UP FROM GIDEON

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This essay challenges the generally prevailing celebration of *Gideon v. Wainwright.* Gideon held that the Sixth Amendment's requirement of appointed counsel for indigent defendants applied to the states by force of the Fourteenth Amendment. My focus, however, is not on *Gideon*'s incorporation holding but on the content of the Sixth Amendment right to appointed counsel *Gideon* extended to the states—a right cribbed not from 1791 but from the 1938 decision in *Johnson v. Zerbst.* There, the Court had held that the Sixth Amendment ousts a federal court of jurisdiction unless the accused has retained, been appointed, or knowingly and voluntarily waived, counsel.

Neither *Gideon* nor *Zerbst* expressed any qualification on the right to appointed counsel, but both decisions involved felony charges, leaving the right to appointed counsel in misdemeanor cases uncertain.⁵ In the

^{*} This essay is based on the Luncheon Address delivered at the Texas Tech University School of Law Symposium on the Sixth Amendment on March 30, 2012. I thank Arnold Loewy and the Texas Tech community for gracious hospitality, and the many participants who offered comments that have helped my thinking in revising the piece for publication.

^{1.} Gideon v. Wainwright, 372 U.S. 335 (1963); see infra Part I.A (discussing the prevailing positive view of Gideon).

^{2.} *Gideon*, 372 U.S. at 344 ("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.").

^{3.} See id. at 343 (quoting Johnson v. Zerbst, 304 U.S. 458, 462 (1938)).

^{4.} See Zerbst, 304 U.S. at 463 ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.").

^{5.} See Louis H. Pollak, The Supreme Court, 1962 Term, 77 HARV. L. REV. 62, 105 (1963) ("While the Supreme Court has never directly decided whether the federal appointment-of-counsel requirement is applicable to misdemeanors, the language of the sixth amendment—extending the right of assistance of counsel to 'all criminal prosecutions'—and decisions in the lower federal courts leave

subsequent decisions in *Argersinger* and *Scott*, the Court held that the Sixth Amendment does *not* require appointing defense counsel in misdemeanor trials that do not in fact lead to a sentence of incarceration.⁶

What I want to explore today is the paradox of *Gideon*. There are three propositions about *Gideon*'s appointed-counsel rule that command extraordinarily broad agreement within the legal academy and in the legal profession generally. The first of these propositions is that *Gideon* was a great decision, great both in the sense of historical significance and in the sense of achieving justice. The second proposition is that the *Gideon* rule is very difficult to support according to the conventional formal sources of constitutional law. And the third proposition, agreed to by the overwhelming weight of informed opinion, is that *Gideon* has not succeeded in providing typical indigent defendants with a competent and vigorous defense.

The paradox of *Gideon* is how the first proposition has survived in the company of the other two. Nobody thinks *Gideon* was required by text and history. Nobody thinks *Gideon* has succeeded in providing effective indigent defense. Everybody loves *Gideon*. I do not think the three propositions together make any sense.

Within the academy, I think the paradox is explicable by the lingering fantasy that the Court someday, somehow, will force legislatures to pony up the resources for effective indigent defense. I'll explain why I think this project—a project in which I have participated—has failed and should be declared a failure. I propose a new discourse about the right to counsel, a conversation in which we investigate how legal institutions and legal doctrine might reduce the cost of effective advocacy for indigent defendants and how best to allocate the available attorney resources.

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little doubt that it is."). Some lower courts, however, were not convinced. *See* David S. Rudstein, *The Collateral Use of Uncounseled Misdemeanor Convictions After* Scott *and* Baldasar, 34 U. FLA. L. REV. 517, 523 n.27 (1982) (noting cases where the Court refused to hear appeals based on the right to appointed counsel in misdemeanor cases).

^{6.} Scott v. Illinois, 440 U.S. 367, 373-74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37, 40 (1972).

^{7.} See, e.g., Kim Taylor-Thompson, Tuning Up Gideon's Trumpet, 71 FORDHAM L. REV. 1461, 1462 (2003) ("[G]enerations have rightly celebrated Gideon.").

^{8.} See, e.g., William P. Marshall, Progressive Constitutionalism, Originalism, and the Significance of Landmark Decision in Evaluating Constitutional Theory, 72 OHIO ST. L.J. 1251, 1251-52 (2011) ("Barnette, Brown, Gideon, and Reynolds, however, share another trait. They are products of progressive constitutionalism. They could not have been decided the way they were had the Court in those cases adhered to conservative theories of constitutional interpretation such as originalism or judicial restraint.").

^{9.} See infra Part I.C. An observer as conservative as Judge Easterbrook has noted that "[a]t 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." Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1974 (1992) (citation omitted).

^{10.} See Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997) [hereinafter Dripps, Ineffective Assistance of Counsel].

The first Part of the Essay elaborates the *Gideon* paradox. The second part adumbrates some concrete steps that might move us in these directions, but first let me elaborate a bit on the essential paradox.

I. THE PARADOX OF GIDEON

A. There Is General Agreement that Gideon Was a Great Decision

Scholars regularly characterize *Gideon* as "iconic." *Miranda* is often mentioned as a great case of the same vintage, but in marked contrast with *Miranda*, *Gideon* has never been controversial. In 1968, Congress purported to overturn *Miranda* by statute; in 1977, twenty-two states asked the Supreme Court to overrule *Miranda*; in 1986, a Justice Department white paper again urged overruling. Substantial scholars such as Paul Cassell and Joseph Grano fought the same battle in the law reviews.

Gideon provoked nothing like that steady drumbeat of controversy. On the contrary, as Michael Mushlin wrote in 1990, *Gideon* "aroused wide support, and even enthusiasm, almost from the moment it was announced in 1963. . . . Even former Attorney General Edwin Meese III approves." ¹⁷

There are some quibbles expressed in the academy. In a classic article on the art of overruling, Jerry Israel criticized Justice Black for harking back to *Powell* when the Court's cases under the special-circumstances test had overruled *Betts* sub silentio. ¹⁸ In somewhat different ways, Tracey

^{11.} See, e.g., Marshall, supra note 8, at 1276.

^{12.} Compare Paul G. Cassell & Richard Fowles, Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement, 50 STAN. L. REV. 1055, 1058-59 (1998) (showing the status of Miranda as widely accepted, but arguing that Miranda should be overturned), with Taylor-Thompson, supra note 7, at 1462 (portraying Gideon as praised throughout the passing of time).

^{13.} See Dickerson v. United States, 530 U.S. 428, 432 (2000) (holding the statute, 18 U.S.C. § 3501, unconstitutional).

