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## So Sue Me: How the Justice Department Can Protect Children by Suing Indigent Defenders

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SO SUE ME: HOW THE JUSTICE DEPARTMENT CAN PROTECT  
CHILDREN BY SUING INDIGENT DEFENDERS

JOSHUA PERRY\*

ABSTRACT

As new leadership takes over at the federal Department of Justice, this Essay argues that the Department of Justice should use its civil rights enforcement authority to improve the quality of legal representation for children by directly suing indigent defense systems—a step the agency has never before taken.

In jurisdictions across the country, juvenile indigent defense has long been a constitutional and moral failure, with profoundly negative implications for the lives of vulnerable children. In some places, not much has changed since the United States Supreme Court first recognized a right to counsel for kids in 1967.

The Obama-era Department of Justice took a first step towards changing the unacceptable status quo. Three times during the Obama Administration, the Department invoked its enforcement powers under 34 U.S.C. § 12601 to investigate juvenile justice systems. As part of those efforts, the Department of Justice attempted to negotiate resolutions improving indigent defense for children.

This Essay is the first to examine all three of those agency interventions—in Memphis, St. Louis, and Meridian, Mississippi—and to suggest lessons for a resurgent Civil Rights Division under the Biden Administration. The three Obama-era investigations highlighted the ways in which many of the problems plaguing juvenile defense are not just exogenous and structural (like funding and independence from the judiciary) but also endogenous—stemming from organizational problems within indigent defense systems, like lack of training and supervision. The Department’s interventions also showed how hard it is to fix indigent defense problems using § 12601 without directly targeting the indigent defense system with investigation and litigation. This Essay argues that the Department of Justice can accomplish real and rapid change by taking a more focused and aggressive approach and directly suing indigent defenders.

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## INTRODUCTION: THE ONGOING CRISIS IN INDIGENT DEFENSE FOR CHILDREN

The first time I went to juvenile court, my job was to win release for a public defender who'd been jailed for fighting too hard for her client. The second time, I saw a judge remand a child into custody for fifteen days for the sin (it's not a crime, of course) of wearing his pants too low. The assigned public defender didn't even object.

This was in New Orleans not long after Hurricane Katrina, when the juvenile public defender was trying to build back better, to borrow a phrase. In many ways, it did. Within a few years of the storm, the new nonprofit that served the city as juvenile public defender became a model for effective and zealous advocacy for children.<sup>1</sup> It reduced caseloads and improved performance. Its holistic advocacy model brought together multidisciplinary teams of lawyers, social workers, case managers, and investigators to help win cases and improve life outcomes. It instituted best-practices models of training, supervision, and performance management. Its lawyers stuck with kids not just until trial or sentencing but until they were entirely free of the justice system.

But the Louisiana Center for Children's Rights was an exception. What I saw on my first two visits to juvenile court was and remains closer to the rule in many places.<sup>2</sup> Persistently over time, and pervasively across jurisdictions, poor children in juvenile delinquency cases have been and are being poorly served by their defense attorneys.<sup>3</sup> The failings have been extensively documented, and the reasons repeatedly explored.<sup>4</sup> Advocates have long urged reform, but in many jurisdictions not much has changed. Kids facing juvenile prison still receive ineffective representation today—just like they did when the U.S. Supreme Court first recognized a constitutional right to counsel for kids in delinquency cases in 1967.<sup>5</sup>

1. See Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. POVERTY L. & POL'Y 543, 578–79 (2009) (documenting how New Orleans' juvenile public defender, known then as JRS, became country's "first standalone office to focus exclusively on juvenile defense . . . JRS can commit the resources of an entire organization toward ensuring effective delinquency representation." (footnote omitted)).

2. See, e.g., NAT'L COUNCIL OF JUV. & FAM. CT. J., ENHANCED JUVENILE JUSTICE GUIDELINES 24 (2018), <https://tinyurl.com/y29euswh> [<https://perma.cc/YL8Z-TFZM>] (describing widespread ineffective assistance of counsel for children in delinquency proceedings); see also Laura Cohen, *The Still-Elusive Promise of In re Gault*, 32 CRIM. JUST. 57, 58 (2018) ("[E]ven a spot check of the nation's juvenile courts exposes a system that fails to fulfill *Gault's* promise.")

3. See, e.g., Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 322 (2007) ("[F]orty years after *Gault*, it is clear that the promise of *Gault* has not been realized, especially as it relates to valuing accuracy in juvenile court proceedings."); see also Barry C. Feld & Perry L. Moriearty, *Race, Rights, and the Representation of Children*, 69 AM. U. L. REV. 743, 747 ("[I]f two of the Court's main objectives in *Gault* were to improve procedural fairness and address systemic racial disproportionality in the juvenile court, it has not succeeded.")

4. See NAT'L JUV. DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL 4 (2017), <https://tinyurl.com/2yvqfjsu> [<https://perma.cc/S4Q8-WQBB>] ("[I]f every state has a basic structure to provide attorneys for children, few states or territories adequately satisfy access to counsel for young people.")

5. See generally *In re Gault*, 387 U.S. 1 (1967); Wallace J. Mlyniec, *In re Gault at 40: The Right to Counsel in Juvenile Court—A Promise Unfulfilled*, 44 No. 3 CRIM. L. BULL. 5 (2008) (summarizing results

New Orleans' juvenile defense success story is unusual because it happened at all, but how it happened is also remarkable. The transformation had little to do with the tools that lawyers usually talk about in law reviews and other scholarly journals. Instead, it was mostly driven by internal organizational development. Within a few years of the storm, the organizational leadership changed—and so did the hiring, training, and ultimately the culture and the practice.<sup>6</sup>

Academic and practitioner observers of indigent defense point to both structural, exogenous constraints—problems like legislative underfunding<sup>7</sup> or judicial control,<sup>8</sup> which arise from systems outside the indigent defender—and organizational, endogenous problems. “Even adequate resources[,]” explained Harvard Law professor Carol Steiker on the fiftieth anniversary of *Gideon v. Wainwright*,<sup>9</sup> “would not be sufficient to solve some of the . . . problems that undergird the country’s indigent defense crisis.”<sup>10</sup> The endogenous problems Steiker listed include “[t]he lack of adequate organization, training, and oversight . . . and the absence of a robust culture of client-centered, zealous advocacy all prevent the delivery of decent indigent defense services just as surely as the lack of adequate material resources.”<sup>11</sup>

The New Orleans example shows that internally driven reform can make a massive difference. Juvenile indigent defense systems and organizations can often get better all by themselves—if they have the will and the know-how. But sometimes there is no internal motivation or capacity to change. And sometimes no amount of internal will or smarts can make a difference in the face of structural barriers to reform.

