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A RIGHT WITHOUT A REMEDY: THE SIXTH AMENDMENT RIGHT TO COUNSEL AND THE AMERICAN INDIGENT DEFENSE CRISIS

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I. INTRODUCTION

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[1] Whether this brief clause imposes an affirmative duty on courts to provide counsel for those who could not otherwise afford it was historically less axiomatic than it is today. The modern understanding that the criminally accused must be appointed counsel when unable to afford a private attorney is based primarily on the landmark Supreme Court decision in *Gideon v. Wainwright*[2] and its legal progeny. *Gideon* declared "that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[3]

Gideon clearly established that the right to counsel is fundamental to ensuring just criminal proceedings,[4] and insisted that no criminal defendant be forced to face prosecution without the assistance of a competent lawyer. Today, however, the American legal system is systematically failing to provide the indigent criminally accused with the type of representation required by *Gideon* and the Constitution. America is facing an indigent defense crisis. Legal, social, and political practicalities have combined to create a seemingly insurmountable barrier to the real enforcement of the Sixth Amendment rights of the criminally accused. The indigent counsel crisis presents a unique and troubling question: what must be done when the nature of the legal system itself proves to defeat a constitutional maxim?

This article traces the development of Sixth Amendment jurisprudence leading to the recognition of the right to appointed counsel in criminal proceedings.[5] It then reviews the apparent state of crisis in which that right goes

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1. U.S. CONST. amend. VI.

2. Gideon v. Wainwright, 372 U.S. 335, 335 (1963).

3. *Id.* at 344.

4. *Id*; *see* Justin F. Marceau, *Embracing A New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161 (2012) (providing an extensive examination of the Supreme Court's interpretation of the Sixth Amendment's application to non-trial oriented and non-truth seeking procedural protections).

5. *See* Randy M. Sutton, Annotation, *Construction and Application of Sixth Amendment Right to Counsel—Supreme Court Cases*, 33 A.L.R. FED. 2d 1 (2009).

largely unrecognized for indigent criminal defendants. Next it proposes that the solution to the crisis may lie in the increased use of structural injunctions and argues that the recent Supreme Court decision in *Brown v. Plata*[6] has opened the door for state and federal courts to impose unprecedentedly expansive affirmative demands upon state and local governments in order to reform constitutionally defective indigent defense systems. Finally, it examines recent federal district court decisions with opposing implications for the future viability of the structural injunction approach to remedying Sixth Amendment violations.

II. THE SCOTTSBORO BOYS: *POWELL V. ALABAMA* EXPANDS THE CONSTITUTIONAL ENTITLEMENT TO COUNSEL

In *Powell v. Alabama*,[7] the Supreme Court recognized for the first time that state courts had a constitutional duty to appoint counsel to certain criminal defendants who could not otherwise acquire representation. *Powell* involved the alleged rape of two white women on a freight train in route from Chattanooga to Memphis, Tennessee.[8] In what became a highly racialized public spectacle, a group of black men between thirteen and twenty years old, who had also been passengers on the train, were arrested in connection with the crime.[9] By the end of the same day, local residents had formed a lynch mob outside the station where the men were held.[10] As the United States Supreme Court would later describe the prosecution:

> The defendants, young, ignorant, illiterate, surrounded by hostile sentiment, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.[11]

The "counsel" Justice Sutherland alludes to above refers to the trial court's dubious appointment of "all of the members of the bar for the purpose of arraigning the defendants and to help if no counsel appear[ed]."[12] While a local lawyer and an interested out-of-state lawyer appeared the day of trial, both merely indicated a willingness to assist court appointed counsel, though no such appointment was ever made.[13] Each of the defendants was found guilty after a one-day trial and sentenced to death.[14]

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6. Brown v. Plata, 563 U.S. 493 (2011).
7. Powell v. Alabama, 287 U.S. 45, 45 (1932).
8. Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 379 (2009).
9. *Id.*
10. *Id.*
11. *Powell*, 287 U.S. at 57-58.
12. *Id.* at 53.
13. *Id.* at 57-58.
14. *Id.* at 50.

On appeal, the Supreme Court confined its examination to whether the trial court's failure to effectively appoint counsel was a violation of the defendants' constitutional rights under the Due Process Clause of the Fourteenth Amendment.[15] Because *Powell* was decided during the pre-incorporation era, the text of the Sixth Amendment informed the analysis, but could not control on the issue of whether or not the *Powell* defendants were entitled to counsel in a state court.[16] Rather, the analysis turned on whether the accuseds' right to counsel in a criminal trial was "of such a nature that [it was] included in the conception of due process of law" encapsulated by the Fourteenth Amendment.[17]

The Court reasoned that the concept of a fair hearing was a "basic element[] of the constitutional requirement of due process of law," as presupposed in the American legal system as the requirement that the court have jurisdiction over the cases it hears.[18] Further, inherent in the concept of a fair hearing was the right to the assistance of counsel.[19] Therefore, in many circumstances, the denial of counsel effectively amounts to an absolute denial of a hearing, and thus violates the Due Process Clause. The *Powell* Court elaborated on the practical unfairness that confronts an unrepresented defendant in a criminal proceeding as further justification for the right's inclusion in the concept of due process of law:

> 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. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[20]

The Court held that the *Powell* defendants had not been accorded their right to a fair trial in accordance with due process under the Fourteenth Amendment.[21]

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15. *Id.* at 61.

16. *See* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 355 (2001).

17. *Powell*, 287 U.S. 45 at 67-68 (quoting Twining v. New Jersey, 211 U.S. 78, 99 (1908)) (internal quotations omitted)).

18. *Id.* at 68.

19. *Id.* at 66

20. *Id.* at 69.

