

# THE RIGHT TO COUNSEL IN THE STATE OF NEW YORK: HOW REFORM WAS ACHIEVED AFTER DECADES OF FAILURE

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## INTRODUCTION

New York has endured a long, tortured journey since *Gideon v. Wainwright* held that the Sixth Amendment guarantees a right to counsel to criminal defendants facing serious charges and the loss of liberty in state court. Only now, fifty-four years later, does New York appear to be on the brink of true statewide reform. A fateful mistake was made in 1965 with creation of a statutory scheme calling upon each of the state's counties to create its own system for criminal defense representation.<sup>1</sup> With no state funding or standards, this approach resulted in a system in which the quality of representation is largely dependent on the wealth of the counties.<sup>2</sup> To be sure, there have been many calls for reform over the years from many sources, including bar associations, the court system, and others. Studies were done, conferences were held, recommendations were made, and they all helped fuel the improvements now being seen.

A critical catalyst for change was a lawsuit brought against the state and five counties on behalf of named criminal defendants denied the right to counsel by a flawed system. When the state's high court held that the lawsuit could go forward, the legislature responded by creating the State Office of Indigent Legal Services (ILS).<sup>3</sup> The new agency was empowered to make efforts to improve the quality of representation but not to deliver services.<sup>4</sup> Staffing and funding were modest at first. However, settlement of the lawsuit against the state and five counties led to recent legislation at last requiring the state to take responsibility for fulfilling the promise of *Gideon*. This Article describes New York's journey—from the original sin of the 1965 law to the 2017 legislation fueling true statewide reform—and ends with reflections meant to spur and contribute to a national discussion regarding how we are complying with *Gideon* and how each

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1. N.Y. COUNTY LAW § 722 (McKinney 1965).

2. Andrew Lucas Blaize Davies & Alissa Pollitz Worden, *Local Governance and Redistributive Policy: Explaining Local Funding for Public Defense*, 51 LAW & SOC'Y REV. 313, 329 (2017) (“[New York’s] highest tax-generating county spends about \$100 more per case than the county with the lowest tax revenues per capita. The county with the most economically disadvantaged population spends about \$80 less per case than the least challenged county.”).

3. N.Y. EXEC. LAW § 832 (McKinney 2010).

4. *Id.*

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state can find the key to unlocking the answer to public defense reform.

## I. DECADES OF FAILURE, DESPITE NOBLE EFFORTS

### A. “You do understand that this is impossible, don’t you?”

I heard this stark admonishment in June 2011, three months after my arrival in Albany as the first Director of ILS. I had convened a meeting with providers of legally mandated representation in New York. The cautionary words came from Steve Pechenik, whose own dual responsibilities illustrate the kinds of structural defects that are present in New York’s public defense system. As County Attorney for Rensselaer County, Pechenik prosecuted allegations of parental abuse and neglect in the Family Court. At the same time, as Administrator of that county’s Assigned Counsel Program, he was responsible for providing representation to some of the parents charged with abuse and neglect. His warning was warranted. After all, as explained below, New York had chosen in 1965 to delegate to its counties the responsibility of providing representation to adults charged with a crime who cannot afford to retain counsel.<sup>5</sup>

In the 1970s, the state’s obligation to provide representation for those unable to afford counsel was extended to include litigants in certain family-related matters.<sup>6</sup> By 2011, New York’s legally mandated representation was furnished by more than 150 entities, including at least one and often several different providers of mandated representation in each of the fifty-seven counties outside of New York City (“upstate counties”), and by fifteen programs at the trial and appellate levels within the city itself.

In addition to having a plethora of defender programs, New York clings to a remarkably fragmented and balkanized criminal court system. There is a statewide system of Family Courts, with one or two centralized locations in each upstate county.<sup>7</sup> However, the bulk of upstate criminal prosecutions begin and end in one of the state’s more than 1,200 Town and Village Courts (also known as “Justice Courts”).<sup>8</sup> These courts are presided over by nearly 2,200 magistrates, most of whom are not lawyers.<sup>9</sup>

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5. COUNTY LAW § 722.

6. N.Y. FAM. CT. ACT §§ 261-62 (McKinney 1975); N.Y. Surr. Ct. Proc. Act Law § 407 (McKinney 1977); *see generally In re Ella B.*, 30 N.Y.2d 352 (1972).

7. N.Y. FAM. CT. ACT § 113 (McKinney 1962).

8. William Glaberson, *In Tiny Courts of N.Y., Abuses of Law and Power*, N.Y. TIMES (Sept. 25, 2006), <http://www.nytimes.com/2006/09/25/nyregion/25courts.html?mcubz=3> [<https://perma.cc/T4RK-8UEM>].

9. *Introduction*, NYCOURTS.GOV [www.nycourts.gov/courts/townandvillage/introduction.shtml](http://www.nycourts.gov/courts/townandvillage/introduction.shtml) [<https://perma.cc/5VKD-3HEM>] (last visited Jan. 19, 2018); *see also* SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE’S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES, FINAL REP. iv (2006), *available at* <https://www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf> [<https://perma.cc/9A39-S3NL>].

This Article focuses on adult criminal defense, a realm which accounts for about seventy-five percent of clients for whom ILS has the responsibility to improve the quality of representation. Our efforts to improve the quality of representation of parents in Family Court, which accounts for the remainder of our agency responsibilities, have yet to result in statewide reform. However, in 2017, we issued a Request for Proposals (RFP) for a Model Upstate Parental Representation Office and received proposals from ten counties which are now under review.<sup>10</sup> As for public criminal defense failure and reform in New York, let us begin at the beginning.

### *B. New York's Original Sin (1965)*

*People v. Witek*,<sup>11</sup> involved the arrest of three young men, all under age twenty-one, as they were stealing apples from an orchard in Rockland County.<sup>12</sup> The total value of the nocturnal heist was “about \$2.”<sup>13</sup> Charged with petit larceny and brought to the local court after midnight for arraignment, the unrepresented defendants pleaded guilty and were sentenced to fifty-five days in jail.<sup>14</sup> County Court promptly ruled that the sentences were excessive, and the men were released after serving seven days.<sup>15</sup>

Upon appeal to New York's highest court, the failure of the local magistrate to advise defendants of their right to appointed counsel was held to be fundamental error.<sup>16</sup> This finding was consistent with *Gideon v. Wainwright*,<sup>17</sup> and anticipated *Argersinger v. Hamlin*.<sup>18</sup> Henceforth, said the *Witek* Court, “defendants must be informed as to the availability of assigned counsel.”<sup>19</sup>

*Witek* was decided by a four-judge majority.<sup>20</sup> The three dissenting judges warned that “[i]n many rural towns in the Third and Fourth Departments [which comprise the bulk of the land area in the state,] there are no resident lawyers and in many there are no lawyers who practice in the local courts of the town.”<sup>21</sup> They advised: “A change of this kind in the processes of the criminal law would be unworkable without extensive implementation which, in turn, ought to be in the

10. For a useful overview of the status of parental representation in New York and nationally, please see generally Angela Olivia Burton, *Reimagining Family Defense: Introduction*, 20 CUNY L. REV. 1 (2016).

11. 15 N.Y.2d 392 (1965).

12. *Id.* at 394.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 397-98.

17. 372 U.S. 335 (1963).

18. 407 U.S. 25 (1972) (accused cannot be subjected to imprisonment unless provided with counsel).

19. *Witek*, 15 N.Y.2d at 395.

20. *Id.* at 398-99.

