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## Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice

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# Why *Gideon* Failed: Politics and Feedback Loops in the Reform of Criminal Justice

Donald A. Dripps\*

## *Table of Contents*

I. Introduction .....	884
II. <i>Gideon</i> 's Failure.....	894
A. The Impact of <i>Gideon</i> .....	894
B. The Current State of Indigent Defense.....	900
III. Leading Academic Critiques of the Court's Right-to-Counsel Jurisprudence .....	902
A. The Liberal Narrative .....	902
B. The Agency-Costs Narrative .....	903
IV. Two Thought Experiments .....	907
A. The First Experiment: Suppose the Supreme Court Compelled Allocation of Adequate Resources for Indigent Defense.....	907
B. Suppose We Curtailed Sentencing Severity and Prosecutorial Discretion.....	913
V. Three Reform Agendas .....	915
A. A Liberal Agenda: Planning for a Second Revolution.....	916
B. A Conservative Agenda .....	919
C. A Pragmatic Agenda.....	924
VI. Conclusion.....	925

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### I. Introduction

The central topic of scholarship on criminal procedure in the United States is the Warren Court's "criminal procedure revolution" of the early 1960s.<sup>1</sup> The literature now includes at least seven important narratives about the Warren Court criminal cases. First, a conservative narrative denounces the Warren Court for imposing judge-made law without due regard for the cost to social control of the new rules.<sup>2</sup> Second, a liberal narrative abetted and then celebrated the Warren Court.<sup>3</sup> As the Court became more sympathetic to law enforcement during the 1970s and since, liberals criticized the post-Warren justices for failing to give the Warren Court landmarks a principled defense.<sup>4</sup>

In the liberal narrative, perverse legislative incentives call on grounds of process theory for an active judicial role on behalf of suspects, defendants, and prisoners drawn disproportionately from disempowered groups, especially African-Americans.<sup>5</sup> The

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1. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966) (holding that the Fifth Amendment privilege against self-incrimination mandates that police notify individuals in police custody of their right to remain silent and the right to counsel); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (declaring that indigent criminal defendants in state criminal prosecutions have a right to court-appointed counsel). These and other criminal procedure decisions of the Warren Court are regarded as landmarks in criminal law. See, e.g., Bernard E. Harcourt, *Imagery and Adjudication in the Criminal Law: The Relationship Between Images of Criminal Defendants and Ideologies of Criminal Law in Southern Antebellum and Modern Appellate Decisions*, 61 BROOK. L. REV. 1165, 1166 (1995) (describing *Gideon* and *Miranda* as "landmark decisions of the Warren Court"); Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 185 (2003) (calling *Gideon* a "landmark right-to-counsel case").

2. See, e.g., Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 955 (1965) ("Justices are too sophisticated really to believe that the first eight amendments speak so clearly on every issue as to make irrelevant the hard facts of life.").

3. See, e.g., Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the "Old" Voluntariness Test*, 65 MICH. L. REV. 59, 62 (1966) (arguing that the protections defendants received before *Miranda* were "largely illusory").

4. See, e.g., Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1199 (1971) (accusing the Burger Court "of what is, at best, gross negligence concerning the state of the record and the controlling precedents").

5. See Donald A. Dripps, *Criminal Procedure, Footnote Four, and the*

liberal narrative points to the long legislative record of indifference or even hostility to the rights of suspects and defendants, the persistent and extreme neglect of indigent defense being a prominent example.<sup>6</sup> Drawing bleaker conclusions from similar premises, a third, more radical narrative read the Warren Court canon not as revolution, but as legitimation and entrenchment.<sup>7</sup>

The clash of traditional liberal and conservative narratives has never entirely abated.<sup>8</sup> That clash, however, lost much of its currency after the “punitive turn” in American criminal justice

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*Theory of Public Choice; or, Why Don't Legislatures Give a Damn about the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081 (1993) (arguing that “active judicial development of constitutional rules governing police, prosecutors, and the criminal trial process is a legitimate exercise of judicial review”); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 831 (1991) (“[The] Supreme Court must be prepared . . . to bar governmentally-imposed burdens on disfranchised groups even when popular opinion strongly endorses them, not just when transformation of racial attitudes has rendered those burdens increasingly anachronistic.”).

6. See Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2067–68 (2000) [hereinafter *Gideon's Promise Unfulfilled*] (“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.” (footnotes omitted)).

7. See Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 746 (1992) (noting that because “there is no organized political campaign comparable to the civil-rights movement dedicated to defending the rights of criminal suspects, there is no group that can take even limited advantage of the *Miranda* ‘victory’”). Seidman argued that in *Miranda* “the Court ended up contributing to the smugness and self-satisfaction that are the main enemies of growth and reform.” *Id.* at 747. For application to *Gideon*, see Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743, 812–13 (1995) (“All that is needed to account for judicial economy and legitimacy is a public defender who appears competent, no matter how rough an appearance it may be.”).

8. Compare, e.g., WILLIAM PIZZI, *TRIALS WITHOUT TRUTH* (1999) 139, 152–53 (1999) (arguing that our criminal justice system is flawed because it is overly adversarial, is too much of a gamble, and is not concerned with seeking the truth), with Richard S. Frase, *The Whole Truth About American and European Criminal Justice*, 3 BUFF. CRIM. L. REV. 785, 846–47 (2000) (reviewing Pizzi and arguing that the American criminal justice system is “much more devoted to truth-seeking than Pizzi claims, . . . [is] less committed to procedural rights . . . [and] is also less strongly adversary than Pizzi suggests”).

policy. During the second half of the 1980s and ever since, sentencing policy throughout most of the country became both more severe and, with respect to the judiciary, less discretionary.<sup>9</sup> Public prosecutors with plenary discretion to select the charges that trigger fixed-sentencing consequences became the most important actors in the system.<sup>10</sup> Guilty pleas, which accounted for about four out of five convictions through the 1970s, accounted for more than nine of ten by the end of the twentieth century.<sup>11</sup>

The punitive turn coincided with another dramatic development in criminal justice—DNA exonerations. The prevailing wisdom, often assumed in liberal as well as conservative narratives, held that (virtually) all criminal defendants are in fact guilty.<sup>12</sup> The DNA technique shook that confidence. In 1996, a review of tens of thousands of DNA tests requested by law enforcement found that about a quarter of the conclusive tests exonerated the suspect.<sup>13</sup>

The punitive turn and the innocence movement supported different, if not entirely new, narratives about the Warren Court's revolution. The innocence movement informed and reinforced a fourth narrative concerned with factual accuracy. The accuracy narrative faulted the Warren Court for neglecting due process in favor of Fourth, Fifth, and Sixth Amendment rights that often have no (or a perverse) relationship to guilt and innocence.<sup>14</sup>

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9. See, e.g., MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 182 (2004) (pointing out that “legislators have purposely transferred discretion from judges to prosecutors to reduce chances that judges will mitigate sentences”).

10. See, e.g., *infra* note 94 and accompanying text (explaining how the severity of criminal statutes, along with an overworked public defender system, allows prosecutors to pressure defendants into pleading guilty).

11. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 90–91 (2005) (presenting data that shows that the federal guilty plea rate was over 95% in 2002).

12. See, e.g., Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 865 (2005) (“It is true that most criminal defendants are guilty. But even [Alan Dershowitz] must be shocked, as we all are, now that we have DNA, to realize how many times we have erred.”).

13. See Peter Neufeld & Barry Scheck, *Commentary, in CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL*, at XXVIII–XXXI (1996) (sexual assault cases).

14. See DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE* 152–55 (2003) [hereinafter DRIPPS, *ABOUT GUILT AND INNOCENCE*] (rejecting the incorporation of the Fourth, Fifth, and Sixth Amendments and arguing that the “Court’s

According to the accuracy narrative, *Gideon's* focus on the Sixth Amendment's specific textual reference to "counsel" deflects attention from the overall reliability of the proceedings, the central focus of due process analysis.<sup>15</sup>

The punitive turn provided the ground for two further narratives, a race-and-crime narrative based on the African-American experience and an agency-costs narrative based on the perspective of political economy. The fifth narrative emphasizes the role of race in criminal justice, that the racially disproportionate impact of discretionary drug enforcement, mediated by coercive plea "offers" that effectively compel not just guilty pleas, but false informant testimony, deprives the criminal sanction of the legitimacy that is crucial to effective social control.<sup>16</sup> So too, in the sixth, the agency-costs narrative, prosecutorial power has made the Warren Court landmarks irrelevant.<sup>17</sup> In response to coercive plea choices, typical

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continued reliance on the basic incorporation framework needs to change before the law can be made either more legitimate or more functional"); GEORGE C. THOMAS III, *THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS* 12 (2008) (contending that the American criminal justice system "often fails" innocent defendants).

15. See DRIPPS, *ABOUT GUILT AND INNOCENCE*, *supra* note 14, at 117–18

("[B]y relying on the Sixth Amendment . . . the Warren Court deflected attention from instrumental reliability in favor of a formalistic focus on the textually referenced 'assistance of counsel.' . . . [B]ecause each defendant has 'counsel'—no matter how overworked, inexperienced, lazy, or incompetent—the constitutional minima appear to be satisfied.").

16. See PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 233 (2009) (discussing that while African Americans "account for about 14 percent of illegal drug users . . . they represent almost 56 percent of people who are incarcerated for drug offenses"). For a rather more provocative comparison of today's criminal justice system with the post-bellum subordination of freed slaves and their descendants in the Jim Crow South, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 2 (2010) ("As a criminal, you have scarcely more rights, and arguably less respect, than a black man living in Alabama at the height of Jim Crow. We have not ended racial caste in America; we have merely redesigned it.").

17. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 4 (1997) [hereinafter Stuntz, *Uneasy Relationship*]

As courts have raised the cost of criminal investigation and prosecution, legislatures have sought out devices to reduce those costs. Severe limits on defense funding are the most obvious example, but not the only one. Expanded criminal liability makes it easier for the government to induce guilty pleas, as do high mandatory

defendants waive the rights recognized by the Warren Court landmarks.<sup>18</sup> Those landmarks, on the agency-costs account, may even have encouraged the turn to draconian sentences and prosecutorial dominance.<sup>19</sup>

Finally, a seventh body of discordant scholarship offers competing originalist narratives about constitutional criminal procedure. The role of originalist methodology in some prominent criminal procedure decisions,<sup>20</sup> together with early work by Akhil Amar,<sup>21</sup> impelled both challenges to the theoretical premises of originalism<sup>22</sup> and a welter of contributions assessing historical evidence about the Fourth, Fifth, and Sixth Amendments.<sup>23</sup>

Now, as with any body of thoughtful work about the same phenomena, the various scholarly narratives agree on many points. In particular, scholars writing from all perspectives agree that even fifty years after *Gideon*, the representation of indigent

sentences that serve as useful threats against recalcitrant defendants. And guilty pleas avoid most of the potentially costly requirements that criminal procedure imposes.

