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# **(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services**

Rodger Citron

The Sixth Amendment guarantees defendants in all criminal prosecutions the right to the assistance of counsel.<sup>1</sup> The right to counsel is essential to the working of the criminal justice system, as the attorney must present the defendant's case and provide guidance throughout the State's proceedings against the defendant.<sup>2</sup> Indeed, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."<sup>3</sup>

The Sixth Amendment right to counsel not only enables the criminal justice system to operate, it also permits a criminal defendant to secure constitutional rights. As Illinois Supreme Court Justice William Schaefer once wrote: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."<sup>4</sup>

While the Supreme Court has expanded the Sixth Amendment right to counsel,<sup>5</sup> the criminal justice system has failed to provide effective legal assistance to indigent criminal defendants.<sup>6</sup> Reformers who study indigent defense systems uniformly note that insufficient funding of defense services prevents those systems from providing effective representation.<sup>7</sup> The disjunc-

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1. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

2. See *Powell v. Alabama*, 287 U.S. 45, 69 (1932) (criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him").

3. *Herring v. New York*, 422 U.S. 853, 862 (1975).

4. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

5. See, e.g., *United States v. Wade*, 388 U.S. 218, 223-27 (1967) (describing stages in adversary process requiring presence of counsel); *Powell v. Alabama*, 287 U.S. 45 (1932) (extending right to counsel to capital cases).

6. See *infra* Part I.

7. NORMAN LEFSTEIN, ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 11-24, 56-60 (1982) (assessing inadequate funding of defense services in various states) [hereinafter LEFSTEIN, DEFENSE SERVICES]; Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 483 ("[A]lmost every study made of defender programs has noted very serious shortcomings that are



tion between the formal rights of indigent criminal defendants and the availability of effective attorneys to vindicate those rights has led to increased claims of inadequate representation.<sup>8</sup> For legal reformers, how to address the growing crisis in indigent defense services—specifically, what efforts should be taken and who should take them—is a matter of intense debate. Some urge the legal profession to address the problem privately, either through raising funds for defense services<sup>9</sup> or by increasing its pro bono commitment.<sup>10</sup> Others insist that the problem is a “political question” that only the legislature can address.<sup>11</sup>

This Note argues that litigation seeking a structural injunction—a detailed remedial order providing affirmative relief—to improve state systems for providing indigent defense services is necessary to promote compliance with the requirements of the Sixth Amendment right to counsel. Judges developed the structural injunction as a remedial tool for implementing reform decrees in institutional litigation. The structural injunction “operates through the forward-looking mandatory injunction but assumes a relatively intrusive form, a more or less detailed order whose prescriptions displace significant areas of defendants’ discretion . . . and often demands an active, administrative role for the judge.”<sup>12</sup>

Part I of the Note sketches the contours of the Sixth Amendment right to counsel and outlines the systemic inadequacies plaguing existing indigent defense systems. Part II criticizes the current legal system’s reliance on post-conviction review of individual cases to address ineffective assistance of counsel claims. Judges have been reluctant to abandon this case-by-case review in favor of prospective structural reform of indigent criminal defense systems.

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traceable directly to lack of funds.”).

8. See, e.g., James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 445 n.8 (1977) (survey of number of claims of incompetent counsel in reported opinions in federal appeals courts shows 262% increase in number of claims from 1963-65 to 1969-71); John K. Van de Kamp, *The Right to Counsel: Constitutional Imperatives in Criminal Cases*, 19 LOY. L.A. L. REV. 329, 330 (1985) (noting increasing frequency with which criminal defendants complain about counsel).

9. Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 681-82 (1986).

10. Jerry L. Anderson, *Court-Appointed Counsel: The Constitutionality of Uncompensated Conscriptio*, 3 GEO. J. LEGAL ETHICS 503 (1990).

11. See *infra* Part III.C.1, especially note 137 and accompanying text. For an explanation of the political question doctrine, which dictates that courts lack the institutional capacity to address certain constitutional questions, see *Baker v. Carr*, 369 U.S. 186, 208-37 (1962).

12. PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* 151 (1983); see also OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 7, 91-93 (1978) (structural injunction initiates lengthy relationship between judge and institution). In Part III.A, this Note defines the structural injunction in greater detail and describes its application in the ongoing litigation to reform Arkansas’ prison system. For a discussion of litigation as a way to address ineffective assistance of counsel claims, see Richard J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986).



By describing ongoing litigation in Georgia, Part II presents a case study of judicial opposition to such structural reform.<sup>13</sup>

Part III presents the case for a structural injunction to reform indigent defense systems and concludes with suggestions courts should consider when structuring the remedial decree. It describes the salutary effect of the Arizona Supreme Court's decision in *State v. Smith*,<sup>14</sup> which provided clear instructions for the provision of indigent services in Mohave County and resulted in increased funding for those services. The Note argues that courts should employ a similar technique of issuing reform guidelines with specific goals for the provision of indigent defense services when the political branches are unwilling to provide adequate funds.

## I. THE SIXTH AMENDMENT RIGHT TO COUNSEL AND THE FAILURE OF EXISTING INDIGENT DEFENSE SYSTEMS

### A. *The Scope of the Sixth Amendment Right to Counsel*

Since the 1932 case of *Powell v. Alabama*,<sup>15</sup> which established the right to counsel in death penalty cases, the Supreme Court has extended the right to counsel to a number of criminal proceedings. Six years after *Powell*, the Court expanded its holding by guaranteeing the right to counsel to any indigent charged with a felony in a federal proceeding.<sup>16</sup> In 1963, *Gideon v. Wainwright*<sup>17</sup> extended the right to counsel in felony trials to the states through the Due Process Clause of the Fourteenth Amendment. Then, in 1972, the Court held that no defendant could be imprisoned, even for a misdemeanor conviction, unless he had been provided counsel.<sup>18</sup>

Just as the Supreme Court has expanded the offenses for which the defendant requires an attorney, it also has extended the right to counsel to various "critical" pretrial stages, such as a custodial interrogation<sup>19</sup> and a lineup.<sup>20</sup> The Court also has required that counsel be provided for the first level of appeal.<sup>21</sup> Although the right to counsel established in *Powell* did not entail a right to effective representation, case law has since developed to guarantee the defendant that right.<sup>22</sup>

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13. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *reh'g denied*, 896 F.2d 479 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 2562 (1990), *petition for permission to appeal granted*, 918 F.2d 888 (11th Cir. 1990), *district court order vacated sub nom.* *Luckey v. Miller* 929 F.2d 618 (11th Cir. 1991). This series of decisions involved jurisdictional issues; the court has not yet evaluated the merits of plaintiffs' case.

14. 681 P.2d 1374 (Ariz. 1984).

15. 287 U.S. 45 (1932).

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

17. 372 U.S. 335 (1963).

18. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

19. *Miranda v. Arizona*, 384 U.S. 436, 473 (1966).

20. *United States v. Wade*, 388 U.S. 218 (1967).

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

22. *McMann v. Richardson*, 397 U.S. 759 (1970).



### B. *The Failure of Existing Indigent Defense Systems*

The development of institutions to provide legal assistance to indigent criminal defendants has closely followed the expansion of the right to counsel.<sup>23</sup> Before *Gideon*, indigent defendants typically were represented by appointed attorneys serving without compensation or by volunteer agencies providing legal assistance.<sup>24</sup> *Gideon* greatly increased the demand for attorneys to represent indigent criminal defendants.<sup>25</sup> As a result of a variety of factors—the increase in criminal activity and corresponding rise in the number of criminal defendants, the expansion of the right to counsel, the increasing complexity of criminal defense, and the inexperience of many appointed attorneys with such work—the demand for effective representation has never been greater.<sup>26</sup>

Today there are three systems for providing counsel to indigent criminal defendants: (1) the public defender system, in which a public or private non-profit organization with full-time attorneys receives public funds for providing representation;<sup>27</sup> (2) the assigned counsel system, which provides for the judicial appointment and compensation of individual private attorneys who represent indigent defendants as the need arises;<sup>28</sup> and (3) the contract system, in which an individual attorney or a private law firm contracts with a government funding source to represent indigent clients for a set fee.<sup>29</sup>

Without sufficient funding, none of these systems can provide adequate assistance to indigent criminal defendants.<sup>30</sup> However, studies of indigent defense systems consistently demonstrate that legal services provided to the poor are inadequate as a result of underfunding.<sup>31</sup> Identifying the various problems afflicting the provision of defense services—heavy public defender caseloads, inadequate compensation for contract attorneys and assigned counsel,

23. Suzanne E. Mounts & Richard J. Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 197 (1986).

24. *Id.* at 197-98.

