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KEYNOTE ADDRESS

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Gideon at Fifty: A Problem of Political Will

ABSTRACT. Although it is fitting to celebrate *Gideon's* promise of representation for indigent criminal defendants at this landmark anniversary, it is important also to note that part of *Gideon's* legacy should be our recognition of the limits of law in the fulfillment of that promise. Law's most powerful role in the struggle to ensure adequate representation for the poor in criminal cases will be in its capacity to generate and direct the political will to produce institutional change. The critical question to ask is how law can help to move the political actors who control the power of the purse, the organization and administration of indigent defense services, and the shape of the substantive criminal law to allocate the resources and make the institutional changes that are necessary to fix what in many jurisdictions is a failing system of indigent defense. Although there is no silver bullet, there are a variety of complementary strategies that can and should be pursued. These strategies include working for legislative change to limit the scope of the substantive criminal law, promoting the success of structural reform litigation in both federal and state courts, enlisting the support of state bar overseers and associations as well as the ABA, enlisting the private defense bar and NGOs that specialize in criminal defense to set higher norms of practice, urging greater federal government involvement in promoting indigent defense reform in the states, promoting social entrepreneurship to generate creative solutions to the indigent defense crisis, and harnessing both the great power of the media to educate and motivate the public and the more targeted power of the legal academy to educate and motivate the next generation of lawyers to address this pressing problem.

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Levon Brooks was exonerated by the Innocence Project after being convicted of the 1990 rape and murder of a child on the basis of bogus expert “bite mark” evidence. At Brooks’s trial in Noxubee County, Mississippi, the prosecutor—the allegorically named Forrest Allgood—gave a short but tremendously powerful opening statement. Allgood began by describing how three-year-old Courtney Smith had been put into bed along with her two sisters at their grandmother’s house. He continued:

And some time that night, ladies and gentlemen, while they slept, a silent evil cloaked in the shape of a man came into the house. But the man who did this, ladies and gentlemen, *left his mark*. The State of Mississippi is simply going to prove to you that that man, and the man who left those teeth marks, is Levon Brooks.¹

What happened next, however, was even more powerful than this hard-hitting opening. What happened next was—nothing. That’s right—nothing. Levon Brooks’s defense attorneys in this capital trial did not stand. They did not say anything at all.

The moment no doubt passed quickly; defense counsel’s decision not to respond takes up just over a line of the trial transcript. But the effect was devastating. The message to the jury could not have been more clear: Brooks’ lawyers said nothing because they had nothing to say. It was the functional equivalent of endorsing Allgood’s opening statement. If a criminal trial is an exercise in granting a defendant his day in court, Levon Brooks had just watched his come and go in a matter of seconds.²

Eventually, Brooks’s lawyers gave a brief and faltering opening statement after the close of the entire prosecution case and put on a half-hearted defense case. Their failure to meaningfully contest their innocent client’s guilt of a heinous crime cost him sixteen years in prison before he was exonerated.

Most crimes are not as awful as the rape and murder of a young child. And of course, most criminal defendants are not completely innocent like Brooks. But dismal failures of representation like that of Brooks’s lawyers are all too common. There is the Washington state lawyer who failed to inform his

1. Transcript of Trial at 461-62, *State v. Brooks* (Miss. Cir. Ct. 1992) (No. 5937) (emphasis added), *quoted in* Tucker Carrington, *Mississippi Innocence: The Convictions and Exonerations of Levon Brooks and Kennedy Brewer and the Failure of the American Promise* 73-74 (2012) (unpublished manuscript) (on file with author).