18. See Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 131 (1995) (explaining that the Supreme Court “has held that, by entering a plea of guilty, a defendant forfeits a broad range of potential legal and constitutional appellate claims that would otherwise have been available had the case gone to trial”).

19. See Stuntz, *Uneasy Relationship*, *supra* note 17, at 4 (“These strategies would no doubt be politically attractive anyway, but the law of criminal procedure makes them more so.”).

20. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 49, 68–69 (2004) (reversing the defendant’s conviction after examining the Sixth Amendment’s Confrontation Clause “upon the original understanding of the common-law right” to confrontation).

21. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 153 (1997) (“Textual argument is . . . a proper starting point for proper constitutional analysis.”).

22. See, e.g., Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2292–93 (1998) (book review) (“Unfortunately, however, Amar never explains exactly why we should treat historical practice as important. The Framers’ world notoriously was not our own, and the differences are nowhere more apparent than when talking about issues of criminal procedure.” (footnote omitted)).

23. See, e.g., Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999) (presenting a detailed historical examination of the Fourth Amendment and concluding, in part, that “we now accord [police] officers far more discretionary authority than the Framers ever intended or expected”).

felony defendants in the state courts is generally inadequate. In other words, there is a scholarly consensus that *Gideon* has failed.

The traditional liberal narrative traces the parlous state of indigent defense to the same conservative political trend that supported the punitive turn. Richard Nixon's four appointees to the Court changed judicial ideology on criminal justice.<sup>24</sup> On the liberal account, the villain is not *Gideon* but the Burger Court's subsequent decision in *Strickland v. Washington*.<sup>25</sup> An extensive literature condemns *Strickland* for tolerating systemic conditions that structurally preclude effective representation.<sup>26</sup> Traditional conservatives agree that indigent defense is in bad shape;<sup>27</sup> their clash with the liberals is what to do about it.

The liberal commentators offer various reform proposals, all of which thus far have fallen on deaf judicial ears.<sup>28</sup> The traditional conservative position opposes reform imposed from the top down by the Court in favor of leaving difficult decisions

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24. See Ronald F. Wright, *How the Supreme Court Delivers Fire and Ice to State Criminal Justice*, 59 WASH. & LEE L. REV. 1429, 1439–40 (2002) (explaining that Chief Justice Burger and President Nixon's three other Supreme Court appointees "changed the rules of habeas corpus to make it easier for federal courts to avoid the merits of constitutional challenges").

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

26. See, e.g., William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 93 (1995) (arguing that *Strickland* "effectively discarded" the judgment in *Gideon* and that "the Court has effectively ensured that *Gideon* guarantees little more than the presence of a person with a law license alongside the accused during trial").

27. See, e.g., Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System*, 666 CATO INST. POL'Y ANALYSIS 1, 1 (2010), <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa666.pdf> ("Public defender offices around the country face crushing caseloads that necessarily compromise the quality of the legal representation they provide.").

28. See, e.g., LAURENCE A. BENNER, AM. CONST. SOC'Y, WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE 2 (2011), [http://www.acslaw.org/files/BennerIB\\_ExcessivePD\\_Workloads.pdf](http://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf); Eve Brensike Primus, *Structural Reform in Criminal Defense: Reallocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 685 (2007) (proposing to allow appellate lawyers to go outside the trial record when making ineffective assistance of counsel claims).

about funding priorities to elected legislatures.<sup>29</sup> This returns traditional liberals to process theory, reinforced by the race-and-crime narrative.

Given the critical contribution of defense counsel to the reliability of convictions,<sup>30</sup> the accuracy narrative endorses

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29. I have not seen the separation-of-powers argument in the scholarly literature, but it obviously weighs heavily with the judges who consistently have rebuffed systemic challenges to indigent defense systems. For example, in *Madden v. Township of Delran*, 601 A.2d 211, 222 (N.J. 1992), the court rejected constitutional challenges to the practice of conscripting lawyers without compensation, then closed its opinion as follows:

Our current system is unworthy of the traditions of this state. We note that legislation proposed by the Law Revision Commission would require every municipality to provide a public defender for the municipal courts. We have no doubt that that is the ideal system, not ideal in the sense of unrealistic but ideal in the sense of the best system to meet the constitutional requirement. It is the most efficient, the fairest, the most likely to achieve equal and effective representation of indigent defendants at the least cost. It is a system that should be instituted by other branches of government. We urge them to act and trust they will. The victim in the present system is not the bar, but the poor.

*Id.* at 222. The state courts agree that they have inherent power to order funding for their own operation. See Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Financial Times?*, 92 Ky. L.J. 979, 1035–36 (2003–2004) (noting that “many state courts” believe “that the judiciary possesses inherent power as a function of being a separate branch of government and that this power extends to compelling necessary funding”). They also agree that compelling an appropriation to preserve the existence of the judicial branch is an option of last resort, reserved for extreme cases. See *id.* at 1041 (“The exercise of [a court’s] inherent powers to compel funding must take place only under the most egregious of circumstances . . .”).

30. Many, perhaps most, *Strickland* violations are mediated by caseload pressures. See, e.g., Richard Klein, *The Eleventh Commandment: Thou Shalt not be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 409 (1993)

The ABA Bar Information Program of the Standing Committee on Legal Aid and Indigent Defendants funded an analysis of a sample of cases from 1970 to 1983 in which there had been findings of ineffectiveness of counsel. This study revealed that perhaps 70% of these cases could be identified as real or possible cases of “systemic failure in adequacy of representation.” The analysis further found that “a closer review of these cases reveals that the errors of counsel were very frequently occasioned by a systemic impairment or restraint which worked to unfairly inhibit or even nullify representation by counsel, although counsel was ‘bodily’ in the courtroom, totally apart from counsel’s personal skills or abilities.”

*Gideon* albeit on the basis of due process rather than the Sixth Amendment.<sup>31</sup> The originalists, confronted by strong historical evidence against *Gideon*, endorse *Gideon* either by surrendering theoretical purity or by leaning on such thin reeds as history offers.<sup>32</sup> While they come by different routes to the premise of a right to appointed counsel, both tend to agree with the liberal narrative about the practical weakness of indigent defense.

The agency-costs narrative takes issue with the liberal narrative's version of process theory. Counter-majoritarian rulings like *Gideon* change the incentives motivating police, prosecutors, lower court judges, state legislatures, and Congress.<sup>33</sup> Procedural advantages for the defense can be offset, via plea bargaining, if prosecutors over-charge or legislatures adopt mandatory minimum sentences.<sup>34</sup> The punitive turn thus effectively nullified the Warren Court's attempt to make the criminal process less unfair and more reliable. Indeed, the Warren Court's ruling arguably contributed to the punitive turn.<sup>35</sup>

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(footnotes omitted).

31. See DRIPPS, ABOUT GUILT AND INNOCENCE, *supra* note 14, at 178–80 (criticizing *Strickland* for diluting the meaning of effective assistance of counsel, and calling for a change of focus to the overall fairness of the trial process under due process).

32. For example, Justice Scalia has not called for overruling *Gideon*, even though his originalist dissent in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), “implicitly questioned whether even *Gideon* and *Strickland* were right.” Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1148 (2011); see also *Padilla*, 130 S. Ct. at 1495 (Scalia, J., dissenting) (rejecting the majority's reasoning, “[e]ven assuming the validity of” *Gideon* and *Strickland*, and reminding the Court that “[w]e have until today at least retained the Sixth Amendment's textual limitation to criminal prosecutions”). AMAR, *supra* note 21, at 140, relies on “structural arguments” to trump countervailing evidence such as the first federal criminal code's provision for appointing counsel only in capital cases. See Crimes Act of 1790, ch. 9, 1 Stat. 112, 118 (authorizing appointment of counsel for capital defendants).

33. See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 210–15 (2002) (describing the public and political response to the Warren Court's counter-majoritarian criminal procedure decisions, including *Gideon*).

34. See Stuntz, *Uneasy Relationships*, *supra* note 17, at 5, 55 (clarifying how severe minimum sentences and “overbroad criminal statutes” help prosecutors pressure defendants into pleading out).

35. See Friedman, *supra* note 33, at 214–15 (describing the public backlash

On this view, the punitive turn made the right to counsel a sideshow. Because the prosecutor's last best offer is practically coercive, counsel's role is "meet 'em, greet 'em and plead 'em."<sup>36</sup> Yet this has not led to calls for overruling *Gideon*.<sup>37</sup> Instead, the most prominent proposals call for rolling back the punitive turn by limiting prosecutorial charging power and the severity of prison sentences.<sup>38</sup> The system would still be adversarial, rather than inquisitorial, with a continuing role for appointed counsel.

My thesis derives from this overlapping consensus of scholarly opinion. This Article argues that *Gideon*'s failure was not just determined, but over-determined. Regardless of whether *Gideon*'s holding is properly grounded on originalism, due process, or the evolution of precedents, the punitive turn would have neutralized the adversary system. Even if the federal courts had steered a true course against prevailing political incentives, and held the conviction of the guilty hostage to the demand for effective public defender systems, well-funded defense systems would still confront effectively coercive prosecutorial discretion.

The reverse is also true. If the federal courts had imposed decent restraints on prosecutorial power and sentencing severity, inadequate support for indigent defense would have left most defendants, guilty and innocent alike, in no position to make good use of a genuine option to stand trial. *Gideon* failed because of *both* the political incentives noted by liberal process theorists *and*

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against the Warren Court as crime rates rose in the 1960s, and how Richard Nixon's timely presidential victory allowed him to place two conservative justices on the Supreme Court). Friedman explained that Chief Justice Burger shared President Nixon's disagreement with the Warren Court's criminal procedure decisions. *Id.* at 215.

36. Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1793 (2001) (citing Alan Berlow, *Requiem for a Public Defender*, AM. PROSPECT, June 5, 2000, at 28).

37. See Abe Krash, Commentary, *Conference on the 30th Anniversary of the United States Supreme Court's Decision in Gideon v. Wainwright: Gideon and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 AM. U. L. REV. 1, 27 (1993) ("[C]ritics have urged the Supreme Court to limit or to overrule various decisions of the 1950s and the 1960s with respect to the rights of accused persons, but no responsible voice—no responsible voice—is heard today urging that the *Gideon* decision should be overruled.").

38. See *infra* notes 103–06 and accompanying text (describing reform proposals).

the substance-procedure feedback loop noted in the agency-costs account.

