Journal of Criminal Law and Criminology

Volume 88
Issue 1 *Fall*

Article 6

Fall 1997

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0091-4169/97/8801-0242
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 88, No.1

Printed in U.S.A.

CRIMINAL LAW

INEFFECTIVE ASSISTANCE OF COUNSEL: THE CASE FOR AN *EX ANTE* PARITY STANDARD

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Gideon v. Wainwright,[1] virtually alone in the field of constitutional criminal procedure, enjoys unqualified support across the ideological spectrum.[2] Many critics sympathetic to the defense,[3] however, have complained that the Court betrayed *Gideon*'s promise of effective defense counsel in *Strickland v. Washington*.[4] *Strickland*, which requires a convicted defendant to prove that defense counsel's unprofessional errors undermined the reli-

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* Professor of Law, University of Illinois College of Law. This article benefited enormously from the thoughtful comments of participants at two faculty workshops, one at the University of Indiana at Bloomington in November 1996, and one at the University of Illinois in February 1997. Special thanks to Craig Bradley, Joe Hoffman, Andy Leipold, John Nowak, Kit Kinports, Ron Totunda and Yale Kamisar.

[1] 372 U.S. 335 (1963).

[2] *See, e.g.*, Michael B. Mushlin, Gideon v. Wainwright *Revisited: What does the Right to Counsel Guarantee Today?*, 10 PACE L. REV. 327, 327-28 (1990) ("Two and a half decades later this support [for *Gideon*] has not diminished. Even former Attorney General Edwin Meese III approves.") (footnotes omitted).

[3] *See, e.g.*, William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986).

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

ability of the trial,[5] ranks among the most-cited Supreme Court cases ever decided.[6]

My thesis holds that the *Strickland* inquiry into counsel's effectiveness *ex post* should be supplement by an *ex ante* inquiry into whether the defense is institutionally equipped to litigate as effectively as the prosecution. Courts could make this determination either in collateral civil proceedings to test the effectiveness of the indigent defense system, or in individual criminal cases upon a pretrial motion claiming that effective assistance cannot be rendered in the instant case because of the indigent defense system's deficiencies.

Strickland's critics rightly claim that the current right-to-counsel doctrine is dysfunctional. The root of the problem, however, lies in *Gideon*'s focus on the *right to counsel* to the neglect of the *right to a fair trial.* It is indeed the case that the publicly-funded lawyers who represent most criminal defendants are overworked, underpaid, and all too often either inexperienced or burnt out. It is indeed the case that the *Strickland* test has failed to improve the defense function. It is indeed the case that effective defense representation is the single most important of our system's safeguards against convicting people of crimes they had nothing to do with or of more serious offenses than they actually committed. And it is indeed the case that there is no prospect of legislative action to improve the situation.

The courts should broaden their focus to concentrate on the fairness of the proceedings rather than the absence of identifiable errors by defense counsel. The key obstacle to reform lies in *Strickland*'s inquiry into the effectiveness of counsel *after the fact.* It is all but ludicrous to ask a reviewing court to assess a record made by counsel to determine how counsel erred. As one might expect, this inquiry has done little to improve the quality of defense representation. The theoretical availability of

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[5] *Id.* at 687.

[6] As of October 31, 1996, there were 12,241 cases containing the term "Strickland v. Washington." Search of WESTLAW, ALLSTATES database (Oct. 31, 1996). The database does not include federal cases.

relief nonetheless undermines the finality of criminal proceedings.

The better approach would ask *before* proceedings commence whether the defendant's lawyer can effectively represent him. Because the effectiveness of counsel is relative to the opposition, the test should be whether the defendant is represented by a lawyer roughly as good and roughly as well-prepared as counsel for the prosecution. Judges could make this determination either when counsel first enters an appearance for the accused, or in a collateral civil proceeding to test the adequacy of a jurisdiction's system of indigent defense.

The article proceeds through six stages. First, it documents the shortcomings of the indigent defense function in the United States. Second, it explains the poor state of indigent defense by reference to public choice theory: rational legislatures have every political incentive to shortchange indigent defense. The chronic shortage of resources imposes perverse incentives on defense lawyers. Third, the article defends the normative judgment that undersupport of the defense function is unjustifiable. This is despite the fact that elected legislatures permit it to continue and despite the fact that poor people generally need many other things more desperately than they need legal services.

Fourth, the article traces the history of right-to-counsel doctrine, a history that helps to explain why the choice of an *ex post* approach virtually dictated *Strickland*'s demanding standard. Fifth, the article develops a critique of *ex post* approaches in general, and of *Strickland v. Washington* in particular.

Sixth and finally, the article offers the *ex ante* parity standard as a promising alternative to the current regime. Jurisdictions could comply with the parity standard by improving the staffing, increasing the compensation, and expanding the support services of indigent defense lawyers working in traditional public defender, contract, or appointment systems. They could also comply by integrating the functions of prosecution and defense. However it happened, progress toward parity would occur incrementally, and with the support, rather than over the opposition, of legislatures. The parity standard, then, is not a panacea,

but it does offer a real prospect of reforming indigent defense through constitutional doctrine.

I. DESCRIPTION: THE PERMANENT CRISIS

Institutional defense of the indigent confronts a cluster of daunting challenges. Caseloads are enormous, funds are scarce, and the prestige of the work is low. Success is less common than failure and often tinged with moral ambiguity. Hence it is difficult to attract highly-qualified lawyers in the first instance. The pressure of case loads and the cynicism that attends whittling down the sentences of guilty clients make it just as hard to retain as to recruit qualified personnel.

Just a few years after *Gideon,* the President's Commission on Law Enforcement and Administration of Justice described these problems in its landmark report, *The Challenge of Crime in a Free Society.*[7] The President's Commission noted that:

> The shortage of criminal lawyers, which is already severe, is likely to become more acute in the immediate future. Some of the reasons for this shortage can be found in the very nature of criminal law practice, with its generally meager economic rewards and limited security. Most criminal defendants can pay only a small fee, if any, and only the organized or professional criminal can provide the steady business of a prosperous civil clientele. Counsel for the defense must expect to lose more cases than he wins, not for any reason related to his legal capabilities but because, as a matter of statistics, most defendants whose cases are not dropped early in the process are in fact found guilty. . . .
>
> All but the most eminent criminal lawyers are bound to spend much of their working lives in overcrowded, physically unpleasant courts, dealing with people who have committed questionable acts, and attempting to put the best possible construction on those acts. It is not the sort of working environment that most people choose. Finally, the professional status of the criminal lawyer tends to be low.[8]

"Defenders," the Commission observed, "are usually paid less than prosecutors, and many prosecutors are badly paid."[9] Every

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[7] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 370-74 (1968) [hereinafter THE CHALLENGE OF CRIME].

[8] *Id.* at 371.

[9] *Id.* at 373. Indeed, one measure of the state of the defense function in the immediate aftermath of *Gideon* can be gleaned from *Gideon* itself. The State of Alabama argued in its brief that the defense bar was so bad that typical defendants were really better off without such advocates:

succeeding survey of the defense function has noticed the same problems. The defense function in the United States is in a permanent state of crisis.[10]

In 1973, the National Legal Aid and Defender Association published a study based on site inspections around the country and on questionnaires to judges, prosecutors, and defense lawyers. The study concluded:

> [T]he resources allocated to indigent defense services have been found grossly deficient in light of the needs of adequate and effective representation. Relatively few indigent defendants have the benefit of investigation and other expert assistance in their defense. Their advocates are overburdened, undertrained, and underpaid, and as recent studies have shown, the poor have as little confidence in such advocates, who are often hand-picked by the same authority which pronounces their sentence, as they do in the inherent fairness of the American criminal justice system.[11]

That same year, David Bazelon, the distinguished Chief Judge of the Court of Appeals for the District of Columbia Circuit, published a lecture entitled, *The Defective Assistance of Counsel*.[12] The judge opined that "a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment."[13] He continued, "I have often been told that if my court were to reverse every case in which there was inadequate counsel, we would have to send back half the convictions in my jurisdiction."[14] Bazelon's jaundiced view may have been too

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> Many observers of the criminal trial scene are of the opinion that today only a few lawyers who undertake criminal defense cases are equal matches for career prosecutors whose intimate familiarity with a wide variety of criminal charges and prosecution techniques makes them formidable adversaries.
>
> This demonstrates that, generally speaking, indigent persons charged with crime are not as unfortunately situated as critics of the *Betts v. Brady* rule would have us believe.

Brief for Amicus Curiae State of Alabama at 10, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155).

[10] Or, in the title of a recent article, "The Indigent Defense Crisis is Chronic." *See* Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9 CRIM. JUST. 13, 13 (1994).

[11] NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 14 (1982) (quoting NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE 70 (1973)).

[12] David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973).

[13] *Id.* at 2 (footnote omitted).

[14] *Id.* at 22-23.

dour, but it may not be attributed to judicial philosophy. Warren Burger pretty much agreed with Bazelon's assessment.[15]

In 1982, Professor Norman Lefstein prepared a report for the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants.[16] He reviewed thirty-seven studies of indigent defense systems.[17] He summarized their findings as follows:

> Most of these studies were undertaken by consultants from outside the jurisdiction evaluated, and in virtually every instance the adequacy of funding, and the overall sufficiency of resources and defense services were principal concerns. Sixteen of the studies involved the total state system for providing defense services, whereas the balance focused on one or several counties in the state. Altogether the summaries in Appendix F contain data on all or part of twenty-four states, the District of Columbia, and Puerto Rico. Taken as a whole, these evaluations of defense programs, consisting of more than 4,000 pages of reports, present an exceedingly depressing picture of insufficient defense financing. Regardless of whether the study was conducted by NLADA, a private research organization, a bar association, or some other group, the message was the same: more funds are desperately needed to hire more lawyers and support staff, to reduce excessive caseloads, to compensate private lawyers adequately, and to provide for a host of other needs.[18]

Lefstein also relied on five new site inspections. These "vividly illustrate[d] the financial difficulties of defense programs."[19]

During the 1980s, the country grew more conservative, with two negative consequences for indigent defense. First, tough-

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[15] Burger noted that:

> Whatever the legal issues or claims, the indispensable element in the trial of a case is a minimally adequate advocate for each litigant. Many judges in general jurisdiction trial courts have stated to me that fewer than 25 percent of the lawyers appearing before them are genuinely qualified; other judges go as high as 75 percent. I draw this from conversations extending over the past twelve to fifteen years at judicial meetings and seminars, with literally hundreds of judges and experienced lawyers. It would be safer to pick a middle ground and accept as a working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation. The trial of a serious case, whether for damages or for infringement of civil rights, or for a criminal felony, calls for the kind of special skills and experience that insurance companies, for example, seek out to defend damage claims.

Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 FORDHAM L. REV. 227, 234 (1973) (footnotes omitted).

[16] LEFSTEIN, *supra* note 11.

[17] *See id.* at F-1 to F-68.

[18] *Id.* at 15-16 (footnote omitted).

[19] *Id.* at 16.

on-crime policies contributed to expanding caseloads. Second, the change in the *zeitgeist* reduced the number of gifted young lawyers who perceived indigent defense as a political obligation. Not surprisingly, the indigent defense function did not noticeably improve.

In 1988, the Special Committee on Criminal Justice in a Free Society, appointed by the American Bar Association, published a report called *Criminal Justice in Crisis.*[20] The Committee found:

> In short, there is ample evidence that the quality of representation, particularly for the poor, is not what it should be. Not only are we, as a society, depriving the system of the funds necessary to ensure adequate defense services, the private civil bar is not meeting its responsibility of involvement in the criminal justice process. The criminal justice system is shunned by the mainstream bar, and it will never be able to attract funds and public support if it cannot even garner the respect and support of the bar.[21]

A 1989 study of New York City found that indigent defenders miss over 40% of required court appearances, requiring appointment of substitute counsel; that few pretrial motions are made; and that defense attorneys view pleading cases as a goal of the system.[22]

In 1993, Richard Klein and Robert Spangenberg—two of the nation's leading experts on indigent defense, if not *the* two leading experts—prepared a report for the American Bar Association's Section of Criminal Justice.[23] They concluded:

> The long-term neglect and underfunding of indigent defense has created a crisis of extraordinary proportions in many states throughout the country. For defendants who enter the criminal justice system, Constitutional protections may be guaranteed only to those who can afford to pay for them. Justice often does not reach impoverished urban centers or poor rural counties where limited funding for indigent defense cannot provide effective representation to those accused of crimes.[24]

The more things change, the more they stay the same.

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[20] SPECIAL COMM. ON CRIM. JUST., CRIMINAL JUSTICE IN CRISIS (1988) [hereinafter CRIMINAL JUSTICE IN CRISIS].

[21] *Id.* at 37.

[22] MICHAEL MCCONVILLE & CHESTER L. MIRSKY, CRIMINAL DEFENSE OF THE POOR IN NEW YORK CITY (Occasional Papers from the N.Y. Univ. Ctr. for Research in Crime and Justice, No. VI, 1989).

[23] RICHARD KLEIN & ROBERT SPANGENBERG, THE INDIGENT DEFENSE CRISIS (1993).

[24] *Id.* at 25.

Also in 1993, *The American Lawyer* published an extensive survey of indigent defense. The general picture was a familiar one: underfunding, morale problems, and frequent incompetence. Despite some success stories, indigent defense is plagued by "serious problems that should disturb the conscience of every American concerned about equal justice."[25]

Charles Ogletree, a former public defender and now a Harvard professor, holds that "the typical public defender is burdened by a dramatic lack of resources, limited training and supervision, an unconscionable caseload, unhealthy working conditions, and unsympathetic police, prosecutors, judges, witnesses, and jurors with whom she must work."[26] Gary Goodpaster asserts that "while we do not know the incidence of trial attorney incompetence, impressionistic information indicates it may be a serious systemic problem."[27] Professors Schulhofer and Friedman opine that "the results of existing indigent defense methods are often abysmal and . . . the need for effective reform is acute."[28] In Georgia, the test of ineffective assistance of counsel is said to be whether counsel can fog a mirror.[29]

The shortcomings of indigent defense counsel are most pronounced in the setting in which the defense function is vital. Death penalty cases consume enormous amounts of time on the part of defense counsel, mental health experts, and private investigators. The defendants are, often understandably, despised. Neither legislators nor courts are willing to pay very much for the defense of these cases. Consequently, trial coun-

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[25] Andy Court, *Is There a Crisis?*, AM. LAWYER, Jan./Feb. 1993, at 45, 47.

[26] Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, LAW & CONTEMP. PROBS., Winter 1995, at 81, 85 (footnotes omitted).

[27] Goodpaster, *supra* note 3, at 73.

[28] Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice For All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 74-75 (1993).