^{14.} See Brief for Petitioner (Iowa) at 14-35, Brewer v. Williams, 430 U.S. 387 (1977) (No. 74-1263), 1976 WL 181163; Brief Amici Curiae of Americans for Effective Law Enforcement, Inc. et al. at 11, Brewer, 430 U.S. 387 (No. 74-1263) (urging the Court to overrule Miranda).

^{15.} See Report to the Att'y Gen. on the Law of Pretrial Interrogation, Op. O.L.P. (1986), reprinted in Stephen J. Markman, Foreword: The 'Truth in Criminal Justice' Series, 22 U. MICH. J.L. REFORM 425, 443 (1989).

^{16.} See, e.g., Cassell & Fowles, supra note 12, at 1060 ("Miranda has in fact handcuffed the cops and ... society should begin to explore other, less costly ways of regulating police interrogation."); Joseph D. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw. U. L. Rev. 100, 145 (1985) (criticizing Miranda as exceeding Court's legitimate authority under Article III); Joseph D. Grano, Voluntariness, Free Will, and the Law of Confessions, 65 VA. L. Rev. 859, 884 (1979) (criticizing Miranda as formalistic).

^{17.} Michael B. Mushlin, Foreword: Gideon v. Wainwright Revisited: What Does the Right to Counsel Guarantee Today?, 10 PACE L. REV. 327, 327-28 (1990) (footnote omitted).

^{18.} Jerold H. Israel, Gideon v. Wainwright: *The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 234-42; *see* Betts v. Brady, 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

Meares and I have argued against *Gideon*'s turn to the Sixth Amendment rather than the more general standard of due process.¹⁹ But no one seems to call for overruling *Gideon*.²⁰ Even Justice Scalia's grumblings have not yet gone so far.²¹

B. There Is General Agreement that Gideon Cannot Be Reconciled with the Traditional Formal Sources of Constitutional Law

The near-unanimous enthusiasm for *Gideon*, in stark contrast with *Miranda*, seems hard to square with the near-unanimous view that the *Gideon* regime is irreconcilable with the formal sources of constitutional law.²² If we begin with the text, the text says "all criminal prosecutions."²³ It does not say all criminal prosecutions in which the sentence includes any period of incarceration.²⁴ If we equate the right to appointed counsel for the indigent with the right of those with means to appear through counsel, either the state could prohibit retained counsel from appearing in misdemeanor cases or the indigent, indeed, have a right to appointed counsel in "all criminal prosecutions," traffic and littering included.²⁵ If we give the right to appointed counsel a narrower scope than the right to appear

^{19.} Donald A. Dripps, About Guilt and Innocence: The Origins, Development, and Future of Constitutional Criminal Procedure 116-18 (2003) [hereinafter Dripps, About Guilt and Innocence] (criticizing *Gideon* as illegitimate on grounds of text and history and unwise in focusing on the provision of counsel rather than the overall reliability of the process); Tracey L. Meares, *What's Wrong with* Gideon, 70 U. Chi. L. Rev. 215, 216 (2003) (arguing that *Gideon* initiated "a jurisprudence that has little room for a discussion of issues that are important to the promotion of public confidence in the criminal justice system"); Meares, *supra*, at 216 ("[B]y looking away from flexible, forward-looking notions of fundamental fairness, the Court has hampered its ability to respond to important changes in the criminal justice system and the social and political shifts that have attended these changes.").

^{20.} See DRIPPS, ABOUT GUILT AND INNOCENCE, supra note 19, at 116-17 ("Everyone, myself included, agrees that the constitutional right of indigent defendants to appointed counsel announced in Gideon provides a critical safeguard against unjust conviction, and a noble symbol of our commitment to equal justice."); Meares, supra note 19, at 215 ("I have no quarrel with Gideon's conclusion establishing the constitutional right of indigent defendants to appointed representation."). In Part II, I suggest some potential modifications of Gideon's holding, but not a return to Betts v. Brady. My title is "up from." not "down with."

^{21.} See Transcript of Oral Argument at 4, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (No. 05-352), 2006 WL 1134467, at *3-5 (quoting Justice Scalia's statement, "But I don't know that fairness was the—was the object of the original right to counsel in the—in the Bill of Rights, which—which only applied to—to your ability to hire your own counsel, and if you couldn't afford counsel, you didn't get one. I hardly think that—that fairness is the object of that."). Justice Scalia has not yet, however, suggested overruling Gideon.

^{22.} See Marshall, supra note 8, at 1251-52.

^{23.} U.S. CONST. amend. VI.

^{24.} Cf. id. ("In all criminal prosecutions, the accused shall enjoy the right to... have the Assistance of Counsel for his defence.").

^{25.} See id.

through retained counsel, we say that "all" means "all" except when it means "some." ²⁶

The immediate historical context of the Counsel Clause is American hostility to the rule of the English common law prohibiting felony defendants from being heard through counsel.²⁷ Blackstone criticized the rule and hinted that it was often honored in the breach rather than in the observance, and this appears to have been the case, especially after lawyers began representing private prosecutors.²⁸

In America, the common-law rule was widely ignored or superseded.²⁹ Joseph Story makes explicit the connection between the Counsel Clause and the common-law ban on felony defense counsel.³⁰ After citing Blackstone's criticism of the English rule, Story says the Sixth Amendment Counsel and Compulsory Process Clauses

make matter of constitutional right, what the common law had left in a most imperfect and questionable state. The right to have witnesses sworn, and counsel employed for the prisoner, are scarcely less important privileges, than the right of a trial by jury. The omission of them in the constitution is a matter of surprise; and their present incorporation is matter of honest congratulation among all the friends of rational liberty.³¹

Appointing counsel for the indigent, however, was another matter. The practice of appointing counsel for indigent defendants varied widely among the states, and this variation was largely the product of states adopting different policies by statute rather than of states adopting differently worded constitutional provisions.³² In 1790, Congress, having sent the Sixth Amendment to the country the year before, adopted the first federal criminal code.³³ Section 29 provided for assigning counsel in cases

^{26.} See cases cited supra note 6 and accompanying text.

^{27.} See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 345 (2d ed. 1872) ("[I]t is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated.").

^{28.} *Id.*; *see* Clive Emsley, Tim Hitchcock & Robert Shoemaker, *Crime and Justice—Trial Procedures*, OLD BAILEY PROCEEDINGS ONLINE, http://www.oldbaileyonline.org/static/Trial-procedures.jsp# lawyers (last visited Oct. 9, 2012) ("[T]he increasing number of prosecution lawyers from the early 1730s appears to have led the courts to allow defence lawyers in order to help maintain a balance. Even so, defence lawyers were not allowed to summarize the case in an address to the jury until 1836. In any case, they were rarely used until the late eighteenth century; and even in 1800 only between a quarter and a third of defendants in property cases had counsel.").

