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State and Federal Constitutional Right to Counsel in an Age of Case Specific Inadequacies

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STATE AND FEDERAL CONSTITUTIONAL RIGHT TO COUNSEL IN AN AGE OF CASE SPECIFIC AND SYSTEMIC INADEQUACIES

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I. INTRODUCTION

As every sentient judge, academic, criminal defense lawyer, prosecutor, and bar association official is painfully aware, provision of competent counsel to indigent defendants in our burgeoning criminal justice system presents a troublesome, stubborn, and recurring problem. For indigent clients themselves, the lack of competent counsel is not simply a problem but potentially a life altering event. There are periodic grand judicial pronouncements of the importance of providing counsel to indigent defendants at critical stages of a criminal prosecution. Just about all lawyers and judges, as bar association meetings across the country, subscribe to this general notion. Yet, all too often, all across the country, states have not consistently provided effective assistance of counsel at all stages of the criminal proceedings and, frankly, have low prospects of doing so in the future without a future paradigm shift of sorts.

So, the literature abounds with sorrowful declarations of the failure of the promise of *Gideon*. In this Article, I examine the question of whether state courts, under their state constitutions, may be better suited than federal courts to provide effective remedial measures designed to ensure that criminal defendants receive effective assistance of counsel in criminal prosecutions.

While intended to be a broad overview of the potential impact of state constitutional law on right to counsel issues, I make no claim of comprehensively covering cases or all aspects of the right to counsel. Further, I readily embrace and hopefully build upon the work of other scholars, judges, and practitioners for whom I have the highest respect and to whom we all are deeply indebted. As will be apparent, this is primarily a work of synthesis, not creation. What I do hope to show, however, from the viewpoint of a retired state supreme court justice with fifteen years of judicial experience, is that state constitutional law has, in the past, played a significant role in the development of the right to counsel and has the potential to do so in in the future.

In Part II, the article examines the theoretical state constitutional environment for right to counsel claims and contrast it with the structural environment provided by the federal constitution. By examining structural features, I hope to demonstrate that the environment for litigation of state constitutional right to counsel issues in state court is simply not the same, or at least should not be the same, as that in federal court. As noted by scholars Robert

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F. Williams and Lawrence Friedman, state constitutions "are not miniature versions of the federal Constitution, nor are they clones of it."[1]

In Part III, the inquiry narrows to an examination of specific provisions of state constitutions that support the development of independent state law related to the right to counsel in criminal cases. In this part, I seek to demonstrate that, in addition to structure, significant textual differences between state and federal constitutions establish a firm foundation for independent development of the right to counsel under state constitutions.

In Part IV, legal and practical barriers facing the development of independent state constitutional law are considered as they relate to the right to counsel in criminal cases. If the theory is there, and the text is there, why is the development of independent state constitutional law related to the right to counsel so sporadic, inconsistent, and even difficult?

In Part V, a comparative approach is employed, contrasting the role played by early state court decisions related to the development of constitutional law regarding the right to counsel. Like decisions in most subject areas, the state court decisions take a wide variety of approaches. Nonetheless, as other scholars have shown, progressive state courts were the leaders in the early development of the legal right to counsel, with the United States Supreme Court being something of a laggard compared to pioneering state courts.

In Part VI, post *Gideon v. Wainwright* right to counsel developments in federal courts are reviewed. The goal in this section is to move from the general structure and specific provisions of state and federal constitutions to specific applications of right to counsel principles in defined factual settings. In other words, the article looks under the hood of selected federal case law to understand how the principles and provisions of the right to counsel doctrine have played out in federal courts.

In Part VII, selected post *Gideon* authority in state courts under state constitutions are considered. Are there differences between the body of federal cases under the Sixth Amendment and the developing case law in the states under state constitutional law provisions? The detailed state case law review will show a rich variety of approaches in the states and fertile, if uncertain, grounds for further development.

In Part VIII, an evaluation of the development of the right to counsel under state constitutions is provided along with consideration of the prospects for future evolution. . . With respect to case specific ineffective assistance of counsel claims, the conclusion is reached that independent state constitutional law is ill developed, particularly on the question of the kind of prejudice a litigant asserting ineffective assistance must show. However, regarding the development of remedies outside of *Strickland,* the state courts have made considerable progress. Many any factors, none determinative but cumulatively powerful, suggest the prospects for further

[1] ROBERT F. WILLIAMS, LAWRENCE FRIEDMAN, THE LAW OF AMERICAN STATE CONSTITUTIONS 39 (2023). The Williams-Friedman text is indispensable and comprehensively reviews many of the issues raised in this article.

development of state constitutional law may be better than some imagine. Positive factors include the growth of the innocence movement, the development of more reasonable case law standards supported by sophisticated empirical studies, the increased recognition of state constitutional law across ideological lines, the growth of concern for the state of legal ethics among lawyers, the burgeoning costs of mass incarceration, the emergence of new and flexible remedies, and a declining expectation of action from the United States Supreme Court. The main dragging anchor is the stubbornly persistent belief that criminal defendants are morally unworthy, get what they deserve, and should not be released due to gymnastics of charlatan lawyers and foolish judges. A diminishing number of judges harbor this philosophy, but the public that elects or retains them still may. A second dragging anchor is the bitter partisanship that prevents agreement on just about anything, regardless of the merits, that may filter into judicial decision-making. In the end, the Article offers some strategic suggestions on how to accentuate the positive factors and minimize the anchoring effects.

II. HISTORICAL, STRUCTURAL, AND PROVISIONAL FEATURES DRIVING INDEPENDENT DEVELOPMENT OF STATE CONSTITUTIONAL RIGHT TO COUNSEL LAW

A. Historical Points: Origins, Diversity, and Context

A first historical point is that the federal constitution ratified in 1791 was not the initial fountain of constitutional vision in America. Many judges and lawyers seem to believe that the United States Constitution is the model and that state constitutions are just miniature versions of it. This notion is historically incorrect. The first written constitution, of course, was not the federal constitution but the preceding eleven state constitutions.[2] As noted by historian Gordon Wood, the development of written state constitutions "captured the attention of intellectuals everywhere in the world." These state constitutions were "published and republished in several European languages." The period of time during which the state constitutions were developed, according to Wood, was "the most creative and significant period of constitutionalism in modern Western history."[3]

The Philadelphia Federal Constitutional Convention occurred after this robust period of state constitutional development. By the Philadelphia federal constitutional convention, eleven state constitutions had already been developed and ratified (Connecticut and Rhode Island continued governance under modified

[2] *See* Willi Paul Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era (2001).

[3] Gordon S. Wood, *Foreword: State Constitution-Making and the American Revolution*, 24 Rutgers L. J. 911, 911, 914 (1983).

colonial charters).[4] Thus, in 1787, there was an existing mature state constitutional tradition upon which the founders could draw.[5]

And the experience under the state constitutions prior to the federal constitution was very important. All provisions of the federal Bill of Rights can be traced to earlier state constitutional provisions.[6] Similarly, while many lawyers and judges believe that *Marbury v. Madison* established the power of judicial review, that view would be incorrect. State courts under state constitutions developed the power of judicial review long before *Marbury v. Madison*.[7]

A second historical point is that during the Revolutionary Era, the notion that state constitutions should be uniform was specifically addressed and rejected. As noted by Fletcher M. Green, the colonialists debated extensively in the months preceding independence whether the states should adopt a uniform constitution, to be prepared by Congress.[8] Instead, following the recommendation of soon-to-be famous state constitution writer John Adams, the Continental Congress recommended that the states form their own constitutions that "in the opinion of representatives of the people, best conduce to the happiness and safety of their constituents in particular, and America in general."[9] So, when faced with the choice of constitutional uniformity or diversity across the federal system, the founders chose diversity.

A third historical point is that, while eleven state constitutions arose *prior* to the federal constitution, many others were also written and ratified or substantially amended many years *after* the federal constitution, under different circumstances than those that faced federal or other state lawmakers. So, for example, state constitutions developed and ratified in the Jacksonian Era have a much different historical pedigree than the federal constitution. And in the interpretation of state constitutions, historical context matters. [10]

The relative importance of Bills of Rights in state constitutions compared to the federal constitution can be seen through history. As noted by Professor Gardner, "state constitutions were originally intended to be the primary vehicles

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[4] *See* RALPH KETCHAM, *Introduction* to THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 3 (1986).

[5] *See* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 5 (1988).

[6] *See* Robert F. Williams, *The State Constitutions of the Founding Decades: Pennsylvania's Radical 1776 Constitution and its Influence on American Constitutionalism*, 62 TEMP. L. REV. 541, 541-542 (1989).

[7] *See* William M. Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 475-476 & n. 83 (2005); A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 877 (1976).

[8] FLETCHER M. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860: A STUDY IN EVOLUTION OF DEMOCRACY 52-54 (1966).

[9] *Id.* at 54.

[10] *See* State v. Young, 863 N.W.2d 249, 278-79 (Iowa 2015) (discussing impact of Fugitive Slave Act on development of right to counsel provision of 1857 Iowa Constitution).See also Saul Cornell, *"Don't Know Much History": The Current Crisis in Second Amendment Scholarship*, 29 U.KY. L. REV. 657, 675-76 (2002); Randy Holland and David A. Skeel, Jr., *Deciding Cases without Controversies,* 5 DEL. L. REV. 115, 121 (2002); G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 32 Rutgers L. J. 841, 859-61 (1991).

for protecting the liberties of Americans . . ." [11] The United States Constitution, of course, was originally adopted without a Bill of Rights. Madison was initially reluctant to include one in light of the limited power of the federal government under the new constitution but ultimately promised enactment of a Bill of Rights in order to overcome objections to ratification of key states.[12]

The importance of the Bill of Rights was reemphasized when later state constitutions were ratified under Jacksonian and antebellum influences. For instance, the 1851 Indiana Constitutional Convention placed an "emphasis on individual rights."[13] Similarly, at the 1857 Iowa constitutional convention, the chair of the committee fashioning the Bill of Rights expressed the desire to "put upon record every guarantee that could be legitimately placed there in order that Iowa . . . might . . . have the best and most clearly defined Bill of Rights."[14] According to George Ells, "The Bill of Rights is of more importance than all of the other clauses in the Constitution put together, because it is the foundation and written security upon which people rest their rights."[15] The Bill of Rights of state constitutions from the Jacksonian and antebellum eras were generally at the very heart of each constitutional project, not a pragmatic afterthought used to secure the necessary votes for ratification.

The historic emphasis on Bill of Rights protections in the crafting of state constitutions is reflected in their structure. In many state constitutions, the Bill of Rights is front and center as the first substantive article. That is intentional. As noted by Professor Gardner, "State constitutions were originally intended to be the primary vehicles for protecting the liberties of Americans, not the supplemental charters they have in many ways become."[16] The strong historic emphasis on personal rights in state constitution is bookended by a "deep, durable, and justified constitutional suspicion of the legislature."[17]

Some judges simply refuse to accept the notion that state constitution makers' first orders of business were to ensure that citizens were protected from encroachments by the legislative, judicial branch of government—about which state framers were so skeptical. Instead, they see state constitutions as fonts of wide-ranging and largely unfettered state police power to be disturbed only in the most compelling circumstances. This latter view of state constitutions is a modern fiction, not an originalist or historical notion.

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[11] James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* (2005), at 18.

[12] Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 303 (1990). For a summary of state constitutional history, *see* Williams and Freidman, The Law of American State Constitutions, supra, note 1, at 1.

[13] Humphreys v. Clinic for Women, Inc., 786 N.E.2d 247, 270 (Ind. 2003) (Boehm, J., dissenting).

[14] THE DEBATES OF THE CONSTITUTION CONVENTION OF THE STATE OF IOWA 171, 100-104 (1857).

[15] State v. Short, 851 N.W.2d 414, 482 (Iowa 2014).

[16] James Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 773 (1992).

[17] Justin Long, *State Protection of Individual Constitutional Rights*, 70 RUTGERS U.L. REV. 937, 944 (2018). *See also* Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policy Making*, 43 U. RICH. L. REV. 571, 571 (2008).

The notion that the states were designed to be strong defenders of individual freedoms may seem counterintuitive to the modern ear. But remember, states' right provided the theory necessary for anti-slavery lawyers to successfully attack slavery, its expansion, and its brutal enforcement through the Fugitive Slave Acts of 1791 and 1850.[18] After *Brown v. Board of Education*,[19] the Southern Manifesto embraced states' right doctrine.[20] In light of the use of state's rights to block efforts at achieving racial equality, particularly in the southern but also the northern states, the potential role of states for advancing and protecting civil liberties has been obscured. Proper construction of state constitutions requires recognition of their strong, tough, anti-majoritarian features embraced in their Bill of Rights and enforced by state courts.

B. Structural Differences: Natural Rights Tradition and Affirmative Duties, The Nature of State Power, the Differential Impact of Federalism, and the Practical Availability of Amendments to State Constitutions

1. Natural Law Tradition

It has largely been forgotten that in the heyday of state constitutional formation, natural law theory was ascendant. By natural law theory, I mean the twin Enlightenment notions that laws of nature establishing universal human rights preexisted the formation of governments and that a primary purpose of government was to ensure that inalienable natural rights are respected and enforced.[21] While the natural law tradition is not explicitly mentioned in some state constitutions, about two dozen states have an express natural law provision, often at the very beginning of their Bill of Rights.[22]

The development of the natural rights clause in state constitutions is traceable to Virginia. In Virginia, George Mason, in 1776, proposed a Declaration of Rights to be included in the Virginia state constitution. Mason's original draft appeared in contemporaneous newspapers and publications throughout America and in Europe.[23] According to historian Pauline Maier, Mason's original draft "had far greater impact than either the Declaration of Independence or the Declaration of Rights that the Virginia convention finally adopted."[24] Another scholar, R. Carter Pitman, has observed that Mason's original draft was "the most influential

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[18] *See generally* Michael E. Woods, *"Tell us Something about State Rights:" Northern Republicans, State's Rights, and the Coming of the Civil War*, 7 J. CIV. WAR ERA 242, 242-268 (2007).

[19] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 483 (1954).

[20] 102 CONG. REC. 4459-61 (1956) (statement of Sen. Walter George).

[21] *See* THOMAS G. WEST, THE POLITICAL THEORY OF THE AMERICAN FOUNDERS 135 (2017).

[22] Ultimately, twenty four states adopted a version of George Mason's Declaration, *See* Steven Calebrese & Sofia M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of the Lockean Natural Rights Guarantees*, 93 TEX. L. REV. 1299, 1318-1319 (1985). *See also* Suzanna Sherry, *Natural Law in the States*, 61 U. OF CINN. L. REV. 1, 1 (1992).

[23] *Id.*

[24] PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE, JULY 4, 1776, 154 (1997).

document in American history."[25] So, while Jefferson's copying of natural law concepts contained in the Declaration of Independence is under glass in the National Archives, the real, cutting-edge work was done by George Mason at the state constitutional convention in Virginia.[26]

Mason's first draft of the Virginia Declaration of Rights declared that "all men are born equally free and independent" and that they have "certain inherent natural rights of which they cannot by any Compact deprive or divest their posterity among which are the Enjoyment of Life and Liberty with the Means of Acquiring and Possessing Property, and pursuing and obtaining happiness and safety."[27] The language regarding equality and liberty is protean. Mason's original draft was later amended to provide that men cannot be deprived of natural rights "when men enter into a state of society."[28]

Following Virginia's lead, other states soon adopted similar natural law provisions.[29] By way of example, the Massachusetts Constitution of 1780 contained a Natural Rights Clause that declared, "All men are born free and equal, and have certain natural and inalienable rights, among which may be reckoned the right of defending their lives and liberties . . ."[30] There are now more than twenty states that have adopted a natural rights provision in their state constitution.[31]

Further, the affirmative obligation of states to ensure the enjoyment of natural rights is reflected in state constitutional provisions. For example, Article 1, Section 1 of the Iowa Constitution of 1857 provides in typical natural law language: "All men and women are, by nature, free and equal, and have certain inalienable rights – among which are those of enjoying and defending life and liberty, acquiring possessing, and protecting property, and pursuing and obtaining safety and happiness."

Importantly, the Iowa constitutional text does not simply end with a declaration of natural rights. Art. 1, § 2 provides that government is "instituted for the protection, security, and benefit of the people . . ." So, the text of the Iowa Constitution supports the notion that government protects, secures, and benefits

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[25] R. Carter Pittman, *Book Review, Sources of Our Liberties*, 68 Va. Mag. of Hist. & Biography 109, 110 (1960); Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 936 n. 22 & 24 (2002).

[26] GEORGE MASON, THE VIRGINIA DECLARATION OF RIGHTS - FIRST DRAFT (1776).

[27] *Id.*

[28] Robert J. Reinstein, *Completing the Constitution: The Declaration of Independence, Bill of Rights, and 14th Amendment*, 66 TEMP. L. REV. 361, 371 n. 28 (1993).

[29] Ultimately, twenty four states adopted a version of George Mason's Declaration. *See* Calebrese & Vickery, 93 TEX. L. REV. at 1319.

[30] PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 8 (2001).

[31] *See* Eugene E. Volokh, *State Constitutional Rights of Sefl Defense and Defense of Property,* 11 Texas Rev. L. & POL. 399, 401-406 (2007). For general discussion of natural law in the context of constitutional analysis, see Santiago Legare, *A New Natural Law Reading of the Constitution,* 78 Louisianna L Rev 872 (2018); Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication, 12 Const. Comment* 93 (1995).

the people through enforcement of the state's natural rights clause. Government is instituted to enforce the commands of natural law.[32]

Notably, the United States Constitution does not contain a natural rights provision. This was not an oversight. Madison considered various possible permutations of a natural rights clause, but decided that such a provision could not be included because of its potential implications for slavery. Madison told LaFayette that the inclusion of natural rights language in the federal constitution "would have been a spark to a mass of gun powder" because of its implications for slavery.[33] But particularly in states with natural rights clauses in the state constitution, the role of state courts in protecting individual rights against majority interference is firmly established.

Generally, the natural rights provisions in state constitutions are underdeveloped. A reasonable argument may be made, however, that natural law provisions establish a right to liberty, that the right includes the right to defend against threats to liberty, that a state criminal prosecution is a threat to liberty, and that where liberty is threatened by the state, an affirmative duty is imposed on the state to provide effective assistance of counsel. Such an interpretation reinforces and perhaps extends the affirmative duty to provide counsel arising from the right-to-counsel provisions in state constitutions.

2. Affirmative Rights in State Constitutions

The United States Supreme Court has confidently declared that the Bill of Rights in the United States Constitution does not impose affirmative duties on government but is a regime of restraint or negative duties. For example, in *DeShaney v. Winnebago*,[34] the United States Supreme Court declared that the Due Process Clause "is phrased as a limitation on the State's power to act, not a guarantee of certain minimal levels of safety and security."[35] The *DeShaney* court further, in the context of due process, rejected the "affirmative right to government aid, even when such aid may be necessary to secure life, liberty, or property interest of which the government itself may not deprive the individual." [36]

The DeShaney language is surely an overblown expression and, at least to some degree, expresses constitutional timidity rather than inexorable constitutional command. For instance, under *Gideon*, does the state not have a clear affirmative duty to provide effective assistance of counsel to indigent criminal defendants in felony cases? Sure it does. In addition, even superficially negative duties have

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[32] *See* Bruce Kempkes, *The Natural Rights Clause of the Iowa Constitution: When the Law Sits Too Tight,* 42 DRAKE L. REV. 593, 600 (1993); Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety,* 25 Hastings Const. L. Q. 1 (1997); Calebresi & Vicery, *supra* note 20 at 1299; *See also* Wash. Const., Art 1, Section 1, stating that governments "are established to protect and maintain individual rights."

[33] Rothstein, 66 TEMP. L. REV. at 374.

[34] DeShaney v. Winnebago Cty. Dep't of Soc. Serv., 489 U.S. 189, 195 (1988).

[35] *Id.*

[36] *Id.*, at 186.

affirmative implications. For example, the negative duty to avoid cruel and unusual punishment under the Eighth Amendment is an affirmative duty to provide adequate housing and medical care to incarcerated criminal defendants.[37] . But, as illustrated by the natural law provisions in many state constitutions, the very purpose of state government is to protect inalienable rights from legislative or executive encroachment.

. But even states without a natural rights clause establish affirmative duties on state government that are simply not found in the federal constitution.[38]

A good example is the affirmative obligation placed on state government to provide for public education. As of 1868, twenty-eight states had recognized a fundamental state constitutional duty to provide public education as a matter of their positive state constitutional law.[39] Many state courts have held that education clauses in state constitutions establish an affirmative duty enforceable by state courts to provide a constitutionally adequate system of public schools. More recently, a number of states are adding positive duties to their state constitutions to address environmental issues.[40] During the Great Depression, New York amended its constitution to include a right to public assistance.[41]

And in the right-to-counsel context, some courts have observed that state constitutional provisions impose affirmative duties on the state. For example, in *Simmons v. State Public Defender*, the Iowa Supreme Court observed that "the state has an affirmative obligation to establish a system of indigent defense that is reasonably likely to provide for zealous advocacy on behalf of the criminal defendant."[42]

The remedial power of courts under affirmative state constitutional provisions has been contested. With respect to education clauses, the record has been uneven, with about half the state courts enforcing state constitutional provisions related to education while the other half declined to enforce them due to separation of powers concerns.[43] While the record has been mixed, there seems

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[37] Estelle v. Gamble, 492 U.S. 97, 104-05 (1976).

[38] *See generally* the seminal work of Helen Hershkopf, *Positive Rights and State Constitutions*, 112 HARV. L. REV. 1131 (1991); Dustin Coffman, *Pathways to Justice: Positive Rights, State Constitutions, and Untapped Potential*, 24 MARQ. BENEFITS & SOC. WELFARE L. REV. 181, 207-217 (2023); Helen Hershkopf, *"Just Words," Common Law Enforcement of State Constitutional, Social, and Economic Rights,* 62 STAN. L. REV. 1521, 1533-1534 (2010).

[39] *See* Steven G. Calebresi and Sara E. Agudo, *Individual Rights Under State Constitutions*, 87 TEX. L. REV. 8, 108 (2008).

[40] Coffman, *supra* note 31, at 207-211.

[41] Helen Hershkoff, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 814 (2002). See also Emily Zqacklin, Looking for Rights in All the Wrong Places (2013); John Dinian, *Policy Provisions in State Constitu9ions: The Standards and Practice of State Constitution Making in the Post Baker v Carr Era*, 60 WAYNE ST. L. REV. 155 (2014); Helen Herschkopf and Stephen Loffredo, *State Courts and Constitutional A Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 Penn. St. L. Rev. 923 (2011); Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 72.

[42] 791 N.W.2d 69, 82 (Iowa 2020); *See also* Public Defender v. Amaya, 977 N.W.2d 22, 43-47 (Iowa 1022) (Appel, J., concurring in part and dissenting in part).

[43] For a list of cases, *see* State v. King, 818 N.W.2d 1, 73 n.40, 74 n.41 (Iowa 2012).

to be little doubt that in a number of cases, courts have fashioned remedies that, at the end of the day (and often a very long day), have vindicated the high value on education embraced in education clauses in state constitutions.[44] If nothing else, judicial review of state efforts under education clauses has often led to a shift in political inertia that has resulted in meaningful, if incomplete, actions by the political branches of government.[45]

The record in the environmental area has also been mixed.[46] Notably, however, in *Montana Environmental Information Center v. Department of Environmental Quality*,[47] the Montana Supreme Court noted that Montana's environmental protection provision in the state constitution was "interrelated and interdependent" with the Montana Declaration of Rights.[48] If so, are not the state constitutional right-to-counsel provisions "interrelated and interdependent" with similar declarations of rights in state constitutions?

Finally, the application of separation of powers principles simply must be different in a state constitutional regime with affirmative duties than in a federal regime with primarily negative rights.[49] As noted by Professor Feldman, judicial review of positive rights does not result in "judicial legislation" in violation of separation of powers.[50] Instead, judicial review of affirmative rights is entirely appropriate because of the express distribution of power between the legislative and executive branch. By obligating the political branches with an affirmative constitutional duty, it follows that if there is to be a remedy for violation of the constitutional command, the judicial branch must be involved in enforcement. In short, federal separation of powers analysis of negative provisions of the federal constitution has no bearing on separation of powers questions arising from affirmative provisions in state constitutions.

In sum, though often contested, state constitutional law has a tradition of enforcing affirmative government obligations arising from state constitutions that are often not found in the case law of the United States Supreme Court under the

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[44] *See e.g.* Rose v. Council for Better Education, Inc., 790 S.W.2d 186, 211-212 (Ky. 1989) (sweeping substantive ruling producing dramatic overhaul of education system in states); Sheff v. O'Neil, 678 A.2d 1267, 1290-91 (Conn. 1996) (nonmonetary remedies and dialogue with legislature through declaratory rather than injunctive relief); Conn. Coal. For Justice in educ. Funding, Inc. v. Rell (Conn. 2016) (finding deficiencies not in level of funding but lack of rationality in delivery of education).

[45] Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 Rutgers L.J. 9881 (1989) (noting the role of courts in overcoming political inertia). For extensive discussion of the need to align substantive rights with appropriate remedies for violation of education clauses in state constitutions, *see* Joshua Weishart, *Aligning Education Rights and Remedies*, 27 Sum. Kan. L. J. & Public Policy 346 (2018).

[46] *See generally* Barton H. Thompson, *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 157 (2003).

[47] Montana Env'tl Info. Ctr. v Dep't of Env'tl Quality, 988 P.2d 1236, 1246 (Mont. 1999).

[48] Dustin Coffman, *Pathways to Justice*, *supra* note 38, at 210; Justin R. Long, *State Court Protection of Individual Constitutional Rights*, 70 RUTGERS L. REV. 937, 941 (2018).

[49] *See* Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543 (1997).

[50] Jonathan Feldman, *Separations of Powers and Judicial Review of Positive Rights Claims: the Role of State Courts in an Era of Positive Government*, 24 Rutgers L.J. 1057, 1084 (1993).

federal constitution. The presence of affirmative constitutional provisions in state constitutions demonstrates that separation of power concerns are different than those articulated by the United States Supreme Court when emphasizing the federal constitution as one of negative rights.[51]

3. Plenary State Power

There is another profound difference in structure between federal courts under the federal constitution and state courts under a state constitution. The nature of state power in the federal constitution is materially different than in a state constitution.

It is often said that the federal government is a government of "limited powers."[52] This slogan, unlike others, is at least somewhat correct. The federal founders intended the new federal government to have more powers than under the Articles of Confederation, particularly in the regulation of commerce, taxation, and national defense. Yet, the federal founders most emphatically intended the federal government to be limited, with only powers specifically enumerated in the Constitution.

State governments, however, are governments not of limited powers but of plenary powers.[53] As a result, as Justin Long has pointed out, "the scope of state courts' substantive authority is greater than that of the federal courts." [54] State courts have general jurisdiction and handle all comers with a wide variety of disputes. Unlike federal courts, which are limited by the terms of Article III, the presumption is that state courts, as courts of general jurisdiction, have the power and capacity to resolve disputes presented to them.[55]

Additionally, state courts have common law powers, something rarely exercised in federal courts. As Helen Hershkopf and Stephen Loffredo have persuasively observed, state common law courts "have developed rules and standards for critical aspects of social and economic life ranging from the marital relationship to property states, from employment at will doctrine to the warranty of habitability, from the doctrine of common carries to the principles of unconscionability, all of which implicate critical questions of "judgment, strategy,

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[51] For discussion of these and other similar separation of powers issues, *see* Jonathan Mansfield, *America's Other Separation of Powers Tradition*, 73 Drake L.J. 545 (2023); Scott R. Burries, *Is There an Elephant in the Room: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALABAMA L. REV. 701 (2010); G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions,* 59 N.Y.U. Ann. Survey of American Law 329 (2003).

[52] Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

[53] See Robert F. Williams, *The Law of American State Constitutions* 250 (2009; Jack Landau, *Legislative Entrenchment and the Oregon Constitution*, 59 Willamette Law Review 1, at 7-8, 8 n. 24 (citations omitted) (2022).

[54] *See generally* ROBERT A. CARP, *The State Courts* in RONALD C. STIDHAM, AND KENNETH L. MANNING (1st ed.) (2010).

[55] *See* Williams and Friedman, The Law of American State Constitutions, *supra* note 1, at 281-83; Hershkopf, *State Courts*, supra note 38, at 1887-1890,

and responsibility."[56] Traditionally, the state courts have exercised their general jurisdiction to be local problem solvers with broad portfolios.[57] The development of the common law, of course, in theory, is a legislative function, and state courts do it all the time.

Federal courts might find common law type questions "nonjusticiable" because of the balancing of private interests and public policies involved. But unlike federal courts operating under Article III, and a regime which has been declared to encompass only negative rights, state courts "remain common-law generalists, with equitable and inherent authority to create law, shape policy, and devise remedies."[58]

Further, in the specific context of developing the law surround the right to counsel, determining what resources or systems are necessary to deliver the constitutionally required effective assistance of counsel does not require state court judges to educate themselves about unfamiliar esoterica. Indeed, who can deny that questions regarding what amounts to effective assistance of counsel and how it can be delivered are squarely in the wheelhouse of judicial expertise? The notion that state courts would be unable to meet the task because of a lack of judicially manageable standards in evaluating system and episodic right to counsel claims is hard to fathom. Who would be better?.

The bottom line is that separation of powers principles operate in a much different environment in state court than in federal court, and this reality may have an impact on the right to counsel litigation in state courts under state constitutional provisions.

