation include not only a concern for human rights and "liberalism," but also the ability to

---

recent Supreme Court decisions such as Pennhurst State School and Hosp. v. Halderman, 465 U.S. 89 (1984), will not be conducted here, because of the detail required. For an excellent discussion of pendant jurisdiction in the jail litigation context, see Jail Primer, *supra* note 30, at 16-27.

46. *See, e.g.*, JAIL PRIMER, *supra* note 30, at 16.

47. Relevant provisions for recovery of attorney's fees are found at 28 U.S.C.A. § 2412(b) (West Supp. 1985) and 42 U.S.C. § 1988 (1982).

48. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Williams, *Equality and State Constitutional Law*, and Bamberger, *Methodology for Raising State Constitutional Issues*, in RECENT DEVELOPMENTS IN STATE CONSTITITUTIONAL LAW 69 & 289 (Practicing Law Institute, 1985); Steinglass, *Lawyers Looking to State Courts to Litigate Federal Sec. 1983 Cases*, Nat'l. L.J., Feb. 18, 1985, at 42, col. 1.

49. *See supra* text accompanying notes 3–4.

50. *See supra* note 48.

51. Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725, 736 (1981).

firmly enforce orders.[52]

2. Jurisdiction

In federal court, the right to sue arises under either the writ of habeas corpus[53] or the Civil Rights Act provisions[54] (hereinafter "section 1983"). The primary obstacle to basing jurisdiction on habeas corpus is the development of burdensome and confusing doctrine regarding exhaustion of state remedies.[55] On the other hand, section 1983 provides some valuable precedent and may be a more viable option.

For example, although the Supreme Court held in *Polk County v. Dodson*[56] that a county public defender does not act "under color of state law" for purposes of section 1983 jurisdiction "when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding,"[57] it cautioned that:

> [W]e do not suggest that a public defender never acts in that role. In *Branti v. Finkle*, 445 U.S. 507 (1980), for example, we found that a public defender so acted when making hiring and firing decisions on behalf of the State. It may be—although the question is not present in this case—that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions.[58]

Therefore, whether a public defender is subject to section 1983 liability for the misfeasance of some systemic function, such as the failure to hire investigators or support staff, or to provide adequate library resources or other investigative tools, is an unresolved question. More important, however, is the section 1983 liability of the office (not the individual), or the governmental entity which finances the defender system.

Wallace v. Kern[59] demonstrates that a well-documented claim under section 1983 can reach systemic issues and result in broad relief. In *Wallace*, a class action[60] was brought on behalf of detainees at the Brooklyn House of

52. JAIL PRIMER, *supra* note 30, at 19.

53. 28 U.S.C. §§ 2254-55 (1982).

54. 42 U.S.C. § 1983 (1982). *See generally* 2, 3 J. COOK & J. SOBIESKI, CIVIL RIGHTS ACTIONS (1985).

55. *Compare* Rose v. Lundy, 455 U.S. 509 (1982) (habeas corpus petition must be dismissed for failure to exhaust state remedies) *with* Fay v. Noia, 372 U.S. 391 (1963) (federal courts have the power to grant relief despite the applicant's previous failure to pursue a state remedy unavailable to him at time of application).

56. 454 U.S. 312 (1981).

57. *Id.* at 325 (footnote omitted).

58. *Id.* at 324-25.

59. 392 F. Supp. 834 (E.D.N.Y.), *rev'd*, 481 F.2d 621 (2d Cir. 1973). The action is described in the opinion of the district court only as a "civil rights action," 392 F. Supp. at 835, but pleadings specifically identify the grounds in 42 U.S.C. § 1983. Second Amended Complaint, Wallace v. Kern, No. 72-C-898 (E.D.N.Y. Jan. 1973).

60. The scope of this article does not permit discussion of the use of class actions as a procedural vehicle in pursuing systemic relief. Most class action statutes or rules borrow from

Detention for Men against the State and City of New York and the Legal Aid Society. The court held that the Legal Aid attorneys were so overburdened that the plaintiffs were being denied effective assistance of counsel; it issued a preliminary injunction against the Legal Aid Society restricting the caseload of its attorneys.[61] The court stated that:

> Comparing the level of representation now provided by the Legal Aid Society with the American Bar Association Standards, it becomes evident that the overburdened, fragmented system used by Legal Aid does not measure up to the constitutionally required level. The overburdening of its attorneys is not the fault of the Legal Aid Society, and it may not prevent adequate representation being given in cases that are actually tried. It is important, however, that criminal defendants have the appearance of justice as well as having a coincidental right result in the end.[62]

Although *Kern* was reversed on appeal,[63] the primary ground of reversal was a jurisdictional failure under section 1983, in that the Legal Aid Society, as a private, not-for-profit corporation, did not act under color of state law.[64] *Kern* is still sound authority for public agency liability. As such, it suggests several approaches for gaining jurisdiction under section 1983.