21. In order to reach the majority's holding in *Powell*, the court carefully distinguished *Hurtado v. California*, in which the Supreme Court ruled that the Fifth Amendment's requirement that convictions

As was typical of the Court's Fourteenth Amendment due process rulings in the criminal procedure context during the pre-incorporation era,[22] *Powell* was decided on narrow and fact-intensive rationale. Despite the Court's language explaining in clear terms the unfairness that confronts *any* unrepresented criminal defendant (including, of course, "the intelligent and educated layman") in the context of *any* criminal prosecution, the *Powell* decision was limited to capital cases in which the defendant was unable to retain counsel, and unable to provide his or her own defense due to a limitation such as "ignorance, feeble-mindedness, illiteracy, or the like."[23] While *Powell* represents a judicial recognition of the fundamental nature of the right to appointed counsel for indigent defendants, it is also illustrative of the limitations imposed by the pre-incorporation case-by-case approach to due process rights in the realm of criminal procedure. Full affirmation of the right to appointed counsel would require the eventual abandonment of the substantive due process approach.

III. ONE STEP FORWARD, TWO STEPS BACK: *BETTS V. BRADY* RETRACTS THE SCOPE OF *POWELL V. ALABAMA*

Only a decade after the Court's decision in *Powell*, the Court made clear the limited nature of the decision's holding. In *Betts v. Brady*,[24] the Court considered the case of Smith Betts, an indigent defendant who was unable to hire a lawyer, denied appointed counsel, and ultimately convicted of robbery.[25] Betts

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based on violations of capital or otherwise infamous crimes be preceded by a grand jury indictment was inapplicable to state courts. *Hurtado v. California,* 110 U.S. 516, 538 (1884).

Hurtado's rationale was that because the grand jury requirement was included in the language of the Fifth Amendment, but not in the language of the Fourteenth Amendment, that language could not have been intended to apply to the states, and thus applied to the federal government alone. *Id.* That rationale could logically have been extended to the Sixth Amendment, mandating a decision that inclusion of the right to counsel in the Sixth Amendment, and the lack of that language in the Fourteenth Amendment, precluded the right to counsel from being applied to the states as a due process right. The *Powell* Court relied on *Chicago, Burlington & Q.R. Co. v. Chicago*, 166 U.S. 226 (1987), which held that uncompensated takings were precluded by the Fourteenth Amendment due process clause, despite being explicitly addressed by the Fifth Amendment Takings Clause. *Powell*, 287 U.S. 45 at 66. The Court also cited *Gitlow v. People of State of New York*, 268 U.S. 652, 666 (1925), which held that the First Amendment freedom of speech and of the press are encompassed within the fundamental rights protected by the due process clause of Fourteenth Amendment, and precluded from state infringement regardless of their explicit inclusion in the First Amendment. *Id.* at 67. The Court additionally cited *Stromberg v. People of the State of California*, 283 U.S. 359, 368 (1931), and *Near v. Minnesota*, 283 U.S. 697, 707 (1931), which reaffirmed the inclusion of First Amendment speech rights in the liberty protected by the Due Process Clause. *Hurtado*, the Court ruled, is merely "an aid to construction . . . it must yield to more compelling considerations whenever such considerations exist." *Id.*

22. Israel, *supra* note 15 at 354 ("The primary example of due process rulings stressing the circumstances of the particular case were those involving claims based upon the failure to provide counsel to assist indigent defendants") (footnote omitted).

23. *Powell*, 287 U.S. at 71.

24. Betts v. Brady, 316 U.S. 455 (1942).

25. *Id.* at 457.

argued that based on numerous precedents following the *Powell* decision, the Supreme Court had laid the foundation for a ruling that the right to appointed counsel applied to every criminal defendant unable to obtain a lawyer.[26] The Court acknowledged that the Sixth Amendment required the appointment of counsel for defendants who were otherwise unable to procure an attorney in federal criminal prosecutions.[27] Whether or not it applied to the states depended on whether it was fundamental to due process of law, a question which *Powell* answered in the affirmative.[28] After a searching review of colonial and early state constitutional provisions addressing the right to counsel at trial, the *Betts* Court determined that the inconsistent treatment of the matter across jurisdictions mandated the conclusion that "appointment of counsel is not a fundamental right, essential to a fair trial."[29] States were not obligated to provide counsel in every criminal prosecution.[30] However, the Court did acknowledge that denial of counsel in a particular case might result in a fundamentally unfair conviction.[31] This was not the case the for Smith Betts, and the Court affirmed the denial of his petition of habeas corpus.[32]

IV. *GIDEON V. WAINWRIGHT*: THE CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL IS EXPLICITLY APPLIED TO THE STATES

On June 3, 1961, there was a break-in at the Bay Harbor Poolroom in Panama City, Florida at about 5:30 a.m.[33] Clarence Earl Gideon, "a fifty-one-year-old white man who had been in and out of prisons much of his life,"[34] was charged with "breaking and entering with intent to commit petit larceny."[35] Prior to trial, Gideon requested the assistance of counsel based on his constitutional entitlement(in a somewhat famous and bizarrely prescient colloquy with court):

> The Court: What says the Defendant? Are you ready to go to trial?
>
> The Defendant: I am not ready, your Honor.
>
> The Court: Why aren't you ready?
>
> The Defendant: I have no Counsel.
>
> The Court: Why do you not have Counsel? Did you not know your case was set for trial today?
>
> The Defendant: Yes, sir, I knew that it was set for trial today.

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26. *Id.* at 462.
27. *Id.* at 464-65 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).
28. *Powell*, 287 U.S. at 73.
29. *Betts*, 316 U.S. at 471.
30. *Id.* at 471-72.
31. *Id.* at 473.
32. *Id.*
33. Bruce R. Jacob, *Memories of and Reflections About* Gideon v. Wainwright, 33 STETSON L. REV. 181, 200 (2003).
34. ANTHONY LEWIS, GIDEON'S TRUMPET 5 (1964).
35. Jacob, *supra* note 32, at 200.