21. *Id.* at 399.

form of statutory enactment, and perhaps also be accompanied by an appropriation of public money.”<sup>22</sup>

The *Witenski* case, which was correctly decided, is not New York’s original sin concerning the right to counsel in criminal cases. That dishonor belongs to County Law Article 18-B, enacted two months later in July 1965.<sup>23</sup> By that time, implementation of *Gideon* had taken almost as many shapes as there were states.<sup>24</sup> New York opted not to place upon the state the responsibility for providing counsel.<sup>25</sup> Instead, each county and New York City were required to establish and fund their own system for providing criminal defense representation.<sup>26</sup> A county could create a public defender office; contract with a legal aid society; use private lawyers pursuant to a bar association plan; or have a combination of any of the three.<sup>27</sup>

What they could not have was state funding, guidance, uniform standards, caseload limits, support, or resources. Each was left to its own devices and disparate fiscal capacity. There was a failure to recognize that effective lawyering is expensive and to see that structurally you must have a single statewide entity if you are serious about providing consistently high-quality representation throughout the state. New York’s county-based system was a recipe for inconsistency, inequity, and failure. The result was portrayed in a devastating 2006 assessment of the statute:

[The law] created no mechanism or standards for ensuring the quality of defense representation and did not prevent the quality of services provided from being directly dependent upon the wealth of a particular county. The unfortunate result of the law . . . is an ill-funded, fractured system of indigent defense. Although a number of organizations set out to study and change elements of this struggling system over the years . . . the counties’ provision of mandated legal services has largely been left to operate without any meaningful oversight through the county law or any other means.<sup>28</sup>

### *C. Good Intentions Gone Awry (1965-2001)*

From its inception in 1965 when County Law Article 18-B was signed into law by Governor Rockefeller, the right to counsel in New York was mired in dysfunction. A watershed moment for reform occurred on July 9, 2001 when three of the framers of Article 18-B – Governor Rockefeller’s former counsel,

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22. *Id.* at 398.

23. N.Y. COUNTY LAW § 722 (McKinney 1965).

24. *See generally* LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS. VOLUME 1: NATIONAL REPORT (1965).

25. SPANGENBERG GROUP, *supra* note 9, at 23.

26. *Id.*

27. *Id.*

28. *Id.*

Michael Whiteman, former Senator Warren Anderson, and former Assembly member Richard Bartlett – issued a letter to Governor Pataki with draft legislation calling for the creation of the Committee for an Independent Public Defense Commission.<sup>29</sup> In a press release accompanying their letter, entitled *Framers of State's Public Defense System Call for Overhaul*, the three contrasted their high hopes for the 1965 law with the reality that, in 2001, “we have an outdated system on the verge of collapse.”<sup>30</sup> They proposed an independent public defense commission that would provide effective representation for persons charged with crime who could not afford to hire an attorney.<sup>31</sup> While their proposal did not become law, their public disavowal of the legislation they had once championed was a critical turning point in New York’s ultimate recognition that its broken right to counsel system must be reformed.<sup>32</sup>

The 2001 breakthrough could not have occurred without the persistent and creative work of many advocates and organizations. They created the atmosphere in which the call for overhaul could be heard. As early as 1967, New York State Bar Association (NYSBA) described the law’s deficiencies.<sup>33</sup> In 1981, the state legislature’s funding of the New York State Defender Association’s (NYSDA) Public Defense Backup Center signaled an understanding of the system’s flaws.<sup>34</sup> Many hearings and studies were undertaken, and NYSDA, in particular, issued an impressive series of reports and recommendations.<sup>35</sup> In 1994, the New York County Lawyers Association (NYCLA) created a Task Force on Representation of the Indigent, and soon followed the creation of and standards set by the Appellate Division, First Department’s Indigent Defense Organization Oversight Committee.<sup>36</sup> The Unified Court System issued a report in 2000, *Assigned Counsel Compensation in New York: A Growing Crisis*.<sup>37</sup> That same year, NYCLA initiated litigation against the state attacking the inadequacy of

29. Geoff Burkhart, *Public Defense: The New York Story*, 30 CRIM. JUST. 22, 24 (2015).

30. *Id.*

31. *Id.*

32. James R. Acker & Catherine L. Bonventre, *Protecting the Innocent in New York: Moving Beyond Changing Only Their Names*, 73 ALB. L. REV. 1245, 1328 (2010).

33. Chester L. Mirsky, *The Political Economy and Indigent Defense: New York City, 1917-1998*, ANN. SURV. AM. L. 893, 907 (1997).

34. SPANGENBERG GROUP, *supra* note 9, at 24.

35. *See id.* The creative and persistent efforts of NYSDA during this barren era were singled out in the Spangenberg Group’s Final Report as “one of the most positive themes” they had heard during their comprehensive study. *Id.*

36. *See generally* INDIGENT DEF. ORG. OVERSIGHT COMM., GENERAL REQUIREMENTS FOR ALL ORGANIZED PROVIDERS OF DEFENSE SERVICES TO INDIGENT DEFENDANTS (July 1996, amended May 2011), available at [https://www.nycourts.gov/courts/AD1/Committees&Programs/IndigentDefOrgOversightComm/general%20\\_requirements.pdf](https://www.nycourts.gov/courts/AD1/Committees&Programs/IndigentDefOrgOversightComm/general%20_requirements.pdf) [perma.cc/NTG8-KCW9].

37. *See generally* HON. JONATHAN J. LIPPMAN & HON. JUANITA BING NEWTON, ASSIGNED COUNSEL COMPENSATION IN NEW YORK: A GROWING CRISIS (2000), available at <https://www.nycourts.gov/ip/nya2j/pdfs/assignedcounselcompensation.pdf> [perma.cc/9YA2-A32M].

compensation rates for representation by assigned counsel. The publication in 2001 by the *New York Times* of an exposé of New York's public defense system was capped by an editorial aptly entitled "Drive-by Legal Defense."<sup>38</sup>

*D. The Awakening Begins (2001-2006)*

The 2001 proposal by the architects of County Law Article 18-B for an Independent Public Defense Commission was a wake-up call for the state and a catalyst for a period of sustained and long-overdue attention.

In February 2003, in the NYCLA action, the court found that inadequate assigned counsel compensation rates violated their clients' constitutional right to the effective assistance of counsel.<sup>39</sup> In response, in May 2003, the state legislature increased assigned counsel rates, established a revenue stream for limited state funding of indigent defense, and created an Indigent Legal Services Fund (ILSF) from which to distribute those funds to the counties and New York City.<sup>40</sup> This legislation marked the first direct state action to alleviate the counsel crisis. However, no state entity with expertise in public defense was created to direct or to oversee the local use of these state funds.<sup>41</sup>

In November 2003, the Office of Court Administration convened a conference at Pace Law School at which state and national experts reached a consensus as to the elements of reform necessary to achieve effective representation statewide.<sup>42</sup> In 2004, NYSBA established a Special Committee to Ensure Quality of Mandated Representation, which created comprehensive standards for institutional and assigned counsel providers.<sup>43</sup> Also in 2004, the Chief Defenders of New York State approved standards for representation, which were adopted by the New York State Defenders Association (NYSDA).<sup>44</sup> Meanwhile, Chief Judge Judith Kaye, in her February 2004 State of the Judiciary address, announced the establishment of her Commission on the Future of Indigent Defense Services.<sup>45</sup> It is the report of that Commission and its impact on reform to which we now turn.

*E. A Devastating Report, a Failure to Act, and a Lawsuit (2006-2009)*

The Final Report of Chief Judge Kaye's Commission on the Future of Indigent Defense Services, issued on June 18, 2006, minced no words in its

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38. *Drive-by Legal Defense*, N.Y. TIMES (Apr. 12, 2001), <http://www.nytimes.com/2001/04/12/opinion/drive-by-legal-defense.html?mcubz=1> [perma.cc/JJ4G-7R4F].