[29] Stephen B. Bright et al., *Keeping* Gideon *From Being Blown Away*, CRIM. JUST., Winter 1990, at 10-11 ("The vice-president of the Georgia Trial Lawyers Association once described the standard for competence of counsel in many Georgia counties as the 'mirror test.' 'You put a mirror under the court-appointed attorney's nose, and if the mirror clouds up, that's adequate counsel.'").

sel in capital cases are often shockingly unqualified, unprepared, and unsupported.[30]

The principal support for the claim that indigent defense generally functions effectively is a study by the National Center for State Courts.[31] The authors compared the outcomes of cases in nine different courts according to representation by private counsel or by a public defender or an assigned lawyer. Although they found that defendants represented by private counsel fared better than the rest, the differences were not catastrophic.

Bear in mind three points about the Hanson research. First, there certainly appear to be many jurisdictions not studied by the Hanson group in which the defense function is grossly deficient. Second, the Hanson data indeed suggest that private representation has some benefits. In five large systems with public defender offices, defendants represented by publicly appointed counsel were incarcerated 71.5% of the time; those represented by private counsel were incarcerated only 50.5% of the time, although, in the smaller courts, the difference was negligible.[32] There may be problems with both the size, and the selection, of the sample, but such inferences as can be drawn from the study cast no great credit on public defenders.

Finally, and most importantly, it needs to be recalled that most criminal defendants are poor, even if they are not indigent. Many of those who can afford counsel can still afford only the services of the bar's bottom-feeders.[33] Thus, a comparison

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[30] *See* TASK FORCE ON DEATH PENALTY HABEAS CORPUS, ABA CRIM. JUST. SEC., TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 48-60 (1990); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 324-29; Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991); Yale Kamisar, Gideon v. Wainwright: *A Quarter Century Later*, 10 PACE L. REV. 343, 360-67 (1990); Ronald Tabak, Gideon v. Wainwright *in Death Penalty Cases*, 10 PACE L. REV. 407 (1990).

[31] ROGER HANSON ET AL., INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL (1992).

[32] *See id.* at 59.

[33] As one report noted:

between appointed counsel and retained counsel is not necessarily a comparison between appointed counsel and effective counsel.[34]

The proposition that indigent defense generally does not attract the most qualified lawyers does not deny that many terrific lawyers do indigent defense work. The proposition that indigent defense generally is inadequately supported does not mean that no indigent defendants enjoy the services of a full-time lawyer, publicly paid expert witnesses, and private investigators. The general propositions, however, remain valid despite these important qualifications.

Regarding indigent defense, the situation remains grim more than thirty years after *Gideon v. Wainwright.* I turn now to consider the institutional determinants of the problem.

II. EXPLANATION: PUBLIC CHOICE AND PERFORMANCE INCENTIVES

The literature suggests two basic causes for the shortcomings of indigent defense. First, the resources provided for it are

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> [I]n nearly every large city a private defense bar of low legal and dubious ethical quality can be found. Few in number, these lawyers typically carry large caseloads and in many cities dominate the practice in routine cases. They frequent courthouse corridors, bondsmen's offices, and police stations for clients, and rely not on legal knowledge but on their capacity to manipulate the system. Their low repute often accurately reflects the quality of the services they render.

THE CHALLENGE OF CRIME, *supra* note 7, at 371. *See also* JAMES EISENSTEIN ET AL., THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS 289 (1988) ("Privately retained attorneys, most of whose clients are not very wealthy, also rarely provide a zealous defense.").

[34] As Feeney and Jackson note:

> The studies to date clearly do not establish . . . that all attorneys lack effect. The record compiled by the top criminal defense attorneys clearly indicates to the contrary. The best lawyers do make a difference. Wealthy defendants, or those who have access to these superior forms of counsel, are likely to fare better in the criminal courts than those who lack this advantage. Only a few of the defendants who retain their own criminal defense counsel, however, fall into this group. Most criminal defendants who hire their own counsel or who have private counsel appointed for them are poor, and only marginally different, if at all, from the public defender's clients.

Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 409-10 (1991) (footnotes omitted).

simply inadequate.[35] The criminal justice system generally is underfunded. Legislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to the defense function rather than to additional police or prison space.[36] Public choice theory clearly predicts what scholars have consistently observed: the defense function is starved for resources.

The second fundamental problem with indigent defense is one of conflicting performance incentives. Professional ethics and personal pride encourage zealous representation.[37] There are however, two countervailing incentives. Begin with what we might call the horizontal conflict of interest, a conflict directly connected to the public choice problem. Resource constraints require indigent defenders to engage in the legal equivalent of triage. If it is impossible to interview the witnesses in every case, let alone try every case, the institutional defense lawyer must decide which cases deserve the acutely limited resources at hand. This, in effect, requires the defense lawyer to betray some clients in the interests of others.

If the defendants were spending their own money and had plenty of it, plea bargaining would still occur. Insurance companies settle cases all the time. When the client bears the costs of litigation, and reaps the benefits of compromise, it is at least plausible to believe in the rationality of settlement. When one adversary pays another's counsel, however, it becomes impossible to replicate the incentives facing litigants who pay their own way.

If the state guaranteed the costs of a well-prepared defense at trial to every defendant, and offered no concessions to defendants who plead guilty, defendants naturally would opt for trial. The costs of trial would be subsidized by the state.

Somehow or other, plea bargaining and public payment of defense counsel must be accommodated. They can be accom-

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[35] *See, e.g.*, CRIMINAL JUSTICE IN CRISIS, *supra* note 20, at 41-44; Klein, *supra* note 3, at 675-76.

[36] For a more general account, see Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993). *See, e.g.*, Schulhofer & Friedman, *supra* note 28, at 87, 91.

[37] *See, e.g.*, Schulhofer & Friedman, *supra* note 28, at 87, 91.

modated only if someone decides what few defendants will have their cases investigated and tried. Indigent defendants, unlike privately-paying litigants, cannot make this decision rationally because the costs of litigation are, so far as defendants are concerned, external. The current system relies on defense counsel to make these triage decisions. Technically, the decision to plead belongs to the client, not the lawyer. Practically, however, typical defendants are in no position to override pressure from counsel. Clients who are slated for a speedy plea may well wonder whether they have received the zealous representation to which they are theoretically entitled.

The second incentive problem might be called the vertical conflict of interest. A lawyer paid by the government to litigate against the government must account for the possibility that success may cut off the flow of government funding.[38] Sometimes this prospect is implicit, but it can sometimes be quite crude. Public defenders have lost their positions for trying too many cases or otherwise litigating *too* vigorously on behalf of their putative clients.[39]

The vertical conflict is obvious to defendants.[40] This makes it difficult for counsel to obtain the full confidence of the client, which in turn impairs both lawyer morale and candid attorney-client communication. In a nutshell, society asks indigent defense lawyers to silence, more often than to assert, claims of

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[38] *See, e.g., id.* at 84-85.

[39] *See* Robinson O. Everett, *Foreword*, 58 LAW & CONTEMP. PROBS. 1, 2-3 (1995).

[40] *See, e.g.*, Schulhofer & Friedman, *supra* note 28, at 86 ("Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is 'processing' and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship."). As Ogletree observes:

> [Public defenders] are paid . . . from the same coffers that pay these other court agents, their offices are occasionally housed in the courthouse itself, and they often make deals with prosecutors that send clients to jail. While attorneys tend to realize the necessity of such arrangements, clients many times do not. As a result, they accuse their public defenders of being too integrally involved in the criminal justice system, misidentifying them as players in a nefarious "confidence game."

Ogletree, *supra* note 26, at 87 (footnote omitted).

constitutional rights, and is well-positioned to get that message across to the stubborn or the thickheaded lawyer.

These problems inhere in institutional defense work regardless of its organizational structure. Legislatures have no more sympathy for defense services rendered by a public defender's office than for those rendered by contract lawyers or lawyers working on appointment. No matter how the government compensates defense counsel, some politically accountable official must decide how much to appropriate for an office, whether to renew a contract, or whether to continue an appointment.

So long as democratic politics fail to secure even minimally adequate funds for indigent defense, no system of representation can avoid the horizontal conflict. In a public defender's office, the lawyers have an incentive to minimize the labor spent on any given case, for the office's budget will not increase with an increase in caseload or in the percentage of cases tried. Since additional cases generate no marginal revenue, there is no financial incentive to the office to investigate cases thoroughly or to try them. To the extent that the lawyers are working to capacity rather than malingering, investigating or trying one client's case means not investigating or not trying another's.

The same incentives apply when the courts contract out defense work to private attorneys. A lawyer who receives a lump sum to represent indigent defendants will receive no more if the caseload is larger than anticipated. Nor will the payment increase if an unexpectedly high percentage of cases are tried. Unless the contract is unduly generous, the contract lawyer, like the public defender, must prioritize the interests of clients, each of whom theoretically enjoys the counsel's independent loyalty. Common experience and public choice analysis agree: the contract will *not* be unduly generous.

Defense lawyers representing indigent clients by appointment, who bill the court for services rendered, theoretically have an incentive to overinvestigate and overlitigate, because the costs of representation fall on the court rather than on the client. Typically, however, the schedule of compensation does not cover the cost of legal services. In effect, an appointment

system asks (or forces) private lawyers into taxing their paying clients to support indigent defense.

Here the horizontal conflict is not among a pool of indigent defendants, but between the pool of paying and nonpaying clients. It doesn't take a Nobel laureate in economics to figure out that the rational and self-interested attorney will slight the representation of the nonpaying clients. If the lawyer is not rational or not self-interested, her rational and self-interested paying clients will find another lawyer who fits the description of *homo economicus.*

A voucher system, such as that proposed by professors Schulhofer and Freidman,[41] faces problems analogous to the appointment system. Giving the indigent client the appointment power would surely represent an important step to combat the vertical conflict. But so long as the "reward" for effective defense of indigent clients is more indigent clients, the compensation paid for the work must exceed the costs of performing it. It will not, unless some way to overcome the public choice hurdle is found first.

Imagine a voucher system that paid defense lawyers less than the cost of service. Lawyers would do their best (or their worst) to avoid becoming a favorite of indigent defendants. Unless nonfinancial returns attend representing indigent defendants, such as trial experience for novices or publicity for veterans, lawyers would do everything they can to avoid the criminal practice. The nonfinancial returns to indigent defense are not now anywhere near enough to overcome the financial deficit that political neglect has forced on public defender, contract, and appointment systems.

If vouchers were worth only a *pro rata* share of an inadequate budget, a voucher system would simply privatize the public defender model. Defense lawyers would have to represent a large number of clients to accumulate the resources needed to try one case. No doubt some private sector efficiencies would accrue, with the result that the private defender would be able to try more cases per thousand than the public defender. But it

[41] *See* Schulhofer & Friedman, *supra* note 28, at 112-22.

would still be a very small fraction, small enough to force counsel into the same sort of triage that prevails now.

If vouchers were simply a portable appointment—entitling counsel to bill the court at an hourly rate set by the court—the public choice problem virtually ensures that the hourly rate would not cover the cost of services. Lawyers could accept the voucher only by internalizing the deficit or passing it through to paying clients. They would face strong incentives to perform as little service as possible, for though indigent defendants under a voucher plan would be paying customers, they would be paying less than the cost of services.

Professors Schulhofer and Friedman hope that legislatures could be cozened into increasing resources by pasting conservative buzz-words onto proposals for more money.[42] They posit that as defendants opted for the more expensive and more vigorous services of private counsel, legislatures would respond by preserving the competitiveness of defender offices and/or by paying what was charged by the private bar.[43] Surely this is politically counterfactual. No voucher system would allow the beneficiary to spend limitless amounts of public money. Rather, rate schedules would be set just as they are now set for appointed counsel—at levels below the cost of providing legal services.[44] Private firms, perhaps organized along the lines of those that prosecute worker's compensation's claims, might well improve on the performance of current indigent defense. Market incentives might spur labor-saving innovations. But the successful firms in such an environment would greatly resemble public defender offices—providing services to a large number of clients, of whom only a small minority can possibly enjoy a well-defended trial.

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[42] The authors speak of "deregulation" to "empower" the indigent defendant. *See id.* at 102-03.

[43] *Id.* at 104.

[44] As Professor Schulhofer has acknowledged, in jurisdictions that resort to involuntary appointment, "services are compensated at rates that are invariably far below their market value, as is obvious from the fact that defense attorneys are not willing to serve voluntarily." Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1989 (1992).

In short, the Schulhofer/Friedman approach responds only to the vertical conflict problem. If the major cause of defense inadequacy were pressure from cost-conscious court administrators, their approach makes sense. The predominant challenge, however, is legislative rather than judicial. If a voucher plan foreseeably results in major infusions of public funds for criminal defense, it will not be adopted. If it did not result in such an infusion, it would do only modest good. The best lawyer in town cannot defend a case for thirty dollars an hour; nobody can.[45] Lawyers who try will either soon give up criminal practice or deal with a huge caseload by favoring some clients at the expense of others.

III. EVALUATION: EFFECTIVE ASSISTANCE AND THE PRIORITY OF A FAIR TRIAL

Supporters of democratic institutions typically assume that accountable legislatures are the best institutions for allocating priorities among the various possible uses of public funds.[46] After all, we want public funds to be spent on behalf of majority interests. Indeed, we are usually disturbed when concentrated minority interests prevail over diffuse majority interests, winning subsidies for mohair or protective tariffs for shoes. Why does criminal defense deserve priority over other worthy projects, and why should this question be answered by constitutional courts rather than by democratically-elected legislatures?

Lawyers generally, and criminal lawyers in particular, may have trouble taking the first question seriously. The first question, however, is by no means trivial. A deeply egalitarian legislator might well prefer to devote scarce resources to improving education, health care, or transportation for the poor, rather than to indigent defense. Are not most of the accused guilty, ei-

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[45] The $30 figure is not hypothetical. *See* KLEIN & SPANGENBERG, *supra* note 23, at 6 (In Knox Country, Kentucky, hourly rates were *cut* from $20 per-hour for out-of-court and $30 per-hour for in-court time; Virginia caps compensation at $350 for most felonies).

[46] *See, e.g.*, THE FEDERALIST NO. 78, at 504 (Alexander Hamilton) (Modern Library ed., 1937) ("The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse . . . ").

ther of the crime charged or of something else equally serious? Why waste precious dollars on testing the government's (usually valid) case against (almost invariably) not very nice people? Indigent defense is not a benefits program for defendants. If it were, many defendants anticipating conviction regardless of the vigor of the defense might prefer the cash value of the legal services they might otherwise receive and represent themselves. That possibility—that the government might, in effect, pay a bounty for the commission of crimes—makes graphically clear that appointed counsel is more than an income transfer.

Instead, effective indigent defense is an essential component of the law enforcement system in a free society. Most of those who have thought about criminal law accept the view that the right to a fair trial has priority over competing consequentialist considerations, however weighty those considerations might be. For example, it is usually agreed that mollifying a vengeful mob with a show-trial of an innocent is wrong, even if the show-trial is the only way to prevent a deadly riot. This conclusion can be reached from broadly utilitarian[47] as well as from deontological[48] premises. For present purposes the important point is that the pursuit of the goal of punishing the guilty is generally agreed to be subordinate to a side-constraint requiring a fair trial before punishment.