> The Court: Why, then, did you not secure Counsel and be prepared to go to trial?
>
> The Defendant: Your Honor I request this Court to appoint Counsel to represent me in this trial.
>
> The Court: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense.
>
> The Defendant: The United States Supreme Court says I am entitled to be represented by Counsel.[36]

Gideon's request for appointed counsel was denied, he was convicted, and ultimately sentenced to five years in a state prison.[37] Proceeding pro se, Gideon filed a petition for habeas corpus challenging his conviction based on the trial court's denial of his request for appointed counsel.[38] The Supreme Court of Florida denied his petition without a written opinion,[39] but the U.S. Supreme Court granted Gideon's petition for writ of certiorari.[40]

The *Gideon* Court recognized that *Betts* rested entirely on the conclusion that the right to appointed counsel for indigent defendants was not so fundamental to a fair trial that it fell within the sphere of protection of the Due Process Clause of the Fourteenth Amendment.[41] However, a number of decisions in the decade or so preceding *Betts*, including *Powell v. Alabama*, had affirmed the fundamental character of the right to counsel.[42] Those affirmations, the Court reasoned, were no less valid because the decisions themselves were limited to the facts of their respective cases.[43] Though none of those precedents declared the affirmative duty of a court to appoint defense counsel where the accused could not otherwise afford it, the *Betts* decision was still an aberration in its declaration that the right to counsel was not fundamental.[44] Stressing the paramount role of the assistance of counsel in ensuring the fairness of American courts, the Court held:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish

36. *Id.* at 200-01
37. *Id.* at 212.
38. Gideon v. Wainwright, 372 U.S. 335, 335 (1963).
39. Gideon v. Cochran., 135 So. 2d 746 (Fla. 1961), *rev'd sub nom. Gideon*, 372 U.S. 335 (1963).
40. Gideon v. Cochran, 370 U.S. 908, 908 (1962).
41. *Gideon*, 372 U.S. at 340.
42. *Id.* at 342-43.
43. *Id.* at 343.
44. *Id.* at 343-44.

> machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide—spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[45]

The Court "concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them [is] the fundamental right of the accused to the aid of counsel in a criminal prosecution."[46] The Court explicitly overruled *Betts*, the Sixth Amendment right to counsel was incorporated to the states through the Fourteenth Amendment, and *Gideon's* legacy was born.[47]

V. THE INDIGENT DEFENSE CRISIS AND THE REALITY OF *GIDEON*

Despite the clarity of *Gideon's* holding that the Sixth Amendment requires that even impoverished defendants be afforded the assistance of counsel, the right to appointed counsel today is more aspirational than actualized. According to the American Bar Association, "indigent defense in the United States remains in a state of crisis."[48] The United States Department of Justice has concluded that America's indigent defense systems routinely fail to meet the constitutionally mandated level of representation required by *Gideon*.[49]

45. *Id.* at 344.

46. *Id.* at 343 (citing Grosjean v. Am. Press Co., 297 U.S. 233, 243-44 (1936)).

47. *Id.* at 345.

48. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS OF THE AM. BAR ASS'N., GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 38 (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter GIDEON'S BROKEN PROMISE].

49. In its memorandum of accomplishments, the United States Department of Justice's Office for Access to Justice summarized the state of indigent defense in America succinctly: "In the criminal justice system, public defender offices are underfunded and understaffed, often so severely that they cannot hope to provide their clients with effective representation. Indigent defender annual caseloads can range from 500 to 900 felony cases and over 2,000 misdemeanors, at least five to six times the

Examination of the various indigent defense systems across the country reveals that the majority of systems are woefully underfunded, lack oversight and accountability, and persistently result in the violation of defendants' constitutional rights. Indigent defenders are underpaid, poorly trained, extraordinarily overworked, unable to adequately investigate or research their cases, impaired by conflicts of interest, overly reliant on plea agreements, and lacking in other practice-essential resources.[50] Their clients are persistently left without adequate representation, and they often cannot avoid violating their professional and ethical duties.[51]

However, the indigent defense crisis is not a new phenomenon. "In fact, since the 1963 Gideon decision, a major independent report has been issued at least every five years documenting the severe deficiencies in indigent defense services. . . . The claim that indigent defense sorely needs reform is neither novel nor controversial."[52] Critics have discussed the disparity between *Gideon's* promise and the realities of indigent defense with the same sense of urgency and moral outrage displayed by today's commentators for some time.[53] However, the problem's persistence is not an indication of triviality, but rather a sign of the truly deep entrenchment of its causes, and its resistance to political reform.

VI. THE CRIMINAL PROCEDURE REMEDY: INEFFECTIVE ASSISTANCE OF COUNSEL AND *STRICKLAND V. WASHINGTON*

To begin to address the inadequacies of representation provided by indigent defense services, the most obvious avenue is probably direct appeal or post-conviction challenges asserting ineffective assistance of counsel. The principle that the right to counsel encompasses the right to *effective* counsel is so straightforward that it is given very little explicit attention in the early cases and is generally treated as being intertwined with the right to counsel itself.[54] Later cases acknowledged that incompetent or otherwise ineffective assistance of counsel may

recommended ceilings set by the National Advisory Commission on Criminal Justice. In some instances, jurisdictions have reported case load assignments to be so high that defenders average just seven minutes per case. Understaffing leads to lack of attention to individual clients' cases, which in turn can lead to grave injustice, including wrongful convictions and unjust imprisonment." OFFICE FOR ACCESS TO JUSTICE OF THE U.S. DEPARTMENT OF JUSTICE: FOUR YEAR ANNIVERSARY ACCOMPLISHMENTS (2010), https://www.justice.gov/sites/default/files/atj/legacy/2014/03/14/accomplishments.pdf.

50. GIDEON'S BROKEN PROMISE, *supra* note 47, at 38-41.

51. *Id.*

52. Note, Gideon's *Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2064-65 (2000).

53. *See, e.g.*, 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, 627 (1986).