That’s where the federal Department of Justice (DOJ) can come in. During the last years of the Obama Administration, the DOJ tried a new experiment. For the first time, it deployed its civil rights enforcement power over juvenile justice systems in response to persistent and egregious shortcomings in indigent defense. In three separate matters, the DOJ investigated county-level juvenile justice systems, found severe juvenile indigent defense deficiencies, and tried to use litigation and the threat of litigation to impose solutions.

As a new administration looks to build civil rights enforcement back better, this Essay examines those DOJ interventions and draws lessons from both their successes and their frustrations. It concludes that the DOJ should launch a sustained campaign of juvenile indigent defense investigation and litigation early in the new administration. But, learning from its initial forays, the DOJ should target indigent

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of qualitative assessments of juvenile indigent defense systems in sixteen states and finding that constitutional right to counsel is unfulfilled).

6. I wish I could claim credit, but I did not become Executive Director of Louisiana Center for Children’s Rights until 2012 when the hard work had already been done by my predecessors. I left the position in 2016.

7. See, e.g., Erwin Chemerinsky, *Lessons from Gideon*, 122 YALE L.J. 2676, 2680–84 (2013) (discussing need for more indigent defense funding).

8. David E. Patton, *The Structure of Federal Public Defense: A Call for Independence*, 102 CORNELL L. REV. 335, 337 (2017) (emphasizing need for defense function to be independent of judiciary).

9. 372 U.S. 335 (1963).

10. Carol S. Steiker, *Gideon at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700 (2013).

11. *Id.*

defense systems directly rather than triangulating towards them through courts and county governments. Perhaps most importantly: the DOJ should distinguish between structural versus organizational problems and aim its remedies squarely at the root cause of the problems it is trying to solve.

I. THE DEPARTMENT OF JUSTICE'S UNIQUE TOOL: CIVIL RIGHTS ENFORCEMENT IN JUVENILE JUSTICE SYSTEMS UNDER 34 U.S.C. § 12601

President Barack Obama's administration provided unprecedented financial, litigation, and rhetorical support for indigent defense. Some of the things the Obama-era DOJ did were mostly different in scale from prior administrations. The federal government had funded indigent defense before Obama, though never enough.<sup>12</sup> It had sponsored technical assistance before, including the development of indigent defense practice standards.<sup>13</sup> But some of the Obama-era DOJ's indigent defense initiatives were genuinely new. For instance: it opened an Office for Access to Justice, which supported reforms aimed at increasing access to counsel in both criminal and civil cases.<sup>14</sup>

The Obama-era innovations also included two new litigation strategies. In the first, the DOJ filed a wave of amicus briefs and statements of interest supporting litigation brought by private plaintiffs against state and local indigent defense systems. These DOJ filings opposed practices that make it too easy for children to waive the right to counsel<sup>15</sup>; cautioned that under resourcing and other structural limitations might result in the constructive denial of counsel<sup>16</sup>; urged a state court to consider imposing workload controls and independent monitoring as part of a remedy for widespread ineffective assistance of counsel<sup>17</sup>; and argued for the availability of prospective, pretrial—as opposed to retrospective, post-conviction—Sixth Amendment relief.<sup>18</sup> It is true that the DOJ had used statements of interests

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12. See U.S. GOV'T ACCOUNTABILITY OFFICE, INDIGENT DEFENSE, DOJ COULD INCREASE AWARENESS OF ELIGIBLE FUNDING AND BETTER DETERMINE THE EXTENT TO WHICH FUNDS HELP SUPPORT THIS PURPOSE (2012), <https://www.gao.gov/assets/600/590736.pdf> [<https://perma.cc/6K2K-9A24>] (reviewing federal funding for indigent defense starting in 2005).

13. Deborah Leff & Melanca Clark, *Doing Justice to "Gideon,"* 39 HUM. RTS. 7, 8 (2013) (describing efforts initiated by Lyndon Johnson's Attorney General, Nicholas Katzenbach, to ameliorate "assembly line justice" delivered by public defenders.).

14. See Maggie Jo Buchanan et al., *The Need to Rebuild the DOJ Office for Access to Justice*, CTR. AMPROGRESS (Nov. 24, 2020, 9:01 AM), <https://tinyurl.com/y272b3fs> [<https://perma.cc/BL3W-VM39>]; see also Leff & Clark, *supra* note 13 (counsel from Office for Access to Justice describing activities to support indigent defense systems).

15. Statement of Interest of the United States at 16–19, *N.P. v. State*, No. 2014-CV-241025 (Ga. Super. Ct. Fulton Cty. Mar. 13, 2015).

16. Statement of Interest of the United States at 6–10, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Civ. Sup. Ct. Albany Cty. Sept. 25, 2014).

17. Statement of Interest of the United States at 6–10, *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

18. Brief for the United States as Amicus Curiae in Support of Appellants at 11–15, *Kuren v. Luzerne County*, 146 A.3d 715 (Pa. 2016); Brief for the United States as Amicus Curiae Supporting Plaintiffs-Appellants at 19–20, *Tucker v. State*, 394 P.3d 54 (Idaho 2017).

to weigh in on civil rights cases prior to the Obama Administration.<sup>19</sup> But those cases had never before centered around the constitutionality of indigent defense systems.

The second strategy was more direct and aggressive. Rather than chiming in alongside private litigants, the Obama-era DOJ opened its own investigations aimed in part at resolving indigent defense shortcomings.<sup>20</sup>

The Violent Crime Control and Law Enforcement Act of 1994,<sup>21</sup> for which now-President Joe Biden and then-President Bill Clinton have been (mostly correctly) pilloried by criminal justice reformers, did at least one good thing for juvenile justice systems, empowering the U.S. Attorney General to “eliminate” patterns and practice of civil rights violations “by officials or employees of any governmental agency with responsibility for the administration of juvenile justice . . . .”<sup>22</sup> Under President Obama, the DOJ interpreted that language as a grant of “authority to enforce the right to counsel in juvenile delinquency proceedings . . . .”<sup>23</sup>

Section 12601 of the Act is a powerful tool for indigent defense reform. Private litigants have certainly tried to use both the state and federal courts to fix indigent defense systems, with mixed results.<sup>24</sup> But private indigent defense litigation can be stymied by a number of obstacles that do not impede DOJ suits under § 12601. Private civil rights plaintiffs who are defendants in open criminal cases can run into abstention problems.<sup>25</sup> Lawyers and other advocates may find their suits dismissed for lack of standing.<sup>26</sup> And some suits are dismissed under the mistaken belief that there is no pretrial Sixth Amendment claim for ineffective assistance of counsel.<sup>27</sup> None of that matters to a DOJ that is statutorily invested with standing and the authority to ferret out and resolve patterns of due process violations.