4. Differential Impact of Federalism

Justice O'Connor once observed, "As every school child learns, our constitution establishes a system of dual sovereignty between States and the Federal Government."[59] The structure of federalism impacts state and federal courts in a profoundly different way. The United States Supreme Court, under the Supremacy Clause, is the ultimate expositor of federal constitutional law.[60] Thus, United States Supreme Court declarations of federal constitutional law necessarily

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[56] Helen Hershkopf and Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis,* 115 PENN. ST. L. REV. 923, 936 (2011); Hershkopf, *Positive Rights,* supra note 38, at 1178-1182. *See also* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U.L. Rev. 1, 10 (1995).

[57] *See* Hershkopf, *State Courts and the "Passive Virtues:" Rethinking the Judicial Function,* 114 HARV. L. REV. 1833, 1888 (2001).

[58] *Id.* at 979.

[59] *Gregory v. Ashcroft, supra* note 51, at 457.

[60] Williams v. Florida, 399 U.S. 78, 136 (1970) (Harlan, J., dissenting).

will be applied in a wide variety of state and local factual and legal contexts across the nation.

The Supreme Court tends to be extremely cautious in its pronouncement of federal constitutional principles, however, because of its fear of unintended consequences arising from the broad application of its ruling across many state jurisdictions. Further, nationwide rules apply in all states, including southern states, where pronouncements from federal courts after the Civil War have met with considerable resistance. Leading commentators have referred to the tendency of federal courts to dilute substantive constitutional rights because of their broad application across the diverse states as a "federalism discount."[61]

As scholars have observed, the notion that federalism is a factor that dilutes or leads to the underenforcement of nationwide constitutional rights is amply demonstrated in the right-to-counsel cases of the United States Supreme Court. For instance, in *Avery v. State of Alabama*, the Court considered whether the failure of a trial court to grant a continuance amounted to a denial of the defendant's right to assistance of counsel.[62] It emphasized that the Court was "reluctant to interfere with the State's determination of social policy."[63] How a state's social policy may interfere with the right to counsel is not explained.

Similarly, in *Bute v People of Illinois*, the Supreme Court considered a case where defendants pled guilty without counsel but the record was silent on the question of whether the defendants desired representation.[64] In rejecting a federal due process challenge, the *Bute* court declared that "[n]o national authority, however benevolent, that governs over 130,000,000 people in 48 states, can be as closely in touch with those who are governed as can the local authorities in the several states and their subdivisions." [65]

And, in *Scott v. Illinois*, the Supreme Court held that the Sixth Amendment applied to misdemeanor cases only when the defendant was sentenced to jail.[66] Justice Rehnquist noted that there were "special difficulties" in the incorporation of the Sixth Amendment against the states because the "range of human conduct regulated by state criminal laws is much broader than of federal criminal laws, particularly on the 'petty' offense part of the spectrum."[67]

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[61] *See* Robert F. Williams, The Law of American State Constitutions 137 (2009); Hershkopf, *Positive Rights*, *supra* note 37, at 1167-68 (federalism concerns not present in state court enforcement of constitutional law); Jeffrey S. Sutton, *San Antonio Independent School District v Rodriguez and its Aftermath*, 94 VA. L. REV. 1963, 1979 (2008). See also Lawrence Gene Sager, *Fair Measure, The Legal Status of Underenforced Constitutional Norms,* 91 Harv. L. Rev. 1212 (1978), passim (discussing underenforcement of federal constitutional norms).

[62] 308 U.S. 444 (1940).

[63] *Id.* at 447. See Sanjay K. Chhablani, *Disentanting the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 16 (2009) (quoting cases).

[64] 333 U.S. 640 (1948).

[65] *Id.* at 652. *See* Chhablani, supra note 61, at 16 (quoting cases).

[66] 440 U.S. 367 (1979).

[67] *Id.* at 372; Chhablani, *supra note 61, at 16 (quoting cases)*; Louis J. Capozzini, *Sixth Amendment Federalism*, 43 J. of Law & Pub. Pol 645, 654-56 (2020)..

The tendency of the Supreme Court to dilute constitutional rights that were applied across the nation was recognized by the Warren Court's leading conservative, John Marshall Harlan. Justice Harlan sounded an alarm when the United States Supreme Court began incorporating federal constitutional rights against the states. Marshall predicted that the extension of federal constitutional rights to the states would end up diluting them in a one-fits-all, lowest-common-denominator fashion. For instance, in *Williams v. Florida*, Harlan warned that accepting a jury with as few as six members under an incorporated federal right to a jury trial "simply reflects the lowers common denominator in the scope and function of the right to trial by jury.[68] In *Ker v. California*, Justice Harlan pondered whether, as a result in incorporation of search and seizure law through the Fourteenth Amendment, the court "[w]as prepared to relax Fourth Amendment standards in order to avoid unduly fettering the States."[69]

What Justice Harlan presciently predicted has largely come true. That is, when considering the application of Bill of Rights provisions against the states, a wary United States Supreme Court will tend to underenforce constitutional norms in order to avoid unnecessary friction with established practices in one or more states. In short, since incorporation, the Supreme Court, so the theory goes, has applied a "federalism discount" or perhaps more pejoratively a "lowest common denominator approach" to the scope of federal constitutional rights that apply against the states by virtue of the Fourteenth Amendment.[70]

The fear of unintended consequences and need to accommodate regional differences, however, is dramatically reduced by the limited geographic scope of a definitive state constitutional ruling by a state supreme court.[71] State supreme court judges are generally familiar with the operations of state and local government in areas such as law enforcement, education, and provision of government services. A multimembered state supreme court invariably has a depth of experience involving many local matters. To the extent that novel issues are presented, the parties can present to the court the practical impacts of legal rulings, which can be done without a weighty fifty-state survey of state law with one thousand variables explained in footnotes. As a result, fear of unintended consequences is less weighty in the context of adjudications under state constitutional law.

So, as Judge Sutton has compellingly argued, in state supreme courts, there is simply no basis for a federalism discount that pervades the decisions of the United States Supreme Court and results in underenforcement of constitutional

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[68] Kerr v. California, 374 U.S. 23, 45-46 (1963) (Harlan, J., concurring).

[69] *See* Robert F. Williams, *"A Row of Shadows": Pennsylvania's Misguided Lockstep Approach to its State Constitutional Equality Doctrine,* 3 WIDENER J. PUB. L. 343, 375 (1993) (noting United States Supreme Court tends to underenforce the Equal Protection Clause of the United States Constitution due to federalism concerns or deference to the states); Short, 851 N.W.2d at 485-486.

[70] Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights,* 35 RUTGERS L. REV. 707, 717 (1983).

[71] Hershkopf, *Positive Rights, supra* note 38 at 1166-1168.

norms.[72] In addition to the undesirability of diluting rights due to federalism concerns that have no application to the states, state courts are free to depart from the substance of constitutional rulings of the Supreme Court in their state jurisprudence. Such variation in substance, and not uncritical uniformity, is the stuff of federalism. For example, the United States Supreme Court has been influenced by direct and indirect forces that may not apply in state courts. The Court in the antebellum era was committed to the institution of slavery, apparently believing such a posture was necessary to live up to past political bargains and save the union.[73] Why should a state court be bound by the precedents of a court operating under different influences and with which it has profound disagreement? Was the Iowa Supreme Court bound by *Dred Scott* in its decision-making under the Iowa Constitution written and ratified by Republican majorities in 1857? As noted by New Jersey Supreme Court Justice Steward Pollack, "[s]tate courts are not obligated to a national constituency . . . (and) can respond more readily to local conditions."[74]

Moreover, in the modern era, presidents have come to use ideological filters to move decision-making at the Supreme Court and in the lower federal courts with considerable success. As noted by the Kansas Supreme Court, "The federal jurisprudence appears to ebb and flow on the tide of political influence."[75] Surely, the vagaries of national politics should not override the independent judgment of state supreme court justices exercising their judicial power under state constitutions.

Of course, this is not to say that state courts are not subject to political influence. They most certainly are. In the Iowa Supreme Court, a dramatic change occurred in abortion law under the Iowa constitution when members of the court changed.[76] A reverse of this pattern may be occurring in Wisconsin, where the makeup of the state supreme court has changed as a result of recent judicial

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[72] Jeffrey Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law,* 85 (2018).

[73] Prigg v. Pennsylvania, 41 U.S. 539 (1842); Jones v. Van Zandt, 46 U.S. (5 How. 215 (1847); Dred Scott v. Sanford, 60 U.S. 19 How. 393 (1857).

[74] State v. Lawson, 297 P.3d 1164, 1169 (Kan. 2013).

[75] *Compare* Planned Parenthood of the Heartland v. Reynolds, 915 N.W.2d 206 (Iowa 2018) (*Planned Parenthood I*) (finding a fundamental right to abortion under the Iowa Constitution) with Planned Parenthood of the Heartland v. Reynolds, 975 N.W.2d 710 (Iowa 2022) (*Planned* Parenthood II) (reversing Planned Parenthood I) and Planned Parenthood of the Heartland, Inc. v. Reynolds, 9 N.W.3d 37 (Iowa 2024) (*Planned Parenthood III*) (rejecting undue burden test for rational basis test of abortion regulation. On the issue of abortion, the Iowa Supreme Court gave maximum protection to the right to abortion in 2018, reversed itself four years later due to changes in the makeup of the court, and further moved, based solely on changed membership of the court, to the most modest basis of judicial protection of abortion.

[76] Planned Parenthood v. Reynolds, 915 N.W.2d 206 (Iowa 2018) (holding abortion regulations subject to strict scrutiny); rev'd Planned Parenthood v. Reynolds, 975 N.W.2d 710 (Iowa 2022) (reversing strict scrutiny but leaving ultimate standard open); Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State, 9 N.W.3d 37 (Iowa 2024) (adopting rational basis test to review abortion regulations).

elections.[77] But the point remains that federal court rulings regarding the right to counsel as it applies to states under the Fourteenth Amendment, or any other theory or right to counsel, are subject to national political considerations in a way that state court rulings are not.

5. Easing of "Counter Majoritarian Difficulty" in State Courts

Alexander Bickel famously explored what he called "the counter majoritarian difficulty" which arises when unelected judges overturn legislation approved by the democratically elected branches of government.[78] Bickel feared that courts might lose their legitimacy in the eyes of the public by engaging in anti-democratic decision making.[79] A common rejoinder of course, may be found in the words of Justice Jackson, who, in *West Virginia State Board of Education v. Barnette,* declared that the very purpose of constitutional provisions protecting civil liberties is "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts."[80] Certainly, the state right to counsel constitutional provisions fall comfortably within the reasoning offered by Justice Jackson in *Barnette*. Further, reliance on political mechanisms will be of little solace to groups or persons who ordinarily do not have access to political power.[81]

But there is good reason to believe that the "counter-majoritarian difficulty," whatever its validity, is less important when state courts construe state constitutional provisions. The federal founders established a remarkably difficult amendment mechanism in the United States Constitution that gave the slave states a virtual veto power over any potential constitutional amendment. State constitutions, however, are more easily amended. Thus, there is a realistic and practical check on judicial power under state constitutions that is not present under the federal constitution. One commentator has characterized the ease of amendments as "perhaps the most striking (and arguably most important) aspect of state constitutions."[82] As another scholar has observed, "the ease of amendment means that state constitutions express recent popular values much more clearly than can the federal constitutional text."[83] State constitutional amendment

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[77] Jason Semaya, *Preserving Judicial Neutrality: Regulating Stare Decisis for Elected Judges in an Era of Polarization,* 51 Fordham Urb. Law Journal 547, 584-586 (2023).

[78] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court and the Bar of Politics 16 (1969).

[79] *Id.*

[80] W. Va. State Bd. Of Educ. V. Barnette, 319 U.S. 624, 638 (1943).

[81] See Gabriel J. Chin and Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter Majoritarian Difficulty,"* 43 HARV C. R. – C. L. REV 1 (2008).

[82] Jonathan Mansfield, "Amendomania" and Individual Rights, 40 Jul. Human Rights 6, 6 (2014).

[83] Bruce Ledewitz, *How State Courts Can Help America Recover the Rule of Law: The Pennsylvania Experience,* 82 ALBANY L. REV. 1325, 1348-49 (2018-19). See generally John Dinian, *State Constitutional Amendments and Individual Rights in the Twenty-first Century,* 76

processes offer approaches for populist participation that differ significantly from the federal experience."[84]

In fact, state constitutions have been amended in ways that impact individual liberties. Voters in California and Florida have amended their state constitutions to require that state courts conform search and seizure precedents with federal law.[85] In any event, to the extent one is knuckled up about the "majoritarian difficulty," it is less of a problem in states where constitutions are more easily impacted by voters than is the case with the federal government, where amendments are nearly impossible.

Another feature of the landscape that lessens the "majoritarian difficulty" is the involvement of the electorate in the selection and retention of state court judges. As noted by Professor Choper, "[t]he greater exercise of discretion in constitutional adjudication by state courts may be seen as presenting a lesser conflict with majoritarian democracy than when unelected national judges with lifetime tenure employ the power of judicial review."[86] So, while page after page has been written by scholars about the "majoritarian difficulty" as undermining the legitimacy of judicial review in federal courts, such undermining of legitimacy is reduced in state courts because of the safety valves of judicial election in addition to the ease of constitutional amendment.[87]

C. Specific State Constitutional Provisions Driving Independent State Constitutional Right to Counsel Law

1. Right to Counsel Provisions

All state constitutions except Virginia contain a right-to-counsel clause. Some of them are parallel or nearly parallel to the language of the Sixth Amendment, while others employ materially different language. Even where the language is identical or nearly identical, states are free to interpret state constitutional provisions in a fashion different than federal courts. As noted by Judge Jeffrey Sutton, "[t]here is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the

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ALB. L. REV. 2105, 2017 (2012-13); John Dinian, *State Constitutional Amendment Processes and the Safeguards of American Federalism*, 115 PENN ST. L. REV., 1007 (2011).

[84] Jesse Choper, *Observations on the Guarantee Clause – As Thoughtfully Addressed by Justice Linde and Professor Eale*, 65 COLO. L. REV. 741, 743 (1994).

[85] Hans Linde, *E Pluribus – Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 199-200 (1984).

[86] Jesse Choper, *Observations on the Guarantee Clause – As Thoughtfully Addressed by Justice Linde and Professor Eule*, 65 U OF COLO. L. REV. 741, 743 (1994). *See also* Hershkopf, *Positive Rights, supra* note 37, at 1157-1163.

[87] *See* Hershkopf, *Positive Rights, supra* note 37, 1157-1165; Robert F. Utter, *State Constitutional Law, The United States Supreme Court and Democratic Accountability: Is there a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 34 (1989).

same or similar words, must be construed the same."[88] Further, according to Judge Sutton, "[s]till less is there reason to think that a highly generalized guarantee . . . would have just one meaning for a range of differently situated sovereigns."[89]

A good example of state courts coming to a different right-to-counsel conclusion under the same or similar language is the extension of the right to counsel by state courts in "all" misdemeanor cases. The United States Supreme Court has limited the right to counsel under the Sixth Amendment to felonies and misdemeanors where imprisonment is actually imposed.[90] But a number of state supreme courts, however, have taken the similar text in state constitutions at face value and applied "all" to misdemeanors generally.[91] The bottom line is that state supreme courts are perfectly free to construe the right to counsel in state constitutions more expansively than federal courts under the Sixth Amendment.

However, some state constitutions use different textual language in their right-to-counsel provisions. For instance, the Iowa constitution generously extends the right to counsel not only to "all criminal cases" but also to "cases involving the life or liberty of an individual."[92] Surely, the additional language demands a more expansive reading of the right to counsel under the Iowa constitution compared to the right to counsel under the Sixth Amendment.[93]

2. Open Textured Due Process Provisions

Most state constitutions have due process provisions. The language of these provisions is varied but often similar to that in the federal constitution. The Fifth Amendment of the United States Constitution ambiguously provides that no person "shall be deprived of life, liberty, or property without due process of law." State constitutions often use similar or nearly identical language.[94]

The due process clause in state and federal constitutions is notoriously open-ended. Most lawyers and law students are familiar with the controversy over whether the due process clause contains a substantive component or whether it only protects the right to fair process. Regardless of the question of whether due process has a substantive component, the question arises: whether due process fundamental fairness requires the presence of effective counsel in various contexts.

Powell v. Alabama, of course, was not a Sixth Amendment right-to-counsel case but was instead a due process case under the Fourteenth Amendment. So, at least in some settings, the need for a fair proceeding will be sufficient to

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[88] Jeffrey S. Sutton, *What Does – and Does Not – Ail State Constitutional Law,* 59 KANSAS L. REV. 687, 707 (2011).

[89] *Id.*

[90] Scott v. Illinois, 440 U.S. 367, 373 (1979).

[91] *See e.g.* In re Johnson, 398 P.2d 420, 422 (Cal. 1965); Bolkovac v State, 98 N.E.2d 250, 252-3 (Ind. 1951); Decker v. State, 150 N.E. 74, 75 (Ohio 1925); Hunter v. State, 288 P.2d 425, 428 (Okla Crim. App. 1955); Brown v. District Court, 570 P.2d 52, 55 (Or, 1977)(en banc) .

[92] Iowa Const. Art. I, section 10..

[93] *See* State v. Young, 863 N.W.2d 249, 277-79 (Iowa 2015).

[94] *See* Chhablani, *Disentangling the Right, supra* note 55; Sanjay K. Chhablani, *Disentangling the Sixth Amendment*, 11 U OF PA. J. OF CONST. L. 487, 541-548 (2009).

require the effective assistance of counsel. Because of the open-textured nature of due process, a state court could develop due process doctrine in a fashion that strengthens or advances the right to counsel beyond that required by the Sixth Amendment, for example, in civil cases involving life or liberty interests. [95]

At least one scholar, instead of seeking to advance right to counsel through due process, has sought to remove due process from the right to counsel.[96] According to Professor Chhablani, the notion that effective assistance of counsel requires a showing of prejudice, as found in *Strickland,* reflects the inappropriate grafting of a due process concept on the right to counsel.[97] Chhablani persuasively argues that the right to counsel is a categorical command not dependent upon a showing of prejudice.[98] The high requirement of prejudice, imported by the *Strickland* court into the right-to-counsel analysis, has, according to Chhablani, undermined the scope of the right to counsel.[99] The question arises to what extent independent state supreme courts will "disaggregate" due process from a more categorical, less fact driven right to counsel under state constitutional provisions.

3. Open Textured Equality Provisions

The federal constitution, and many state constitutions, have open-textured equality provisions. The federal constitution has both an equal protection and a privileges and immunities provision with equality implications. State constitutions have a wide variety of equality language; specific language varies considerably. However, they all contain a general statement of the fundamental nature of equality before the law.

It is clear that state courts interpreting state constitutional provisions related to equality are not bound to follow federal precedents under the Equal Protection Clause of the United States Constitution. And, on many occasions, state courts have charted a path more protective of equality than the federal courts. According to Jeffrey Shaman, writing in 2008, more than twenty states had ruled that state equality provisions are more protective than equal protection as interpreted by the United States Supreme Court.[100]

Most of the key federal right to counsel precedents were not decided on equality principles. But, as Sundeep Kothari and Lauren Sudeall Lucas have pointed out, potential foundations of equality course through the body of United

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[95] See Long, *State Court Protection of Individual Rights*, *supra* note 17, at 937, 961 n. 130.

[96] Chhablani, *Disentagling the Right*, *supra* note 55, at 4, 20-35; *See also Eve Brensicki Primus, Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 Cornell L Rev 679 (2007).

[97] *Id.* at 4.

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

[99] JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 96 (2008).

[100] Jeffrey M. Shaman, *Equality and Liberty in the Golden Age of State Constitutional Law* 96 (2008).

States Supreme Court right to counsel precedents.[101] In *Powell*, the court noted that "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense, it is the duty of the court . . . to assign counsel . . ."[102] In *Gideon*, the court noted that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Though not cited, equal protection arguments do not seem so distant to these cases.

Scholars have cited this and other language to urge that the right to counsel be framed using equality principles.. There is some history here. State courts have used state equal protection to invalidate statutes that declined to provide counsel in termination of parental rights or adoption proceedings where counsel was provided in other contexts state.[103] According to Lucas, equality-framed right to counsel claim does not focus on attorney performance, avoids subjective determination of "effectiveness," avoids spongy prejudice requirements, and does not run into a wall of adverse precedent.[104]

While United States Supreme Court right-to-counsel cases are generally not decided on equal protection grounds, there are exceptions. As Lucas points out, in *Griffin v. Illinois,* the Supreme Court held that a state was obligated to pay expert costs of indigent defendants.[105] Though not directly involving the right to counsel, *Griffin* declared that an indigent person was entitled to the cost of a transcript in order to pursue an appeal, reasoning that could be applied to the right to counsel questions. And, in *Douglas v. California*, the Supreme Court held that equal protection was violated where indigent defendants were denied counsel on appeal as a matter of right following a determination that appointment of counsel would be of no value to defendants or the court.[106] Further, Lucas cites three subsequent United States Supreme Court cases that seem to recognize, if not rely upon, equal protection principles in the right to counsel context.[107]

There are advantages to right-to-counsel advocates in following equal protection theory. As noted by Lucas, equal protection does not focus on nebulous attorney performance, avoids subjective determinations of "effectiveness," avoids totality of circumstances prejudice analysis, and does not run into a wall of adverse

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[101] Sundeep Kothari, *And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigent With Meaningful Access to the Courts*, 72 Tulsa L. Rev. 2159 (1998); Lauren Sudell Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197 (2013); Brandon Bushey and Lauren Sudeall Lucas, *Keeping Gideon's Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases,* 85 Fordham L Rev 2299 (2017); Brandan Bushey, *Escaping into the Abyss: The Promise of Equal Protection to End Detention without Counsel*, 61 St. Louis, UY L Rev 665 (2017). 1

[102] Powell v. Alabama, 287 U.S. 45, 71 (1932).

[103] In Re S.A.J.B., 679 N.W.2d 645, 646 (Iowa 2024); In re Adoption of K.L.P., 735 N.E.2d 1071, 1079, 1080 (Ill, App. 2000), aff'd 763 N.E.2d 741 (Ill. 2002).

[104] *See* Lucas, *Reclaiming Equality*, *supra* note 95, at 1240-1263.

[105] *See* Griffin v. Illinois, 351 U.S. 12, 14-15 (1956).

[106] *See* Douglas v. California, 372 U.S. 353, 364 (1963).

[107] *See generally* Entsinger v. Iowa, 386 U.S. 68, 83 (1967). *See also* Mayer v Chicago, 404 U.S. 189, 195-96 (1971); Ake v. Oklahoma, 470 U.S. 68, 93 (1985).

precedent.[108] Ultimately, while the United States Supreme Court has generally not relied on equal protection principles to protect the right to counsel, there is ample room for state courts to develop an equal protection doctrine in the context of the right to counsel under state constitutions.

4. Natural Rights Clauses in State Constitutions

As noted above, many states have natural rights provisions designed to protect inalienable rights in life, liberty, and property. In order to protect liberty and property, states must arguably provide effective assistance of counsel when these interests are threatened by criminal prosecution. Of course, there is no federal case law; the United States Constitution is bereft of a natural rights clause, unlike more than two dozen states.

III. CONSTITUTIONAL PROVISIONS DRIVING POTENTIAL DEVELOPMENT OF INDEPENDENT STATE CONSTITUTIONAL LAW RELATED TO THE ENFORCEMENT OF STATE RIGHT-TO-COUNSEL PROVISIONS BY THE JUDICIARY

A. Comparative Constitutional Provisions Related to the Exercise of Judicial Power

Article III, Section 2 of the United States Constitution famously provides that the judicial power extends to all "cases" or "controversies" involving specific subject matters or specific parties. The cases or controversies requirement of Article III does not apply, of course, to state courts operating under their state constitutions.[109] The United States Supreme Court has held that the cases or controversies requirement establishes the outbounds of federal court jurisdiction. Under the cases or controversies rubric, the United States Supreme Court has developed restrictive doctrines of standing, ripeness, and political questions. Article III's restraints, however, do not apply to the states.

The federal doctrines of standing, ripeness, and political questions all seek to limit the constitutional power of courts to provide remedies in certain cases. There is, of course, a large academic literature examining these federal Article III doctrines.[110] It seems clear, however, that notions of limited federal court power are based, at least in part, on federalism concerns, namely, that federal judicial power should not cut too deeply into the large residuum of state power. This

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[108] *See* Lucas, *supra* note 62, at 1205, 1215.

[109] *See* Ascaro Inc. v. Kadish, 490 U.S. 605, 617 (1959).

[110] *See generally* Thomas P. Schmidt, *Standing Between Private Parties*, 2024(1) WIS. L. REV. 1, 3 (2024); Jonathan R. Siegl, *The Article III Mask v. The Article III Reality*, 59 WAKE FOREST U. 501 (2024); Heather Elliott, *The Functions of Standing*, 61(3) STAN. L. REV. 459, 461 (2008); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93(2) CORNELL L. REV. 275, 276 (2008); Corey C. Watson, *Mootness and the Constitution,* 86 NW. U. L. REV. 143, 144 (1991); Kenneth H. Leggett, *Article III Justiciability and Class Actions: Standing and Mootness,* 59 TEX. L. REV. 297, 297 (1981).

federalism concern, however, has literally no application in the exercise of the judicial power of state courts.[111]

Further, state constitutions do not embrace the language of Article III in crafting provisions related to the exercise of judicial power. Instead, the state constitutional language often includes language related to the supervisory powers of state supreme courts and the ability of the courts to regulate the judicial process. For instance, in the Iowa Constitution of 1857, the "judicial power" is vested in a Supreme Court.[112] The Supreme Court has "the power to issue all writs and process necessary to secure justice to parties" and "shall exercise a supervisor and administrative control over all inferior judicial tribunals throughout the state."[113] There is no mention of "cases" or "controversies."

The differences between Article III and state constitutional provisions related to the exercise of judicial power are important for at least two reasons. First, the restrictive federal doctrines of justiciability, including mootness, standing, ripeness, and political questions that the United States Supreme Court has found established jurisdictional limits to judicial intervention under a limited powers federal constitution do not establish jurisdictional barriers to state court action under state constitutional provisions.[114] Scholars including Zachary Clampton, James Doggett, and Helen Hershkopf have persuasively argued that states should not adopt the procedural retrenchment of the United States Supreme Court.[115]

In fact, states have shown a fair amount of independence on justiciability issues like mootness. For example, several state supreme courts have held that mootness concepts are prudential only and do not deprive them of jurisdiction.[116]

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[111] See Rebekah G. Strotman, *No Harm, No Problem (In State Court): Why States Should Reject Injury in Fact*, 72 Duke L.J. 1605 (2023).

[112] IOWA CONST. art. V, § 1.

[113] *Id.* § 4.

[114] Some state supreme courts have nonetheless elected to follow federal Article III principles under their state constitutions. *See* Trs. of Off. of Hawaiian Affs. v. Yamasaki, 737 P.2d 446, 456 (Haw. 1987) (noting absence of Article III language but recognizing teaching of United States Supreme Court standing and political questions cases); Long v. United States, 312 A.3d 1247, 1254 (D.C. 2024) (recognizing lack of Article III cases or controversies language but following federal principles for prudential reasons). It is important to point out that in jurisdictions that follow federal Article III case law for "prudential reasons", there may be grounds to carve out an exception. *See* Grisham v. Van Soelen, 539 P.3d 272, 289 (2023) (federal standards may be relevant but are merely persuasive).

[115] *See* Zachary Clampton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411, 441 (2018); James W. Doggett, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing be Imported Into State Constitutional Law*, 198 CALUM. L. REV. 839, 839 (2008); Helen Hershkopf, *State Courts and the Passive Virtues, Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1834 (2001).

[116] *See e.g.* Alons v. Iowa Dist. Ct., 698 N.W.2d 858, 869 (Iowa 2005) ("[T]he federal test for standing is based in part upon constitutional strictures and prudential consideration while our rule on standing is self-imposed); Rush v. Ray, 332 N.W.2d 325, 326 (Iowa 1983) (finding a public interest exception to the mootness doctrine); Sears v. Hull, 961 P.2d 1013, 1020 n. 11 (1998)(same); *See generally* Dickey v. Iowa Ethics and Campaign Disclosure Board, 943 N.W.2d 34, 42-47 (Iowa 2020) (Appel, J., dissenting) (citing cases).

Others have found a "public interest" exception to the mootness doctrine.[117] Others have developed a "collateral consequences" mootness exception.[118]

The same is true with restrictive standing doctrines. For example, the restrictive standing requirements announced by the United States Supreme Court in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 606 (1992) have been rejected by state courts in Colorado, Connecticut, Hawaii, Nevada, Oregon, and Washington.[119]

In addition, The United States Supreme Court has adopted strict pleading rule in *Bell Atlantic v. Trombley*[120] and *Ashcroft v. Iqbal.*[121] A number of state courts, however, have declined to adopt the Supreme Court's new restrictive pleading rules.[122]

Further, state court provisions that allocate writ power, as well as supervisory and administrative control, to their state supreme courts, are potentially quite impactful. In plain language, the state supreme court is meant to superintend and administer justice in the state courts.

B. Inherent Powers of State Judiciaries Over Operations of Judicial Branch

Some time ago, Robert F. Williams has observed that a "major focus of state constitutional law should be on nonadjudicative function of state supreme courts.[123] He might have included state district courts. Indeed, there are many state cases where courts exercise inherent authority derived from judicial power in their state constitutions to compel the provision of adequate resources to the judiciary. Inherent power is not expressly stated but is indirectly implied by the constitutional

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[117] Commonwealth Edison Co. v. Ill. Commerce Comm'n, 41 N.E.3d 788, 791 (Ill. 2016); State v. Kiese, 273 P.3d 1180, 1195 (Haw. 2012) (discussing public interest exception).