54. For example, in *Powell*, one of the bases on which the Court decided that the defendants had been denied their due process rights was that the representation administered by the court was more "pro forma than zealous and active. "Powell v. Alabama, 287 U.S. 45, 60 (1932); *See also* Reece v. Georgia, 350 U.S. 85, 90 (1955) ("The *effective* assistance of counsel in such a case is a constitutional requirement of due process which no member of the Union may disregard." (emphasis added)).

violate a defendant's Sixth Amendment right to counsel but did not, however, elaborate on a threshold level of representation sufficient to satisfy the right.[55]

The seemingly glaring absence of a constitutional standard for the effective assistance of counsel was addressed by the Supreme Court in *Strickland v. Washington*.[56] The Court in *Strickland* explained the test for ineffective assistance of counsel as "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[57] Under *Strickland*, to demonstrate that counsel's representation was sufficiently defective to warrant post-conviction relief, the defendant must demonstrate (1) that counsel committed serious errors in the course of the representation of the defendant, and (2) that the defendant was prejudiced by those errors.[58] As to the first prong, the Court announced an objective test requiring a showing that counsel's performance was unreasonable in light of the prevailing norms of the legal profession.[59] The second prong then requires a defendant demonstrate that but for his or her counsel's unreasonably deficient performance there is a reasonable probability that the proceeding would have resulted in a different outcome.[60]

The holding in *Strickland* has been heavily criticized on number of grounds. Perhaps most compellingly, many commentators argue that the Court misconstrued the Sixth Amendment's function in that it merely serves to ensure that trials result in just *outcomes*, and does not protect the accused's *procedural* right to counsel in an absolute sense.[61] This outcome centered approach, it has been argued, "suggests that the end justifies the means in the precise circumstance where the legitimacy of the end is dependent on the legitimacy of the means. . . . [O]ne cannot know the 'correct' result without first allowing the process to operate properly."[62] Critics have also asserted the inappropriateness of the requirement that a defendant make an affirmative showing of prejudice based on the likelihood that it will often be nearly, if not actually, impossible for a defendant to prove that a

55. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[D]efendants 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.") (footnote omitted).

56. Strickland v. Washington, 466 U.S. 668 (1984).

57. *Id.* at 686.

58. *Id.* at 687.

59. *Id.* at 688.

60. *Id.* at 694.

61. *See* Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1266 (1986).

62. *Id.*

different result would have ensued but for counsel's error, especially where a jury verdict is at issue.[63]

Whatever else may be said about the legal reasoning underlying *Strickland* (and much more might be said), it is clear that the standard places an incredibly high burden on defendants pursuing ineffective assistance of counsel claims. The decision's clear implication is that even where representation is systemically defective, very few convictions are likely to be overturned based on the ineffective assistance of counsel. With *Strickland* as the operative standard, appeals and collateral actions challenging convictions based on the inadequacy of appointed counsel are unlikely to have any reformative effect on inadequate indigent defense systems. Successful post-conviction challenges are simply unlikely to ever be so numerous or burdensome that they impede the function of the courts to a degree that might garner the attention of policy makers.

Nevertheless, some cases have attempted to incorporate ineffective assistance of counsel claims with systemic challenges to indigent defense systems, arguing that the dysfunction of the public defender systems caused de facto ineffective assistance for defendants represented by those systems. In at least three such cases, the respective courts agreed that the indigent defense systems at issue were sufficiently defective to justify an inference or even legal presumption that the systems' clients received ineffective assistance.[64] The judicial recognition that the indigent defense systems at issue were constitutionally defective as a whole is a tremendous first step toward fixing those systems. However, because those cases were criminal appeals of individual convictions, any potential remedies applied only to the particular defendants. Even where a presumption of inadequate counsel applies, defendants are still haled into court, tried, and convicted in violation of their rights. Post-conviction criminal remedies cannot eliminate the underlying violations. Remedies based in criminal procedure, by themselves, are simply not capable of working the systemic change needed to address the indigent defense crisis.

VII. THE LEGISLATIVE REMEDY

Many commentators, including the American Bar Association, have urged that inadequate indigent defense systems can be cured through a combination of legislative changes and voluntary efforts on the part of non-state actors like the various national, state, and local bar associations.[65] It is true that the indigent

63. *Id.* at 1281 ("Proof of a reasonable probability that the result would have been different is virtually impossible since jurors' decisions are based on an infinite variety of subjective data, and one can rarely, if ever, state that it is reasonably probable that a jury would have reached a different result than it did.").

64. Gideon's *Promise Unfulfilled*, *supra* note 51, at 2069 ("[T]he high courts of Arizona, Louisiana, and Oklahoma have all found their state indigent defense systems constitutionally deficient.") (footnote omitted) (citing *State v. Smith*, 681 P.2d 1374 (Ariz. 1984); *State v. Peart*, 621 So.2d 780 (La. 1993); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990)).

65. GIDEON'S BROKEN PROMISE, *supra* note 47, at 38-41.

defense crisis might be solved through the political process. However, despite the opportunity provided by the better part of a century, we have yet to see any such meaningful national reform take shape. The political branches may have the capacity to solve the indigent defense crisis, but the persistence of the problem indicates that they apparently do not have the will. After all, as a group, the indigent criminally accused have minimal political clout,[66] and indigent defense systems must compete for resources with other, more politically palatable causes.[67] Where political expediency encourages eschewing the issue, and where "current constitutional law . . . leaves legislatures free to underfund indigent defense,"[68] a political solution seems improbable. That being the case, advocates should necessarily focus on the development of a legal strategy.