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19. One account traces the first DOJ statement of interest in a civil rights case to 1994. See Victor Zapana, Note, *The Statement of Interest as a Tool in Federal Civil Rights Enforcement*, 52 HARV. C.R.-C.L. L. REV. 227, 233 (2017).

20. See Leff & Clark, *supra* note 13, at 10 (“For the first time, the DOJ used its authority under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141, to address constitutional violations within a juvenile justice system.”).

21. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796 (1994) (codified at 34 U.S.C. § 12601 (2018)).

22. *Id.* (creating cause of action).

23. Statement of Interest of the United States at 2, N.P. v. State, No. 2014-CV-241025, (Ga. Super. Ct. Fulton Cty. 2015).

24. Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89, 94–106 (2018) (reviewing history of indigent defense reform litigation).

25. See, e.g., *Younger v. Harris*, 401 U.S. 37, 50–1 (1971); see also *Bender v. Wisconsin*, No. 19-cv-29-wmc, 2019 U.S. Dist. LEXIS 159171 (W.D. Wis. Sep. 18, 2019) (dismissal of ineffective assistance of counsel claims in Wisconsin); *Yarls v. Bunton*, 231 F. Supp. 3d 128, 132–135 (M.D. La. 2017) (citing *Younger* abstention in dismissing pretrial ineffective assistance of counsel lawsuit against Orleans Public Defenders).

26. See, e.g., *Kowalski v. Tesmer*, 543 U.S. 125, 130–34 (2004) (attorneys lack third-party standing to bring ineffective assistance of counsel suit).

27. See *Platt v. State*, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996) (rejecting pretrial ineffectiveness claim in state case). At least one federal circuit has upheld a pretrial ineffective assistance of counsel claim. See *Luckey v. Harris*, 860 F.2d 1012, 1017–18 (11th Cir. 1988) (clarifying appropriate standard for determining whether defendant is entitled to prospective relief).

Prior to 2012, the DOJ had never used its unique powers under § 12601 to investigate indigent defense practices. But that year, the DOJ opened the first of three pathbreaking civil rights investigations.

## II. SHELBY COUNTY: AIR COVER FOR ORGANIZATIONAL CHANGE

In April 2012, the DOJ published the findings from a three-year investigation into the Juvenile Court of Memphis and Shelby County (JCMSC), Tennessee.<sup>28</sup> That court, the DOJ concluded, was constitutionally compromised.<sup>29</sup>

This was the first time that the DOJ used its § 12601 authority to investigate a juvenile court system.<sup>30</sup> And because JCMSC served not just as an adjudicatory body but also as the administrative center for the county’s juvenile justice system, including juvenile indigent defense, a hard look at the court also included a hard look at the county’s indigent defense mechanism for children in delinquency cases.

JCMSC’s control over juvenile defense in Shelby County was a quirk of history and local power politics. Shelby County has a well-established, full-time institutional public defender system—the third oldest in the country.<sup>31</sup> Under Tennessee law, each county’s public defender has “the duty and responsibility of representing indigent persons for whom the district public defender has been appointed as counsel by the court.”<sup>32</sup> And “indigent person” includes children in delinquency cases.<sup>33</sup> The law seems clear, then, that Tennessee’s county public defenders are also responsible for juvenile defense. So, for instance, Davidson County—the state’s second-largest county, and home to Nashville—has had a juvenile public defender division since 1978.<sup>34</sup>

But in Shelby County, indigent defense for kids had fallen under court control. The somewhat misleadingly named Juvenile Defender’s Office was in fact a panel of private attorneys under contract with the court who were managed by the “Chief

28. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT 1 (2012), <https://tinyurl.com/y5rlfwo8> [<https://perma.cc/XJ8Z-6E3R>]. For several years, first as Executive Director of the Louisiana Center for Children’s Rights and then as a private consultant, I was privileged to consult with the then-Shelby County Public Defender, Stephen Bush, on organizational changes aimed at improving its juvenile defense practice. I did not use any information gathered through that work in this Essay. But I acknowledge both professional and personal bias, since Mr. Bush is an admired friend.

29. *See id.* (“We find that JCMSC fails to provide constitutionally required due process to children of all races. In addition, we find that JCMSC’s administration of justice discriminates against Black children.” (footnote omitted)).

30. Sandra Simkins, *Success in Shelby County: A Roadmap to Systemic Juvenile Reform*, 44 U. MEM. L. REV. 727, 742 (2014).

31. *Our Office*, LAW OFF. OF THE SHELBY CTY. PUB. DEF., <https://www.defendshelbyco.org/history> [<https://perma.cc/M3XW-G4H8>] (last visited Jan. 28, 2021). Shelby County, which centers on Memphis, is Tennessee’s largest county. *Id.* Its public defender system was founded in 1917. *Id.*

32. TENN. CODE ANN. § 8-14-104 (2019), *amended by* Tenn. L. Pub. Ch. 64 (S.B. 785) (2021).

33. TENN. CODE ANN. § 8-14-101 (2020) (“For the purposes of this part, an ‘indigent person’ is one who does not possess sufficient means to pay reasonable compensation for the services of a competent attorney: (1) In any criminal prosecution or juvenile delinquency proceeding involving a possible deprivation of liberty . . .”).

34. *Juvenile Division*, NASHVILLE DEF.’S, <https://publicdefender.nashville.gov/about-us/juvenile-division/> [<https://perma.cc/4EGB-EBHB>] (last visited Jan. 29, 2021).