[118] *See* In re Joan K., 273 P.3d 594, 597-598 (Alaska 2012) (collateral consequences exception applies to right of appeal from a moot order of involuntary commitment); Putnam v. Kennedy, 900 A.2d 1256, 1262 (Conn. 2006) (expiration of domestic violence restraining order not moot considering collateral consequences).

[119] *See* City of Greenwood Vill. v. Petitioners for Proposed City of Centennial, 3 P.3d 427, 437 n. 8 (Colo. 2000) (en banc); Andross v. Town of West Hartford, 939 A. 2d 1146, 1159 (Conn. 2008); Citizens for Prof. of N. Kohala Coastline v. Cnty. of Hawai'i, 979 P.2d 1120, 1127 (Haw. 1999); Stockmeier v. Nev. Dep't of Corr. Psch. Rev. Panel, 135 P.3d 220, 225-226 (Nev. 2006) (per curiam), *abrogated on other grounds by* Buzz Stew, LLC v. City of North Las Vegas, 181 P.3d 670, 672 n. 6 (Nev. 2008); Kellas v. Dep't of Corr., 145 P.3d 139, 143 (Ore. 2006); West v. Seattle Port Comm'n, 380 P.3d 82, 86 (Wash. 2016). *See also* Hawkeye Food Serv. Distrib. v. Iowa Educators Corp., 812 N.W.2d 600, 608 (Iowa 2012).

[120] *See* Bell Atl. Corp. v. Twombley, 550 U.S. 544 (2007).

[121] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[122] *See generally* Hawkeye Foodservice Distrib., 812 N.W.2d at 608 (Iowa 2012); Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 436 (2010); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863-64 (Wash. 2010). *But see* Joseph W. Owen, *A 'Plausible' Future: Some State Courts Embrace Heightened Pleading After Trombly and Iqbal,* 36 N.C. CONST. L. REV. 104, 104 (2013).

[123] See Robert F. Williams, *State Constitutional Law Processes*, 24 WM. MARY L. REV. 169, 208 (1983); Williams and Friedman, The Law of American State Constitutions, *supra* note 1, at 331-3333..

necessity to have an operating judicial branch of government.[124] For example, there have been cases where courts have compelled funds to be provided to the judicial branch for its operations.[125] Other cases have permitted judiciaries to increase salaries.[126] And many cases stand for the proposition that courts have the inherent power to appoint counsel, regulate the conduct of counsel, and find persons in contempt for noncompliance.[127]

Of course, inherent powers cases triggering expenditure of funds raise separation of powers concerns.[128] Yet, state courts have a long history of dealing with funding problems designed to make sure that the judiciary is a coequal branch of government. While appropriation of funds is primarily a legislative function, some scholars maintain it crosses the line into judicial authority when necessary to secure the operation of the court system.[129]

Federal courts, too, may have inherent powers, but they have not been exercised in the same way or as frequently as state courts. In particular, the judicial exercise of inherent powers to compel expenditures of funds has been largely conducted by state courts.[130] It seems fair to say that the state exercise of inherent power is well established and includes the power to, in effect, require the expenditure of public funds in certain situations. It has often involved requiring the state to pay for appointed counsel in an individual case. But the million dollar question (literally) is whether state court inherent powers, well established as a tool to coerce relatively minor expenditures in specific cases, may be used to force state expenditures of substantial funds running to ensure that indigent defendants are provided with constitutionally adequate counsel.

C. State Court Supervisory Power Attorneys and Judges

For decades, state supreme courts have promulgated binding disciplinary rules for judges and lawyers. Further, for the last fifty years, state supreme courts have taken the lead in disciplining lawyers for ethical lapses. While federal courts

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[124] *See generally* Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54(2) GA. L. REV. 411, 411 (2020). *See also* Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Power*, 52(1) MD. L. REV. 217, 217 (1993).

[125] *See generally* Pena v. Dist. Court of Second Judicial Dist., 681 P.2d 953, 958 (Ariz. 1984) (air conditioning); Comm'rs of Neosho County v. Stoddart, 13 Kan 207, 210 (Kan. 1874) (carpeting); State ex rel. Kitmeyer v. Davis, 68 P. 689, 691 (Nev. 1902) (carpeting and furniture); O'Coins Inc. v. Treasurer of the Cnty. of Worchester, 287 N.E.2d 608, 615 (Mass. 1972).

[126] *See generally* Smith v. Miller, 384 P.2d 738 (Colo. 1963); Young v. Board of Cnty. Comm'rs, 530 P.2d 1203 (Nev. 1975).

[127] Knox County Counsel v. State ex rel. McCormack, 29 N.W.2d 404, 405 (Ind. 1940); In re Evans, 130 P.2d 217, 231 (Utah 1913).

[128] *See* Webster Cnty. Bd. Of Supervisors v. Flattery, 268 N.W.2d 869, 877 (Iowa 1940); In re Alamance Cnty. Ct. Facilities, 405 S.E.2d 125, 134 (N.C. 1991); In re Matter of Salary of Juvenile Dir., 552 P.2d 163, 173 (Wash. 1976).

[129] *See* Andrew W. Yates, *Using Inherent Judicial Power in a State-Level Budget Dispute*, 62 DUKE L. J. 1463, 1463 (2013).

[130] *See* Gary D. Spivey, *Annotations* in *Inherent Power of Courts to Compel Appropriations or Expenditure of Funds for Judicial Purposes*, 59 A.L.R. 3d 569, 571 (1974).

entertain federal constitutional challenges based upon the performances of lawyers, the day-to-day supervision of lawyers and judges is the bread and butter of state supreme courts. The court-imposed requirement that lawyers act ethically has significant potential implications on the right to counsel questions. The state's role in regulating and disciplining attorneys contrasts sharply with the lack of similar jurisdiction in federal courts. [131]

The leading academic advocate of the application of ethical rules as it relates to the right to counsel is Norman Lefstein. In a major work published in 2011, Lefstein canvassed the applicability of the ABA Model Rules on lawyers who represent criminal defendants.[132] Lefstein emphasized that a number of the ABA Model Rules have applicability to criminal defense attorneys carrying crushing caseloads. Specifically, Lefstein asserted the applicability of Rule 1.1 related to attorney competence, Rule 1.3 related to diligence and promptness, Rule 1.7(a) related to conflicts of interest, and Rule 1.16(a) related to the necessity to withdraw from representation resulting in ethical violations. In addition, Lefstein emphasized the requirement in Rules 5.1 and 5.2 that supervising attorneys act reasonably to ensure that attorneys working under their direction comply with ethical rules. Further, Lefstein noted the persuasive power of ABA Ethics Opinion 06-44, which clearly stated that the generally applicable ethical rules for lawyers were not subject to some kind of criminal defense exception. Finally, Lefstein cited the American Bar Association's Ten Principles of Public Defense as establishing ethical guidelines for organized criminal defense.[133]

With respect to judges, ABA Model Code of Judicial Conduct R. 2.6 requires a judge to "accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law." Further, Standard 6.1.1(a) of the ABA Criminal Justice Standards Regarding Special Functions of the Trial Judge states that "[t]he trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in administration of criminal justice." Plainly, under these directives and in the states that have adopted them, the trial judge is not the proverbial bump on the log when it comes to the provision of effective assistance of counsel as demanded by the state or federal constitution.[134] A version of the ABA Model Code of Judicial Conduct has been adopted in many states.

The notion that trial judges have an affirmative responsibility to ensure that a criminal defendant receives the assistance of counsel is well supported in case law. In *Powell*, the court emphasized that where an indigent person is unable to employ counsel and cannot conduct their own defense, "it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite

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[131] Long, *State Court Protection*, *supra* note 17, at 957-60.

[132] *See* NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011).

[133] *Id.* at 26-31.

[134] *See* Peter Joy, *A Judge's Duty to Do Justice: Ensuring the Accused's Right to the Effective Assistance of Counsel,* 46 HOFSTRA L. REV. 139, 139 (2017).

of due process . . ."[135] Academic commentary supports the notion that judges have affirmative obligations to ensure the right to counsel is a reality in the courtroom.[136] What all this means is that state courts have potentially very powerful tools to ensure the right to counsel through their ability to impose and police ethical obligations on judges and lawyers.

D. Power of State Judiciary to Make Rules

Generally, state courts have the power to make rules of procedure for courts.[137] Sometimes, this power may be shared with the legislature.[138] With respect to rules of procedure, state court authority vesting power in the judiciary is particularly strong.[139]

This is not so much the case with respect to federal courts. Under the Federal Rules Enabling Act, Congress has, in the first instance, delegated authority to the Supreme Court but has required that any proposals be presented to Congress.[140] The Supreme Court has declared that this retention of Congressional control is "undoubted[ly] constitutional."[141] But as Professor Long has observed, although there are exceptions, "for most courts, the supreme lawmaking authority with respect to rules of procedure is the high court itself, sometimes even in the face of contrary statutes."[142] So, state supreme courts clearly control their own procedural rules, while the authority of the United States Supreme Court is less clear. In any event, whether through legislation or court action, state constitutions permit the fashioning of rules of procedure independent of any federal rulemaking process.

For purposes of right-to-counsel litigation in state courts, there may be three impacts. First, if a class action is brought, the rules in state court may be more generous than in federal court, particularly after *Walmart v. Dukes*.[143] Second, rules or case law related to the admission of empirical evidence may be more liberal in state courts than in federal courts. Third, state courts could engage in rulemaking related to the right to counsel in criminal cases. Finally, state courts may develop new and interesting versions of remedies, such as declaratory judgments with

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[135] *Powell,* 287 U.S. at 65.

[136] *See* Patrick S. Metzer, *Speaking Truth to Power: Obligation of Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH. LAW REV. 163 (2012); Joy, *supra* note 90.

[137] Long, 70 RUTGERS U. L. REV. at 950.

[138] *See id. at 951.*

[139] *See id.* at 956. *See generally* Thoams Ward Frampton and Brandon Charles Osowski, *The End of Batson Rulemaking, Race, and Criminal Procedural Reform*, 124 COLUMBUS L. REV. 1 (2024); Jeffrey Jackson, *Individual Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD L. REV. 217, note 28 (1993).

[140] Shady Grove Orthopedic Assoc., P.A. v. Allstate Insurance, 559 U.S. 393, 406-07 (2010).

[141] *See* Sibbach v. Wilson Co., 312 U.S. 1, 9-10 (1941), as cited in Long, *supra* note 96, at 105.

[142] Long, *State Court Protection*, supra note 17, at 951.in

[143] *See generally Walmart v. Dukes,* 564 U.S. 338, 338 (2011).

continuing jurisdiction or mandatory collaborative structures to achieve institutional change with input from multiple actors.[144]

E. Right to a Remedy and Open Courts Clauses

The common law notion, of course, is that where there is a right, there is a remedy. Further, up to forty state constitutions have a right to a remedy provision.[145] These state constitutional provisions have been interpreted in a wide variety of ways.[146] Among the issues litigated are whether the right to a remedy clause protects common law causes of action from legislative interference and, if so, what the scope of that protection is. The right to remedy and open court clauses, of course, did not expressly find their way into the federal constitution.

But they have a good pedigree. The nobles at Runnymead extracted from King Johjn a promise that buying justice through purchase of writs from the courts would no longer be tolerated.[147] The open courts clauses thus arose in an access to justice context. The access to justice aspect of open courts clauses is reflected in at least some state case law. For example, in *Griffin Industries, Inc. v. Thirteenth Ct. of Appeals*, the Texas Supreme Court considered the applicability of an open courts clause where an attorney refused to pay the filing fee for his client to take an appeal.[148] The Texas court emphasized that the court is open to all those with legitimate disputes, not simply those who can afford to pay fees.[149]

While the federal constitution has no open courts provision, the importance of a right of access to courts has been acknowledged under federal law. Consider *Smith v. Bounds*.[150] In *Bounds*, the Supreme Court found a "fundamental right of access to the courts."[151] Using the reasoning of *Bounds*, is a reasonably competent attorney essential for a litigant to have access to the courts?[152]

A fair case may be made that the right to remedy and open courts clauses found in state constitutions are not directed at the legislature, but at the judiciary. Consider *Meech v. Millhaven*.[153] In this case, the Montana Supreme Court emphasized that the right to a remedy provision of the Montana Constitution "was

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[144] *See generally* Emily Chiang, *Reviving the Declaratory Judgment: A New Path to Structural Reform*, 63 (3) BUFF. L. REV. 549, 551 (2015).

[145] Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1309 (2003).

[146] *See generally* Tracy A. Thomas, *Ubi Jus, Ibi Remedium, The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 633 (2004); Donald H. Siegler, *Rights, Rights of Action, and Remedies: An Integrated Approach,* 76 WASH L REV. 67 (2001); Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571 (2009).

[147] Patrick John McGinley, *Results from the Laboratories of Democracy: Evaluating the Substantive Open Courts Clause as Found in State Constitutions*, 82 ALB. L. REV. 1449, 1456-57 (2018-19).

[148] 934 S.W.2d 349 (Tex. 1996).

[149] *Id.* at 353.

[150] *See generally* State v Bounds, 430 U.S. 817, 823 (1977).

[151] *See id.* at 828. *See also* Lewis v. Casey, 518 U.S. 343, 346 (1996).

[152] *See* McGinley, *Results from the Laboratories*, *supra* note 146, at 1465.

[153] *See generally* Meech v. Millhaven, 776 P.2d 488 (Mont. 1999).

directed at the courts, and it was framed to provide for equality in the administration of justice."[154] It is the duty of the courts, then, and not the duty of the legislature, to ensure there is a right to a remedy is constitutionally protected. If so, this has important implications for the separation of powers. Courts enforcing the right to a remedy are engaged in the performance of a constitutionally mandated duty, not an invasion of the legislative branch.

F. Summary

In considering cases seeking to enforce the right to counsel in state court, the presence of positive law tradition may be a factor encouraging judicial enforcement of constitutional norms. On the other hand, restrictive federal precedent limiting the power of federal courts under Article III has no applicability in state constitutional challenges in state court. Further, state constitutional provisions may vest state judicial branches with considerable inherent, supervisory, and rulemaking power over inferior courts. Each of these state court powers has implications for ensuring that the right to counsel established in state constitutions is recognized and enforced in state court criminal proceedings. Importantly, that includes ethical rules for judges and attorneys that may have right-to-counsel implications.

IV. LEGAL AND PRACTICAL BARRIERS TO EFFECTIVE DEVELOPMENT AND IMPLEMENTATION OF RIGHT TO COUNSEL IN CRIMINAL CASES UNDER STATE CONSTITUTIONS

A. State "Constitutional Amnesia"[155]: Failure to Recognize The Distinctive Role of State Courts and State Constitutions

A significant barrier to the development and implementation of the right to counsel under state constitutions is the continued fundamental misunderstanding of the relationship between state and federal constitutions. Although thoroughly debunked in a substantial body of scholarship that grows each year, many lawyers and judges view state courts as miniature and lesser federal courts that deal with mundane day-to-day legal problems. If a state constitutional provision is similar to a federal constitutional provision, so it goes, state courts should follow federal interpretations. According to the misguided theory, if the language between state

[154] *Id.* at 492.

[155] Nina Morrison, *Curing "Constitutional Amnesia:" Criminal Procedure Under State Constitutions*, 73 N.Y.U. L. REV. 880, 885 (1998).

and federal constitutions is different, state courts should still follow the federal model

B. Problem of Faux and Bad Precedent

Some less sophisticated state courts have apparently grafted federal case law onto state constitutions without any adversary presentation. Take *Strickland.* The Iowa Supreme Court has declared many times that claims of ineffective assistance of counsel must meet the *Strickland* test. But there is no case where the Iowa Supreme Court considered possible alternative approaches to ineffective assistance of counsel.[156] The *Strickland* test emerged as an uncontested proposition and is now routinely cited in boilerplate recitations of right-to-counsel law.

But an uncontested statement of law plastered into a case by the agreement of the parties is not entitled to stare decisis.[157] Such statements are not really holdings produced by the adversary process but are more akin to stipulations of the parties for purposes of litigation of a particular case. Such agreement between the parties on applicable legal principles might be binding on them as agreed upon law of the case, but they are faux precedents that should be of little value in future cases. Another problem is what I call bad precedent, specifically, that many state supreme courts for decades held that state constitutional provisions mean the same thing as authoritative federal interpretations of similar federal constitutional provisions by the United States Supreme Court. The somewhat pejorative term for this methodology in the literature is "lockstep." The lockstep approach, which basically surrenders state court independence and delegates state judicial powers to federal courts, in the view of Professors Williams and Friedman, simply indefensible.[158] But in many states, there may be ill-considered but well-established lockstep precedents that may be difficult to unwind.[159]

C. Inability of Lawyers to Engage in Comparative Law in State Constitutional Interpretation

In order to adequately develop state constitutional law, lawyers must engage in the exploration of the law of other jurisdictions and compare the strengths and weaknesses of a variety of legal approaches found or hidden in case law. A few decades ago, this might have been a tall order. But now, with computer-based legal research, any competent and diligent attorney can develop a comparative analysis of a particular legal question. Even lawyers without access to a proprietary legal database may use various internet search methods to engage

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[156] Simmons v. State Public Defender, 791 N.W.2d 69, 76 n. 3 (Iowa 2010).
[157] *See* Haskenhoff v. Homeland Energy Sols., LLC, 897 N.W.3d 553 (Iowa 2017)(Appel. J., concurring in part and dissenting in part); United States v. Hemmingway, 734 F.3d 323, 335 (4th Cir. 2013).
[158] *See* Williams and Friedman, The Law of American State Constitutions, supra note 1, at 226-263.
[159] *See generally* State v. Ochoa, 792 N.W.2d 260, 264-267 (Iowa 2010).

in at least some comparative analysis of different legal approaches in the authorities.

But comparative analysis takes time. It is hard work. There may be few raw historical materials, but what exists must be scoured to help support an argument on a constitutional issue that departs from federal precedent. Other relevant state precedents must be considered; law review literature canvassed; dissenting opinions examined; paths not taken reexamined; factual and legal principles supporting received wisdom must be reevaluated.[160]

But deadlines loom. A lawyer's desire to be productive and efficient may encourage her to grab hold of the nearest superficially persuasive Sixth Amendment case and move on to the next issue or file. And developing independent state constitutional law requires additional hours of work and thus may strain client litigation budgets.

One approach that often chokes the robust development of state constitutional law is for lawyers first to make a reasoned argument that counsel was ineffective under federal case precedents and then, in the alternative, merely cite the parallel provision of the state constitution as state constitutional law provisions. In other words, the state constitutional provision is a hitchhiker along for the ride.[161] Now, of course, it is conceivable, perhaps in some cases, that the same argument applies in precisely the same way under federal and state constitutions.[162] But usually, effective advocacy requires exploration of different legal standards. In hitchhiker cases, the appellate court may be foreclosed from the development of new theories or substantive tests because advocates have failed to make a meaningful argument that substantive state constitutional law should differ from its federal counterpart.[163]

D. Real or Perceived Lack of Institutional Competence

At first glance, it might appear that there are ample reasons to believe that state courts might be better suited to assure that the right to counsel guaranteed in the United States and state constitutions is adequately enforced. But there have been doubts and skeptics. Almost fifty years ago, Burt Neuborne published an influential essay in the Harvard Law Review questioning the ability of state court judges compared to their federal counterparts in enforcing federal constitutional

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[160] *See* Hans Linde, *First Things First: Rediscovery of the State's Bill of Rights*, 9 BALT. L. REV. 379, (1980) ("[t]o make an independent argument under the state clauses takes homework – in texts, in history, and alternative approaches to analysis.").

[161] *See* State v Doolin, 942 N.W.2d 500, 556 (Iowa 2020) (Appel, J., dissenting).

[162] *See* Robert F. Williams, *Equality Guarantees State Constitutional Law*, 63 TEX. L. REV. 1195, 1219 (1985) (state courts may apply federal constructs independently and reach result that conflict with federal courts).

[163] *See* State v. Bruegger, 773 N.W.2d 829, 833; *See also* State v Baldon, 829 785, 822-23 (Iowa 2013) (Appel., J., concurring).

rights.[164] The same type of argument could be made about the state courts that hear a state constitutional right-to-counsel claim.

It is hard to deny that state courts are not generally as well equipped to handle substantial, time-consuming, and resource-draining cases as the federal courts. First, state courts are resource deserts. State judiciaries are chronically underfunded compared to federal counterparts. Dockets burgeon, and motion queues grow. The pressures to decide cases and move on in state court in most cases will exceed efficiency pressures in federal courts.

In addition, limited resources mean limited judicial salaries, and, as a result, it may be more challenging to recruit top-notch candidates to state judicial positions. State judicial salaries may seem rather high in rural areas where well-paying jobs are relatively scarce, but judicial salaries do not remotely compare with what a skilled lawyer could make in private practice in urban areas. It is becoming increasingly difficult to attract competent lawyers, with a broad range of experience, listening and learning skills, and the fierce independence and toughness required to be an effective state trial judge.

Further, as for attorneys, the development of state constitutional law is time-consuming and requires considerable judicial effort. It is easier to simply uncritically cut and paste federal case law into the regional reporters. And, in cases that are likely to be protracted and complex, state courts may believe they lack the resources to engage in meaningful monitoring of systemic challenges to the provision of the right to counsel over potentially lengthy periods of time.

Second, there is a lack of training for state court judges to help them handle complex litigation. A systemic right-to-counsel challenge is not your ordinary contract, tort, or family law dispute that is the daily fare of a state court. It is complicated and complex and requires active and perceptive judicial management. Neuborne perceived federal judges as having a higher level of technical competence, supported by high-caliber judicial law clerks, and infused with an elite tradition that elevates the federal judiciary.[165]

Third, excessive localism. State court judges perceive themselves as being part of a team, which usually includes law enforcement, county officers, prosecutors, and sometimes public defenders or lawyers on the court-appointed list.[166] When the judge enters the courthouse, an informal greeting to a sheriff, deputy sheriff, or assistant county attorney is the norm. How are the kids? How about that Friday night high school football game with Johnny at halfback? Such collegiality can lead to a "don't rock the boat" commitment to highly flawed systemic arrangements. A defense lawyer with the temerity to zealously assert in open court that she cannot handle an additional felony case consistent with her

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[164] Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1104 (1977); *but see* Michel E. Solimine, *The Future of Parity*, 46 WM. & MARY L. REV. 1457 (2005).

[165] *See* Neuborne, *supra* note 110 at 1121-1123.

[166] Justin RE. Long, *State Constitutional Etudes: Variations on the Theme of a Contemporary State Constitutional Problems*, 60 WAYNE STATE L. REV. 69, 109 (2014).

duty of providing effective assistance may not be seen as a champion for the downtrodden as much as a former team player gone rogue.

Of course, there are counterarguments. If the institutional competence of the judiciary is to be considered, it can be done only in comparison with the institutional competence of the legislative branch.[167] Where unpopular people like criminal defendants are involved, is it likely that legislatures will have political incentives to adequately fund public defense in compliance with the right-to-counsel requirements in state constitutions? In other words, is the judicial branch more institutionally capable of ensuring mandatory constitutional rights than the state legislature? Is that not what the counter-majoritarian branch is designed to do? If the judiciary declines to step in, does that make the question of whether a criminal defendant receives the right to effective assistance of counsel a matter of legislative grace?

E. "Common Sense" Reasons for State Court Judges to Refuse to Enforce Right to Counsel Under State Constitutional Provisions

1. Traditional Reluctance of Judges to "Attack" Lawyers

Many years ago, Judge David Bazelon noted that one of the reasons why courts are reluctant to find ineffective assistance is that such a holding would "soil the reputations" of counsel.[168] As noted in one case:

> . . . ineffectiveness of counsel, in the constitutional sense, is malpractice of law. It carries with it the most serious professional and economic consequences for the accused counsel . . . The bones of one lawyer are not for the picking by another except upon the clearest and most concrete reasons.[169]

Similarly, the Iowa Supreme Court has wrung its hands in a post-conviction case, stating that "even a lawyer is entitled to his day in court . . ."[170] But wait?! The focus of ineffective assistance of counsel claims must be on whether the criminal defendant received the kind of advocacy necessary for the adversary system to function properly, not on the professional plight of the attorney. As noted by Judge Bazelon:

> Ineffectiveness is neither a judgment of the motives or abilities of lawyers nor an inquiry into culpability. The concern is simply whether the adversary system has functioned properly: the

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[167] Hershkopf, *Positive Rights, supra* note 38, at 1176.
[168] David L. Bazelon, *Realities of Gideon and Argersinger,* 64 GEO. L.J. 811, 822 (1976).
[169] *See* Angarano v. United States, 329 A.2d 453, 468 (D.C. Ct. App. 1974) (statement of Judge Nebecker regarding order allowing PDS to withdraw from the case).
[170] State v Coil, 264 N.W.2d 293, 295 (Iowa 1978).

> question is not whether the defendant received the assistance of effective counsel but whether he received the effective assistance of counsel. In applying this standard, judges should recognize that all lawyers will be ineffective some of the time; the task is too difficult and the human animal too fallible to expect otherwise. . . Perhaps we should replace the phrase "ineffective assistance" with a new term, such as "the failure of the criminal process" which property implicates the system rather than the attorney.[171] But consider the fact that some courts have considered the need to protect prosecutorial reputations and minimize the stigma of an adverse ruling in the context of Brady violations. For example, the Iowa Supreme Court in *State v Schlitter* distinguished between what it called "prosecutorial error" and "prosecutorial misconduct" in considering *Brady* violations.[172] The distinction no doubt designed to lessen the stigma associated with enforcement of constitutional violations. A similar approach may be needed on "ineffective assistance of counsel" claims.

2. They Are "Guilty Anyway"

Judge Bazelon has also noted that some lawyers and judges seem to approach ineffective assistance cases with a "guilty anyway" attitude.[173] As a state supreme court justice, I have heard this expression many times, to my general dismay. The underlying theme is that while the process may not have been perfect (and maybe not even constitutional, rough justice has been served in most cases, even where counsel performed poorly. But Judge Bazelon, quoting the English historian McCauley, warned, "[t]he guilty are almost always the first to suffer those hardships, which are afterwards imposed on the innocent."[174] It seems to me the "guilty anyway" concept is based on racial or socioeconomic stereotypes that are the exact opposite of particularized justice that American judges and lawyers have traditionally prized. But the "guilty anyway" concept can dampen judicial ardor regarding right to counsel violations and the appropriate remedies that should accompany them.

3. Fear of the Proverbial Floodgates of Litigation

State courts across the country struggle for resources; fear of the proverbial "litigation floodgates" is not unheard of in the right-to-counsel context. The theme

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[171] *Bazelon, supra* note 112 at 822-823.
[172] State v. Schlitter, 881 N.W.2d 380, 393-394 (Iowa 2016).
[173] *Id.* at 825.
[174] *Id.*

that remedies for ineffective assistance should be tightly controlled in order to prevent courts from being overwhelmed is recurrent in these cases.[175]

But the argument is obviously flawed. If opening the courthouse door to systemic challenges produces justice, or constitutional compliance, should not the door be wide open? Does the right of an indigent defendant to assistance of counsel in "all" criminal prosecutions depend on the grace of legislative bodies? Further, structural litigation seeking imposition of categorical rules related to right to counsel may, in the long run, cause the flood waters to recede? Further, as Justice Harlan observed decades ago, "current limitations upon the effective function of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles.[176]

4. Judges as Team Players with an Obligation to Support the Criminal Justice System

Judges in courthouses scattered throughout the state develop close relationships with prosecuting attorneys, local law enforcement, and local legislators. Judges have surrendered a private career in the law in favor of public service. It is not surprising that the first instinct of a local judge facing a crisis in representation of indigent defendants is to identify with the system and look for ways to make the system work.[177] This is not a bad instinct, and is not necessarily self-serving. But it may be myopic if the underlying quality of resulting representation is not carefully monitored.

5. Unfocused Belief in Judicial Minimalism and Legislative Supremacy Even in Matters involving Individual Rights

The presence of judicial minimalism, in the hands of some judges, strongly counsels avoidance of confrontations with the legislative and judicial branches. In some contexts, this judicial caution makes pretty good sense. When a nation is at war, judicial review of military or diplomatic initiatives is not only unworkable, but also potentially dangerous.

Yet, excessive caution by state courts in all contexts results in judicial abdication in states with strong Bill of Rights provisions. The mere fact that other branches are impacted by judicial decisions is not a free-standing excuse for judicial abstention (abdication?). The Bill of Rights provisions in state

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[175] *See generally* Strickland v. Washington, 466 U.S. 668, 689 (1984) (asserting that "the availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges."); In Hill v. Lockhart, 474 U.S. 52, 58 (1985) the Supreme Court considered but rejected floodgates claims but rejected them in extending the right to counsel to guilty plea settings. In Padilla v. Kentucky, 559 U.S. 358, 371 (2010), the court noted that "a flood did not follow in that decision's wake."

[176] Bivens v. Six Unknown Names Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

[177] *See* Long, 70 RUTGERS L. REV. at 962 ("judges perceive themselves to be part of the team, an arm of the state meant to smooth over legal problems rather than serve as a check on the political branches more audacious policy ambitions.").

constitutions are presumably mandatory and do not solely turn on the will of the legislature to appropriate funds. Indeed, many state Bills of Rights were enacted in a period of great distrust of the legislative branch. Yet, judges may find it easier to ignore or avoid rather than confront clear constitutional violations if the remedy involves either releasing criminal defendants or expenditure of significant additional amounts of public funds. Finally, judges may not be familiar with the well-established tradition of independent state constitutional law may regard the United States Supreme Court as a superior source of law that provides a convenient escape from legal problems that must be confronted and resolved by the judiciary as a co-equal branch of government exercising its assigned responsibilities under a state constitution.