First, the vast majority of public defender offices are public agencies, usually part of county or state government, and are thereby clearly within the ambit of "state action" requirements. Second, the defender office, whether public or private, need not be joined as a party defendant. This eliminates the issue of office liability entirely, and leaves responsibility where it more appropriately lies—with the funding authority or the judiciary.[65]

In fact, the defender office may be the party bringing the suit on behalf of named plaintiffs. For example, one public defender office successfully brought a class action against Spokane County, Washington, under section 1983, alleg-

---

the requirements of Federal Rule of Civil Procedure 23. A good synopsis of the requirements is found in Bamberger, *Considerations in Making a Choice of Forum*, in RECENT DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 324-31 (Practicing Law Institute, 1985).

61. 392 F. Supp at 847, 849.

62. *Id.* at 847.

63. Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974).

64. 481 F.2d at 622. The continuing validity of the position that a private, not-for-profit corporation, which receives all of its funds from the government, can insulate itself from civil rights liability by virtue of its private nature is questionable. This is particularly so in light of the movement toward privatization of correctional services, which seems, at least in part, to be explicitly designed to avoid such liability. *See* Lauter, *The Plunge into 'Private Justice,'* Nat'l. L.J., Mar. 11, 1985, at 21-23, col. 1.

65. Choice of party defendants can be important in a section 1983 suit. The BIP Litigation Project, *supra* note 44, identifies some properly chosen defendants. *See, e.g.*, Complaint-Class Action, Lillard v. Stewart, (N.D. Ga. 1980) (defendants include the county sheriff, several local judges, and the county commissioner, both individually and in their official capacities, as well as the county clerk); Second Amended and Supplemental Complaint, Welcher v. Heller, No. 78-CV-500 (N.D.N.Y. Oct. 12, 1978) (defendants include the administrator of an assigned counsel plan, a municipal judge, and the county).

ing that the office was unable to provide effective assistance because of inadequate funding.[66] Thus, section 1983 is a viable means of obtaining federal court jurisdiction.[67]

In state court, jurisdiction can be invoked under the writs of mandamus or prohibition, or through the general supervisory powers of the highest reviewing court.[68] The previously mentioned habeas corpus[69] and section 1983 jurisdiction is normally available in state court as well.[70]

No good examples of state-based mandamus exist in this area. However, one analogous case in federal mandamus is *Family Division Trial Laywers of the Superior Court—DC, Inc. v. Moultrie.*[71] Here, a group of trial lawyers who had been regularly appointed to represent parents in neglect proceedings challenged the practice of providing such service without compensation. The D.C. Superior Court had informed the attorneys that they would not be appointed in compensated juvenile cases unless they agreed to represent indigent parents in neglect proceedings without compensation. The mandamus writ sought to compel adequate compensation for services, and further sought damages and injunctive relief from unconstitutional "involuntary servitude" and "taking" of property without just compensation under the thirteenth and fifth amendments, respectively. The district court granted summary judgment to the defendants, holding that the *pro bono* requirement did not constitute a "taking" of the lawyers' property without just compensation under the fifth amendment. The reviewing court reversed, finding that "if the superior court appointment system effectively denies the appellants the opportunity to maintain a remunerative practice as family lawyers before the Family Division, and that specialty is determined to be a 'property' interest practice it might effect an unconstitutional 'taking.' "[72]

The superintending jurisdiction of a state supreme court was invoked in Michigan in 1981. There, appointed lawyers working in the criminal trial courts of Detroit, called Recorder's Courts, had not received an increase in compensation rates since 1967, although the cost of living in the area had tripled. After unsuccessfully attempting to negotiate an agreement with local

66. Doe v. Spokane County, No. C-83-406-RJM (E.D. Wash. filed June 10, 1983). The suit was later settled.

67. *But see* Gardner v. Luckey, 500 F.2d 712, 715 (5th Cir. 1974), *cert. denied*, 423 U.S. 841 (1975) (plaintiffs, in-custody clients of the Florida Public Defender system, had no case or controversy in federal court when no injury is asserted and they can challenge their custody in state court through habeas corpus).

68. Superintending control is expressly granted to superior courts over inferior tribunals in many states, either by constitutional or statutory grant. *See* 20 AM. JUR. 2D *Courts* §§ 111-117 (1965).