The accuracy and race-and-crime critics are also right about *Gideon*. While doctrinal form certainly did not determine *Gideon*'s failure, the judiciary's focus on the Bill of Rights, a charter preoccupied with procedure rather than substance, made it harder for the courts to come to grips with the substance-procedure feedback loop.<sup>39</sup> Even without grotesque racial disparities, political incentives and the punitive turn probably would have crippled the right to counsel. Nonetheless, draconian yet discretionary supply-side drug enforcement gave the punitive turn a major impetus.<sup>40</sup> The distribution of drug enforcement's pain on racial minorities made that pain politically more sustainable than it should have been.<sup>41</sup>

Part II of this Article briefly summarizes the Supreme Court's doctrine respecting the right to appointed counsel. Part II then, again briefly, summarizes the prevailing state of indigent defense. Part III then considers *Gideon*'s manifest failure from the standpoint of the scholarly literature, focusing on the liberal and agency-costs narratives. Illuminatingly, each of these perspectives locates a distinct weakness in *Gideon*'s project.

Part IV then develops two thought-experiments. In the first, the Supreme Court, rather than retreating from *Gideon* in *Strickland* and subsequent cases, vigorously insisted on effective representation for indigent defendants. What would have happened? If nothing else changed, the punitive turn in substantive law would still have vested prosecutors with the power to make functionally coercive, outcome-determinative plea "offers." Even well-prepared defense lawyers would have little choice but to advise even clients plausibly claiming factual innocence to plead out.

In the second thought-experiment, the Supreme Court decided *Strickland* just as it appears in the U.S. Reports. Prosecutorial power and excessive sentences, however, are curtailed by the menu of reforms put forward by Professor

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39. See *supra* notes 14–15 and accompanying text (neglect of due process).

40. See *supra* note 16 and accompanying text (discretionary drug enforcement).

41. See *id.* (same).

Stuntz—minus his proposal for invigorating indigent defense. In this experiment, typical defendants could dare to stand trial without risking catastrophic penalties. Holding right-to-counsel law constant, however, would mean that legislative neglect of the defense function would give defendants electing trial poor prospects for winning. Those prospects, moreover, would decline as an increasing percentage of defendants elected trial in the absence of catastrophic trial penalties.

Part V confronts the implications of Part IV. For *Gideon* to succeed, there must be both a commitment of resources to the defense function *and* effective regulation of the plea bargaining process. For liberals this makes a case for another top-down Criminal Procedure Revolution orchestrated by the Supreme Court. For skeptics who find the bloom long since off the rose of judicial activism, the logical alternative to despair is exploration of institutional arrangements that promise at least some hope of offering all defendants a fair trial, despite the prevailing politics of crime and justice. As with the general consistency of the critiques the various perspectives support, so too with the directions for reform. Liberals may not expect much from legislatures just as political economists doubt the prospects for truly counter-majoritarian judicial intervention. Both camps should be happy to see their expectations falsified.

## II. *Gideon's Failure*

### A. *The Impact of Gideon*

*Johnson v. Zerbst*,<sup>42</sup> decided twenty-five years before *Gideon*, held that 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.”<sup>43</sup> The right of indigent defendants to appointed counsel in all felony cases, however, did not apply to prosecutions in state courts. Under *Betts v. Brady*,<sup>44</sup> Fourteenth Amendment due process required appointing counsel for indigent

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42. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

43. *Id.* at 463 (footnote omitted).

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

defendants only when the totality of the circumstances of any given case made denial of counsel fundamentally unfair.<sup>45</sup> *Gideon* overruled *Betts* and incorporated the Sixth Amendment rule of *Zerbst* into Fourteenth Amendment due process.<sup>46</sup>

*Gideon* did not appear revolutionary. By 1963, only a few states, concentrated in the south, did not appoint counsel for all felony defendants.<sup>47</sup> Outside of those states, *Gideon* did not require dramatic changes. By contrast, the ruling two years before in *Mapp v. Ohio*<sup>48</sup> had imposed the exclusionary rule on roughly half the states, including cosmopolitan northern jurisdictions like New York and Massachusetts.<sup>49</sup> The ruling three years later in *Miranda*<sup>50</sup> imposed a novel interrogation procedure on all fifty states.<sup>51</sup> Justice Harlan dissented in *Mapp* and *Miranda* but concurred in *Gideon*.<sup>52</sup>

Nonetheless the new federal right to counsel in state cases at least potentially promised nationwide systemic reforms. Even under the due process test, the mere fact that a licensed attorney was assigned to represent the accused did not automatically satisfy the right to counsel. In *Powell v. Alabama*<sup>53</sup> the Court treated appointment of counsel on the day of trial as a

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45. See *id.* at 473 (concluding that the Fourteenth Amendment does not mandate assistance of counsel in every criminal case).

46. *Gideon v. Wainwright*, 372 U.S. 335, 339 (1963) (overruling *Betts*).

47. See Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 267 (noting that, prior to *Gideon*, "thirty-eight states ha[d] legal provisions requiring the appointment of counsel in such cases, and seven more almost invariably follow[ed] that procedure as a matter of practice" (footnotes omitted)); Brief for Petitioner at 30, *Gideon*, 372 U.S. 335 (No. 155) ("There remain only five states—Alabama, Florida, Mississippi, North Carolina, and South Carolina—which do not make provision for appointment of counsel in behalf of indigents in all felony cases.").

48. *Mapp v. Ohio*, 367 U.S. 643 (1961).

49. *Id.* at 655, 660 (applying the Fourteenth Amendment's exclusionary rule to the states and invalidating a state criminal conviction based on an unconstitutional search of Mapp's home).

50. *Miranda v. Arizona*, 384 U.S. 436 (1966).

51. See *id.* at 478–79 (outlining the procedural safeguards required to protect the suspect's privilege against self-incrimination).

52. See, e.g., *id.* at 504 (Harlan, J., dissenting) ("I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large.").

53. *Powell v. Alabama*, 287 U.S. 45 (1932).

constructive denial of counsel altogether.<sup>54</sup> In federal cases after *Zerbst*, the courts of appeal had developed a test for the adequacy of appointed counsel cribbed from the due process cases. If counsel's performance made the trial fundamentally unfair—"a farce and mockery" of justice—then the appointment failed to satisfy *Zerbst*.<sup>55</sup>

So *Gideon* made the *quality* of indigent defense a federal question. While almost all states appointed counsel for indigent felony defendants, the quality of indigent defense was widely seen as dubious. For example, Alabama argued in *Gideon* that the defense bar was so bad that typical defendants were really better off without such advocates:

Many observers of the criminal trial scene are of the opinion that today only a few lawyers who undertake criminal defense cases are equal matches for career prosecutors whose intimate familiarity with a wide variety of criminal charges and prosecution techniques makes them formidable adversaries. This demonstrates that, generally speaking, indigent persons charged with crime are not as unfortunately situated as critics of the *Betts v. Brady* rule would have us believe.<sup>56</sup>

Doubts about the effectiveness of criminal defense were by no means confined to the South. According to Norman Lefstein:

The quality of representation in the 1960s was indescribable compared to what it is today. We are light-years ahead of where we were. I began in the fall of 1963 doing criminal defense representation in the old D.C. Court of General Sessions as part of Georgetown's Prettyman Fellowship program. Having lawyers intoxicated in the courtroom was not uncommon. I'd see lawyers drinking in the men's room and encounter empty liquor bottles strewn around. I have a distinct memory of a lawyer interviewing a client in the cell block, right before a court appearance. After talking to the client, the lawyer announced to the other lawyers in the cell

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54. See *id.* at 71 (calling the late appointment of counsel in a capital case a "clear denial of due process").

55. See *Diggs v. Welch*, 148 F.2d 667, 668–69 (D.C. Cir. 1945) (writing that the Sixth Amendment requires a showing that "the proceedings were a farce and a mockery of justice" in order to grant habeas corpus relief). The Court of Appeals emphasized that "to justify habeas corpus on that ground an extreme case must be disclosed." *Id.* at 669.

56. Brief for State of Alabama as Amici Curiae Supporting Respondent at 10, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155).

block, without shame or embarrassment, that “my client has no money so I am going to plead him right away.”<sup>57</sup>

In 1973, the National Legal Aid and Defender Association reported a nationwide study based on both questionnaires and site inspections. The study found that

the resources allocated to indigent defense services have been found grossly deficient in light of the needs of adequate and effective representation. Relatively few indigent defendants have the benefit of investigation and other expert assistance in their defense. Their advocates are overburdened, undertrained, and underpaid, and as recent studies have shown, the poor have as little confidence in such advocates, who are often hand-picked by the same authority which pronounces their sentence, as they do in the inherent fairness of the American criminal justice system.<sup>58</sup>

Even in federal courts, in which *Johnson v. Zerbst* had been the law since 1938, the quality of defense representation was less than excellent. Judge David Bazelon declared that “a great many ‘if not most’ indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment.”<sup>59</sup> Bazelon had “often been told that if my court were to reverse every case in which there was inadequate counsel, we would have to send back half the convictions in my jurisdiction.”<sup>60</sup>

In the immediate aftermath of *Gideon*, two other developments put new strains on the already struggling systems of indigent defense. First, in *Douglas v. California*,<sup>61</sup> a companion case to *Gideon*, the Court held that the Equal Protection Clause required appointing appellate counsel for the indigent at the first appeal-as-of-right.<sup>62</sup> In 1967, *In re Gault*<sup>63</sup> extended the *Gideon*

57. See Malia Brink, *An Interview with Norman Lefstein*, 30 CHAMPION 38, 38 (2006).

58. NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR 14 (1982) (quoting NAT’L LEGAL AID & DEFENDER ASS’N, THE OTHER FACE OF JUSTICE 70 (1973)).

59. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973) (footnote omitted).

60. *Id.* at 22–23.

61. *Douglas v. California*, 372 U.S. 353 (1963).

62. See *id.* at 358 (describing a state’s denial of court-appointed counsel on appeal as a “meaningless ritual”).

63. *In re Gault*, 387 U.S. 1 (1967).

rule to juvenile delinquency adjudications.<sup>64</sup> Coupled with other decisions extending the right to counsel, the practical consequence was to increase the demand for indigent defense representation in many jurisdictions that were appointing trial counsel before *Gideon*.<sup>65</sup>

Second, during the 1960s and 1970s, crime rates went up. “From 1961 to 1974, murder rates nearly doubled and robbery rates more than tripled.”<sup>66</sup> With more offenses came more prosecutions.<sup>67</sup>

The systems that had struggled to handle pre-*Gideon* caseloads saw those caseloads increase dramatically. According to Professor Stuntz:

Criminal defense has been treated both more and less generously. Budgets in the early 1970s saw enormous percentage increases, but from a very low baseline. By the late 1970s, the increases had slowed considerably. Total spending on indigent defense rose slightly more than 60% in constant dollars between 1979 and 1990; state and local spending on indigents roughly doubled. Meanwhile, the percentage of cases in which defendants were given appointed counsel was also rising, from just under half in the late 1970s and early 1980s to 80% by 1992. And the total number of criminal cases was rising as well: State court felony filings more than doubled between 1978 and 1990. Thus, notwithstanding nominal budget increases, spending on indigent defendants in constant

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64. See *id.* at 73 (stating that the application of *Gideon* “must include with special force those who are commonly inexperienced and immature”).