G. The Problem of the Unfunded Mandate

No one seriously doubts that the lack of funding is a major factor in inadequate representation of indigent criminal defendants. Can courts, with no armies, no political war chest, no political action committees, no phone banks, and no large demanding constituency, enter an order commanding the state legislature to appropriate funds to finance implementation of the right to counsel for indigent defendants? It's a tall order.[178]

And, state supreme courts may face a conflict of interest. If they choose to lobby the legislature for increased appropriations for indigent criminal defense, do they lessen the chances of adequate financing of the judicial branch, including long-withheld pay raises? Will the direct operations of the judicial branch be impaired by seeking funds for indigent defense?

Finally, any remedies for the problem of an unfunded mandate may prove difficult and require extended judicial supervision. By analogy, the New Jersey Supreme Court heard the same case involving a state constitutional right to education nearly two dozen times.[179] Perhaps a similar result would occur if a state judicial branch ordered expenditure of funds for indigent defense that the legislature believed was unnecessary.

H. The Crocodile in the Bathtub

Decades ago, Justice Otto Kaus gave a speech where he called the possibility that the public might deny him reelection based on disapproval of judicial opinions as "a crocodile in the bathtub when you are shaving in the morning."[180] Arguably, state court judges are more responsive than federal judges

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[178] See Erwin Chemerinski, *Lessons from Gideon*, 122 Yale L. J. 1676 (2013); Jackson, *Judicial Independence*, *supra* note 123, at 228-245 (discussing cases).

[179] *See id.* at n. 61.

[180] Gerald F. Uelmen, *Otto Kaus and the Crocodile*, 30 LOY. L.A.L. REV. 971, 974 (1997).

to public opinion, which may not be supportive of expenditure of scarce state dollars on counsel for criminal defendants.

V. EARLY LEADING ROLE OF STATE CONSTITUTIONAL LAW IN DEVELOPING THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS

A. Early State Court Precedent On Ineffective Assistance Of Counsel Prior To *Powell* And *Strickland*

While early state court cases recognized a right to assistance of counsel, many cases declined to consider a defendant's challenge to a conviction based upon the lack of effectiveness of his counsel. Many courts articulated an agency theory where the counsel was the agent of a criminal defendant and, as a result, the defendant as a principal was bound by the agent's acts. But as Sara Mayeux had demonstrated, state courts in the late nineteenth and early twentieth century began to depart from agency theory and develop a theory of ineffective assistance of counsel well before *Powell* and *Gideon*.[181]

Mayeux has cited two state court cases as illustrating the development of ineffective assistance doctrine. In *People v. Nitti,* the Illinois Supreme Court considered a challenge to a murder conviction of a poor and non-English speaking Italian immigrant.[182] Counsel apparently had little familiarity with evidence and asked incriminating questions of witnesses. Citing both right to counsel provisions of the state and federal constitution, the *Nitti* court stated that the rights were more than "mere empty formalities."[183] According to the *Nitti* court, "The fact that the defendants were ignorant, illiterate foreigners, unacquainted with law or court procedure in this or any other country and unable to speak the English Language, requires that we take into consideration the gross incompetency and stupidity of counsel appearing for them."[184] The *Nitti* court reversed the conviction and ordered a new trial.

A second case cited by Mayeux is *State v Sanchez*, where the Indiana Supreme Court considered a murder conviction of an 18-year-old Mexican immigrant.[185] Among other things, Sanchez's lawyer did not notify Mexican authorities of the charge, did not subpoena witnesses for trial, failed to challenge a courtroom interpreter hired by the prosecution, and declined to request jury instructions.[186] Sanchez claimed, among other things, that he was deprived of a fair

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[181] *See* Sara Mayeux, *Ineffective Assistance of Counsel Before Powell v. Alabama: Lessons from History for the Future of the Right to Counsel*, 99 IOWA L. REV. 2161 (2014); Chhablani, *Disentangling the Right, supra* note 63, at 6-11. .

[182] People v. Nitti, 143 N.E. 448, 453449 (Ill. 1924).

[183] *Id.* at 453.

[184] *Id.* at 454.

[185] State v. Sanchez, 157 N.E. 1, 4 (Ind. 1927).

[186] *See id.*

trial because of the inexperience and incompetence of his attorney.[187] Sanchez further cited the right to counsel provision of Section 13, Art. 1 of the Indiana Constitution.[188] The Indiana Supreme Court acknowledged that Sanchez voluntarily employed his attorney, but in light of the total failure of the attorney, a new trial was required.

A third line of cases may be found in Georgia. In *Reliford v. State*, the Georgia Supreme Court found that giving experienced counsel ten minutes to discuss a case with inexperienced appointed counsel was insufficient to meet constitutional commands.[189] The *Reliford* court found that the district court abused its discretion by failing to grant a continuance to permit more preparation time for trial. As noted in another Georgia case, the constitutional privilege of counsel "would amount to nothing if the counsel for the accused are not allowed sufficient time to prepare for his defense."[190] The implication was that the mere appointment of counsel is not sufficient, but counsel must have enough time to be reasonably prepared to engage in the defense.[191]

The point emphasized by Mayeux is that state courts under state constitutions were developing ineffective assistance of counsel doctrine in the decades prior to *Powell* and *Gideon*. As noted by Mayeux, both *Nitti* and *Sanchez* were cited extensively in the brief filed in *Powell*.[192] When it comes to ineffective assistance of counsel doctrine, state courts were engaged in creative legal development under state constitutions well in advance of *Powell* and *Gideon*.[193] If state courts can lead the way to *Powell* and *Gideon*, perhaps they can lead the way in the area of systemic violations of the right to counsel, or the application of equal protection principles to criminal defense, or the development of meaningful ineffective assistance of counsel standards, or a clearer development of the duty of trial courts to ensure effective assistance, etc. etc. etc.

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[187] *Id.*

[188] *See id.* at 4-5.

[189] *See* Reliford v. State, 79 S.E. 1128, 1129 (Ga. 1913).

[190] Blackman v. State, 76 Ga. 288, 289 (Ga. 1886).

[191] *See id.*; *See also* Jackson v State, 15 S.E. 677, 677-678 (Ga. 1892) (continuance should have been granted where counsel needed more time to prepare); McArver v. State, 40 S.E. 779 (Ga. 1902) (same).

[192] *Mayeux*, 99 IOWA L. REV. at 2181.

[193] As noted in Bute v. People, the 1931 Wickersham Report noted that thirty four states provided indigent defendants with appointed counsel in felony cases, with twenty eight providing counsel in misdemeanor cases. Butte v. People, supra note 52 , at 66; By 1963, as Donald Dripps has observed, only a few states, concentrated in the south, did not appoint counsel for all indigent felony defendants. Donald Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice,* 70 Wash. & Lee Review 883, 895 (2013). The application of *Gideon* to the southern states is the real contribution of *Gideon*, not so much the development of the scope of right to counsel generally.

B. Early State Court Precedent On Entitlement Of Indigent Defendants To Counsel Prior To Powell And Gideon

There is plenty of rhetoric in the literature about the *Gideon* revolution. But in fact, as with the development of ineffective assistance doctrine, a number of state courts had held that indigent criminal defendants had a right to counsel appointed by the court about a hundred years prior to *Gideon.*

Consider, for instance, the Indiana case of *Webb v. Baird.*[194] A criminal defendant charged with burglary was without funds to hire a lawyer. In this case, the trial judge appointed counsel and authorized payment of $25 by the county. The issue on appeal was whether the trial court had the power to compel the county to pay the fee in the absence of statutory authority to do so.

The Indiana Supreme Court concluded that the trial court had the power to order the county to pay. In sweeping language, the court declared:

> . . . that the services rendered by Baird were necessary to be rendered by some attorney, will scarcely admit of argument. It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty should be debarred of counsel because he was too poor to employ such aid. No court could be respected, or respect itself to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.[195]

These were powerful, uncompromising words from common sense antebellum judges on the Indiana frontier. The notion that this poor burglary defendant should proceed to trial without counsel appointed was something of an outrage to the Indiana court.

But the Indiana Supreme Court does not stop there. While the court was in high dungeon over the principle, it also had a pragmatic bent. If counsel was to be appointed, who would pay? According to the *Webb* court, the cost could not be imposed upon the lawyer. Instead, the court declared:

> . . . a moment's reflection would seem to fix that duty on that part of the body politic embraced in the county of Tippecanoe. The poor of that county are not left to the generous charity of individual citizens. They are provided for by law. A poor prisoner , as to his physical wants, falls within the reason of the law, and , to that extent, is clearly embraced by the law. If the prisoner was brought into Court not decently or comfortably clad, and was too poor to provide for himself, no one would doubt the power and duty of the Court, on general principles, without any statute, to order suitable closes for him. It cannot be admitted for a moment that the law regards the physical wants of the citizen of more consequence that his life or his liberty. Whenever, therefore, the law

[194] Webb v. Baird, 6 Ind. 13, 13 (Ind. 1854).
[195] *Id.* at 15.

> makes provision for the one, at the public expense, the other, being within the reason of the law, is also embraced. It seems eminently proper and just, that the treasury of the county, which bears the expense of his support, imprisonment, and trial , should also be chargeable for his defense.[196]

Or consider the Iowa case of *Hall v. Washington*.[197] In *Hall,* the Iowa Supreme Court held that the county was liable for the costs of counsel appointed by the district court in a murder case involving an indigent defendant. In *Hall,* a statute expressly authorized the district court to appoint a lawyer for an indigent defendant. The statute, however, did not expressly address the issue of payment of the costs of appointed counsel.

The Iowa Supreme Court observed that where service is provided pursuant to a statutory mandate, an obligation for payment to the person who performs the service is implied. Otherwise, according to the *Hall* court, "the arm of the law will be too short to accomplish its designs."[198] The *Hall* court noted that when courts appoint auditors, commissioners, and masters in chancellery, the court has the implied judicial power to provide for compensation. The same should be true of lawyers appointed by courts pursuant to statutory authority.

Hall could be regarded as a case of statutory interpretation. But it clearly has constitutional overtones. The Iowa Supreme Court suggested that requiring counsel to perform services without payment amounted to a violation of due process under the United States Constitution.[199] It further noted that the result in the case was supported by the right to counsel established in the Sixth Amendment.[200]

And consider two very early Wisconsin Supreme Court cases. In *Carpenter v. Dane County,* the Wisconsin Supreme Court considered a case where a defendant was charged with petit and grand larceny.[201] The Wisconsin Supreme Court demonstrated indigence and had the benefit of court-appointed counsel, but such counsel was not paid. The county maintained that there were no statutes or constitutional provisions regarding the right of appointed counsel to compensation. The Wisconsin Supreme Court emphasized that the various rights secured by a criminal defendant under the state constitution, including the right to a speedy trial, to cross-examine witnesses, and to compel attendance, would be of little value without the assistance of counsel. According to the Wisconsin Supreme Court:

> Would it not be a little like mockery to secure to a pauper these solemn constitutional guarantees for a fair and full trial of matters with which he was charged, and yet say to him when on trial, that he must employ his

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[196] *Id.* at 15.
[197] Hall v. Wash. Co., 2 Greene 473, 473 (Iowa 1850).
[198] *Id.* at 476.
[199] *See id.* at 478.
[200] *See id.* at 478.
[201] Carpenter v. Cnty. of Dane, 9 Wis. 274, 274 (Wis. 1859).

> own counsel, who could alone render those guarantees of any real permanence value to him.[202]

In support of its position, the Wisconsin Supreme Court cited Art. I, § 7 of the Wisconsin Constitution.

The Wisconsin Supreme Court closed with a rousing remark that "the duty of the court and of the county are equally clear and manifest."[203] It was the responsibility of the court to see that an indigent defendant had counsel who was reasonably compensated and the duty of the county to pay for it. Plain and simple.

The Wisconsin legislature's response was plain and simple. It amended its statutes to provide that counties shall not be liable for the expenses of appointed counsel.[204] In *Dane County v. Smith*, the Wisconsin Supreme Court considered whether counsel was entitled to payment notwithstanding the terms of the statute. The *Dane* court answered the question in the affirmative, declaring that the statute itself was inconsistent, and that you could not have a mandatory obligation to provide services under a statute without entitled to compensation for those services. The *Dane* court found the statute "inconsistent with itself" and thus could not be enforced.[205]

Other states prior to followed suit prior to *Gideon*. Beaney notes that state courts in New York, California, Georgia, Nevada, and Nebraska all found that indigent criminal defendants had a right to counsel under state constitutions.[206] In other states, statutory right to counsel provisions obviated the need for a constitutional determination and none occurred.[207] While many states continued to cling to the notion that right to counsel only meant right to retained counsel, it is clear at the time of *Gideon* that there was ample state precedent supporting the notion that under a right to counsel constitution theory, indigent criminal defendants were entitled to appointed counsel in felony cases.[208]

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[202] *Id.* at 276.
[203] *Id.* at 275.
[204] *See* Cnty. of Dane v. Smith, 13 Wis. 585, 588 (Wis. 1861).
[205] *Id.* at 589.
[206] *See* William M. Kunstler, *Beaney: Right to Counsel in American Courts*, 53 MICH. L. REV. 902 (1955) (The cases cited include People ex rel. Moore v. Hunt, 16 N.Y.S. 2d 19 (Cnty. Ct. N.Y. 1939); People v. Avilez, 194 P.2d 829 (Cal. Ct. App. 1948); Jones v. State, 195 S.E. 316 (Ga. Ct. App. 1938); State v. Crosby, 50 P. 127 (Nev. 1897); State v. Garcia, 142 P.2d 552 (N.M. 1943); Alexander v. O'Grady, 290 N.W. 718 (Neb. 1940)).
[207] *See Kunstler*, *supra* note 147.
[208] *See generally* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 SO. CAL. L. REV. 323, 374-75 (2011) (noting influence of state constitutional law on Powell and Zerbst).

C. State Supreme Court Foundations Relied Upon By United States Supreme Court In Early Landmark United States Supreme Court Right To Counsel Precedents

1. Powell v. Alabama

Powell v. Alabama is often heralded as a groundbreaking case regarding the right to assistance of counsel in state court.[209] And, to some extent, it was. In *Powell*, after decades of lynchings and violence in the south against Black people, the Supreme Court finally intervened on due process grounds in a farcical state court criminal proceeding against Black defendants. In eloquent terms, the Supreme Court emphasized the key role of counsel in the adversary criminal justice system, at least in cases involving indigent defendants facing the death penalty.

But as seen in the above discussion of early state court right to counsel cases, *Powell* was not a leading case, but something of a laggard. Indeed, as Mayeux has observed, the major propositions declared in *Powell* were supported by state court precedent. For example, as noted by Mayeax, the *Powell* court cited thirteen state law cases from eight states for the notion that pro forma participation of counsel did not satisfy constitutional right to counsel.[210]

What was remarkable about *Powell*, however, was the establishment through due process of a federal floor of rights that included a right to an indigent defense to representation by counsel that would apply evenly to states, particularly in the south, that bitterly resisted the notion as interfering with the antediluvian state criminal justice systems. But *Powell* cannot overshadow the fact that state courts, well in advance of federal courts, were developing right to counsel theory and that the *Powell* court heavily relied on state court precedent in justifying its decision.

2. Johnson v. Zerbst

In Johnson v. Zerbst, the United States Supreme Court considered an appeal by a defendant convicted of possessing and uttering counterfeit money. In *Johnson*, the Supreme Court held that the right to counsel extended to all cases where "life and liberty" was at stake.[211] The *Johnson* court held that the district court would be without jurisdiction to convict the defendant if the defendant proceeded without counsel unless that right had been waived. In order to waive the

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[209] *Powell*, 287 U.S. at 45.

[210] *See* Mayeux, 99 IOWA L. REV. at 2183; see also Joseph Bloucher, *Reverse Incorporation of State Constitutional Law,* 84 S. CAL. L. REV. 323. 373-75 (2011)..

[211] *See* Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

right to counsel, the Johnson court stated that the defendant must make an "intelligent relinquishment or abandonment of a known right or privilege."[212]

As noted by Professor Boucher, the *Johnson* court relied on *Patton v. United States*,[213] which in turn relied on a Wisconsin state court case, *Hack v. State*.[214] As noted in *Johnson*, the *Hack* court declared that the "days when the accused could not testify in his own behalf (and) was not furnished counsel, and which had been make it possible to convict a man when he was without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story . . ."[215] It seems that state court right to counsel development impacted directly not only *Powell* but also *Johnson*.[216] Further, though not cited in the opinion, there were ample state court precedents for *Johnson*'s jurisdictional analysis.[217]

3. Betts v. Brady

But, in *Betts v. Brady*, the Supreme Court backtracked from *Powell* and *Zerbst*.[218] In this case, the Supreme Court considered whether the Due Process Clause of the federal constitution categorically required the appointment of counsel for indigent persons in all felonies. The *Betts* majority said no.[219]

They reasoned that under existing common law, during which the federal Bill of Rights was adopted, counsel was not permitted in all felonies but only cases of treason.[220] Thus, the Sixth Amendment was designed to do away with the prohibition, but did not impose a mandatory duty on the states to provide counsel in all felony cases. The *Betts* majority looked to statutory provisions in the colonies and states prior to inclusion of the Bill of Rights and the constitutional, legislative, and judicial history of the states to the present date.[221]

Finally, the *Betts* majority canvassed the case law and concluded that, in most states, appointing counsel was not a fundamental right essential to a fair trial.[222] The *Betts* majority reasoned that the states "should not be a straight jacketed in this respect by a construction of the Fourteenth Amendment."[223] While the dissenters cited the Wisconsin Supreme Court decision in *Carpenter v. Dane*

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[212] *Id.* at 464.
[213] *See id.* at 464 (citing Patton v. United States, 281 U.S. 276 (1930)).
[214] *See Patton*, 281 U.S. at 307 (citing Hack v. State, 124 N.W. 492, 494-495 (Wis. 1910); *See* Joseph Bloucher, *Reverse Incorporation*, *supra* note 209, at 374.
[215] *See Johnson*, 304 U.S. at 464 (quoting *Hack*, 124 N.W. at 494).
[216] *See* Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125, 145 (1969).
[217] *See* William M. Beaney, RIGHT TO COUNSEL IN AMERICAN COURTS 129 N. 221 (1955).
[218] Betts v. Brady, 316 U.S. 455 (1942).
[219] *Id.* at 473.
[220] *Id.* at 466.
[221] *Id.* at 467-72.
[222] *Id.* at 472-73.
[223] *Id.* at 472.

County and the Indiana Supreme Court decision in *Webb v. Baird*, the majority did not engage in the reasoning of the cases.[224]

Betts, of course, is an example of the tendency of the United States Supreme Court to underenforce constitutional norms in order to preserve a vision of federalism where states are permitted considerable leeway in the development of constitutional frameworks. And, instead of looking to the developing law of the right to counsel in the states, it sought to minimize and cabin *Powell.*

4. Gideon v. Wainwright

In *Gideon v. Wainwright*, the Supreme Court overruled *Betts v. Brady* and held that the right to counsel was a fundamental right protected in state courts through the Fourteenth Amendment in felony cases.[225] Justice Black returned to *Powell* and *Johnson v. Zerbst*, two Supreme Court cases heavily influenced by state court precedents, as authority to declare that *Betts* was simply wrong.[226] Although no state court precedents were cited in Justice Black's majority opinion, the connection to *Powell* and *Johnson,* which did rely on state court precedents, was clear. Notably, while Florida filed an amicus brief in support of affirming *Betts* was also supported by two other states, twenty-two filed an amicus brief declaring that *Betts* was wrongly decided and should be overturned.[227]

While *Gideon* is said to be revolutionary, that is only partly true. Many states, either through statute or judicial decision, had been appointing counsel to indigent felony defendants.[228] The real point of *Gideon*, unstated in the opinion, is that it applied nationally, and that included the southern states where the criminal justice system notoriously rode roughshod over Black defendants. Like *Brown v. Board of Education*, *Gideon* can be best understood as attempting to revive the promise made by the Reconstruction Amendments that traditional notions of federalism would not deprive formerly enslaved individuals of equal protection before the law in southern states committed to historic policies of segregation and racial inequality.[229]

5. Summary

With the exception of *Powell,* the United States Supreme Court did not always cite in its opinions the powerful rhetoric emanating from state courts regarding the right to counsel. Yet, the bottom line here is that the march of federal

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[224] *Id.* at 476 (Black, J., dissenting).
[225] Gideon v. Wainwright, 372 U.S. 335, 345 (1963).
[226] *Id.* at 342-343.
[227] *Id.* at 345.
[228] *See generally* Sara Mayeux, *What Gideon Did,* 115 COLUM. L. REV. 15, 18-23 (2016).
[229] Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99(1) MICH. L. REV. 48, 48 (2000); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2239 (2013); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1398 (2004).

law to recognize a right to appointed counsel by an indigent defendant was preceded by and supported by an ample body of case law developed in state court by state court judges, often relying on state constitutional provisions. So, the strong philosophical and constitutional underpinnings in *Powell*, *Zerbst*, and *Gideon*, as well as their powerful rhetorics, were not a sudden discovery of enlightened, courageous federal judges, but had been proclaimed by conscientious state court judges in many state court cases. So, the broad generalization that the federal courts are the innovators and state courts are the laggards with respect to the foundational development of the right to counsel is simply inaccurate. If anything, the *Powell* and *Gideon* courts were laggards in constitutional development.

Don't get me wrong. I marvel at the *Gideon* story, and I adore Anthony Lewis's wonderful narrative.[230] Whenever a judge or lawyer is discouraged about the legal process, they should pick up *Gideon's Trumpet* and reread it. But a basic question underlying *Powell* and *Gideon* is: why did it take so long to develop in federal law in the first place? It is true, of course, that federal criminal law did not develop until the late nineteenth century. But still. Was it the historic fear of the Supreme Court that to intervene in the criminal justice system in the southern states would meet with bitter resistance, fuel the Klu Klux Klan, and be unenforceable? Regardless, at the end of the day, no one can doubt that the *Gideon* court was using the Fourteenth Amendment precisely as intended, namely, to prevent notions of federalism from defeating enforcement of basic constitutional rights in the former slave states. But as seen above and below, *Gideon* is only part of the story. As in the past, state courts may play a leading role in developing law surrounding the right to counsel through interpretation and enforcement of state constitutional provisions.

VI. POST GIDEON RIGHT TO COUNSEL DEVELOPMENTS IN UNITED STATES SUPREME COURT

A. Overview of Individual Claims of Individual Ineffective Assistance in United States Supreme Court

1. Test for Ineffective Assistance of Counsel in Individual Cases

Powell made it clear that mere pro forma representation by counsel was inadequate to meet the demands of due process in a murder case. The question that follows is where to draw the line between constitutionally acceptable performance of trial counsel and constitutional inadequacy. The United States Supreme Court brushed by the issue in *McMann v. Richardson*.[231] The *Richardson* court noted that defendants facing felony charges are entitled to effective assistance of competent counsel.[232] The *Richardson* court, however, did not elaborate on what might

[230] *See generally Introduction* in Anthony Lewis, GIDEON'S TRUMPET (1964).
[231] McMann v. Richardson, 397 U.S. 759, 759 (1970).
[232] *Id.* at 771.

constitute ineffective assistance, leaving the matter to "the good sense and discretion of the trial courts . . ."[233]

The Supreme Court filled in some of the blanks in the *Richardson* opinion in *Strickland v. Washington*.[234] In this case, the court considered an appeal from a criminal defendant sentenced to death where his lawyer did not prepare a case for mitigation but simply relied on the hope that the sentencing judge would credit the defendant for accepting responsibility for his crimes.[235]

The battlelines in *Strickland* were shaped by cases out of the D.C. Circuit. While *Gideon* and *McMann v. Richardson* established the right of criminal defendants facing felony charges to *effective* assistance of counsel, the implications were unclear. The D.C. Circuit took on the issue in the *De Coster* cases.[236] Among the contested issues was whether the legal test for ineffective assistance of counsel should be a checklist of certain categories of legal actions that must be taken or performed or whether the test should be more open-ended and less categorical. The D.C. Circuit ultimately rejected the checklist or categorical test, over a dissent by Judge David Bazelon.[237]

In *Strickland*, the Supreme Court held that in order to assert a post-conviction ineffective assistance claim, a defendant must satisfy a two-pronged test. First, the defendant must show that his legal representation was not reasonable under prevailing professional norms under all the facts and circumstances.[238] The Court elaborated, however, that there was no "checklist" for judicial evaluation of ineffectiveness claims and that judicial scrutiny of counsel's performance should be "highly deferential."[239]

Second, the Supreme Court held that the defendant also had to show prejudice to be entitled to relief under the Sixth Amendment.[240] The standard for prejudice was declared to be whether there was, based on examination of the record, a "reasonable probability" that the outcome of the trial would have been different if counsel had acted differently.[241] Reasonable probability is defined as sufficient to undermine confidence in the outcome, not requiring it to be more likely than not that the outcome would have been different.[242] The burden of showing both elements of an individual ineffective assistance of counsel claim rested with the defendant.[243]

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[233] *Id.*
[234] Strickland v. Washington, 466 U.S. 668, 668 (1984).
[235] *Id.* at 672-675.
[236] *United States v. DeCoster*, 487 F.2d 1197, 1199 (1973); *United States v. DeCoster*, 624 F.2d 196, 199 (D.C. Cir. 1978)
[237] *See* Donald Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997) for a scholarly discussion of related issues.
[238] *Strickland*, 466 U.S. at 687-668.
[239] *Id.* at 689.
[240] *Id.* at 691-692.
[241] *Id.* at 694.
[242] *Id.*
[243] *Id.* at 700.

In a famous dissent joined by Justice Brennan, Justice Marshall chastised the vague new standard for ineffective assistance. Marshall pointed out that the "reasonableness" prong of Strickland was "so malleable that, in practice, it will either have no grip at all or will yield excessive variation . . ."[244] On the prejudice prong, Marshall noted that it may be impossible on the basis of a cold record to determine what a competent attorney could have achieved.[245] Further, Justice Marshall noted that the right to counsel applies to all defendants, guilty or not.[246] Based on the record, Marshall concluded that counsel in a death penalty case should investigate a mitigation defense and that there was a significant chance Washington would have received a life sentence.[247]

When first announced, *Strickland v. Washington* may have appeared as something of a compromise. Prior to *Strickland,* most federal courts would not reverse a conviction on federal right to counsel grounds unless the representation was a farce or mockery. Justice O'Connor's opinion moved away from the farce or mockery standard and replaced it with a somewhat looser standard, arguably at least somewhat akin to state court precedents.

But if the new standard under *Strickland* was somewhat pliable, the majority had direction for lower courts on how the amorphous standards were to be applied. On the merits prong, the *Strickland* court spoke of a strong presumption that counsel was effective.[248] Some of the language, like that suggesting a violation only if "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," could be read as a highly difficult standard to meet.[249]

And, the prejudice prong invited conclusory declarations by busy appellate courts that after a full examination of the record, the evidence is "overwhelming" and no relief is available under the second *Strickland* prong. Of course, while the evidence might seem to be "overwhelming" in a given case, it is unknown what the record would look like if competent counsel developed the case. Indeed, that is exactly what happened in *Gideon,* who was actually pretty good in the courtroom, but desperately needed a skilled lawyer to develop the kind of record that would lead to his ultimate acquittal.

The case law arising after *Strickland* showed that lower federal courts, when given a chance, would seek to affirm criminal convictions and reject ineffective assistance claims whenever possible. To the Sixth Amendment right to counsel advocates, some of the developing case law was outrageous.[250] To the extent Justice O'Connor sought to advance a moderate, middle position, she failed. The broad generalized "totality of the circumstances" language of *Strickland* and

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[244] *Strickland*, 466 U.S. at 707.
[245] *Id.* at 710.
[246] *Id.* at 711.
[247] *See id.* at 719.
[248] *See id.* at 689.
[249] *Id.* at 687.
[250] For an example of the scholarship critical of the application of Strickland in the cases, see Wiliam 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 (Sept. 1995).

the language of the *Strickland* opinion making a review of counsel's performance "highly deferential" gave lower courts permission to reject ineffective assistance of counsel claims in cases even when the violations seemed most egregious.

Yet, problematic as *Strickland* is, a careful analysis of the cases at least suggests the possibility of some bite. First, the actual elements of *Strickland*, absent some of the mood music in the opinion, seem to have some potential to protect criminal defendants from incompetent lawyering. Second, as noted by Primus, *Stickland* may be narrowly construed as applying only in cases of what she describes as episodic ineffective assistance of counsel.[251]

Nonetheless, given the barriers presented by *Strickland* to claims brought by individual *defendants,* right-to-counsel advocates soon sought to escape the barriers of *Strickland* by bringing claims that were not based on individual deprivations but were based upon systemic, pretrial violations of the right to counsel as protected by federal and state constitutions.