^{29.} See generally 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1786-88 (Da Capo Press 1970) (1833) (contrasting the rights guaranteed the accused by the Sixth Amendment of the U.S. Constitution with the common-law rule).

^{30.} See id. § 1786.

^{31.} *Id*.

^{32.} See Betts v. Brady, 316 U.S. 455, 477-80 (1942) (surveying the state provisions), overruled by Gideon v. Wainwright, 372 U.S. 335 (1963).

^{33.} See An Act for the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790).

of treason and "other capital offences." The initial federal criminal code, however, included many offenses punishable by less than death. The founders saw no conflict between the formulation of the right to counsel in the criminal code and the Constitution. To put it in a nutshell, as a matter of text and history, *Gideon* is more strumpet than trumpet.

Now anyone familiar with American constitutional law knows that the Court sometimes goes beyond strict adherence to the formal authorities. For example, Justice White's dissenting opinion in *Miranda* did not challenge the legitimacy of judicial innovation.³⁶ Even when the Court's holding

is neither compelled nor even strongly suggested by the [constitutional] language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation . . . It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision . . . what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.³⁷

But, Justice White insisted, when the Justices innovate, they should be robustly confident about their policy preferences and about their institutional competence to impose those preferences on the other branches of government.³⁸

His point applies to *Gideon* and to all those who would rewrite the opinion to emphasize less formal methods of constitutional exegesis, such as process theory, common-law constitutionalism, or a turn to the more plastic text of the Due Process or Equal Protection Clauses.³⁹ When the Court turns to these flexible tools of interpretation for the sake of pragmatic objectives, the proof of the pudding is in the eating. As Alexander Bickel

^{34.} Id. § 29, 1 Stat. at 119.

^{35.} See id. § 13, 1 Stat. at 115 (maiming punishable by up to seven years imprisonment); id. § 15, 1 Stat. at 115-16 (theft or destruction of judicial records punishable by imprisonment up to "seven years, and whipped not exceeding thirty-nine stripes"); id. § 18, 1 Stat. at 116 (perjury punishable by imprisonment up to three years, plus one hour in pillory).

^{36.} See Miranda v. Arizona, 384 U.S. 436, 531 (1966) (White, J., dissenting).

^{37.} Id. (footnote omitted).

^{38.} See id. at 531-32 ("In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.").

^{39.} See id.; Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963).

wrote, with precise reference to decisions that conflict with prevailing political opinion, "The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and—the short of it is—it labors under the obligation to succeed."

"It labors under the obligation to succeed."⁴¹ I suspect that no knowledgeable observer of the American criminal process would say that *Gideon* succeeded in providing every indigent felony defendant the effective assistance of counsel.

C. There Is General Agreement that Gideon Has Not Led to Effective Representation for All Indigent Defendants

The nation's top prosecutor, Attorney General Eric Holder, had this to say in 2010:

As we all know, public defender programs are too many times underfunded. Too often, defenders carry huge caseloads that make it difficult, if not impossible, for them to fulfill their legal and ethical responsibilities to their clients. Lawyers buried under these caseloads often can't interview their clients properly, file appropriate motions, conduct fact investigations, or spare the time needed to ask and apply for additional grant funding. 42

General Holder's view is shared by the overwhelming weight of scholarly opinion. 43

The American Bar Association (ABA) Standards recommend a maximum annual caseload of 150 felonies or 400 misdemeanors per attorney,⁴⁴ but most defendants are prosecuted in jurisdictions that are over

⁴⁰. Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 239 (1962).

^{41.} Id. (emphasis added).

^{42.} Eric Holder, Att'y Gen., Address at the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010 (Feb. 18, 2010), available at http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html.

^{43.} See, e.g., Note, Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 HARV. L. REV. 2062, 2063-64 (2000) ("Although analysts of the criminal justice system may disagree about the best solution to the problems facing indigent defense, there is broad consensus that criminal defense systems are in 'a state of perpetual crisis.' As two commentators recently noted, '[t]he grave inadequacy of existing systems for serving the indigent is widely acknowledged and widely discussed.' 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." (footnotes omitted)).

^{44.} ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 72 (3d ed. 1992). The standards of the National Advisory Commission, first developed in 1973, have proven resilient over time, and provide a rough measure of caseloads. They recommend that an attorney handle no more than the following number of cases in each category each year:

¹⁵⁰ felonies per attorney per year; or

⁴⁰⁰ misdemeanors per attorney per year; or

²⁰⁰ juvenile cases per attorney per year; or

²⁰⁰ mental commitment cases per attorney per year; or

those numbers, many with caseloads double that for felonies and triple that for misdemeanors. These numbers are abstractions with potentially catastrophic consequences. The DNA exoneration data show defective representation as a recurring contributor to miscarriages of justice. 46

I am well aware that within the academy the standard view is that this scandalous state of affairs is attributed to the Supreme Court's lack of political will to enforce *Gideon*'s mandate.⁴⁷ The *Strickland* standard is widely regarded as practically toothless.⁴⁸ Various clever arguments have been advanced as to how to persuade courts and legislators to take the right to counsel seriously. Some, such as Professor William Geimer, have suggested tweaking Judge Bazelon's performance checklist.⁴⁹ Stephen Schulhofer and David Friedman proposed a voucher system for indigent defense.⁵⁰ Collateral civil litigation has been suggested, including my 1998 proposal for requiring rough parity between prosecution and defense.⁵¹ More recently, Eve Brensike Primus has proposed both automatic appointment of new counsel on first appeal and revision of federal habeas to target structurally deficient defense institutions, while Laurence Benner has

Whereas standards generally limit public defender caseloads to 150 felonies per attorney per year, or 400 misdemeanors . . . , the reality in many offices is far in excess of these limits. BJS research on the nation's 100 largest counties indicates that assistant public defenders in the nation's 100 largest counties have average caseloads over 530 annually. *Id.* (footnotes omitted).

²⁵ appeals per attorney per year.

Id. (footnotes omitted).

^{45.} See, e.g., Scott Wallace & David Carroll, The Implementation and Impact of Indigent Defense Standards, 31 S.U. L. REV. 245, 250 (2004).

^{46.} Emily M. West, Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals, INNOCENCE PROJECT 1 (Sept. 2010), http://www.innocenceproject.org/docs/Innocence_Project_IAC_ Report.pdf ("A review of published appeals among the DNA exonerations reveals that 54 exonerees (about 1 in 5) raised claims of ineffective assistance of counsel and courts rejected these claims in the overwhelming majority of cases.").