25. Klein, *supra* note 9, at 656. After *Gideon*, Congress passed the Criminal Justice Act, 18 U.S.C. § 3006A (1985 & Supp. 1991), to regulate the appointment of private attorneys to represent indigent criminal defendants in U.S. district courts. The statute specifies fees for the appointed attorneys and procedures for obtaining "investigative, expert, or other services necessary." 18 U.S.C. § 3006A(e).

26. *State ex rel. Partain v. Oakley*, 227 S.E.2d 314, 320-22 (W. Va. 1976); Robert L. Spangenberg, *We Are Still Not Defending the Poor Properly*, CRIM. JUST., Fall 1989, at 10 (describing recent reform efforts as inadequate). For a discussion of the difficulties criminal defense attorneys encounter in their practice, see Symposium, *Limitations on the Effectiveness of Criminal Defense Counsel: Legitimate Means or "Chilling Wedges?"*, 136 U. PA. L. REV. 1779 (1988).

27. Klein, *supra* note 9, at 656-57.

28. Anderson, *supra* note 10, at 503.

29. Meredith A. Nelson, Note, *Quality Control for Indigent Defense Contracts*, 76 CAL. L. REV. 1147, 1147 (1988) (calling for legislation to establish quality standards in award and administration of indigent defense contracts).

30. See LEFSTEIN, DEFENSE SERVICES, *supra* note 7.

31. See *id.*; C. Anthony Friloux, Jr., *Equal Justice Under the Law: A Myth, Not a Reality*, 12 AM. CRIM. L. REV. 691 (1975); Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 678 (1989); Mounts, *supra* note 7; Mounts & Wilson, *supra* note 23, at 200.



and a shortage of attorneys to represent criminal defendants in capital and misdemeanor cases—Professor Lefstein stated in 1986 that “[a]ll of these problems stem from a lack of appropriated funds.”<sup>32</sup>

The sharp disparity in funding for defense services as compared to other criminal justice institutions<sup>33</sup> results in many deficiencies. Lacking sufficient staff and resources, defense attorneys must ration their time and cannot adequately prepare their cases.<sup>34</sup> Defense attorneys may be unable to investigate their cases properly<sup>35</sup> and to consult with their clients.<sup>36</sup> The resulting lack of information may lead attorneys to strike unfair and harmful pleas for their clients when bargaining with the State.<sup>37</sup> Similarly, they may not prepare adequately for their clients’ sentencing hearings.<sup>38</sup> In some jurisdictions, the lack of adequate funding and resources not only precludes attorneys from thoroughly preparing to assist clients, but also prevents them from accompanying clients during critical stages of the adversary process, despite the Supreme Court’s explicit requirement to the contrary.<sup>39</sup>

Lack of funding may also pressure attorneys to plead cases as quickly as possible in an effort to manage their caseload.<sup>40</sup> Finally, within an office responsible for representing indigent defendants, there is little opportunity for new attorneys to receive adequate training and supervision, which compromises the quality of service they provide.<sup>41</sup>

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32. Norman Lefstein, *Keynote Address*, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 9 (1986).

33. A recent Bureau of Justice Statistics survey reports that public defense received \$1.05 billion of government (local, state, and federal) criminal justice funds; prosecution services received \$3.23 billion; corrections, \$13.03 billion; and police services, \$22.01 billion. U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1987, at 2 tbl. 1.1 (1988); see also Klein, *supra* note 9, at 675 (“The prosecution receives almost four times the amount of funds spent by state and local governments on indigent defense.”); Spangenberg, *supra* note 26 (showing recent increases in expenditures have not matched indigents’ demand for defense attorneys, especially with increasing number of drug arrests).

34. Klein, *supra* note 9, at 678-79; Nancy Albert-Goldberg et al., *Developing Strategies for Resolving Workload Problems and Controlling Caseloads* 9 (unpublished report by Abt Associates, Inc., on file with author).

35. LEFSTEIN, DEFENSE SERVICES, *supra* note 7, at 56; Norman Lefstein, *Financing the Right to Counsel: A National Perspective*, 19 LOY. L.A. L. REV. 391 (1985); Margulies, *supra* note 31, at 679-80; Sheldon Portman, *Financing the Right to Counsel: A View From a Local Public Defender*, 19 LOY. L.A. L. REV. 363, 364-65 (1985) (California defense attorneys lack time to conduct proper investigation). In Part II.B, this Note argues that inadequate investigation by the defense attorney violates the defendant’s constitutional right to counsel.

36. Klein, *supra* note 9, at 667-69.

37. *Id.* at 669-73.

38. *Id.* at 673-75.

39. Margulies, *supra* note 31, at 680.

40. See, e.g., Robert L. Spangenberg et al., *Overview of the Fulton County, Georgia Indigent Defense System* 25-26 (October 1990) (unpublished report, on file with author) [hereinafter Spangenberg Report].

41. *Id.* at 24, 28, 43.

## II. JUDICIAL OPPOSITION TO STRUCTURAL REFORM OF INDIGENT DEFENSE SYSTEMS

Despite the systemic problems hampering the provision of indigent defense services, courts generally reject litigation seeking to reform indigent defense systems. Instead, ineffective assistance of counsel claims are adjudicated on a post-conviction case-by-case basis. The post-conviction approach fails to remedy errors of omission resulting from staff and resource shortages. It may correct flagrant errors, but it cannot reach claims never brought and strategies never used. Because claims are case specific, the use of this approach precludes criminal defendants from raising structural challenges to improve indigent defense systems. As Section B demonstrates, courts have erected jurisdictional barriers to adjudicating cases seeking to reform defense systems.<sup>42</sup>

### A. *Establishing Ineffective Assistance of Counsel*

Currently, courts employ a case-by-case approach to evaluate ineffective assistance of counsel claims. The cases are adjudicated in one of two ways depending on the particular allegation of inadequacy. In cases involving the state's obligation to provide attorneys to indigent defendants and the state's regulation of that process, the Supreme Court has adopted what one commentator calls a "systemic" approach to the right to counsel.<sup>43</sup> That is, if the harm stems from state action or from denial of the right to counsel at a critical stage, the appellate court decides the case by applying a *per se* rule rather than by inquiring into the specific facts of the defendant's case.<sup>44</sup>

Alternatively, if the harm results from errors committed by the defendant's attorney, the appellate court reviews the facts to determine whether the errors prejudiced the outcome of the case. Here, the defendant bears the burden of meeting the two-prong test outlined in *Strickland v. Washington*.<sup>45</sup> In a post-conviction appeal, the defendant must show that his trial attorney's performance was deficient and that this inadequate performance prejudiced his case. Furthermore, the Supreme Court held in *United States v. Cronin*,<sup>46</sup> decided the same day as *Strickland*, that a defendant alleging ineffective assistance of

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42. See, e.g., *Luckey v. Miller*, 929 F.2d 618, 619-20 (11th Cir. 1991) (summarizing case history).

43. Margulies, *supra* note 31, at 676.

44. *United States v. Cronin*, 466 U.S. 648, 658 (1984). Automatic reversal is appropriate, for example, when counsel is denied at a critical stage in the criminal proceeding, when the attorney suffers from a clear conflict of interest and is not removed from the case, and when the defendant faces prejudicial circumstances that make "it so unlikely that any lawyer could provide effective assistance." *Id.* at 661.

45. 466 U.S. 668 (1984).