2. The Approach in Cases Involving Constructive Denial of Counsel

There was another case that raised some prospects for ineffective assistance claims, *United States v. Cronic.*[252] In *Cronic,* the defendant was charged with mail fraud in connection with a check-kiting scheme.[253] *Cronic's* chosen counsel withdrew shortly before trial was scheduled. The trial court then appointed a young real estate attorney to represent Cronic but gave him only 25 days of pretrial preparation even though the government had four and a half years to investigate the case and review documents. Two co-defendants testified for the government. Cronic was convicted of eleven out of thirteen counts in the indictment. Cronic received a twenty-five year sentence.[254]

The Tenth Circuit reversed Cronic's conviction.[255] According to the Tenth Circuit, Cronic's conviction had to be reversed because ineffective assistance of counsel could be inferred from the record. The Court of Appeals made this inference based on five criteria: (1) the time afforded for investigation and preparation, (2) the experience of counsel, (3) the gravity of the charge, (4) the complexity of possible defenses, and (5) the accessibility of witnesses to counsel.[256] The Supreme Court rejected the Court of Appeals approach. Writing for the Court, Justice Stevens recognized that reversal was required when a criminal defendant was completely denied counsel. Building from that premise, and from *Powell v. Alabama*, Justice Stevens recognized that there were situations where a lawyer was formally appointed but the circumstances made it so unlikely that that

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[251] Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness.* 72 STAN. L. REV. 1581, 1590-1591 (June 2020).
[252] United States v. Cronic, 446 U.S. 648, 648 (1984).
[253] *Id.* at 649-650.
[254] *Id.*
[255] United States v. Cronic, 675 F.2d 1126, 1126 (10th Cir. 1982).
[256] *Cronic*, *supra* note 192 at 652-653 (listing the criteria the Court of Appeals utilized in their decision).

any lawyer could provide effective assistance. In these situations, ineffectiveness could be presumed.[257]

But Justice Stevens found that the circumstances in this case and the five criteria utilized by the court of appeals did not show what has been called a constructive denial of counsel.[258] Justice Stevens reasoned that every lawyer is at one point in her career inexperienced, and the real estate background of Cronic's lawyer may well have been a plus. While the government spent a long time developing the case, that did not mean that the charges that were ultimately filed were all that complicated. The facts thus did not make is so likely that there was a failure of the adversary system requiring reversal of the conviction without a showing of prejudice under *Strickland*.[259]

Cronic was not a total defeat for criminal defendants. Under the ruling, if there has been a total or constructive denial of right to counsel at a critical state of a criminal proceeding, the second prejudice prong of *Strickland* did not apply. The surrounding circumstances must be such that there has been a failure of the adversary process. Further, *Cronic* emphasized that of all constitutional rights, "the right to be represented by counsel is by far most pervasive, for it affects his ability to assert any other rights he may have."[260]

There are several reasons to keep *Cronic* in mind today. First, the attorney in the case had twenty-five days to prepare for trial after workup by previous attorneys. That is not a narrow window in a check-keeping case where the documents spoke for themselves. One can only wonder whether public defenders today have a similar time window to prepare a felony case.[261] Second, the preparation of a criminal case in 1984 was comparatively uncomplicated compared to today's criminal defense environment involving forensics and increasingly complicated law.[262] And third, legal studies like those conducted by the Spangenberg group provide a far more sophisticated factual basis for finding an "inference" of ineffective assistance.[263] And last, state courts using *Cronic* principles, may apply them in a less restrictive manner than their federal counterparts.

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[257] *See id.* at 659-660.
[258] *See id.* at 663.
[259] *See id.* at 664-665.
[260] *Id.* at 654.
[261] *See* Samantha Jaffe, *"Its Not You, its Your Caseload,"* 116 MICH L. REV. 1465, 1475-76 (noting public defenders in Atlanta, Detroit, and New Orleans spend an average of 59 minutes, 32 minutes, and 7 minutes on each case in 2017).
[262] Caitlin M. Plummer, and Imran J. Sayed, Criminal Procedure v. Scientific Progress: The Challenging Path to Post Conviction Relief, 41 Vermont L Re 297, 321-22 (suggesting that the holding in *Cronic* might be applied to cases where the science has shifted in a fashion that undercuts the verdict).
[263] *See* Primus, *Disaggregating Ineffective Assistance, supra* note 250, at 1641.

3. "Check List Lite": Use of Professional Standards in Guilty Plea Cases

The United States Supreme Court used three guilty plea cases to reinforce the role of professional standards in determining whether counsel had provided reasonably competent advice under *Strickland*. First, in *Padilla v. Kentucky*, the Supreme Court considered a claim of ineffective assistance related to a failure to properly inform a criminal defendant of the immigration consequences of a plea.[264] Padilla had lived in the United States for forty years and served as a member of the armed forces. Padilla's lawyer advised him that pleading guilty to a charge of transportation of marijuana would not have immigration consequences because he had been in the country for "so long" when, in fact, it made his deportation virtually mandatory.[265]

Addressing the first prong of the *Strickland* test, the *Padilla* court held that his lawyer's conduct met the competence prong of Strickland. In reaching this conclusion, the court relied explicitly on ABA standards of professionalism. While the *Strickland* court characterized the ABA standards as "only guides,"[266] the *Padilla* court emphasized that the standards "may be valuable measures of the prevailing professional norms of effective representation."[267] The *Padilla* court then surveyed in detail the various professional standards that universally required defense counsel in a plea bargaining context to advise the non-citizen client of deportation.[268] It remanded the case to Kentucky courts for a determination on the prejudice prong of *Strickland*.[269]

Second, in *Missouri v. Frye,*[270] a defendant pleaded guilty to driving while revoked, a felony under state law. His lawyer did not communicate to him a plea offer made by the prosecution until the offer expired. The terms of the expired plea agreement were more generous than the plea agreement later entered into by the defendant.[271] According to the *Frye* court, "[t]hough the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides." So, the professional standards of various organizations were elevated from "only guides" status in *Strickland* to "important guides" in *Frye* that establish, "as a general rule," that defense counsel has a duty to communicate formal offers from the prosecution of plea offers.[272] Notably, the *Frye* court cited numerous state court cases and state rules embracing the professional standards.[273]

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[264] Padilla v. Kentucky, 559 U.S. 356, 356 (2010).
[265] *Id.* at 359.
[266] Strickland v. Washington, 466 U.S. at 688.
[267] *Padilla, supra* note 201 at 367.
[268] *Id.* at 367-368.
[269] *See id.* at 374-375.
[270] Missouri v. Frye, 566 U.S. 134, 134 (2012).
[271] *Id.* at 138-140.
[272] *Id.* at 145.
[273] *See id.* at 145-146.

Padilla, Frye, and similar cases do not explicitly endorse a "check list" approach to ABA standards.[274] But, as noted by Gabriella Querina Kahrl, it is hard to see how counsel may provide effective assistance of counsel without following the ABA standards in these cases.[275]

B. United States Supreme Court Cases Limiting When Right to Counsel Attaches

1. No Right to Counsel For Misdemeanors that Do Not Result in Imprisonment

In several cases, the United States Supreme Court has addressed the question of whether the right to counsel arises in misdemeanor prosecutions. In the first case, *Argersinger* v. *Hamlin,* the Court held that no imprisonment may be imposed unless the accused in represented by counsel.[276] But in 1979, the Court in *Scott v. Illinois* held that there was no right to counsel under the Sixth Amendment unless actual imprisonment was part of the punishment.[277] In other words, if only a fine is imposed, there is no right to counsel.

The opinion in *Scott* was based in part on federalism concerns. Justice Rehnquist wrote that the range of conduct governed by state law was much broader than federal law.[278] In addition, Justice Rehnquist noted that any extension of the right to counsel would cause "unpredictable, but necessarily substantial costs on the 50 quite diverse states."[279] Justice Brennan countered that costs were not a factor in interpreting the scope of constitutional commands.[280] *Scott* did not impress academia.[281]

2. No Application Outside Direct Criminal Prosecution

In a number of cases, the United States Supreme Court declined to extend the right to counsel under the Sixth Amendment outside direct criminal prosecution. For instance, In *Gagnon v. Scarpelli,*[282] the United States Supreme court refused to apply the right to counsel in the context of probation or parole revocation hearings. In *Murray v. Giarranto*, it declined generally to extend a Sixth

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[274] *See* Stan Zeidman, Eradicating Assembly Line Justice: An Opportunity Lost by the Revised American Bar Association Criminal Justice Standards, 46 Hofstra Law Rev. 293, 297-300 (2017)(noting role of ABA standards in Padilla and Frye).

[275] Gabriella Querina Kahrl, *Negotiating Immigration-Friendly Outcomes in a Post Padilla World, 16-08 Immigration Briefings* (August 2016).

[276] Argersinger v. Hamlin, 407 U.S. 25, 25 (1972).

[277] Scott v. Illinois, 440 U.S. 367, 367 (1979).

[278] *See id.* at 367.

[279] *Id.* at 373.

[280] *Id.* at 384-387 (Brennan, J., dissenting).

[281] *See* Louis J. Cappuzzi III, *Sixth Amendment Federalism*, 43 HARV. J. L. & PUB. POL'Y 645, 654 (2020).

[282] Gagnon v. Scarpelli, 411 U.S. 778, 778 (1973).

Amendment right to counsel to civil cases brought by criminal defendants seeking post-conviction relief.[283]

Similarly, in *Moran v. Burbine*, the United States Supreme Court considered both the Fifth and Sixth Amendment implications of whether the state could refuse to permit a lawyer from speaking with his client at the stationhouse before formal proceedings had commenced.[284] The Court concluded that because formal criminal proceedings had not yet commenced, there was no right to counsel. And, in *Rothgery v. Gillespie County, Texas*,[285] the Supreme Court concluded that the right to counsel did not "attach" until the commencement of a criminal prosecution.

3. Prospects and Dangers

Two recent United States Supreme Court cases show prospects and dangers for advocates of the right to counsel. On the prospective side, the Supreme Court in *United States v. Gonzalez-Lopez* considered whether a state may, consistent with the right to counsel in the Sixth Amendment, deny a criminal defendant's choice of retained counsel.[286] The Supreme Court held that denial of a their choice of such counsel amounts to a structural error because it "affects the framework within which the trial proceeds."[287] In this case, at least, the Supreme Court embraced a view of the scope of right to counsel that was free from a amorphous due process style of totality of circumstances fair trial analysis. Like *Padilla* and *Frye*, *Gonzalez-Lopez* is more categorical or rule-based than fact-based.

On the more troubling side, however, is *Garza v. Idaho*.[288] In this case, the Supreme Court found ineffective assistance where a lawyer declined to file a notice of appeal notwithstanding the client's clear requests.[289] In dissent, Justice Thomas, joined by Justices Gorsuch and Alito, questioned the development of ineffective assistance doctrine over the decades. The dissent questions prior cases as departing from the original meaning of the Sixth Amendment.[290] Justice Thomas cited with apparent approval *Betts v. Brady*, which is characterized in a parenthetical as declining to extend the right to counsel to the States because "the matter has generally been deemed on of legislative policy."[291] So, while there have been some successes in expanding the Sixth Amendment right to counsel in recent years before the Supreme Court, it appears that there are three votes on the Supreme

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[283] *See generally* Murray v. Giarratano, 492 U.S. 1, 7 (1989).
[284] Moran v. Burbine, 475 U.S. 412, 412 (1986).
[285] Rothgery v. Gillespie Cnty., 554 U.S. 191, 191 (2009).
[286] *See generally* United States v. Gonzalez-Lopez, 548 U.S. 148, 148 (2006).
[287] *See id.*
[288] Garza v. Idaho, 586 U.S. 232, 232 (2019).
[289] *See id.* at 241.
[290] *See id.* at 263.
[291] *Id.*

Court in favor of overturning *Gideon*. If this happens, the importance of state constitutional law in the right-to-counsel area will obviously increase.

C. Remedies

There has not been much post-*Gideon* development of remedies in the context of right-to-counsel cases in federal courts. But in *Brown v. Plata,* the Supreme Court considered a claim that prisons in California were so overcrowded that continued incarceration under the existing conditions amounted to cruel and unusual punishment under the Eighth Amendment.[292] The court concluded that an Eighth Amendment constitutional violation was present and ordered California authorities to remedy the problem. The fact that the ruling on the merits had significant fiscal impacts on the state of California did not deter the court from proceeding to address the issue. The *Plata* teaching might well apply in the right to counsel context.[293]

D. Systemic Litigation in Federal Court Challenging State Court Proceedings Based on Right to Counsel

1. Federal Cases Refusing to Intervene in Right to Counsel Cases Based Upon Standing

The federal requirements for standing under Article III of the United States Constitution prove to be a major obstacle in federal court to bringing a prospective systemic claim. For example, in *Gardner v. Luckey,* three defendants convicted of crimes under Florida law brought an action seeking declaratory and injunctive relief against the Florida Public Defender Offices.[294] The plaintiffs did not seek release from custody or damages. They claimed that the Public Defender Offices systematically failed to meet minimum constitutional standards in the representation afforded indigents.[295] Specifically, they claimed that the Public Defenders failed to consult with their clients, to provide adequate factual and legal investigations, and to assign specific attorneys to defend indigent defendants.[296] The district court dismissed the complaint.[297]

The Fifth Circuit affirmed. Relying on *O'Shea v. Littleton,*[298] the *Garner* Court held that the plaintiffs failed to allege injury in fact.[299] The *Garner* Court noted that nowhere in the complaint did any named plaintiff allege past injury by

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[292] *See* Brown v. Plata, 563 U.S. 493, 510 (2011).
[293] Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail in a Systematic Challenge to an Indigent Defense System*, 61 ST. LOUIS U. L. REV. 625, 659-662 (2017).
[294] *See* Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974).
[295] *See id.* at 713.
[296] *See id.*
[297] *Id.*
[298] O'Shea v. Littleton, 414 U.S. 488, 502 (1974).
[299] *See Gardner*, 500 F.2d at 714.

the conduct of the Public Defender.[300] The claim that plaintiffs will in the future be exposed to inadequate representation by the public defender in the future was adjudged to be "too speculative" to satisfy Article III.[301] Other federal courts have reached similar conclusions.[302]

Citing *Preiser v. Rodriguez*, the *Garner* Court additionally noted that if such allegations had been made, habeas corpus would be his exclusive federal remedy.[303] Further still, any challenge to present violations in state court proceedings would be barred under the doctrine of *Younger v. Harris*.[304]

There is some federal authority to the contrary on the question of standing. In *Luckey v. Harris*, the Eleventh Circuit came to conclusions different than *Gardner*.[305] In *Harris*, the plaintiffs brought class actions on behalf of all indigent persons charged, those to be charged, and all attorneys who represent indigent defendants. [306] The gravamen of the complaint was that the defendant state officials were responsible for a system of public defense that included deficiencies such as inadequate resources, delays in the appointment of counsel, pressure on attorneys to hurry through their case or enter a guilty plea, and inadequate supervision. The plaintiffs alleged violations of the right to counsel, due process, the right to bail, and equal protection.[307]

Departing from the approach in *Gardner*, the Eleventh Circuit held that the plaintiffs had standing to litigate the claim.[308] The Court rejected the application of the *Strickland* test, noting that the claim did not involve a post-conviction challenge.[309] For a prospective challenge, the Eleventh Circuit proposed that the plaintiffs needed to show not injury in fact but "the likelihood of substantial and immediate irreparable injury and the inadequacies of remedies at law."[310] The Eleventh Circuit reversed the district court's dismissal and remanded the case.[311]

On remand, however, the district court again dismissed the case, this time on abstention grounds.[312] On appeal, the Eleventh Circuit affirmed the dismissal.[313] Thus, an apparent victory for plaintiffs evolved into a defeat. Abstention, of course, would not apply in a state court right to counsel challenge brought under a state constitutional provision.

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[300] *See id.*
[301] *See id.* at 715.
[302] *See generally* Thomas v. Jones, 428 Fed. Appx. 122, 124 (3d Cir. 2011).
[303] *See* Preiser v. Rodriguez, 411 U.S. 475, 476 (1973).
[304] Younger v. Harris, 401 U.S. 37, 43 (1971).
[305] *See generally* Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988),
[306] *See id.* at 1013.
[307] *See id.*
[308] *See generally id.* at 1017.
[309] *See id.*
[310] *Id.*
[311] *See* Harris v Luckey, 918 F.2d 888, 891 (11th Cir. 1990) .
[312] *See* Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992).
[313] *See id.*

2. Federal Cases Refusing to Intervene in Systemic Challenges to State Court Proceedings Based on Abstention

As suggested above, abstention is also a major obstacle to litigation of systemic right to counsel claims in federal court. For instance, in *Foster v. Kassulke*,[314] a defendant convicted in state court of five murder counts and sentenced to death was prosecuting an appeal before the Kentucky Supreme Court. The defendant filed a civil action alleging that state court procedures related to her appeal violated due process, equal protection, and effective assistance of counsel. She attacked a fee cap of $2,500 per appeal imposed by Kentucky law.[315] She noted that the state no longer provided transcripts but only electronic recordings of transcripts, making processing of an appeal more difficult.[316] She sought an order requiring the Kentucky Supreme Court to provide a reasonable fee and to provide her with a written transcript of the video testimony.[317] The district court dismissed the claim based on abstention and lack of standing.[318]

The Sixth Circuit affirmed on abstention grounds.[319] The Court noted that *Younger* concerns include equity, comity, and federalism in state and federal relations.[320] The Sixth Circuit noted that the plaintiff had an opportunity to litigate all the issues in state court proceedings and that no "extraordinary circumstances existed justifying federal intervention."[321]

3. Federal Cases Refusing to Intervene Based on State Immunities

Federal courts have declined to engage in a review of prospective systemic claims based on the doctrine of state immunities. In *Church v. Missouri*, arrestees in the state of Missouri brought a putative class action in Missouri state courts alleging that the state of Missouri and its Governor had failed to meet their obligation to provide indigent defendants with meaningful representation of counsel.[322] The plaintiffs brought due process and right to counsel claims under both state and federal constitutions as well as claims based on Missouri statutory law.[323] The plaintiffs sought declaratory and injunctive relief. At the outset of the litigation, the defendants removed the case to federal court.[324]

The plaintiffs presented extensive empirical evidence concerning the provision of legal services to indigent criminal defendants in Missouri.[325] The

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[314] Foster v. Kassulke, 898 F.2d 1144, 1144 (6th Cir. 1990).
[315] *See id.* at 1145.
[316] *See id.*
[317] *See id.*
[318] *See id.* at 1145-1146.
[319] *See id.* at 1146.
[320] *See Foster*, 898 F.2d at 1146.
[321] *See id.* at 1148.
[322] *See* Church v. Missouri, 268 F. Supp. 3d 992, 996-997 (W.D. Mo. 2017).
[323] *See id.* at 1008.
[324] *See id.* at 997.
[325] *See Id.* at 997.

plaintiffs' evidence showed the Missouri Public Defender's Trial Division handled more than 75,000 cases per year and spent an average of $356 per case.[326] In terms of per capita funding of indigent defense, Missouri ranked 49th out of 50 states.[327]

The parties cumulatively pointed to ten independent evaluations of Missouri's public defense system, all of which were highly critical of the caseloads carried by each public defense attorney.[328] Plaintiffs asserted it would take an additional $20 million dollars, or 333 additional lawyers, to provide minimally adequate public defense for indigent defendants.[329]

As a result of the deficiencies in funding, plaintiffs asserted that Missouri public defenders were often unavailable to represent individual defendants at arraignment, at bond proceedings, and to post arraignment lineups.[330] Missouri State Public Defender (MSPD) attorneys were unable to analyze discovery early enough to make important investigative decisions, and were unable to meet with witnesses or take other steps to prepare for trial or negotiate a more favorable settlement adequately.[331] MPSD attorneys were unable to meet with clients on a regular basis.[332]

The five named plaintiffs also made extensive individualized factual allegations. In general, the plaintiffs alleged that they had very little timely contact with their attorneys, were not represented at timely bond hearings, and were kept in pretrial incarceration for months or years after being taken into custody.[333] Four of the plaintiffs remained in custody pending trial, while one pleaded guilty and was on probation.[334]

The defendants moved to dismiss the case for lack of subject matter jurisdiction and failure to state a claim.[335] The district court held that the defendants were not entitled to dismissal based on sovereign immunity or legislative immunity. The district court found that the four plaintiffs currently in custody and awaiting disposition had standing to litigate but the claim brought by a plaintiff who had plead guilty and was no longer in custody was dismissed.[336] The district court dismissed certain statutory claims against the governor.[337] Defendants appealed.

The Eighth Circuit reversed.[338] On the question of sovereign immunity, the Eighth Circuit concluded that although framed as an action for injunctive relief, there was no exception to sovereign immunity under the Missouri constitution that

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[326] *Id.* at 997.
[327] *Id.* at 997.
[328] *See id.* at 997-998.
[329] *Id.* at 998.
[330] *Id.* at 999.
[331] *See id.* at 999.
[332] *Id.* at 999.
[333] *See id.* at 1002-1007.
[334] *Id.*
[335] *Id.* at 1008; *See generally id.* at 1011-13.
[336] *See id.* at 1014-1015.
[337] *See id.* at 1023.
[338] *See* Church v. Missouri, 913 F.3d 736, 741 (8th Cir. 2019).

would permit any actions against the state.[339] The Eighth Circuit recognized that there were certain federal obligations, such as the right to compensation after a taking and a right to recover taxes unlawfully extracted, that trumped state sovereign immunity. But these specific remedies were not implicated in the case.[340]

The Eighth Circuit further rejected the plaintiff's claim that the governor was a proper party because of his "connection" to the underlying violations under a Supreme Court case from 1908, *Ex Parte Young*.[341] The Eighth Circuit, however, rejected the governor's generally stated powers as chief executive, his power to appoint members to the board controlling public defense, and his participation in the appropriation process as sufficient to defeat sovereign immunity and legislative immunity under Missouri law.[342]

In retrospect, one wonders whether it may have been a mistake to allege federal causes of action in this case and risk the prospect of removal to federal court. Would not the state causes of action have been adequate?

4. Federal Courts Intervening in State Court Proceedings Based on Systemic Challenges

As demonstrated above, federal court challenges to the systemic right-to-counsel deficiencies face barriers including standing, abstention, and immunities. However, two recent federal cases indicate that there may be some prospects in federal court for systemic right to counsel claims. Both arise in the Pacific Northwest.

The first case is *Wilbur v. City of Mt. Vernon*.[343] In this case, indigent criminal defendants brought a class action under 42 U.S.C. § 1983, alleging that public defense provided by two cities deprived plaintiffs of their right to counsel under the Sixth Amendment and Art. I, Sec. 22 of the Washington State Constitution.[344] According to the district court, the evidence established that public defenders in these two jurisdictions were far in excess of what caseload standards adopted by the Washington Supreme Court found acceptable.[345] Further, the evidence showed that the public defense system amounted to a "meet and plead" system with little investigation or case preparation.[346] The district court found that the constitutional violations "were the direct and predictable result of the deliberate policy choices of City officials."[347]

Wilbur, however, is most notable for its remedy. The district court noted that "the exact impacts of the constitutional deprivation are widespread but

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[339] *Id.* at 743-745.
[340] *Id.* at 746-747.
[341] *See* Ex parte Young, 209 U.S. 123, 157 (1908).
[342] *See id.* at 753.
[343] *See* Wilbur v. City of Mt. Vernon, 989 F. Supp. 1122, 1123 (W.D. Wash. 2013).
[344] *See id.* at 1131-1133.
[345] *See id.* at 1125.
[346] *See id.* at 1124.
[347] *See id.* at 1132.

difficult to measure on a case-by-case basis, making legal remedies ineffective."[348] Although the district court considered merely issuing declarative relief, the court had "grave doubts regarding the Cities' ability and political will to make the necessary changes on their own."[349] As a result, the district court entered a detailed injunction designed to trigger a process that would, at the end of the day, provide the plaintiffs with meaningful relief.[350]

The injunction required city officials to "read the Washington Defender Association's 2007 Final Standards for Public Defense Services with Commentary."[351] Further, the Cities were ordered to reevaluate their existing contracts for the provision of public defense to ensure proper communication occurs between attorney and client.[352] The district court ordered the cities to hire a Public Defense Supervisor (PDS) with duties designed to improve the quality of public defense in the cities.[353] The PDS was to engage in periodic evaluation of the operations of the public defense system.[354] The PDS was to collect data from time sheets and other sources on a regular basis and randomly review files quarterly to evaluate performance.[355] Further, the PDS was to submit detailed biannual reports to the parties.[356] If plaintiffs believed the Cities efforts were noncompliant, the district court established a framework to address the dispute in a timely fashion.[357] The district court's remedy was well defined, collaborative, ongoing, and had a mechanism for periodic review and enforcement.

The second case is *Betschart v. Oregon.*[358] *In Betschart,* "ten indigent defendants in custody awaiting trial without representation in Washington County filed a joint habeas corpus petition, seeking class status, and alleging violations under the Sixth, Eighth, and Fourteenth Amendments."[359] The district court preliminarily certified a class involving individuals in physical custody (the Custody class) but without appointed lawyers.[360] The district court issued a temporary restraining order (TRO) stating that "if class members were not provided representation within ten days of their initial appearance, or within ten days of their previous counsel's withdrawal, Oregon would have to release them."[361] The district court converted the TRO to a preliminary injunction and

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[348] *Id.* at 1133.
[349] Wilbur, 989 F. Supp. 2d at 1134.
[350] *See id.* at 1134-1137.
[351] *Id.* at 1134.
[352] *See id.*
[353] *See id.* at 1134-1135.
[354] *See id.* at 1135-1136.
[355] *Id.* at 1136.
[356] *See id.*
[357] *See generally id.* at 1137.
[358] Betschart v. Oregon,103 F.4th 607, 607 (9th Cir. 2024).
[359] *Id.* at 613.
[360] *See id.* at 614.
[361] *See id.*

reduced the time for the defendants to appoint counsel to 48 hours.[362] Defendants appealed.

The Ninth Circuit affirmed.[363] The *Betschart* court first considered athe pplicability of the abstention doctrine, which proved to be a substantial barrier in other prospective right to counsel challenges in federal courts.[364] The *Betschart* Court canvassed the traditional test for application of *Younger* abstention, but noted an exception "where there exists other 'extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of usual prerequisites of bad faith and harassment.'"[365] The *Betschart* Court found that the incarceration of a defendant before trial without counsel ch an extraordinary circumstaces requiring federal intervention.[366] Thus, abstention did not apply.

Turning to the likelihood of success on the merits, the *Betschart* court presented nine situations derived from case law where an attorney's advice outside the courtroom was necessary to provide competent and zealous advocacy.[367] The *Betschart* Court cited examples that generally stood for the proposition that the right to counsel was important not just in critical in court proceedings, but in the run up to and preparation for various critical events (i.e. investigation of lines of defense, communications, and advise to client about potential pleas, warning of risks of sentencing, keeping abreast of Supreme Court cases impacting client's interest, etc.).[368] As a result, the *Betschart* Court held that "the district court's conclusion that the Petitioners were likely to succeed on the merits was not an abuse of discretion."[369]

The *Betschart* Court then moved to consideration of the district court's preliminary injunction. It stated that the deprivation of constitutional rights constituted irreparable harm and that the district court acted within its discretion in finding that the public had an interest "in a functioning criminal justice system and the protection of fundamental rights."[370] Further, the *Betschart* Court upheld the district court's exception from releasing those charged with murder and aggravated murder as reflecting the balancing of the equities.[371]

Judge Bumatay filed a lengthy and strongly worded dissent that was seemingly designed to attack the attention of the United States Supreme Court.[372] Judge Bumatay attacked the district court's injunction as "reckless and extreme."[373] Judge Bumatay protested that there was no constitutional violation

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[362] *See id.* at 614.
[363] *See id.* at 628.
[364] *See generally* Betschart, 103 F.4th 607 at 616-618,
[365] Betschart v. Oregon, 103 F.4th 607, 617 (9th Cir. 2024) (quoting Kugler v. Helfant, 421 U.S. 117, 124 (1975) ((quoting Younger v. Harris, 401 U.S. 37, 53 (1971)).
[366] *See* Betschart, 103 F.4th 607 at 617.
[367] *See id.* at 620-621.
[368] *See id.*
[369] *Id.* at 620.
[370] *See id.* at 625.
[371] *See id.* at 625-627.
[372] *See generally* Betschart, 103 F.4th 607 at 628-653 (Bumatay, J., dissenting).
[373] *See id.* at 628.

under the facts presented, that *Younger* abstention applied, that the district court's injunction violated case law extending the right to counsel only to critical stages of a criminal prosecution, that the Fourteenth Amendment due process did not provide a basis for relief, and that the district court improperly balanced the interests in the case.[374]

The use of the "extraordinary circumstances" exception to *Younger* in a right-to-counsel context is potentially very important. If upheld, it could signal new receptivity in federal courts to systemic r-to- to counsel challenges.

VII. POST GIDEON RIGHT TO COUNSEL DEVELOPMENTS IN STATE COURT UNDER STATE CONSTITUTIONS

A. Individual Claims of Ineffective Assistance in Post Conviction Relief Settings

Once the Supreme Court decided *Strickland*, the many states reflexively adopted *Strickland* standards under their state constitutional right to counsel provisions, usually without much analysis.[375] But there at least four notable exceptions. The New York Court of Appeals in *People v. Beneventio* adopted a "meaningful assistance" test for ineffective assistance under the New York Constitution that is "somewhat more favorable to defendants," focusing on "the fairness of the process as a whole rather than its particular impact on the outcome of a case."[376] The Hawaii Supreme Court has adopted a somewhat more generous test in *State v. Aplaca,* holding that a criminal defendant must prove (1) errors by counsel reflecting a lack of skill, judgment, or diligence and (2) that the errors or omissions resulted in withdrawal of or "a substantial impairment of a substantial defense."[377] In determining substantial impact, the test is not the *Strickland* prejudice test but is instead whether the error or omission "could have had a direct bearing on the ultimate outcome of the case."[378]

Alaska too has departed from the *Strickland* formulation. According to the Alaska Supreme Court in *Risher v. State*, the prejudice prong in ineffective assistance cases under the state constitution only requires a defendant to show "a reasonable doubt that the incompetence contributed to the outcome."[379] Similarly, the Oregon Supreme Court has lessened somewhat the prejudice showing for

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[374] *See id.* at 630-631.