Thus the indigent defense lawyer represents the client, but the state subsidizes the representation to place a necessary check on a necessary system. The question is not what priority indigent defense deserves versus public education or public health. Rather, the question is, given the priority of the criminal justice system relative to such other responsibilities as education and public health, what kind of indigent defense arrangement is minimally sufficient to ensure the fairness of criminal proceedings?

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[47] R.M. HARE, MORAL THINKING 162 (1981); H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 22 (1968). *See* John Rawls, *Two Concepts of Rules*, 64 PHILA. REV. 3, 7-8 (1955).

[48] *See, e.g.*, CHARLES FRIED, AN ANATOMY OF VALUES 125-32 (1970).

Gideon[49] quite convincingly connects effective defense counsel and the fairness of the trial. Indeed, Gideon's acquittal at retrial is a classic illustration of the connection.[50] Effective defense representation is essential to a fair trial. If we are going to dispense with effective counsel on grounds of expense, we might as well go whole hog and save what is spent on judges, bailiffs and court reporters. The transition from arrest to prison would be quicker and cheaper, and only a little less certain.

No one seriously supports saving what is spent on judges because other public responsibilities cry out for funds. Society has to enforce the criminal law, and it dares not leave this responsibility to unchecked executive discretion. If, as *Gideon* suggests, counsel is as essential to due process as the court itself, the normative case for diverting scarce resources to indigent defense derives from society's willingness to divert resources to law enforcement.

People who work in the criminal justice system have great confidence in its safeguards. In a recent study by C. Ronald Huff, Arye Rattner, and Edward Sagarin, a survey of judges and criminal lawyers (of whom only a small minority were defense lawyers) showed that the respondents generally estimated the false conviction rate at 1% or lower.[51] The generally complacent view about the system's potential for convicting the innocent, however, should be profoundly shaken by experience with DNA testing. Post-conviction testing has conclusively exonerated many defendants judged guilty by the system. A recent Department of Justice study reviewed twenty-eight such cases.[52]

Twenty-eight cases is a vanishingly small number in a system that incarcerates a million people at any one time.[53] But cases in which the system convicts, yet dedicated advocates of the defen-

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[49] Gideon v. Wainwright, 372 U.S. 335 (1963).

[50] For the story, see ANTHONY LEWIS, GIDEON'S TRUMPET 223-38 (1964).

[51] C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT: WRONGFUL CONVICTION AND PUBLIC POLICY 60-61 (1996).

[52] EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).

[53] On the size of the prison population, see, e.g., James R. Brown, Note, *Drug Diversion Courts: Are They Needed and Will They Succeed in Breaking the Cycle of Drug Related Crime?*, 23 N.E. J. CRIM. & CIV. CONFINEMENT 63, 76 (1997).

dant's cause continue to search for exonerating evidence, are very rare. The Department of Justice study contains a far more revealing, and far more disturbing, statistic. The authors surveyed DNA research labs about the tests they had run thus far:

> In about 23% of the 21,621 cases, DNA test results excluded suspects, according to respondents. An additional 16 percent of the cases, approximately, yielded inconclusive results, often because the test samples had deteriorated or were too small. Inconclusive results aside, test results in the balance of cases did not exclude the suspect.[54]

This is a large sample of contemporary cases. Given the expense of a DNA test, law enforcement agencies have a strong incentive not to test people other than very serious targets. What the DOJ statistics seem to suggest is that for every two or three prime suspects inculpated by DNA testing, one prime suspect is exculpated.[55]

What about cases in which there is no DNA evidence? There is little reason to think that the police batting average will be higher in robbery or burglary cases than in rape and homicide cases. Sometimes the perpetrator is apprehended *in flagrante*, and sometimes there is physical evidence, such as robbery booty. The police sometimes have similar success in rape and homicide cases, although perhaps less frequently. In property cases, as in crimes against persons cases, however, the police begin with a list of usual suspects and look for one who fits. If the fit is established by eyewitness testimony, there is great reason for caution. But further investigation is unlikely to be done by the police who think they have their case. Neither is it likely to be done by a public defender managing three hundred felony files. In these cases, the DNA statistics go far to discredit the conventional complacence. In the absence of the DNA evidence, how many of the suspects tested by the labs would have either pleaded out or been convicted after trial? Innocent people in our system are hard to convict; given experienced and well-prepared counsel, the challenge is made far greater. A common denominator running through the unjust

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[54] CONNORS ET AL., *supra* note 52, at 20.

[55] *See id.* at 20 n.* ("If inconclusive cases were omitted, the exclusion rate for the FBI would be approximately 25 percent, and the average exclusion rate for the other 18 laboratories would be about 30 percent.").

conviction cases is a shoddy defense at trial. As Huff et al. note, "That some people are convicted because their lawyers have little experience, caseloads that are too large, and inadequate budgets to carry out excellent investigations is evident."[56]

Forming an estimate of the false conviction rate based on the DNA lab results would require assumptions about whether innocent people are likely to plead guilty in the face of strong incriminating evidence. It would further require estimating the success of the trial process in acquitting innocent defendants who go to trial. That is work for another paper. What seems clear from the DNA lab tests, however, is that the notion that "they're all guilty, so what does it matter?" greatly overstates the reliability of police investigations.

Misidentification is the leading cause of unjust convictions. Official misconduct, dishonest informants, and false confessions play a role. A single reform, however, would do more than any other plausible policy to reduce the frequency of false convictions. That reform is making sure that every defendant has the effective assistance of counsel.

The dubious belief that trials do not matter because police investigation and prosecutorial screening weed out all but the guilty is a rationalization for the neglect of indigent defense, not the cause. There is general agreement that fair trial deserves special priority and that effective defense counsel is essential to a fair trial.[57] The conventional comfort dulls the urgency of

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[56] HUFF ET AL., *supra* note 51, at 77.

[57] For example, Judge Easterbrook notes that:

> Compulsion to represent criminal defendants is scandalous, as are the payment scales offered to these involuntary agents. You get what you pay for. Unwilling workers do not provide the level of care that not only defendants but also society are entitled to expect. At average expenses *per case* as low as $63, states are providing so little legal time to defendants that much exculpatory evidence and many valid defenses go begging. A shortfall is less pressing at the bargaining stage than at trial . . . but is unjustifiable in either setting. A society professing the inestimable value of liberty, yet prepared to more than $20,000 per year to incarcerate a person, should be willing to pay the market cost of supplying defense services. Increased accuracy will improve deterrence and cut the expense of imprisonment—not only the outlays to maintain prisons, but also the production foregone and the value of freedom. The Medicare system pays the market price for medical services; the military system pays the market price for soldiers

these beliefs, but it does not displace them. Why then is the defense function so seriously neglected? Basically, judges and scholars agree that criminal defense deserves special priority, but they also agree that the appropriation of funds is a legislative matter. The second commitment undermines the first.

Surely the appropriation of public funds is central to legislative authority. Courts hesitate to attempt to compel appropriations even to fund their own operations.[58] In the desegregation context, the Supreme Court has approved of remedies that in effect force states to spend money.[59] But the right-to-counsel context is very different. A judicial order to spend more money on indigent defense might *prevent* a great many violations of the constitution, but it is hard to describe it as a *remedy* for any discrete breach of the Sixth Amendment or due process. Thus, in the desegregation context, the courts have ordered state and local authorities to adopt policies that cost money. In the indigent defense context, the courts would be ordering state and local authorities to spend money *as* a policy.

Impact litigation seeking relief from crushing caseloads bears out the claim that judicial reluctance to compel appropriations undermines the commitment to effective defense representation. The Minnesota Supreme Court, for example, dodged the issue on standing grounds.[60] The Second[61] and Eleventh[62] Circuit Courts of Appeal achieved the same result on the ground of federal-state comity. The Supreme Court of Iowa

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and aircraft carriers; the criminal justice system should pay the market price for legal services.

Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1973-74 (1992) (footnotes omitted).

[58] *See, e.g.*, Note, *The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687 (1983).

[59] *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33 (1990) (district court erred under comity doctrine by imposing a property tax levy, but had power to enjoin enforcement of state property tax caps that prevented raising funds for remedies for past unconstitutional racial discrimination).

[60] Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996).

[61] Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973) (per curiam).

[62] Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992) (per curiam).

recently found a challenge to statutory fee limits justiciable, but rejected the claim on the merits.[63]

Some courts have agreed that caseload pressures violate the Constitution, but they have yet to develop an effective remedy. The remedial challenge is illustrated by the paradox of some courts conscripting private lawyers into service,[64] while other courts declare this practice an unconstitutional taking of property.[65]

Recently, the Supreme Court of Arizona overturned a trial court's order conscripting all members of the local bar for indigent defense—including those with no criminal or trial experience.[66] The court, however, refused to fashion a remedy more specific than ordering the (obviously desperate) lower court to "provide a fair and equitable fee schedule for lawyers appointed from private practice."[67] Apparently, only one court has gone so far as to adopt a *rebuttable* presumption of ineffectiveness under *Strickland v. Washington*.[68]

None of these responses is very promising. The rebuttable presumption of prejudice only changes the tie-breaker, when the real vice of *ex post* review is the very appearance of inevitability in a record made unchallenged by well-prepared counsel. Capping assignments to overburdened attorneys does not produce more lawyers for the remaining defendants. Declaring confiscatory rates of compensation unconstitutional does not produce money to pay higher hourly rates.

Judicial respect for legislative authority over appropriations reflects both political principle and political reality. If the basic defect of indigent defense is inadequate funding, and if appropriation is inherently a legislative prerogative, the conclusion seems to follow that constitutional doctrine can do little to improve the defense function.[69]

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[63] Lewis v. Iowa Dist. Ct. for Des Moines County, 555 N.W.2d 216 (Iowa 1996).

[64] *See* KLEIN & SPANGENBERG, *supra* note 23, at 18.

[65] *See, e.g.*, Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. 1972).

[66] Zarabia v. Bradshaw, 912 P.2d 5 (Ariz. 1996) (en banc).

[67] *Id.* at 9.

[68] *See* State v. Smith, 681 P.2d 1374 (Ariz. 1984) (en banc).

[69] *See* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 114-15 (1996) ("Especially if money, wisely

Appropriations probably should, and certainly will, remain a legislative prerogative. But it does not follow that constitutional doctrine is impotent. The courts might well design a constitutional standard that increases the incentives for legislatures to provide a decent minima of support for indigent defense. This in turn might invigorate the defense function without usurping legislative authority. The courts, however, have excused legislative neglect by testing the adequacy of counsel's performance after the fact, based on appellate review of a record made by the very lawyer whose effectiveness is challenged. I turn now to explain how the Supreme Court came to this curious result.

IV. DOCTRINE: FROM *GIDEON* TO *STRICKLAND*

The *Gideon* Court had to choose between two different approaches followed in the applicable precedents.[70] In one line of cases, the Court had held that due process requires the appointment of counsel for the indigent in state cases whenever a trial without counsel would be fundamentally unfair. In *Powell v. Alabama*[71]—the notorious case of the "Scottsboro boys"—the Court had held that a trial ending in a death sentence for illiterate defendants, represented by counsel only in name, was fundamentally unfair. The language of the opinion seemed to suggest that some serious cases demand defense counsel as a matter of fundamental fairness.[72] In *Betts v. Brady*,[73] however, the Court rejected this view and held that felony trials of unrepresented defendants could be consistent with due process. Whether fundamental fairness required counsel for a given defendant was to be determined according to the totality of the circumstances in each case.[74]

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spent, constitutes a *sine qua non* for elimination of factors conducive to widespread no-fault ineffectiveness—a plausible hypothesis—I believe there is little in a practical vein the Court could have done, or can do in the future, to promote competent performance by counsel."). My argument holds the opposite—that by shifting the constitutional focus from the *ex post* to the *ex ante* the courts can indeed stimulate the political process to come forward with the needed funds.

[70] 372 U.S. 335 (1963).

[71] 287 U.S. 45, 71 (1932).

[72] *Id.* at 53.

[73] 316 U.S. 455, 464 (1942).

[74] *Id.*

In the other line of cases, the Court had relied on the equal protection clause to require the states to waive filing fees and supply free trial transcripts for indigent defendants contesting their convictions on appeal.[75] Broadly expressed by Justice Black, the theme of these cases was that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[76]

Both lines of cases were unsatisfying. The due process test was vague enough to permit almost any result. While the Supreme Court reversed almost all of the cases in which the accused was denied counsel, most such cases never reached the Supreme Court. The unrepresented convict was in a poor position to prosecute an appeal, and in the few states that had not gone beyond *Betts* as a matter of state law, the lower courts were unsympathetic to claims under *Betts*.[77] Nonetheless, the vagueness of the standard conferred broad discretion on federal courts entertaining petitions for federal habeas, and the state courts chafed under this supervision. The equal protection cases conflicted with the then-prevailing two-tier system of judicial review, under which classifications based on race were tested with strict scrutiny and other classifications were rubber-stamped under the rational-basis test.[78] The Court could not declare poverty a suspect class without prohibiting governments from making some goods or services available solely to those with means. Even modest extensions of the *Griffin-Douglas* principle collided with broadly held judgments about the reasonableness of charging fees for public services, such as health care and higher education.

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[75] Smith v. Bennet, 365 U.S. 708 (1961); Burns v. Ohio, 360 U.S. 252 (1959); Griffin v. Illinois, 351 U.S. 12 (1956).

[76] *Griffin*, 351 U.S. at 19 (plurality opinion).

[77] *See* Brief of Amici Curae American Civil Liberties Union and the Florida Civil Liberties Union at 8-11, 48-57, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155) (of 139 Betts "special circumstances" cases, the Supreme Court took only 14 but reversed 11).

[78] *See, e.g.*, 2 RONALD D. ROTUNDA ET AL. TREATISE ON CONSTITUTIONAL LAW § 18.3, at 324-26 (1986).

In *Gideon*,[79] the Justices unanimously decided to overrule *Betts* and require appointed counsel for the indigent in all felony prosecutions. Justice Black wrote for the majority, and as might be expected, delivered a plea for total incorporation. With some fairness, Black characterized *Betts* as unfaithful to *Powell v. Alabama*;[80] but the strongest portion of the opinion characterizes counsel as fundamental to a fair trial.

Justice Black noted that the prosecuting authority and any defendant with the means to pay invariably "secure" the best lawyers they can afford.[81] And Black quoted extensively from *Powell*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[82]

Thus *Gideon* spoke both the language of selective incorporation and the language of fundamental fairness. The Fourteenth Amendment requires the availability of counsel at all felony trials, perhaps because the Sixth Amendment includes the right to counsel, and perhaps because no felony trial is fair without a lawyer for the defense.[83]

What *Gideon* did not speak was the language of equality. *Gideon* does not hold that the poor have the right to representation as effective as that provided to the rich by private counsel. Instead, *Gideon* sets a floor beneath which the defense of the accused may not fall, regardless of how much more elaborate may

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[79] Gideon v. Wainwright, 372 U.S. 335 (1963).