39. N.Y. Cty. Lawyers' Ass'n v. State, 763 N.Y.S.2d 397, 419 (N.Y. Sup. Ct. 2003).

40. SPANGENBERG GROUP, *supra* note 9, at 30.

41. *Id.* at 32.

42. Burkhart, *supra* note 29, at 24.

43. Malia Brink, *Indigent Defense*, 29 CHAMPION 42, 43 (2005).

44. COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REP. TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 14 n.30 (2006) [hereinafter FINAL REPORT].

45. Burkhart, *supra* note 29, at 25.

assessment of New York's public defense system.<sup>46</sup> The list of deficiencies decried was long. They ranged from the absence of clear standards for determining financial eligibility for assignment of counsel to the lack of statewide performance standards or any mechanism to enforce them if they existed; from excessive caseloads to the lack of adequate support services and training; from minimal client contact and investigation to the widespread denial of counsel in Town and Village Courts; from the lack of resources to address collateral impacts of conviction, such as immigration consequences, to the absence of comprehensive data collection.<sup>47</sup> Moreover, there was a disparity of resources between prosecution and defense resources and among resources available in various counties.<sup>48</sup> The Kaye Commission concluded that "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused."<sup>49</sup>

The Report recommended creation of a state Indigent Defense Commission, vested with "the responsibility for ensuring that quality legal representation is provided on a consistent basis throughout the state, independent of parochial or private interests."<sup>50</sup> The Commission would be vested with broad powers to hire a Chief Defender and a Conflict Defender, to establish Regional Offices, and to establish and implement standards to address the myriad of deficiencies that had been identified in the Report's critique.<sup>51</sup>

The Kaye Commission Report all but shouted, "reform or be sued!" and it furnished a blueprint for legislation to effectuate its recommendations.<sup>52</sup> Despite that clarion call, legislation was not to be; New York had not yet found the political will to act. Having failed to achieve a consensus to enact reform, New York found itself in the crosshairs of a class action lawsuit.

*Hurrell-Harring v. State of New York* was filed in Albany County in November 2007, on behalf of more than twenty individuals facing prosecution in five upstate counties, by the New York Civil Liberties Union and the law firm of Schulte, Roth & Zabel LLP.<sup>53</sup> While the lawsuit placed blame squarely on the state, the state moved successfully to include the five counties—Onondaga, Ontario, Schuyler, Suffolk and Washington—as defendants in the litigation.<sup>54</sup>

46. *Id.* at 25-26.

47. *Id.*

48. FINAL REPORT, *supra* note 44, at 19-20, 33.

49. *Id.* at 15.

50. *Id.* at 27.

51. *Id.* at 27-30.

52. Burkhart, *supra* note 29, at 26.

53. 66 A.D.3d 84 (N.Y. App. Div. 2009); *see also Hurrell-Harring et al. v. State of New York (Challenging New York State's Failure To Provide Adequate Public Defense Services)*, NYCLU, <https://www.nyclu.org/en/cases/hurrell-harring-et-al-v-state-new-york-challenging-new-york-states-failure-provide-adequate> [<https://perma.cc/8JME-5F9N>] (last visited Feb. 27, 2018) (State Supreme Court, Albany County, Index No. 8866-07) [hereinafter NYCLU].

54. *Hurrell-Harring*, 66 A.D.3d at 84-86; NYLCU, *supra* note 53.

The state also moved to dismiss the action as non-justiciable.<sup>55</sup> Its motion was denied in the trial court, but on appeal to the Appellate Division, Third Department, the state prevailed in a split decision.<sup>56</sup> An order of dismissal was entered, subject only to review by the Court of Appeals.<sup>57</sup> Thus, with respect to upstate New York, 2009 ended with no legislation, no viable litigation, and no relief from the pervasive infirmities identified by the Kaye Commission.<sup>58</sup>

The state legislature did, however, authorize the Chief Administrative Judge to establish caseload limits for institutional providers of public defense in New York City, with the promise of state funding to assure compliance with those limits.<sup>59</sup> In April 2010, the Chief Administrative Judge issued Rule 127.7, which established an annual assignment limit of 150 felony cases or 400 misdemeanor cases in New York City, to become binding as of April 1, 2014.<sup>60</sup> No caseload limit of any kind was put into place in any upstate county.<sup>61</sup>

## II. BREAKTHROUGHS IN PUBLIC DEFENSE REFORM

### A. Litigation and Legislation (2010)

In May 2010, the Court of Appeals (Lippman, Ch. J.) reversed the Appellate Division and ruled that the lawsuit could proceed.<sup>62</sup> Relying upon *United States v. Cronin*,<sup>63</sup> the majority declared that the “complaint state[d] a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*.”<sup>64</sup> Rejecting the reliance of the dissenting judges upon the effective assistance of counsel test enunciated in *Strickland v. Washington*,<sup>65</sup> the majority described the relevant issue as “whether the state has met its foundational obligation under *Gideon* to provide legal representation.”<sup>66</sup>

Key to the majority’s decision was a recognition that in upstate counties, the right to assigned counsel at arraignments was rarely honored, despite the fact that

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55. *Hurrell-Harring*, 66 A.D.3d. at 86.

56. *Id.* at 99.

57. *Id.*

58. *See generally id.*

59. John Eligon, *State Law to Cap Public Defenders’ Caseloads, but Only in the City*, N.Y. TIMES (Apr. 5, 2009), <http://www.nytimes.com/2009/04/06/nyregion/06defenders.html> [perma.cc/2Z68-UYW9].

60. *Rules of the Chief Administrative Judge, Section 127.7*, N.Y. STATE UNIFIED CT. SYS., <https://nycourts.gov/rules/chiefadmin/127.shtml> [https://perma.cc/4C6A-H82L] (last visited Dec. 28, 2017).

61. Eligon, *supra* note 59.

62. *Hurrell-Harring v. State of New York*, 930 N. E. 2d 217, 227-28 (N.Y. 2010).

63. 466 U.S. 648 (1984).

64. *Hurrell-Harring*, 930 N.E.2d at 225.

65. 466 U.S. 668 (1984).

66. *Hurrell-Harring*, 930 N.E.2d at 222.



*Witenski* had affirmed this right decades earlier, and that it is guaranteed by statute.<sup>67</sup> Thus, there was resounding force in the *Hurrell-Harring* Court's declaration that, "nothing in the statute may be read to justify the conclusion that the presence of defense counsel at arraignment is ever dispensable, except at a defendant's informed option, when matters affecting the defendant's pretrial liberty or ability subsequently to defend against the charges are to be decided."<sup>68</sup>

One month later, in June 2010, Executive Laws §§ 832 and 833 were enacted.<sup>69</sup> Section 832 authorized the creation of ILS, and § 833 established the ILS Board.<sup>70</sup> The express statutory purpose of both the Office and the Board "is to monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law."<sup>71</sup>

Forty-five years after the enactment of County Law Article 18-B, the state of New York took a significant step toward addressing its notorious statewide deficiencies. But make no mistake, this was not the powerful state-operated Indigent Defense Commission recommended by the Kaye Report. That Commission was envisioned as wielding "broad powers and responsibilities for the delivery of quality indigent defense services."<sup>72</sup> The ILS Office and Board, in contrast, were to "make efforts to improve"<sup>73</sup> a county-controlled and largely county-funded delivery muddle that included 150 different providers of representation.<sup>74</sup> The new Office and Board would have to be dedicated, creative, nimble and persistent, if the goal of achieving widespread quality improvement was to be achieved.

By late 2010, the ILS Board had been appointed.<sup>75</sup> The nine-member body included the Chief Judge of the Court of Appeals as Chair and another judge, two appointments directly by the Governor, two on recommendation of the New York Association of Counties (NYSAC), and one each on recommendation of the Assembly, the Senate and NYSBA.<sup>76</sup> A search for a person to lead the Office immediately began.