46. 466 U.S. 648 (1984).



counsel must demonstrate actual ineffectiveness to warrant Sixth Amendment protection.<sup>47</sup>

*Strickland's* reliance on post-conviction review to remedy systemic deficiencies provides no guarantee that indigent defendants will receive adequate assistance of counsel. By requiring the defendant to demonstrate that the ineffectiveness of counsel was prejudicial, the *Strickland* criteria tend to focus on errors of commission; however, especially with overworked defense attorneys, ineffective assistance more often results from an attorney's errors of omission.<sup>48</sup>

*Strickland* requires the defendant to demonstrate a direct connection between the attorney's error and the defendant's conviction. However, in a case involving an overworked defense attorney, the record is likely to be so sparse that it conceals the information the defense attorney should have discovered and presented on the defendant's behalf. Furthermore, reliance on post-conviction review by an appellate court overlooks the extent to which effective counsel can influence the entire trial process and thus the outcome of the case. Judge Schwarzer explained: "The lifeless and fragmentary appellate record will provide few insights into, and a poor perspective of counsel's knowledge of the law, capacity to analyze and plan, and ability to conduct effective direct and cross-examination of witnesses. This problem will be magnified to the extent that the lawyer was incompetent."<sup>49</sup>

The Supreme Court has acknowledged the dangers of attempting to measure the injury to a defendant's Sixth Amendment rights based on reviewing an appellate transcript in other effectiveness-of-counsel cases. These cases not only create an affirmative governmental duty to guarantee that the defendant has counsel at the critical stages of the adversary proceeding, they also prevent the state from interfering with the attorney's representation of her client.<sup>50</sup> For example, in *Holloway v. Arkansas*,<sup>51</sup> in which a public defender was compelled to represent several defendants with conflicting interests in the same case, Chief Justice Burger stated that "an inquiry into a claim of harmless error here would require . . . unguided speculation."<sup>52</sup>

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47. In *Cronic*, the Supreme Court held that the circumstances surrounding the defendant's representation—that counsel was given only 25 days to prepare for trial, that he had never tried a criminal case, that the charges were complex—did not justify a presumption of ineffectiveness. Instead, defendant was required to show the specific instances in which counsel's actual performance at trial constituted ineffective assistance of counsel. *Id.*

48. See *supra* Part I.B.

49. William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 643 (1980).

50. See, e.g., *Geders v. United States*, 425 U.S. 80 (1976) (trial judge's ruling preventing defendant from consulting with attorney during overnight recess improperly denied defendant access to counsel); *Herring v. New York*, 422 U.S. 853 (1975) (invalidating New York statute allowing trial judge to decline to hear closing arguments).

51. 435 U.S. 475 (1978).

52. *Id.* at 491.



In conflict of interest cases, the Court adopts a per se rule because the "impairments preclude counsel from doing many things that might otherwise be done. It is impossible to reconstruct, much less to evaluate, what these things were. It also wastes the court's time to attempt to do so."<sup>53</sup> The same rationale should apply to judicial scrutiny of cases alleging ineffective assistance of counsel resulting from the state's failure to provide adequate defense services for indigents.

In addition, the deficiencies in the indigent defense system result from the state's failure to fund these systems. Whereas the injury from a state-imposed conflict of interest is inflicted during the criminal defendant's trial, the damage caused by inadequate funding results from state action at an earlier stage in the process—the legislature's failure to allocate sufficient funding for the indigent defense system. Nevertheless, state action is the source of error in both situations. If inadequate funding causes the absence of counsel at a critical stage in the adversary process, then it constitutes systemic error mandating per se reversal. The same standard should apply when insufficient funding prevents the defense attorney from providing effective representation.

Moreover, regardless of whether the attorney's error is one of omission or commission, *Strickland* forces the indigent defendant to challenge trial counsel's conduct without the assistance of counsel. Although *Douglas v. California*<sup>54</sup> guarantees the defendant appointed counsel on the first appeal, *Ross v. Moffitt*<sup>55</sup> limits the right to that appeal alone. As an indigent defendant is likely to have the same attorney for the appeal as she had at trial, she is not in a position to challenge appointed counsel's effectiveness on appeal. On collateral attack, she must challenge trial counsel's effectiveness without a lawyer, even though "there are few situations in which a defendant needs assistance of counsel more direly . . . ."<sup>56</sup> After *Strickland*, the convicted defendant is required to prepare pleadings that convince the district court to hold a hearing "and then, perhaps with counsel assigned, prove not only that his attorney was incompetent but that the incompetence *produced* the conviction."<sup>57</sup>

Finally, a case-by-case approach to ineffective assistance of counsel claims prevents courts from considering systemic issues. An individual alleging ineffective assistance of counsel in her case cannot assert the claims of other indigent defendants. The public defender's lack of adequate resources is likely to affect each client's case differently. Reliance on post-conviction remedies ignores the source of Sixth Amendment deficiencies in indigent defense services and thus misdirects remedial efforts by failing to consider the average or typical

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53. Brief for Respondent at 20, *United States v. Cronin*, 466 U.S. 648 (1984) (No. 82-660).

54. 372 U.S. 353 (1963).

55. 417 U.S. 600 (1974).

56. Brief for Respondent at 62-63, *Cronin* (No. 82-660).

57. *Id.* at 63 (citations omitted).



case. This failure wastes judicial resources on redundant inquiries. A more sensible way to solve ineffective assistance of counsel problems is to address their causes rather than their symptoms.

B. *Luckey v. Miller: Dissecting the Legal System's Opposition to Structural Reform of Indigent Defense Systems*

The current crisis in Georgia's indigent defense system reveals the extent to which existing legal remedies fail to address systemic flaws in the representation of poor criminal defendants.<sup>58</sup> Georgia's system presents a case study of how insufficient funding undermines indigent defense services and produces violations of the Sixth Amendment right to counsel. Since 1986, a group of Georgia attorneys have maintained a class action to reform the state's indigent defense system. *Luckey v. Miller's*<sup>59</sup> procedural history presents in microcosm the legal barriers courts have erected to bar lawsuits seeking to address systemic deficiencies in indigent defense services.<sup>60</sup>

1. *Georgia's Indigent Defense System*

Although Georgia has declared its intention to "provide the constitutional guarantees of the right to counsel and equal access to the courts to all its citizens in criminal cases,"<sup>61</sup> the state's reliance on a county-by-county system to furnish indigent defense services has proven inadequate. Georgia assigns its criminal courts the task of "provid[ing] for the representation of indigent persons in criminal proceedings . . ."<sup>62</sup> About 66% of the counties rely on court-appointed attorneys to represent indigents, 23% have public defender offices, and 11% contract with private attorneys.<sup>63</sup>

Although Georgia has increased its expenditures on indigent defense services in recent years, it still fails to provide adequate funding for those services. In 1989, Georgia spent more than \$14 million on indigent defense services, with more than 90% of that money coming from counties and the remainder from the state.<sup>64</sup> The state spends an average of \$174.61 on each

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58. See Peter Applebome, *Study Faults Atlanta's System of Defending Poor*, N.Y. TIMES, Nov. 30, 1990, at B5.

59. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), cert. denied, 110 S. Ct. 2562 (1990), district court order vacated sub nom. *Luckey v. Miller*, 929 F.2d 618 (11th Cir. 1991).

60. At least two cases seeking structural reform have succeeded in obtaining trial court orders requiring reform of indigent defense services. See *Wallace v. Kern*, 392 F. Supp. 834 (E.D.N.Y.), rev'd on jurisdictional grounds, 481 F.2d 621 (2d Cir. 1973), cert. denied, 414 U.S. 1135 (1974) (enjoining New York Legal Aid Society from taking additional cases without judicial approval); *Gilliard v. Carson*, 348 F. Supp. 757 (M.D. Fla. 1972) (issuing injunction to guarantee representation for criminal defendants in municipal court).