2. Carrington, *supra* note 1, at 74.

twelve-year-old client or his client's parents that a plea of guilty to child molestation could never be expunged from his record and would lead to his registration as a sex offender, possibly for the rest of his life.³ And there are the New Orleans public defenders who were unable, in the wake of Hurricane Katrina, to produce a list of the 6,500 to 8,000 prisoners whom they were supposed to be representing.⁴ And let us not forget the Texas lawyers who slept through portions of their clients' capital trials—who, Stephen Bright quips, give a new meaning to the phrase "Dream Team."⁵

The recitation of dramatic failures like these, however, can mislead us about the nature of the challenge of ensuring adequate indigent defense services. The failures of individual lawyers, however appalling, are often the product of structural forces that pose systemic barriers to the delivery of adequate criminal defense services to the poor, even by demonstrably capable and dedicated lawyers. Structural constraints prevent many well-intentioned lawyers from meeting regularly with their clients, conducting adequate investigations or legal research, trying (as opposed to pleading) plausible cases, and providing meaningful adversarial testing of the evidence on the rare occasions when they do go to trial. For example, in some Mississippi counties, defendants may wait up to a year to speak to a court-appointed lawyer about their case, and many lawyers meet their clients for the first time on the day of trial.⁶ In Miami-Dade County, Florida, the average felony caseload per lawyer has reached five hundred in recent years due to budget cuts.⁷ And these conditions are not confined to the South: in New York, indigent defense services are supplied through a patchwork of inadequately funded county-based systems, without any statewide attorney training, supervision, or monitoring.⁸

3. KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE 17-20, 46 (2013).

4. *Id.* at 124-25.

5. Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, <http://articles.latimes.com/2000/jul/15/news/mn-53250>.

6. See *Assembly Line Justice: Mississippi's Indigent Defense Crisis*, NAACP LEGAL DEF. & EDUC. FUND, INC. 6 (Feb. 2003), http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.

7. See Deborah Hastings, Associated Press, *Nationwide, Public Defender Offices Are in Crisis*, SEATTLE TIMES, June 3, 2009, http://seattletimes.com/html/nationworld/2009296604_apusnodefenseabridged.html.

8. See Comm'n on the Future of Indigent Def. Servs., *Final Report to the Chief Judge of the State of New York*, N.Y. ST. UNIFIED CT. SYS. 15-19 (June 18, 2006), http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_reporto6.pdf.

It is not only indigent defense lawyers (or former public defenders like myself) who note these endemic deficiencies. Just last year, the nation's chief prosecutor, Attorney General Eric Holder, acknowledged grimly that "[a]cross the country, public defender offices and other indigent defense providers are underfunded and understaffed."⁹ As a result, Holder concluded, "[t]oo often, when legal representation is available to the poor, it's rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight. . . . [T]he basic rights guaranteed under *Gideon* have yet to be fully realized."¹⁰

The widespread recognition of this depressing reality is reflected in the titles of the scholarly articles that I collected to prepare for this occasion, all of which range from concerned to excoriating about the state of indigent criminal defense services. Riffing off of the title of Anthony Lewis' triumphant account of the *Gideon* litigation in his blockbuster *Gideon's Trumpet* (also a major motion picture starring Henry Fonda), scholars have declared *Gideon's* trumpet to be "muted,"¹¹ "silen[t],"¹² or out of "tune"¹³ and have worried about the promise of *Gideon* being "blown away."¹⁴ If Clarence Earl Gideon had had a name of different biblical provenance, I'm sure we would be reading about Noah's leaky ark, Moses' hollow staff, or David's broken slingshot.

These uniformly bleak assessments of the health of *Gideon's* mandate leave me of two minds. On the one hand, I share the completely justified indignation of the many lawyers and scholars familiar with the current state of indigent defense and agree that this half-century anniversary should be commemorated with nothing less than a call to arms to address the profound shortfalls of representation in our criminal justice system. On the other hand, I recall with great pride my days as a line attorney with the Public Defender Service for the District of Columbia (PDS) and believe that organizations like PDS and the inspired work of some of its alumni—like Stephen Bright, Mary Kennedy, and Jonathan Rapping—can offer some help in forging the difficult path forward.

9. Eric Holder, Att'y Gen., Address at the American Bar Association National Summit on Indigent Defense (Feb. 4, 2012) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>).