^{47.} See, e.g., Vivian O. Berger, The Supreme Court and Defense Counsel: Old Roads, New Paths —A Dead End?, 86 COLUM. L. REV. 9, 115 (1986) ("[T]he Court's visions of the right to counsel and the role of counsel are incoherent, or downright cynical.").

^{48.} Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that reversal of a conviction for ineffective assistance requires the defendant to show that counsel made unprofessional errors that created a reasonable probability of an adverse outcome). For criticism, see George C. Thomas III, *When Lawyers Fail Innocent Defendants: Exorcising the Ghosts that Haunt the Criminal Justice Systems*, 2008 UTAH L. REV. 25, 43 ("Perhaps the pithiest criticism of the *Strickland* test is that some defense counsel call it the foggy mirror test. 'If you place a mirror in front of defense counsel during trial and it fogs, counsel is in fact effective." (quoting RANDALL COYNE, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS, TEACHER'S MANUAL 210 (3d ed. 2006))).

^{49.} William S. Geimer, A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 Wm. & MARY BILL RTS. J. 91 (1995).

^{50.} See 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, 110-11 (1993).

^{51.} See Dripps, Ineffective Assistance of Counsel, supra note 10, at 264.

suggested characterizing pretrial investigation as a critical stage requiring the active presence of counsel.⁵²

While we—academics—have presented plausible argument after plausible argument for reform, the situation has deteriorated. Professor Benner reports that between 1999 and 2007, state public defender offices experienced a 20% increase in caseload but only a 4% increase in resources.⁵³ And we all know about the Great Crash of 2008.⁵⁴

The reason why indigent defense is starved for resources is not a shortage of plausible constitutional arguments or statutory reform proposals. Every state legislature is free to go beyond constitutional minima, and state courts are free to depart from *Strickland* when construing the right-to-counsel provisions of state constitutions. ⁵⁵ Congress could condition federal revenue sharing for state law enforcement on compliance with the ABA Standards. The root of the problem is that indigent defense competes for public funds with other urgent priorities. ⁵⁶ And the competing priorities that are not backed by powerful interest groups are, from a normative point of view, hard to subordinate to the needs of indigent defendants. ⁵⁷

According to the Center on Budget and Policy Priorities,

The cuts enacted in at least 46 states plus the District of Columbia since 2008 have occurred in all major areas of state services, including health care (31 states), services to the elderly and disabled (29 states and the District of Columbia), K-12 education (34 states and the District of Columbia), higher education (43 states), and other areas.⁵⁸

The National Alliance on Mental Illness reports that since 2009, states have cut 1.6 billion dollars from mental health services.⁵⁹ NPR reports that many states "facing big deficits are cutting programs to prevent abuse and

^{52.} Eve Brensike Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims, 92 CORNELL L. REV. 679, 706 (2007); Laurence A. Benner, When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice, Am. Const. Soc'y Issue Brief 11 (Mar. 2011), http://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf.

^{53.} Benner, supra note 52, at 1 n.2.

^{54.} See generally ROSS GARNAUT & DAVID LLEWELLYN-SMITH, THE GREAT CRASH OF 2008 (2009) (exploring the causes and effects of the global economic downturn).

^{55.} See, e.g., Heitman v. State, 815 S.W.2d 681, 682-83 (Tex. Crim. App. 1991) (en banc) (interpreting Texas constitutional provisions) ("[T]he states are free to reject federal holdings as long as state action does not fall below the minimum standards provided by federal constitutional protections.").

^{56.} See Dripps, Ineffective Assistance of Counsel, supra note 10, at 257.

^{57.} Id. at 257-58

^{58.} Nicholas Johnson, Phil Oliff & Erica Williams, *An Update on State Budget Cuts*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (Feb. 9, 2011), http://www.cbpp.org/files/3-13-08sfp.pdf.

^{59.} Ron Honberg et al., State Mental Health Cuts: The Continuing Crisis, NAT'L ALLIANCE ON MENTAL ILLNESS 1 (Nov. 2011), http://www.nami.org/Content/NavigationMenu/State_Advocacy/State Budget Cuts Report/StateMentalHealthCuts2.pdf.

protect children" and describes staffing shortages akin to those in public defender operations in the agencies responsible for preventing child abuse and neglect. And, if one were looking for a place where courts should draw the line and force legislatures to allocate resources against majority preferences, the Supreme Court's decision to insist on minimal medical care for prisoners seems as good a choice as any for priority number one.

As for the claim that rights are trumps, it should be recalled that the right to appointed counsel is a judge-made right and that the judges have tolerated underfunding indigent defense. There is, according to the courts, nothing unconstitutional about the current arrangement. Advocates of greater support for indigent defense have failed to persuade courts as well as legislatures.

The holy grail for advocates of effective defense representation is a Supreme Court ruling imposing caseload limits along the lines of the ABA Standard. There is nothing exotic about the Justices picking a number to enforce a general standard. If you can get "48 hours" for judicial review of an arrest out of the "unreasonable seizure" language of the Fourth Amendment, or "two weeks" for limiting the duration of a *Miranda* invocation out of the general language of the Fifth Amendment, you can easily get "150 felonies per attorney per year" out of the general language of the Sixth Amendment. 66

So why has the supposedly antimajoritarian federal judiciary delivered nothing more than *Strickland*? Scholars who have tackled the right-to-

^{60.} See Pam Fessler, State Budget Cuts Threaten Child Welfare, NPR (Mar. 2, 2010), http://www.npr.org/templates/story/story.php?storyId=124127356.

^{61.} See Brown v. Plata, 131 S. Ct. 1910, 1923 (2010) (upholding a lower court order to reduce prison population to 137.5% of design capacity as necessary remedy for constitutionally inadequate medical and mental health care).

^{62.} See Gideon v. Wainwright, 372 U.S. 335, 344 (1963). See generally Rodney J. Uphoff, On Misjudging and Its Implications for Criminal Defendants, Their Lawyers, and the Criminal Justice System, 7 Nev. L.J. 521, 544 (2007) (criticizing judges for tolerating ineffective assistance).

^{63.} See Strickland v. Washington, 466 U.S. 668, 700 (1984).

^{64.} DRIPPS, ABOUT GUILT AND INNOCENCE, *supra* note 19, at 179. I continue to believe that The cost of procedural safeguards against false conviction should be understood as part of the cost of criminal law enforcement, not as a freestanding claim on public funds. The public is willing to pay billions for prisons, police, and prosecutors that might well be spent on education, health care, or what not. Indigent defense should be thought of as entailed by the priority of law enforcement, in the same way that we would never think of drafting young men for police work at submarket wages, or of building prisons with slave labor to save money.