[375] *See generally* Platt v. State, 664 N.E.2d 357, 362-363 (Ind. Ct. App. 1996); Commonwealth v. Pierce, 527 A.2d 973, 976-77 (1987); State v. Braswell, 324 S.E.2d 241, 248 (1985).

[376] People v. Benevento, 697 N.E.2d 584, 584 (N.Y. 1998); People v. Canales, 972 N.Y.S. 316, 316 (N.Y. App. 2013).

[377] State v. Aplaca, 837 P.2d 1298, 1305 (Haw. 1982).

[378] *Id.* at 1307.

[379] Risher v. State, 523 P.2d 421, 425 (Ala. 1974).

ineffective assistance under state constitutions by requiring only that it has a "tendency" to affect the result.[380]

State courts have been willing to modify *Cronic* type principles as well. For instance, in *Commonwealth v. Hodge*,[381] the Massachusetts Supreme Court held that in *Cronic* type conflict situations, there is no requirement of proof of actual prejudice.

The majority of state courts have simply grabbed hold of the two-prong test of *Strickland* and applied it with little analysis or consideration of the potential options. Too often the test is simply announced, is declared to impose demanding standards on a defendant in proving ineffective assistance, and the conclusion is stated that the defendant failed under one or both prongs.

At least some state courts are sensitive to the concerns expressed by Justice Marshall in his *Strickland* dissent. But generally, state constitutional innovation in the area of effective assistance of counsel, especially in the context of post-conviction relief, has been limited. This phenomenon likely reflects judicial fear of being accused of opening the jailhouse gates and releasing dangerous criminals to the public. But the powerful innovative engine of state courts as judicial innovators has not yet operated in the context of *Strickland*. Whether the work of Professor Primus, who makes a strong argument that *Strickland* should be limited to episodic post-conviction cases, will have an impact in state courts, remains to be seen.

B. State Court Cases When Right to Counsel Attaches

Many state courts, often pursuant to faux or bad precedent, have simply followed federal cases on when the right to counsel attaches in a criminal proceeding under state constitutional provisions. But while state court departure from *Strickland* has been minimal, a growing number of state courts have shown independence from federal right-to-counsel law on the attachment of the right in at least four settings.

First, many states have rejected the teaching of *Scott* and extended the right to counsel to misdemeanors under state law, either legislatively or through judicial decision.[382] Second, a number of states have found a right to counsel in post-conviction relief proceedings.[383] Third, state supreme courts under state law have extended the right to counsel to parole or probation proceedings.[384]

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[380] Lichau v. Baldwin, 39 P.3d 851, 856-857 (Or. 2002) (prejudice shown if it has tendency to affect the result).

[381] Commonwealth v. Hodge, 434 N.E.2d 1246, 1248-1249 (Mass. 1992).

[382] Young, 863 N.W.3d at 274.

[383] Jackson v. State, 732 So.2d 187, 191 (Miss. 1999); Seeney v, Leapley, 487 N.W.2d 617, 619-620 (S.D. 1992); Olive v. Maas, 911 So. 837, 845 (Fla. App. 2005).

[384] People v. Bauer, 150 Cal. Rptr. 3d 804, 811 (Cal. Ct. App. 2012); Hicks v. State, 452 Sol 2d 606, 608 (Fla App. 1984) (noting Supreme Court precedent inconsistent with Florida rule); Pearl v State, 996 P.2d 688, 692 (Wyo. 2000).

Finally, a number of state courts have challenged the plurality in *Kirby v. Illinois*[385] that the right to counsel in lineups applied only post filing of formal charges against the accused. For instance, in *Blue v. State*,[386] the Alaska Supreme Court found a preindictment right to counsel under the Alaska Constitution in lineups. So did the Michigan Supreme Court in *People v. Jackson*.[387] Similarly, in *People v. Bustamante*, the California Supreme Court found an independent state constitutional right to counsel in preindictment lineups.[388] So did the Pennsylvania Supreme Court in *Commonwealth v. Richman*.[389] The Supreme Court of Oregon has determined that under the state constitution, the right to counsel attaches at arrest, not upon formal initiation of the criminal process.[390] These departures from *Kirby* are very important as they may implicate the questions such as whether a preindictment eye witness line-up identification without the presence of defense counsel is admissible in a subsequent criminal proceeding.

In addition, state supreme courts have rejected the United States Supreme Courts approach in *Moran v. Burbine*.[391] For instance, in *Commonwealth v. Mavrdakis*, the Massachusetts Supreme Court declined to follow the case.[392] Other state supreme courts have followed suit.[393]. The main point here is that state courts have the capability to make substantial departures from federal law under state constitutional provisions to help ensure a robust right to counsel.

C. State Court Remedies

There have been several examples of creative state court remedies in the context of structural litigation or failure to appropriate funds. For example, in Massachusetts, the state Supreme Court authorized a single justice to enforce a degree requiring the funding of a public finance fund for political campaigns. The justice enforced the decree not by ordering the legislature to appropriate funds, but by selling state surplus at judicial auction.[394]

In the cases involving systemic challenges to the failure of the state to provide adequate education under state constitutional provisions, the state courts

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[385] Kirby v. Illinois, 406 U.S. 682 (1972).

[386] Blue v. State, 558 P.2d 636, 642 (Alaska 1977).

[387] People v. Jackson, 217 N.W.2d 22, 28 (Mich. 1974); Young, 863 N.W.2d at 249.

[388] People v. Bustamante, 30 Cal. 3d 88, 101 (1991). *See generally* Neil Colman McCabe, *The Right to a Lawyer at a Lineup: Support from State Courts and Experimental Psychology*, 22 IND. L. REV. 905, 924 n. 152 (1989).

[389] Commonwealth v. Richman, 320 A.2d 351, 353-354 (Pa. 1974).

[390] State v. Spencer, 750 P.2d 147, 152 (Or. 2010).

[391] Moran v. Burbine, 475 U.S. 412, 427 (1986).

[392] Commonwealth v. Mavredakis, 725 N.E.2d 169, 178 (Mass. 2000).

[393] State v. Stoddard, 537 A.2d 446, 482 (Conn. 1988); Bryan v. State, 571 A.2d 170, 177 (Del. 1990); People v. McCauley, 645 N.E.2d 923, 930 (Ill. 1994); see generally John F. Terzano, *Maintaining an Accusatorial System of Justice: The States Refusal to Follow the Supreme Court Sanctions of Official Police Deception in Moran v Burbine*, 4(1) U.D.C. L. REV. 43, 48 (1998).

[394] *See* Justin R. Long, Comment, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neil*, 151 U. PA. L. REV. 277, 300, 302 n. 155 (2002); Bates v. Dir. of Office of Campaign & Political Fin., 763 N.E.2d 6, 10-11, 18 (Mass. 2002).

have developed a flexible approach to remedies.[395] In *Connecticut Coalition for Justice in Education Funding, Incorporated v. Rell*, the court flexibly found that a declaratory relief would be appropriate but with the specific proposed remedy to be first considered by the legislative branch, thereby setting up potential dialogue between the judicial and legislative branches.[396] In *Campaign for Fiscal Equity*, the New York court took a balanced approach in fashioning a remedy that was not too intrusive but was designed to ensure ultimate compliance. Here, the New York court carefully sculpted a remedy that included determining the actual costs of a sound basic education in New York City, a system of accountability in providing a sound education, and sufficient time for the policy makers to implement reforms.[397]

D. Systemic Litigation in State Courts Regarding Right to Counsel

1. Introduction

In light of these roadblocks to federal right-to-counsel claims, plaintiffs have often chosen to prosecute structural right-to-counsel litigation in state courts. All in all, there has been post-Gideon structural litigation brought in more than twenty-five states. An examination of a number of cases in a dozen states shows the complex woof and weave of structural litigation regarding any state constitutional right to counsel. As will be shown below, while structural litigation is always difficult and expensive in state court, there may be prospects for more stringent enforcement under state constitutional approaches than in federal courts. There can be no doubt, however, that some state supreme courts, utilizing state law concepts, may be receptive to litigation challenging systemic denial of the right to counsel. As will be seen below, the case law is rich and varied.[398]

2. Rebuttable Presumptions of Ineffective Assistance Arising from Systemic Deficiencies

In *Strickland*, the burden of proof remains with the defendant asserting ineffective assistance of counsel. One of the early independent state constitutional

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[395] *See* Connecticut Coalition for Justice in Ed. Gunding v. Rell, 990 A.2d 206, 221-223 (Conn. 2010); Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 344-349 (N.Y. 2003) (recognition of complexity of remedy). See generally Weishart, Algining Education Rights, *supra* note 44.

[396] Connecticut Coalition, *supra* note 329.

[397] Campaign for Fiscal Equity, supra note 357, at 344 – 349.

[398] For excellent but differently structured discussion of cases, *see* Hanlon, *The Appropriate Legal Standard, supra* note 292 at 630-648; Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense*, 75 MO. L. REV. 751 (2010); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. OF LAW AND SOC. CHANGE 427 (2009); and Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 Ind. L. Rev. 89 (2018).*

law approaches to the right to counsel is to reallocate the burden of proof in ineffectiveness cases. The leading cases are from Arizona and Louisiana.[399]

In *State v. Smith,* the Arizona Supreme Court considered an appeal by a defendant Smith who was convicted of burglary, sexual assault, and aggravated assault.[400] Smith challenged the manner in which the state provided public defense in Mohave County, Arizona, pursuant to a low bid contract.[401] Under the challenged low-bid contract system, the county only used the low bid as criteria without considering the attorney's experience, overall workload, the nature of the cases assigned and their subject matter, or the number of clients or hours worked.[402] Specifically, Smith alleged that his attorney spent only two to three hours interviewing the defendant and possibly eight hours studying the case because of his attorney's "shocking, staggering, and unworkable case load."[403] Smith brought claims under the due process and right to counsel provisions of the Arizona Constitution, and under the Arizona Supreme Court Rules of Professional Responsibility.[404]

Preliminarily, the *Smith* Court ordered a remand to the trial court to have the record expanded.[405] The record on appeal ultimately established that Smith's attorney, in an eleven-month period, handled 149 felonies, 160 misdemeanors, 21 juvenile cases, and 33 other types of cases.[406] And these statistics did not include his private civil practice.[407] Citing ABA Standards for Criminal Justice, the National Legal Aid and Defender Association filed an amicus unequivocally stating that under no circumstances should case load exceed 150 felonies per attorney per year, 300 misdemeanors per attorney per year, 200 juvenile cases per year, 200 mental commitments per year, or 25 appeals per attorney per year.[408] Smith's attorney's caseload well exceeded the new maximum caseload recommended by NLADA.[409] Based on the evidence, the Arizona Supreme Court declared it was "obvious that the caseload of defendant's attorney was excessive, if not crushing."[410]

But the Arizona Supreme Court did not specifically make a finding of ineffective assistance. Instead, in a single paragraph, it stated that the no-bid contract arrangement that led to the hiring of Smith's counsel "militates against assistance of counsel for indigent defendants."[411] As a result, as long as Mohave County maintained a no-bid system with the flaws identified in the opinion, the

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[399] State v. Smith, 681 P.2d 1374, 1384 (Ariz. 1984); State v. Peart, 621 So.2d 780, 791 (La. 1993).
[400] *Smith*, 681 P.2d at 1376.
[401] *Id.* at 1379.
[402] *Id.*
[403] *Id.* 1378-1379.
[404] *Id.* at 1381.
[405] *Id.* at 1379.
[406] *Smith*, 681 P.2d at 1380.
[407] *Id.*
[408] *Id.*
[409] *Id.*
[410] *Id.*
[411] *Smith*, 681 P.2d at 1381.

Arizona Supreme Court declared that there would be "an inference that the adequacy of representation is adversely affected by the system."[412]

The Arizona Supreme Court did find that the procedure in Mohave County violated the right of a defendant to due process and right to counsel under both the Arizona and United States Constitutions.[413] The Court reasoned that an attorney so burdened with his workload simply cannot adequately represent all his clients properly and be reasonably effective.[414]

On the facts of the case, however, the Arizona Supreme Court concluded that the state had rebutted the inference by showing lack of prejudice.[415] The analysis was minimal: "Even though we believe that the system used raises and inference of inadequate representation of counsel, that inference has been rebutted by the record in this case."[416] That's it. Was this an application, sub silentio, of *Strickland?* If so, on which prong did the State meet its burden of proof? The performance prong? The prejudice prong? We just don't know. We do know, however, that Smith was convicted of a violent sexual crime. Did the violent nature of the underlying crime drive the court decision?

The Louisiana Supreme Court in *State v. Peart* took an approach similar to the Arizona Supreme Court in *Smith*.[417] Peart was charged with a number of crimes, including aggravated rape and first-degree murder.[418] Peart presented four right-to-counsel issues for the court to decide. First, Peart claimed that a provision of Art. I, § 13 of the Louisiana state constitution, providing that the state legislature "shall provide for a uniform system for securing and compensating qualified counsel for indigents," established a personally enforceable right. Second, Peart asserted that a court may address, before trial, a claim that a defendant is receiving ineffective assistance of trial. Third, Peart asserted that consolidated motions on behalf of multiple defendants are permitted when they are represented by a single attorney and allege that that attorney is providing ineffective assistance. Fourth, Pert claimed that there were indigent criminal defendants in Section E of the Orleans Criminal District Court being provided with effective assistance.[419]

The Louisiana Supreme Court held that the uniform system language of Art. I, § 13 was not enforceable. The Louisiana Supreme Court noted that while the right to counsel was expressed as a "right," the provisions of the uniform system language were directed at the legislature.[420] The Louisiana Supreme Court also noted ambiguous language in that the uniform systems language was not to

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[412] *Id.*

[413] *Id.*

[414] *Id.*; The *Smith* Court also noted that "we must fault not only the system used in Mohave County but the attorneys involved as well." *Id.*; Further, the *Smith* Court noted that under the Arizona Rules of Professional responsibility, attorneys must comply with ethical standards governing diligence and workload. *Id.*

[415] *Id.*, at 1383.

[416] *Id.*

[417] *See Peart*, 621 So.2d at 783.

[418] *Id.* at 784.

[419] *See generally id.* at 785.

[420] *Id.* at 786.

suppress or supplant but to supplement the right to counsel.[421] But would not a cause of action against the state for a failure to meet the uniform system requirement "supplement" the individual criminal defendant's right to counsel? The opinion also seems oblivious to the notion that state constitutions establish positive rights.

On the question of whether a criminal defendant may bring an ineffective assistance of counsel claim before trial, the Louisiana Supreme Court answered in the affirmative.[422] The Louisiana Supreme Court saw this issue as a question of the adequacy of the record to adjudicate the claim.[423] But as the Louisianna Supreme Court made clear in considering whether individual claims could be consolidated, it held that each individual defendant must make a showing of ineffective assistance of counsel under *Strickland*.[424] So, while for convenience the district court might consolidate a pretrial hearing and take some "general[ized] evidence," particularized findings with respect to each defendant were required.[425]

Finally, the Louisiana Supreme Court turned to the question of whether individual defendants in Section E of the Orleans Criminal District Court were receiving effective assistance of counsel. Although the Court had previously emphasized individualized findings, the Court proceeded to "make some global findings about the state of indigent defense in Section E . . ."[426] The Court noted that the Louisiana Supreme Court Judicial Council's Statewide Indigent Defense Board Committee had hired the Spangenberg group to prepare a study on indigent defense in Louisiana.[427] The Spangenberg Report noted a "desperate need to double the budget for indigent defense in Louisiana in the next two years."[428] In addition, the workload standard of the ABA Standards for Criminal Justice were "routinely violate[d]."[429] Sitting as its own expert, the Supreme Court observed that, "We know from experience that no attorney can prepare for one felony per day."[430] Based on the unchallenged evidence in the record, the Court determined that defendants in Section E "are generally not provided with effective assistance of counsel the constitution requires."[431] The provision of the constitution involved, whether state or federal, is not specifically identified.[432]

The Court next turned to the question of remedies. Here, however, it relied on state constitutional provisions related to the judicial branch. It noted that the state constitution vested the court with "general supervisory jurisdiction over all

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[421] *Peart*, 621 So.2d at 786.
[422] *Id.* at 787.
[423] *Id.*
[424] *Id.* at 788.
[425] *Id.*
[426] *Id.*
[427] *Peart*, 621 So.2d at 789.
[428] *Id.* (quoting Study of the Indigent Defender System in Louisiana).
[429] *Id.*
[430] *Id.*
[431] *Id.* at 790.
[432] *Id.*

the other courts."[433] The Court also noted that it had inherent powers "to do all things reasonably necessary for the exercise of [its] functions."[434] And, it further mentioned that inherent powers include the authority "to fashion a remedy which will promote the orderly and expeditious administration of justice."[435]

The remedy developed by the Louisiana Supreme Court did not arise out of individual violations of due process or the right to counsel. Instead, in light of the problems identified in the Spangenberg Report and evidence presented, the court would use its own authority to fashion new standards related to ineffective assistance. The Louisiana Supreme Court declared that in light of the evidence, a rebuttable presumption would arise that indigent defendants in Section E are receiving assistance of counsel "not sufficiently effective to meet constitutionally required standards."[436] As in *Smith,* the ruling was prospective only. Unlike *Smith*, the *Peart* Court remanded the case to determine the issue of prejudice.[437]

As noted by Justice Dennis in dissent, the *Peart* case is not a model of judicial analysis.[438] It does not discuss standing, the nature of the scope of constitutional provisions involved, or the steps that must be taken by the legislature to bring the public defender system into constitutional compliance. Nonetheless, the *Peart* discussion of inherent and supervisory powers of the court under the state constitution as authorizing the court to pragmatically develop remedies suggests that state courts applying state law may provide, at least in some circumstances, a more desirable forum for right to counsel contests than the federal courts.

3. Remedy of Dismissal Where Public Defense Function in Inadequately Staffed

One of the difficulties in systemic right to counsel litigation is that a favorable ruling on the merits would require a court to order the state legislature to appropriate additional funds for public defense in violation of separation of powers principles. But Massachusetts state courts developed what might be characterized as a work around avoiding the problem.

In *Lavallee v. Justices in Hampden Supreme Court*, the Massachusetts Supreme Court entertained a challenge under the Massachusetts state constitution to public defense where there was an insufficient number of qualified lawyers willing to accept appointments due to the very low rate of compensation legislatively authorized by the Massachusetts legislature.[439] The petitioners were indigent criminal defendants who had not been appointed lawyers to represent them.[440] The shortage of lawyers was caused by very low rates of compensation

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[433] *Peart*, 621 So.2d at 790 (quoting LA. CONST. art 5, § 5).
[434] *Id.* at 791 (quoting Konrad v. Jefferson Parish Council, 520 So.2d 393, 397 (La. 1988)).
[435] *Id.* (quoting State v. Mims, 329 So.2d 686, 688 (La. 1976)).
[436] *Id.*
[437] *Id.* at 783.
[438] *Id.* at 792-796 (Dennis, J., dissenting).
[439] Lavallee v. Justices in Hampden Sup. Ct., 812 N.E.2d 895, 899 (Mass. 2004).
[440] *Id.* at 899-900.

provided by the state.[441] The Massachusetts Supreme Court emphasized the importance of prompt appointment of counsel to assist in the investigation and preparation of a criminal matter.[442] As a result, the Massachusetts Supreme Court had "no difficulty concluding that the petitioners' constitutional right to the assistance of counsel [was] not being honored."[443]

The Massachusetts Supreme Court addressed the issue of harm. Where petitioners seek a remedy for ongoing denial of right to counsel that affects the way in which the criminal case will be prosecuted and defendant, no specific showing of prejudice is required.[444] Instead, it is sufficient to show that a violation of that right "may likely result in irremediable harm if not corrected."[445]

The Massachusetts Supreme Court considered use of inherent power to increase funding for indigent defense. The Court declined to enter an order to authorize compensation rates in excess of what the legislature had appropriated.[446] It cited examples where courts at least in the first instance deferred to legislative action to address right to counsel shortcomings.[447] Instead, however, the Massachusetts Supreme Court developed a remedy within the judicial power, namely, to declare that a defendant may wait no more than forty-five days for appointed counsel or the claim must be dismissed without prejudice.[448] Where defendants are held in lieu of bond, counsel must be appointed within seven days or dismissal without prejudice would result.[449] A single justice of the court was appointed to see that necessary procedures to enforce the court's order are implemented, to meet with affected parties, and to modify the enforcement mechanisms as may be required.[450]

At first blush, the Massachusetts order looks stronger than *Smith* and *Peart*. Ultimately, the Massachusetts legislature ultimately did respond with significant increases in funding for public defense.[451] A theme in many of the state right to counsel cases is the desire to avoid direct clash between judicial and legislative branches in favor of a judicial approach that uses progressive remedies and seeks voluntary cooperation from the legislative branch.

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[441] *Id.* at 790.
[442] *See id.*
[443] *Id.* at 905.
[444] Lavallee, 812 N.E.2d at 905.
[445] *Id.*
[446] *Id.* at 907-908.
[447] *See id.* at 908.
[448] *Id.* at 911.
[449] *Lavallee,* 812 N.E.2d at 911.
[450] *Id.* at 912-913.
[451] Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75(3) MO. L. REV. 751, 761 (2010).

4. Use of Inherent Judicial Power to Impose Remedies Requiring Expenditures of Funds to Effectuate Right to Counsel

One of the highly sensitive remedial questions in the systemic right-to-counsel litigation is the source of the power of the court to order the expenditure of funds, a function ordinarily assigned to the political branches of government. Yet, ample case law suggests, at least on the margins, that the judicial branch has inherent power to ensure that the court system can operate, and that the inherent power of the judicial branch may include mandating the expenditure of state funds.[452]

Cases from Florida demonstrate the manner in which some state courts have grappled with this problem in the right to counsel context. In the case of *Rose v. Palm Beach County*, the Florida Supreme Court considered whether the district court had the power to order the expenditure of funds for witness fees and expenses above the amount provided by Florida statute.[453] In *Rose*, a change in venue required the witnesses to travel a distance of some 300 miles. Many of the witnesses were indigent.[454] The district court approximately doubled the daily witness and mileage fees beyond that authorized by the legislature in order to support compulsory process.[455] The district court order was reversed by the District Court of Appeals.[456] On appeal, Rose claimed the low witness fees and reimbursement rates violated the rights of equality, due process, and compulsory process guaranteed by the Florida Constitution.[457]

The Supreme Court of Florida affirmed. It did not rely directly on the constitutional claims, but instead emphasized the doctrine of inherent judicial power. Under the doctrine of inherent power, courts "may do all things that are reasonably necessary for the administration of justice."[458] The Court reasoned that the right to utilize compulsory process against witness is fundamental.[459] In order to safeguard the fundamental right, the court had the power to treat the statute as a guideline only and to order the expenditure of additional funds to ensure the attendance of witnesses at trial.[460] If the established fee levels established an absolute maximum, the statute would "improperly infringe the prerogative of the court in effectuating the constitutional right to compulsory process."[461]

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[452] *See generally* Jeffrey C. Dobbins, *The Inherent and Supervisory Power*, 54 GA. L. REV. 411, 424 n. 47 (2020); Gary D. Spivey, Annotation, *Inherent Power of Courts to Compel Appropriation of Expenditure of Funds for Judicial Purposes*, 56 A.L.R. 569 (1974).
[453] Rose v. Palm Beach County, 361 So.2d 135, 135 (Fla. 1978).
[454] *Id.* at 136.
[455] *See id.*
[456] *Id.*; *See also* Accord Palm Beach County v. Rose, 347 So.2d 127, 127 (Fla. Dist. Ct. App. 1977) (reversing the district court).
[457] *Rose*, 361 So.2d at 136.
[458] *Id.* at 137.
[459] *Id.*
[460] *Id.* at 139.
[461] *Id.*

The *Rose* case dealt with the right of the accused to compulsory process and not right to counsel. But in later case, *Makemson v. Marin County*,[462] the Florida Supreme Court considered whether a district court may order payment of attorneys fees in excess of those established by statute. Makemson was appointed by a Florida district court to represent a defendant charged with first-degree murder, kidnapping, and armed robbery.[463] During trial, Makemson offered expert testimony worth 248.3 hours of service valued at a minimum of $25,000.[464] Makemson sought an order authorizing payment of $9,500.[465] The applicable Florida statute, however, limited payment to $3,500.[466]

In *Makemson*, the Florida Supreme Court declined to hold the Florida fee statute unconstitutional on its face, but held that the statute was unconstitutional "when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused."[467] The *Makemson* Court cited violations of due process and right-to-counsel provisions of the Florida Constitution and the Sixth Amendment. Using a strong rhetoric, the *Makemson* Court declared, "In order to safeguard individual rights, it is our duty to firmly and resolve any conflicts between the treasury and fundamental constitutional rights without hesitation."[468] The *Makemson* Court also noted the increased complexity of some of the criminal law cases and the increased overhead involved in criminal practice.[469]

Makemson involved an individual application of a generally applicable fee cap. So, the financial and political stakes were not as high as in structural litigation, which poses broader systemic challenges. But *Makemson* does stand for the proposition that the mere fact that protection of constitutional rights for indigent criminal defendants cost money does not prevent the state court from ensuring that constitutional rights are realized. If that principle applies when one defendant proves a constitutional violation, it applies when a constitutional violation has occurred with respect to two, four, six, eight, and a hundred defendants.

Another case of significance is *State v. Citizen*.[470] Here, two criminal defendants who had been charged with serious crimes were held in detention because they were not appointed lawyers due to a lack of public defense funding.[471] The Louisiana Supreme Court held that "unless adequate funds are identified and made available in a manner authorized by law . . . upon motion of the defendants, the trial judge may halt prosecution of these cases until adequate funds become

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[462] Makemson v. Marin County, 491 So.2d 1109, 1109 (Fla. 1986).
[463] *Id.* at 1111.
[464] *Id.*
[465] *Id.*
[466] *Id.*
[467] *Id.* at 1112.
[468] *Makemson,* 491 So.2d at 1113.
[469] *Id.* at 1114-1115.
[470] State v. Citizen, 898 So.2d 325, 325 (La. 2005).
[471] *See generally id.* at 339.

available . . ."[472] The Louisiana Supreme Court did not issue an order demanding money from the legislature, but the holding did have resulting fiscal implications.

No one can doubt that state judicial branches should resort to inherent powers only on a compelling showing of necessity and only as an act of last resort. But what is more important to the functioning of the judiciary than taking steps to ensure that indigent criminal defendants are provided with adequate counsel for their defense? As powerfully noted by a plurality opinion of the Pennsylvania Supreme Court, "the judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers to administer justice, if it is to be in reality a co-equal branch of our Government."[473]

5. Use of Due Process and Equal Protection under State Constitutions by Attorneys to Increase Compensation of Appointed Counsel

Most of the focus of independent state constitutional law involving the right to counsel focuses on state constitutional analogues to the Sixth Amendment right. But due process and equal protection theories are also available under state constitutions. As discussed above, many state supreme courts have taken independent approaches to due process and equal protection questions and declined to follow restrictive federal precedent.

The Oklahoma Supreme Court decision in *State v. Lynch* employs equal protection principles to indirectly advance the right to counsel.[474] The facts in *Lynch* were striking. The two lawyers in the case were appointed to represent Lynch who faced a first degree murder charge.[475] The defendant was convicted and sentenced to life in prison.[476] Following sentencing, the two lawyers sought a hearing on payment of attorneys fees.[477]

At the hearing, the two lawyers produced evidence that one spent 169 hours on the case with a small amount of expenses, while the other recorded 109.55 hours on the file.[478] They submitted to the district court claims seeking payment of $17,073.03 and $10,995.00, or about $100 per hour.[479] The lawyers further documented that their overhead costs were approximately $50.88 and $48.00 respectively.[480] The relevant statute, however, authorized payment only up to a cap of $3,200. If the two lawyers split the statutory cap, they would be paid at an hourly rate of $9.47 and $14.61 per hour.[481] Given the low hourly rate imposed by the

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[472] *Id.* at 339.
[473] Com. ex rel. Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971) (plurality opinion).
[474] *See* State v. Lynch, 796 P.2d 1150, 1150 (U.S. 1990).
[475] *Id.* at 1153.
[476] *Id.*
[477] *Id.*
[478] *Id.*
[479] *Lynch*, 796 P.2d at 1153.
[480] *Id.*
[481] *Id.*

$3,200 cap, the two lawyers would lose about $38 an hour for representing their client if their compensation were so limited.[482] The district court found the statutory fee cap unconstitutional and approved the requested fees.[483] The state appealed.[484]

The issue before the *Lynch* Court was not whether Lynch actually received effective assistance of counsel under Art. 2, § 20 of the Oklahoma Constitution. Instead, the question was whether the due process rights of the attorneys under the Due Process Clause of Art. 2, § 7 of the Louisiana Constitution would be violated by enforcement of the very low statutory fee cap on attorneys fees.[485]

The *Lynch* Court stated that an attorney's private practice is property under Oklahoma's Due Process Clause.[486] As a result, due process required notice and an opportunity to be heard before a lawyer was appointed to a representation that could end up depriving the lawyer of his property.[487] The *Lynch* Court held that an attorney may refuse a court appointment for good cause, including but not limited to a conflict of interest, or repugnancy so great that a lawyer could not engage in effective representation.[488] In addition, the court incorporated Rule 1.16 of the Oklahoma Code of Professional Responsibility in its definition of just cause. R. 1.16, among other things, provides that a lawyer may refuse to engage in a representation if to engage in such representation would violate disciplinary rules.[489] Finally, the *Lynch* Court found that the Due Process Clause of the Oklahoma Constitution forbids appointments unless provisions are "adequate, speedy, and certain."[490]

So state constitutional notions of due process in the context of attorneys fees and equal protection more generally are viable theories in some right to counsel contexts. With respect to equal protection, state court independent interpretations are collected in Jeffrey M. Shaman's comprehensive work, *Equality and Liberty in the Golden Age of State Constitutional Law* (2008). Some of the state law principles identified by Shaman may well have application in state right to counsel contexts.[491]

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[482] *See id.* at 1154.
[483] *Id.*
[484] *Id.*
[485] *See id.* at 1155.
[486] *Id.* at 1156.
[487] *See id.*
[488] *See id.* at 1158.
[489] *See id.*
[490] *Id.*
[491] *See* Lauren Sudeall Lucas, *Public Defense Litigation, an Overview*, 51 IND. L. REV. 89, 107 (2018) (advocating right to counsel litigation based on equal protection, due process, and notions of fundamental fairness).