61. GA. CODE ANN. § 17-12-31 (Michie 1990).

62. GA. CODE ANN. § 17-12-4 (Michie 1990).

63. Telephone Interview with Neal Bradley, plaintiffs' attorney in *Luckey v. Harris* (Sept. 24, 1990).

64. *Pay Me Now or Pay Me Later*, GA. COUNTY GOV'T, Apr. 1990, at 16.



indigent defendant's case, ranking forty-fourth in the United States.<sup>65</sup> When the Georgia legislature decided to contribute \$1 million to the system in 1989, it conditioned distribution of the money on county compliance with minimum standards of adequate assistance of counsel.<sup>66</sup> Not all counties applied for state funding, and not all of those which received state funds complied with the state's requirements.<sup>67</sup>

Anecdotes and surveys demonstrate that Georgia is plagued with attorneys who are forced to be "walking violations of the [S]ixth [A]mendment."<sup>68</sup> In some counties, public defenders report that they have to represent hundreds of clients. In the Fulton County Public Defender Office, which services the largest county in Georgia, a recent report found that some public defenders each represent more than 500 accused felons a year.<sup>69</sup> The negative publicity generated by this report enabled the public defender office to obtain emergency funds in the fall of 1990 and to receive an additional \$470,000 in its 1991 budget.<sup>70</sup> Even with the additional funds, however, each defender will have a caseload of at least 220 felony cases a year, a number that significantly exceeds the maximum effective caseload standards suggested by professional legal organizations.<sup>71</sup>

The resulting indigent defense system fails to pass constitutional muster in at least two ways. First, it fails to provide representation to criminal defendants at certain "critical stages"—including trials—in the adversary process. A 1987 survey found that judges in at least eleven of the state's forty-five judicial circuits do not provide counsel to indigent defendants charged with misdemeanors, even charges that may lead to imprisonment, despite *Argersinger*

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65. *Id.*

66. Stephen B. Bright et al., *Keeping Gideon From Being Blown Away*, CRIM. JUST., Winter 1990, at 10.

67. Jeanne Cummings, *Council Gives \$1 Million for Needy Defendants*, ATLANTA J. & CONST., Dec. 9, 1989, at B1. The guidelines require, for example, an attorney to meet with her client as soon as possible after the client's arrest, preferably within 72 hours. They also require an appointed lawyer to be paid between \$35 and \$45 per hour, about half of what a private attorney may charge, and prohibit fee caps on death penalty cases. *Id.*

Only 119 of Georgia's 159 counties applied for state funds. The failure of counties to comply with the guidelines has been noted by Ken Foskett in *War on Drugs Takes Indigent Defense Hostage*, ATLANTA J. & CONST., Oct. 7, 1990, at D10 (state money withheld from four counties for failing to appoint attorneys within 50 hours of defendants' arrest); Trisha Renaud & Ann Woolner, *Meet 'Em and Plead 'Em*, FULTON COUNTY DAILY REP., Oct. 8, 1990, at 1 (describing "slaughterhouse justice" system in which defense attorneys plead as many clients' cases as possible at arraignment to keep Fulton County Public Defender Office operational).

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

69. Spangenberg Report, *supra* note 40, at 27.

70. Trisha Renaud, *PD Reforms: Double-Teaming*, FULTON COUNTY DAILY REP., June 20, 1991, at 1.

71. Margulies, *supra* note 31, at 677. The National Advisory Commission on Criminal Justice Standards and Goals, for example, estimates that an attorney can effectively represent 150 clients in a single year. *Id.* (citing NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, *THE OTHER FACE OF JUSTICE* 29 (1973)).



v. *Hamlin*'s<sup>72</sup> requirement that they do so.<sup>73</sup>

Second, lawyers are unable to investigate adequately their clients' cases. Defense attorneys report that they routinely lack the time and resources to interview their clients thoroughly and sometimes fail to interview relevant witnesses in a case.<sup>74</sup> The Fulton County report found that trial attorneys sometimes "delay ordering investigations even when they feel that it may be helpful to the defense, hoping that the case will result in a plea rather than go to trial."<sup>75</sup>

The Supreme Court once warned that the "denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution . . . ."<sup>76</sup> More specifically, federal appeals courts have held that the failure to investigate adequately a client's case supports a claim of ineffective assistance of counsel. In *Coles v. Peyton*,<sup>77</sup> the Fourth Circuit reversed an indigent defendant's rape conviction because his appointed attorney failed to interview any relevant witnesses to the crime, including the alleged victim and another possible suspect.

## 2. *Luckey v. Miller*

In response to the systemic deficiencies plaguing their state's indigent defense system, attorneys in Georgia have been litigating a sweeping class action to restructure the system by prospective injunction.<sup>78</sup> In 1986, the *Luckey* plaintiffs, a class consisting of indigent persons who are or will be charged with criminal offenses in Georgia courts and the attorneys who represent them, sued to vindicate indigents' Sixth Amendment rights. The lawsuit, which is still pending, seeks to restructure Georgia's indigent defense system by obtaining an injunction that would limit the number of cases an attorney may handle, regulate the amount of compensation a court-appointed attorney may receive, and set minimum standards necessary for a defense attorney to provide effective assistance of counsel.<sup>79</sup>

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72. 407 U.S. 25 (1972).

73. Tracy Thompson, *Rural Georgia's Poor Often Find Free Legal Aid Lacking*, ATLANTA J. & CONST., Dec. 14, 1987, at A1; see also *Lowrance v. State*, 359 S.E.2d 196 (Ga. 1987) (indigent criminal defendant denied appointed counsel to contest misdemeanor charge).

74. Renaud & Woolner, *supra* note 67; Thompson, *supra* note 73.

75. Spangenberg Report, *supra* note 40, at 25-26.

76. *Avery v. Alabama*, 308 U.S. 444, 446 (1940).

77. 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968). But see *Jackson v. Cox*, 435 F.2d 1089, 1093 (4th Cir. 1970) (limiting *Coles* to cases in which there was "complete lack of investigation" by counsel).

78. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert. denied*, 110 S. Ct. 2562 (1990), *district court order vacated sub nom. Luckey v. Miller*, 929 F.2d 618 (11th Cir. 1991).

79. Plaintiffs' Second Amended Complaint at 33-35, *Luckey* (No. C86-297R).

The plaintiffs have requested that the court instruct the state defendants to guarantee that indigent criminal defendants be brought before a judicial officer within two or three days of their arrest and assigned



The *Luckey* plaintiffs have encountered a number of jurisdictional obstacles to adjudicating the merits of their case. The district court originally dismissed the case for failure to state a claim for which relief can be granted and for violating the Eleventh Amendment's provision of sovereign immunity for the states, but the Eleventh Circuit reversed the district court and reinstated the plaintiffs' case.<sup>80</sup> More recently, the Eleventh Circuit approved the district court's request to consider the question of the *Younger* abstention doctrine—the principle that a federal court should refrain from interfering with a state court's administration of its criminal justice system.<sup>81</sup> As this next section argues, none of these jurisdictional issues—case or controversy, *Younger* doctrine, or Eleventh Amendment sovereign immunity—warrants dismissal of the case prior to adjudication on the merits.

a. *Case or Controversy*

The Article III “case or controversy” requirement has two related components.<sup>82</sup> First, it requires plaintiffs to demonstrate that other remedies, such as habeas corpus proceedings to challenge a conviction resulting from ineffective assistance of counsel, are inadequate to address plaintiffs' claims. Second, it mandates that plaintiffs show actual injury before a federal court can provide injunctive relief.<sup>83</sup> The district court in *Luckey* held that prospective injunctive relief was inappropriate because plaintiffs had not shown that the Georgia indigent defense system produced “across-the-board” violations of the Sixth Amendment right to counsel, as *Strickland* requires.<sup>84</sup>

Yet *Strickland* should not apply to a request for prospective injunctive relief. When the right to counsel has been deprived through systemic error—such as when a defendant is denied counsel at a lineup or is represented by an appointed attorney with a court-imposed conflict of interest in the case—the rule requiring reversal is applied per se, without a factual inquiry.