#### *B. The Office of Indigent Legal Services: Early Years (2011-2014)*

Having been selected as the first Director of the Office, I began my five-year

67. *Id.* at 223-24.

68. *Id.* at 223.

69. *Mission*, N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/content/mission> [perma.cc/8B8E-FTPS] (last visited Oct. 28, 2017).

70. N.Y. EXEC. LAW §§ 832-33 (McKinney 2010).

71. *Id.* § 832(1), § 833(1).

72. FINAL REPORT, *supra* note 44, at 28.

73. N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., *supra* note 69.

74. *Advisory Group*, N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/content/advisory-group> [perma.cc/Y7XN-8EFV] (last visited Oct. 28, 2017).

75. EXEC. LAW § 833(2).

76. *Id.* § 833.

statutory term in Albany on February 22, 2011.<sup>77</sup> It became immediately apparent that New York's political winds had shifted significantly, potentially to our detriment. First, the State Senate had returned in 2011 to longstanding Republican control, following a two-year hiatus during which the ILS legislation had been passed.<sup>78</sup> In early meetings with leaders of the restored Senate majority, I heard the blunt message that they had not been consulted about the legislation, that they did not agree with it, and that their intent was to undo it.<sup>79</sup>

Second, the new Democratic Governor, Andrew Cuomo, had inherited an estimated ten billion dollar deficit, which he had vowed during his campaign to eliminate.<sup>80</sup> He supported our venture in both word and deed.<sup>81</sup> In his first budget proposal, in January 2011, he recommended full funding of three million dollars and a staff of twenty for the Office.<sup>82</sup> However, he had a massive deficit to reduce, and the Senate was antagonistic.<sup>83</sup> To put it mildly, our earliest days were not easy ones. The budget that became effective on April 1, 2011 cut the Governor's staff funding recommendation in half.<sup>84</sup> Until November 2011, the Office staff consisted of myself and our Counsel, Joseph Wierschem; we were not able to reach our authorized level of ten staff members until January 2013.<sup>85</sup>

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77. Previously, I had served as Chief Counsel of the Massachusetts Committee for Public Counsel Services (CPCS) from 1991-2010, and as Deputy Chief Counsel overseeing the CPCS Public Defender Division from 1984-1991.

78. Thomas Kaplan & Nicholas Confessore, *4 Democrats In State Senate Break With Leaders*, N.Y. TIMES: CITY ROOM, (Jan. 5, 2011, 12:41 P.M.), <https://cityroom.blogs.nytimes.com/2011/01/05/four-state-senators-bolt-democratic-conference/> [perma.cc/N8EK-46A8].

79. David Howard King, *With Money Tight, Will State Finally Overhaul Its Public Defender System?*, GOTHAM GAZETTE (Aug. 2, 2011), <http://www.gothamgazette.com/criminal-justice/796-with-money-tight-will-state-finally-overhaul-its-public-defender-system> [https://perma.cc/R32X-327F].

80. Tami Luhby, *New governors: Budget cuts not tax hikes*, CNN: MONEY (Nov. 15, 2010, 9:24 A.M.), [http://money.cnn.com/2010/11/15/news/economy/governors\\_budgets/index.htm](http://money.cnn.com/2010/11/15/news/economy/governors_budgets/index.htm) [perma.cc/G2VY-RNMW].

81. See generally Jeff Storey, *Q&A: William J. Leahy*, N.Y. L. J. (June 10, 2011), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ny\\_law\\_journal\\_qa\\_leahy.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ny_law_journal_qa_leahy.authcheckdam.pdf) [perma.cc/RWM3-BEQT] (describing reform venture goals).

82. ROBERT L. MEGNA, *NEW YORK AT A CROSSROADS: A TRANSFORMATION PLAN FOR A NEW NEW YORK* 67 (2011-12), available at <https://www.budget.ny.gov/pubs/archive/fy1112archive/eBudget1112/fy1112littlebook/BriefingBook.pdf> [perma.cc/YS4S-3AAB].

83. Nicholas Confessore & Thomas Kaplan, *With Cuts, Cuomo Offers Shrunken Budget*, N.Y. TIMES (Feb. 1, 2011), <http://www.nytimes.com/2011/02/02/nyregion/02budget.html> [perma.cc/KVT4-QS64].

84. S. 2800, 199th Leg. Sess. 326 (N.Y. 2011), available at <https://www.budget.ny.gov/pubs/archive/fy1112archive/eBudget1112/fy1112appropbills/StateOpsBudget.pdf> [perma.cc/XR8W-K2CS].

85. *Testimony of Office of Indigent Legal Servs.: J. Legis. Hearing on the 2013-2014 Public Protection Budget Before the S. Fin. Comm. & Assemb. Comm. on Ways & Means*, 2013 Leg.,

Notably, one of our earliest hires was a Director of Research, Andrew Davies, because we knew that our ability to demonstrate the inadequacy of funding and structure with hard data and keen analysis would be essential to achieving reform.

In this ominous environment, we got to work. At our first ILS Board meeting in March 2011, the Board approved a distribution of \$4.4 million to the counties and New York City to improve the quality of their public defense services.<sup>86</sup> To receive these funds, the counties and city were required for the first time to consult with their public defense providers and to demonstrate that the funds would be used to improve the quality of representation.<sup>87</sup> The requirement of consultation was intended to remind county officials that the provision of effective legal representation for people who cannot afford a lawyer is as important a governmental function as any other and to elevate the status of county public defense leaders within their localities.<sup>88</sup> Quality improvement was our fundamental statutory mission. Ever since, these principles—consultation, empowerment, and quality improvement—have guided every activity undertaken by the Office and the Board.

In June 2011, the Board approved proposals to develop our first two competitive grants: one to assist upstate counties in providing counsel at arraignment; and another to create the nation's first statewide network of Regional Immigration Assistance Centers to enable publicly funded defense counsel to comply with their professional obligations under *Padilla v. Kentucky*.<sup>89</sup> Our Counsel at First Appearance Request for Proposals (RFP) was issued in November 2012.<sup>90</sup> In August 2013, we announced grant awards in the total amount of twelve million dollars over a three-year period to twenty-five upstate counties to provide counsel at a defendant's first appearance in court.<sup>91</sup> Also in August 2013, we released a second RFP, for Upstate Quality Improvement and Caseload Reduction.<sup>92</sup> In March 2014, we awarded twelve million dollars over a

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200th Sess. 3 (N.Y. 2013) (statement of William Leahy, Dir., Off. of Indigent Legal Servs.), available at <https://www.ils.ny.gov/files/Budget%20Testimony%20020613.pdf> [perma.cc/KMH7-BHMM].

86. *Quality Enhancement Distributions*, N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/content/quality-enhancement-distributions> [perma.cc/B4VT-LYPE] (last visited Nov. 4, 2017).

87. *Id.*; see also Confessore & Kaplan, *supra* note 83 (calling for reality-based budgeting).

88. *Quality Enhancement Distributions*, *supra* note 86; see generally Confessore & Kaplan, *supra* note 83 (discussing other government provisions considering budget needs).

89. 559 U.S. 356 (2010); see also *Competitive Grants*, N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/content/competitive-grants> [perma.cc/9SNL-DDR7] (last visited Nov. 4, 2017).

90. *Funding Announcement: Counsel at First Appearance Demonstration Grant*, N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/files/RFP%20For%20Counsel%20At%20First%20Appearance%20113012.pdf> [perma.cc/TL6Q-VGU8] (last visited Nov. 4, 2017).

91. *Quality Enhancement Distributions*, *supra* note 86.