Id. What I have ceased to believe is that either a judicial or a legislative majority will agree with me in the foreseeable future. We must try a new tack.

^{65.} See ABA, supra note 44, at 72 n.13.

^{66.} See Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991) (adopting a presumption of unreasonableness under the Fourth Amendment when time from warrantless arrest to judicial determination of probable cause exceeds forty-eight hours); Maryland v. Shatzer, 130 S. Ct. 1213, 1227 (2010) (holding that an invocation of right to counsel under *Miranda* does not preclude reapproaching the suspect after the suspect has been out of custody for two weeks); ABA, *supra* note 44, at 72 n.13.

counsel problem, including myself, have neglected the more general literature on constitutional law.⁶⁷ The Court is in general sympathy with mainstream political opinion.⁶⁸ Typically, it will move on behalf of disempowered groups *after* those groups have established a political identity, achieved some successes in the political realm, and won important lower court victories pursuant to a careful litigation strategy.⁶⁹ The lawyers for the civil rights of gays and lesbians succeeded in overthrowing *Bowers v. Hardwick* because they absorbed the lessons taught by Charles Hamilton Houston and Thurgood Marshall in the struggle for the civil rights of African-Americans.⁷⁰ Advocates of the rights of the accused in general, and of the right to counsel in particular, have not done this; until we do, we should not expect five Justices in gleaming armor to gallop up upon white steeds.

II. SUPPLY AND DEMAND

So I, for one, am out of the business of telling the Supreme Court how it *could* do something about the lack of support for indigent defense. My new business is to explore how we might—brace yourself for this—reduce the cost of effective representation for the indigent. We can do that in two ways: by increasing the supply and reducing the demand for indigent defense services. In what follows I offer some tentative—too tentative to publish or even post on the Internet—thoughts about how we might pursue this project.

^{67.} See, e.g., Dripps, Ineffective Assistance of Counsel, supra note 10, at 286-306 (defending the alternative doctrinal standard of ineffective assistance without discussing positive political theory or identity-based social movements).

^{68.} Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 283 (1957) (arguing that the Court protects minority rights after a national consensus emerges on behalf of those rights). Dahl's work is a seminal contribution in this area. *See, e.g.*, Lee Epstein et al., *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 583 (2001) ("If the mark of a seminal study is the quantity and quality of the progeny it spawns, then Robert A. Dahl's *Decision Making in a Democracy: The Supreme Court as a National Policy-Maker*, scores a bullseye." (footnote omitted)).

^{69.} See William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062, 2064 (2002) ("[M]ost twentieth century changes in the constitutional protection of individual rights were driven by or in response to the great identity-based social movements ('IBSMs') of the twentieth century.").

^{70.} See, e.g., DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF LAWRENCE V. TEXAS 184 (2012) (quoting Ruth Harlow, the supervising attorney for the Lambda Legal Defense Fund, as stating: "If you frame the case in terms of 'Does the government belong in your bedroom?' 75 to 80 percent of America will say no And we wanted the case to be positioned as if the Court were catching up to society, as opposed to pushing the Court to do something that would be leading society"); Jack M. Balkin, What Brown Teaches Us About Constitutional Theory, 90 VA. L. REV. 1537, 1542 (2004) ("By the time Lawrence was decided, the movement for gay rights had gained more success in winning over popular opinion and shifting popular attitudes in favor of decriminalization than the corresponding movement for desegregation had achieved when Brown was decided.").

Let me begin on the demand side. Erica Hashimoto's study found that pro se felony defendants experienced outcomes that were not observably worse, and were arguably better, than those received by represented counterparts. Now the current pro se felony defendant is self-selected, but that cuts in two ways. Pro se defendants are notorious cranks, and Hashimoto characterizes 20% of her sample as behaving oddly enough to trigger a judicial inquiry into mental competence. We might hope for at least a little more functionality in randomly selected indigent defendants charged with minor felonies. Be that as it may, the real reason why there is no observed disparity is likely not the character of the pro se defendants, but the defects of the alternative, i.e., appointed counsel with no time for the individual case.

So reform to-be-thought-about number one: What if the Supreme Court extended the *Scott* no-jail—no-lawyer rule to felony cases?⁷⁴ The Department of Justice reports that 27% of those convicted of felonies in state courts are sentenced to probation rather than incarceration and that 4% receive sentences that include neither incarceration nor conditional release.⁷⁵ One possible rule would allow courts, with the consent of the prosecution, to advise defendants that they may have appointed counsel but may also waive counsel and thereby preclude incarceration. Alternatively, trial courts might refuse to appoint when the charge and criminal history make incarceration a low-probability outcome. As under *Scott*, a court's refusal to appoint would preclude incarceration.⁷⁶

There would be some transition problems. Felony probation is often the hook for coercing mental health or substance abuse treatment, and if the *Shelton* rule followed *Scott* into the felony realm, some other lever would

^{71.} Erica Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 423 (2007) ("Somewhat surprisingly, the data indicate that pro se felony defendants in state courts are convicted at rates equivalent to or lower than the conviction rates of represented felony defendants, and the vast majority of pro se felony defendants—nearly 80%—did not display outward signs of mental illness.").

^{72.} Id. at 428.

^{73.} *Id.* at 428-29 ("Far from establishing that pro se defendants represent themselves because of mental illness, the data instead suggest that felony defendants choose to represent themselves because of legitimate concerns about, or dissatisfaction with, appointed counsel. Nearly half of the pro se federal felony defendants in the Federal Docketing Database asked the court to appoint new counsel prior to invoking the right of self-representation." (footnote omitted)).

^{74.} See Scott v. Illinois, 440 U.S. 367, 373-74 (1979).

^{75.} BUREAU OF JUSTICE STATISTICS, DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS 2006—STATISTICAL TABLES 2 (Dec. 2009), available at http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06 st.pdf.

^{76.} See Scott, 440 U.S. at 373-74 (holding that "the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense"). The Court's language in Scott does not distinguish misdemeanor from felony prosecutions. See id.

be required.⁷⁷ *Padilla*'s principle that collateral consequences must be understood for a plea to be voluntary would require a more thorough colloquy for unrepresented defendants.⁷⁸

The prospect of cutting the indigent caseload by double-digit percentages, however, is too attractive to ignore. Not only would defense attorney resources be concentrated in the more serious cases, but we might actually begin to reverse the insidious Stuntzian feedback loop. If a nojail—no-lawyer rule caught on, we might see the percentage of felony cases without prison sentences rise substantially. And if Professor Hashimoto's numbers reflect a broader reality, those proceeding without counsel would be adversaries little, if any, weaker than the typical appointed lawyer.