[80] *See id.* at 342-44 ("[T]he Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents.").

[81] *Id.* at 344.

[82] *Id.* at 345 (quoting Powell v. Alabama, 287 U.S. 45, at 68-69 (1932)).

[83] Justice Harlan concurred separately, emphasizing how the result could be reached on grounds of fundamental fairness. *See id.* at 349 (Harlan, J., concurring).

be the defense mounted by another defendant of greater means.[84]

How high was this floor to be? The Sixth Amendment provides that in "all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[85] The incorporation approach, which looks to the text of the Sixth Amendment rather than to any more general due process requirement of a fair trial, suggests that the floor could be quite low. All the Sixth Amendment guarantees is "the Assistance of Counsel"—not of experienced or dedicated or talented counsel.

In the first few years after *Gideon*, the text of the Sixth Amendment seemed less important than the overall fairness of the proceedings in determining the answers to the questions *Gideon* had raised. With respect to the effectiveness of counsel, the leading pre-*Gideon* case was *Diggs v. Welch*.[86] Diggs was a federal prisoner who complained on a petition for habeas corpus that his defense counsel led him to plead guilty on the basis of unsound advice. The case therefore was governed by the Sixth Amendment; but Judge Thurman Arnold deftly converted it into a due process case.

"All [the Sixth] amendment requires is that the accused shall have the assistance of counsel,"[87] Arnold wrote. "It does not mean that the constitutional rights of the defendant are impaired by counsel's mistakes subsequent to a proper appointment."[88] *Diggs*, therefore, must

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[84] The Court did not entirely give up on equal protection analysis. The same day that *Gideon* came down, the Court decided *Douglas v. California*, 372 U.S. 353 (1963). *Douglas* struck down a California practice of appointing appellate counsel for indigent defendants only after the appellate court determined, from an examination of the record, that the appeal raised colorable issues requiring the assistance of an appellate lawyer. The majority was not entirely clear about whether this holding followed from equal protection or due process; but in any event the Justices' willingness to rely on equal protection in the appellate, but not the trial, context suggested what subsequent experience would confirm. Poverty was not going to be declared a suspect class, and *Douglas*, along with its predecessor *Griffin v. Illinois*, 351 U.S. 12 (1956), would be confined to the realm of criminal appeals.

[85] U.S. CONST. amend. VI.

[86] 148 F.2d 667 (D.C. Cir. 1945).

[87] *Id.* at 669 (footnote omitted).

[88] *Id.*

> rely on the due process clause of the Federal Constitution which guarantees him a fair trial. But, to justify habeas corpus on that ground an extreme case must be disclosed. It must be shown that the proceedings were a farce and mockery of justice. No doubt in such cases careless representation of the defendant by his attorney may contribute to the lack of due process of the trial as a whole. But if so, it is only one of the factors leading to the violation of petitioner's constitutional rights . . . . Carelessness of counsel is not the ground for habeas corpus in such a case. If relied on it must be as one of the evidentiary facts which, coupled with others, show a violation of the Fifth Amendment.[89]

The cases cited in support of this passage include such fundamental fairness decisions as *Moore v. Dempsey*, *Powell v. Alabama*, and *Brown v. Mississippi*.[90]

Judge Arnold had some very good reasons for adopting so harsh a standard. Unlike the claim that counsel was denied to a defendant, the claim of incompetent representation is easily made, difficult to evaluate, and costly to remedy after the fact. At a time when the system struggled to supply lawyers of any sort even to those felony defendants who insisted on trial, there was little sympathy for the complaint that the lawyer who had been found performed ineffectively.

So courts throughout the United States made this "farce and mockery" standard the prevailing test of ineffective assistance of counsel claims.[91] The standard was, needless to say, difficult to satisfy. For example, Judge Henry Friendly wrote for a unanimous Second Circuit Court of Appeals that counsel was not ineffective even though he had slept through the testimony of a prosecution witness.[92]

The practical difficulties of improving the defense function were not easily addressed by appellate courts. Between *Gideon* and the 1984 decision in *Strickland v. Washington*, the lower fed-

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[89] *Id.*

[90] *Id.* at 669 nn.3-5 (citing, among other cases, *Moore v. Dempsey*, 261 U.S. 86 (1923), *Powell v. Alabama*, 287 U.S. 45 (1932), and *Brown v. Mississippi*, 297 U.S. 278 (1936)).

[91] *See* Trapnell v. United States, 725 F.2d 149, 151 (2d Cir. 1983) ("By 1962, nine of the eleven circuits were applying the *Diggs* 'farce and mockery' standard. The two remaining circuits adopted the 'farce and mockery' standard in 1965 and 1970, respectively.") (citations omitted).

[92] United States v. Katz, 425 F.2d 928 (2d Cir. 1970). The court's opinion includes a footnote expressing a typical view of ineffectiveness claims: "The court is grateful to [appellate counsel] for his vigorous undertaking of the distasteful task of criticizing a brother lawyer on Katz' behalf." *Id.* at 931 n.3.

eral courts grappled with the problem without clear guidance from the Supreme Court.[93] The Supreme Court's right-to-counsel cases during this period mainly dealt with the question of when the Sixth Amendment right to counsel applied, rather than on the question of what the right entailed.

The Court did, however, give the lower courts room to maneuver. The 1970 decision in *McMann v. Richardson*[94] initiated a trend toward a standard somewhat less forgiving of professional errors. The defendants in *Richardson* sought federal habeas corpus relief from convictions entered after guilty pleas.[95] They claimed that they had pled guilty because they feared that coerced confessions might be admitted against them at trial.[96] The Court rejected this claim, holding that the decision to plead guilty amounts to a deliberate by-pass of state remedies, precluding subsequent collateral attack.[97] Only if the guilty plea was not "based on reasonably competent advice" would the conviction be "open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession."[98] The Court stated:

> Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand, defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.[99]

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[93] *See* Bazelon, *supra* note 12, at 21-22.

[94] 397 U.S. 759 (1970).

[95] *Id.* at 761-64.

[96] *Id.*

[97] *Id.* at 768.

[98] *Id.* at 770 (footnote omitted).

[99] *Id.* at 771.

The opinion does not elaborate on "the range of competence demanded of attorneys in criminal cases."

That same term, the Court decided *Chambers v. Maroney*,[100] a case that unexpectedly turned out to shed more light on the Fourth Amendment than it shed on the Sixth. After Chambers' first trial ended in a mistrial, he was convicted at a second trial of two robberies. Chambers met his appointed lawyer for the second trial for the first time in a courthouse hallway on the morning of the trial.[101]

Chambers claimed that the late appearance by counsel precluded effective representation at trial.[102] The only discrete error by counsel claimed by Chambers, however, was the failure to seek suppression of evidence obtained during two searches, one of an automobile and one of Chambers' home.[103] The Court determined that the automobile search was legal and agreed with the lower court that the reception of the evidence seized in the residential search was harmless beyond reasonable doubt.[104] Accordingly "the claim of prejudice from substitution of counsel was without substantial basis."[105]

Only Justice Harlan questioned the Court's casual adoption of a prejudice requirement. The appropriate test, Harlan argued, did not turn on "a mere assessment of particular missteps or omissions of counsel" but rather on the "total picture."[106] Reviewing courts should try to determine whether the accused was "deprived of rudimentary legal assistance."[107]

Justice Harlan had a cogent point; the consequences of a lawyer's incompetence both pervade and exceed the scope of

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[100] 399 U.S. 42 (1970).

[101] *Id.* at 53. Meeting the client on the day of trial is not some relic from the distant past. *See* Ogletree, *supra* note 26, at 88 ("A public defender burdened with inadequate resources and an unreasonable caseload may not even know the client's name—much less the identity of the witnesses and the theories of the case—until the day of the trial itself.").

[102] *Chambers*, 399 U.S. at 53.

[103] *Id.* at 53-54.

[104] *Id.* at 54.

[105] *Id.* (footnote omitted).

[106] *Id.* at 60 (Harlan, J., dissenting).

[107] *Id.* (Harlan, J., dissenting).

the record. Chambers could not point to any discrete error by counsel, other than the failure to press the meritless search-and-seizure claims; but if his trial lawyer was incompetent there was no way for Chambers, or for his appellate counsel, to reconstruct the possibilities trial counsel had neglected. To limit scrutiny of counsel's performance to a record made by counsel is for the reviewing court to don the very blinders worn by counsel.

In any event, particular decisions by counsel are difficult to evaluate after the fact. Exclusive focus on specific tactical choices, without reference to the "total picture," leaves no room for the possibility that counsel was incompetent even though the court can imagine some competent lawyers making similar decisions. If Perry Mason pursues a self-defense theory, rather than insanity, that is one thing. If Bozo the Clown pursues the same strategy, it hardly follows that effective assistance has been rendered.

There is, finally, something peculiarly academic about the *Chambers* Court's conclusion that because the search-and-seizure claim was rejected (over dissent) by the Supreme Court, therefore Chambers was not prejudiced by his lawyer's feeble presentation of the claim to the trial court.[108] A well-prepared lawyer might have succeeded in persuading the trial judge to suppress, even though such a ruling would have been vulnerable to reversal. The government might then have elected to proceed to trial without the suppressed evidence, and perhaps have lost a weakened case. Or the government might have offered a favorable plea bargain once the trial court had ruled in favor of the defense. There is no way of knowing; and thus the assignment of the burden of proof determines the outcome.

One might have supposed that the ruling in *Chambers* cast the burden of showing prejudice on the defendant claiming ineffective assistance, but the opinion says nothing about burdens of proof. The Court further clouded the picture by deciding during the 1970s a series of cases in which *the government* had in one way or another interfered with defense counsel's prepara-

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[108] *Id.* at 54.

tion or presentation of the case.[109] In these cases, the Court "uniformly found unconstitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."[110] The Court adopted a similar rule of automatic reversal in conflicts-of-interest cases in which the trial court fails to remedy a conflict apprehended by a lawyer representing multiple defendants.[111]

Thus, throughout the 1970s, the Supreme Court did not offer guidance about ineffective assistance claims. The accused was entitled to representation "within the range of competence demanded of attorneys in criminal cases."[112] What this meant was anybody's guess. As for the prejudice question, *Chambers* looked in one direction, while the government-interference and conflict-of-interest cases looked in quite another.

Left with this much discretion, the lower courts developed a variety of approaches.[113] For the most part they abandoned the "farce and mockery" standard. They tended to evaluate counsel's performance according to the facts of each case, with deference to counsel's choices, rather than promulgating specific guidelines for counsel to follow in every case. Also, for the most part they required the defendant to establish that counsel's unprofessional errors prejudiced the accused; but some courts re-

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[109] *See* Geders v. United States, 425 U.S. 80 (1976) (trial court refused to permit counsel to consult with defendant during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (state statute authorized judge to dispense with closing argument at bench trial); Brooks v. Tennessee, 406 U.S. 605 (1972) (state statute requiring defendant testify first, or not at all, during defense case).

[110] McMann v. Richardson, 397 U.S. 759, 770 (1970). *See also* United States v. Cronic, 466 U.S. 648, 659 n. 25 (1984).

[111] Holloway v. Arkansas, 435 U.S. 475 (1978). The Court later held that the rule of automatic reversal applies only to those cases in which counsel or the defendant brings the conflict to the attention of the trial court. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980). If the conflict is not called to the attention of the court, the defendant can obtain reversal only by showing an "actual" as opposed to "potential" conflict and that this conflict adversely influenced counsel's performance. But *Cuyler* did not require the defense to establish that the conflict influenced counsel in such a way that the result of the trial might have been different.

[112] *McMann*, 397 U.S. at 770.

[113] *See* Bruce Andrew Green, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053 (1980); Philip H. Newman, Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659 (1980).

quired that, once the defense established counsel's negligence, the government prove beyond reasonable doubt that the denial of the right to counsel had been harmless.

Judge David Bazelon, a vigorous critic of the quality of defense representation, offered new and stronger medicine in the celebrated case of *United States v. Decoster*.[114] Decoster was accused of being one of three men who had mugged Roger Crump outside the Golden Gate Bar in Washington, D.C.[115] Two police officers witnessed the robbery; each officer gave chase to one of the muggers.[116] Officer Box caught up with and arrested Decoster inside a hotel lobby.[117] Crump identified Decoster as one of his assailants.[118]

At trial, Decoster testified that he had had a few drinks with Crump but had left him inside the bar and returned to the hotel, where he lived.[119] The jury rejected his story and convicted him of aiding and abetting an armed robbery.[120] On appeal, he claimed that the evidence was insufficient and that he could not be convicted of armed robbery since the principals had pled guilty only to simple robbery.[121] Judge Bazelon, joined by J. Skelly Wright, dismissed these contentions in footnote 1 of a fourteen page opinion devoted to the issue of ineffective assistance of counsel.[122]

Bazelon noted that Decoster's lawyer had been lackadaisical in seeking Decoster's release on bond pending trial; that he answered ready for trial without having responded to the government's demand for notice of alibi witnesses; and that he agreed to waive a jury (the government refused to agree to this) without realizing that the trial judge had accepted the guilty pleas of

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[114] United States v. Decoster, 487 F.2d 1197 (D.C. Cir. 1973) [hereinafter Decoster I].

[115] For the facts, see *United States v. Decoster*, 624 F.2d 196, 199-200 (D.C. Cir. 1976) (en banc), *cert. denied*, 444 U.S. 944 (1979) [hereinafter Decoster II].

[116] *Id.*

[117] *Id.* at 200.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Decoster I*, 487 U.S. 1197, 1199 n.1 (D.C. Cir. 1973).

[122] *Id.*

the two other muggers.[123] These signs of ineffective assistance prompted the court of appeals to remand the case for a hearing to determine whether counsel's apparent failings had some justification.[124]

To guide the district court, the *Decoster I* court set out a new and demanding Sixth Amendment standard. The defendant would have the right to "reasonably competent assistance," which would include, but not be limited to, certain specific duties. Among these duties would be conferring with the accused; securing the client's rights before trial (such as the right to remain silent and any right to pretrial release); and "appropriate investigation," which meant that "in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible."[125]

But the really revolutionary aspect of *Decoster I* lay in the presumption of prejudice that would attend deviations from the enumerated duties. "If a defendant shows a substantial violation of any of these requirements he has been denied effective representation unless the government, 'on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.'"[126] If the government failed to establish harmless error, retrial would be required.

Because the courts never adopted performance standards, we do not know how such standards would have influenced the defense function. If the *Decoster I* approach had prevailed, the avenues of attack on a criminal conviction would be broad indeed. Retrial would be necessary whenever the defense could point, on appeal, to an exculpatory factual possibility that the government could not disprove either with affidavits or the trial record. Arguably, ensuring the quality of the defense bar would have become an essential feature of effective law enforcement. If that transformation had occurred, it would have been a tremendous benefit to those persons who are charged with crimes

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[123] *Id.* at 1199-1201.
[124] *Id.* at 1201.
[125] *Id.* at 1204.
[126] *Id.*

that they did not commit, whatever the cost in terms of resources and finality.