65. See, e.g., Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 477 (“Clearly, the combined effect, in terms of the legal personnel required to fulfill the promise made in these decisions, is enormous. This increase in the demand for criminal defense attorneys has had substantial impact on the systems used to provide defense services.”).

66. Gary LaFree, *Explaining the Crime Bust of the 1990s*, 91 J. CRIM. L. & CRIMINOLOGY 269, 270 (2000) (reviewing ALFRED BLUMSTEIN & JOEL WALLMAN, *THE CRIME DROP IN AMERICA* (2000)) (footnote omitted).

67. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536 nn.126–28 (2001) [hereinafter Stuntz, *Pathological Politics*] (explaining that by the late 1970s, state court felony prosecutions had increased by 36%, much faster than the growth in crime rate and prosecutorial staffing).

dollars per case appears to have declined significantly between the late 1970s and the early 1990s.<sup>68</sup>

If the Supreme Court had adopted a robust standard of effective assistance, legislatures would have faced a forced choice between allocating dramatically more resources to indigent defense and scaling back the number of felony prosecutions.

Judge Bazelon, for example, proposed setting a required list of specific duties, prominently including a duty to investigate, coupled with a presumption of prejudice from the neglect of any required duty.<sup>69</sup> Bazelon's own estimate that this would require reversing half the convictions coming to the appellate courts is a measure of just how revolutionary *Gideon* might have been.<sup>70</sup> So a great deal depended on how the Supreme Court ultimately defined the minimum standard of effective assistance.

Instead, in *Strickland v. Washington* the Supreme Court adopted the now notorious two-pronged test of ineffective assistance. On appeal, the defense must show that counsel acted outside the range of professional competence and that counsel's errors prejudiced the accused.<sup>71</sup> *Strickland* has been the subject of sustained academic criticism since it came down.<sup>72</sup> We turn now to exploring just why the state of indigent defense remains in crisis after almost thirty years under *Strickland*.

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68. Stuntz, *Uneasy Relationship*, *supra* note 17, at 9–10 (footnotes omitted).

69. *United States v. DeCoster (DeCoster III)*, 624 F.2d 196, 275 (D.C. Cir. 1976) (en banc) (Bazelon, J., dissenting) (“That upon showing a substantial violation of any of counsel’s specified duties, a defendant establishes that he has been denied effective representation and the burden shifts to the government to demonstrate that the violation did not prejudice the defendant.”).

70. *Supra* note 59 and accompanying text.

71. *See id.* at 694 (“The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”).

72. *See generally* DRIPPS, ABOUT GUILT AND INNOCENCE, *supra* note 14, at 179 (“The worse the pretrial investigation was, the harder it is to prove that the investigation prejudiced the defendant”); Geimer, *supra* note 26, at 93 (arguing that *Strickland* “effectively disgraced” the judgment in *Gideon*); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433, 503 (1993) (“[T]he *Strickland* standard affords no relief in cases where unqualified defense counsel provides poor representation in every respect, but commits no single egregious error that, standing alone, cannot be explained as a reasonable strategic option.”).

*B. The Current State of Indigent Defense*

I have previously remarked on the paradox of *Gideon*: it is generally agreed that *Gideon* was a great decision, yet it is also generally agreed that *Gideon* was not required by text and history and has not led to effective representation of typical indigent defendants.<sup>73</sup> *Gideon* indeed makes a great story. “Clarence Gideon’s journey to the Supreme Court of the United States was a piece of storybook Americana—the luckless drifter . . . the least of men, could appeal to the highest, the most august court of the land. And once there, not only would he be heard, but he would triumph.”<sup>74</sup>

*Gideon*’s “triumph” is indeed “storybook”—an unrealized dream, a myth. Attorney General Eric Holder reported common knowledge in 2010:

As we all know, public defender programs are too many times under-funded. 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.<sup>75</sup>

General Holder’s view is shared by the overwhelming weight of scholarly opinion.<sup>76</sup>

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73. Donald A. Dripps, *Up from Gideon*, TEXAS TECH L. REV. (forthcoming 2013) (manuscript at 2), available at <http://ssrn.com/abstract=2120782>.

74. ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 405 (1997).

75. Eric Holder, U.S. Att’y Gen., Address at the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010 (Feb. 18, 2010) <http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html>, (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

76. See, e.g., *Gideon’s Promise Unfulfilled*, supra note 6, at 2063–64

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.

The ABA Standards recommend a maximum annual caseload of 150 felonies or 400 misdemeanors per attorney,<sup>77</sup> but most defendants are prosecuted in jurisdictions that are over those numbers, many dramatically over. Using the ABA Standards as the benchmark, the Bureau of Justice Statistics reports that:

Twenty-seven percent of county-based public defender offices reported sufficient numbers of litigating attorneys to handle the cases received in those offices in 2007. About a quarter (23%) of all offices reported less than half of the number of litigating attorneys required to meet the professional guidelines for the number of cases received in 2007.<sup>78</sup>

“The huddled masses in holding pens will be surprised to learn that they are ‘equal before the law.’ Indigent defendants are lucky to have a warm body and even a few minutes to discuss their case with that warm body.”<sup>79</sup>

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(footnotes omitted).

77. See AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES § 5-5.3 cmt. (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
- 25 appeals per attorney per year.

(footnote omitted).

78. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 231175, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 10 (2010), <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf>. It should be noted that a focus on the number of offices probably understates the scope of the problem, since the urban offices that handle the most cases are also the most likely to be overstretched.

79. THOMAS, *supra* note 14, at 21.

### III. Leading Academic Critiques of the Court's Right-to-Counsel Jurisprudence

#### A. The Liberal Narrative

The basic liberal narrative about constitutional criminal procedure celebrates the Warren Court's project of reforming the criminal process to advance liberty and equality, and condemns the Supreme Court's pro-prosecution turn in the years since Warren's retirement in 1969.<sup>80</sup> In the right to counsel context, the liberal narrative celebrates *Gideon* and condemns *Strickland*.<sup>81</sup>

Liberal commentators follow Justice Marshall's *Strickland* dissent by criticizing both the performance prong of the test and the prejudice prong.<sup>82</sup> The performance prong is too vague to guide defense counsel or lower courts, and the presumption of competence serves to mask what in many cases are not "tactical choices" but simple blunders.<sup>83</sup> The prejudice prong insulates even failures of the performance prong from reversal; the defendant saddled with a record made by an ineffective advocate must rely on that very record to prove the probable consequences of the misrepresentation.<sup>84</sup>

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80. See *supra* notes 3–4 and accompanying text (describing liberal support for the Warren Court's criminal justice decisions).

81. See, e.g., Geimer, *supra* note 26, at 93 (criticizing *Strickland* and the Burger Court).

82. See *Strickland v. Washington*, 466 U.S. 668, 707 (1984) (Marshall, J., dissenting) (expressing disagreement with both the performance and prejudice prongs adopted by the Court).

83. See, e.g., Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 82 (1986) (arguing that Justice O'Connor's concerns about handcuffing defense counsel are unpersuasive and "[a]ppropriately rigorous professional standards for appraising counsel's conduct should not discourage the type of attorney one wants to attract from accepting in forma pauperis assignments"); Meredith Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 21–24 (criticizing the presumption of competence); Green, *supra* note 72, at 502 ("Relying on the factually unwarranted but legally mandated presumption [of competence], courts frequently reject ineffective assistance claims premised on defense counsel's failure to present a case at the sentencing proceeding or even to investigate the possibility of a defense." (footnote omitted)).

84. See Geimer, *supra* note 26, at 93 (writing that *Strickland* and subsequent Supreme Court jurisprudence has "undermined, if not virtually destroyed, the right of indigent accused to have counsel do the kind of things . . .

*Strickland* therefore undermines *Gideon*. Legislatures disinclined to fund indigent defense know that the failure to provide effective representation will lead to the reversal of few if any convictions.<sup>85</sup> Given liberal process theory's skepticism about legislative incentives in the criminal justice field, the Supreme Court ought to revisit *Strickland* and replace it with at least some concrete duties, linked to a presumption of prejudice when counsel neglected the required duties.<sup>86</sup> In the alternative, the Court should approve institutional-reform litigation aimed at ensuring qualified attorneys and limiting defender caseloads.<sup>87</sup>

### B. The Agency-Costs Narrative

The liberal narrative endorses judicial intervention to compensate for defects in legislative incentives respecting the criminal process.<sup>88</sup> The agency-costs narrative initiated by Judge Easterbrook<sup>89</sup> and brilliantly elaborated by Professor Stuntz,<sup>90</sup> takes process theory further by asking how the other actors in the system respond to judicial rulings on criminal procedure.<sup>91</sup> The

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that an attorney should reasonably be expected to do”).

85. See Berger, *supra* note 83, at 71 (comparing the possibility of “reversal on the ground of attorney inadequacy” to “the camel’s proverbial path through the eye of a needle”).

86. See, e.g., Benner, *supra* note 28, at 2 (proposing appeal strategy that focuses “on the absence of counsel at a critical stage of the proceedings, rather than the ineffectiveness of counsel’s conduct”); Geimer, *supra* note 26, at 168–72 (proposing a checklist of “Minimal Duties of Capital Defense Counsel,” and adding that a judicial finding that these duties have been violated “should shift the burden of proving absence of prejudice to the government”).

87. See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 264 (1997) (outlining factors courts should consider prior to trial in examining a defense lawyer’s ability to represent a client); *Gideon’s Promise Unfulfilled*, *supra* note 6, at 2070–72 (discussing advantages of litigated reform of indigent defense, including establishing ex ante standards to evaluate effective assistance of counsel).

88. See *supra* note 5 and accompanying text (calling for an active judicial role).

89. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

90. See generally Stuntz, *Uneasy Relationship*, *supra* note 17.

91. See Easterbrook, *supra* note 89, at 290 (comparing criminal procedure to a market with scarce resources in which interactions among judges,

essence of the agency-costs critique is that while the Court has constitutionalized criminal procedure, it has not constitutionalized the rest of the system.<sup>92</sup> In consequence, procedural rulings set in motion unforeseen consequences, as prosecutors, defense lawyers, and legislatures reacted to the new incentive structure.<sup>93</sup>

Legislatures may not overrule the Court's constitutional rulings about criminal procedure. Current constitutional law, however, leaves legislatures free to underfund indigent defense<sup>94</sup> and to increase both the scope and the severity of the substantive criminal law.<sup>95</sup> *Strickland* imposes only an indefinite duty to investigate,<sup>96</sup> while the bulk of the Warren Court revolution

prosecutors, and defendants “tend to attain . . . the maximum deterrent punch”).