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“competent, effective” counsel at each critical stage in the prosecution. The plaintiffs have not sought a specific compensation rate for appointed attorneys, but they have requested that the number of cases a public defender handles not exceed “recognized minimum national standards.” *Id.* at 34.

80. *Luckey v. Harris*, 860 F.2d 1012.

81. *Luckey v. Miller*, 929 F.2d 618 (11th Cir. 1991) (vacating district court order).

82. U.S. CONST. art. III, § 2.

83. In *Gardner v. Luckey*, 500 F.2d 712 (5th Cir. 1974), *cert. denied*, 423 U.S. 841 (1975), a case strikingly similar to *Luckey*, indigent criminal defendants filed a class action to remedy inadequate funding and excessive caseloads in the Florida Public Defender Offices. The Fifth Circuit Court of Appeals reasoned that the case did not present a case or controversy, given the availability of state court remedies and federal habeas corpus procedures. *Id.* at 715.

As the discussion of *Younger* abstention doctrine in Part II.B demonstrates, the availability of habeas corpus does not present an adequate alternative for an indigent criminal defendant denied his Sixth Amendment right to counsel. See *infra* note 101 and accompanying text.

84. *Luckey v. Harris*, 860 F.2d at 1016-17.

*Strickland*, in contrast, is the appropriate standard to apply when the defendant alleges attorney error.<sup>85</sup>

The Eleventh Circuit suggested *Strickland*'s inapplicability when it reversed the district court:

[D]eficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the [S]ixth [A]mendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively.<sup>86</sup>

Two issues central to the case or controversy requirement are collapsed in Judge Vance's opinion for the Eleventh Circuit. The first concerns the scope of the Sixth Amendment right to counsel: outlining the scope of the right will determine whether the defendant has been "harmed" by deprivation of the right. For Judge Vance, the right to counsel protects more than just the outcome of the defendant's case. In contrast, the Supreme Court, in its seminal right to counsel cases, *Strickland*<sup>87</sup> and *Cronic*,<sup>88</sup> has held that the right serves primarily to protect the defendant's right to a fair trial.<sup>89</sup>

Judge Vance's opinion cites three cases—*Coleman v. Alabama*,<sup>90</sup> *United States v. Wade*,<sup>91</sup> and *Gerstein v. Pugh*<sup>92</sup>—in which pretrial denial of the right violated the Constitution, even though the defendants made no factual showing of harm.<sup>93</sup> These cases support the proposition that violations of the Sixth Amendment right to counsel may occur, even though the defendant does not and need not demonstrate that denial of the right violates *Strickland*'s requirements.

If, as Judge Vance argues, systemic harms are cognizable, a second issue arises concerning the availability of injunctive relief to address systemic harms. For Judge Vance, the crucial distinction is timing—whether the defendant seeks prospective or post-trial relief. In the three Supreme Court cases cited by Judge Vance and noted in the preceding paragraph, the Supreme Court distinguished between pre- and post-trial relief. Judge Vance explained that the *Strickland*

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85. Margulies, *supra* note 31, at 715.

86. Luckey v. Harris, 860 F.2d at 1017.

87. 466 U.S. 668 (1984).

88. 466 U.S. 648 (1984).

89. See *id.* at 654 ("[T]he core purpose of the counsel guarantee was to assure 'Assistance' at trial." (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973))).

90. 399 U.S. 1 (1970).

91. 388 U.S. 218 (1967).

92. 420 U.S. 103 (1975).

93. This analysis is consistent with the Supreme Court's systemic approach to the right to counsel, discussed *supra* Part II.A.



factors—"concerns for finality, concern that extensive post-trial burdens would discourage counsel from accepting cases, and concern for the independence of counsel"—favor case-by-case analysis where a party seeks to overturn his or her conviction and do not apply when only prospective relief is sought.<sup>94</sup>

Because the right to counsel is more than just the right to an outcome, and because the *Luckey* plaintiffs seek a prospective injunction to prevent future harm, they should only be required to demonstrate threatened injury, as Judge Vance argues. Imposing the *Strickland* criteria on the entire class of *Luckey* plaintiffs would be too stringent. The allegations in *Luckey* clearly present a "case or controversy."

#### b. Younger Abstention Doctrine

The *Younger* abstention doctrine raises another jurisdictional issue. The doctrine prevents federal courts from enjoining pending state criminal prosecutions (the narrow reading) and from engaging in a major continuing intrusion into state criminal proceedings (the broad reading).<sup>95</sup> The *Younger* doctrine has two justifications. It "is based in part on the view that the state judicial proceeding provides an adequate alternative forum to resolve the issues sought to be litigated in the federal court."<sup>96</sup> It also derives from the Court's commitment to "Our Federalism"—the view that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."<sup>97</sup>

Thus, the *Luckey* plaintiffs and other litigants seeking a structural injunction to improve indigent defense services must address both prongs of the *Younger* doctrine. The narrow reading dictates that the federal court not interfere with an ongoing state criminal prosecution. This objection is easily addressed—the relief requested in *Luckey* is systemic and would not intervene in any current criminal prosecutions. *Luckey* focuses on improving the state's indigent defense institutions—a separate sphere—while leaving intact the state's laws and apparatus for prosecuting criminal defendants.<sup>98</sup>

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94. *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988), *cert. denied* 110 S.Ct. 2562 (1990), *district court order vacated sub. nom. Luckey v. Miller*, 929 F.2d 618 (11th Cir. 1991) (citation omitted); *see also* *Wallace v. Kern*, 392 F. Supp. 834, 845-46 (E.D.N.Y.), *rev'd on jurisdictional grounds*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974) (discussing pre-and post-trial relief).

95. *Younger v. Harris*, 401 U.S. 37 (1971); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 744-49 (1978).

96. Frug, *supra* note 95, at 745.

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

98. The Supreme Court has held that a federal district court may order systemic reform of state criminal procedures that are not directly involved in a prosecution. In *Gerstein v. Pugh*, 420 U.S. 103 (1975), plaintiffs filed a civil rights class action challenging Florida's practice of detaining persons before trial on the basis of a prosecutor's information without a judicial determination of probable cause. The district court held for the plaintiffs and eventually issued a detailed final order changing pretrial procedures. *Id.* at 108.

Although the Supreme Court disagreed with the lower court on the merits, and reversed and remanded the case for additional proceedings, it noted that the lower court did have the power to enter such an order.



The broad reading of the *Younger* doctrine, which prevents federal courts from overseeing state criminal proceedings, presents a more difficult hurdle. In the Sixth Amendment right to counsel context, however, at least one federal district court has held that the plaintiffs' need for relief may overcome *Younger* abstention concerns. In *Gilliard v. Carson*,<sup>99</sup> the court issued an injunction to guarantee that indigent criminal defendants in a Jacksonville municipal court were appointed attorneys in a manner consistent with *Argersinger v. Hamlin*.<sup>100</sup>

Neither justification for the *Younger* abstention doctrine persuaded the *Gilliard* court to stay its hand. First, it found the alternative remedy of petitioning for a writ of habeas corpus "manifestly inadequate" because the defendant could not obtain it until after she had suffered the irreparable injury of denial of the right to counsel.<sup>101</sup> Moreover, the court found the constitutional injury suffered by the Jacksonville criminal defendants more compelling than the federalism concerns protected by the *Younger* doctrine.<sup>102</sup>

When weighing an individual's interest in vindicating his constitutional rights against the state's interest in preserving its sovereignty, it is instructive to recall the language of *Mitchum v. Foster*,<sup>103</sup> decided the same year as *Gilliard*: "The very purpose of Section 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'"<sup>104</sup>

Even though the Burger and Rehnquist Courts have eviscerated this vision of Reconstruction federalism,<sup>105</sup> which posits that federal courts are the primary guardians of federal rights, *Gilliard* at least stands for the proposition that federal injunctive relief is warranted if the state's practices threaten to deprive many defendants of their federal constitutional rights and other remedies are inadequate to correct these practices.<sup>106</sup> Comity does not allow states to pre-

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The *Younger* abstention doctrine was not a bar to relief, the Court said, because "[t]he injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution." *Id.* at 108 n.9; see also Donald H. Zeigler, *An Accommodation of the Younger Doctrine and the Duty of the Federal Courts to Enforce Constitutional Safeguards in the State Criminal Process*, 125 U. PA. L. REV. 266, 296-98 (1976) (discussing *Gerstein* and *Younger* doctrine).