But it is possible—in my view, at least—that performance-based standards would have worked no such revolution. There is more to effective assistance than following a checklist, and it is more than possible to go through the motions of the checklist without putting on a vigorous or well-thought-out defense. Defense lawyers would have learned how to comply with the performance standards with the least effort (perhaps even pleading clients out earlier and earlier to avoid the duties attending motions and trial preparation). Appellate courts, faced with the specter of costly retrials that promised no improvement on the original, would likely dilute the performance standards to the prevailing level of indigent defense performance.

Judge Bazelon correctly pointed out the central weakness in Sixth Amendment doctrine: looking backward at the trial to determine whether counsel's deficiencies might have permitted an unjust conviction overlooks that the trial itself is a creature of counsel's performance.[127] But this argument proves too much; for if the record is suspect, the government could not rebut a presumption of prejudice simply by proving the defendant's guilt on the basis of the record. In effect, *Decoster I* looked to a rule of automatic reversal whenever counsel failed to perform the enumerated duties.

In a world in which most defendants get no trial at all, the costs of such an approach were thought to be prohibitive. On remand, the district court found that counsel's investigation had been adequate.[128] The D.C. Circuit panel reversed the conviction and ordered a new trial, applying the standard set out in *Decoster I*.[129] The D.C. circuit judges then granted the government's motion for rehearing *en banc*, vacated the panel's judgment, and affirmed the conviction.[130] The panel's second

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[127] *See id.* ("proof of prejudice may well be absent from the record precisely because counsel has been ineffective.") (footnote omitted).

[128] *See Decoster II*, 624 F.2d 196, 200 (D.C. Cir. 1976), *cert. denied*, 444 U.S. 944 (1979).

[129] *See id.* at 300-13 (Bazelon, J., dissenting).

[130] United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc), *cert. denied*, 444 U.S. 944 (1979) [hereinafter Decoster III].

opinion is known as "*Decoster II*" and the en banc court's decision as "*Decoster III.*"

Judge Leventhal's opinion in *Decoster III*, joined by four of the nine judges, rejected both the enumeration of specific duties and the requirement that the government prove that dereliction of those duties was harmless. "The claimed deficiency must fall measurably below accepted standards . . . but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards."[131] Each case must stand on its own facts. As for prejudice, the defense must "demonstrate . . . a likelihood of effect on the outcome."[132]

In two cases decided in 1984, the Supreme Court followed Judge Leventhal's lead. One of these, *Strickland v. Washington*,[133] has become the fountainhead of modern ineffective assistance law. The other, *United States v. Cronic*,[134] has faded into relative obscurity. *Cronic*, however, makes graphically clear what is wrong with *Strickland*.

The government charged Cronic with mail fraud, arising out of a complex "check kiting" scheme. It took the prosecution four-and-a-half years to investigate the case and review the thousands of relevant documents. Cronic's court-appointed attorney was a young real estate lawyer who had never conducted a jury trial. Nonetheless, the trial court set a trial date only twenty-five days after the appointment.[135]

After the jury convicted, Cronic appealed, claiming ineffective assistance.[136] He did not, however, complain of any specific errors of omission or commission by trial counsel. Rather, he claimed that the circumstances of the case—the complexity of the facts and the law, the inexperience of counsel, and the limited time to prepare—justified an inference of ineffectiveness.

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[131] *Id.* at 214-15.
[132] *Id.* at 215.
[133] 466 U.S. 668 (1984).
[134] 466 U.S. 648 (1984).
[135] *Id.* at 649.
[136] *Id.* at 650.

The Tenth Circuit agreed with Cronic;[137] the Supreme Court unanimously reversed.[138]

Conceding that certain circumstances make it impossible for even a good lawyer to effectively represent the defendant's case, the *Cronic* Court described those circumstances as extreme. The only case Justice Stevens cited as an example in which an inference of ineffective was appropriate is *Powell v. Alabama,* in which an out-of-state lawyer was appointed for all the defendants on the day of the trial. Absent such extreme circumstances, the *Cronic* Court held that the defendant can "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel."[139]

The *Strickland* case set out the standards for evaluating claims that discrete errors by counsel justify a new trial.[140] Strickland pled guilty to three murders, and was sentenced to death after trial of the sentencing issue.[141] On collateral review, he claimed that trial counsel was ineffective in failing to adequately investigate the defendant's background and mental condition at the time of the crimes.[142]

The Court required a convicted defendant to establish that defense counsel's unprofessional errors prejudiced the defense:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.[143]

The Court refused to enumerate any specific duties for defense lawyers. Rather, "the performance inquiry must be whether

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[137] Cronic v. United States, 675 F.2d 1126 (10th Cir. 1982).

[138] *Cronic,* 466 U.S. at 649.

[139] *Id.* at 666 (citing Powell v. Alabama, 287 U.S. 45 (1932)).

[140] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[141] *Id.* at 671-75.

[142] *Id.* at 675.

[143] *Id.* at 687.

counsel's assistance was reasonable considering all the circumstances."[144] By "prejudice," the Court meant that the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[145] Only Justice Marshall dissented.[146]

The *Cronic* and *Strickland* decisions reflect the Burger Court's characteristic refusal to look beyond the case at bar and consider the systemic consequences of decision. On appeal, the defendant's guilt appears certain even if trial counsel botched the investigation; only a heroic second-effort by appellate counsel can challenge that impression. Retrial is a costly remedy. *Strickland* follows these premises where they lead to a vaguely-worded but forgiving standard for counsel's performance, and a strong and precisely-worded burden, imposed on the defense, to prove prejudice.

V. CRITIQUE: THE INHERENT FLAWS OF *EX POST* REVIEW

Ineffective assistance doctrine has, not surprisingly, done little to improve the overall quality of the defense function. The focus is never on how good the defense lawyers are, but always on how well they did in a case that is already over. Taking selective incorporation seriously—by defining the "assistance of Counsel" by specific standards, as the *Decoster I* court had done[147]—conflicted with the apparent uselessness of ordering retrials for "plainly" guilty defendants. Instead, *Strickland* married the worst features of selective incorporation and fundamental fairness, by characterizing counsel's assistance as a self-contained right, but a right that could be violated with impunity absent a "breakdown in the adversary process."[148]

If effective defense counsel is really essential to a fair trial, than a showing of ineffective assistance is, without more, proof

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[144] *Id.* at 688.

[145] *Id.* at 694.

[146] *Id.* at 706 (Marshall, J., dissenting). Justice Brennan dissented on the ground that the death penalty violates the Eighth Amendment, but he concurred with the general standard set out by the Court. *Id.* at 701 (Brennan, J., concurring in part and dissenting in part).

[147] *Decoster I*, 487 F.2d 1197, 1201 (D.C. Cir. 1973).

[148] *Strickland*, 466 U.S. at 687.

of an unfair trial. If there was a "breakdown in the adversary process," it shouldn't matter that counsel made some discrete error that fell outside the range of customary performance.

In the aftermath of *Gideon* the courts began to think about the effectiveness of defense counsel as an important but dispensable safeguard against an unfair trial. This was a hangover from fundamental fairness, as the "farce and mockery" standard suggests. Slowly but steadily the judges came to think of the Sixth Amendment right to counsel as a self-contained right made effective against the states by the incorporation doctrine, rather than as a component, albeit a crucial component, of the due process right to a fair trial. The unrecognized consequence of divorcing the right to counsel from the right to a fair trial, however, has been the counterfactual—even Khafkaesque—assumption that when the poor performance of defense counsel undermines the fairness of the trial, the situation will be manifest to a reviewing court after the fact.

Counsel's performance cannot be separated from the trial that counsel conducted. In particular, because the trial record will be limited by defense counsel's investigation, the failure to pursue exculpatory possibilities will not be in the record at all. Justice Marshall, the lone dissenter from the *Strickland* standard, hit the nail on the head:

> [I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.[149]

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[149] *Id.* at 710 (Marshall, J., dissenting) (footnote omitted). This is precisely the same point that was made, decisively, against the rule of *Betts v. Brady*, 316 U.S. 455 (1942). *See* Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 42-57 (1962) (providing a detailed examination of the record in *Betts*, and suggesting that Betts may have innocent and that a good lawyer might have won his case). The gist of it is captured in an exchange from that classic dialogue:

In death cases, the extreme stakes and the extended time-period permit post-conviction counsel to seek affidavits from uncalled witnesses and to perform neglected scientific tests. But in other cases, who is going to interview the witnesses if trial counsel did not?

It is problematic to evaluate a record made by counsel to evaluate counsel's performance. Psychological research suggests that human beings tend to underestimate the contingency of past events. Asking an appellate judge to imagine an exculpatory hypothesis confronts not just the rational reluctance of judges to order retrials, but also the irrational reluctance of human minds to accept that the past might have been different.[150]

Any *ex post* approach can remedy defective assistance only in cases in which someone takes a sustained interest in litigation on behalf of the defendant. In misdemeanor, juvenile, and even felony cases in which prolonged incarceration is not imposed, *Strickland* is virtually a dead letter. Even when the defendant is serving a long sentence, a searching review of the record must be made by competent counsel before a valid *Strickland* claim can be vindicated. In a system that fails to furnish an adequate supply of good lawyers in the first instance, how are those convicted on account of bad lawyering supposed to bring *Strickland* into play?

The real impact of *Strickland* is not on the performance of defense counsel. Sixth Amendment doctrine provides virtually no incentive for anybody—judges, prosecutors, public defenders, or legislatures—to upgrade the effectiveness of lawyers for the indigent. Instead, *Strickland* amounts to a constitutional trump on any rules of waiver or finality. Any failure to raise a claim that retrospective analysis shows would have been a clear

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"What are you telling me now? That every unrepresented defendant is actually prejudiced?"

"No, only that we can never tell whether or not he was."

Id. at 42. If we substitute "inadequately represented" for "unrepresented," we have a critique of *Strickland* nearly as powerful as the critique of *Betts*.

[150] *See* G.V. Bodenhausen, *Second-Guessing the Jury: Stereotyping and Hindsight Biases in Perceptions of Court Cases*, 20 J. APP. SOC. PSYCH. 1112 (1990) (subjects put weight on known jury verdict in assessing guilt of defendants).

winner amounts to ineffective assistance; indeed, this is about the only thing that does amount to ineffective assistance. In effect, *Strickland* amounts to a rule against waiver of winning claims in criminal cases.

This may or may not be a good rule, but it is surely not all that should be demanded of the defense bar. The typical defendant is not much threatened by a negligent failure to assert the statute of limitations; clear winners are uncommon and usually spotted even by bad lawyers. What the typical defendant really needs is not competent advice about clear winners, but competent advice about questions that have no clear-cut answer.

Should we take the government's plea offer? Should we rely on self-defense, or on accident, or on insanity? Should we put the defendant on the stand? Can we trust witness X to testify as we expect? These are the kinds of judgments that people need defense lawyers to make. They are also the kind of judgments that can rarely be challenged successfully under *Strickland.* As "tactical choices" to which reviewing courts afford a "heavy measure of deference," the consequences of which are imponderable and thus presumptively not prejudicial, counsel's key decisions are virtually beyond review. It hardly follows, however, that typical indigent defenders make these decisions as well as they could be made.

Despite its general futility, the *Strickland* standard invites a great deal of litigation. In 1992, I served as a Reporter for a series of seminars for state court judges organized by the Illinois Judicial Conference. As part of that project, I agreed to prepare a report on Sixth Amendment law in Illinois. "No problem," I thought. "I'll just run *'Strickland v. Washington'* through the computer and see what salutes. Then copy and read all the cases, and I'll be done." Oh sweet naivete! In Illinois alone the appellate courts decide about a hundred *Strickland* cases a year.

Very few of these cases result in reversal, and those few convictions that are reversed are subject to retrial. Nonetheless, it is impossible for a criminal defendant to waive a winning argument in Illinois. Theoretically, failure to appeal a claim waives the claim. Theoretically, the same is true of failure to raise a claim in the first collateral attack on the judgment in state

court. But if counsel's assistance is defective, the procedural default is in either case excused.[151]

Thus the convict can "tile" ineffective assistance claims in unlimited layers. For example, assume trial counsel missed a clear winner. That, by hypothesis, is both negligent and prejudicial. Failure to raise the winning claim on appeal would waive the claim, but if appellate counsel fails to raise it that too is ineffective assistance. In *Pennsylvania v. Finley*,[152] the Supreme Court held that the Sixth Amendment does not apply to collateral review proceedings. For purposes of state law, however, ineffective assistance deprives an Illinois post-conviction proceeding of preclusive effect.[153] Thus, if the lawyer bringing the first post-conviction petition fails to raise the winning claim that again would be ineffective assistance, that claim would not be barred on a second post-conviction petition.

Strickland's invitation to protracted litigation extends to the federal courts. For example, in *Stone v. Powell*,[154] the Supreme Court carried the majority's hostility to the Fourth Amendment exclusionary rule to the point of barring the federal district courts from hearing Fourth Amendment claims on federal habeas. The Court subsequently held, in *Kimmelman v. Morrison*,[155] that if the defendant claims to have lost his Fourth Amendment claim in state court *on account of ineffective assistance*, the federal district courts may entertain the claim. *Strickland*'s *ex post* approach thus has the power to dissolve even rules expressly adopted to terminate relitigation of criminal cases.

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[151] *See* People v. Gaines, 473 N.E.2d 868, 875 (Ill. 1984), *cert. denied*, 471 U.S. 1131 (1985) (ineffective assistance claim raised for first time in post-conviction proceeding cognizable because trial counsel represented defendant on appeal, and "[i]t would be unreasonable to expect appellate counsel to convincingly raise and argue his own incompetency"); People v. Flores, 606 N.E.2d 1078, 1086 (Ill. 1992), *cert. denied*, 510 U.S. 831 (1993) (when a defendant "files a second or subsequent post-conviction petition in which he raises meritorious claims of ineffective assistance of appellate counsel, which could not have been raised in a prior post-trial proceeding, the defendant is entitled to consideration of those claims").

[152] 481 U.S. 551 (1987).

[153] *See Flores*, 606 N.E.2d at 1086.

[154] 428 U.S. 465 (1976).

[155] 477 U.S. 365 (1986).