10. *Id.*

11. Victoria Nourse, *Gideon's Muted Trumpet*, 58 MD. L. REV. 1417 (1999).

12. Jordan Glaser, Note, *The Silence of Gideon's Trumpet: The Court's Inattention to Systemic Inequities Causing Violations of Speedy Trial Rights in Vermont v. Brillon*, 129 S. Ct. 1283 (2009), 89 NEB. L. REV. 396 (2010).

13. Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461 (2003).

14. Stephen B. Bright, Stephen O. Kinnard & David A. Webster, *Keeping Gideon from Being Blown Away: Prospective Challenges to Inadequate Representation May Be Our Best Hope*, CRIM. JUST., Winter 1990, at 10.

The constitutional right to counsel itself shares something of a similar oppositional duality. On the one hand, the right to counsel is uniquely powerful, because counsel is the conduit for the assertion of all other rights, whether constitutional or nonconstitutional. On the other hand, the right to counsel is also exceedingly oblique: the right itself does not specify, and courts have had great difficulty elaborating, just what it is that renders a legal representative the “counsel” that the constitution requires, beyond a bar card and a pulse.

The landmark *Gideon* decision, too, shares this duality. On the one hand, the case is one of the most famous of the Warren Court’s criminal procedure revolution, and it has been recognized by the Supreme Court itself in its retroactivity jurisprudence as the epitome of a “watershed” decision of constitutional criminal procedure.¹⁵ On the other hand, as Justice Harlan wrote separately to emphasize, *Gideon* merely formalized what had been almost entirely accomplished by the preexisting “special circumstances” rule, because the Court had already “come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.”¹⁶ Thus, one could fairly characterize *Gideon* as less than revolutionary—as merely the formal interment of an already moribund rule so as to pull in a relatively few recalcitrant outliers. Moreover, while *Gideon* promised the appointment of counsel for the indigent in ringing terms, it remained crucially silent on the quality and scope of services that constitutionally sufficient counsel must provide or on the appropriate mechanisms for the funding, appointment, training, or supervision of such counsel, thus leaving the right very far from self-executing.

Fast forward to the present, where there has been much excitement, at least in academic circles, about the Supreme Court’s recent expansions of the Sixth Amendment right to counsel in cases like *Padilla*,¹⁷ *Lafler*,¹⁸ and *Frye*,¹⁹ among others. Commentators have hailed “a new era”²⁰ and dubbed last Term the Supreme Court’s “right-to-counsel Term,”²¹ while embracing what they see as

15. *Teague v. Lane*, 489 U.S. 288, 311 (1989).

16. *Gideon v. Wainwright*, 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

17. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

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

19. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

20. Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161 (2012).

21. Christopher Durocher, *Are We Closer to Fulfilling Gideon’s Promise? The Effects of the Supreme Court’s “Right-to-Counsel Term,”* AM. CONST. SOC’Y FOR L. & POL’Y (Jan. 2013),

powerful “unintended consequences”²² of the Court’s recent decisions. Despite this enthusiasm, the Court’s recent Sixth Amendment decisions share many of the same tensions as *Gideon* itself. On the one hand, like *Gideon*, the recent decisions represented welcome constitutional recognition of new realities. *Padilla* recognized that “changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction”²³ and thus held that a defense lawyer fell below the constitutional threshold of effective advocacy in failing to advise a client of the possible deportation consequences of his conviction. *Lafler* and *Frye* recognized the “simple reality” that “plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process.”²⁴ These are important, even “landmark” holdings, and commentators are not wrong to hope and predict that these decisions will open up new doctrinal avenues in Sixth Amendment litigation.