VIII. THE MOST DRASTIC AND MOST APPROPRIATE REMEDY: REFORM THROUGH RESURGENCE OF THE STRUCTURAL INJUNCTION

As several scholars have argued, the unique characteristics of the indigent defense crisis make it an ideal candidate for reform through the use of structural injunctions. A structural injunction, "in addition to enjoining the defendant institution from acting in a particular unconstitutional fashion, order[s] forward-looking, affirmative steps to prevent future deprivations."[69] This immensely powerful judicial tool has its origins in the seminal public school desegregation cases of the 1950s.[70] Structural injunctions gained some prominence throughout the 1970s as an instrument of reform in the contexts of prison administration, public housing, and mental health care,[71] though the use of the remedy is generally considered to have faded since that time.[72] Because the indigent defense crisis is both unsuited to resolution through post-conviction procedural remedies, and is unlikely to be cured by the political process, attack through structural injunction

66. Gideon's *Promise Unfulfilled*, *supra* note 51, at 2067-68 ("Criminal defendants comprise a political constituency with little, if any, leverage; indeed, many felony convicts are formally disenfranchised. Public choice theory clearly predicts, and experience demonstrates, that indigent defense will be undersupported." (footnote omitted)).

67. *See* Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2700 (2013) ("Although the need for greater resources for indigent defense services may be obvious, it is here that political will falters most, for equally obvious reasons. With clamoring demand for dwindling public funds for schools, hospitals, roads and bridges, public transportation, firefighters, and police officers, it is not surprising that more money for lawyers representing alleged criminals is not high on anyone's list. Generating the will to provide these crucial resources is an enormous challenge.").

68. Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 904 (2013).

69. Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops . . . It's Still Moving!*, 58 U. MIAMI L. REV. 143, 144 (2003).

70. *Id.* at 172 n.2. ("The birth of the modern structural reform injunction can be traced to Brown v. Bd. of Educ. (Brown II), 349 U.S. 294 (1955), which directed the district courts to implement the right to a non-segregated education. ").

71. 9 WEST'S FED. ADMIN. PRAC. § 11255 (2016).

72. Gilles, *supra* note 68, at 145 ("There are no contemporary examples of bold, Brown-like reformist judicial enterprises.").

may well represent the only remaining method for effecting *Gideon's* now half-century old promise.

A handful of cases filed in multiple jurisdictions in recent years indicate that the structural injunction has not escaped the notice of indigent defense reform advocates. These cases, generally brought against states and municipalities and claiming affirmative injunctive relief based on Sixth Amendment violations, present a highly perplexing question: what legal standard applies to claims of denials of substantive Sixth Amendment rights? Should entitlement to injunctive relief be governed by the generally accepted standard for awarding injunctive relief, or should plaintiffs be additionally required to meet the ineffective assistance of counsel standard established by *Strickland*? The distinction between these alternatives is immensely important in determining the viability of the structural injunction approach.[73] If courts require that plaintiffs meet *Strickland's* requirements, then plaintiffs will be barred from bringing suits based on any pre-conviction Sixth Amendment violation, as no "outcome" will exist to allow analysis of *Strickland's* prejudice prong.[74] Additionally, where plaintiffs proceed with post-conviction civil actions for structural injunction, *Strickland's* incredibly burdensome standards might significantly limit the number of potentially successful actions, as many plaintiffs will simply be unable to demonstrate either serious error or substantial prejudice.

While it seems clear that civil claims based on Sixth Amendment violations should not require plaintiffs to meet the *Strickland* test for ineffective representation,[75] precisely what the alternative is remains unclear. Where

73. For an extensive review of the various standards applied by the courts reviewing Sixth Amendment challenges to defective public defense systems, *see* Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 462 (2010).

74. *See, e.g.*, Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996) ("Here, Platt seeks to enjoin the Marion County public defender system because it effectively denies indigents the effective assistance of counsel. However, a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial. This prejudice is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable. *Id.* Accordingly, the claims presented here are not reviewable under the Sixth Amendment as we have no proceeding and outcome from which to base our analysis.")(citing *Strickland*, 466 U.S. at 687); *Chiang, supra* note 72, at 462 (arguing "the lesson of Platt is that unless the court understands that Strickland is wholly inapplicable to pre-conviction claims, plaintiffs with even the most egregious of Sixth Amendment rights violations will see their claims fail.").

75. *See* New York Cty. Law. Ass'n v. State, 763 N.Y.S.2d 397, 412 (N.Y. Sup. Ct. 2003) (holding that a Sixth Amendment "claim of ineffectiveness is ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case and therefore this court finds the more taxing two-prong Strickland standard used to vacate criminal convictions inappropriate in a civil action that seeks prospective relief.") (citing New York Cty. Law. Ass'n v. State, 745 N.Y.S.2d 376 (N.Y. Sup. Ct. 2002)) (internal quotations omitted). *See also* Hurrell-Harring v. State, 930 N.E.2d 217, 225 (N.Y. 2010) ("Collateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland.* These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic, unadorned question presented by such claims where, as here, the

Strickland has been held not to apply, courts have applied the general standard for entitlement to injunctive relief in which the plaintiff(s) must demonstrate "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law."[76] While the uncertainty underlying the injunctive relief standard is problematic for developing a systemic Sixth Amendment violation litigation model, if these claims continue to be brought, a clearer test will undoubtedly emerge. Whatever the precise contours of the eventual test, a recent Supreme Court decision confirms that where it is met, the nature and scope of the affirmative equitable remedies that a court may permissibly impose on government is vaster than ever before.[77]

IX. *BROWN V. PLATA* AND EXPANSION OF THE STRUCTURAL INJUNCTION

In 2011, the Supreme Court decided *Brown v. Plata*, a consolidated case arising from two class action suits alleging overcrowding and inadequate medical care in California prisons in violation of the Eighth and Fourteenth Amendments.[78] In the first of the underlying cases, *Coleman v. Wilson*,[79] the United States District Court for the Eastern District of California found that California's prison system was responsible for systemic violations of mentally ill state prisoners' Eighth Amendment right to be free from cruel and unusual punishment.[80] Upon that finding, the court ordered the state prison administrator:

> [T]o develop and implement a series of forms, protocols, and plans in consultation with court-appointed experts. . . . [And] also recommended appointment of a special master for a period of three years to (1) consult with the court concerning the appointment of experts; (2) monitor compliance with court-ordered injunctive relief; (3) report to the court in twelve months on the adequacy of suicide prevention; and (4) perform such additional tasks as the court may deem necessary.[81]

The second of the underlying cases involved similar Eighth Amendment claims based on systemically deficient medical care in California's prisons.[82] The Defendants admitted that California's prison medical system was unconstitutionally defective and "stipulated to a remedial injunction. The State

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defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial."); Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988) (holding that *Strickland* is "inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment.").