As Professor Bator pointed out in a classic article, finality in criminal cases has both economic and psychological value.[156] Economically, the resources consumed in relitigation are wasted unless the second proceeding is clearly more likely to reach a just result than the first (in which case the resources consumed in the first proceeding are a waste). Psychologically, relitigation trivializes the trial, leaving the accused to gnaw the bones of hope and judges and lawyers to console themselves with the thought that their errors can be corrected later. Relitigation, Bator concluded, is justifiable only when some procedural flaw in the original proceedings, or some institutional concern such as federalism, counsels review of the trial court result in another forum.[157]

Bator was quick to point out that lack of counsel is just the sort of procedural flaw that justifies relitigation.[158] If *Strickland* really did much to improve the defense function, perhaps the futile but endless cycle of ineffective assistance litigation would be worth the effort. But if *ex post* review is simply incapable of identifying and correcting most errors by defense counsel, *Strickland* gives us the worst of all worlds. The original proceedings were flawed by the inadequacy of indigent defense, but after another bout of litigation, the reviewing court will all but invariably conclude either that no negligence by defense counsel is manifest in the record, or that the defendant failed to prove that counsel's alleged errors changed the result. In a nutshell, the *Strickland* test compromises the finality interest without advancing the fairness of the trial.

In one sense, the critics of *Strickland* rightly claim that the Court betrayed the promise of *Gideon*. But *Strickland*'s critics have missed two important points, one descriptive, the other prescriptive. Descriptively, once *Gideon* took the selective-incorporation route, it was natural—if not inevitable—for appel-

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[156] Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451-53 (1963).

[157] *Id.* at 455-62.

[158] *Id.* at 458 ("Deprivation of counsel in cases where the demands of fairness embodied in the due process clause call for representation by counsel is, I submit, precisely the kind of error which should deprive a state litigation of sanctity.").

late judges to think of counsel's performance as a self-contained constitutional right, rather than as an essential element in a fair trial. This focus on the right to counsel led to the *ex post* approach, which is inherently incapable of determining whether the accused received a fair trial. To the extent that *Gideon* detached the right to counsel from the due process right to a fair trial, *Strickland* is no pretender but rather *Gideon*'s rightful heir.

The prescriptive point is related to the descriptive one. Critics of *Strickland* have called for modifying, rather than abandoning, the *ex post* inquiry into counsel's performance.[159] They suggest performance-based standards, such as those advocated by Judge Bazelon, and a presumption of prejudice. *Strickland* rightly recognized that no check-list adequately measures effective representation. A savvy defense lawyer might be able to obtain the best possible results for her client with a single telephone call. A lawyer who dutifully interviewed witnesses and filed motions, without thinking about the defenses the witnesses' stories suggest or how to support the motions made, might well get the client more time than he deserved.

Abandoning the presumption of prejudice would do even greater damage to the finality interest than *Strickland.* Under *Strickland,* ineffective assistance is easily alleged but almost impossible to prove. *Strickland* thus generates much futile appellate litigation, but few retrials. A presumption of prejudice would lead either to a flood of retrials (and a corresponding groundswell of new ineffective assistance claims, as inmates see that release is possible), or to judicial tolerance of outrageously bad performances by defense counsel. Following Professor Bator, we might ask what point new trials would have, if as seems likely, defense counsel would perform no better on the second go-round.

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[159] *See, e.g.,* Klein, *supra* note 3, at 654-55 (advocating performance standards); Geimer, *supra* note 3, at 168-71 (same); Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims,* 77 GEO. L.J. 413, 437 (1987) (advocating performance standards with burden of showing "insubstantial" omission on government as supplement to *Strickland* test); Berger, *supra* note 69, at 95-96 (suggesting retaining deficient performance prong but replacing prejudice prong with traditional harmless-error analysis).

Ultimately, no *ex post* standard can remedy the real defects of the defense function. In the first place, *ex post* review is simply incapable of detecting ineffective assistance. In the second place, *ex post* review can remedy ineffective assistance only at the expense of the finality interest. Maybe a performance-based standard coupled with a presumption of prejudice could finally bludgeon legislatures into providing the needed funds. It seems far more likely that indigent defenders would learn to go through the motions of following the approved checklist, while appellate judges devised ways to water down the performance standard until the standard matched the performance of local defense counsel. The contrary hypothesis assumes that a very large number of convictions of guilty persons in serious cases would need to be reversed to get the attention of the legislature. Appellate judges are unlikely to let that happen, but if they did it would be a very costly way (indeed, a bloody way) to reform indigent defense.

The case against performance standards applies a fortiori to reliance on tort liability to ensure adequate defense representation. Like the *Strickland* test, tort liability depends on showing negligence and prejudice. Without negligence there is no liability, even though the client is innocent, and without prejudice, there are no damages. Tort liability, then, cannot really improve on *Strickland.* But by imposing significant costs on indigent defense lawyers (whether through insurance payments or the risk of adverse judgments), tort liability would only exacerbate the underlying resource deficiency. The courts understandably have given malpractice suits against public defenders a chilly reception.[160]

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[160] *See, e.g.*, Harold H. Chen, Note, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 DUKE L.J. 783, 795-802 (1996) (discussing an emerging trend toward recognizing qualified or even absolute immunity to malpractice actions against indigent defense lawyers; the Note is critical of the trend). The Supreme Court has rejected federal liability under 42 U.S.C. § 1983 for deprivation of Sixth Amendment rights for want of state action. *See* Polk County v. Dodson, 454 U.S. 312 (1981).

VI. AN ALTERNATIVE: THE *EX ANTE* PARITY STANDARD

The limitations of *ex post* approaches suggest the possibility of assessing the adequacy of defense counsel prior to the trial. This possibility raises at least several specific questions for analysis. First, how could a litigant, practically speaking, raise an *ex ante* challenge? Second, if a court agreed to hear an *ex ante* challenge, what specific standard should the court apply? Third, if the court found ineffective assistance before trial, what remedy could the court order? Fourth, is there some way for a jurisdiction to comply with the appropriate *ex ante* standard without either spending vast sums or risking reversals in serious cases? Fifth, how would the recognition of an *ex ante* standard change the role of *ex post* review under *Strickland v. Washington*? I address each of these questions in turn.

A. PROCEDURAL ASPECTS OF AN *EX ANTE* CHALLENGE

Institutional reform litigation, exemplified by the prison-conditions cases,[161] offers one avenue for testing the systemic adequacy of the defense function. In federal courts, however, the abstention doctrine of *Younger v. Harris*[162] bars criminal defendants from contesting the prosecution through collateral civil litigation. When Georgia's indigent defense system was challenged in a civil suit, the Eleventh Circuit agreed that *Strickland* did not—logically, could not—supply the standard for resolving an *ex ante* challenge.[163] But the court ultimately concluded that the action was barred by the abstention doctrine.[164] Basically, before the defendant is charged, he has no standing to complain about indigent defense; after he is charged, his claims must be brought in the course of the criminal proceedings.[165]

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[161] *See* Rhodes v. Chapman, 452 U.S. 337, 353-54 n.1 (1981) (Brennan, J., concurring) (listing 24 states in which the prisons were under court orders).

[162] 401 U.S. 37 (1971).

[163] Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988).

[164] Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992).

[165] *See* O'Shea v. Littleton, 414 U.S. 488 (1974) (both standing doctrine and abstention doctrine prevent federal court from enjoining future acts of racial discrimination in administration of state criminal prosecutions); Bundy v. Rudd, 581 F.2d 1126 (5th Cir. 1978) (charged defendant could not seek federal court order requiring state

It might be possible for the defense lawyers themselves to sue, as being overworked and underpaid surely qualify as injury-in-fact. To raise the constitutional rights of their clients, however, the lawyers would need to establish that the right-holders could not vindicate their own claims.[166] This approach was accepted by the Supreme Court of Iowa, a state forum not constrained by the federal abstention doctrine.[167] If the reason for the clients' inability to assert their own rights is the abstention doctrine, it would seem that *Younger* bars federal suits by defense lawyers just as it bars claims by defendants.

If the justiciability hurdle proves insurmountable, it should still be possible to attack indigent defense systems on an *ex ante* basis. Counsel for criminal defendants should move before trial for a ruling that the indigent defense system violates the Sixth Amendment by failing to secure the defense representation equal to the task of defending the charge. A record should be made of the inadequacy of the defense function in comparison to the prosecution.

If the trial judge offers a continuance, counsel should respond that caseload pressures and inadequate support services mean that no amount of additional time could result in constitutionally effective representation. At the same time, the indigent defense lawyers should make similar motions in other pending cases. Finally, such a motion should not be understood

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court to permit defendant's chosen counsel to conduct defense); Williams v. Rubiera, 539 F.2d 470 (5th Cir. 1976) (federal plaintiffs not facing pending charges had no standing to challenge state failure to provide appointed counsel in misdemeanor cases; plaintiff facing pending charge barred from federal relief by *Younger* doctrine); Wallace v. Kern, 481 F.2d 621 (2d Cir. 1973) (per curiam) (rejecting plea for order limiting assignments to legal aid lawyers on federal/state comity grounds). *But see* Gilliard v. Carson, 348 F. Supp. 757 (M.D. Fla. 1972); Roger Citron, Note, *(Un)*Luckey v. Miller: *The Case for A Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 492-96 (1991).

[166] *See* Craig v. Boren, 429 U.S. 190, 195-97 (1976) (brewers may assert equal protection rights of young men to buy beer); Eisenstadt v. Baird, 405 U.S. 438, 443-46 (1972) (sellers of contraceptives may assert sexual privacy rights of consumers); Barrows v. Jackson, 346 U.S. 249, 257 (1953) (white seller to black buyer may assert buyer's equal protection rights to defend action on racially restrictive covenant when purchaser could not intervene under local rules).

[167] Lewis v. Iowa Dist. Ct. for Des Moines County, 555 N.W.2d 216, 218-19 (Iowa 1996).

as a waiver of speedy trial rights. The Sixth Amendment guarantees both speedy trial and effective assistance of counsel, not one or the other.

If the trial judge denies the motion, and the defendant is convicted, the appeal from the denial of the pretrial motion cannot be based on *Strickland v. Washington.* As the Eleventh Circuit recognized in the *Luckey* litigation, *Strickland* applies only to claims brought *ex post.*

Where a party seeks to overturn his or her conviction, powerful considerations warrant granting this relief only when that defendant has been prejudiced. The *Strickland* Court noted the following factors in favor of deferential scrutiny of a counsel's performance in the post-trial context: concerns for finality; concern that extensive post-trial burdens would discourage counsel from accepting cases; and concern for the independence of counsel. These considerations do not apply when only prospective relief is sought.[168]

The *Strickland* Court did not have an *ex ante* challenge before it. The Court's opinion expressly confines the two-part ineffectiveness test to a "*convicted* defendant's claim that counsel's assistance" was defective.[169]

Prior to the trial, there is no way to test the effectiveness of counsel except according to some circumstantial standard such as the parity standard. Trial courts will be faced with *ex ante* challenges in the future. Accordingly, the appellate court should review the denial of a pretrial motion alleging inevitable ineffective assistance on its own merits, rather than under the *Strickland* test.

The *Strickland* standard is explained by the expense and delay of the retrial remedy. Defendants bringing *ex ante* challenges are not sandbagging. They are, instead, saying that they reasonably anticipate an unfair trial that is not susceptible to subsequent review. The state whose neglect undermines the fairness of the trial should not be permitted to lean on the finality of trials as a justification.

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[168] *Luckey,* 860 F.2d at 1017 (footnote omitted).

[169] Strickland v. Washington, 466 U.S. 668, 687 (1984) (emphasis added).

The *Strickland* Court itself felt that when the state interfered with defense counsel's representation, or when counsel is burdened by an actual conflict of interest, the usual inquiry into negligence and prejudice is inappropriate.[170] When the state denies counsel or interferes with counsel's performance, prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost. . . . Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent."[171] Likewise, proof of prejudice is not required in conflict-of-interest cases, because "it is difficult to measure the precise effect on the defense" and because of "the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts . . . ."[172]

In *Cronic*, by contrast, the issue before the Court was whether the Sixth Amendment required a new trial after the trial court refused to grant a thirty day continuance to enable inexperienced counsel to prepare for a complicated case.[173] Even in *Cronic*, however, the Court ruled that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial."[174] *Cronic*, according to the Court, wasn't such a case.

Perhaps it wasn't. The trial court did grant defense counsel a twenty-five day continuance to prepare for the trial. Twenty-five days to prepare a case for trial would be a gift from God to most big-city public defenders. They could accept that gift only at the cost of underserving other clients in other cases. The prevailing neglect of the indigent defense function thus partakes of both *Powell v. Alabama* and the conflicts-of-interest cases. The circumstantial indicators of ineffectiveness are stronger than in *Cronic*, and efforts by counsel to overcome those circum-

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[170] *Id.* at 692.
[171] *Id.*
[172] *Id.*
[173] United States v. Cronic, 466 U.S. 648, 650 (1984).
[174] *Id.* at 662 (approving Powell v. Alabama, 287 U.S. 45 (1932)).

stances in one case conflict with the representation of clients in other cases.

Appellate review of *ex ante* challenges to systems of indigent defense therefore should not be reduced to case-by-case challenges to individual convictions under *Strickland.* A state convict who challenged the system of indigent defense before trial, and whose appeal was rejected for failure to satisfy *Strickland*'s *ex post* standard, could relitigate the issue on a petition for federal habeas corpus.[175] Such a claim would fall within the classic understanding of habeas as a remedy for detention absent fair trial. If the petitioner's claim is correct, his trial was unfair in a way that *ex post* review cannot disclose. A petitioner who made, rather than waived, an *ex ante* challenge in the state courts could have that claim vindicated on federal habeas.

If, moreover, a state's appellate courts insist that case-by-case application of *Strickland* supplies the only avenue for testing ineffective assistance claims, it would be plausible to revisit the idea of institutional reform litigation. In *Gerstein v. Pugh,*[176] the Court agreed that the *Younger* doctrine did not bear a civil challenge to the state's failure to provide a prompt judicial determination of probable cause following warrantless arrest.[177] Such a claim could not be remedied by litigation within the criminal process, because the plaintiffs challenged the very time it took to raise the issue in state court. The constitutional violation in *Gerstein* was complete before the defendant ever saw a judge.

If the state courts hold that *Strickland* supplies the exclusive vehicle for litigating ineffective assistance, the federal courts should apply the *Gerstein* exception to the *Younger* doctrine. Indigent defense lawyers could bring the claim, seeking relief as parties injured by the violation of their clients' Sixth and Fourteenth Amendment rights. The state's erroneous application of the *Strickland* standard for post-conviction challenges to pre-trial

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[175] *See* 28 U.S.C. § 2254 (1997).

[176] 420 U.S. 103 (1975).

[177] *Id.* at 108 n.9 ("The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits.").

challenges would prevent litigation of the federal claim in the state courts. The challenge to the system of indigent defense would be collateral to pending criminal cases. So long as the complaint sought only prospective relief, there would be no interference in pending state cases. Thus, one way or another, it should be possible to litigate the claim that the institutional conditions of indigent defense fall below constitutional standards before a defendant represented by that system has been convicted.