Juvenile Defender,” an administrator appointed by the court. Those contract attorneys were compensated through state Supreme Court funds that in other counties were generally used for conflict counsel.<sup>35</sup> The Juvenile Defender’s Office, the DOJ found, “is not an independent agency, nor is it affiliated with the county public defender’s office. Instead, JCMSC operates it entirely, and the Chief Juvenile Defender is appointed by, and reports directly to, the Juvenile Court Judge.”<sup>36</sup>

The DOJ’s look at the court-owned-and-operated indigent defense system was unsparring.<sup>37</sup> Federal investigators observed defenders behaving unacceptably. One defense attorney failed to object when a prosecutor called an accused child to testify at his own transfer hearing in violation of the right against self-incrimination. Another lawyer admitted a client’s guilt in open court, apparently without an appropriate waiver.<sup>38</sup> Investigators saw indications that these shocking performance failures were part of a routinely deficient defense practice. Defenders regularly failed to request discovery, to challenge probable cause for pretrial detention, and to take appeals and file written motions.<sup>39</sup> All of these problems were connected to the court’s control over the indigent defense function, which, in the DOJ’s view, “while not unconstitutional *per se*, creates an apparent conflict of interest . . . .”<sup>40</sup>

The DOJ never filed suit in Shelby County. Instead, just a few months after issuing the formal findings report, the DOJ entered into a forty-three-page Memorandum of Agreement (MOA) committing the county and the court to dozens of juvenile justice reforms.<sup>41</sup> Among other things, the MOA required Shelby County to:

- “Creat[e] a responsibility for the supervision and oversight of juvenile delinquency representation to the Shelby County Public Defender’s Office (“SCPD”) and support[] the establishment of a specialized unit for juvenile defense;
- Support[] SCPD training for juvenile defenders . . .
- Ensur[e] that juvenile defenders have appropriate administrative support, reasonable workloads, and sufficient resources to provide independent, ethical, and zealous representation . . .
- Implement[] attorney practice standards for juvenile defenders . . . .”<sup>42</sup>

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35. Simkins, *supra* note 30, at 757 (2014); *see also* INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT, *supra* note 28, at 50 (explaining concerning structure of Shelby County Juvenile Defender’s Office). The contracted attorneys were compensated at just \$50/hour for court time and \$40/hour for out-of-court time. Simkins, *supra* note 30.

36. INVESTIGATION OF THE SHELBY COUNTY JUVENILE COURT, *supra* note 28, at 50.

37. *Id.* at 48–50.

38. *Id.* at 48.

39. *Id.* at 49–50.

40. *Id.* at 50.

41. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY (2012), <https://tinyurl.com/2qh4pxer> [<https://perma.cc/MZT5-3XBF>].

42. *Id.* at 14–15.

These commitments jumpstarted remarkable change—and change that took effect quickly, at least on the geological timescale of indigent defense reform.<sup>43</sup> The SCPD responded to the MOA by setting up a specialized juvenile division that reflected many nationally-embraced best practices. It hired lawyers, social workers, and investigators, and it adopted an organizational structure that had multidisciplinary staff working collaboratively in teams to provide youth with robust fact defenses and access to supportive services.<sup>44</sup> For the most challenging cases—youth who were eligible for transfer to criminal court to face adult prosecutions and consequences—the public defender set up a specialized juvenile transfer team.<sup>45</sup> Lawyers in the new juvenile division received training in both trial skills and adolescent development by national experts in juvenile defense, and the public defender stepped up its supervision to promote attorney adherence to demanding practice standards.<sup>46</sup> By the time the Trump Administration closed out the MOA and terminated federal supervision in October 2018, the public defender’s new juvenile division represented 61% of all juvenile delinquency cases in Shelby County Juvenile Court.<sup>47</sup>

Those are tangible and meaningful wins. There is a lot to say about them, but for the purposes of this Essay I want to highlight just a few things. First: There is no reason to think the reforms would have happened without federal intervention. That’s mostly because they didn’t happen until the feds intervened. Second: None of the MOA’s juvenile defense reforms required any changes in state statute, local ordinance, or court rules. They were, in that sense, changes in practice rather than changes in formal legal structure. Third: The remedies mandated by the MOA were relatively specific. The MOA didn’t just settle for requiring “effective assistance of counsel” but explained that effective assistance in this context required “a specialized unit for juvenile defense” and other specific organizational changes.<sup>48</sup> Fourth: Important aspects of the changes were exclusively organizational in the sense I’m using the term. They were the product of internal reforms designed and

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43. See generally Stephen C. Bush & Laurie S. Sansbury, *The Essence of Justice: Independent, Ethical, and Zealous Advocacy by Juvenile Defenders*, 44 U. MEM. L. REV. 799, 824–28 (2014) (describing ways Shelby County Public Defender can strengthen juvenile defense).

44. See Memorandum from Sandra Simkins, Due Process Monitor, to Winsome Gayle, U.S. Dep’t of Justice et al. (July 3, 2015), <https://tinyurl.com/55g2oomf> [<https://perma.cc/CHR8-WYA6>] (report of MOA’s due process monitor, recording establishment of team representation, with lawyers working collaboratively alongside social workers and investigators in juvenile unit of Shelby County Public Defender).

45. *Juvenile Division*, SHELBY CTY. PUB. DEF., <https://www.defendshelbyco.org/services-2> [<https://perma.cc/68QZ-R6GR>] (last visited Feb. 8, 2021).

46. Memorandum from Sandra Simkins, Due Process Monitor, to Winsome Gayle, U.S. Dep’t of Justice et al. 3–5 (Dec. 15, 2014), <https://tinyurl.com/1nvm31cp> [<https://perma.cc/J4TV-U4CU>] (describing juvenile public defender training and development of practice standards).

47. Letter from John M. Gore, Acting Assistant Attorney Gen., Civil Rights Div., to Marlinee Clark Iverson, Shelby Cty. Attorney (Oct. 19, 2018), <https://tinyurl.com/msegi3yw> [<https://perma.cc/6QFY-62ZX>] (terminating federal supervision under Memorandum of Agreement); Raven Rakia, *Memphis’s Juvenile Court Plagued by ‘Culture of Intimidation’ and ‘Blatantly Unfair’ Practices*, APPEAL (Feb. 1, 2019), <https://theappeal.org/memphis-juvenile-court-department-of-justice-report/> [<https://perma.cc/39VN-96KN>].

48. MEMORANDUM OF AGREEMENT REGARDING THE JUVENILE COURT OF MEMPHIS AND SHELBY COUNTY, *supra* note 41, at 15.

implemented by the Chief Public Defender and his team. Fifth: As the previous four points imply, many of the changes could (but would not) have been implemented without the need for federal intervention. Prior to the MOA, the SCPD was already obligated by law to represent children in delinquency cases. The public defender also had the authority, pre-MOA, to train its lawyers, structure them into multidisciplinary teams, and impose practice standards.

But it didn't. The federal intervention catalyzed the internal, organizational change. It also provided political cover, which matters because SCPD is not insulated from local and state politics. It's a creature of the Shelby County government, and the Chief Public Defender is appointed and can be removed by the county mayor.<sup>49</sup> While SCPD had the legal power and responsibility to take juvenile cases prior to 2012, it might have paid a political cost for disrupting the existing, court-controlled, largely non-adversarial system.