The second step we might consider to reduce the demand for indigent defense attorneys is to take a bite out of *Douglas v. California* rather than out of *Gideon* itself. ⁸² Under *Douglas*, a convicted indigent defendant has the right to an appointed lawyer on appeal, a right that can only be cut off by filing an *Anders* brief that requires as much attorney time as a merits brief. ⁸³ The doctrinal basis of *Douglas* is an equal protection theory that is something of a derelict on the waters of the law. ⁸⁴ On equal protection

Countermajoritarian criminal procedure tends to encourage legislatures to pass overbroad criminal statutes and to underfund defense counsel. These actions in turn tend to mask the costs of procedural rules, thereby encouraging courts to make more such rules. That raises legislatures' incentive to overcriminalize and underfund. So the circle goes. This is a necessary consequence of a system with extensive, judicially defined regulation of the criminal process, coupled with extensive legislative authority over everything else.

Id

- 80. See Scott, 440 U.S. at 373-74 (the no-jail-no-lawyer rule).
- 81. See supra notes 71-73 and accompanying text.
- 82. Douglas v. California, 372 U.S. 353, 355 (1963) (holding that the Fourteenth Amendment of the U.S. Constitution requires states to provide effective counsel for defendants on the first appeal as of right).
- 83. See Anders v. California, 386 U.S. 738, 746 (1967) (holding that counsel appointed on first appeal under *Douglas* who conclude that any appeal would be wholly frivolous may move to withdraw after filing a brief apprising the court and the defendant of anything in the record arguably supporting the appeal); Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1232 ("Most lawyers explained that preparing an Anders brief often requires much more writing than an appeal itself.").
- 84. See Ross v. Moffitt, 417 U.S. 600, 610 (1974) (holding that *Douglas* does not require appointing counsel for indigent defendants seeking discretionary review in the state supreme court). The Ross Court stated,

[T]here are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages," nor does it require the State to "equalize economic conditions."

^{77.} See Alabama v. Shelton, 535 U.S. 654, 658 (2002) (holding that the misdemeanor conviction of an indigent defendant who had not waived or received appointed counsel may not be the basis for probation conditions that can trigger incarceration).

^{78.} See Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010) (holding that failure of counsel to advise defendant that guilty plea would result in deportation was ineffective assistance).

^{79.} See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1, 54 (1997).

terms, even defendants with the means sometimes decide not to appeal after consulting counsel about the costs and prospects, including the possibility of a higher sentence on a remand after reversal.⁸⁵ On due process terms, a procedure that screened appeals for their merits strikes a better balance of accuracy versus cost than a rule of automatic appeal does.⁸⁶

Douglas could be interpreted to require appointment of a lawyer to consider whether to appeal as well as to execute the appeal if one is taken.⁸⁷ This practice would not only maximize the value of the available attorney resources but also give the institutional defense bar at least a measure of influence over the flow of criminal cases to appellate courts and ultimately the Supreme Court—an influence it largely lost after *Gideon* and *Douglas* as Tony O'Rourke shows in an excellent article.⁸⁸

A study by the National Center for State Courts found that the overall reversal rate in a five-court sample was an impressive 21%, but the figure must be qualified. Actual acquittal on appeal occurred in only 1.9% of the cases; the rest of the reversals were remands or sentencing corrections. A screening approach would target cases where significant relief was a

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Id. at 612 (citations omitted). The Court never explained precisely why access to appellate review was different than access to health care or education. *See id.* Every public service that chargers a user fee discriminates against the indigent.

^{85.} See Schulhofer & Friedman, supra note 50, at 80 ("But middle class or even wealthy individuals can easily be rendered indigent by the costs of defending against a serious criminal charge.").

^{86.} In a world of insufficient resources of indigent defense, "rationing occurs whether or not it is thoughtful and deliberate." Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 834 (2004). The current constitutional guarantee of state-financed appeal draws scarce defense resources toward weak appeals and away from both trial defense and substantial appeals. *See* A.C. Pritchard, *Auctioning Justice: Legal and Market Mechanisms for Allocating Criminal Appellate Counsel*, 34 AM. CRIM. L. REV. 1161, 1190 (1997) ("The small percentage of criminal defendants with meritorious appeals are given the same right to representation as defendants with frivolous ones. The result clogs the system with claims doomed to fail." (citing *Anders*, and *Douglas*)). Triage still occurs, administered by staff attorneys for the appellate court. *See* Pritchard, *supra*, at 1168-69. It is hard to see how this distribution of attorney resources could survive any "thoughtful and deliberate" rationing decision.

^{87.} See Douglas, 372 U.S. at 354-55. The California procedure struck down in *Douglas* required the appellate court to scan the record for colorable issues and appoint appellate counsel if it found one. *Id.* If the screening function were assigned to a defense lawyer, *Douglas* is distinguishable. *See supra* note 86. At least in some instances, defendants with means to retain appellate counsel choose not to, given the costs and potential benefits. *See supra* note 85.

^{88.} Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 726-28 (2011) ("Before *Gideon* helped transform the political economy of criminal litigation, the Supreme Court's litigation landscape was of a type that . . . gave the criminal defense bar significant opportunities to shape the criminal procedure agenda of even a conservative Supreme Court. . . . The litigation conditions that have existed since the Warren era, however, have given [criminal defense] organizations considerably less power to counterbalance the ideological preferences of Supreme Court Justices in criminal procedure cases.").

^{89.} NAT'L CTR. FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS, FINAL REPORT 5-8 (Joy A. Chapper & Roger A. Hanson co-project directors, 1989), available at http://caught.net/caught/ReveErrCtApp.pdf.

^{90.} Id.

plausible outcome. As for defendants whose appeals are declined by the indigent defense bar, the firms and the schools are in a much better position to supply pro bono appellate help than to supply pro bono trial help.

Some meritorious cases would fall through the cracks. That is happening now, on a massive scale, in the trial courts. To the extent we can, we should be concentrating resources in the trial sector, rather than the appellate and post-conviction process.

What about the supply side? Here, I suggest we think seriously about distinguishing effective representation from representation by a licensed attorney. The key to practical success with this approach is to avoid threatening the professional bar's—how shall I put this—guild concerns. The mainstream bar wants nothing to do with indigent defense and is content to consign this disagreeable work to contract lawyers with marginal practices or to public defenders willing to work full time for modest pay under demoralizing conditions. So long as we confine new entrants into the market for legal services to indigent defendants in criminal cases, there would be no overt threat to the business of the mainstream bar.