99. 348 F. Supp. 757 (M.D. Fla. 1972).

100. 407 U.S. 25 (1972).

101. *Gilliard*, 348 F. Supp. at 762. The court also noted that the plaintiff has the option to choose whether to sue in state or federal court to vindicate her constitutional rights. *Id.* at 762 n.3.

102. *Id.* at 762; see also *Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 506-09 (M.D. Ala. 1976) (issuing injunction to guarantee indigent defendants' right to counsel despite *Younger* abstention concerns).

103. 407 U.S. 225 (1972).

104. *Id.* at 242 (citation omitted).

105. See, e.g., Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

106. See also *Wallace v. Kern*, 392 F. Supp. 834, 847 (E.D.N.Y.), *rev'd on jurisdictional grounds*, 481 F.2d 621 (2d Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974) ("Where there is a present violation of constitutional rights, the hope of delayed correction by the state (or the city) should not stay the hand of a federal district court.").



vent indigent criminal defendants from vindicating their Sixth Amendment rights.

c. *Eleventh Amendment Sovereign Immunity*

Whereas the *Younger* abstention doctrine addresses the federalism concerns between state and federal courts, the Eleventh Amendment issue raises federalism concerns between states' political branches and federal courts.<sup>107</sup> The Eleventh Amendment has been interpreted to prohibit a citizen from directly suing the state. However, as *Luckey* demonstrates, litigation to restructure indigent defense systems involves suing not the state itself, but the state officials who fund and administer the system. *Ex Parte Young*<sup>108</sup> allows state officers to be sued to prevent them from engaging in unconstitutional conduct in their official capacities.<sup>109</sup> The district court in *Luckey* held *Ex Parte Young* inapplicable because any remedial order compelling indigent defense funding would be enforced against the state itself rather than against the officials who were the defendants in the lawsuit.<sup>110</sup> However, as the Eleventh Circuit noted in its reversal of the district court, the Eleventh Amendment does not bar lawsuits to compel state officials to comply with the Constitution in the future, regardless of how much the order would cost the state.<sup>111</sup>

### III. STRUCTURING THE REMEDY TO IMPROVE INDIGENT DEFENSE SYSTEMS

To summarize: the legal arguments against a federal court's issuing a structural injunction to reform a failing indigent defense system are not persuasive. Courts have the legal authority to evaluate the constitutionality of state systems responsible for providing essential services to its citizens and, if necessary, to require the state legislature to raise money to bring the system

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Another route around the *Younger* abstention doctrine, suggested by Zeigler and pursued by the plaintiffs in *Luckey*, is to sue for prospective relief. Zeigler, *supra* note 98, at 298. The *Younger* doctrine does not apply when criminal prosecution is only a possibility. *Id.* Such an approach encounters standing problems, however, as plaintiffs are required by *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), to demonstrate that they are likely to be injured in the future by the practices they seek to challenge. See Margulies, *supra* note 31, at 718-24. The Supreme Court has relaxed this standing requirement of likelihood of future injury in certain institutional reform cases, such as the Arkansas prison litigation, *Hutto v. Finney*, 437 U.S. 678 (1978), and the Florida pretrial detention case, *Gerstein v. Pugh*, 420 U.S. 103 (1975).

107. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

108. 209 U.S. 123 (1908).

109. See *Milliken v. Bradley*, 433 U.S. 267 (1977).

110. *Luckey v. Harris*, 860 F.2d 1012, 1014 (11th Cir. 1988).

111. *Id.*; see also *Milliken v. Bradley*, 433 U.S. at 289; *Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (requiring state officials to spend money, as ancillary effect of court order, is "often an inevitable consequence of the principle announced in *Ex Parte Young*"); Frug, *supra* note 95, at 751-52.



into compliance with the Constitution.<sup>112</sup> A description of the Arkansas prison litigation, which is literally a textbook example of judicial reform of a constitutionally infirm state institution, illuminates the dynamics of institutional reform through the structural injunction.<sup>113</sup>

### A. *The Legal Case for the Structural Injunction*

The structural injunction is a court's remedial tool to reform an entire state institution in order to bring it into compliance with the Constitution. It requires a judge to maintain an ongoing relationship with the institution as she supervises its reconstruction.<sup>114</sup> The need for institutional transformation motivates a judge's decision to oversee its reorganization. In *Hutto v. Finney*,<sup>115</sup> the Arkansas prison litigation, the plaintiffs presented detailed evidence that the prison was "a dark and evil world completely alien to the free world."<sup>116</sup> Confronted with extensive violations of the prisoners' constitutional rights in a number of areas—such as the lack of safe and sanitary living conditions and the unconstitutional use of isolation cells to punish prisoners—the court initially required the state to address the deficient conditions.<sup>117</sup>

As time progressed, prison administrators addressed the problems in piecemeal fashion. The court oversaw the reforms by holding hearings to monitor the improvements and by issuing orders for more detailed instructions to the prison administrators.<sup>118</sup> Through the structural injunction, the court promoted institutional reform by supervising the prison administrators, focusing public attention on the need for prison reform, and prodding the legislature to increase its funding of the prison system. The State of Arkansas' corrections expenditures increased at least sixfold after the court's intervention.<sup>119</sup> The Arkansas prison litigation illustrates the dynamics involved in using the structural injunc-

112. See Robert A. Schapiro, Note, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231 (1989) (arguing court order requiring legislature to raise funds is consistent with judicial review).

113. OWEN M. FISS & DOUG RENDLEMAN, *INJUNCTIONS* 529-752 (2d ed. 1984) (presenting excerpts of primary decisions in ongoing—and over a decade long—litigation to reform Arkansas' prisons).

114. FISS, *supra* note 12, at 92.

115. 437 U.S. 678 (1978).

116. *Id.* at 681 (quoting *Holt v. Sarver*, 309 F. Supp. 362, 381 (E.D. Ark. 1970) (*Holt II*)). The case history is summarized in Robert E. Easton, Note, *The Dual Role of the Structural Injunction*, 99 YALE L.J. 1983, 1998 n.62 (1990).

117. *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969) (*Holt I*).

118. *Holt II*, 309 F. Supp. 362 (declaring certain prison practices—"trusty" guard system, open barracks, isolation cells, and inadequate rehabilitation program—unconstitutional and requiring structural reform), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Holt v. Hutto*, 363 F. Supp. 194 (E.D. Ark. 1973) (*Holt III*) (maintaining prior decrees); *Finney v. Hutto*, 410 F. Supp. 251 (E.D. Ark. 1976) (finding constitutional violations in medical treatment, living conditions, and certain disciplinary procedures), *aff'd*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

119. Malcolm M. Feeley, *The Significance of Prison Conditions Cases: Budgets and Regions*, 23 LAW & SOC'Y REV. 273, 274 (1989).



tion and demonstrates its capacity for improving constitutionally infirm state institutions.