92. *Upstate Quality Improvement and Caseload Reduction - Second RFP*, N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/content/upstate-quality-improvement-and->

three-year period to forty-five of the fifty-seven upstate counties for these purposes.<sup>93</sup>

During the summer of 2013, the Office convened two working groups to produce statewide standards for appellate representation and for the representation of parents in child welfare cases.<sup>94</sup> Previously, the Board had approved standards for conflict defender representation (effective July 1, 2012) and trial level representation (effective January 1, 2013).<sup>95</sup> In November 2013, our Director of Research published our initial *Estimate of the Cost of Compliance with National Maximum Caseload Limits in Upstate New York*, which pegged that estimated annual cost at \$111.2 million.<sup>96</sup> In developing that estimate, we used a weighted caseload assignment limit of 367 misdemeanors, as opposed to the 400 derived from the 1973 national standard and implemented in New York City.<sup>97</sup> We did this to account for the reality that supervision is essential and that engaged supervisors cannot be expected to carry full caseloads. In September 2014, the Board established a limit of 367 weighted case assignments for providers in the upstate counties, contingent upon the appropriation of state funding for that purpose.<sup>98</sup>

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caseload-reduction-second-rfp [perma.cc/6Z7E-GN8R] (last visited Nov. 4, 2017).

93. Joel Stashenko, *Counties Share \$12 Million for Criminal Representation*, N.Y. L. J. (Mar. 24, 2014), <https://www.law.com/newyorklawjournal/almID/1202648011656/?sreturn=20140221204054> [https://perma.cc/SQP4-DJG5].

94. See Ass'n of the Bar N.Y., *Indigent Legal Services Board Agenda*, N.Y. STATE OFF. OF INDIGENT LEGAL SERVS. (Sept. 25, 2015), [https://www.ils.ny.gov/files/ILSB%20Meeting%209.25.15%20Agenda\\_Attachments.pdf](https://www.ils.ny.gov/files/ILSB%20Meeting%209.25.15%20Agenda_Attachments.pdf) [perma.cc/ZR77-3V98] (describing parental representation). The ILS *Appellate Standards and Best Practices* went into effect on January 5, 2015. See APPELLATE STANDARDS AND BEST PRACTICES 1 (N.Y. STATE OFF. OF INDIGENT LEGAL SERVS. 2015), available at <https://www.ils.ny.gov/files/Appellate%20Standards%20Final%20010515.pdf> [perma.cc/J8NX-ZA6Y]. Our *Standards for Parental Representation in State Intervention Matters* became effective on December 1, 2015. See STANDARDS FOR PARENTAL REPRESENTATION IN STATE INTERVENTION MATTERS 1 (N.Y. STATE OFF. OF INDIGENT LEGAL SERVS. 2015), available at <https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf> [perma.cc/CT5P-XAEZ].

95. *Standards and Performance Criteria*, N. Y. STATE OFFICE OF INDIGENT LEGAL SERVS., <https://www.ils.ny.gov/content/standards-and-performance-criteria> [perma.cc/3ZCQ-DCFD] (last visited Nov. 5, 2017).

96. AN ESTIMATE OF THE COST OF COMPLIANCE WITH MAXIMUM CASELOAD LIMITS IN UPSTATE NEW YORK, REP. OF THE OFF. OF INDIGENT LEGAL SERVS. 14 (2013), available at <https://www.ils.ny.gov/files/Estimate%20of%20Upstate%20Cost%20of%20Compliance%20Report%20Nov%202013.pdf> [perma.cc/FZY6-HSRA].

97. *Id.* at 3-4.

98. ESTIMATE OF THE COST OF COMPLIANCE WITH MAXIMUM NATIONAL CASELOAD LIMITS IN UPSTATE NEW YORK – 2013 UPDATE, REP. OF THE N. Y. STATE OFF. OF INDIGENT LEGAL SERVS. 2 (2014), available at <https://www.ils.ny.gov/files/Estimate%20of%20the%20Cost%20of%20Compliance%20with%20Maximum%20National%20Caseload%20Limits%20in%20Upstate%20New%20York%20-%202013%20Update%209%2024%2014%20Final.pdf> [perma.cc/KZ8X-

During these early years, despite very limited staff and only four million dollars in additional local aid, we achieved significant public defense improvement. From 2012 to 2014, the fifty-seven upstate counties saw a 14.3% decrease in average annual caseloads, a 12.5% increase in attorney staff, and almost an 18% increase in support staff.<sup>99</sup> The spending per case rose by 22% among institutional provider programs and by 16% in assigned counsel programs.<sup>100</sup> We had done a lot with very little. But without additional authority and funding, we were approaching the ceiling of what further progress could be achieved; and the average weighted caseload among institutional providers in upstate counties, at 616, far exceeded the 400-case assignment limit in New York City.<sup>101</sup>

### III. HURRELL-HARRING SETTLEMENT AND IMPLEMENTATION

In October 2014, the parties in the *Hurrell-Harring* case reached a Settlement Agreement that mandated the state to remedy four major areas of deficiency: the lack of counsel at arraignment; excessive caseloads and inadequate support services; lack of quality control and oversight structures; and the failure to have a uniform standard of eligibility for the assignment of counsel.<sup>102</sup> Two aspects of the settlement are of vital importance. For the first time, the state acknowledged that it bears the responsibility to comply with *Gideon*.<sup>103</sup> In addition, the state vested the duty to implement these reforms in ILS, the only agency with the

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K9P7].

99. Letter from Bill Leahy to Indigent Legal Services Board (Apr. 19, 2016), *available at* [https://www.ils.ny.gov/files/ILSB%20Meeting%204.22.16%20Agenda\\_Attachments.pdf](https://www.ils.ny.gov/files/ILSB%20Meeting%204.22.16%20Agenda_Attachments.pdf) [perma.cc/S7SE-EPST].

100. *Id.*

101. *Id.* In 2015, the average weighted caseload among upstate institutional providers dropped further, to 561, still far above maximum national standards. ESTIMATE OF THE COST OF COMPLIANCE WITH MAXIMUM NATIONAL CASELOAD LIMITS IN UPSTATE NEW YORK – 2015 UPDATE, REP. OF THE N.Y. STATE OFF. OF INDIGENT LEGAL SERVS. 2 (2016), *available at* <https://www.ils.ny.gov/files/Hurrell-Harring/Caseload%20Reduction/Estimate%20of%20the%20Cost%20of%20Compliance%20with%20Maximum%20National%20Caseload%20Limits%20in%20Upstate%20New%20York%20-%202015%20Update.pdf> [https://perma.cc/EPM9-VCBE]; *see* N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., A DETERMINATION OF CASELOAD STANDARDS PURSUANT TO § IV OF THE *HURRELL-HARRING V. THE STATE OF NEW YORK* SETTLEMENT 1 (2016), *available at* <https://www.ils.ny.gov/files/Hurrell-Harring/Caseload%20Reduction/Caseload%20Standards%20Report%20Final%20120816.pdf> [perma.cc/USJ7-M2YN][hereinafter CASELOAD STANDARDS].

102. *See* Stipulation and Order of Settlement, *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (No. 8866-07), *available at* <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf> [perma.cc/U32L-5K93].

103. *Settlement Begins Historic Reformation of Public Defense in New York State*, NYCLU (Oct. 21, 2014), <https://www.nyclu.org/en/press-releases/settlement-begins-historic-reformation-public-defense-new-york-state> [perma.cc/C322-TWQ6].

expertise and the independence necessary to do the job.<sup>104</sup>

The Settlement, however, had one very significant limitation: its first three remedial provisions, which required the state to provide funds for reform, applied only to the five counties represented by members of the certified plaintiff class.<sup>105</sup> They did not apply to any of the other fifty-two upstate counties or to New York City.<sup>106</sup> Moreover, the eligibility for counsel reform, which did apply to all fifty-seven upstate counties, was unaccompanied by any provision for additional state funding to cover the cost of the anticipated additional assignments that the new financial eligibility criteria would require.<sup>107</sup>

On the day after the Settlement, October 22, 2014, I wrote that three things would be necessary for its effective implementation in the five counties: a continuation of the cooperation among county government officials, public defense providers and ILS; full funding of the Settlement Implementation Unit that we had proposed; and fulfillment by the state of its fiscal commitments under the Settlement Agreement.<sup>108</sup> We can say today that all three foundational requisites have been met and that implementation in the five counties is proceeding effectively.