This is the sixth point: While the change driven by the MOA was largely organizational, the need for change was closely linked to structural problems such as a lack of political independence and a hostile court culture. Those two structural problems were not specifically addressed by the MOA, but both were real impediments to both short-term and lasting change. The Shelby County juvenile court, not eager to relinquish its control over juvenile indigent defense, was still fighting back when the MOA was closed out in 2018.<sup>50</sup> The federal due process monitor's final report excoriated the court for creating a "culture of intimidation" by leaning hard on defense counsel who fought for their clients.<sup>51</sup> The court also refused to relinquish control over the panel of contract defense attorneys that, even at the closure of the MOA, continued to provide representation for 39% of children accused in juvenile court.<sup>52</sup>

So, like many real-world wins—and especially many justice reform wins—the progress in Shelby County came with some important qualifications. The court's continued resistance to due process protections, and the public defender's continued vulnerability to political interference, speak to the fact that organizational change can't fix every problem—and suggest that the DOJ should be attentive to both proximate and ultimate causes of defense disfunction in future interventions. But at least for the 61% of prosecuted children represented by a revitalized juvenile public defender, the DOJ's first dip into indigent defense reform through § 12601 made a real, and positive, difference.

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49. Shelby County Charter § 3.08(B) (appointment of public defender by county mayor).

50. Memorandum from Sandra Simkins, Due Process Monitor, to Mark Billingsley, Chairman Pro Tempore et al. (Dec. 10, 2018), <https://tinyurl.com/1k4jdav5> [<https://perma.cc/Z8FA-2RX6>] (noting "Juvenile Court has actively resisted compliance with the word and the spirit of the Agreement").

51. *Id.* at 5.

52. *Id.* at 2 ("Since 2012 Shelby County has been and remains non-compliant in creating an independent conflict attorney panel. As a consequence, several hundred children a year continue to be represented by attorneys who practice under the direct control of the Juvenile Court Judge." (footnote omitted)).

## III. ST. LOUIS COUNTY: RICOCHET DEFENSE REFORM

On July 31, 2015, the DOJ released its findings from an investigation into the St. Louis County Family Court (SLCFC).<sup>53</sup> As in the earlier Shelby County investigation, the DOJ found multiple due process and equal protection violations. But systemic ineffective assistance of counsel was given pride of place in the findings report: “[SLCFC] fails to provide adequate representation for children in delinquency proceedings, in violation of the Due Process Clause of the Fourteenth Amendment.”<sup>54</sup> This got the problem exactly right. But it was, at least superficially, a strange attribution of responsibility.

In the SLCFC, as throughout the state of Missouri (and much of the country, for that matter), appointment of counsel is part of the court’s job.<sup>55</sup> But Missouri’s public defenders do not work for, and should not be funded by, the court. That would create precisely the conflict of interest that the DOJ decried in Memphis. Instead, Missouri has a statewide public defender system with thirty-six district offices. The district office in St. Louis County is responsible for representing children in juvenile delinquency proceedings before the SLCFC.<sup>56</sup>

But like many other indigent defense systems, the Missouri system is badly underfunded. The DOJ’s investigation found that a single lawyer was appointed to represent every public defender client in SLCFC—394 new cases in 2014.<sup>57</sup> Unsurprisingly, the system was not working for children.<sup>58</sup> Almost no cases went to trial, and literally no cases featured contested sentencing hearings or appeals.<sup>59</sup> Taken together, the DOJ concluded, “these failings reflect a system devoid of adversarial process.”<sup>60</sup>

These factual findings, and the legal conclusion of ineffective assistance that the DOJ drew from them, seem unimpeachable. The family court plainly bore some of the blame. After all, it tolerated bad practice from public defenders, directly controlled a private panel of appointed non-public defender lawyers—a practice that the DOJ described as “arbitrary,” and prejudiced children by failing to timely appoint counsel.<sup>61</sup> But the court (quite properly) did not control either the organizational practices or the funding levels for the broken state public defender system.

Nevertheless, the court was held to account for the failure and for the fix. In the last days of the Obama administration, the DOJ signed a MOA with the SLCFC mandating that “[t]he Court will secure the equivalent of at least two publicly-funded

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53. U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT (July 31, 2015), [https://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis\\_findings\\_7-31-15.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2015/07/31/stlouis_findings_7-31-15.pdf) [<https://perma.cc/YU58-LZUL>].

54. *Id.* at 2.

55. MO. REV. STAT. § 211.211.3 (2017) (providing that court “shall appoint counsel for the child.”).

56. INVESTIGATION OF THE ST. LOUIS COUNTY FAMILY COURT, *supra* note 53, at 8.

57. *Id.* at 9.

58. *See id.* at 15. (“None of the signposts of zealous advocacy, such as pre-trial motion practice, contested hearings, independent evaluations, and expert witnesses, are present in the St. Louis County Family Court.”).

59. *Id.*

60. *Id.* at 17.

61. *Id.* at 19–21.

full-time juvenile defense counsel for the Court's delinquency cases."<sup>62</sup> The MOA also required the SLCFC to promulgate an "administrative rule requiring that all appointed juvenile delinquency defense counsel undergo juvenile delinquency defense training[,] and to "bi-annually notify the Missouri State Public Defender's Office" of that rule.<sup>63</sup> These things, apparently, the court did.<sup>64</sup> And according to the DOJ's independent due process auditor, defense representation got better. Judge Arthur Grim reported: "[J]uveniles and their families constantly stated that they were well represented . . . Both attorney[s] . . . are highly experienced and committed lawyers and are prime examples of the importance of quality defense counsel who are assigned permanently to the juvenile court process."<sup>65</sup>

As in Shelby County, I want to draw out a handful of notable aspects of the St. Louis intervention. First: Here too, there is no reason to believe that indigent defense representation in SLCFC would have improved without DOJ intervention. Second: The improvement, though apparently real and significant in the eyes of the auditor, was relatively modest in scale. One lawyer for 394 new juvenile cases, in the status quo ante, was unacceptable. Two lawyers for 394 new juvenile cases—or about new 200 cases per attorney—is still too high.<sup>66</sup> Neither the MOA nor the auditor's report suggested anything about non-attorney staff like investigators, paralegals, and social workers. The relatively modest demands, relative to Shelby County, may have had something to do with the clock running out on the Obama Administration, and suggests that the Biden-era DOJ should consider investigating

62. U.S. DEP'T OF JUSTICE, MEMORANDUM OF AGREEMENT BETWEEN THE UNITED STATES DEPARTMENT OF JUSTICE AND THE ST. LOUIS COUNTY FAMILY COURT 7 (2021), <https://tinyurl.com/4ay2pcd5> [<https://perma.cc/M8CE-L9QN>].