As in the prison example, additional funding is essential to improving indigent defense systems. Some political officials, such as the Governor of Georgia, who is a defendant in *Luckey*, insist that the legislature has the prerogative to decide how to spend state funds.<sup>120</sup> Yet, as the description of Georgia's indigent defense system demonstrates, the legislature seems unlikely to pursue vigorously adequate funding of indigent defense systems. Legislatures are, after all, majoritarian institutions, whereas the beneficiaries of indigent defense systems are minorities—not only numerically, but economically and often ethnically as well.<sup>121</sup> Moreover, “[p]roviding effective assistance, especially at state expense, is widely regarded as assisting criminals in crime.”<sup>122</sup>

Some reformers suggest that the legal profession should increase its pro bono commitment by furnishing attorneys for indigent criminal defendants when the state lacks the resources to do so.<sup>123</sup> Depending on the jurisdiction, the attorney may either receive compensation for her services or have to provide representation without compensation. During the last decade, a majority of states have decided that compulsory pro bono service is inappropriate.<sup>124</sup> Even in states where compensation is required, however, the money provided may amount to a pittance and thus discourage the assigned attorney from vigorously representing her client.<sup>125</sup>

Other reformers, such as Professor Klein, advocate raising money from within the legal profession to fund improvements in the system. Klein proposes allocating funds collected from lawyer registration fees to indigent defense services, as well as drawing on funds collected from Interest on Lawyer Trust Accounts (IOLTA).<sup>126</sup> State criminal justice systems have embraced these reforms with varying degrees of enthusiasm.<sup>127</sup>

120. Brief for Appellees at 15-22, *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988) (No. 88-8047).

121. Brief for Respondent at 39, *United States v. Cronin*, 466 U.S. 648 (1984) (No. 82-660).

122. *Id.* at 39-40 (footnote omitted).

123. Anderson, *supra* note 10, at 531 (“system of uncompensated court appointment of counsel is constitutionally sound” although Constitution imposes some limits).

124. American Bar Association, Section of Criminal Justice, Report to the House of Delegates, app. B at 7-8 (Aug. 1990) (unpublished report, on file with author); *see, e.g.*, *State v. Smith*, 747 P.2d 816 (Kan. 1987).

125. *See, e.g.*, *Ex parte Grayson*, 479 So. 2d 76 (Ala.), *cert. denied*, 474 U.S. 865 (1985) (statutory limit of \$500 on funds for expenses incurred in defense of indigent defendant does not violate Sixth Amendment guarantee of effective assistance of counsel).

126. Klein, *supra* note 9, at 683-92. According to Professor Klein:

Lawyers had traditionally placed in aggregated, non-interest bearing accounts, those client funds held in trust for future use which were either so small in amount or expected to be held for such short duration that they could not be invested productively on behalf of the client. Since the funds belonged to the clients until needed for the specific transaction, the lawyer was not permitted to receive any interest on the funds.

*Id.* at 688-89. IOLTA programs pool attorney trust accounts to generate interest income to help fund public interest causes, such as subsidizing civil legal services programs. *Id.* at 689.

127. Spangenberg, *supra* note 26, at 12 (surveying recent indigent defense reforms and concluding that “available resources to respond to . . . present demands are sadly lacking”).



When legislative appropriations prove insufficient and private strategies fail to increase funds, the federal judiciary has the authority, indeed the obligation, to bring a deficient state system of defense services into compliance with the Constitution.<sup>128</sup> The judiciary retains this authority even when its remedial order will require the legislature to appropriate additional funds.<sup>129</sup>

### B. *The Pragmatic Case for the Structural Injunction*

Based on evaluations of judicial intervention to reform various state bureaucracies—schools, prisons, and mental hospitals—since the 1960's,<sup>130</sup> critics of the structural injunction offer prudential as well as legal objections to broad judicial remedial orders. However, institutional differences suggest that criticisms of the structural injunction are less applicable to indigent defense systems. First, as discussed earlier, prison reform has been successful. Second, an indigent defense system is more open, and thus more amenable to judicial reform, than a prison. Finally, because the state's indigent defense system is a legal institution, a federal district court is uniquely qualified to oversee the state system.

Professor Schuck argues that courts often lack comprehensive knowledge of the institutions they seek to reform.<sup>131</sup> This argument is unpersuasive in the ineffective assistance of counsel context, however, for judges have the knowledge and experience to evaluate the efficiency of indigent defense systems. Schuck also argues that the judge's isolation from the institution and her reliance on secondary sources for information—pleadings and monitors' and masters' reports—prevent her from effectively responding to the peculiar dynamics of the litigation.<sup>132</sup> However, because criminal defense attorneys operate in public forums with outside officials—in hearings and trials before judges, in communications with prosecutors regarding plea bargains and discovery—reforming a state's indigent defense system does not present the same informational barriers as does reforming closed institutions such as prisons and mental hospitals.<sup>133</sup>

The same qualities that prevent the court from understanding and learning about the institution it seeks to improve, Schuck argues, hamper it from promot-

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128. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("Judicial authority enters only when a local authority defaults.").

129. *Missouri v. Jenkins*, 110 S. Ct. 1651, 1665 (1990) (court can order local government body to levy taxes).

130. See *id.* Empirical evaluations of structural reform include Note, *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428 (1977) (describing limits of structural reform), and Diane S. Kaplan & Richard M. Zuckerman, Note, *The Wyatt Case: Implementation of a Judicial Decree Ordering Institutional Change*, 84 YALE L.J. 1338, 1367-69 (1975) (discussing results of Alabama mental hospital litigation).

131. SCHUCK, *supra* note 12, at 154-69.

132. *Id.*

133. Telephone Interview with Neal Bradley, plaintiffs' attorney in *Luckey v. Harris* (Nov. 3, 1990).



ing institutional reform. For instance, the judge's isolation limits communication of her reform proposals to the institution's employees—a "leakage of authority" occurs as the judge's instructions filter through the bureaucracy, frustrating implementation of the reforms.<sup>134</sup> Similarly, Schuck argues that the court, possessing only the formal power to coerce and the informal influence of moral legitimacy, lacks the tools to induce bureaucratic change and to garner political support for institutional reform.<sup>135</sup>

In short, criticisms of the structural injunction refer to complex institutions that require close supervision and have less relevance for institutions such as indigent defense systems, which are relatively open and decentralized. As a legal body, the court can adopt a straightforward set of rules to address indigent defense deficiencies, enabling prosecutors, defense attorneys, and trial judges to understand their own legal obligations.

### C. *Structuring the Remedial Decree*

A court that reaches the merits of a case seeking structural reform of the state's indigent defense system and rules in the indigent defendants' favor will have to devise a remedial scheme. Courts in other institutional reform cases have employed a variety of techniques for overseeing bureaucratic improvements and for compelling the legislature to increase funding for a state agency.

#### 1. *Declaratory Judgment*

Using this mechanism, the district court would simply declare that the state's indigent system fails to provide effective assistance of counsel as required by the Sixth Amendment. The court would allow the governor and the legislature to propose and to implement the changes necessary to bring the system into compliance with the Constitution. If the political branches view the court's decision as legitimate, then the declaratory judgment can be an effective tool for raising funds.<sup>136</sup> Of course, this remedy succeeds only to the extent that the governor and the legislature agree to reform the indigent defense system in response to the court's adjudication. To vindicate the Sixth Amendment right to counsel, some state courts have issued declaratory judgments to reform statutory schemes for compensating private attorneys who represent indigent criminal defendants. Such judgments have generally resulted in greater funding for those attorneys.<sup>137</sup>

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134. SCHUCK, *supra* note 12, at 161 (footnote omitted).

135. *Id.* at 167-69.

136. *Id.* at 191.

137. The court in *Bradshaw v. Ball*, 487 S.W.2d 294 (Ky. 1972), stating that "[t]he proper duty of the judiciary . . . is neither to enforce laws nor appropriate money," simply issued a declaratory judgment that Kentucky's system of court-appointed uncompensated counsel was unconstitutional. *Id.* at 299; *see also* *State ex rel. Partain v. Oakley*, 227 S.E.2d 314, 319 (W. Va. 1976) (state statutes requiring private attorneys to



Although the declaratory judgment has been effective in resolving straightforward issues such as the constitutionality of compensation statutes and might be effective in raising funds, it would not provide the political branches with the comprehensive and ongoing guidance in addressing the various deficiencies needed to bring the system into compliance with the Constitution. Indeed, even though many legislators and executive branch officials have legal training,<sup>138</sup> they are not as experienced and knowledgeable as judges are in developing remedial schemes to improve indigent defense systems.