In that message, I also addressed the limitation of the Settlement reforms to just five counties and called for extending their benefits throughout the state:

If there is an argument based upon equity, justice or fundamental fairness that the 52 upstate counties should continue to be excluded from the benefits of the *Hurrell-Harring* settlement because of the happenstance that they were not selected as lawsuit counties, I have yet to hear it. Therefore we will be working with the Governor, the Legislature, and everyone who stands for the principle of equal justice in the state of New York to ensure that appropriate funding is provided . . . so that no county, no defender and no client will be excluded from the benefits of this historic settlement, and so that the state of New York will have, at long last, one standard of justice for all.<sup>109</sup>

The Settlement became effective upon final court approval in March 2015.<sup>110</sup> In November 2015, our *Hurrell-Harring* Implementation Unit, under the leadership of Chief Implementation Attorney Patricia Warth, produced final plans

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104. Stipulation and Order of Settlement, *supra* note 102, at 2.

105. *Id.* at 5-11.

106. *Id.* at 11.

107. *Id.* at 11-13.

108. William J. Leahy, ILS Direct Leahy Statement 1 (Oct. 22, 2014), *available at* <https://www.ils.ny.gov/files/Hurrell-Harring%20ILS%20Director%20Leahy%20Statement%20102214.pdf> [perma.cc/N5RX-F2RG].

109. *Id.* at 1-2.

110. Joel Stashenko, *Judge Approves Settlement Over Indigent Criminal Defense*, N.Y. L.J. (Mar. 18, 2015), <https://www.ils.ny.gov/files/Judge%20Approves%20Settlement%20Over%20Indigent%20Criminal%20Defense%20-%20NYLJ%20031815.pdf> [perma.cc/977T-P2KA].

for implementing the counsel at arraignment<sup>111</sup> and quality improvement initiatives components of the Settlement.<sup>112</sup> Having heard public opinion during a series of eight statewide public hearings during 2015, in April 2016, we issued uniform criteria and procedures for determining financial eligibility for counsel for all counties outside New York City.<sup>113</sup> These criteria and procedures went into effect in the five lawsuit counties in October 2016 and in the remaining counties in April 2017.<sup>114</sup>

In 2016, we contracted with the RAND Corporation to conduct a study of caseloads and workloads among the eleven public defense providers in the five *Hurrell-Harring* counties.<sup>115</sup> The study encompassed timekeeping, a survey of public defense providers, and a Delphi panel of accomplished public defense providers from all parts of New York.<sup>116</sup> On December 8, 2016, we delivered to the settlement parties *A Determination of Caseload Standards pursuant to §IV of the Hurrell-Harring v. The State of New York Settlement*.<sup>117</sup> They are the first publicly enunciated and binding caseload standards in the United States to require sharp reductions from the often criticized 1973 National Advisory Commission standards.<sup>118</sup> Instead of 400 average annual misdemeanor assignments, our standards call for no more than 300 misdemeanors and violations; instead of 150 felonies, no more than 50 violent felonies or 100 non-violent felonies; and in place of 25 full appeals from verdict, 12.<sup>119</sup> They also add new categories for post-disposition cases (200), parole revocation cases (200), and appeals from guilty pleas (35).<sup>120</sup> We described the significance of these new standards as follows:

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111. See generally N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., IMPLEMENTING THE COUNSEL AT ARRAIGNMENT OBLIGATIONS IN THE *HURRELL-HARRING V. THE STATE OF NEW YORK SETTLEMENT* (2015), available at <https://www.ils.ny.gov/files/Hurrell-Harring/Counsel%20At%20Arrestment/Hurrell-Harring%20Final%20Counsel%20At%20Arrestment%20Plan%20111215.pdf> [perma.cc/AG6Z-9KGA] (describing the implementation of the obligations).

112. *Id.*

113. See generally N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., CRITERIA AND PROCEDURES FOR DETERMINING ASSIGNED COUNSEL ELIGIBILITY (2016), available at <https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf> [perma.cc/S2FW-UWQH].

114. *Id.*

115. CASELOAD STANDARDS, *supra* note 101, at 13.

116. *Id.*

117. *Id.* at 1.

118. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 43-49 (Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants 2011), available at [https://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf) [https://perma.cc/AWV3-KX27].

119. CASELOAD STANDARDS, *supra* note 101, at 14.

120. *Id.*

Implementation of these standards in these counties marks an historic accomplishment: the achievement of fully funded caseload relief that is unprecedented in its provision of time and resources for public defenders and assigned counsel to represent their clients in accordance with established professional standards and ethical rules.<sup>121</sup>

We estimated the annual cost of their implementation in the five counties at \$19,009,712 and requested funding in that amount for the state fiscal year beginning on April 1, 2017.<sup>122</sup>

#### IV. LEGISLATIVE EMBRACE OF REFORM, A VETO, AND A PROMISE FULFILLED

##### *A. Reform Legislation Passed, Then Vetoed*

In March 2015, the month in which the state Supreme Court approved the *Hurrell-Harring* Settlement Agreement, Assembly member Patricia Fahy of Albany filed proposed legislation that would require the state to pay all costs for legally mandated representation, including Family Court cases.<sup>123</sup> In January 2016, Senator John A. DeFrancisco of Syracuse filed a virtually identical bill in the Senate.<sup>124</sup> In June 2016, the now identical bills, referred to either as the “Public Defense Mandate Relief Act” or the “Justice Equality Act,” were approved by unanimous votes in each legislative branch and sent to Governor Cuomo for his consideration.<sup>125</sup> Passage had been supported by more than 200 local, state, and national organizations, representing points of view that traversed the entire political spectrum.<sup>126</sup>

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121. *Id.* at 15.

122. *Id.* On April 9, 2017, the state budget for fiscal year 2017-2018 was approved. It included full funding for implementation of the Settlement reforms in the five counties: \$19,010,000 for Caseload Relief, \$2.8 million for Counsel at Arraignment, and \$2 million for Quality Improvement Initiatives. See *Testimony of Office of Indigent Legal Servs.: J. Legis. Hearing on the 2017-2018 Public Protection Budget Before the S. Fin. Comm. & Assemb. Comm. on Ways & Means*, 2017 Leg. 204th Sess. (N.Y. 2017) (statement of William Leahy, Dir. Off. of Indigent Legal Servs.), available at <https://www.ils.ny.gov/files/FY%202017-18%20Legislative%20Budget%20Testimony%20013117.pdf> [perma.cc/296L-C5W6].

123. See *A06202C Summary*, N.Y. STATE ASSEMBLY, <http://assembly.state.ny.us/leg/?term=2015&bn=A06202> [https://perma.cc/7ZZA-R429] (last visited Dec. 28, 2017) (An act to amend the county law, the executive law and the state finance law, in relation to indigent defense services).

124. See *S06341 Summary*, N.Y. STATE ASSEMBLY, [http://assembly.state.ny.us/leg/?default\\_fld=&bn=S06341&term=2015&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y#S06341](http://assembly.state.ny.us/leg/?default_fld=&bn=S06341&term=2015&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y#S06341) [https://perma.cc/N4BG-A3WB] (last visited Dec. 28, 2017) (An act to amend the county law, the executive law and the state finance law, in relation to indigent defense services).