63. *Id.*

64. *See* ARTHUR E. GRIM & MARK A. GREENWALD, FOURTH REPORT OF THE INDEPENDENT AUDITOR AND DMC SUBJECT MATTER EXPERT 11–12 (2019), <https://tinyurl.com/18widsaa> [<https://perma.cc/ELP9-EEJN>] (finding substantial compliance with indigent defense requirements of MOA).

65. *Id.* at 3.

66. There is virtually no reliable descriptive data on existing juvenile defense caseloads across jurisdictions, much less research aimed at showing what optimal and maximum acceptable caseloads might be. *See* OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, LITERATURE REVIEW: INDIGENT DEFENSE FOR JUVENILES (June 2018), <https://ojjdp.ojp.gov/mpg/literature-review/indigent-defense-for-juveniles.pdf> [<https://perma.cc/J6QV-EHP9>] (summarizing the state of the field and concluding that there are massive gaps in juvenile defense data). The best data-informed research here probably comes out of studies done by the American Bar Association that brought groups of experts together to estimate how much time it should take to represent public defender clients. *See, e.g.*, POSTLETHWAITE & NETTERVILLE, AM. BAR ASS'N, THE LOUISIANA PROJECT, A STUDY OF THE LOUISIANA DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 1 (2017), <https://tinyurl.com/uqod5c8> [<https://perma.cc/YDA5-V2UF>] (estimating average time that expert juvenile defenders believe should be spent defending a juvenile delinquency case in Missouri at 19.78 hours/case); RUBINBROWN, AM. BAR ASS'N, THE MISSOURI PROJECT, A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 6 (2014), [https://www.aclu.org/sites/default/files/field\\_document/Ex007-The-Missouri-Project-2014-Public-Defender-Study.pdf](https://www.aclu.org/sites/default/files/field_document/Ex007-The-Missouri-Project-2014-Public-Defender-Study.pdf) [<https://perma.cc/8K56-5VHG>] (estimating average time that expert juvenile defenders believe should be spent defending a juvenile delinquency case in Missouri at 19.5 hours/case). If those studies are right, a public defender who "bills" 2,000 hours a year (a pretty high number) could only represent about 100 delinquency clients effectively.

and litigating as early as possible in the administration's term. Third: As in Shelby County, at least some of the problem was organizational. Set aside funding and staffing. It is hard to understand why it was incumbent on the *court* to create a juvenile defense training program and to advise the *state public defender* of its availability. One would have hoped to find the institutional capacity to train defense lawyers in the public defender system.

The public defender was neither the target of the investigation nor a party to the MOA. That leads to a fourth notable aspect of the St. Louis intervention: Even though the public defender was not directly bound by the MOA, the MOA appears to have catalyzed—or at least been followed by—significant organizational change in the state public defender's office. The DOJ closed the St. Louis MOA in December 2019.<sup>67</sup> That same year, the state public defender received additional funding from the legislature to open the Children's Defense Team, a specialized unit charged with representing children in delinquency cases in and around St. Louis and Kansas City.<sup>68</sup>

Finally, and relatedly, the fifth point: The DOJ achieved its public defense aims here indirectly. If the problem is public defense underfunding, or systematic misallocation of resources, or a failure to care enough about juvenile practice to develop the capacity to even offer a few hours of annual training: Why not also investigate the state public defender, and bind it into the MOA? That wouldn't mean the public defender is morally to blame—only that, statutorily, it bears the responsibility. The state and its creatures (like, for instance, a statewide public defender) are responsible for setting up and funding public defense systems under *Gideon* and *Gault*.<sup>69</sup> You need to get the responsible parties in the room if you want to solve the problem. It is unclear why the DOJ chose not to directly implicate the public defender in its investigation and instead held the court responsible for ensuring the public defender's effective representation. But as the next section shows, that approach may no longer be feasible, if it was ever advisable.

#### IV. LAUDERDALE COUNTY: WHEN IS THE JUVENILE JUSTICE SYSTEM ADMINISTRATOR NOT RESPONSIBLE FOR THE ADMINISTRATION OF JUVENILE JUSTICE?

The Shelby County and St. Louis County cases were resolved without litigation. The DOJ had a harder time in Mississippi, where it launched a third juvenile defense-related investigation.

Meridian is the seat of Lauderdale County, Mississippi, about 100 miles east of Jackson and right up against the Alabama border. In August 2012, the DOJ released

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67. Letter from Steven H. Rosenbaum, Chief, Special Litig. Section, to Judge Margaret T. Donnelly, Family Court of St. Louis Cty., and John Sauer, Mo. Attorney Gen.'s Office (Dec. 16, 2019), <https://tinyurl.com/ael7yyd5> [<https://perma.cc/7V58-RSCX>] (terminating MOA with SLCFD).

68. Memorandum from Charles E. Atwell, Chair, Pub. Defender Comm'n, to Mike Parson, Governor et al. 9 (2020), <https://tinyurl.com/4x7umak4> [<https://perma.cc/7XL8-GACZ>].

69. See, e.g., Margaret E. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1953 (2014) (describing obligation that *Gideon* imposes on states).

a scathing findings letter that indicted the city's schools and police; the county, its juvenile court, and the court's judges; and the state, whose agencies oversee children on probation.<sup>70</sup> At its core, the letter alleged a pattern and practice of civil rights violations arising out of a formalized school-to-prison pipeline. Schools called the police over minor student infractions; police arrested children without investigation or probable cause and funneled them into the juvenile justice system; the court convicted kids unnecessarily and without due process, and placed them on probation; and probation frequently involved stints locked up in juvenile detention.<sup>71</sup> "All entities," the DOJ concluded, "engage in a pattern or practice of imposing disproportionate and severe consequences including incarceration for technical probation violations such as school suspensions, without any due process whatsoever."<sup>72</sup> Government violations included depriving children of the effective assistance of counsel: "Children and their guardians consistently report that they are not always appointed an attorney for detention or adjudication hearings, and that the public defender who is appointed pursuant to a contract with the Youth Court does not provide children and guardians with meaningful or effective representation."<sup>73</sup>

When the parties did not voluntarily come into compliance, the DOJ sued under its Violent Crime Control and Law Enforcement Act authority.<sup>74</sup> The complaint expanded on the alleged due process violations, with detailed attention to the indigent defender's shortcomings. Almost all youth in Lauderdale County juvenile delinquency proceedings were represented by a single public defender, appointed and approved by the court, who refused to talk or meet with clients until the day of court. That public defender failed to "(1) explain the court proceedings to children and their parents; (2) participate in the court proceedings on their behalf; or (3) assist children in defending against the charges brought against them by presenting witnesses or evidence on their behalf."<sup>75</sup>

The city and the state ultimately settled.<sup>76</sup> But the county, its juvenile court, and its judges would not. So for the first time, federal judges were called upon to decide the extent of the DOJ's enforcement power under 34 U.S.C. § 12601.<sup>77</sup> The narrow legal question was whether Lauderdale County's juvenile court is a "government agency" within the meaning of the statute, which (recall) empowers

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70. Memorandum from Thomas E. Perez, Assistant Attorney Gen, U.S. Dep't of Justice, to Phil Bryant, Governor, State of Miss. et al. 2 (Aug. 10, 2012), <https://tinyurl.com/433vlzts> [<https://perma.cc/9XAF-PCRX>].