6. Aggregate Proof as Supporting Remedy of Refusal to Accept Future Cases Due to Ethical Considerations

One of the issues in pretrial right-to-counsel litigation is the question of what kind of proof of future problems is required to support a claim for judicial relief. The problem was canvased in *Public Defender, Eleventh Judicial Circuit v. State.*[492] In this case, the Florida public defender filed motions to decline future appointments in twenty-one criminal cases on the ground that its staff was overworked and under-resourced.[493] Because of scarce resources, the public defender certified a conflict of interest because if more appointments were accepted, she would be forced to ration its services and thereby had a conflict of interest among its clients.[494] A Florida statute, however, stated that "in no case shall the court approve a withdrawal by the public defender based solely upon inadequacy of funding or work load."[495] Questions were raised in the case whether the statute applied under the facts, whether it intruded on the inherent powers of the court, whether the statute forced attorneys to violate the Florida Rules of Professional Conduct, and whether it could be applied to the facts of the case under the Sixth Amendment and the Right to Counsel provision of Art. I, § 16 of the Florida Constitution.[496]

The Florida Supreme Court recognized that in many challenges to ineffective assistance of counsel, also required was an applied challenge to a statute. But here, the Florida Supreme Court was struck "with the breadth and depth of evidence of how excessive caseload had impacted the Public Defender's representation of indigent defendants."[497] Some of the facts were plainly shocking. For instance, there were 105 public defenders, but 45,055 new or reopened cases at the time.[498] Third-degree felony attorneys often had as many as fifty felony cases scheduled for trial in a single week.[499] The Florida Supreme Court noted that attorneys were routinely unable to interview clients, conduct investigation, take depositions, prepare mitigation, or counsel clients about pleas after arraignment."[500] The Florida Court concluded that with such a heavy caseload, the attorneys engage in a system of "triage" with "the clients who are in custody or who face the most serious charges getting priority to the detriment of other clients."[501] In such circumstances, the Florida Supreme Court declared "the courts should not address the problem on a piecemeal case by case basis."[502]

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[492] *See* Public Defender, Eleventh Judicial Circuit v. State 115 So.3d 261, 261 (Fla. 2013).
[493] *Id.* at 265.
[494] *Id.* at 265.
[495] *Id.* at 268.
[496] *Id.* at 271.
[497] *Id.* at 273.
[498] Public Defender, 115 So.3d at 273.
[499] *Id.* at 274.
[500] *Id.*
[501] *Id.*
[502] *Id.*

The Florida Supreme Court further rejected the application of the *Strickland* test in the case which sought to protect rights prospectively.[503] The Court determined that the proper test was a showing that the excessive caseload "posed a substantial risk that representation of [o]ne or more clients will be materially limited by the lawyer's representation of another client."[504]

In addressing the validity of the statute, the Florida Supreme Court noted the term "solely" as limiting its scope. The statute did not prohibit excessive caseload from being a factor and did not prevent caseload from being a determinative factor upon a proper evidentiary showing. While the statute might not be facially unconstitutional, the Florida Supreme Court made clear that the statute "should not be applied to preclude a public defender from filing a motion to withdraw based on excessive caseload or underfunding that would result in ineffective representation of indigent defendants nor to preclude the trial court from granting a motion to withdraw under those circumstances."[505] The Florida Supreme Court remanded the case to the district court to determine if the plaintiffs met their burden under the standards developed in the opinion.[506]

The Court is notable for not requiring individual showings under *Strickland* for preconviction claims of ineffective assistance of counsel even where a class action is not used as a procedural vehicle to present the claims. A number of state court preconviction right-to-counsel cases adopted this more liberal approach.

But not all state courts, however, have been receptive to aggregate proof as supporting in claims involving preconviction systemic claims of violation of the right to counsel. In *Kennedy v. Carlson*,[507] the Chief Public Defender of the Fourth Judicial District initiated a declaratory judgment action against the Governor, Treasurer, Commissioner of Finance, and the State Board of Public Defense of Hennepin County.[508] Kennedy asserted that the limited funds made available by the legislature to the Public Defense Board violated the constitutional rights of indigent criminal defendants to the effective assistance of counsel.[509] Further, Kennedy sought injunctive relief requiring the Public Defense Board to enforce its caseload limitations adopted by the Board after a thorough study by the Spangenberg Group of the defense function in Minnesota.[510]

Evidence in the case included a report by the Spangenberg Group recommending caseload limitations for public defenders in Minnesota.[511] The Minnesota Public Defense Board adopted some but not all of the Spangenberg recommendations but established that full-time public defenders should take no

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[503] *See generally id.* at 274-279.
[504] *Id.*, at 282.
[505] *Id.*
[506] *Id.*, at 265.
[507] Kennedy v. Carlson, 544 N.W.2d 1, 1 (Minn. 1996).
[508] *Id.* at 3.
[509] *Id.*
[510] *Id.* at 4.
[511] *Id.*

more than 100-150 felonies per year.[512] Kennedy asserted that the actual caseload carried by the attorneys far exceeded these standards and that the overburdening of the office.[513]

The Minnesota Supreme Court rejected these claims.[514] The *Kennedy* Court asserted that the plaintiffs must establish "injury in fact" and not simply a possibility of substandard legal representation due to excessive caseloads.[515] According to the Minnesota Supreme Court, Kennedy "has shown no evidence that his clients actually have been prejudiced due to ineffective assistance of counsel."[516]

The *Kennedy* Court approach has at least two significant weaknesses. First, it analyzed the ineffective assistance claims as if they were post-conviction. But the case did not involve post-conviction ineffective assistance claim, rather it involved a prospective attack seeking to ensure that the right to counsel is not violated by state authorities.

Second, the *Kennedy* Court's discussion of the need for injury in fact is unsound for state courts. Interestingly, the Court at no time identifies the constitutional provision at issue. However, it relied on several federal law cases applying restrictive standing doctrine with respect to alleged future inquiries to criminal defendants.[517] One of the cases is cited as applying the standing doctrine required by Article III of the federal constitution in federal courts.[518] Of course, Article III of the federal constitution is inapplicable in state constitutional cases.

7. Rejection of Federal Substantive and Procedural Obstacles to Reach the Merits of Systemic Right to Counsel Claims

There is some state court precedent that eliminated substantive and procedural underbrush that could present serious obstacles to litigation of systemic right to counsel issues in federal court. The question of whether federal procedural barriers to access to the courts should be applied in state courts is a controversial one and, apparently, may depend upon the makeup of a state supreme court at the time the question is presented. In this regard, an interesting case is *Duncan v. Michigan.*[519]

In *Duncan,* indigent criminal defendants in certain counties filed a putative class action against the state and the governor ,alleging violations of the right to counsel and the right to effective assistance of counsel under Art. I, § 20 of the

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[512] *Id.*

[513] *Kennedy*, 544 N.W.2d at 5.

[514] *Id.* at 5-8.

[515] *Id.* at 6.

[516] *Id.* at 7. The *Carlson* court did not explicitly state whether the claim was brought under the Minnesota Constitution, the United States Constitution, or both.

[517] *Id.* at 8 (citing Portman v County of Santa Clara, 995 F.2d 898, 903 (9th Cir. 1993)); Gardner v. Luckey, 500 F.2d 712, 714-715 (5th Cir. 1974), *cert. denied* 423 U.S. 841 (1975).

[518] *Id.* at 8 (citing Dash v. Mitchell, 356 F. Supp. 1292, 1295 (D.D.C. 1972) (legal defense organization has no injury in fact necessary for standing under Article III)).

[519] Duncan v. State, 774 N.W.2d 89, 89 (Mich. 2009).

Michigan constitution, violations of the right to due process under Art. I, § 17 of the Michigan Constitution, and the right to counsel provision under Amendment VI of the United States Constitution.[520] The plaintiffs alleged that public defenders in three Michigan county indigent defense systems were underfunded, poorly administered, and did not have the wherewithal to put provide meaningful adversary testing of cases brought by the prosecution.[521] In addition to system wide flaws such as lack of training, workload standards, and lack of supervision, the plaintiffs presented a laundry list of specific allegations on inadequacy, including speaking with counsel for the first time only minutes before important proceedings, advising defendants to waive important procedural rights regarding preliminary matters without adequate consultation, entering into plea negotiations without client approval, and total lack of preparation before hearing and trials.[522]

In *Duncan*, the plaintiffs alleged that these inadequacies and examples of ineffectiveness were caused by a failure of the state and governor to provide adequate funding and administrative oversight.[523] Plaintiffs sought declaratory and injunctive relief under 42 U.S.C. § 1983, alleging violations of the right to counsel under the Sixth Amendment, the Right to Counsel Clause in Art. 1, § 20 under Michigan Constitution, and the Due Process Clause of Art. 1, § 17 of the Michigan Constitution.[524] Before the district court, the plaintiffs sought certification of the class while the defendants moved for summary on multiple grounds.[525] The district granted class certification and denied the motion for summary judgment. Defendants appealed.[526]

The Michigan Court of Appeals first addressed the issue of government immunity.[527] Relying on prior Michigan precedent, the court held that governmental immunity was not available where violations of the Michigan Constitution were based upon custom or policy.[528] The Michigan Court of Appeals rejected the notion that because the plaintiff seeks money from the state to pay for legal defense, the action seeks damages not permitted by government immunity.[529] Citing *Edelman,* the Court of Appeals found that a fiscal consequence arising from compliance with equitable decrees, which by their terms are prospective in nature, are not damages actions. With respect to the claims against the governor, the Michigan Court of Appeals concluded that the governor was involved in matters involving state funding and had a duty under the Michigan Constitution to see to take care that the laws are faithfully executed.[530] Again, the Michigan Court of

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[520] *Id.* at 97.
[521] *Id.* at 99.
[522] *Id.*
[523] *Id.*
[524] *Id.* at 99-100.
[525] Duncan, 774 N.W.2d at 100.
[526] *Id.*
[527] *Id.* at 104.
[528] *Id.* at 106.
[529] *Id.*
[530] *Id.* 106-107.

Appeals emphasized that the claim against the governor did not amount to a damage action where government immunity might apply.[531]

The Michigan Court of Appeals considered the related question of whether the court had authority to order appropriations of state funds when the Michigan Constitution expressly stated that no appropriations from the treasury could be made except as might be provided "by law."[532] But the Michigan Court of Appeals emphasized that the plaintiffs sought declaratory relief and that injunctive relief would be appropriate only if there was no possibility of corrective measures being implemented.[533] And, any injunction might be prohibitory rather than mandatory, as in *Smith* and *Peart*.[534] Further, the Michigan Court of Appeals noted that under the Michigan Constitution, the judiciary had inherent authority to compel funding to allow the courts to carry out their constitutional responsibilities.[535] And, if plaintiffs' allegations were true, it would be "certainly arguable" that the courts have the authority to compel funding to ensure that court processes comply with constitutional requirements.[536]

The Michigan Court of Appeals then turned to various justiciability arguments. In particular, it rejected the *Strickland* standard for the right to counsel claims.[537] According to the Court, *Strickland* must be viewed in its specific context, namely, an ineffective assistance of counsel claim for postconviction relief.[538] The principles intended to be applied in the postconviction relief context "are not workable or appropriate to apply when addressing standing, ripeness, and related justiciability principles" with respect to claims seeking prospective relief.[539] Further, applying *Strickland* to prospective claims "defies logic, where the allegations concern widespread, systemic instances of constitutional inadequate representation, and where the requested remedy in the form of prospective relief seeks to curb and halt continuing acts of deficient performance."[540] The court remanded the case to the district court for further proceedings.[541]

The State sought to appeal the decision to the Michigan Supreme Court. The Supreme Court granted appeal and in a cursory order vacating the trail court's class certification, affirming the denial of summary judgment in result only, and remanding the case back to the district court.[542] But on reconsideration, the Supreme Court reversed course and reversed the Court of Appeals.[543] Then, the

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[531] *Duncan*, 774 N.W.2d at 107.
[532] *Id.* at 110.
[533] *Id.* 110-111.
[534] *Id.* at 112.
[535] *Id.*
[536] *Duncan*, 774 N.W.2d at 113.
[537] *Id.* at 124-125.
[538] *Id.* at 125.
[539] *Id.*
[540] *Id.*
[541] *Id.* at 145.
[542] Duncan v. State, 780 N.W.2d 843, 844 (Mich. 2010).
[543] Duncan v. State, 784 N.W.2d 51, 51 (Mich. 2010).

Supreme Court reinstated its original order affirming the decision and remanding the case to the district court.[544]

The district court, on remand, denied the defendant's motion for summary judgment. The defendants appealed, giving the Michigan Court of Appeals a second crack at the case.[545] In a narrow order, the court held that the trial court's handling of the class action issue was appropriate, that the Michigan Supreme Court's intervening case law liberalizing standing under the Michigan Constitution applied, and that with respect to the bulk of the issues, the law of the case applied. So, at the end of the day, the powerful original opinion of the Michigan Court of Appeals was undercut by the Michigan Supreme Court in the first appeal but given full force and effect on procedural grounds in the second appeal.[546]

The most important aspect of *Duncan* is the unequivocal rejection of *Strickland* in a right to counsel action seeking declaratory or injunctive relief. As with other cases, however, the Michigan Court of Appeals did not present a separate state constitutional law argument but instead merged the state and federal issues posed in the case. Duncan illustrates a problem of litigating in state courts: state court precedent may be less than stable in our polarized times.

8. Utilization of Cronic Principles to Defeat Dismissal of Systemic Challenge Alleging Absence or Constructive Absent of Counsel at Critical Stages of Criminal Proceedings

In *Hurrell-Harring v. State*, criminal defendants in five New York counties brought an action claiming that the system of providing for indigent defense had functioned to deprive them of and other similarly situated defendants of constitutionally and statutorily representation.[547] The plaintiffs sought declaratory and injunctive relief, but did not seek relief from any criminal convictions.[548] Lower courts dismissed the action on the grounds that collateral civil actions related to right to counsel, particularly those involving potential expenditures of funds, were nonjusticiable.[549] The claim appears to have alleged a violation of the Sixth Amendment, but no parallel state constitutional provisions were cited.[550]

The New York Court of Appeals reversed. The Court noted that ten of the twenty plaintiffs had alleged that no counsel at all was present when they were jailed for failure to post bond. Further, the plaintiffs alleged that while lawyers were nominally appointed, they were scarcely available. Ten of the plaintiffs lacked lawyers at their arraignment.[551] Even where lawyers were appointed, they

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[544] Duncan v. State, 866 N.W.2d 407, 407 (Mem.) (Mich. 2010).
[545] *Id.*
[546] *Id.*
[547] Hurrell-Harring v. State, 930 N.E.2d 217, 219 (N.Y. 2010).
[548] *Id.* at 219.
[549] *Id.* at 219-220.
[550] *Id.* at 219.
[551] *Id.*

often missed court appearances and were not properly prepared when they did appear.[552]

According to the New York Court of Appeals, pretrial cases involving core denials of the right to counsel are not inconsistent with *Strickland*, which dealt with how present counsel performed. The Court cited *Cronic* for the proposition that some deprivations of counsel and prejudice need not be shown.[553] The Court noted that the claims in the case involved a claim of basic denial of right to counsel under *Gideon*, not a claim for ineffective assistance of counsel under *Strickland*.[554] The *Hurrell-Harring* court demonstrates that state courts may take a fairly aggressive approach to applying *Cronic* to situations where counsel are overburdened and lack the time to provide competent representation. The *Cronic* test is sufficiently flexible to permit a fair range of state court innovation under right to counsel provisions of state constitutions.[555]

9. Administrative Rules as Means of Managing Caseload of Public Defender

Some states have sought to strengthen the enforceability of constitutional right to counsel through the promulgation of rules by appropriate state agencies. This approach may strengthen right to counsel claims. When a state agency promulgates rules attempting to vindicate right to counsel concerns, it eliminates the binary "we versus they" contest between the judiciary and the legislation and inserts another interested party, the executive, into a triparty contest.

Missouri provides an example. The provision of services to indigent defendants has been in a state of crisis in Missouri for many years and is well documented in the literature.[556] In *State ex rel Wolff v. Ruddy*,[557] the Missouri Supreme Court set up a framework of temporary guidelines designed to protect the right to counsel of criminal defendants after the state had run out of funds to pay counsel.[558] Among other things, the Missouri Supreme Court encouraged lawyers to continue representation even though compensation might not be forthcoming.[559] If counsel could not ultimately be found, the Missouri Supreme Court authorized the trial court to discharge the accused.[560] Unnuanced and overbroad language in

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[552] *Id.* at 222.
[553] *Id.* at 225.
[554] *Id.* at 224.
[555] *See* Samantha Jaffa, *It's Not You, It's Your Caseload: Using Cronic to Solve Indigent Defense Underfunding*, 116 MICH. L. REV. 1465, 1473 (2018).
[556] *See generally* Sean D. O'Brien, *Strange Justice for Victims of the Missouri Public Defender Funding Crisis: Punishing the Innocent*, 61 ST. LOUIS U. L. 725, 727 (2017); Paige Masters, *Caught Between a Rock and a Hard Place: Missouri Court's Touch Choice and the Power to Change The Face of Indigent Defense*, 37 OKLA. CITY U. L. Rev. 97 (2012); Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853, 873 (2010).
[557] State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 64 (Mo. 1981).
[558] *Id.* at 65.
[559] *Id.* at 67-68.
[560] *Id.* at 67.

the *Ruddy* opinion strongly suggested, however, that the appropriations of funds was a legislative and not a judicial junction.[561]

More than twenty years later, in *State ex rel Missouri Public Defender Commission v. Pratte,* the statutorily established Missouri Public Defender Commission brought an action seeking a preliminary writ of prohibition restraining trial court judges from appointing the public defender contrary to rules promulgated by the commission governing caseloads.[562] In the first case, the district court sought to appoint the public defender contrary to the commission's rule that public defenders would not be provided where defendants had at some point retained private counsel.[563] In the second case, the district court sought to appoint the public defender to defendant accused of a probation violation contrary to the commission's rules.[564] Third, the public defender challenged a district court order appointing a public defender "in his private capacity" to represent a defendant accused of a probation violation contrary to the commission's rules.[565]

The rules in *Pratte* seeking to limit appointment of public defense attorneys arose in the context of overwhelming caseloads.[566] The commission adopted modified caseload standards that had been developed by the National Advisory Council in 1972.[567] By July 2009, every public defender's office in the state had a workload in excess of these standards.[568]

The *Pratte* Court held that the rule prohibiting the public defender from representing a person who had previously fired retained counsel was contrary to the underlying statute, which provided that all indigent persons "shall" be considered eligible for representation by the public defender.[569] The *Pratte* Court took a similar approach to the rule that purported to exclude public defender representation of defendants accused of violation of probation when resources were not available.[570] Finally, the *Pratte* Court concluded that the district court was without authority under the applicable statutes to appoint a public defender "in his private capacity" to represent an indigent defendant.[571] The result was not what right to counsel advocates had hoped.

However, after making the required holdings, the Court reviewed procedures available to the public defender under the commission's rules and seemed generally supportive of the framework. Under the rules, the public defender may certify "limited availability," which, if present for three consecutive months, triggers a meet and confer process involving the public defender,

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[561] *Id.* at 65.
[562] State ex rel. Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 873 (Mo. 2009).
[563] *Id.* at 881.
[564] *Id.* at 874.
[565] *Id.*
[566] *See id.* at 877-880.
[567] *Pratte*, 298 S.W.3d at 878.
[568] *See id.* at 880.
[569] *See id.* at 882.
[570] *See id.* at 884-885.
[571] *See id.*at 886.

prosecutors, and the presiding judge.[572] The parties are to work together to determine how to address the problem best.[573] The *Pratte* Court recognized, however, that conscription of private lawyers to engage in public defense without compensation might give rise to serious constitutional problems.[574]

Pratte was not the last word on what to do when the public defender sought to limit caseloads. In *State ex rel Missouri Public Defender Commission v. Waters*, the Missouri Public Defender Commission sought a writ of prohibition ordering the trial court to withdraw its appointment to represent a criminal defendant contrary to a caseload management rule promulgated by the commission.[575] Under the rule adopted by the commission, the public defender could decline additional appointments based on certifications that caseloads exceeded certain limits three months in a row.[576] The district court appointed the public defender notwithstanding the commission's rule authorizing it to limit representation based on persistent case overload.[577]

On appeal, the state argued that the matter was moot because the defendant's case was resolved by a guilty plea while the matter was pending.[578] The *Waters* Court, however, applied Missouri's version of the public interest exception to the mootness doctrine.[579] Under Missouri law, "[e]ven thought [it]t may appear to be moot . . . if there is some legal principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance."[580]

The *Waters* Court proceeded to consider the merits. Under Missouri Code § 600.042.4, "[t]he director and defenders shall provide legal services to an eligible person."[581] The first question was whether the commission's rule seeking to limit appointments when caseload limits were reached was contrary to this statutory language. The public defender emphasized that in interpreting the statute, the court should presume that the legislature did not intend to violate the constitution.[582]

The *Waters* Court agreed. Citing the right to counsel under both the Missouri and United States Constitutions,[583] the court emphasized that the right to counsel means the right to effective assistance of counsel.[584] The *Waters* Court also noted that the right to counsel involved in the case was an affirmative and prospective right.[585] Because the case involved the affirmative and prospective

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[572] *See id.* at 887.
[573] Pratte, 298 S.W.3d at 887-888.
[574] *See id.* at 889.
[575] State ex rel. Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592, 597 (Mo. 2012) (en banc).
[576] *Id.*
[577] *See id.*
[578] *Id.* at 603.
[579] *See id.*
[580] *Id.*
[581] *Waters*, 370 S.W.3d at 606.
[582] *See id.* at 605.
[583] *See generally* U.S. CONST. AMEND VI; MO. CONST. art. I, § 18(a).
[584] *Id.* at 606.
[585] *Id.*

right to counsel and not a retroactive challenge to a past criminal conviction, the *Waters* Court declined to apply *Strickland* standards of prejudice.[586]

The *Waters* Court noted that none of the parties contested the validity of the underlying rule.[587] The Court declared that because the trial court did not find the regulation invalid or inapplicable, it erred in ordering the public defender to disobey it.[588] On remand, it encouraged the parties to consider appropriate mechanisms to address the overload problem.[589]

In light of *Waters*, the Missouri legislature amended its statutes to eliminate the ability of the public defender to decline cases based on caseloads. The amended statutes were considered by the Missouri Court of Appeals in *In re Area 16 Public Defender Office II*.[590] Under the new statutes, neither the public defender nor the commission had the authority to limit representation without the approval of the district court.[591] The statute further provided a framework to seek the approval of the district court.[592] In *In re Area 16* court found that the relevant statutes were legislative implementation of the inherent power of the judiciary.[593] Therefore, judicial review of such decisions would be for abuse of discretion, a standard deferential to the trial court.[594]

The experience in Missouri with public defender rules is one of change and evolution. Rulemaking by the public defender, however, certainly offers a potential approach to attorney overload issues, and the remedial structures tested in the Missouri cases offer the prospect of establishing a framework of cooperation among the courts, the executive, and prosecutors to seek workable, local solutions. But the work goes on.

10. Attorney Claims Regarding Potential Unethical Conduct as Vehicle for Public Defense Reform

Many cases seeking right to counsel reform involve class actions or claims by individual defendants that they have been directly harmed or are threatened with immediate harm because of the failure of the state to provide for their defense. But there is another approach, namely, a claim brought by attorneys who represent criminal defendants that their continued appointment to represent criminal

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[586] *Id.* at 607.
[587] *Id.* at 610.
[588] *Id.* at 612.
[589] *See id.* at 611.
[590] *See generally* Petsch v. Jackson Cnty. Prosecuting Att'y's Office, 609 S.W.3d 743, 743 (Mo. 2020).
[591] *Id.* at 747-748, n. 8.
[592] *See generally id.* at n. 9.
[593] *See id.* at 753.
[594] *See id.* at 755.

defenders causes them to violate ethical restrictions promulgated by state supreme courts.

In *Public Defender of Marion County v. Oregon,* the state public defender and an attorney working for the public defender brought an action against the State of Oregon alleging that an Oregon trial court erroneously appointed public defender Timothy Downin to represent a criminal defendant facing serious criminal charges.[595] The PD and attorney Downin asserted that all attorneys in the office, including Downin, lacked the capacity to represent new defendants consistent with the right to counsel under the Oregon Constitution, an applicable statute, and the relevant rules of professional ethics for Oregon lawyers.[596] The cause of the lack of capacity was excessive workloads of all attorneys at the county's public defender office.[597]

At the initial arraignment of the defendant involved in this case, Shannon Wilson, then the executive director of the Public Defender of Marion County (PDMC), presented substantial evidence related to the excessive caseloads in the office and the inability of public defenders to take on new cases.[598] Nonetheless, the district appointed Downin to represent the defendant.[599] PDMC and Downin filed a petition for writ of certiorari before the Oregon Supreme Court seeking to vacate the court's order and an order not to appoint other public defenders in similar circumstances.[600]

The record before the district court was robust. Included was a lengthy and detailed study entitled "The Oregon Project, An Analysis of the Oregon Public Defense System and Attorney Workload Standards" ("Oregon Report").[601] The Oregon Report study was prepared by the American Bar Association Standing Committee on Legal Aid and Indigent Defense at the request of the Office of Public Defense Services in Oregon. The ABA Standing Committee engaged the accounting firm of Moss Adams to assist in the analysis.[602]

The Oregon Report established what most observers already knew, namely, that the public defenders in Oregon were markedly understaffed to do their jobs. The study carefully considered the caseloads and resources available in Oregon for public defense. The Oregon Report concluded that the state's public defense system needed an additional 1,296 full-time attorneys to provide reasonably effective assistance of counsel under prevailing professional norms. As

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[595] *See generally* Relator's Opening Brief, Pub. Def. of Marion Cnty., Inc. v. Izell Guajardo-McClinton, Marion Cnty. Cir. Ct., No. S070205 (Or. July 27, 2023).
[596] *See* Opening Brief of Petitioner at 5-6, Public Defender of Marion County, Inc. and State of Oregon v. Izell-Guajardo-McClinton, No. 23CR16472 (Or. July 27, 2023).
[597] *Id.* at 5.
[598] *Id.* at 3.
[599] *Id.* at 6.
[600] *Id.* at 4-5.
[601] Opening Brief of Petitioner, *supra* note 528 at 9.
[602] *Id.* at 11.

to PDMC specifically, the study determined that a total of 29.2 full-time attorneys were required, while the PDMC employed only 18.5 full-time attorneys.[603]

On the merits, PDMC and Downin argued that the order, if enforced, would force Downin to violate the Oregon Rules of Professional Responsibility. Specifically, the severe staff shortages posed a significant risk that staff lawyers would not be able to provide "legal knowledge, skill, thoroughness, and preparation reasonably necessary for representation." Further, the caseloads were so heavy that they risk causing attorneys to "neglect" legal matters as they put out one fire after another, thereby preventing intelligent and forward case planning. In addition, the caseloads prevent public defenders from having the kind of communication necessary for an effective attorney-client relationship. Further, because of the overload, public defenders who are assigned new cases are forced to triage services. So, the addition of a new client meant less service to other clients, a problem that created a conflict of interest contrary to professional obligations. Additionally, supervisors may be held liable for the conduct of other attorneys if they know of ethical violations and fail to take appropriate actions to ensure ethical compliance. Finally, a lawyer who, during the course of representation, develops a conflict due to case overload, the attorney is required to take affirmative steps to protect the client's interests.[604]

In addition to professional conduct rules, the PDMC and Downin relied on the ABA Defense Function Standards. The PDMC and Downwin pointed to numerous ways in which the excessive workloads prevented public defenders from compliance with the standards.[605]

The PDMC and Downin also asserted that the excessive workloads at the PDMC violated the right to counsel provision of Art. 1, § 11 of the Oregon Constitution. Here, PDMC and Donwin relied at least in part on Oregon case law. Two cases are worth mentioning. In *Krummacher v. Gierloff,* the Oregon Supreme Court provided a rather detailed discussion of the scope of right to counsel under Oregon law.[606] Further, in *State ex rel. Acocella,* the Oregon Supreme Court emphasized that in the face of evidence that a lawyer cannot properly handle more cases, the trial court has a "nondiscretionary duty" to act.[607]

This case posed a major threat to the status quo in Oregon. The parties challenging this issue were not lowly criminal defendants, who might be treated with distain, but lawyers trying to do their jobs. Judges may identify with the lawyer's plight more than that of a criminal defendant. Further, the state courts for about a hundred years or more have been immersed in developing and enforcing the laws of legal ethics. Under state constitutions, state supreme courts have the power to supervise court proceedings, and that ordinarily includes regulation of attorneys. Many state courts take these obligations quite seriously.