125. An act to amend the county law, the executive law and the state finance law, in relation to indigent defense services, S.B. 8114, 2015 Leg., Reg. Sess. (N.Y. 2016).

126. *Justice Equality*, N.Y. STATE ASS'N OF CRIMINAL DEF. LAWYERS, <http://nysacdl.site->



On the evening of December 31, 2016, Governor Cuomo vetoed the Fahy-DeFrancisco bill, stating that its cost was prohibitive.<sup>127</sup> In his veto message, however, he agreed that the *Hurrell-Harring* reforms should be extended statewide.<sup>128</sup> Moreover, he promised to introduce a plan to bring this extension to the rest of the state.<sup>129</sup>

### *B. Statewide Public Defense Reform, Proposed and Enacted*

On January 17, 2017, Governor Cuomo fulfilled his promise by proposing the extension of the *Harrell-Harring* reforms throughout the state at state expense.<sup>130</sup> As with the lawsuit settlement implementation, ILS would be given responsibility to develop plans for the statewide reforms and to oversee their implementation.<sup>131</sup>

On April 10, 2017, the final FY 2018 state budget included two groundbreaking statutory amendments.<sup>132</sup> First, County Law § 722-e, which since 1965 had foisted upon the counties the burden of paying for assigned counsel, was amended to specify that any costs of implementing the ILS reform plans “shall be reimbursed by the state to the county or city providing such services.”<sup>133</sup> Furthermore, the statute provides that the “state shall appropriate funds sufficient to provide for the reimbursement required by this section.”<sup>134</sup>

Second, a new subdivision of the Executive Law, § 832 (4), entitled “Additional Duties and Responsibilities,” gives ILS the authority to craft and implement plans for statewide implementation that provide counsel at arraignment, caseload relief, and quality improvement—the components of the

ym.com/?page=JusticeEquality16 [perma.cc/Q4JF-2URE] (last visited Oct. 25, 2017).

127. Andrew Cuomo, Veto # 306 (Dec. 31, 2016), available at <https://www.scribd.com/document/335441819/Veto-306> [https://perma.cc/7WRU-AJ94].

128. *Id.* at 1 (“The groundbreaking advances in those five counties can, and should, be extended to the rest of the State.”).

129. *Id.*

130. ANDREW M. CUOMO, FY 2018 EXECUTIVE BUDGET BRIEFING BOOK 109 (2017), available at <https://www.budget.ny.gov/pubs/executive/eBudget1718/fy1718littlebook/BriefingBook.pdf> [https://perma.cc/3SKP-CUF8] (“This year, the Governor will introduce a plan to extend the provisions of the Hurrell-Harring settlement to the rest of the State. Under this plan, the State will fund one hundred percent of the costs necessary to extend the reforms . . . .”); Hillary Russ, *New York governor wants to spend more on education, lower taxes*, REUTERS (Jan. 17, 2017, 11:07 PM), <http://www.reuters.com/article/us-new-york-budget/new-york-governor-wants-to-spend-more-on-education-lower-taxes-idUSKBN1520D2> [perma.cc/GPK5-6TX9].

131. FY 2018 NEW YORK STATE EXECUTIVE BUDGET, PUBLIC PROTECTION AND GENERAL GOVERNMENT ARTICLE VII LEGISLATION 45-48 (2017), available at <https://www.budget.ny.gov/pubs/executive/eBudget1718/fy18artVIIbills/PPGGArticleVII.pdf> [perma.cc/MJ9L-JY8M].

132. 2017 N.Y. LAWS 207-09, Part VVV, §§ 11-13, available at [http://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A03009&term=2017&Summary=Y&Actions=Y&Memo=Y&Text=Y](http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03009&term=2017&Summary=Y&Actions=Y&Memo=Y&Text=Y) [https://perma.cc/YX6W-XXHA].

133. *Id.* § 11.

134. *Id.*

*Hurrell-Harring* Settlement Agreement.<sup>135</sup> Common to each of the three prongs of reform was this (or a substantially identical) provision:

Each county and the city of New York shall, in consultation with the office, undertake good faith efforts to implement the plan and such plan shall be fully implemented and adhered to in each county and the city of New York by April first, two thousand twenty-three. Pursuant to section seven hundred twenty-two-e of the county law, the state shall reimburse each county and the city of New York for any costs incurred as a result of implementing such plan.<sup>136</sup>

In May 2017, we previewed our approach to developing the plans for statewide reform at a meeting at NYSBA headquarters in Albany before a large gathering of state and local officials and public defense providers.<sup>137</sup> Governor Cuomo's First Assistant Counsel hailed the reforms as being "truly transformational."<sup>138</sup> I honored the political, public defense, county government, and bar leaders whose support had made reform possible.<sup>139</sup>

On June 1, 2017, we selected a Chief Statewide Implementation Attorney, Joanne Macri, who will lead an eight-member Statewide Implementation Unit.<sup>140</sup> She has been meeting with public defense providers and local government officials in the counties and New York City to create implementation plans by December 1, 2017, determine appropriate interim steps, and estimate the cost of full compliance with those plans in the coming years. The compliance date for the completion of statewide reform is a notable one. As former New York state Senator and current ILS Board member John Dunne has written, by "April 1, 2023—shortly after the 60<sup>th</sup> anniversary of the *Gideon v. Wainwright* decision—the reforms will be fully implemented, and New York will have gone from constitutional laggard to leader."<sup>141</sup>

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135. *Id.* § 12.

136. *Id.* § 12 iii; N.Y. EXEC. LAW § 832(4)(a)(iii) (2017) (for providing counsel at arraignment); § 832(4)(b)(iii) (for providing caseload relief); § 832(4)(c)(iv) (for initiatives to improve the quality of indigent defense).

137. David Carroll, *New York caseload standards announced and their importance to statewide reform explained*, SIXTH AMENDMENT CTR. (May 8, 2017), <http://sixthamendment.org/new-york-caseload-standards-announced-in-wake-of-state-funding-agreement/> [perma.cc/LC9U-X7PB].

138. *Id.*

139. N.Y. State Bar Ass'n, *ILS Conducts Kickoff Meeting for the Statewide Implementation of Hurrell-Harring Reforms*, ILS.NY.GOV (May 2, 2017), <https://www.ils.ny.gov/files/videos/Statewide%20Implementation%20Kickoff%20050217/Low%20Bitrate%201.mp4>.

140. Letter from Bill Leahy to Indigent Legal Services Board members and colleagues (June 1, 2017), available at <https://www.ils.ny.gov/files/Statewide%20Expansion/Macri%20Appointed%20Statewide%20Implementation%20Chief%20060117.pdf> [perma.cc/Y694-UX64] (on Joanne Macri Statewide Implementation Attorney selection announcement).

141. "The Constitution of the United States," N.Y. TIMES MAG., July 2, 2017, annotated, print-only insert. The 60th anniversary of the *Gideon* decision is March 18, 2023. See *Gideon v.*

There is one very important structural reform that remains undone and is essential to the success of publicly funded criminal defense representation. That is the establishment of the nine Regional Support Centers that we have proposed: one in every upstate Judicial District and one in New York City. These state-funded and ILS-staffed Centers would provide badly needed support for beleaguered county-based providers who have suffered for decades from a lack of state resources and expertise.<sup>142</sup>

#### V. LESSONS LEARNED

“In 40 years of leading public defense in my county, I have never before been consulted by county officials as I have been this year.”

These words, spoken by then-Executive Director Stephen J. Pittari of the Westchester County Legal Aid Society, came during the same June 2011 meeting of public defense leaders at which Steve Pechenik made the statement quoted at the outset of this story (“You do understand that this is impossible, don’t you?”). I have since come to think of their messages as bookends. One expresses the difficulty of reforming public defense in New York, and the other articulates an essential component of jump-starting reform—elevating and empowering public defense leaders to become more influential advocates in their own localities.