71. *Id.* at 2–4.

72. *Id.* at 4.

73. *Id.* at 6.

74. Complaint ¶ 18, *United States v. City of Meridian*, No. 12-168 (S.D. Miss. Oct. 24, 2012).

75. *Id.* ¶ 111.

76. Settlement Agreement, *United States v. City of Meridian*, No. 13-978 (S.D. Miss. Sep. 18, 2015), <https://www.justice.gov/crt/file/778016/download> [<https://perma.cc/9NY5-DJNL>] (city settlement agreement).

77. *See United States v. Lauderdale County*, 914 F.3d 960, 964 (5th Cir. 2019) ("As far as we are aware, this is the first—and thus far the only—Section 12601 claim brought against the judges of a youth court (or any court) to be resolved in the federal courts through adjudication.").

the DOJ to “eliminate” civil rights violations “by officials or employees of any *governmental agency* with responsibility for the administration of juvenile justice.”<sup>78</sup>

Both the district court and the Fifth Circuit answered *no*.<sup>79</sup> Because a court is not an “agency,” they concluded, Congress did not authorize § 12601 suits against courts—even if a court administers the entire local juvenile justice system, including the public defender. This latter point got short shrift in the decisions. The DOJ’s indigent defense allegations did not implicate judicial decision-making. The claim was that the court failed in funding and running its public defense system. Those are administrative, not adjudicative, functions.

The Fifth Circuit’s decision threatens to give safe harbor to jurisdictions that build their indigent defense systems poorly. Judicial administration of indigent defense defeats the structural independence that forms a cornerstone of effective advocacy.<sup>80</sup> The Fifth Circuit would exempt from federal oversight precisely the juvenile justice entities that need oversight most. A public defender under the county government umbrella—say, the SCPD, in Tennessee—can be subject to DOJ intervention if it fails to deliver effective assistance of counsel for children.<sup>81</sup> But a public defender wholly run by a judge cannot. This incentivizes a unitary model of juvenile justice where a county judge controls every aspect of the system, even indigent defense. Conflicts of interest are among the least frightening possible outcomes of systems where judges are not just adjudicators but all-powerful administrators.<sup>82</sup>

The decision was wrong. But even if it was right and other circuits adopt it, the Fifth Circuit’s holding does not entirely vitiate the DOJ’s power to remedy public defense problems under § 12601. It does instruct the DOJ how to use its power in the future, though. And this is the first aspect of the Mississippi case that I want to

78. *Id.* (emphasis added) (quoting 34 U.S.C. § 12601 (2018)).

79. *See id.* at 969.

80. *See, e.g.,* AM. BAR ASS’N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002), <https://tinyurl.com/119ttijj> [<https://perma.cc/UXY9-VPS3>] (“The public defense function, including the selection, funding, and payment of defense counsel, is independent.”).

81. *See e.g., Lauderdale Cty.*, 914 F.3d at 968 (“[T]he government can presumably still bring Section 12601 lawsuits against many other entities in the juvenile justice system without stretching the ordinary meaning of any words—including counties, city councils, mayors, police commissioners, correctional facilities, and youth services . . .”).

82. Why this perverse result? Mostly, according to the Fifth Circuit, because “[i]n ordinary parlance, . . . courts are not described as ‘departments’ or ‘agencies’ of the Government.” *Lauderdale Cty.*, 914 F.3d at 964 (citing *Hubbard v. United States*, 514 U.S. 695, 699 (1995)). Even if that’s generally true of “ordinary parlance,” it’s not true when it comes to the specific context that the statute was talking about. There, juvenile courts routinely assume many of the administrative functions that, in the criminal justice system, are fulfilled by county or state agencies. Just in this Essay, in addition to the all-powerful Lauderdale County court, we’ve seen the Juvenile Court of Memphis and Shelby County, which controls the county’s juvenile detention center and probation function, and the St. Louis County Family Court, which even employs the county’s prosecutors. Since *In re Gault*, courts applying legal principles to the juvenile justice system have looked to the realities of function rather than the niceties of form. *See In re Gault*, 387 U.S. 1, 27 (1967) (“The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School.”). If it looks and acts like an administrative agency, the government’s enforcement power over it cannot depend on whether the chief administrator has an “Honorable” before their name.



call attention to: As in Memphis and St. Louis, the DOJ did not name the Lauderdale County indigent defender specifically. Going forward, specifically and explicitly investigating and suing the indigent defender may be not just wise—especially where the problem is at least in part organizational—but necessary where the indigent defender (however inappropriately) works under judicial supervision.<sup>83</sup>

The second point: Because the DOJ's indigent defense-related Lauderdale County claims were never adjudicated on the merits, it is hard to know exactly what caused the county's indigent defense problems. The DOJ never claimed that they were related to high caseloads. Instead, the due process violations were caused by the public defender's bad practices. The public defender's failings, in turn, could have been a function of poor hiring, poor training, poor supervision, and poor culture. Alternatively, or additionally, the public defender could have failed because he was under the court's thumb. Here too, there may have been organizational problems that could have been resolved through engaging the public defender directly, as well as structural problems that demanded suing the court system.

#### V. CONCLUSION: DEPLOYING § 12601 TO HELP FIX JUVENILE INDIGENT DEFENSE

When Donald Trump took over from Barack Obama, and Attorney General Jefferson Beauregard Sessions III replaced Attorney General Loretta Elizabeth Lynch,<sup>84</sup> the DOJ stopped opening new matters relating to juvenile defense and began angling to get out of its ongoing juvenile defense-related matters. The DOJ's Civil Rights Division did not initiate any new juvenile justice litigation during the Trump presidency.<sup>85</sup> Its formal and publicly-announced juvenile justice activity focused solely on conditions of confinement: A statement of interest in a case about special education for youth in custody, and a report of an investigation that revealed

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83. The Fifth Circuit explicitly acknowledged that it was not resolving the question of whether the Lauderdale County public defender was amenable to suit.