I suggest we explore two options. The first is lay advocacy in juvenile and misdemeanor cases. As it stands, a young man facing criminal charges can represent himself or be heard through a public defender swamped by files and very often with very little experience. The accused has no third option to be heard through a parent, a sibling, a religious leader, a probation officer, a coach, or a commanding officer. The law would trust many of these people with a medical power of attorney, but not with interviewing witnesses or negotiating a plea.

The empirical evidence, prominently including Herbert Krtizer's 1998 study, indicates that where allowed, lay advocates can be as effective as attorneys. ⁹⁵ Kritzer found that the biggest determinants of successful

^{91.} See, e.g., Easterbrook, supra note 9.

^{92.} See, e.g., In re Gault, 387 U.S. 1, 42 (1967) (holding that juveniles in criminal proceedings that might result in incarceration have right to retained or appointed counsel or can waive that right).

^{93.} See Wheat v. United States, 486 U.S. 153, 159 (1988) ("Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court."). See generally, Note, Rethinking the Boundaries of the Sixth Amendment Right to Choice of Counsel, 124 HARV. L. REV. 1550 (2011) (exposing forcefully the tension implicit in the "other than himself" exception).

^{94.} Compare Medical Power of Attorney: Questions & Answers on Being a Health Proxy, and the Medical Power of Attorney Form, TALK EARLY TALK OFTEN, http://www.talk-early-talk-often.com/medical-power-of-attorney.html (last visited Sept. 15, 2012) (providing examples of people who can be designated for medical power of attorney), with Wheat, 486 U.S. at 159 n.3 (stating that a criminal defendant's right to be represented by counsel does not include the right to choose any advocate).

^{95.} See HERBERT KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 193-94 (1998). Kritzer observed four dispute-resolution systems in which an individual could be heard either by a lawyer or a by a nonattorney advocate: (1) unemployment compensation appeals, (2) appeals before the Wisconsin State Tax Commission, (3) Social Security disability appeals, and (4) labor grievance arbitrations. *Id.* at 21-22. He saw a distinct advantage for lawyers only in the tax appeals, where the

representation were substantive expertise in the subject matter and contextualized experience in the particular dispute-resolution system. 96

In *Walters v. National Ass'n of Radiation Survivors*, the Supreme Court rejected a due process challenge to a statute limiting the fee that could be paid to an agent representing a claimant in an appeal for the Veterans' Administration's appeals board. ⁹⁷ The fee limit had the effect of precluding representation by attorneys except on a pro bono basis. ⁹⁸ The *Walters* Court reported the success rates for veterans' appeals, broken down by type of advocate:

American Legion	16.2%
American Red Cross	16.8%
Disabled American Veterans	16.6%
Veterans of Foreign Wars	16.7%
Other nonattorney	15.8%
No representation	15.2%
Attorney/Agent	18.3%. ⁹⁹

The figures are open to some interpretation. Even so, they are suggestive evidence that, in at least some settings, nonattorney advocates can deliver representation roughly comparable to that of licensed lawyers. 101

Lay representation might take different forms in the criminal context. As I envision it, someone close to a juvenile or misdemeanor accused might be allowed to represent the defense, without compensation, in a single case. The option has costs but also benefits—benefits worth considering very seriously.

100. See id. at 328 ("The District Court opined that these statistics were not helpful, because in its view lawyers were retained so infrequently that no body of lawyers with an expertise in VA practice had developed, and lawyers who represented veterans regularly might do better than lawyers who represented them only *pro bono* on a sporadic basis.").

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accountants who represented taxpayers had substantive knowledge of the law but were not prepared for adversary hearings. See id.at 193-94.

^{96.} *Id.* at 201 ("[T]he presence or absence of formal legal training is less important than substantial experience with the setting. It is almost certainly the case that lawyers are more able to move across settings, particularly if the settings differ both substantively and procedurally. . . . A nonlawyer unfamiliar with court processes but experienced in grievance arbitration and knowledgeable about workplace disciplinary processes might be more effective walking in to handle a UC appeal than would a lawyer experienced in trial process but without substantial experience in workplace-related issues.").

^{97.} Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 326 (1985).

^{98.} *See id.* at 308 ("Appellees contended . . . that the fee limitation provision . . . denied them any realistic opportunity to obtain legal representation").

^{99.} Id. at 327.

^{101.} See, e.g., Jean R. Sternlight, Lawyerless Dispute Resolution: Rethinking a Paradigm, 37 FORDHAM URB. L.J. 381, 411 (2010) ("[I]t would be a mistake to accept the idea that non-legal representation necessarily makes more sense in ADR processes than it does in litigation. There is no reason to believe that mediation or arbitration require fewer legal skills and knowledge than litigation.").

^{102.} See Faretta v. California, 422 U.S. 806, 819 (1975) (holding that the Sixth Amendment provides defendants with a constitutional right to represent themselves pro se in criminal proceedings).

The other suggestion I have is simple and, at least superficially, radical. The root of the problem is that representing all indigent defendants with generalist lawyers is something our society has decided it cannot afford but will pretend to achieve. Suppose we separated indigent defense from the general practice of law at every level: professional training, licensing, employment, and discipline. What if, in other words, we made public defense a different career than practicing law?

Public defense is widely recognized as an important service. ¹⁰⁴ So too is public education; ¹⁰⁵ so is social work, in all its vulnerary variations. ¹⁰⁶ Yet, school teachers and social workers do not cost as much as lawyers. The reasons for this are that teachers and social workers have in general invested less in their professional training and have only a very limited, if any, private market bidding for their services. ¹⁰⁷

American law schools are looking, as never before, for ways to market legal education to consumers other than traditional J.D. students. The LLM well has been tapped. What the schools need is a product other than the J.D. And what the states—and defendants—need is affordable indigent defense.

So let us suppose that some enterprising law dean and some forward-looking chairperson of a state judiciary committee set about designing a course of study of a year and one-half designed to prepare students to take an examination that would qualify them for a license to represent indigent criminal defendants in the courts of the state. *And nothing else*. If a sweetener were required and could get over the political hump, one might make those who practiced public defense for, say, ten years eligible to take the general bar exam without first obtaining a J.D. degree.

^{103.} See supra notes 43-64 and accompanying text.

^{104.} See, e.g., Holder, supra note 42 ("[T]he fundamental integrity of our criminal justice system, and our [country's] faith in it, depends on the effective representation on both sides.").

^{105.} See, e.g., President Barack Obama, State of the Union Address (Jan. 24, 2012), available at http://www.whitehouse.gov/state-of-the-union-2012 (click "Transcript") ("Most teachers work tirelessly, with modest pay, sometimes digging into their own pocket for school supplies, just to make a difference. Teachers matter.").