69. *E.g.*, Gaines v. Manson, 194 Conn. 510, 481 A.2d 1084 (1984).

70. Steinglass, *supra* note 48; see Steinglass, *The Emerging State Court Sec. 1983 Action: A Procedural Review*, 38 U. MIAMI L. REV. 381 (1984) for a detailed examination of state court section 1983 litigation.

71. 725 F.2d 695 (D.C. Cir. 1984) [hereinafter cited as *Family Division*]. This suit uses the federal provisions for mandamus under 28 U.S.C. § 1361. State grounds are no different.

72. *Id.* at 706.

authorities, a large group of bar associations filed an original action in the Michigan Supreme Court against the various Chief Judges of the Recorder's Court. The action sought exercise of the state high court's superintending powers over lower courts to review the fee schedule, and to order the implementation of a "revised and reasonable schedule of fees."[73] Multiple constitutional claims were raised. After some negotiation between local judges and Wayne County officials, the complaint was dismissed without prejudice in August 1982, and a settlement doubled the previous fees.[74]

3. Choice of Parties

Choice of parties should be determined by the facts and circumstances of the individual case.[75] One option is to use individual plaintiffs who only represent the client community; another is to name a number of individual and organizational plaintiffs, representing several constituencies, to demonstrate the range of support for the litigation. Defendants should be carefully chosen as well. Those individuals or entities necessary to obtain the desired jurisdiction must be included, as well as those defendants necessary to attain the relief sought.

Claims can be filed on behalf of a class of plaintiffs and against a class of defendants. Close attention, however, must be given to the procedural requirements for class certification.[76] In addition, some attention should be given to the issues of abstention which are implicit in the inclusion of state pretrial detainees as plaintiffs in federal court.

4. Remedies

Remedies range from simple declaratory relief to broad injunctive remedies and the award of actual or punitive damages. When seeking the latter types of relief in federal court, remember that the strong notions of federalism and comity underlying the complex doctrines of abstention may present insurmountable procedural obstacles if the complaintant seeks to interfere with ongoing state criminal prosecutions.[77] However, many federal court complaints are filed seeking injunctive relief; some of them have withstood objections based on abstention grounds.[78]

At times, declaratory relief may be all that is necessary to accomplish reform of the system. For example, in *People ex rel. Partain v. Oakley*, the

73. Complaint for Writ of Superintending Control to the Chief Judge of the Wayne County Circuit Court and to the Chief Judge of the Recorder's Court for the City of Detroit, Detroit Bar Association v. Chief Judge of the Third Judicial Circuit, No. 70647, at 7 (Mich. 1981).

74. *Compromise Reached in Wayne County Attorney Fee Crisis*, 6 CRIMINAL DEFENSE NEWSLETTER, No. 7, at 10 (State Appellate Defender of Michigan, June 1983).

75. Curiously, standing to assert claims has not been an issue which has been raised or settled in any of the cases included in the BIP Litigation files, *supra* note 44.

76. *See* Bamberger, *supra* note 60.

77. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971).

78. *See, e.g., Family Division*, 725 F.2d at 700-04.

court's exercise of supervisory authority led to prompt legislative action in West Virginia.[79]

B. Constitutional Claims

As noted above,[80] a litigant should seriously consider selecting state-based constitutional claims, perhaps to the exclusion of federal claims. Creative claims using distinct provisions of state constitutions may provide both a vehicle for relief and a way to avoid the risk of a favorable ruling being overturned in the federal forum.

It is also possible to raise state and federal claims simultaneously, although this carries with it the same risks inherent in raising federal claims alone.[81] The emphasis on federal grounds in this section arises not so much from an endorsement *of* them as from historical reliance *on* them. In all cases, the attorney should refer to parallel or additional state constitutional provisions. These provisions may be inherently stronger, or may have been rendered so by virtue of judicial interpretation.[82]

The sixth amendment claim that the defendant is being denied effective assistance of counsel is the most frequently invoked federal constitutional provision in suits challenging the adequacy of defense systems. However, this ground has not been as successful as it could be. It is frequently responded to by arguments based on the *pro bono* obligation.[83] The court may also apply an erroneous standard for evaluating the adequacy of counsel. The standard used to review the defendant's prospective right to counsel in future criminal proceedings should be stricter than the standard used to review counsel's performance in a past proceeding, since the court need not second-guess the counsel's motives. The prospective standard should be one of reasonableness, as measured in the local community.