76. O'Shea v. Littleton, 414 U.S. 488, 502 (1974).

77. *See* Brown v. Plata, 563 U.S. 493 (2011).

78. *Id.*

79. Coleman v. Wilson, 912 F. Supp. 1282 (E.D. Cal. 1995)

80. *Id.* at 1297.

81. *Id.*

82. *Brown*, 563 U.S. at 510-11.

failed to comply with that injunction, and in 2005 the court appointed a Receiver to oversee remedial efforts."[83] After nearly a decade of judicial oversight, the plaintiffs in both *Coleman* and *Plata* concluded that the ongoing violations of prisoners' constitutional rights would not be remedied without a significant reduction in the overall prison population.[84] The plaintiffs in both cases moved to convene a three judge panel which, under the Prison Litigation Reform Act ("PLRA"),[85] had the authority to order the State to reduce the prison population.[86] After a two week trial, the three-judge panel ordered that California "reduce its prison population to 137.5% of the prisons' design capacity within two years."[87] That order would require the release of 46,000 California state prisoners.[88] The state appealed the order of the three-judge panel to the U.S. Supreme Court.[89]

At the outset of the majority opinion in *Brown*, Justice Kennedy acknowledges the sheer magnitude of the remedy granted by the three-judge panel, noting its "unprecedented sweep and extent."[90] However, Justice Kennedy reasoned, while courts must be deferential to the administrative arms of the state, courts must also abide by their obligation to enforce the constitutional rights of all persons.[91] That obligation is not less compelling merely "because a remedy would involve an intrusion into the realm of prison administration."[92]

Under the PLRA, before implementing a prisoner release, the three-judge panel must have determined "that the relief [was] narrowly drawn, extend[ed] no further than necessary, and [was] the least intrusive means necessary to correct the violation of the Federal right."[93] After reviewing the extensive remedial efforts undertaken by the District Court in both *Coleman* and *Plata*, the Court found that "the District Courts were not required to wait to see whether their more recent efforts would yield equal disappointment."[94] The Court found that the release order was not impermissibly broad because it might encompass prisoners who were not among the class of plaintiffs suing.[95] Nor did the Court find the release order overbroad because it "encompass[ed] the entire prison system, rather than separately assessing the need for a population limit at every institution,"[96] or

83. *Id.* at 507.
84. *Id.* at 509.
85. The PLRA provides in relevant part that "In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court." 18 U.S.C. § 3626(a)(3)(B) (2012).
86. *Brown*, 563 U.S. at 508-11.
87. *Id.* at 509-10.
88. *Id.*
89. *Id.*
90. *Id.* at 501.
91. *Id.* at 510-11.
92. *Id.* at 511.
93. *Id.* (internal quotations omitted) (citing 18 U.S.C. §3626(a)(3)(E)).
94. *Id.* at 516.
95. *Id.* at 531-32.
96. *Id.* at 532.

because it intruded on the State's authority to administer its prisons.[97] Finally, the State had not proposed any reasonable alternative to the release order, and decades of remedial effort had failed to produce one.[98] As Justice Kennedy explained:

> The State's desire to avoid a population limit, justified as according respect to state authority, creates a certain and unacceptable risk of continuing violations of the rights of sick and mentally ill prisoners, with the result that many more will die or needlessly suffer. The Constitution does not permit this wrong.[99]

The Court elaborated on the scope of courts' authority to craft affirmative injunctive remedies generally. "Once invoked, the scope of a district court's equitable powers . . . is broad, for breadth and flexibility are inherent in equitable remedies" (though in this case, the PLRA required narrow tailoring).[100] Courts additionally retain broad and flexible authority to supervise remedial orders and make necessary modifications.[101] A court may "invoke[] equity's power to remedy a constitutional violation by an injunction mandating systemic changes to an institution [and] has the continuing duty and responsibility to assess the efficacy and consequences of its order."[102] While the Court reasoned that the state and its administrative entities deserved at least some deference, it ruled that there was nothing in the three-judge panel's order that was violative of either the district court's equitable authority, or the specific limitations imposed by the PLRA.[103] Justice Kennedy's opinion concludes, the "extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding. The relief ordered by the three-judge court is required by the Constitution and was authorized by Congress in the PLRA. The State shall implement the order without further delay."[104]

The decision in *Brown* was accompanied by immense critical backlash.[105] The general tone of the criticism is well-encapsulated by Justice Scalia's blistering dissent, which begins by describing the majority's holding as "perhaps the most radical injunction issued by a court in our Nation's history," and "a judicial travesty" that "ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity."[106]

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97. *Id.* at 533.
98. *Id.*
99. *Id.*
100. *Id.* at 538 (citing Hutto v. Finney, 437 U.S. 678, 688 n.9 (1978)).
101. *Id.* at 1946.
102. *Id.* (citing New York State Assn. for Retarded Children, Inc. v. Carey, 706 F.2d 956, 967 (2d Cir. 1983)).
103. *Id.*
104. *Id.* at 545.
105. *See id.* at 550 (Scalia, J., dissenting).
106. *Id.*