92. See Stuntz, *Uneasy Relationship*, supra note 17, at 6 (“Constitutionalizing procedure . . . may tend to encourage bad substantive law and underfunding . . . . It may be that . . . courts have been not too activist, but activist in the wrong places.”).

93. See, e.g., *id.* at 56, 59 (explaining that “criminal procedure . . . may give defense counsel more arguments to raise . . . but at the cost of also giving them less time and money to work with,” adding that “every pro-defense procedural rule raises the gain to the government from overcriminalization”).

94. See *id.* at 4

Counter-majoritarian 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.

95. See Stuntz, *The Pathological Politics of Criminal Law*, supra note 67, at 538

Anything that broadens criminal liability adds to the range of cases prosecutors can win. Likewise, broadening criminal liability makes it easier, across a range of cases, to induce a guilty plea—precisely because the prosecution is so likely to win if the case goes to trial. And more prosecutorial victories at lower cost advances not only prosecutors' welfare, but legislators' as well.

96. See Stuntz, *Uneasy Relationship*, supra note 17, at 70

If this constitutional regulation of defense counsel's performance had worked, it would have regulated funding indirectly. Sixth Amendment law would force counsel to perform to a given level, thereby forcing states to spend whatever it took to permit counsel to perform to that level. But the regime failed. No one has yet figured

imposed regulations on police and prosecutors that are largely insensitive to factual guilt.<sup>97</sup> Defense attorneys have an incentive to shun the resource-intensive investigation into factual guilt in favor of motions to exclude evidence.<sup>98</sup> Prosecutors have an incentive to overcharge to deter both suppression motions and the exercise of the increasingly expensive (in terms of both resources and the risk of losing the case) trial right.<sup>99</sup>

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out a good mechanism for defining a reasonable level of representation—more importantly, no one has figured out a way to define a reasonable level of attorney investigation. The difficulty is that some cases may call for almost no effort while others require a lot; separating the categories is at least expensive, and at most impossible. The law has responded by retreating to the model of the discrete attorney error. Insufficient investigation is basically left alone. The upshot is that *Gideon*, while not trivial, means vastly less than it seems. Defendants receive counsel, but counsel must bear caseloads that require them to start with a strong presumption against any significant investment in any given case.

97. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 228 (2011) [hereinafter STUNTZ, *COLLAPSE*] (“Warren and his colleagues continued and exacerbated a long-term trend: they proceduralized criminal litigation, siphoning the time of attorneys and judges away from the question of the defendant’s guilt or innocence and toward the process by which the defendant was arrested, tried, and convicted.”).

98. See Stuntz, *Pathological Politics*, *supra* note 67, at 570 n.242

The law of criminal procedure creates a range of claims defendants can raise at various points in the process, and those claims tend to be cheaper to investigate and litigate than claims bearing on defendants’ factual guilt. Legislatures, meanwhile, fund appointed defense counsel at levels that require an enormous amount of selectivity—counsel can contest only a very small fraction of the cases on their dockets, and can investigate only a small fraction of the claims their clients might have. This effect applies to the mass of criminal litigation, since roughly eighty percent of criminal defendants receive appointed counsel. The consequence is to steer criminal litigation away from the facts, and toward more cheaply raised constitutional claims. Those claims tend not to correlate with innocence; or if they do, the correlation may be perverse.

99. William J. Stuntz, *The Political Economy of Criminal Justice*, 119 HARV. L. REV. 780, 841 (2006) [hereinafter Stuntz, *Political Economy*]

Notice the incentives *Bordenkircher* creates. For prosecutors, the message is: threaten everything in your arsenal in order to get the plea bargain you want. For defendants, the message is simpler: take the deal, or else. (The incentive to plead applies to innocent and guilty defendants alike. Indeed, it may apply more strongly to innocents, who are more risk averse than their guilty counterparts.)

(footnote omitted).

The punitive turn, then, made the Warren Court's "revolution" a dud. Armed with sweeping statutory definitions of guilt and draconian mandatory minimum sentences, prosecutors became the dominant actors in the system. Plea bargaining went from the resolution of most cases in the shadow of the law to the resolution of almost all cases with very little practical legal constraint.<sup>100</sup> While Stuntz was sometimes equivocal, in places he argues that the Warren Court bears some responsibility for the punitive turn.<sup>101</sup> By arming defendants with guilt-insensitive procedural rights, the Court encouraged legislatures and prosecutors to exploit the constitutionally unregulated parts of the system: legislative power over budgets and statutory sentence ranges, and prosecutor power over charge selection.

Stuntz proposed various reforms aimed at recalibrating the relationship between the parts of the system regulated by constitutional law and the parts left to legislative control or executive discretion.<sup>102</sup> These included more vigorous judicial review of substantive criminal law under the due process clauses and the Eighth Amendment,<sup>103</sup> judicially-mandated appropriations for indigent defense,<sup>104</sup> and requiring prosecutors to prove that the charges against the accused were similar in severity to the charges brought against other defendants who engaged in similar conduct.<sup>105</sup>

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100. See generally William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

101. Compare STUNTZ, *COLLAPSE*, *supra* note 97, at 236 ("The law of criminal procedure raised the cost of policing and prosecution when that cost was already too high, and lowered it when the cost was already too low. The consequence was to make both the punishment drop of the 1960s and the punishment rise of the following three decades larger and more destructive."), *with id.* at 241 ("The Supreme Court was not responsible for all this."); *and id.* at 242 ("But if the Justices did not cause the backlash, they made a large contribution to it."). In *Collapse*, Stuntz focused more on the role of the Warren Court in prompting a tough-on-crime political backlash generally rather than with the rational-actor model elaborated in *Uneasy Relationship*, *supra* note 17. The two causal mechanisms are not mutually inconsistent.

102. See, e.g., Stuntz, *Uneasy Relationship*, *supra* note 17, at 66–72.

103. See *id.* at 66–67 (proposing greater judicial control over interpretation of law and sentencing).

104. See *id.* at 70–72 (arguing for funding requirements that would directly address "serious and common injustices").

105. Stuntz, *Political Economy*, *supra* note 99, at 840–41 ("For all sentences over some minimum level—say, three or six months—prosecutors should be

The liberal narrative's version of process theory assumed, or at any rate hoped, for a stable baseline of statutory law and prosecutorial discretion.<sup>106</sup> The agency-costs narrative points out just how naive (at least in retrospect) the assumption was.<sup>107</sup> We turn now to consider how far these prevailing narratives diverge.

#### *IV. Two Thought Experiments*

We can compare the liberal and agency-cost narratives by imagining that the key problems identified by each were somehow solved. I shall argue that these thought experiments suggest that *Gideon* failed because of both a lack of political will and systemic changes that made standing trial an irrational option for almost all defendants. Even if the Court compelled legislatures to provide adequate resources to the defense function, the effective performance of that function would do little good to most defendants, including innocent ones. Even if the system somehow curtailed prosecutorial discretion and legislative sentencing excesses, defendants would not receive fair trials, or make well-informed decisions to plead guilty, without the commitment of major new resources for the defense function.

##### *A. The First Experiment: Suppose the Supreme Court Compelled Allocation of Adequate Resources for Indigent Defense*

Commentators have offered several alternative reforms of the *Strickland* standard.<sup>108</sup> I leave aside the issue of which of these alternatives offers the most legitimate and practical route to improving indigent defense. The question I pose is, *assuming* that ineffective-assistance doctrine somehow compelled the

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required to show that sentences at least as severe have been imposed some minimum number of times for the same crime on similar facts. Those limits would make sentences less harsh and disparities smaller.”); *id.* at 841 (“Best of all, such limits would also reduce prosecutors’ power in plea negotiations.”).

106. See *supra* Part III.A.

107. See *supra* notes 88–93 and accompanying text for an introduction to the agency-costs narrative.

108. See *supra* notes 86–87 and accompanying text.

allocation of major new resources to indigent defense, how much difference would it make in the processing of typical cases?

We can base an answer on more than pure speculation. Indigent defense in *federal* prosecutions is generally regarded as in much better shape than in most of the states. In the federal practice, most judicial districts now have a public defender office, whether a creature of the Justice Department (“Federal Defender Services”) or as an independent nonprofit legal services corporation (“community defender organizations”).<sup>109</sup> While almost all districts now have a public defender office, conflicts of interest among defendants require representation of a significant number of defendants (roughly 40%) by private lawyers taking individual cases on a fee-for-service basis (“panel attorneys”).<sup>110</sup>

Inga Parsons, who spent five years in the Federal Defender Division of the New York Legal Aid Society, saw sharp contrasts between that office and the Society’s Criminal Defense Division, whose lawyers represented defendants in state court:

My friends who were lawyers with the same Legal Aid Society,  
but defending state cases in the Criminal Defense Division

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109. See JON WOOL, K. BABE HOWELL & LISA YEDID, IMPROVING PUBLIC DEFENSE SYSTEMS: GOOD PRACTICES FOR FEDERAL PANEL ATTORNEY PROGRAMS 2 n.4 (2003)

Federal public defender organizations are offices of federal employees of the judicial branch. Each office is headed by a federal public defender who is appointed by the court of appeals for the circuit in which the office is located and is subject to removal by the court for incompetency, misconduct in office or neglect of duty. 18 U.S.C. § 3006A(g)(2)(A). Community defender organizations are nonprofit legal service providers established and administered by groups authorized by the district CJA plan. 18 U.S.C. § 3006A(g)(2)(B). Unlike a federal public defender, a community defender operates under a board of directors and is not employed by the federal judiciary. A community defender may be funded by grants from the Judicial Conference or through submission of vouchers on a case-by-case basis. 18 U.S.C. § 3006A(g)(2)(B)(i) and (ii).

110. See *The Defender Services Program*, U.S. COURTS, <http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel.aspx> (last visited Apr. 2, 2013)

In those districts with a defender organization, panel attorneys are typically assigned between 30 percent and 40 percent of the CJA cases, generally those where a conflict of interest or some other factor precludes federal defender representation. Nationwide, federal defenders receive approximately 60 percent of CJA appointments, and the remaining 40 percent are assigned to the CJA panel.

(on file with the Washington and Lee Law Review).

(hereinafter “CDD”), would constantly complain about the assembly line mentality of state courts, where lawyers are expected to process, perfunctorily, outrageous caseloads—sometimes carrying 300 misdemeanors at a time, or the juggling of 100 felonies with 200 misdemeanors. These cases are stacked in a bin in the courtroom, needing immediate attention, with little time to conduct investigations or legal analysis—much less to interview the client.