## 2. *Injunction with Reform Guidelines*

In addition to issuing a judgment declaring the system unconstitutional, as in the first scenario, the court could issue a series of guidelines governing the provision of indigent defense services. It would then maintain jurisdiction over the lawsuit to provide more specific instructions as necessary to ensure that the state's political branches bring the indigent defense system into compliance with the Constitution. The guidelines could (and should) establish standards by setting a limit on the number of cases handled by a public defender, by requiring a minimum number of investigators to be assigned to each public defender, and by assuring that private attorneys appointed to represent indigent defendants receive adequate compensation. If the defendant demonstrates error due to funding and resource deficiencies, the court would view the harm as state-imposed error, which would require automatic reversal of the conviction unless the error was harmless.

At least one Sixth Amendment right to counsel case dealt with remedies in this manner. In *State v. Smith*,<sup>139</sup> the Arizona Supreme Court found that Mohave County's bid system failed to consider four factors in awarding criminal defense contracts: (1) the amount of time the attorney is expected to spend representing indigent defendants; (2) the support costs for the attorney; (3) the attorney's competence; and (4) the complexity of each case. Holding that this failure created an inference that the system produced inadequate representation,<sup>140</sup> the court required the county to follow a series of guidelines in order to maintain a contract defense system. The county's failure to comply with those guidelines would result in the reversal of any conviction obtained under the system and appealed by the defendant, unless the state could demonstrate that the error was harmless.

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spend "substantial amount" of time representing indigent defendants without compensation is unconstitutional taking of property). On the beneficial effect such lawsuits have had on raising funds for defense services, see Wilson, *Litigative Approaches*, *supra* note 12, at 209.

138. For a discussion of the pervasive presence of lawyers in government, see Michael Kinsley, *Now You're Thinking Like a Lawyer*, WASH. MONTHLY, Feb. 1989, at 44.

139. 681 P.2d 1374 (Ariz. 1984).

140. *Id.* at 1381.



The decision prompted Mohave County to begin paying appointed counsel on an hourly basis to represent indigent defendants, an action that increased the county's expenditure on defense services and improved the quality of representation in the county.<sup>141</sup> On the model of *Smith*, injunctive guidelines for the reform of indigent defense systems would ensure that the system operates to provide effective assistance of counsel—that the attorneys handle a manageable number of cases, are given adequate resources, and receive adequate compensation. Besides favoring the *Smith* guidelines model, this Note also endorses the *Smith* approach of harmless error review on appeal. One reformer has argued that the *Smith* court should have adopted a per se rule preventing prosecutions in Mohave County until the defense counsel system was in compliance with the Constitution.<sup>142</sup> However, *Smith*'s harmless error standard ensures that the criminal justice system continues to operate while the state attempts to comply with the injunction, and avoids the *Younger* abstention concerns that would arise from a federal court order temporarily freezing the state's criminal prosecution system.<sup>143</sup>

Perhaps more important than the specific relief ordered by the court is the process by which it administers the decree. The Arkansas prison litigation suggests that the court should initially formulate specific goals regarding the Sixth Amendment right to counsel and then allow the political branches to attempt to meet these goals. The *Smith* court adopted this approach by establishing standards while not precisely dictating the way in which Mohave County should improve its contract defense system.

By setting goals for the operation of indigent defense systems, judicial application of the structural injunction would promote gradual reform. For instance, the court could order the legislature to establish a reasonable rate of compensation for appointed attorneys and could allow it to allocate the necessary funds. If the legislature failed to establish an adequate compensation scheme, the court could then determine the compensation rate and *order* the legislature to provide adequate funds.

In effect, the structural injunction would penalize the state for its inadequate indigent defense institutions by making convictions more difficult to obtain until the system was reformed. The attention generated by implementing the guidelines would focus systematic attention on ineffective assistance of counsel, so that state court judges, public defenders, and even prosecutors would be likely to address the problem. The guidelines—for example, a simple judicial order requiring counsel at all critical stages in the prosecution—would clearly instruct state judges in criminal cases on how to deal with denial of effective assistance of counsel. Issuing an injunction with guidelines also likely would increase

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141. Caroline A. Pilch, Note, *State v. Smith: Placing A Limit On Lawyers' Caseloads*, 27 ARIZ. L. REV. 759, 767-68 (1985).

142. See Margulies, *supra* note 31, at 712-14.

143. See *supra* Part II.B.2.b.



funding for indigent defense services. The structural injunction has proven to be an effective tool for pressuring political officials to increase funding for constitutionally deficient state institutions.<sup>144</sup> Judicial oversight of the institution provides its managers with leverage to obtain additional funding.<sup>145</sup> The effect of a detailed judicial order demanding reform of the state's indigent defense system, then, may be to require the state's political branches to spend more money than they otherwise would.<sup>146</sup> In summary, judicial guidelines and the public attention generated by their implementation would enable indigent criminal defendants denied adequate representation to assert more effectively their Sixth Amendment right to counsel.

If the political branches default on their responsibility, the court should issue a more detailed order to instruct the political branches on how to bring the indigent defense system into compliance with the Constitution. In its effort to restructure the state's indigent defense system, such a multifaceted order would raise *Younger* abstention concerns.<sup>147</sup> These concerns would be mitigated by the observation that the court was not initially very intrusive—at first, it simply set goals—and only interfered with the state's discretion when it had good cause to do so. More generally, as noted in the discussion of *Gilliard*, the need to remedy widespread constitutional injury to the right to counsel justifies setting aside *Younger*'s federalism concerns.<sup>148</sup> Within the Sixth Amendment right to counsel context, then, a structural injunction with reform guidelines could focus the political branches' attention and resources on the problem and provide them with direction toward a solution.<sup>149</sup>

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144. Frug, *supra* note 95; Feeley, *supra* note 119; cf. William A. Taggart, *Redefining the Power of the Federal Judiciary: The Impact of Court-Ordered Prison Reform on State Expenditures for Corrections*, 23 LAW & SOC'Y REV. 241, 266 (1989) (concluding "[f]ederal courts have played a limited, if sometimes very significant, role in shaping state expenditures").

145. James M. Hirschhorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1822 (1984); Kaplan & Zuckerman, *supra* note 131, at 1367-68.

146. Hirschhorn, *supra* note 145, at 1823 (citing court orders requiring additional funding despite opposition of political actors).

147. See discussion *supra* Part II.B.2.b.

148. See *supra* notes 99-106 and accompanying text.

149. Another possible remedy is to have the court order the legislature to levy taxes. After *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990), it is clear that "a court order directing a local government body to levy its own taxes [to comply with the Constitution] is plainly a judicial act within the power of a federal court." *Id.* at 1665. A court order authorizing a tax to raise money is appealing because of its directness in addressing problems stemming from inadequacy of funds. However, such an order would likely be unnecessary, since the promulgation of guidelines would lead naturally to taxation or, at least, redirected spending. In addition, such an order might stiffen resistance by the political branches to the court's objective. Although courts may command authority on legal issues such as the relationship between indigent defense systems and the Sixth Amendment right to counsel, they lack the experience and expertise to design and to implement tax increases. *Id.* at 1667, 1672-73 (Kennedy, J., concurring); Frug, *supra* note 95 at 740. Political officials would probably resist this intrusion into the sphere of their expertise more than they would resist judicial reform. Furthermore, such an approach, like a simple declaratory judgment, would fail to guide the political branches on how to restructure their indigent defense system to comply with the Constitution.



## CONCLUSION

The Sixth Amendment right to counsel requires effective assistance of counsel. Inadequate funding denies lawyers who represent indigent criminal defendants the time and the resources to provide competent representation. As a result, their clients are unable to vindicate their constitutional rights. The existing legal remedy for such deficiencies, post-conviction review of ineffective assistance of counsel claims, fails to address the systemic deficiencies plaguing indigent defense systems and thus overlooks the cases in which inadequate representation led to unfair conviction. When political institutions do not adequately fund defense services, courts have the constitutional obligation and authority to provide injunctive relief to address the resulting deficiencies. Indeed, because of their legal expertise, courts are uniquely qualified to issue guidelines for administering indigent defense systems in order to bring those systems into compliance with the Constitution.