Citing his own concurrence in *Mine Workers v. Bagwell*,[107] Justice Scalia outlined the origins of the structural injunction and concluded that historically, equitable remedies such as injunctions could not require any ongoing court supervision of a litigant's conduct.[108] Injunctions were traditionally limited to the requirement of no more than a "single simple act."[109] Thus, the ongoing administrative supervision required by many structural injunctions is simply an impermissible adulteration of an otherwise legitimate and long-established equitable remedy.[110] Additionally, structural reform litigation, Justice Scalia argued, has the unavoidable consequence of usurping the policy choices of the branches they legitimately belong to and replacing them with that of unelected judges.[111]

The most significant aspect of Justice Scalia's dissent in *Brown* is his conclusion that the decision "not only affirms the structural injunction but vastly expands its use, by holding that an entire system is unconstitutional because it *may produce* constitutional violations."[112] Other commentators have similarly concluded that *Brown* represents a watershed moment for the structural injunction, and very likely signals its potentially burgeoning use as a tool for systemic civil rights reform.[113] If the vast structural injunction at issue in *Brown* can be upheld even in spite of the extreme limitations, such as the narrow tailoring requirement imposed by the PLRA, then it is difficult to imagine what, if any, affirmative injunctive orders would be impermissibly overbroad when aimed at addressing systemic rights violations like that at issue in *Brown*.

X. PERFECT PARALLELS: THE LEGAL RATIONALE OF *BROWN V. PLATA* AS APPLIED TO THE INDIGENT DEFENSE CRISIS

The structural obstacles underlying the persistence of the constitutional violations at issue in *Brown v. Plata* are markedly similar to those underlying the entrenchment of unconstitutionally defective indigent defense services. The Court

107. International Union, UMWA v. Bagwell, 512 U.S. 821, 841-42 (1994) (Scalia, J., concurring).

108. *Id.*

109. *Id.* at 841 (citing H. MCCLINTOCK, PRINCIPLES OF EQUITY § 15, at 32-33 (2d ed. 1948)).

110. *Id.* at 842-43.

111. *Brown*, 569 U.S. at 558 (Scalia, J., dissenting).

112. *Id.* at 555.

113. *See* Alicia Bower, *Unconstitutionally Crowded: Brown v. Plata and How the Supreme Court Pushed Back to Keep Prison Reform Litigation Alive*, 45 LOY. L.A. L. REV. 555, 567 (2012) ("With Brown v. Plata, the U.S. Supreme Court upheld perhaps the most extreme remedial order that it has ever issued. The structural injunction that the Court upheld called for the early release of a shockingly large number of California inmates. Beyond the practical implications of the order, the Court in Plata clearly signaled that structural injunctions in prison reform litigation remain a valid exercise of judicial power. Even more, the Court may have signaled an expansion of the scope of the structural injunction remedy by focusing on the potential, rather than the actual, constitutional deficiencies in the California prison system. The Court reached its conclusion, moreover, despite a congressional statute that was aimed at preventing precisely this type of judicial decision-making in this context; the Court ultimately pushed back on the PLRA in an effort to reaffirm its own broad equitable powers.").

in *Brown* described the rights violations attendant to the prison system as "rarely susceptible of simple or straightforward solutions. In addition to overcrowding the failure of California's prisons to provide adequate medical and mental health care may be ascribed to *chronic and worsening budget shortfalls, a lack of political will in favor of reform, inadequate facilities, and systemic administrative failures*."[114]

The Court also used the political failure to remedy the systemic violations as further support for judicial intervention. "The Court cannot ignore the political and fiscal reality behind this case. California's Legislature has not been willing or able to allocate the resources necessary to meet this crisis . . . There is no reason to believe it will begin to do so now, when the State of California is facing an unprecedented budgetary shortfall."[115] The obvious similarities between the structural nature of the violations at issue in the California prison system and the indigent defense crisis compel the conclusion that rampant Sixth Amendment violations might also be addressed through sweeping injunctive orders.

While structural reform litigation on the scale of that at issue in *Brown v. Plata* will without a doubt encounter vehement opposition as violating separation of powers, federalism, comity, and judicial restraint, those concerns may not be sufficient to stymie the approach. At least one federal district court decision ordering fairly extensive affirmative injunctive relief against a municipal public defender system has already cited *Brown* to establish the extent of the district court's equitable authority. *Wilbur v. City of Mount Vernon*[116] involved the public defense system utilized by the cities of Burlington and Mount Vernon, Washington. The cities' municipal court systems relied on a traditional public defender's office as well as privately contracted, appointed defense counsel.[117] The district court found that inappropriately low funding and understaffing of private appointed counsel created a system which "amounted to little more than a 'meet and plead' system."[118]

Plaintiffs challenged the adequacy of the system as a whole, and alleged that it directly and foreseeably resulted in the violation of criminal defendants' rights under the Sixth Amendment.[119] Consistent with the Supreme Court's reasoning in *Brown v. Plata*, the court focused not only on the actual representational inadequacies experienced by plaintiff class members, but also on the *potential and conceivable* violations that were likely to occur as result of the dysfunctional system.[120] The court ruled that the endemic Sixth Amendment violations were the foreseeable result of policy choices made by city officials.[121]

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114. *Brown*, 563 U.S. at 525 (emphasis added).

115. *Id.* at 530.

116. Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

117. *Id.* at 1124-25.

118. *Id.* at 1124.

119. *Id.* at 1123.