B. THE CASE FOR THE PARITY STANDARD

Those who accept my argument for testing counsel's capacity for effective representation *ex ante* might well disagree about the precise form an *ex ante* standard might take. Following the lead of *Gideon*, one might argue that the appropriate *ex ante* standard is whether counsel's circumstances permit the minimal functions necessary for compliance with the Sixth Amendment. Following *Powell v. Alabama* and, in a way, *Strickland* itself, one could argue that counsel should be able to contest the issue more or less equally against the state. That is to say, one might accept *Strickland*'s equation of effective assistance with the fairness of the trial, but recognize that a trial between unequal adversaries is not reliable.

In keeping with my skepticism about selective incorporation and corresponding preference for due process adjudication, I favor the latter course. That should not be understood as opposition to an absolute, as opposed to a relative, standard of *ex ante* effectiveness. Building on the American Bar Association's *Standards for Criminal Justice*,[178] it might be possible for courts to fashion a workable definition of the minimum qualifications, minimum support, and maximum caseload that indigent defenders can sustain without lapsing into constitutionally deficient representation.

But such standards are difficult to define, and more difficult to maintain over time. There is the standing danger that professional bodies will change their views (one way or another)

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[178] ABA STANDARDS FOR CRIMINAL JUSTICE—PROSECUTION AND DEFENSE FUNCTIONS (3d ed. 1993).

with the knowledge that their judgments may acquire the force of constitutional law. More fundamentally, minimal standards fail to account for the basic truth that some rough parity between opponent's capacity for litigation is essential if our adversary system is to generate reliable results.

The same prosecutor's office that routinely prevails at trial over the public defender somehow rarely wins a high-profile case against well-compensated private counsel. Anyone who reads the newspapers could cite the cases of John Delorean, David Hinkley, Bernard Goetz, John Gotti, Klaus von Bulow, William Kennedy Smith, Stacey Koon and O.J. Simpson. Given high-quality defense work, it is difficult to convict the patently guilty. Given indigent defense, it is too easy to convict the innocent.

I do not argue that the public fisc should elevate the quality of indigent defense to the level of the private bar's most successful attorneys. I do claim, however, that the public fisc should elevate the quality of indigent defense to the level of the prosecutor's office. Murray Schwartz, in an important paper, developed the relation between parity and justice in the adversary system:

> Because only in rare cases will the parties be equal in their presentational ability, it is not possible to reach the evenhandedness of an impartial tribunal charged with the prosecution and presentation functions. Nevertheless, it is critical that the imbalance be reduced as much as possible, and this can be best accomplished through two postulates relating to the professional representatives: the Postulate of Equal Competence and the Postulate of Equal Adversariness.
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> The Postulate of Equal Competence is a shorthand way of saying that for the adversary system to function properly, the opposing representatives (advocates) should be roughly equal in their ability to perform their professional functions. The Postulate of Equal Adversariness is a shorthand way of saying that the opposing advocates should also be roughly equal in their dedication to the cause of their principals and in their opposition to the cause of their opponents. The postulates do not—cannot—require true equality; they do assert that there should not be gross disparities in these respects.[179]

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[179] Murray L. Schwartz, *The Zeal of the Civil Advocate*, 1983 AM. B. FOUND. RES. J. 543, 547. Schwartz distinguishes the criminal from the civil system by suggesting that in criminal cases, the defense should enjoy certain advantages over the prosecution. *Id.* at 549. That of course does not deny my claim that indigent defense should, when necessary, be brought up to the standard of the prosecution by constitutional ruling.

On an instrumental theory of adjudication, "equality of competence and adversariness of the advocates is the best way to ensure correct outcomes."[180]

As for how counsel's competence might be assessed before the fact, the truth is that consumers of legal services make this very judgment all the time. Whenever a paying client hires a private lawyer, the client makes inquiries designed to determine the competence of potential representatives. Reputation is built on successful experience, and the reputation of most lawyers can be easily determined. The private client in a civil case is stuck with counsel's "unprofessional errors," however "prejudicial." Malpractice is an option but relitigation is not.

Courts themselves routinely make *ex ante* determinations of lawyer competence. Frequently courts appoint the public defender or let the contracts for indigent defense. Judges typically hire law clerks. The judges do not do their hiring by throwing darts at the yellow pages. They look to the background and experience of the candidates, and while there is much room for preferring one lawyer to another, there is also much agreement on their relative attractiveness.

The *ex ante* parity standard is thus not concerned with equality or with the appearance of equality (although the latter value at least would be served by the test proposed). Rather, the *ex ante* parity standard derives from *Gideon*'s postulate that a fair trial without effective counsel is unlikely at best. The adversary system can be a mighty engine for the discovery of the truth, but only if the litigation capability of the adversaries, independent of the merits of their respective cases, is more-or-less evenly matched.

On a pretrial motion alleging that the defense function is not in parity with the prosecution, the court should consider: (a) whether defense counsel's credentials and experience would enable defense counsel to compete for a post in the prosecutor's office with responsibilities for prosecuting charges similar in severity and complexity to those against the accused; (b) whether defense counsel is compensated at a level comparable

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[180] *Id.* at 548.

to the compensation paid to a lawyer of comparable seniority in the prosecution's office; and (c) whether defense counsel's current caseload permits defense counsel to defend the case as vigorously as it will be prosecuted, given the investigative resources and support staff available. Several points about the proposed test deserve further explanation.

First, the test does not require absolute equality between the lawyers representing the two sides in the instant case. Instead it requires only rough equality between the defense lawyer in the instant case and the lawyers who typically represent the prosecution in similar cases. The test describes rough equality in terms of employability: not whether defense counsel would be instantly hired by the prosecution, but only whether defense counsel could compete for a post comparable to the prosecutor's. Obviously many subjective factors enter into employment decisions. Just as obviously, there is a floor below which each law office, public or private, will not go. If defense counsel could not get an interview in the prosecutor's office, the imbalance is sufficient to doubt the fairness of the pending proceedings.

One obvious proxy for the quality of counsel is the compensation counsel commands. When the public defender not only puts up with the opprobrium attached to the work, but makes markedly less money than her counterpart in the state's attorney's office, it is logical to infer that the state can attract and retain better lawyers than the public defender's office. While an inquiry into compensation would be more complex in contract or appointment systems, it would nonetheless be a relatively easy inquiry. It should be possible to determine whether defense counsel can expect to earn less per hour than the prosecutor.

Even if the lawyers representing the two sides are roughly comparable in the abstract, their respective responsibilities and resources may render the contest decisively uneven. There can be no easy formula for balancing the litigation burden of prosecuting and defending criminal cases. For example, it might seem that because the prosecutor can rely on the police to investigate, the prosecution has an enormous advantage. But in many jurisdictions the relations between prosecutors and police

officers do not exactly fall into the master/servant category. Nor do the police always focus on the facts that the prosecutor later realizes are crucial to the success of the case.

Likewise, it might seem that the investigative burden on the defense is reduced by access to the defendant's personal knowledge. Yet the defendant is often an uncooperative or unreliable source of information. Moreover, in the case that is of central concern to the defense function—the innocent defendant mistakenly identified or deliberately framed—the defendant cannot supply any information about the offense.

The prosecution, of course, must prove every element of every count, while the defense need only raise reasonable doubt about one element to defeat a charge. This formal difference is again less important in practice than it looks. Modern notice provisions and common sense will often point to the obvious defense—consent in a rape case, say, or alibi plus mistaken identity. Moreover, while the prosecutor's obligation to prove every element beyond a reasonable doubt requires preparing to examine more witnesses at trial, most of the burden of litigation is borne before trial. Most cases, of course, do not go to trial.

The number of files per attorney is not the whole story of caseload pressures. Given computers, investigators, paralegals, and interns, a defender's office might be able to extend the number of cases each attorney can undertake. These support services, however, are typically the weakest link in the defense operation, for while *Gideon* demands that every defendant have a lawyer, it does not demand that every lawyer have a laptop computer, a research assistant, or an investigator.

The proposed parity standard would go a long way toward clarifying the inquiry into caseload effectiveness. The real question is not whether extreme caseloads *can* preclude effective assistance. The real question is how to determine when a given caseload has reached the extreme. The parity standard provides a rational benchmark: is the workload for defense counsel roughly comparable to the workload for the prosecution?

Once made, a ruling on defense counsel's parity with the prosecution need not require detailed inquiry in future cases. If the individual lawyer is guilty of mis- or mal-feasance; or if the

caseload increases dramatically; or if the prosecution is improved with the injection of fresh resources, it may be necessary to reconsider counsel's effectiveness. For the most part, however, it is an inquiry that would need to be made only at fairly extended intervals—say, every other year.

In a civil challenge to the system of indigent defense, the application of the *ex ante* standard obviously could not focus, as it might on a pretrial motion brought by an individual criminal defendant, on the balance of litigation capacity between the parties in a single case. The standard, however, could be easily modified to account for the difference in procedural contexts. The basic variables remain the credentials and experience of the lawyers representing the two sides, their compensation, and their respective caseloads in light of the available support services. In the civil context, these questions would be asked about typical indigent defenders as compared to typical prosecutors, rather than about the defender and the prosecutor in a given case.

How would the *ex ante* parity standard address the underlying causes of the crisis in indigent defense? With respect to the public choice problem, the standard would achieve two important changes. First, by shifting the constitutional inquiry away from *Strickland*'s case-by-case focus on error correction to a systemic analysis of indicators of legal effectiveness, the proposed approach would enlarge the role of courts relative to legislatures in determining the resources available for indigent defense. This change implements the representation-reinforcing model of judicial review. Yet the parity standard would not involve courts in the dubious project of attempting to compel legislative appropriations by judicial fiat.

The parity standard does not require legislatures to supply any given level of support for indigent defense. Under the standard, legislatures could even cut indigent defense services—but they could do so only if they also made comparable reductions in the support of the prosecution. Legislatures could be tough on crime only if they were equally committed to due process.

The parity standard would not only bring about greater judicial involvement in determining the level of support for indigent defense. The second important change would be to enlist *the prosecution* in the struggle for adequate support of the defense function. The parity standard would link the fortunes of prosecution and defense. Legislatures could not raise the compensation, reduce the workload, or increase the support services provided to prosecutors without making roughly matching improvements for the defense system. Just as legislatures could not devote resources to the prosecution without comparable support for the defense, prosecutors could not seek additional support for their own offices without seeking parallel support for the defense function.

What about the horizontal and vertical conflicts?[181] The horizontal conflict among defense counsel's clients derives from the public choice problem. To the extent that the parity standard initiates progress in securing for indigent defense the required resources, the conflict among clients would decline in intensity. No doubt it will never disappear; only limitless resources could eliminate it entirely, and those will never be forthcoming. Nonetheless, most lawyers, prosecutors included, must make hard choices about how much time to devote on behalf of each case. Real parity between defense and prosecution would not eliminate the need for such choices, but even clients relegated to low priority would receive meaningful representation.

The vertical conflict, too, can hardly be eliminated. So long as the public funds indigent defense, the public will be tempted to punish indigent defenders who are too successful. If the judiciary, however, were to adopt the parity standard, it would be more difficult for legislatures to pressure indigent defenders. The defense budget could be cut only with corresponding reductions in the prosecution's budget. A constitutional standard for the general level of support required for indigent defense would secure a measure of independence for indigent defense lawyers.

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[181] *See supra* text accompanying notes 37-40.

The judicial commitment to effective assistance of counsel has faltered when confronted with legislative neglect of the defense function. Judges have been quite right to steer clear of attempts to compel appropriations. But the legitimate reluctance to try to force an elected coordinate branch of the government to exercise its fiscal prerogative has bred a false sense of despair about the role of constitutional doctrine in securing an effective defense. The *ex ante* parity standard comes to grips with the incentive problems underlying the crisis in indigent defense, without the troubling specter of an interbranch conflict over appropriations.

C. IDENTIFYING A PRUDENT REMEDY

The ultimate practical hurdle facing *ex ante* challenges is identifying a feasible and prudent remedy.[182] Indeed, one political advantage of an *ex ante* approach is that, in stark contrast to *Strickland*, the bellwether litigation could be brought in juvenile or misdemeanor cases. Judges who might refuse to threaten the release of murderers and rapists might very well be willing to threaten the release of drug users, prostitutes, and shoplifters. Once the basic approach is in place, its application to more serious cases would involve no more than legislative compliance with an accepted constitutional standard.

If this seems like strong medicine, there is a more direct judicial remedy. Some desperate courts have resorted to out-and-out conscription to provide indigent defense. The parity standard comes with a built-in remedy. If lawyers are to be con-

[182] The prison cases here offer a useful illustration. Forced to expand facilities or release convicts, legislatures somehow find the funds for minimally humane prison conditions. Once a court ruled that a jurisdiction's indigent defense system fails an *ex ante* challenge, the court should continue pending cases until a date certain upon which the least serious pending cases will be dismissed until caseload pressures permit compliance with constitutional standards. In the aftermath of both *Gideon* and *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (holding that the Sixth Amendment requires appointed counsel at trial when incarceration is imposed for misdemeanor offenses), legislatures anted up the resources to comply with constitutional standards. Nor was there anything illegitimate about the courts forcing the state to choose between forgoing punishment or providing the resources required for fair trials. An *ex ante* approach would no more derogate legitimate legislative authority than did *Gideon* and *Argersinger*.

scripted for criminal litigation, why not conscript those with experience? There is much to be said for integrating the prosecution and indigent defense functions. But even if this approach were not adopted as a legislative matter, as a judicial remedy the transfer of lawyers and support services from the prosecution to indigent defense has much to recommend.

The legislature would not be compelled to spend any new money. The lawyers assigned would have extensive local criminal trial experience. Their reassignment from prosecution to defense would increase the caseload pressures on the prosecution even as it reduces the pressures on the defense. And it seems fair to say that this remedy would generate strong political pressures for comprehensive reform of the indigent defense function.

D. THE INTEGRATION OPTION

The prospect of conscripting prosecutors for indigent defense suggests at least one way to comply with the parity standard. Any given jurisdiction could integrate the prosecutorial and indigent defense functions into a single office with a single set of personnel policies respecting qualifications, training, promotion, compensation, and support services. The Army follows this basic approach under the Uniform Code of Military Justice. The Code provides that at a general court-martial, lawyers for both sides must be certified as competent by the Judge Advocate General of the relevant service.[183] Under Army practice, defense work is done by lawyers assigned to the Trial Defense Service (TDS) after at least six months experience representing the government in other capacities, including prosecuting crimes.[184]

The Uniform Code also provides for a measure of consumer sovereignty. A defendant may retain civilian counsel at his own expense, or have counsel "detailed" (i.e., appointed) at government expense.[185] The accused, however, may also request

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[183] *See* 10 U.S.C. § 827 (1988).

[184] *See* Diane Knox, *Military Justice for All*, AM. LAWYER, Jan./Feb. 1993, at 81.