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[603] *Id.*
[604] *Id.* at 18.
[605] *See id.* at 24-27.
[606] *See* Krummacher v. Gierloff, 627 P.2d 458, 461-463 (Or. 1981).
[607] State ex rel. Acocella, 604 P.2d 391, 396 (Or. 1979).

And, the logic of what I will call the "Lefstein approach" is powerful and virtually unassailable. While criminal law is full of ideological divides, there is surely a broad consensus among state supreme court judges that they have a duty to ensure that the lawyers who appear in state courts behave in an ethical manner. Further, although not very well developed in the briefing, the constitutional argument was at least presented the Oregon Constitution with some distinctive Oregon case law. But after a highly anticipated oral argument in the case, Downin left the employ of the PDMC and, in a two-page order, the Oregon Supreme Court dismissed the matter as moot.[608] It appears, however, that another similar case may be headed to the Oregon Supreme Court.[609] Stay tuned.

Aside from Oregon, there has been a recent development in Missouri related to the application of legal ethics to lawyers engaged in public defense. In a law review article, Steven F. Hanlon recounts the ethics case involving Karl William Hinkebein.[610] A prisoner brought a bar grievance against Hinkebein.[611] Because of health problems and an excessive case load, Hinkebein was unable to timely communicate with his clients and missed filing deadlines.[612] Of course, ABA Opinion 06-441 declared that there was no exception to the disciplinary rules for those involved in public defense.[613] The Missouri Supreme Court found that Hinkebein, a public defender, violated Rules 4-1.3 (diligence) and Rules 4-1.4(a) (communication) of the Missouri Rules of Professional Conduct, suspended his license indefinitely, stayed the suspension, placed Henkebein on probation for a year, and taxed a fee of $1,500.[614]

11. Class Actions Brought by Attorneys and Criminal Defendants

One of the significant issues in right to counsel litigation is the question of whether classes of attorneys or criminal defendants may bring class actions seeking

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[608] *See* Conrad Wilson, *Oregon Supreme Court dismisses case challenging state public defense system*, OR. PUB. BROADCASTING (Oct. 13, 2023, 11:39 PM), https://www.opb.org/article/2023/10/13/oregon-supreme-court-dismisses-case-challenging-public-defense-system/.

[609] *See id.*

[610] *See generally* Stephen F. Hanlon, *Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients*, 51 IND. L. REV. 59, 74-77 (2018).

[611] *Id.* at 76.

[612] *See id.*

[613] *See id.* at 76-77.

[614] *Id.* at 77.

to obtain class wide relief in right to counsel cases.[615] A representative case in this regard is *Kuren v. Luzerne County.*[616]

In *Kuren*, Al Flora Jr., the chief public defender for Luzerne County, and several criminal defendants who needed counsel brought a putative class action alleging systematic violations of 42 U.S.C. § 1983, the Sixth Amendment, and Art. I, section 1 of the Pennsylvania Constitution.[617] In support of their claims, the plaintiffs alleged that because of the shortage of adequate staff, public defenders in Luzerne County lacked adequate knowledge of the relevant law, were often not assigned until after initial arraignments, lacked adequate time to consult with clients before key decisions were made, lacked the ability to conduct reasonable investigations, and generally lacked the resources to conduct in-person visits of incarcerated persons.[618] They sought a writ of mandamus and an injunction requiring the immediate appointment of private counsel to assist the public defender and for the county and its county manager to provide necessary funds to resolve the right to counsel crisis.[619]

After appointing a Special Master to oversee settlement negotiations, the district court entered a preemptory writ of mandamus and a preliminary injunction. Prior to trial, Flora was terminated as public defender and the named plaintiffs were either transferred to other jurisdictions or sought to voluntarily dismiss their claims. The district court allowed an amended pleading where new individual plaintiffs were named. But the district court held that the individuals lacked standing to litigate and that the plaintiffs failed to state a cause of action for mandamus or a constitutional violation.[620]

The Pennsylvania Commonwealth Court affirmed the trial court's dismissal.[621] The Commonwealth Court concluded that an action for postconviction relief was the proper remedy under *Strickland* or a claim for postconviction relief.[622] Further, the Commonwealth Court held that mandamus did not lie to force state actors to adequately fund public defense. Such a coercive order from the judiciary, according to the Commonwealth Court, may violate separation of powers.[623] While the Commonwealth Court recognized that the failure to appropriate funds "in extreme circumstances amounting to a

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[615] In a somewhat dated but informative summary of class actions involving right to counsel, *see generally* Vidhya Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel,* AM. CONST. SOC. (July 13, 2010), https://www.acslaw.org/wp-content/uploads/2018/04/ACS-Issue-Brief-Drinan-Indigent-Def-Reform_0.pdf.

[616] *See generally* Kuren v. Luzerne County, 146 A.3d 715, 715 (Pa. 2016).

[617] *Id.* at 720.

[618] *Id.* at 723.

[619] *Id.* at 720.

[620] *Id.* at 726.

[621] Flora v. Luzerne County, 103 A.3d 125, 140 (Pa. Commw. Ct. 2014).

[622] *But see id.* at 138.

[623] *Id.*

constitutional violation, the plaintiffs did not allege sufficient facts to support such a claim."[624] Plaintiffs appealed.

On appeal, the Pennsylvania Supreme Court began with a general discussion of the right to counsel under the Sixth Amendment. In particular, the *Kuran* court found *Luckey, Duncan*, and *Hurrell-Harring* compelling on the question of whether defendants may seek relief for a widespread, systematic and constructive denial of counsel when alleged deficiencies in funding and resources provided by the state deny indigent defendants the right to counsel.[625] The *Kuran* Court emphasized the approach that systemic violations was the gravamen of the case. It relied on *O'Shea v. Littleton* for the proposition that plaintiffs have standing to seek injunctions for prospective claims if they demonstrate "a likelihood of substantial and immediate irreparable injury and the inadequacies of remedies at law."[626] Although most of the discussion on the prejudice question was based on federal law, the Court turned to state court precedent on the question of its inherent authority to "ensure that indigent defendants receive constitutionally adequate assistance of counsel."[627]

The *Kuran* Court next turned to the question of whether a writ of mandamus is a valid remedy under the facts presented. Citing Pennsylvania precedent, the *Kuran* court held that mandamus was not available when there was an alternate remedy available. Here, it reasons that the plaintiffs, if they proved their case, would be entitled to an injunction. Thus, there was an alternate remedy available at law. But, as noted by the *Kuran* Court, the end result was pretty much the same.[628]

Kuran stands for the important proposition that in some state courts, preconviction class actions alleging violations of the right to counsel may be brought without requiring an individualized showing of prejudice under *Strickland.* Under these circumstances, the plaintiffs will have the prospect, at least, of obtaining class wide relief significantly broader than an individualized remedy. The atmosphere for class actions is likely to be more favorable in state than in federal courts. And there have been a number of class action successes where the *Strickland* barriers to bringing a right-to-counsel claim have been avoided.[629]

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[624] *Id.* at 139.
[625] *Kuren,* 146 A.3d at 743.
[626] *Id.* at 728.
[627] Commonwealth v. McGarrell, 87 A.23d 809, 810 (Pa. 2014) (Saylor, J., dissenting)
[628] *See* Kuren, 146 A.3d at 749-751.
[629] *See generally Lavalle*, 812 N.E.2d at 895; *Hurrell-Harding*, 66 A.D. 3d at 85-89.

V. THE FUTURE OF STATE COURT LITIGATION RE RIGHT TO COUNSEL UNDER STATE CONSTITUTIONS

A. Developments That May Encourage Development Of Enforceable Right To Counsel In State Courts

1. The Innocence Movement

First, as noted by Judge Bazelon and emphasized by Peter Joy, one of the notions that have prevented some judges from being more aggressive regarding the right-to-counsel issues is the view that most criminal defendants are "guilty anyway."[630] But now, the National Registry of Exonerations has identified 3, 478 exoneration from 1989 to the end of 2023.[631] As to the actual rate of wrongful convictions of serious crimes, estimates vary from a high of 15% to a low of less than one percent.[632] In any event, determining the exact number of wrongful convictions may not be the right way to look at wrongful convictions when the risks and consequences are high and grave.[633]

Further, a study by the American Bar Association related to the demise of jury trials provides further disturbing evidence regarding the problem of wrongful convictions. Researchers conducted a series of interviews and found that defense counsel recommended plea bargains, in part, because of overwhelming caseloads and limited resources.[634] And, in another multi-state study of defense attorneys, 78% stated that in the current system there were cases where innocent individuals should plead guilty.[635] Further, more than 90% indicated that defendants they represented who claimed innocence ended up pleading out.[636] Even more, the Innocence Movement has opened the eyes to improper use of junk science, false confession, and unreliable identifications, all of which might be mitigated far more effectively by front-end lawyering prior to trial rather than back-end lawyering in

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[630] Peter Joy, 46 HOFSTRA L. REV. at 147 n 71.

[631] *2023 Annual Report*, The National Registry of Exonerations, A PROJECT OF THE UNIVERSITY OF CALIFORNIA IRVINE NEWKIRK CENTER FOR SCIENCE & SOCIETY, UNIVERSITY OF MICHIGAN LAW SCHOOL AND MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, https://www.law.umich.edu/special/exoneration/Documents/2023%20Annual%20Report.pdf (March 18, 2024).

[632] *See* Stephanie Roberts Hartung, *Missing the Forest for the Trees: Federal Habeas Corpus and the Piecemeal Problem in Actual Innocence Cases*, 10 Stan. J. of C. R. & Civ. Lib. 55, 72 (2014).

[633] *See* Marvin Zalman and Robert J. Norris, *Measuring Innocence: How to Think About the rate of Wrongful Convictions*, 24 New Crim L Rev 601 (2021).

[634] Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 120-21 (2021).

[635] Rebecca K. Helm, Valerie F. Reyna, Allison A. Franz, Rachel Z. Novick, Sarah Dincin & Amanda E. Cort, *Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System*, 24 PSYCH. CRIM. L. REV. 915, 922 (2018).

[636] *Id.*

postconviction relief.[637] In many exoneration cases, there did not at first appear to be any *Strickland* prejudice problem. Prosecutorial swagger about the obvious accuracy of convictions obtained through guilty pleas or eyewitness identification, never solidly based, is now cringe-worthy. In many exoneration cases, there did not at first appear to be any *Strickland* prejudice. We may not be at a point as a society to endorse the traditional Blackstonian notion that it is better for ten guilty persons to go free than one innocent to be condemned, but the stunning reality of the Innocence Movement has reinforced the need to improve the reliability of the criminal justice process. A robust right to counsel in part addresses the problem of wrongful convictions on the front end rather than back end, post-conviction efforts.

2. Reevaluation of Acceptable Case Law Standards and New Empirical Approaches

Second, as pointed out by Deputy Director of the ABA Center for Innovation Geoffrey Burkhard, there has been a dramatic improvement in empirical evidence to support systemic challenges under state constitutional right-to-counsel provisions.[638] In 1973, the National Advisory Commission (NAC) on Criminal Justice Standards and Goals, the Defense (Black Letter) originally developed a caseload standard for defense attorneys. According to the Commission, a criminal defense attorney should carry a maximum annual caseload of 150 felonies, or 400 misdemeanors, or 200 juvenile cases, or 200 mental commitments, or 25 appeals per attorney. These standards were subsequently adopted by the ABA Standards for Criminal Justice.[639] Sadly, many jurisdictions across the United States have not remotely met these rough standards.[640]

The 1973 NAC Standards were flawed in that they did not directly tie to any substantive criteria of what effective assistance of counsel should look like. Frankly, it was a number, picked out of the air, and declared. But it was a number. And it seemed to stick, for a while, as some kind of distant, aspirational star.[641]

But that distant weak aspirational star winked out some time ago. It was never likely a realistic approach to criminal caseloads. Today, however, the current caseload numbers identified in the NAC are completely unrealistic. Criminal defense has grown increasingly complicated since 1973. Forensic science has exponentially expanded, increasing the need for careful defense preparation and the hiring of expert witnesses. Empirical evidence abounds in areas including DNA, use of cell phones, ballistics, fingerprinting, arson science, fiber matching, blood work, social psychology, and the list goes on. Linguistic barriers have

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[637] *See generally* Andrew M. Siegel, *Moving Down the Wedge of Injustice: A Proposal for a Third Generation of Wrongful Convictions Scholarship and Advocacy*, 41 AM. CRIM. L. REV. 1219, 1220 (2005).

[638] *See* Geoffrey T. Burkhart, *How To Leverage Public Defense Workload Studies*, 14 OHIO ST. J. CRIM. L. 403, 403 (2017).

[639] Joy, *supra* note 562 at 147; Burhkhart, *How to Leverage, supra* note 562 at 412.

[640] *Id.* at 147.

[641] Burkhart, *How to Leverage, supra* note 562, at 412-15.

become increasingly problematic requiring extra time and effort by defense counsel. Further, counsel's knowledge must now extend to new areas including at least a smattering of knowledge of immigration law. While it is no doubt true that felony charges have varied complexity, no one would believe that it is reasonably possible for a lawyer to handle 150 felonies in a year.

New studies have dramatically improved on the NAC approach. For years, the Spangenberg Group produced state-by-state empirical studies that dramatically demonstrated the problems in the provision of defense counsel.[642] Similar empirical studies will be required to increase the prospects of success in right-to-counsel litigation.[643]

3. Increased Recognition of Validity of Independent State Constitutional Law Across the Ideological Spectrum

Just about everything in American law seems to get polarized along Republican and Democratic lines, or liberal and conservative cleavages. Many conservative judges viewed state constitutional law as an end run around unfavorable United States Supreme Court precedents and therefore resisted it withstanding a lack of historical or theoretical justification. Judicial progressives, on the other hand, welcomed the development of independent state constitutional law as a way to avoid the increasingly conservative drift of criminal justice rulings before the United States Supreme Court.

Yet, today, there is a growing awareness across a broad spectrum of judges and scholars of the legitimacy of independent state constitutional adjudication. Judge Jeffrey Sutton's recent book *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018) has achieved a widespread readership. And, with the Supreme Court's decision in cases like Rucho and *Dobbs*, many persons with an interest in the abortion issue are learning about the importance of state constitutional law in our legal fabric.[644] But issues surrounding the need for the state to provide right to counsel may have more bipartisan support than those regarding abortion.

4. Increased Recognition of Professional Ethics Norms as Essential to Rule of Law

Enforcement of the professional ethics has been an important issue before the organized bar and for the judiciary. In 1970, the American Bar Association issued the Clark Report[645], where former Supreme Court Justice Tom Clark

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[642] *See* John Gross, *Reframing the Indigent Defense Crisis*, HARVARD LAW BLOG, April 4, 2024, https://harvardlawreview.org/blog/2023/03/reframing-the-indigent-defense-crisis/.

[643] *Id.*

[644] Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (reversing abortion rights precedent); Rucho v. Common Cause, 588 U.S. 684 (2019) (declining to review partisan reapportionment plan).

[645] *Id.*

excoriated the state of ethics enforcement in the United States.[646] The Clark Report was a kick where states and attorneys do not want to be kicked. After the Clark Report, a period of structural and administrative reforms took place across the country designed to adequately staff and professionalize ethics enforcement.

The issue of professional ethics in the context of criminal defense got a boost when the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-441.[647] The opinion makes clear that the rules apply to all lawyers including public defenders with no exception for lawyers representing indigent persons charged with crimes.[648]

The use of legal ethics to provide substantive content to constitutional right to counsel received another boost in 2010, when Professor Norman Lefstein published *Securing Reasonable Caseloads: Ethics and Law in Public Defense.*[649] Lefstein carefully reviewed provisions of the Model Rules of Professional Responsibility and forcefully argued that they were applicable or potentially applicable to attorneys facing overwhelming case loads. In addition, Lefstein collected cases and narrated a compelling story about the requirements of effective assistance of counsel, the failure of most jurisdictions to deliver it, and potential solutions to the problem, including litigation. Just as Judge Sutton's cogent presentation jolted awareness of independent state constitutional law, Lefstein's volume put the notion that a lawyer with an overwhelming caseload may run afoul of ethical rules into the legal mainstream and no doubt stimulated additional academic writing in the area.[650]

Although they are entirely unrelated to the subject matter of right to counsel, the ethical issues surrounding lawyers' conduct in the aftermath of the 2020 election also may be impactful. The prominence of cases involving Rudy Guliani and John Eastman reinforces the notion that what goes on in our courtrooms is subject to ethical restraints, the precise point made by ABA Opinion 06-441 and Lefstein in the past.

5. Possibility that Gideon Could be Reversed by Supreme Court

Here is a wake-up call. Many state courts, in the past, have been content to allow federal courts to do the heavy lifting in controversial constitutional areas. Think *Mapp v. Ohio*.[651] Think *Miranda.*[652] State courts and litigants had no need to worry about state constitutions as the feds had the controversial bases pretty well

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[646] *See Problems and Recommendations in Disciplinary Enforcement*, American Bar Association Special Committee on Evaluation of Disciplinary Enforcement (1970)

[647] ABA Comm. On Ethics Prof'l Responsibility, Formal Op. 06-441 (2006).

[648] *See id.* at 3.

[649] *See generally* NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 3-5 (2011).

[650] *See generally* Heidi Reamer Anderson, *Funding Gideon Promise By Viewing Excessive Caseloads As Unethical Conflicts of Interests,* 39(2) HASTINGS CONST. L. Q. 421 (2012); Rayza B. Goldsmith, *Is It Possible to Be An Ethical Public Defender,* 44 N.Y.U. L. & SOC. CHANGE 13, 15 (2019).

[651] Mapp v. Ohio, 367 U.S. 643, 643 (1981).

[652] Miranda v. Arizona, 384 U.S. 436, 436 (1966).

handled. There was no reason to extend any judicial necks unnecessarily over controversial issues.

Except there is a reason. The current United States Supreme Court is dramatically moving in new directions. *Gideon*, that pillar, that bright shining star, that glorious trumpet, may be on the verge of reversal. In reading Justice Thomas's opinion in *Garza*, I see at least three votes on the current Supreme Court to do just that.[653] Justice Thomas notes that the court has gone "another step further from the original meaning of the Sixth Amendment."[654] Those interested in ensuring effective representation of criminal defendants might consider keeping a copy of the relevant state constitution nearby.

B. ASSERTING STATE CONSTITUTION CLAIMS OF RIGHT TO IN STATE COURT

Based on the above analysis, I conclude that there is a clear role for state constitutional litigation with respect to the right to counsel.[655] The record, of course, is spotty, and success is often expensive, partial, and drawn out. But state courts can provide a manageable forum where federal courts might be more likely to find procedural barriers such as standing or abstention. But state constitutional litigation must be well planned in order to be successful. From the perspective of a former state supreme court justice, I embrace a number of suggestions made by judges and lawyers with considerable experience with right to counsel cases.

First, as noted by Oregon Supreme Court Justice Hans Linde, in raising a state constitutional claim, the putative plaintiff lawyers must do the necessary homework. [656] You cannot simply rely on a body of federal Sixth Amendment law and call it a day. You need to dig in original state constitutional sources. You need to examine the precise language of state constitutional provisions. You need to not simply throw together a parade of authority, you need to develop a state constitutional theory. Which theory will work best? Should you try to maneuver around *Strickland?* Is there a *Cronic* type theory that makes the most sense? Does inherent power to control court processes sound good? Or state constitutional concepts of due process or equal protection or right to a remedy? Is the state supreme court more likely to be susceptible to the power of ethical arguments regarding lawyers who practice in the state courts than to criminal defendants

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[653] *See Garza v. Idaho*, 586 U.S. 232, 248-264 (2018) (Thomas, J., dissenting).

[654] *Id.* at 258.

[655] *See* Lucas, 51 IND. L. REV. at 89; Margaret Costello, *Fulfilling the Unfulfilled Promise of Gideon Litigation as a Viable Tool,* 99 IOWA L. REV. 1951, 1951 (2014); Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE. LAW REV. 1309, 1309 (2013); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation,* 33 N.Y.U. REV. L. & SOC. CHANGE 427, 427 (2009); Vidya Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel,* (Wash. Univ. Sch. Of Law, Working paper No. 1279185) (2007).

[656] *See* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. OF BAL. L. REV. 379, 392 (1980) ("[T]o make an independent argument under the state [constitution] takes homework – in texts, in history, in alternative approaches to analysis").

seeking to consume more state resources? We need better answers to these questions. But the good news is there is a growing body of independent state constitutional law that can encourage lawyers and judges to think more broadly about legal issues, including those related to the right to counsel.

In a similar vein, the advocate should urge that state constitutions with the Bills of Rights have a strong libertarian flavor and the state courts are guardians of them. It is emphatically the role of the courts to ensure that the proceedings being heard are consistent with the rights provided in the state constitution. Refusal to recognize that responsibility is to abdicate the judicial role in the state constitutional scheme.

In asserting a state constitutional claim, the advocate must not regard it as a second-class argument or theory. State constitutional claims in state court should be advocated with gusto. State courts are the great innovators and problem solvers in our legal system. Certainly, as demonstrated above, they have been so in the context of right to counsel. It is the state courts, not the United States Supreme Court burdened by considerations of federalism and limited jurisdiction, that are in the best position to do the heavy lifting in right to counsel.

Second, as Cara Drinan, Stephen Hanlon, and Geoffrey Burkhardt have pointed out, right-to-counsel advocates will need to present both empirical and anecdotal evidence in support of their claim.[657] Empirical evidence can give judges the confidence they need in finding a state constitutional violation. Certainly, it will be hard to ignore if there are thorough and similar findings to those recently performed by the Spangenberg Group and the ABA. Anecdotal evidence, standing alone, may not be sufficient, but it can help establish a persuasive narrative that may help the state courts convince themselves as well as communicate with the public the basis for their decision.

Third, Drinan also advises us to carefully think through who the plaintiffs are and who the defendants are.[658] In the state in question, does it make the most sense to have a class action by lawyers based on ethical rules or criminal defendants based on right-to-counsel norms? Is a class action desirable? Or do you even need a class action? Is a definitive declaratory ruling an adequate first step or a meaningless gesture? That may depend upon an objective evaluation of the good faith of the political branches.

Fourth, as noted by Abigail Hollinger, think through potential remedies.[659] Don't eliminate a remedy where the consequence is the expenditure of funds if

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[657] *See* Drinan, *The Third Generation*, *supra* note 578, at 451-452.; Drinan, *Getting Real About Gideon*, *supra* note 578, at 1324; Steven F. Hanlon, *Case Refusal: A Duty for a Public Defender and A Remedy for all of a Public Defender/s Clients*, 51 Ind. L. Rev. 59 (2018)(advocating a remedy of case withdrawal by overloaded defense lawyer); Geoffrey S. Burkhardt, *How to Leverage*, supra note 619.

[658] *See* Drinan, *The Third Generation, supra* note 580, at 453-455.

[659] *See generally* Abigail Hollinger, *Funding Indigent Defense: A Judicial Solution to a Legislative Failure,* 88 GEO WASH. L. REV. ARGUENDO 195 (2020) (arguing for a three pronged judicial remedy including 1) a rebuttable presumption of ineffective assistance where caseload standards are

necessary to ensure that court processes comply with the state constitution. Although courts have inherent authority to protect operations of the judiciary, directly corkscrewing large amounts of money out of a resistant or defiant state legislature may be difficult though not impossible. Are there other achievable indirect remedies that might have a substantial impact? Like dismissal of cases? Or granting declaratory relief with injunctive relief held in abeyance while defendants and other actors seek to comply?[660] Or other types of progressive but collaborative remedies? Or granting lawyers the right to withdraw if they show continued representation would give rise to overload?

Fifth, Drinan urges affiliation with national and local advocacy groups.[661] As has been widely recognized, the American Civil Liberties Union, the National Legal Aid & Defender Association, and the Sixth Amendment Center have extensive experience in right-to-counsel issues. The national groups may not be in the best position to take the lead oar in the development of state constitutional arguments, but they have a wealth of relevant experience and knowledge about the opportunities and pitfalls of right-to-counsel litigation.

The involvement of local bar groups is critical, particularly for litigation that is likely to be protracted over a lengthy period of time and will involve collaboration with various stakeholders.[662] Further, the involvement of local bar groups may provide a buffer for political backlash that may arise from right-to-counsel litigation. [663]

Sixth, consider the potential impact of rulemaking by the judiciary or the agency responsible for public defense. Rulemaking could play a role in affording a broad channel for raising ineffective assistance of counsel claims as suggested by Professor Primus.[664] Such efforts may lessen separation of powers issues if rulemaking regarding case overloads is subject to notice and comment and promulgated pursuant to established executive or judicial authority.[665]

Seventh, , do not overlook ethical issues. The case laid out by Leftstein in 2010 is even stronger today, and it appeared, for a time at least, that the Oregon Supreme Court might make a major ruling applying ethics to a case involving

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exceeded, 2) a prohibition on assigning cases to attorneys whose caseloads exceeds the standards, and 3) mandatory release of indigent defendants if counsel not assigned within 45 days of commencement of prosecution).

[660] Emily Chang, *Reviving the Declaratory Judgment: A New Path to Structural Reform*, 63 BUFF. L. REV. 549 (2015).

[661] *See* Drinan, *The Third Generation, supra* note 580, at 452-453.

[662] *Id.* at 458, 466.

[663] *Id.* at 467.

[664] Eve Brenke Primus, *Effective Trial Counsel After Martinez v. Ryan: Focusing the Adequacy of State Procedures*, 122 YALE L. JOURNAL 2604 (2013).

[665] Cf. J.B. v. Department of Children and Families, 158 So.3d 653, 659 (Fla App. 2014) (suggesting rulemaking to fill remedial gaps in right to counsel cases involving termination of parental rights); Samuel D. Jockel, *Fulfilling The Promise of Gideon in Massachusetts: Providing a Post Conviction Right to Counsel for Prisoners Asserting Innocence,* 26 B.U. PUB. INT. L. J. 205, 227 (2017)(suggesting rulemaking in right to counsel context).

systemic right to counsel. But the logic of Lefstein, embraced by Stephen Hanlon and others, is very powerful.[666]

Eight, consider attacking bad or faux state court precedent. Cases in the fifties and sixties often adopt federal case law reflexively without any real contest. Those precedents are not entitled to ordinary stare decisis if the precedents were uncontested and simply cut and pasted into the cases. And sometimes the declarations of law are just wrong. Boldface past statements by courts that state constitutional law mimics federal law are historically weak and analytically unprincipled.

Ninth, focus on the increasing authority of ABA Standards. As my former colleague Robert Rigg has shown, over the past couple of decades, the Supreme Court seems increasingly comfortable with workability of applying the ABA standards in determining issues surrounding the right to counsel.[667] The Supreme Court itself appears to have moved in that direction. A fair argument can be made that multiple decades of experience has shown that while thousands of precise rules would be an inappropriate constitutional measure, the ABA Standards go a long way in structuring questions regarding the competence of counsel.[668]

Last, prepare for the long haul.[669] Right to counsel litigation is complicated both with respect to liability and remedy. And, to date, results are mixed; advocates of the robust right-to-counsel requirements should zealously pursue appropriate litigation strategies but should also encourage state policymakers to take steps to reduce or dismantle mass incarceration and lessen the demand for defense resources.

And, while I am at it, I have one recommendation for state judicial branches. Develop a thorough CLE program for state court judges on the right to counsel and recent factual and legal developments regarding right to counsel law. Just as lawyers need to up their game on state court matters, so too do state court judges.

IX. CONCLUSION

There is an established tradition of independent state constitutional law development in the area of right to counsel. The state case law is spotty and uneven and perhaps to some extent unpredictable. Lawyers, however, should carefully consider bringing right to counsel claims under state constitutions in state court. If

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[666] *See* Stephen F. Hanlon, *Case Refusal: A Duty for a Public Defender and A Remedy for All of a Public Defender's* Clients, 51 IND. L. REV. 59 (2018). See also Joseph H. Ricks, *Raising the Bar's Establishing an Ineffective Remedy Against Ineffective Counsel,* 2015 B.Y.U. L. Rev. 1115, 1138-1144 (2015).

[667] *See* Robert F. Rigg, *The T Rex without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 94-97 (2007). *But see generally* Steven Zeidman, *Eradicating Assembly Line Justice: An Opportunity Lost by the Revised American Bar Association Criminal Justice Standards*, 46 HOFSTRA L. REV. 293, 293 (2017).

[668] *See* Cara Drinan, *Getting Real About Gideon: The Next Fifty Years*, 70 WASH. & LEE L. REV. 1309-1316-19 (2003); Drinan, The Third Generation, *supra* at note 397, at 456-57.

[669] *See* Drinan, 70 WASH. & LEE. LAW REV. at 1331.

they do, counsel should recognize the significant differences between state and federal constitutions and the state and federal courts. Right-to-counsel advocates, however, who raise state constitutional right-to-counsel claims need to do so with zeal and zest, recognizing that state courts have the capability to be innovators and problem solvers in a way that is unlikely to occur in federal courts today.