During these conversations I would think how lucky I was to be in the federal system where the culture of lawyering was based on traditional notions of adversarial advocacy and manageable caseloads. I was supported by an energetic and competent support staff, generous training and computer services budget, access to talented and experienced trial lawyers in-house, and pleasant and commodious office facilities. Moreover, my salary was significantly higher than that of staff attorneys at the CDD, and essentially on par with my adversaries in the United States Attorney’s Office. In sum, I felt that I was able to provide individualized adversarial advocacy to each and every one of my clients with few cost constraints.<sup>111</sup>

The reputation of the federal defender offices is generally high.<sup>112</sup>

There is some evidence that the panel attorneys are not as well-regarded. The Vera Institute’s researchers found that, within the federal criminal practice community, federal defenders had a better reputation than panel attorneys.<sup>113</sup> A 2007 study for the National Bureau of Economic Research (NBER) found that panel attorneys were not as effective as federal defenders.<sup>114</sup>

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111. Inga L. Parsons, “*Making it a Federal Case*”: *A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837, 840 (footnote omitted).

112. See, e.g., WOOL ET AL., *supra* note 109, at 15 (“Without exception, the people we interviewed had high opinions of community defenders and federal public defenders.” (footnote omitted)).

113. See *id.* (“Everyone we spoke with said that attorneys in defender offices provide at least slightly higher quality representation, on average, than do panel attorneys.” (footnote omitted)).

114. Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* 28 (Nat’l Bureau of Econ. Research, Working Paper No. 13187, 2007), available at <http://www.nber.org/papers/w13187> (“It appears that public defenders outperform CJA panel attorneys in all outcomes that were considered.”). For methodological objections, see *Study Says Public Defenders Do Better than CJA Attorneys*, TALKLEFT (July 14, 2007, 11:15 AM), <http://www.talkleft.com/story/2007/7/14/2111/18099> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

The NBER study attributed all the difference in outcomes to “attorney experience, wages, law school quality and average caseload”<sup>115</sup>—all at least partly functions of the compensation paid to the panel attorneys. Since the NBER study, compensation levels for panel attorneys have increased:

Today, panel attorneys are paid an hourly rate of \$125 per hour in non-capital cases, and, in capital cases, a maximum rate of \$178 per hour. These rates were implemented January 1, 2010, for work performed on or after that date. The rates include both attorney compensation and office overhead. In addition, there are case maximums that limit total panel attorney compensation for categories of representation (for example, \$9,700 for felonies, \$2,800 for misdemeanors, and \$6,900 for appeals). These maximums may be exceeded when higher amounts are recommended by the district judge as necessary to provide fair compensation and the chief judge of the circuit approves.<sup>116</sup>

The arithmetic works out to seventy-seven fully compensable hours for felony cases. Compared to the rates charged by elite private firms, this is low indeed.<sup>117</sup> Compared to the rates paid in many states, it is quite generous.<sup>118</sup>

115. Iyengar, *supra* note 114, at 3.

116. *The Defender Services Program*, *supra* note 110.

117. See, e.g., Allen Abrahamson, *Simpson Legal Fees Could Run into Millions*, L.A. TIMES, Jul. 9, 1994, at A1 (stating that top criminal defense attorneys charge between \$250 and \$400 an hour).

118. See Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 912–13 (2010)

States vary widely with regard to funding levels, funding structures, and stability for indigent defense. Hourly rates for appointed counsel vary widely. For example, the rate is \$40 per hour in Oregon, Kentucky, and Wisconsin; \$50 an hour in Vermont and Tennessee; \$60 an hour in South Carolina, Ohio, Oklahoma, New Hampshire, and New Jersey; \$90 an hour in Hawaii, Virginia, and California (for some felonies in certain localities); and \$100 an hour in Nevada and Massachusetts (for homicide cases).

Caps on total fees vary greatly as well. For appointed counsel, Virginia limits fees to \$600 per case for less serious felonies and \$1,235 per case for more serious felonies (although courts can grant increases up to \$2,085). West Virginia has no maximum fee on life-incarceration felonies and a \$3,000 limit on all others. Vermont’s limits are \$25,000 for life felonies, \$5,000 for other major felonies, and \$2,000 for lesser ones. Nevada’s fees are \$20,000 for life-without-parole felonies and \$2,500 for all others. Mississippi’s fees are capped

In a recent survey of judges, Richard Posner and Albert Yoon found that: “Federal judges generally rate prosecutors as comparable in quality to public defenders and significantly better than court-appointed counsel or retained counsel. State judges agree with respect to the high quality of prosecutors but hold retained counsel in higher regard than public defenders or court-appointed counsel.”<sup>119</sup> I am not suggesting the federal indigent defense is perfect. It, does, however, appear to be dramatically better than its state counterparts, and this difference appears to be largely a function of better financial support. Has the relative strength of the defense function really benefitted federal defendants?

In the federal system, 97% of convictions result from guilty pleas, an even higher rate than the astounding 94% that prevails in the state systems.<sup>120</sup> In federal cases, the average sentence is 46 months and the median sentence is 24 months.<sup>121</sup> The gross figures for the states are somewhat lower, but the great majority of murder and rape prosecutions occur in the state systems. Despite “three strikes laws,” the “sentences available in a federal prosecution are generally higher than those available in state court—often ten or even twenty times higher.”<sup>122</sup>

Professor Barkow puts it well:

In the 95% of cases that are not tried before a federal judge or jury, there are currently no effective legal checks in place to police the manner in which prosecutors exercise their discretion to bring charges, to negotiate pleas, or to set their office policies. In a national government whose hallmark is

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at \$1,000, plus overhead reimbursement at \$25 an hour. Several states have no per-case fee cap.

(footnotes omitted).

119. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 320 (2011).

120. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (stating that ninety-seven percent of federal convictions and ninety-four percent of state convictions are obtained through guilty pleas).

121. U.S. SENTENCING COMM’N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.13 (2009).

122. Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 998 (1995).

supposed to be the separation of powers, federal prosecutors are a glaring and dangerous exception.<sup>123</sup>

This is strong language, but, in my view, justifiably strong.

Barkow sees the incentives and resources available to the defense as precluding an effective check.<sup>124</sup> As we have seen, however, the defense function in federal cases is as strong as we have any cause to expect from a public system. The prosecutor's coercive discretion makes a robust defense against the best interests of the client.<sup>125</sup> Indeed, Professor Stuntz, for one, saw the ability of well-heeled white-collar defendants to hire first-rate lawyers as contributing to the pathologies attending the punitive turn. "Federal law and practice is where overcriminalization and oversentencing seem most prevalent—and, not coincidentally, that is also where defendants with resources are concentrated (which makes overcriminalization especially useful from the government's perspective)."<sup>126</sup>

As Barkow notes, Congress "routinely passes laws with punishments greater than the facts of the offense would demand to allow prosecutors to use the excessive punishments as bargaining chips and to obtain what prosecutors and Congress would view as the more appropriate sentence via a plea instead of a trial."<sup>127</sup> If the defense function became more robust, prosecutors could respond by increasing the trial penalty. If existing legislation does not provide enough prosecutorial leverage (a rather improbable hypothesis), Congress could easily supply it.

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123. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) (footnotes omitted).

124. See *id.* at 881–82 (finding that prosecutors have significant financial leverage over defendants and that defendants and their lawyers often have "divergent interests when it comes to bargaining with prosecutors").

125. Ron Wright has pointed out that guilty pleas have disproportionately displaced acquittals relative to trial convictions and dismissals. See Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 104 (2005) ("[T]he acquittal slice of the pie in the federal system has been shrinking more quickly than the slices for dismissals or trial convictions. Acquittals now occupy a smaller portion of the non-plea outcomes than at any time since the repeal of Prohibition."). Even defendants with good chances for acquittal are pleading guilty.

126. Stuntz, *Uneasy Relationship*, *supra* note 17, at 58.

127. See Barkow, *supra* note 123, at 880 (footnote omitted).

Clearly, better representation can benefit individual clients. In the prosecutor-dominated system of overcriminalization and plenary discretion, however, good representation very often means cooperating with the prosecution of suspected confederates. From the standpoint of defendants as a class, the benefits of flipping first (or holding out longest, an alternative strategy) are fixed; it is a zero-sum game.

So let us indulge the hypothesis that, whether by judicial rulings or legislative intervention, state systems of indigent defense were brought up at least to the federal standard. We would expect state prosecutors and state legislators to act like federal prosecutors and Congress. Better support for indigent defense would increase the risk of acquittal at trial, increasing the incentive of prosecutors to secure a plea. Since constitutional law leaves practically no check on charging decisions, prosecutors could respond to better investigations by defense counsel by increasing the gap between the consequences of plea and trial. Since constitutional law leaves practically no check on sentence severity, if state law did not permit prosecutors to ratchet up the trial penalty, state legislatures could increase the bargaining power of prosecutors. From the perspective of political economy, the liberal story has no happy ending.

*B. Suppose We Curtailed Sentencing Severity and Prosecutorial Discretion*

Now let us explore my second thought experiment. Suppose that prosecutorial power to coerce guilty pleas by threatening catastrophic trial consequences was curtailed. James Vorenberg offered thoughtful proposals more than thirty years ago,<sup>128</sup> and the recent literature abounds with plausible ideas.<sup>129</sup>

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128. See James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1560–72 (1981) (proposing, among other things, fixed trial penalty, prosecutorial guidelines, and judicial review of plea bargains).

129. See, e.g., Barkow, *supra* note 123, at 874

[Prosecutors] who make investigative and advocacy decisions should be separated from those who make adjudicative decisions, the latter of which should be defined to include some of the most important prosecutorial decisions today, including charging, the acceptance of pleas, and the decision whether or not to file substantial assistance

The proposals of Professor Stuntz offer a good focus for the experiment. Stuntz proposed (1) less severe sentencing legislation;<sup>130</sup> (2) one-way judicial sentencing discretion to impose sentences below guideline recommendations;<sup>131</sup> (3) disparity review at sentencing imposing a burden on prosecutors “to show that sentences at least as severe have been imposed some minimum number of times for the same crime in the same state on similar facts”;<sup>132</sup> (4) judicial review of plea bargains such as occurs in the military justice system where courts “review the factual basis of guilty pleas with great care, and with little deference to the pleas themselves”;<sup>133</sup> and (5) that courts read vague normative standards into the meaning of the substantive criminal law.<sup>134</sup>

Now, Stuntz also proposed “ratcheting up” review of ineffective assistance claims in jurisdictions that do not comply with funding levels recommended by “expert commissions.”<sup>135</sup> Standing alone, this proposal is no more than another clever doctrinal move designed to advance the liberal narrative’s concern for effective indigent defense. Its inclusion in Stuntz’s reform package is a good indicator of how my thought experiment—in which prosecutorial power is regulated but the defense function is *not* improved—would likely turn out.

More robust guilty-plea procedures would impose new demands on defense time as well. The burden might be modest in individual cases, but pleas would remain more common by far

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motions.

Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 964 (2009) (“Prosecutors’ offices should promulgate and publish more procedural guidelines to structure their internal review of cases.”); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA. L. REV. 393, 460–64 (2001) (proposing “Public Information Departments” and “Prosecution Review Boards”); Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1013 (2005) (proposing “self-regulation by prosecutors prompted by [sentencing] commissions and loosely enforced by judges”).