[185] 10 U.S.C. §§ 838 (b)(1)-(3) (1988).

representation by military counsel who is "reasonably available."[186]

The Trial Defense Service and the government thus draw legal talent from the same pool. The TDS, however, is not accountable either to the commanding officers who screen and prefer charges or to prosecuting lawyers at levels lower than the Judge Advocate General.[187] TDS lawyers are paid the same as other lawyers of similar rank and experience. The Uniform Code forbids representation by counsel who have previously represented the opposing side in the same case.[188]

A civilian jurisdiction could borrow much from the military model. The State's Attorney's Office would simply include a Criminal Defense Division. The Defense Division either would recruit long-term employees from the Prosecuting Division, or lawyers could be rotated at, say, two year intervals between the two divisions. The former option guarantees the defense more independence; the latter option avoids the prospect of lawyers refusing to perform both prosecution and defense functions.

In my view, the most promising integration scheme would assign a career supervisor to the defense division, just as the prosecution function should be supervised at the highest level by a lawyer for the government. Within divisions, evaluations should be made by supervisory personnel who would not answer to members of the other division. The trial lawyers, however, would rotate at fixed intervals between divisions, carrying the rank and salary they earned in one division over to the next.

Integration of functions would set in motion political forces that would lead to rough parity between prosecution and defense. If prosecutors know they must serve terms representing the defense, the conditions of defense representation will be improved to a level that will enable the prosecutor's office to retain quality lawyers. Integration of functions would guarantee

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[186] *Id.* § 838 (b)(3)(b).

[187] On the development of the Trial Defense Service due to concerns for defense counsel's actual and perceived independence, see John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4 (1983).

[188] 10 U.S.C. § 827(a) (1988).

that defense counsel is qualified for a job in the prosecutor's office and paid on the same scale as the prosecutor.

More generally, experience with representing both sides would improve the criminal justice system. Prosecutors would recognize more often that police investigation sometimes focuses on the innocent and sometimes exceeds the bounds of both decency and the constitution. Defense lawyers would realize more fully that their role as partners in the pursuit of justice requires the vigorous assertion of the client's legal rights, but that acquitting the guilty comes with a price. Whatever was lost in ideological commitment would be more than made up for by gains in material support and morale. If our system of constitutional rights is extravagant, it is better to have those rights asserted even by the poor, and ultimately modified for rich and poor alike, than to have one set of constitutional rights for the well-represented and another set for typical defendants. In the long run, the recruitment of judges from the ranks of prosecutors suggests yet another mellowing influence that integration of functions might exert.

The appearance of justice might suffer from the fact that the lawyer representing the accused today would represent the government next year. Of course, if the public defender is notably successful, that result often obtains today. Similarly, a notably successful prosecutor is likely enough to take a job in criminal defense with a private firm. Professional ethics permit lawyers to shift sides from defense to prosecution, or from prosecution to private defense work, so long as the lawyer does not defend a position adverse to a former client "in the same or a substantially related matter."[189]

What is practically unheard of is for a prosecutor to voluntarily take a job in indigent defense, although such a shift is just as permissible under the rules of ethics as the shift to the private

[189] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1995). Of course, different jurisdictions articulate and apply the ethical principle in different ways. My point is less that current ethics rules permit integrated provision of prosecution and defense services than that the ethical rules ought to permit reforms that improve the vigor of the defense function. If a specific dispensation from general ethical obligations be required to permit such reforms, so be it.

defense bar. If the system addresses the reality of justice, appearances can be counted on to take care of themselves.

E. THE ROLE OF *EX POST* REVIEW AFTER RECOGNITION OF AN *EX ANTE* STANDARD

Should *Strickland* itself survive the adoption of an *ex ante* standard? An *ex ante* standard clearly should not affect the law applicable to state interference with counsel's performance,[190] or to Sixth Amendment claims based on conflicts of interest.[191] The Supreme Court has recognized that these situations, in part because they can be prevented *ex ante*, call for more intrusive review *ex post*.[192] *Strickland* claims, as current law recognizes, are a different matter.

Nonetheless, it seems impossible to avoid some sort of *ex post* scrutiny of counsel's effectiveness. Even good lawyers from well-funded offices have bad days, caused by everything from a death in the family to too many drinks the night before. If some sort of *ex post* review is available, it is difficult to imagine a more demanding standard than *Strickland*.[193] No matter how tight the standard, convicts facing long sentences have every incentive to raise *ex post* challenges, so that the cost to finality of litigating unmeritorious claims cannot be significantly cut back by tinkering with the precise terms of the *ex post* standard.

Moreover, for good or ill, the Supreme Court has woven the *Strickland* standard into the fabric of federal habeas corpus law. A state prisoner must show cause and prejudice to raise in fed-

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[190] *See, e.g.*, Geders v. United States, 425 U.S. 80 (1976) (trial court prohibited consultation between lawyer and defendant during overnight recess); Brooks v. Tennessee, 406 U.S. 605 (1972) (counsel required to call defendant as first witness if defendant was to testify).

[191] *See* Cuyler v. Sullivan, 446 U.S. 335 (1980) (when actual conflict, not disclosed to trial court, adversely influences counsel's representation, reversal required without showing likelihood that result would have been different); Holloway v. Arkansas, 435 U.S. 475 (1978) (failure of trial court to make due inquiry upon notice by defense counsel of conflict requires automatic reversal).

[192] *See* Strickland v. Washington, 466 U.S. 668, 692 (1984).

[193] Illustrative is the Second Circuit's conclusion in *Trapnell v. United States*, 725 F.2d 149, 153 (2d Cir. 1983), that the outcome of cases never turned on whether counsel's performance was assessed under a "reasonable competence" or "farce and mockery" standard.

eral court a claim not presented to the state courts.[194] But a *Strickland* violation *ipso facto* establishes both cause (counsel's unprofessional error) and prejudice (for without prejudice there would be no *Strickland* violation).[195] The Supreme Court's reluctance to recognize other types of "cause"[196] makes retaining *Strickland* an important gateway to the federal forum. For death row inmates, *Strickland* may be a literally vital gateway.

Surely the adequacy of a system of indigent defense does not dispose of the claim that there was no fair trial because of counsel's deficiencies (private counsel's negligence can undermine a conviction, too). Just as surely, the adequacy of the system of indigent defense is relevant to the probability that a claimed case-specific dereliction by defense counsel undermined the validity of the conviction. If a jurisdiction complies with the appropriate *ex ante* standard, it should be rewarded with an even stricter *ex post* standard. Circumstantial indicia of effective assistance *ex ante* should cast an even stronger burden on convicts seeking relief on grounds of ineffective assistance *ex post.*

The *Strickland* rule compromises the finality of criminal convictions, without securing effective defense at trial. In effect, *Strickland* justifies itself; since legal doctrine fails to secure decent representation at trial, it follows that trials should not be final.[197] This is perverse. Logically, compliance with constitutional standards *ex ante* ought to raise the bar at the first step of the *Strickland* inquiry. This might be done by formalizing the

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[194] Wainwright v. Sykes, 433 U.S. 72 (1977).

[195] *See* WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 28.4, at 1215 (1992). The authors note that "in such cases, petitioners ordinarily will have little incentive for pursuing the underlying constitutional claim under the *Sykes* test, rather than simply seeking relief on the basis of the Sixth Amendment violation." *Id.*

[196] *See* Coleman v. Thompson, 501 U.S. 772 (1991) (counsel's negligent failure to file timely appeal of denial of state court collateral review petition was not cause under *Sykes* because Sixth Amendment right to counsel does not apply in post-conviction collateral review proceedings); Murray v. Carrier, 477 U.S. 478 (1986) (counsel's failure to appeal an issue not cause absent unconstitutional ineffective assistance of counsel; negligent failure to file timely appeal of denial of petition for post-conviction relief in state court not cause under *Sykes*; no free-standing Sixth Amendment violation because Sixth Amendment does not apply to collateral attack proceedings).

[197] *See supra* text accompanying notes 151-59.

"heavy measure of deference" to counsel's choices into a presumption of competence that can be rebutted only by clear and convincing evidence. This modest concession to finality interests would do negligible damage to the function of correcting errors on appeal.

Even in the absence of ineffective assistance doctrine, traditional appellate practice authorizes reviewing courts to order retrials in the unusual case in which the trial court commits plain error, notwithstanding counsel's failure to complain at trial. If the error was obvious and prejudicial to the defense, the reviewing court has discretion to correct errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings."[198] When defense counsel is simply ignorant of the defendant's rights, the plain error standard provides as much protection as the *Strickland* test.

There is a difference between the deliberate waiver and the unconscious forfeiture of the defendant's rights.[199] *Strickland* theoretically covers the case of counsel's incompetent but deliberate decision to waive a legal entitlement, while the plain-error doctrine does not. This is an important point, especially given the importance of cause and prejudice in federal habeas corpus. But a deliberate waiver will almost always be classed as a "tactical choice" under *Strickland*'s first prong. Perhaps in a few cases the record will show that counsel negligently exercised tactical discretion by deliberately waiving a winning claim. Those cases, however, are needles in the vast haystack of the criminal justice system.

Far more important to the unjustly accused is competent advice about genuine tactical choices—whether to testify, what jurors to strike, above all, how far to carry the investigation of possible defenses. Current indigent defense systems deny the majority of criminal defendants the thoughtful and independ-

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[198] United States v. Olano, 507 U.S. 725, 734 (1993) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)). *See generally* 3A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 856 (2d ed. 1982 & Supp. 1996).

[199] *Olano*, 507 U.S. at 733 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'") (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

ent judgment of qualified counsel on these crucial questions. If an *ex ante* standard contributed even a little to improving the overall quality of the defense function, it would prevent far more miscarriages of justice than it might leave uncorrected as a consequence of curtailing *ex post* review under *Strickland.* Improving the quality of the defense function generally would also go a long way toward reducing the number of boneheaded waivers—the one class of troubling cases reached by *Strickland* but not by the plain-error rule.

As for federal habeas, the theoretical availability of *Strickland* claims led the Court to conflate—if not confuse—ineffective assistance as excuse for default in state court and ineffective assistance as a free-standing violation of the Sixth Amendment.[200] As a result of *Strickland,* state law claims can be relitigated in the guise of ineffective assistance claims. If the state trial judge violated state law in instructing the jury, that claim is not cognizable on federal habeas. But counsel's failure to object or to appeal the jury instructions is cognizable as a free-standing violation under *Strickland.* In its zeal to guard the federal forum, the Court has refused to find counsel's failings as cause for state defaults *unless* those failings amount to ineffective assistance under *Strickland.* The habeas tail is wagging the Sixth Amendment dog.

Maybe federal habeas review of defaulted claims should be confined to cases that meet the *Strickland* test, but if so, it is not because *Strickland* provides the current test for Sixth Amendment violations. The contrast between *Stone v. Powell*[201] and *Kimmelman v. Morrison*[202] is instructive. Maybe Fourth Amendment claims should be heard on federal habeas and maybe not, but their cognizability should not depend on whether a Fourth Amendment claim was erroneously denied by a judge or negligently waived by a lawyer. In the default context, *Strickland* converts state law claims into federal claims, while it furnishes a

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[200] *See* Murray v. Carrier, 477 U.S. 478 (1986); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4266.1 (2d ed. 1988).

[201] 428 U.S. 465 (1976).

[202] 477 U.S. 365 (1986).

rhetorical prop to a narrow interpretation of "cause" that keeps some genuine federal claims out of the federal forum.

Whatever one's views of federal habeas, those views are logically independent of the appropriate standards for effective assistance of counsel.[203] If, as I suggest, the adoption of an *ex ante* standard led to even more restrictive standards for *ex post* ineffective-assistance challenges on direct appeal, the Court would have to rethink its reliance on ineffective assistance doctrine in the habeas cases. How that process might work itself out is the subject of another article.

VII. CONCLUSION

I have developed several claims about indigent defense, and thoughtful readers might agree with some but dispute others. I conclude by enumerating the various claims I have defended.

First, I have made a descriptive claim. Indigent defense in the United States is chronically undersupported, morally as well as financially. This claim is not novel; it echoes conventional wisdom. I have, however, traced the chronic neglect of the defense function to its roots in legislative incentives. The public choice problem explains why legislatures underfund indigent defense. The persistent lack of support in turn subjects defense lawyers to a horizontal conflict among clients manifested in legal triage, and to a vertical conflict with the funding authority manifesting itself in diffident representation more concerned with processing caseloads than with resisting authority.

Second, I have made a normative claim. Fair trial, which depends on effective defense counsel, deserves special priority over competing uses of public funds. This claim also has found acceptance in conventional wisdom, but its implications are underappreciated. Anyone who accepts the normative premise of

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[203] On a view of habeas as a remedy for the enforcement of federal rights state courts might neglect, the *Stone/Kimmelman* contrast makes the point graphically clear. On a view of habeas as a procedural safeguard against factual error, the conclusion still follows that review should not depend on an independent Sixth Amendment violation. *Cf.* Joseph Hoffman & William Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 113 ("If a habeas petitioner can show a reasonable probability that his conviction was unjust—that he is innocent of the crime charged—we believe it is wrong to deny him relief solely because his lawyer mistakenly failed to raise a claim.").

Gideon may not logically object to my proposed parity approach on the ground that it will cost too much money. It is fair to question whether the parity approach will, as I hope, set in motion political forces to improve the material resources of indigent defense. It is not fair to accept that positive prediction but object to the result on grounds of economy. At least, it is not fair to make that argument without urging the overthrow of *Gideon v. Wainwright.*

Third, I have made a doctrinal claim. An *ex ante* parity standard would improve on *Strickland* in realizing the commitment to fair trials embodied in the due process clauses, the Sixth Amendment, and in *Gideon.* *Ex post* standards test counsel's performance against a record made by counsel, and with retrial as the only remedy. *Ex post* approaches thus do little to improve the performance of the defense function. They nonetheless compromise the important interest in the finality of criminal proceedings.

My argument against *ex post* analysis, including performance-based standards, is novel. Even if the parity standard I support is rejected, courts and scholars who agree with my critique of *ex post* approaches can make a fresh start by searching for a more acceptable *ex ante* standard. For example, guidelines based on the American Bar Association's *Standards for Criminal Justice* might be developed.

The parity standard—which like *ex ante* analysis is generally novel—recognizes that fair trial requires rough equality in litigation effectiveness. If adopted by courts as a constitutional standard, the parity approach would operate on the roots of the indigent defense crisis by giving both legislatures and prosecutors political incentives to upgrade the defense function. The military system offers one possible model for achieving parity. Once again, however, even readers who agree with my *ex ante* parity standard might reasonably reject the military model in favor of some other approach to achieving parity.

No doubt the precise form of the *ex ante* standard could be a subject of much debate. There is, however, broad and deep agreement on the premises supporting an *ex ante* approach. Studies across a generation have documented the failings of in-

digent defense. Observers spanning the spectrum from Burger to Bazelon have agreed with the studies. No one believes that *Strickland* improves the trial process beyond a few rare cases of error correction. Everyone agrees that *Gideon* was rightly decided. Putting these elements together, I see the real potential to reform the criminal justice system through constitutional doctrine.