Claims can also be based on the equal protection provisions of the federal Constitution.[84] These claims are most effective when appointed attorneys, as opposed to defendants, are the plaintiff class. The court in *Mowrer v. Superior Court*[85] held that compelling lawyers to provide representation without compensation "seeks to charge the cost of operation of a state function conducted for the benefit of the public to a particular class."[86]

---

79. *See supra* note 38 & 40 and accompanying text.

80. *See supra* note 48 and accompanying text.

81. Recent case law suggests that a state court's failure to specify whether it is relying exclusively on independent state grounds, when both state and federal grounds exists, will result in a presumption that the court relied on the federal ground. Michigan v. Long, 463 U.S. 1032 (1983).

82. No statutory claims are covered in this article. Careful preparation of a systemic lawsuit requires knowledge of statutory and rule-based claims, as well as those claims raised by state constitutions.

83. *See supra* notes 16-26 and accompanying text.

84. U.S. CONST. amends. V and XIV.

85. 201 Cal. Rptr. 893 (Cal. App. 1984).

86. *Id.* at 896; *see also* Safer, *supra* note 28, at 24-25.

Another frequent claim is that of involuntary servitude under the thirteenth amendment.[87] This claim is seldom successful because of the assumption that the attorney's service on a panel is entirely voluntary, and that the attorney can remove her name from the list at any time.[88] Moreover, this claim was recently rejected even where participation as assigned counsel was deemed mandatory.[89]

The most promising federal constitutional claim is that of a taking of the attorney's property without just compensation under the fifth amendment.[90] The leading case to the contrary, *United States v. Dillon*,[91] was decided in 1965, only two years after *Gideon v. Wainwright*.[92] The reality of the demands of contemporary appointed criminal practice appears to be gaining ground on the outdated *pro bono* notions espoused in *Dillon*.[93]

Furthermore, the roots of federal just compensation doctrine are well established under state holdings which long antedate *Dillon*. For example, as early as 1854, the Indiana Supreme Court rejected the notion that counsel could constitutionally be compelled to serve without just compensation;[94] Wisconsin adopted this view only seven years later.[95]

A quick review of the aforementioned constitutional grounds reveals a telling fact about the judicial conscience. Claims which concern the rights of the defendant—the right to counsel, due process or equal protection—are significantly less successful than claims which concern the rights of attorneys, such as the taking of property without just compensation. Nonetheless, while the litigant should employ the most persuasive claims, she should remember that the litigation is being conducted to improve the indigent's access to counsel. Thus, claims which concern the rights of defendants should be raised to underscore the fact that the litigant is not just looking for another way to line the pockets of lawyers.

C. Preparation and Proof

The district court's opinion in *Wallace v. Kern*,[96] is a roadmap of a well-documented factual claim. It is an excellent model for those who seek a way to present facts to prove that a defense system has failed to meet its mandate. The district court noted that the witnesses in the proceedings included law-

87. U.S. CONST. amend. XIII.

88. *See, e.g., Family Division*, 725 F.2d at 704-05.

89. *See, e.g., Ruddy*, 617 S.W.2d at 66; Wood v. Superior Court, 690 P.2d 1225, 1231 (Alaska 1984).

90. U.S. CONST. amend. V.

91. 346 F.2d 633 (9th Cir. 1965).

92. 372 U.S. 345 (1963).

93. *See, e.g., Family Division*, 725 F.2d at 705-09; *see also Wood*, 690 P.2d at 1230-31; Note, *Appointed Pro Bono Defense: Involuntary Servitude and/or An Unconstitutional Deprivation of Property?*, 50 UMKC L. REV. 206, 216-17 (1982).

94. Webb v. Baird, 6 Ind. 13 (1854).

95. County of Dane v. Smith, 13 Wis. 654 (1861).

96. *See supra* notes 59-64 and accompanying text.

yers, supervisors, and administrators from the Legal Aid Society, as well as incarcerated clients. Private counsel testified as to the differences between their practices and those of Legal Aid. Budgetary documents were entered into evidence, and inter-office memoranda describing procedures were introduced. Lawyers from the assigned counsel component of the system also testified. Three studies of legal representation in the city were made part of the record. A historic account of prior steps to deal with constitutional shortcomings of the system was also offered.[97]

The standard against which the alleged inadequacies of a system is measured is one of the most difficult areas involved in proving a claim. In remedial litigation it is difficult to develop an objective measure of such lawyering traits as zeal, technical competence, or tactical judgment. Some have suggested that this difficulty requires the adoption of minimum performance criteria for the defense attorney.[98] It must be remembered, however, that an attack on a system for defense services is not constrained by an examination of actual performance, but can be expanded to include the character of the system itself.