130. STUNTZ, COLLAPSE, *supra* note 97, at 295.

131. *Id.*

132. *Id.* at 297.

133. *Id.* at 302–03 (footnote omitted).

134. *Id.* at 303–04.

135. *Id.* at 299.

than trials. If the new system required a 25% increase in defense time devoted to guilty pleas, and pleas accounted for 80% of dispositions, the defense system would need a 20% increase in resources simply to process the guilty pleas.

Curtailing the trial penalty would remove the biggest incentive discouraging defendants from standing trial. Converting guilty pleas into mini-trials would reduce the cost to the prosecution of trial relative to plea. More trials would result. If the guilty plea rate went down from 95% to 80%, the number of trials would quadruple. The same indigent defense system that now struggles simply to process guilty pleas would be called upon to conduct these trials.

Unprepared lawyers would beg for continuances that would lead to massive trial delays if granted and to seat-of-the-pants defense at trial if denied. Innocent defendants would spend more time in pretrial detention and have a greater risk of conviction at trial. Ineffective assistance would become more common. Quadrupling the trial rate without massive increases in defense resources is close to unthinkable.

The first experiment suggests that improving indigent defense without reining in sentence severity and prosecutorial discretion would do little good. It might even do harm if prosecutors respond to the heightened risks of losing trials by increasing the trial penalty. The second experiment suggests that reigning in sentences and discretion without dramatic improvements in the defense function would likewise do little good. Trials would be more common but poorly conducted by overwhelmed defenders. If even a modest trial penalty survived in the new regime, more than a few defendants would suffer that penalty after trials that would have ended in acquittal given well-prepared defense counsel. In short, the compelling arguments for reinforcing the defense function *in the current system* would become *far stronger* in a system that relied more heavily on trials.

### V. Three Reform Agendas

The agency-costs account establishes a central premise of efforts to reform our criminal justice system. We must think of it *as a system* in which court rulings, statutory changes, funding

commitments, and discretionary enforcement decisions interact with one another.

For liberals skeptical of constructive legislative intervention, that calls for charting an interlocking set of constitutional rulings designed to restore an adversary system—a system in which each defendant has a genuine advocate and a genuine trial option. For conservatives seeking a similar result through legislative channels, the logical way to seek systemic reform through the political process is to support the call for a new National Commission on Crime and Justice. For pragmatists trying to mitigate the worst features of the present system on the assumption that the political will to do more is a distant prospect, the rather depressing course is also clear. Pragmatists should work to rationalize the defense function by looking for ways to provide it at less cost and to ration what is available for maximum benefit.

#### *A. A Liberal Agenda: Planning for a Second Revolution*

Positive political theorists<sup>136</sup> and progressive constitutionalists<sup>137</sup> doubt the chances for genuinely constructive counter-majoritarian judicial review. Yet the widely held view that the Court's role in the criminal process is distinct from its more general constitutional docket has considerable factual foundations. For the most part, the early critics of the Warren Court gave *Mapp*, *Gideon*, and *Miranda* a free pass.<sup>138</sup> Those decisions have not been overruled, although they have been qualified by two generations of justices more conservative than their authors. In *Crawford v. Washington*<sup>139</sup> and *Apprendi v.*

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136. See generally Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as National Policymaker*, 6 J. PUB. L. 279 (1957) (arguing generally that the Court protects minority rights after a national consensus emerges on behalf of those rights).

137. See generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

138. See, e.g., ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 49 (1970) (describing *Miranda* as “a radical, if justifiable, departure from prior practice”).

139. *Crawford v. Washington*, 541 U.S. 36 (2004).

*New Jersey*,<sup>140</sup> the current Court has carried forward an active role in regulating criminal procedure.<sup>141</sup>

The current structure of the constitutional jurisprudence, in which the Court announces substantial Fourth, Fifth, and Sixth Amendment limits on police, prosecutors, and courts, then leaves those limits to be subverted by constitutionally unregulated plea bargaining against the background of constitutionally unregulated authorized sentences, was not inevitable. It was a near-run thing, more near-run than the agency-costs account invites us to suppose.

The key plea bargaining case, *Bordenkircher v. Hayes*,<sup>142</sup> was decided by the margin of five to four.<sup>143</sup> All of the Eighth Amendment cases upholding recidivism enhancements were five-to-four decisions.<sup>144</sup> In *Grady v. Corbin*,<sup>145</sup> the Court majority adopted (temporarily!) a transactional test of “same offense” in the Double Jeopardy Clause, a doctrine that could have provided the basis for a constitutional merger doctrine that could have prevented charge stacking.<sup>146</sup>

With robust judicial scrutiny of trial penalties, a constitutional merger rule, and a prohibition on sentences longer than twenty-five years for crimes not involving immediate threat to human life or sexual assault, prosecutorial power would have

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140. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

141. *See Crawford*, 541 U.S. at 68–69 (holding that an admission of testimonial hearsay from an unavailable declarant violates the confrontation clause absent an opportunity for the defendant to cross-examine the declarant); *Apprendi*, 530 U.S. at 490 (holding that a mandatory sentencing enhancement triggered by a specific factual finding by the sentencing judge violates the Sixth Amendment right to a jury trial).

142. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

143. *See id.* at 365 (Blackmun, J., joined by Justices Brennan and Marshall, dissenting); *id.* at 368 (Powell, J., dissenting).

144. *See Ewing v. California*, 538 U.S. 11, 32 (2003) (Stevens, J., joined by Justices Breyer, Ginsburg and Souter, dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 1009 (1991) (White, J., joined by Justices Blackmun and Stevens, dissenting); *id.* at 1027 (Marshall, J., dissenting); *Rummel v. Estelle*, 445 U.S. 263, 285 (1980) (Powell, J., joined by Justices Brennan, Marshall and Stevens, dissenting). Justice Stewart joined the majority in *Rummel* only with expressed distaste for the statute. *See id.* at 285 (Stewart, J., concurring).

145. *Grady v. Corbin*, 495 U.S. 508 (1990), *overruled by United States v. Dixon*, 509 U.S. 688 (1993).

146. *Id.* at 516.

remained considerable but not plenary. The liberal narrative holds that the Supreme Court came close to adopting these doctrines, but fell short, more from a policy preference for the prosecution than from a shortage of plausible doctrinal resources.

The Court's recent Sixth Amendment decisions in *Padilla*,<sup>147</sup> *Frye*,<sup>148</sup> and *Cooper*<sup>149</sup> break relatively modest doctrinal ground.<sup>150</sup> They may portend something far more momentous—a majority willing to try to resuscitate the adversary system. Justice Scalia, for one, seems to think that it would be “foolish to think that ‘constitutional’ rules governing counsel’s behavior will not be followed by rules governing the prosecution’s behavior in the plea bargaining process.”<sup>151</sup>

The first shot in a new revolution would be a ruling that effective assistance of counsel must be established affirmatively at the plea colloquy.<sup>152</sup> If the trial court refuses to enter a plea absent a record of factual investigation and sound legal advice by counsel, the present house of cards would collapse.

That turn actually would call forth major new resources for indigent defense. As we have seen, however, a more vigorous defense can do little but advise surrender in the face of draconian potential penalties and prosecutorial power to impose those penalties for the crime of standing trial. What liberal

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147. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

148. *Missouri v. Frye*, 132 S.Ct. 1789 (2012).

149. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

150. See *Frye*, 132 S. Ct. at 1408 (holding that failure to communicate plea offer to client was ineffective assistance); *Lafler*, 132 S. Ct. at 1384 (holding that erroneous legal advice inducing defendant to reject a plea offer was ineffective assistance); *Padilla*, 130 S. Ct. at 1482 (holding that a failure to advise a client that a guilty plea might result in deportation was ineffective assistance of counsel). In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court held that erroneous advice about the potential sentence could constitute ineffective assistance entitling the defendant to withdraw a plea. *Id.* at 56–57. *Padilla*, *Frye*, and *Cooper* involved attacks on trial convictions by defendants who were led to reject a plea offer by bad advice. Thus far it is generally held that *Frye* and *Cooper* did not make “new law” for purposes of federal habeas. See, e.g., *Hare v. United States*, 688 F.3d 878, 879 (7th Cir. 2012). Since *Cooper* was a state case reversed on habeas by the Court, there seems to be little room for arguing otherwise.

151. *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting).

152. On this possibility, see Donald A. Dripps, *Plea Bargaining and the Supreme Court: The End of the Beginning?*, 25 FED. SENT’G REP. 141, 142 (2012).

scholarship needs to do is less to devise fresh doctrinal avenues to a stronger defense function than to explore whether there are legitimate doctrinal avenues for reconsidering *Harmelin*<sup>153</sup> and *Bordenkircher*.

If a majority of the justices wants to reinvigorate the defense function, the doctrinal tools are readily at hand. The judicial will may well be lacking. If, however, we do witness a second criminal procedure revolution, it will fail, as did the first, unless the Court perceives the systemic feedback loops and can find legitimate doctrinal ways to channel them.

### *B. A Conservative Agenda*

Liberal process theory turns to judicial review precisely because when legislatures have intervened in the criminal justice process, they have all but invariably acted to criminalize new conduct and increase existing penalties, without regulating the discretion of police and prosecutors. Conservative hostility to judicial intervention, however, does not necessarily imply complacency with mass incarceration and prosecutorial dominance. An important strand of contemporary conservative thought indeed sees the modern criminal justice system as big government with its usual defects.

Almost fifteen years ago, John Dilulio decided that “two million prisoners are enough.”<sup>154</sup> Chief Justice Rehnquist lamented the indiscriminate federalization of criminal law.<sup>155</sup> More recently, Edwin Meese III has led a “Right on Crime” movement aimed at responsible reductions in incarceration, a movement supported by several leading conservatives.<sup>156</sup> The

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153. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

154. John Dilulio, *Two Million Prisoners Are Enough*, WALL ST. J., Mar. 12, 1999, at A14.

155. See William H. Rehnquist, Remarks on the Federalization of Criminal Law, Address Before the American Law Institute (May 11, 1998), in 11 FED. SENTENCING REP. 132 (1998) (stating that the number of cases brought into federal court through the federalization of state crime is straining judicial resources).