120. *Id.* at 1127 ("The Court does not dispute the fact that many, if not the vast majority, of the plaintiff class obtained a reasonable resolution of the charges against them. The problem is not the ultimate disposition: if plaintiffs were alleging that counsel had affirmatively erred and obtained a

Applying the controlling Ninth Circuit standard, the court ruled that Plaintiffs had demonstrated that they were subjected to irreparable injury and that other adequate legal remedies were unavailable, thus entitling the class to injunctive relief.[122] Citing *Brown* for the court's duty to enforce the constitutional rights of all persons and the extent of the court's equitable powers, the court entered an extensive and detailed injunction requiring, among other things, that the cities reevaluate their indigent defense provision contracts, hire additional supervisory staff, comply with a rigorously detailed supervision schedule, and submit numerous, frequent, and detailed performance reports to the court at regular intervals.[123]While the relief ordered in *Wilbur* is closer to the scale of the relief ordered in some pre-*Brown* affirmative injunction cases dealing with indigent defense systems, than it is to the scale of *Brown* itself, the district court displayed few qualms with ordering significant and costly reforms of the municipal indigent defense systems upon a finding of systemic rights violations.[124]

XI. YOUNGER ABSTENTION PRESENTS OBSTACLES

Despite the broad inherent equitable power of federal courts apparent in *Brown*, other doctrines may present serious obstacles for the structural injunction reform approach. Specifically, the abstention doctrine announced in the Supreme Court's seminal decision, *Younger v. Harris*,[125] may prevent federal courts from enforcing structural reform orders if that enforcement would result in federal interference with pending state court criminal prosecutions. The Court in *Younger* held, "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations, where necessary to prevent immediate irreparable injury."[126] Justice Black described the constitutional underpinnings of *Younger* abstention:

> This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government

deleterious result, the Sixth Amendment challenge would have been brought under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), rather than *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The point here is that the system is broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned.").

121. *Id.*

122. *Id.* at 1133 (citing Sierra Club v. Penfold, 857 F.2d 1307, 1318 (9th Cir. 1988)).

123. *Id.* at 1134-37.

124. *See id.*

125. Younger v. Harris, 401 U.S. 37 (1971).

126. Samuels v. Mackell, 401 U.S. 66, 69 (1971) (describing the Court's holding in *Younger*).

> will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism.'[127]

Despite the existence of cases like *Wilbur*, *Younger* concerns remain an ever-present feature of any attempt to force federal intervention into state court criminal prosecutions.

Recently, the United States District Court for the Middle District of Louisiana dismissed a class action suit challenging the constitutional adequacy of certain practices of the Orleans Parish Public Defender "as a matter of federalism and comity."[128] Likely in anticipation of the enforcement problems presented by *Younger* and its progeny, the original iteration of the Plaintiffs' complaint exclusively sought declaratory relief,[129] though injunctive claims were added in their amended complaint and in their second amended complaint.[130]

Despite Plaintiffs' attempts to limit the relief requested, the court concluded that "Plaintiffs [had] clearly requested relief which would inevitably cause [the] Court to violate comity and federalism principles."[131] The Court placed particular emphasis on its inability to remedy violations of even limited injunctive and declaratory orders without impermissibly interfering with Louisiana's state courts.[132] The court soundly rejected its ability to engage in the type of ongoing supervision like that entertained in *Brown*, explaining, "[a]ny declaratory judgment or injunction entered by this Court would inevitably lead it to become the overseer of the Orleans Parish criminal court system, a result explicitly condemned by the United States Supreme Court in *Younger* . . . ." [133] Despite the district court's

127. *Younger*, 401 U.S. at 44.

128. Yarls v. Bunton, NO. 16–31–JJB–RLB, 2017 WL 424874, at *7 (M.D. La. Jan. 31, 2017).

129. Class Action Complaint at 15-16, *Yarls*, NO. 16–31–JJB–RLB, 2016 WL 212997.

130. Amended Class Action Complaint at 14-15, *Yarls*, NO. 16-31-JJB-RLB, 2016 WL 4061657; Second Amended Class Action Complaint at 16-18, *Yarls*, NO. 16-31-JJB-RLB, 2016 WL 4975341; *see Yarls*, 2017 WL 424874 at *6.

131. *Yarls*, 2017 WL 424874 at *6.

132. *Id.* ("On its face, an injunction that requires the Defendants to 'implement a plan' to provide the class with competent counsel may seem innocuous enough, but, what would happen if the Defendants failed to implement the plan? Would this Court have to order attorneys for certain indigents? To what extent would this Court be encroaching upon the role of the state judges in individual prosecutions? What would happen if inconsistent orders were issued? What if the Defendants were nominally complying with the order by assigning counsel to indigents but those attorneys were not 'competent?' Would the Court have to make a 'competence' determination pretrial? Would a class member be able to enforce the injunction and find that counsel was ineffective at the pretrial stage thereby circumventing the post-conviction habeas process? What if Defendants still refused to comply? Would this Court order the state courts to release the incarcerated members who were still on the waitlist? The Court declines to issue injunctive relief because it will inevitably lead this Court to engage in an ongoing audit of the criminal cases in Orleans Parish.").

133. *Id.* at *3.

finding that "[i]t is clear that the Louisiana legislature is failing miserably at upholding its obligations under *Gideon*," it dismissed the case.[134]

XII. CONCLUSION

The ongoing failure of our legal system to provide constitutionally adequate indigent services has rightfully been recognized as a national embarrassment. Fortunately, the crisis is receiving the attention of dedicated advocates, and academic and legal scholars have continued to look for new approaches to remedy the rampant violations of the constitutional rights of the impoverished accused. This comment has reviewed a few the potential solutions frequently touted as the best way forward. However, as *Gideon* continues to age, the necessity of an impactful judicial remedy becomes more glaring, even if that remedy might be controversial in its doctrinal origins, scope, and role in our system of government. Structural reform litigation seeking expansive injunctive orders may have the very real potential to begin addressing the indigent defense crisis *today*. The Supreme Court has demonstrated that our nation's courts may order our constitutionally defective institutions to fall into line. If the structural injunction can be reconciled with our system of federalism and the limited power of federal courts, and does in fact undergo a modern resurgence, perhaps we will see *Gideon's* promise fulfilled after all.

134. *Id.* at *7.