Several bodies of national standards for the adequate provision of defense services are available.[99] Many states have also begun to adopt specific standards governing the delivery of services, such as experiential requirements for those who accept appointments.[100] These standards and guidelines provide an invaluable norm against which the existing system can be measured.

Moreover, comparative norms are also useful tools in proof. As mentioned above, the performance of the private defense attorney provides a standard against which to measure both the performance and the resources available to the publicly funded defense attorney.[101] The local prosecutor's office also provides a standard against which to compare the extent of staffing, resources, and overall funding. Such a comparison usually reveals a gap between the resources available to the prosecutors and those available to the

97. *Kern*, 392 F. Supp. at 835-44.

98. *See, e.g.*, Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181 (1984); Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983); Lewis, *Toward Competent Counsel*, 13 RUTGERS L.J. 227 (1982).

99. GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (NLADA 1976); GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES (NLADA 1984); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS Ch. 13 (1973); STANDARDS FOR CRIMINAL JUSTICE Ch. 5, Providing Defense Services (1980); STANDARDS FOR DEFENDER SERVICES (NLADA 1976). The New York State Defenders Association, Inc., has combined these standards, as well as other criminal justice standards, into a document called THE MODEL PUBLIC DEFENSE SYSTEM (Nov. 1984).

100. *See, e.g.*, Administrative Order 1981-7, 412 Mich. lxv (1981) (this order promulgates regulations for the administrative system and performance of counsel in appointed criminal appellate cases); BASIC QUALIFICATIONS FOR INDIGENT REPRESENTATION (Georgia Indigent Defense Council 1984); OHIO PUBLIC DEFENDER COMM. ADMINISTRATIVE REGULATION 210-1-10 (Nov. 1984) (experiential criteria for death penalty and other felony representation); STANDARDS FOR PUBLIC DEFENSE SERVICES (Washington Defender Association 1984).

101. *See also How Firms Bill*, Nat'l. L.J., Feb. 27, 1984 (Special Section).

defender system, even when prosecutorial services are appropriately "discounted" for civil work and that portion of the criminal caseload handled by privately retained counsel. Comparative data can also be offered regarding the resources available to those attorneys working for the government in civil contractual matters.[102]

CONCLUSION

Is remedial litigation inevitable? If history is any teacher, the answer to this question must be emphatically affirmative. The crisis in resources available for representation of the indigent accused promises to continue unabated, despite overall declines in the national crime rate. The resulting strain on the defense system, the lawyers, and their clients continues every day in virtually every jurisdiction in the country. Lawyers have begun to vocally refuse to take appointments in criminal cases when inadequate resources are provided and have occasionally walked out or "gone on strike," either through collective bargaining or on a "wildcat" basis.[103] Until quite recently, these actions would have been considered professionally unbecoming and unethical, if not suicidal.

Despite this strain, public hostility to "criminals," and to lawyers in general, results in constant pressure on government officials to keep expenditures down. As a result, more and more advocates are turning to the courts as a means of effecting changes in, and rectifying structural defects of, defense systems. Such remedial litigation is possible; indeed, the number of remedial suits which raise the issues of systemic inadequacies in a broad and organized fashion has been on the rise in the past few years. Precedent for systemic challenges can be found in litigation challenging prison conditions and in suits brought by assigned defense counsel contesting the amount of compensation granted for representing individual defendants. Judicial obstacles to hearing such cases, frequently based on the attorney's *pro bono* obligation or separation of powers theory, can be overcome by persuasive advocacy. A case such as *Wallace v. Kern*[104] serves as a road map for a well-documented claim that a defense system, due to systemic inadequacies, is failing to meet its mandate to provide effective assistance of counsel. As the crisis in resources allocated to defense system continues, defense counsel and their clients may have no other remedy than to turn to the courts for orderly resolution of the tension between

102. *See, e.g.*, Detroit Bar Association, et al. v. Chief Judge, Memorandum of Law: Statutory and Constitutional Arguments in Support of Reasonable Compensation of Assigned Counsel (State Appellate Defender Office of Michigan, Nov. 4, 1980); E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981); Lauter, *U.S. Paid $50 Million to Private Firms*, Nat'l. L.J., Feb. 4, 1985, at 1, col. 2.

103. A strike by the unionized Legal Aid Society of New York City is described in Wilson, *Empty-Handed Justice*, 22 JUDGE'S JOURNAL 20 (Winter 1983). The "wildcat" strike of the D.C. Superior Court Trial Lawyers Association is described in *Joint Introduction*, *supra* note 13, at 194 n.4.

104. *See supra* notes 59-64 and accompanying text.

society's requirement that effective counsel appear for the accused, and its refusal to devote the necessary resources to enforce that mandate.