^{106.} See, e.g., Jaffee v. Redmond, 518 U.S. 1, 15-16 (1996) ("Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals." (citations omitted)).

^{107.} See generally BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT PROJECTIONS, http://www.bls.gov/emp/ep_education_tech.htm (last visited Oct. 11, 2012) (providing information about education and training requirements for various occupations).

^{108.} See, e.g., Elie Mystal, *The Early Numbers on Law School Applications*, ABOVE THE LAW (Jan. 20, 2012), http://abovethelaw.com/2012/01/the-early-numbers-on-law-school-applications (indicating that 2012 law school applicants were down 16% from 2011, as of January 13, 2012).

^{109.} See 100 Most Popular Law Schools 2012, LLMGUIDE, http://www.llm-guide.com/most-popular/usa (last visited Oct. 12, 2012) (ranking the top 100 LLM programs in the United States). So we already have at least 100 LLM programs, many of them capable of adding to their current enrollments. See id.

I suppose that those who elected this career path would recognize the costs and benefits: a shorter course, less debt, and exciting work, in exchange for pay on the scale of school teachers and social workers. The practicing bar would be freed from any prospect of conscription to do work it strongly prefers to avoid. Current indigent defense lawyers would see reinforcements finally appear over the hill.

The law schools could sell a degree in Public Defense Law (PDL), including the usual first year—but substituting Criminal Procedure II Adjudication for Civil Procedure—with Evidence, Criminal Procedure I Police, and Professional Responsibility in the third and final semester. The PDL exam would weed out the obviously incompetent, and after two years of work in an office, I predict that variance between J.D. and PDL representatives would be minute. Some in both categories would be stars, and some in both categories would be clunkers.

The difference would be in numbers. In May of 2011, the Bureau of Labor Statistics listed the mean annual salary of various occupations, with lawyers at approximately \$130,000, secondary school teachers at approximately \$56,000, and social workers at approximately \$54,000. 110 Costs to the employer include benefits, prominently including health care and retirement contributions; so the cost differential is less than the wage differential. Still, there is an obvious opportunity to lower costs—dramatically—by specializing and fast-tracking the public defense career option.

The other factor reducing the cost efficiency of a specialized public defense career is that the very point to the proposal is reducing caseloads. My rough and ready guess is that an office could substitute three PDLs for two attorneys, for an increase in staff over time of 50%. An office now handling four thousand felony files with ten attorneys could handle the same four thousand files with fifteen PDLs, reducing the caseload per advocate from four hundred to two hundred sixty-six.

We can expect that public administrators and legislators may attempt to appropriate the surplus provided by any strategy for reducing the costs of indigent defense. With respect to the PDL proposal, the operative

^{110.} See May 2011 National Occupational Employment and Wage Estimates United States, BUREAU LABOR STATISTICS, available at http://www.bls.gov/oes/current/oes nat.htm.

^{111.} See News Release, Employer Costs for Employee Compensation—June 2012 (Sept. 11, 2012), BUREAU LABOR STATISTICS, http://www.bls.gov/news.release/pdf/ecec.pdf (reporting employer costs for wages and employee benefits for nonfarm private and state and local government workers).

^{112.} See generally WILLIAM J. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 42 (1971) ("Bureaucrats maximize the total budget of their bureau during their tenure, subject to the constraint that the budget must be equal to or greater than the minimum total costs of supplying the output expected by the bureau's sponsor.") While we may expect public defense offices to fight to hold on to existing levels of support, the current level of support is low precisely because criminal defense is an unpopular priority. The level of support is set more by legislative perceptions of what the courts will tolerate than by a genuine legislative preference for providing the current level. If enhanced efficiency permitted satisfaction of the constitutional minima at reduced cost, there is little

legislation could impose file limits as part of the ethical obligations attending the license. Court administrators and public defense supervisors could be expected to resist cutbacks. The legislative incentives, however, are powerful enough to make the claw-back scenario plausible.

The final check on the pressure of priorities is the judiciary. Judges who now shrink from imposing the cost of effective representation by attorneys for all indigent defendants might be less reluctant to force adherence to prevailing levels of support in jurisdictions that have taken the lead in showing that effective representation can be achieved within the prevailing priority structure. 113

And even if this final check failed, reducing the cost of public defense would not have been wholly vain. Defense representation would be little, if any, worse than now, and scarce resources would be freed for other pressing public needs.

III. CONCLUSION

My specific suggestions are likely to call forth vigorous debate. There are always devils in the details, and there are always unintended consequences. The various proposals might be packaged together in different arrays. My basic point is one I am more than happy to see carried forward with entirely different policy initiatives than I have proposed. We need to reduce the cost of indigent criminal defense.

Before concluding, I would like to emphasize some things I have *not* said. I have not denied that many, many first-rate lawyers do indigent defense work. I have not denied that some jurisdictions provide generally effective public representation. And I have said nothing about the defense of capital cases, a subject important enough to be dealt with in depth on some other occasion.

I close with a quotation from a recent article by Professor Benjamin Barton, opposing the notion of "civil *Gideon*," i.e., the appointment of lawyers to represent indigent civil litigants. ¹¹⁴ Barton writes that

[i]n fact, there is an argument to be made that *Gideon* has worked out great for everyone in the system except criminal defendants. The legal profession won because a massive new source of guaranteed business emerged. Judges won because lawyers, in comparison to pro se litigants,

reason to suppose that indigent defenders could retain the surplus.

^{113.} See generally Brown v. Plata, 131 S. Ct. 1910 (2010) (proving that even conservative judges are willing to release the guilty when criminal justice conditions become not just unconstitutional, but shamefully so). Perhaps a system in which a third of felony defendants must proceed pro se or with the help of a nonattorney advocate, and indigent defense lawyers were *still* responsible for caseloads three times over the ABA guidelines, would be shameful enough to provoke systemic reform.

^{114.} Benjamin H. Barton, Against Civil Gideon (and for Pro Se Court Reform), 62 FLA. L. REV. 1227, 1230-31 (2010).

make every judge's job easier. Society wins because everyone gets to feel better about guaranteeing defendants a lawyer. The psychological value of *Gideon*—that everyone can rest easy knowing that lawyers are theoretically ensuring that the system works for rich and poor alike—should not be underestimated. The double bonus is that system-wide the lawyers are so underpaid and overburdened that in most jurisdictions they are unable to put up much of a fight, so society gets the appearance of fairness without a high rate of acquittals or actual trials.¹¹⁵

Indeed. So let us accept the mission of moving forward, which is to say—accept the mission of moving up from *Gideon*.