But *Gideon* has demonstrated that even “landmark” or “watershed” doctrinal change cannot, by itself, be the catalyst for the kind of institutional change necessary to create and maintain an adequate system for the provision of indigent defense services across the country. Courts are the enforcers of constitutional remedies, but in the Sixth Amendment right-to-counsel context, their primary enforcement role has involved their power to reverse individual convictions on direct appeal or postconviction review. The success of this mode of enforcement is, of course, limited by the constitutional standards themselves, and the application of the *Strickland* standard for assessing ineffective assistance of counsel, especially during postconviction review when most claims must be developed, is truly daunting.²⁵ However, regardless of constitutional standards, case-by-case review is also limited by the fact that the primary means of policing failures of representation in the courts are the very representatives whose failures need policing—and that is on a good day. On bad days, which are more common, indigent criminal defendants must police

http://www.acslaw.org/sites/default/files/Durocher_-_Are_We_Closer_to_Fulfilling_Gideons_Promise.pdf.

22. Lauren Sudeall Lucas, *Unintended Consequences: The Impact of the Court’s Recent Cases on Structural Ineffective Assistance of Counsel Claims*, 25 FED. SENT’G REP. 106 (2012).
23. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1480 (2010).
24. *Frye*, 132 S. Ct. at 1407 (quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012), for the proposition that ours “is for the most part a system of pleas, not a system of trials”).
25. See *Strickland v. Washington*, 466 U.S. 668 (1984). See generally Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 518–26 (2009) (describing the extent to which deficient representation is tolerated, at least in noncapital cases, under the *Strickland* standard).

the failures of their appointed representatives without any counsel at all, because indigent criminal defendants are not generally entitled to appointed counsel on postconviction review except in capital cases. So generating a better list of constitutional duties and remedies is not even half the battle, without more reliable means of enforcement.

My own journey from the trenches of direct client representation at trial and constitutional litigation on appeal to the different roles of scholar and governing-board member of a statewide public defender system has impressed upon me the limits of Supreme Court doctrine. Moving from courtroom to classroom to boardroom has made clear to me that any thoroughgoing solution to our Sixth Amendment quandary is less a matter of law than one of political will. Law's most powerful role in the struggle to ensure adequate representation to the poor in criminal cases will be in its capacity to generate and direct the political will to produce institutional change. The largest and most obvious piece of the puzzle is, of course, the power of the purse. Especially in the financially straitened years since the economic crisis of 2008, resources for indigent defense have been hit hard, suffering reductions from what were already woefully inadequate levels in many jurisdictions.²⁶ Although the need for greater resources for indigent defense services may be obvious, it is here that political will falters most, for equally obvious reasons. With clamoring demand for dwindling public funds for schools, hospitals, roads and bridges, public transportation, firefighters, and police officers, it is not surprising that more money for lawyers representing alleged criminals is not high on anyone's list. Generating the will to provide these crucial resources is an enormous challenge.

Even adequate resources—which remain something of a pipedream—would not be sufficient to solve some of the structural problems that undergird the country's indigent defense crisis. The lack of adequate organization, training, and oversight of indigent defense lawyers by experienced leaders; the lack of crucial independence from the political and judicial branches that many such lawyers and public defense organizations face; and the absence of a robust culture of client-centered, zealous advocacy all prevent the delivery of decent indigent defense services just as surely as the lack of adequate material resources. Moreover, precisely because infusions of funding sufficient to solve the nation's indigent defense crisis are almost certainly not going to be forthcoming any time soon, it is crucial to consider alternative means to approach the problem. These means include structural improvements that

26. See Nathan Koppel, *Public Defenders Stretched Thin by State Cuts*, WALL ST. J., Apr. 14, 2011, <http://online.wsj.com/article/SB10001424052748704530204576232812464584064.html>.

would not necessarily require large financial infusions, as well as possible changes in the substantive criminal law. Some jurisdictions have experimented with reclassifying low-level, nonviolent offenses as civil infractions rather than crimes, and others have increased opportunities for pretrial diversion, with great success at reducing defender caseloads while also conserving scarce judicial and prosecutorial resources.²⁷

Thus, in my view, the crucial question to ask in this anniversary year is how to move the political actors who control the power of the purse, the organization and administration of indigent defense services, and the shape of the substantive criminal law to allocate the resources and make the institutional changes that are necessary to fix what in many jurisdictions is a failing system of indigent defense, an embarrassment to the ideal of justice that we teach in law schools and celebrate at bar swearing-in and naturalization ceremonies around the country. There is clearly no silver bullet here; rather, the answer to this question involves the long, slow, and concerted effort of all possible institutional actors. This may not be the sort of sexy or exciting answer that makes a great banner logo or after-dinner speech, but it has the virtue of truth—and, truth be told, a measure of hope.