By 2011, New York had demonstrated its resistance to the kind of strong centralized state public defender agency embraced by several nearby states, including Massachusetts, New Jersey, Connecticut, and Vermont. I was slow to recognize the extent of differences between the Bay State and the Empire State. In Massachusetts, I led a statewide public defense agency that had earned national prominence.<sup>143</sup> In New York, I began my leadership of ILS with an intention to create the powerful state agency that had been proposed by the Kaye Commission. However, I gradually came to understand that the historic, geographic, and political differences between the two states made that goal presently unattainable. I learned that there is more than one path to meaningful reform.<sup>144</sup>

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Wainwright, 372 U.S. 335 (1963).

142. See WILLIAM LEAHY, OFFICE OF INDIGENT LEGAL SERVICES BUDGET REQUEST FOR FY 2017-2018 Attachment B (2017), available at <http://www.ils.ny.gov/files/FY%202017-18%20ILS%20Budget%20Request%20101816.pdf> [perma.cc/96YG-XQ5Z].

143. See LEFSTEIN, *supra* note 118, at 191-205.

144. The evolution in my thinking about public defense reform in New York can be seen in three public documents: a question and answer interview with the New York Law Journal on June 10, 2011, Storey, *supra* note 81; a speech, William Leahy, Remarks delivered at the New York State Defenders Association 44th Ann. Conf.: The Curious Creation, Perilous Present and Favorable Future of the Office of Indigent Legal Services (July 25, 2011), available at <https://www.ils.ny.gov/files/Curious%20Creation%20Speech%20Saratoga%202011.pdf> [perma.cc/E5XR-UP8S]; and a podcast that was taped with John Caher of the Office of Court Administration in November 2014, one month following the *Hurrell-Harring* settlement. See

Very early on, the tension between local officials and state government—some say, the historic antipathy between them—became inescapably apparent. So we began, and we have since continued, by breaking down that distrust and altering the conditions that have given it life. We have learned that the better approach is to listen rather than preach, consult rather than pressure, and collaborate rather than dictate. In our negotiations, we always seek to arrive at “yes.”

Since our first days, we have forged close relationships with the New York State Association of Counties (NYSAC), NYSBA, and prominent local officials across the state. We meet regularly with the associations of County Administrators, County Executives, County Attorneys, and the Town and Village Court magistrates. In those meetings, we often candidly acknowledge the tension inherent between our core responsibility to improve the quality of mandated representation and their broader array of responsibilities. We believe that such forthrightness earns respect and enhances credibility.

We are secure in our principles, as our standards and our progress and even our letterhead<sup>145</sup> amply demonstrate. But we believe that earning local cooperation transcends issuing orders. We know that, for New York, encouraging local leadership in the fulfillment of universal principles not only works—it is essential to success.<sup>146</sup>

## VI. NOT FOR NEW YORK ALONE

Some might dismiss or minimize New York’s breakthrough by reasoning that, because it is a “blue” state politically, its lessons have little meaning for the many states with underperforming, constitutionally non-compliant public defense systems. Such a conclusion would be mistaken. First, not all such states are “red.” Among those with deficient county-based systems, and (usually) reliable presidential support for Democratic candidates, are California, Pennsylvania, Illinois, and Washington. Second, outside of New York City and its immediate environs, New York is conservative politically, as its decades of Republican Senate leadership prove. The New York Senate supported serious public defense reform in 2016 and again in 2017.<sup>147</sup> That is not only eye-opening: it is replicable

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*Amici: Indigent Legal Services: A Discussion with William Leahy*, N.Y. COURTS (Nov. 2014), transcript available at <https://www.ils.ny.gov/files/Caher%20Podcast%20Transcript.pdf> [perma.cc/5D3Z-TL8M].

145. Our office letterhead, at the top of the page just below our agency address, states our mission forthrightly: “Improving the Quality of Mandated Representation Throughout the State of New York.” A quotation from the *Gideon* decision appears at the bottom of the page: “The right . . . to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” *Gideon*, 372 US at 344.

146. See generally Alissa Worden et al., *Court Reform: Why Simple Solutions Might Not Fail? A Case Study of Implementation of Counsel at First Appearance*, 14 OHIO ST. J. CRIM. L. 521 (2017).

147. An Act to amend the county law, the executive law and the state finance law, in relation

in other states. Third, states that have been boldly reforming their county-based systems in recent years—Idaho and Utah come to mind—happen to be politically conservative.<sup>148</sup>

The right to counsel is the fundamental right of every person. There is no necessary divide between progressives and conservatives as to this constitutional guarantee.<sup>149</sup> The public defense reform now underway in New York is the result of many years of work by scores of dedicated people and organizations. It is the result of litigation combined with implementation. It is the product of serious determination by political leaders—both conservative and progressive. It bespeaks a consensus that our Constitutional right to the assistance of counsel must be a reality for all, not merely an aspiration or a platitude.

Any state can follow New York’s lead and achieve reform in providing effective assistance of counsel. Reform will happen not by replicating our experience, much as my experience in Massachusetts could not provide the path to success in New York. But other states can draw upon relevant lessons from New York. First, you must have a vision for high quality representation. Second, you must have a strategy. This strategy must include solidifying support among not just those who share your goals but also those who do not understand, or actively resist, the need for reform. Third, you must be fierce in your commitment and smart in your strategy so that you will know when to fight, when to compromise, and when to be creative. It is often correct to accept modest progress; but it is never right to be satisfied with it. Finally, in the rare moments when transformative change is within reach, it is well to remember that the perfect can be and often is the enemy of the very good.

Right to counsel reform can be accomplished in any state if it is tailored to the political, geographic, and historic nuances in each locality while simultaneously elevating the voices of legal service providers. Only when reform has been accomplished in every state will the promise of *Gideon* be fully realized in the United States.

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to indigent defense services, S.B. 8114, 2015 Leg., Reg. Sess. (N.Y. 2016); 2017 N.Y. LAWS 207-09, Part VVV, §§ 11-13, available at [http://nyassembly.gov/leg/?default\\_fld=&leg\\_video=&bn=A03009&term=2017&Summary=Y&Actions=Y&Memo=Y&Text=Y](http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A03009&term=2017&Summary=Y&Actions=Y&Memo=Y&Text=Y) [<https://perma.cc/YX6W-XXHA>].

148. Jessica Miller, *Utah lawmakers move to fix public defender system*, SALT LAKE TRIB. (Mar. 9, 2016, 11:23 PM), <http://archive.sltrib.com/article.php?id=3639321&itype=CMSID> [[perma.cc/2VGY-4EPD](https://perma.cc/2VGY-4EPD)]; Andrew Ottoson, *Idaho County seeks grant money as new public defense standards go into effect*, IDAHO CTY. FREE PRESS (May 2, 2017), <http://www.idahocountyfreepress.com/news/2017/may/03/idaho-county-seeks-grant-money-new-public-defense/> [[perma.cc/46WV-VEME](https://perma.cc/46WV-VEME)].

149. Public opinion research has shown that “[t]he most important values relating to support for public defense are respect for the Constitution, belief in equal justice, and desire to protect the innocent.” NAT’L PUB. OP. SURVEY CONDUCTED FOR THE RIGHT TO COUNSEL NAT’L CAMPAIGN, AMERICANS’ VIEWS ON PUBLIC DEFENDERS AND THE RIGHT TO COUNSEL 6 (2017), available at <https://static1.squarespace.com/static/55f72cc9e4b0af7449da1543/t/594826d8ff7c50d4cb6a8ff0/1497900982642/BRS+Report.pdf> [[perma.cc/KZ2M-KCPV](https://perma.cc/KZ2M-KCPV)].