156. Charles Savage, *Trend to Lighten Harsh Sentences Catches on in Conservative States*, N.Y. TIMES (Aug. 12, 2011), [http://www.nytimes.com/2011/08/13/us/13penal.html?\\_r=18](http://www.nytimes.com/2011/08/13/us/13penal.html?_r=18) (last visited Apr. 2, 2013) (noting that the “Right on Crime” movement supported by Edwin Meese III, Newt Gingrich, Grover

arbitrary power of contemporary prosecutors sits uncomfortably with conservative principles.<sup>157</sup>

For principled conservatives dismayed by the excesses of American criminal justice but loathe to embrace judicial intervention, the responsible course is to engage the political branches. Professor Broughton puts it well:

But there are natural political consequences—or, more accurately, obligations—if conservatives adhere to this critique. If conservatives insist on a judiciary that is as deferential to political actors as the one I have described, thereby leaving the Eighth Amendment and judicial review as ineffectual constraints on criminal punishment, then they must be prepared to advocate political action that will chain the American criminal justice Leviathan.<sup>158</sup>

Any such political campaign confronts at least two major challenges.

The first is the continued perception of professional politicians that anything smacking of “soft on crime” is political suicide.<sup>159</sup> The second is the integrated nature of the justice system’s component parts—federal, state, and local, as well as substantive criminal law, funding decisions, prosecutorial discretion, and constitutional court decisions. Incremental reform risks unintended consequences; sweeping proposals have even less of a chance of political success.

The logical course for those who seek reform through legislation is to seek from the legislature a commitment to take seriously a set of recommendations from a broadly-based

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Norquist, Asa Hutchinson, and William Bennett) (on file with the Washington and Lee Law Review).

157. Cf. BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 57 (1960) (“The enemy of freedom is unrestrained power, and the champions of freedom will fight against the concentration of power wherever they find it.”). Goldwater’s specific context was monopoly power, but his principle is general and it might fairly be added that the modern prosecutor *is* a monopolist.

158. J. Richard Broughton, *Some Reflections on Conservative Politics and the Limits of the Criminal Sanction*, 4 CHARLESTON L. REV. 537, 558 (2010).

159. See, e.g., TONRY, *supra* note 9, at 4

Americans are having second thoughts about the wisdom of current antidrug and anticrime policies, but elected politicians most places are afraid to change them. To do so runs risks of being tarred as soft on crime and, until significant numbers of politicians take that risk and get reelected, most will not take the chance.

comprehensive study of the criminal justice system. Former Senator Jim Webb proposed The National Criminal Justice Commission Act, which has yet to become law but in prior incarnations has passed the House and been reported out of the Senate Judiciary Committee.<sup>160</sup> The bill has the support of the ABA, the Innocence Movement, and the International Association of Chiefs of Police.<sup>161</sup>

Liberals have some cause for skepticism about the commission approach. The last national commission, the 1967 President's Commission on Law Enforcement and Administration of Justice, produced a superb report.<sup>162</sup> The report triggered congressional legislation subsidizing local police, repudiating *Miranda*, and authorizing wiretapping.<sup>163</sup>

Yet those who seek reform should not permit their fears to frustrate their hopes. Some 2012 election results hint at a new public mood about crime and punishment. Voters in Washington State and Colorado passed ballot measures legalizing marijuana possession,<sup>164</sup> and a recent poll shows a slim national majority in favor of withholding federal enforcement in states that have legalized.<sup>165</sup> California voters rolled back the notorious “three

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160. See National Criminal Justice Commission Act of 2010, S. 714, 111th Cong. (2010).

161. See *id.*

162. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967).

163. See Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3711 (1968). If the title of the statute is thought insufficiently suggestive, the relevant legislative history frankly declares: “The major purpose of Title III is to combat organized crime.” S. REP. NO. 90-1097, at 2153–58 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157. The unofficial history of Title III reveals unmistakably the law-enforcement orientation of the legislation. See Richard Harris, *Annals of Legislation—the Turning Point*, NEW YORKER, Dec. 14, 1968, at 68, 164–76 (discussing legislators' sense of public demand for tough-on-crime policies).

164. See, e.g., Aaron Smith, *Marijuana Legalization Passes Colorado*, *Washington*, CNNMONEY, <http://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html> (last visited Apr. 2, 2013) (“Voters in Washington and Colorado passed ballot initiatives Tuesday to legalize marijuana for recreational use.”) (on file with the Washington and Lee Law Review).

165. Micah Cohen, *Marijuana Legalization and States Rights*, N.Y. TIMES (Dec. 9, 2012), <http://fivethirtyeight.blogs.nytimes.com/2012/12/08/marijuana-legalization-and-states-rights/> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

strikes” law by requiring a conviction for a violent offense for the third “strike,” and made the change effective retroactively.<sup>166</sup>

Liberals have good reasons for skepticism about the political prospects, but ought to support any legislative movement to ratchet down penalties and regulate prosecutorial discretion. Likewise conservatives should not be too rigid in opposing reform from the courts. After all, the Court has given legislatures carte blanche for thirty years, and the results have been lamentable. And it is possible that some strong signals from the Court might be the catalyst that, like a commission, both prompts reforms and gives reformers some political protection.

Constitutional history shows that the Court’s successful interventions are those that either prompt or parallel prevailing political opinion. *Brown v. Board of Education*<sup>167</sup> reflected a national consensus against Southern segregation and led to actual desegregation only after the Civil Rights Act of 1964.<sup>168</sup> The Court recognized equal protection rights for women only after Congress proposed the Equal Rights Amendment.<sup>169</sup> It

166. See Debra Cassens Weiss, *A Third of Three Strikes Inmates in California Could Benefit from Vote to Ease Law*, A.B.A. J. (Nov. 8, 2012), [http://www.abajournal.com/news/article/a\\_third\\_of\\_three-strikes\\_in\\_california\\_could\\_benefit\\_by\\_vote\\_to\\_eas/](http://www.abajournal.com/news/article/a_third_of_three-strikes_inmates_in_california_could_benefit_by_vote_to_eas/) (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

167. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

168. See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2392 (2002)

Little desegregation occurred between 1955 and 1966, in large part because the Supreme Court was uncertain as to how enthusiastically district judges would follow its lead and whether the Eisenhower Administration would back it up. Actual integration occurred all over the South between 1966 and 1971, in large part because the Johnson Administration and the Warren Court both pressed school districts to take affirmative action to integrate (and districts risked losing needed federal money if they did not). The Court’s sex discrimination cases were easier for the nation to swallow because they were congruent with legislative reforms in states all over the country.

169. See, e.g., Reva B. Siegal, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1324 (2006)

In the 1970s, a mobilized feminist movement persuaded Congress to send an Equal Rights Amendment to the states for ratification. With energetic countermobilization, the ERA was defeated. In this same period, the Court began to interpret the Fourteenth Amendment in ways that were responsive to the amendment’s proponents—so much

overruled *Bowers v. Hardwick*<sup>170</sup> after the great majority of the states, Georgia included, had abandoned their sodomy statutes, either by legislation or judicial decision.<sup>171</sup> *Lawrence v. Texas*<sup>172</sup> was followed within a decade by repeal of Don't Ask Don't Tell.<sup>173</sup> This past November voters in three more states authorized gay marriage.<sup>174</sup>

So liberals and conservatives should see appeals to the courts and a new commission as complementary. Hope from legislatures might prompt action by the courts, and action by the courts might prompt action from legislatures.

Signs of a fresh judicial assault on the status quo might reinforce the case for a commission, and also reinforce the political defense of elected leaders who act to approve recommended reforms. A commission might stimulate a political movement to roll back mass incarceration. If it turns out that even a commission is beyond the range of current political vision,

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so that scholars have begun to refer to the resulting body of equal protection case law as a “de facto ERA.”

(footnote omitted).

170. *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

171. *See Lawrence*, 539 U.S. at 573

The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.

*See also* Powell v. State, 510 S.E.2d 18, 26 (Ga. 1998) (holding sodomy statute contrary to state constitution's right of privacy); Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1543 (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.”).

172. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

173. *See* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

174. *See, e.g.,* Lila Shapiro, *Gay Marriage Victory in Maine, Maryland; Minnesota Votes Down ‘Traditional’ Amendment*, HUFFINGTON POST (Nov. 7, 2012), [http://www.huffingtonpost.com/2012/11/07/gay-marriage-victory\\_n\\_2085900.html](http://www.huffingtonpost.com/2012/11/07/gay-marriage-victory_n_2085900.html) (last visited Apr. 2, 2013) (“On Election Day Tuesday, voters in Maine, Maryland and Washington chose to legalize gay marriage.”) (on file with the Washington and Lee Law Review).

the liberals' case for judicial review would be correspondingly strengthened. If instead substantial reforms passed into law, the Justices could weigh the results when they consider, for example, whether to modify *Strickland* or *Bordenkircher*.

### C. A Pragmatic Agenda

At present indigent defense is constitutionally required, but only in anemic form. Legislators have consistently failed to provide the levels of funding that would be required for even minimally adequate representation. For the immediate future there is little prospect of dramatic changes from either the Judicial or the Legislative Branch. And as we have seen, standing alone, a more vigorous defense function could do little to resist legislative excess or executive caprice.

This unhappy state of affairs calls for rational allocation of the distinctly limited resources. Darryl Brown is right that if we have never known anything but underfunding of indigent defense, "rationing occurs whether or not it is thoughtful and deliberate."<sup>175</sup> He would have defenders concentrate on pressing plausible claims of factual innocence and resisting charges carrying the heaviest penalties.<sup>176</sup> I have recently suggested some alternative approaches: eliminating the right to appointed counsel in felony cases that do not carry sentences of incarceration, giving appellate defenders discretion to decline unpromising appeals, and permitting defense representation by lay advocates and trained specialists rather than generalist lawyers.<sup>177</sup> The more seriously these proposals are taken, the more likely they are to shame judges and legislators into taking some constructive steps. If it turns out that shame is not enough—as it hitherto has proved to be<sup>178</sup>—then indeed rationing would seem to be the logical course.

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175. Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 834 (2004).

176. *Id.* at 818 ("[W]e should distribute limited defense resources (1) toward strategies more likely to vindicate factual innocence, and (2) toward charges and clients who have the most at stake or are likely to gain the greatest life benefit." (footnote omitted)).

177. Dripps, *Up from Gideon*, *supra* note 73.

178. "Shameful" is the term widely and justly applied. For example, a term

*VI. Conclusion*

*Gideon* failed both because legislators undervalue the rights of the accused and because prosecutors and legislators exploited their unconstrained power over charge selection and sentence severity. Liberals see a case for constitutional constraints on charge selection and sentence severity. Conservatives see a case for reaching the same ends through other channels.

A stronger defense function is essential to comprehensive reform, but, standing alone, would do little to restore a truly adversarial system. Liberals should applaud political efforts to secure comprehensive criminal justice reform from the political branches. If those efforts come to naught, as they so often have, conservatives may need to reconsider whether addressing “the disaster that is contemporary American criminal justice”<sup>179</sup> is really less important than an abstract commitment against judicial activism.

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search on December 9, 2012 for “indigent defense” /p shameful in the Westlaw Law Reviews and Journals database produced thirteen hits.

179. STUNTZ, COLLAPSE, *supra* note 97, at 307.