In a letter filed with the court after oral argument, the government argues that if we interpret Section 12601's use of the phrase 'governmental agency' to exclude the Youth Court, then we should remand to determine whether public defenders and non-judicial court personnel can be held liable under the statute. However, not only did the government fail to make that argument in its briefs, but it has also not named these persons as defendants in this litigation. As such, we decline the government's invitation to remand for that purpose, and leave it be addressed in future cases where the issue is squarely raised and litigated.

*Lauderdale Cty.*, 914 F.3d at 969 n.15 (citing *Sindhi v. Raina*, 905 F.3d 327, 334 (5th Cir. 2018)).

84. Sessions was open about his distaste for the DOJ's involvement in litigation that engaged local and state governments in consent decrees and other long-running agreements with the federal government. Memorandum from Jeff Sessions, Attorney Gen., U.S. Dep't of Justice, to U.S. Attorneys, Heads of Civil Litigating Components, U.S. Dep't of Justice (2018), <https://tinyurl.com/1ehxsnpu> [<https://perma.cc/2JQ5-VXJC>]. For an analysis of the obstacles that Sessions' memo placed in the way of federal-led justice system reform, see Christy E. Lopez, *Here's Why Jeff Sessions' Parting Shot Is Worse Than You Thought*, THE MARSHALL PROJECT (Nov. 19, 2018, 10:00 PM), <https://tinyurl.com/y5feyooh> [<https://perma.cc/7XYB-RXQ7>].

85. See *Special Litigation Section Cases and Matters*, U.S. DEP'T OF JUST. (Mar. 25, 2021) <https://tinyurl.com/yxf8ug7o> [<https://perma.cc/M6CX-2ZYK>].

unconstitutional conditions of confinement in a juvenile prison.<sup>86</sup> By contrast, it formally closed at least three juvenile justice matters, including the Shelby County and St. Louis County matters.<sup>87</sup> It also lost the Fifth Circuit decision that made it harder to reform juvenile defense in Lauderdale County, Mississippi.

President Joe Biden’s election victory promises new (or, at least, renewed) opportunities for proponents of stronger indigent defense. That isn’t lost on those proponents, some of whom immediately formulated recommendations for the new administration. But those generally ambitious recommendations shied away from encouraging the administration to invoke § 12601. In its “[r]ecommendations for the Biden Administration,” the National Association for Public Defense (NAPD) heavily emphasized federal help with data collection and analysis—a lot of which is a core function of any effective organization and which public defenders could, in fact, do for themselves—but says nothing about using the power of the Civil Rights Division to improve public defense.<sup>88</sup> In its own recommendations, the National Juvenile Defender Center also took the time and space to ask for data help (again, an organizational capacity issue), but—like the NAPD—it did not mention the federal statute that gives the DOJ unique powers to help juvenile defenders and the children they serve.<sup>89</sup>

Maybe there’s a fear of suggesting publicly that the DOJ should aggressively intervene in local justice systems or that indigent defenders should be (and sometimes, where the organizational problems are of their own making, deserve to be) sued. But that fear is misplaced. One of the best things the DOJ can do for due process in the juvenile justice system is to use its § 12601 powers early and often, to investigate and sue indigent defense systems directly, and to target remedies at the specific structural and organizational root problems presented in each jurisdiction.

There are clear takeaways from juvenile indigent defense reform’s recent success stories and from the federal interventions that surrounded them. New Orleans, Shelby County, and St. Louis show that organizational problems are real barriers to effective practice. Where defenders cannot or will not solve them on their own, federal intervention can help. The DOJ can provide a push for defense

86. Statement of Interest of the United States of America at 2, *H.C. v. Bradshaw*, No. 18-80810 (S.D. Fla. Oct. 1, 2018), <https://tinyurl.com/24pdd5hf> [<https://perma.cc/VP73-YPP7>] (arguing that the local school board and the local sheriff in Palm Beach County, Florida, were both responsible for providing special educating services to children in custody); Letter from Eric S. Dreiband, Assistant Attorney Gen., Civil Rights Div., U.S. Dep’t of Justice, to Henry McMaster, Governor of S.C. (Feb. 5, 2020), <https://tinyurl.com/49wg95pd> [<https://perma.cc/GQ9U-Z9ZY>].

87. Letter from Steven H. Rosenbaum, Chief, Special Litig. Section, Civil Rights Div., U.S. Dep’t of Justice, to Chelsea L. Chicosky, Special Assistant Attorney Gen., Counsel to Miss. Dep’t of Educ. (June 26, 2019), <https://tinyurl.com/1ahe13uo> [<https://perma.cc/XZ9Q-NPPS>] (closing DOJ investigation into Mississippi’s Leflore County Juvenile Detention Center School); Letter from Steven H. Rosenbaum, *supra* note 67 (terminating MOA and closing investigation into SLCFB); Letter from John M. Gore, *supra* note 47 (Oct. 19, 2018), (terminating MOA and closing investigation into Juvenile Court of Memphis and Shelby County).

88. *Recommendations for the Biden Administration*, NAT’L ASS’N FOR PUB. DEF. (Nov. 12, 2020), <https://tinyurl.com/y3qk3s7d> [<https://perma.cc/PB77-435C>].

89. *Recommendations for the Biden/Harris Administration*, NAT’L JUV. DEF. CTR. (Dec. 21, 2020), <https://tinyurl.com/yxthvwm> [<https://perma.cc/Y959-8N9X>].

leadership, air cover to insulate indigent defenders from political pushback, and technical assistance where the problem stems from ignorance rather than ill-will.

And organizational problems are often intertwined with structural problems; an indigent defense system under the judiciary's thumb may find it much harder to implement internal reforms. DOJ intervention can help there, too, including through pressure on the courts that yields downstream benefits for indigent defense. But the DOJ should go into these investigations recognizing the reality of both structural and organizational barriers, and should make sure—for reasons both practical and doctrinal, as the Lauderdale County matter suggests—that all the necessary stakeholders to fix the problems are first informally brought to the table and then, and if necessary, formally sued.

Those stakeholders can and should include indigent defense systems themselves. Litigation is a tool to drive change in indigent defense. The shame isn't in being imperfect or ineffective. The juvenile defense community has been acknowledging and decrying the widespread ineffectiveness of defense systems almost since *Gault* came down. The shame is in failing to take advantage of every opportunity to build our way out.