Although, as I indicated above, case-by-case review of attorney performance under *Strickland* offers little likelihood of promoting institutional change, structural litigation under the Sixth Amendment aimed at declaratory or injunctive relief for systemic problems like inadequate funding and unmanageable caseloads shows significantly more promise. The Supreme Court shut off systemic arguments by individual defendants seeking to overturn their convictions in *United States v. Cronin*,²⁸ the companion case to *Strickland*, which held that except in the most extraordinary of circumstances, proof of ineffective assistance of counsel requires evidence of specific acts or omissions that demonstrate deficient performance, rather than evidence of background circumstances (like time constraints or counsel's inexperience) that would likely impede performance.²⁹ However, structural litigation seeking prospective or injunctive relief is not necessarily limited in the same way, though it has run into its own difficulties.

In the first wave of structural litigation in the decades following *Strickland*, victories were few and evanescent. For example, in a major federal action

27. See Joel M. Schumm, Standing Comm. on Legal Aid & Indigent Defendants, *National Indigent Defense Reform: The Solution Is Multifaceted*, A.B.A. 14-17 (2012), http://www.abanow.org/wordpress/wp-content/files_flutter/1357574231NIDR_Solution.pdf.

28. 466 U.S. 648 (1984).

29. *Id.* at 663-67.

seeking a remedy for Georgia's now-defunct, county-based system of indigent defense, the ACLU won an important victory when the Eleventh Circuit recognized that the *Strickland-Cronic* standard for reversal of individual convictions "is inappropriate for a civil suit seeking prospective relief" because the Sixth Amendment protects rights beyond those that can be shown to affect the outcome of a particular trial, and concluded that the appropriate standard is one that looks to "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law."³⁰ However, the Eleventh Circuit eventually ruled against the plaintiffs³¹ on the grounds of *Younger* abstention,³² which prevents federal courts from issuing rulings that would interfere with ongoing state criminal prosecutions—a doctrine that has thus far precluded the success of Sixth Amendment structural litigation in the federal courts.³³

State court structural litigation is not hampered by abstention doctrine, but many state courts have rejected such litigation to reform indigent defense services by insisting, contra the Eleventh Circuit, that the *Strickland-Cronic* standard requires proof of specific prejudice from systemic underfunding and excessive caseloads,³⁴ or by holding that resource constraints must be addressed by the legislature rather than the courts.³⁵ Moreover, in the few early cases that did succeed in state courts, in which state supreme courts announced rebuttable inferences of ineffective assistance of counsel,³⁶ or set guidelines for the compensation of indigent defense counsel,³⁷ the success achieved was

30. *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)).

31. *See* *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992) (declining to exercise its equitable jurisdiction to hear the case).

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

33. *See* Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, AM. CONST. SOC'Y FOR L. & POL'Y 4-5 (Sept. 2010), http://www.acslaw.org/sites/default/files/Primus_-_Litigation_Strategies.pdf.

34. *See, e.g., Kennedy v. Carlson*, 544 N.W.2d 1, 8 (Minn. 1996) (rejecting such a claim as "too speculative and hypothetical").

35. *See, e.g., Webb v. Commonwealth*, 528 S.E.2d 138, 145 (Va. Ct. App. 2000) (holding that, as to the challenge to statutory fee caps for court-appointed counsel, "redress must come from the General Assembly").

36. *State v. Smith*, 681 P.2d 1374 (Ariz. 1984); *State v. Peart*, 621 So.2d 780 (La. 1993).

37. *State v. Lynch*, 796 P.2d 1150 (Okla. 1990).

fleeting in that the courts failed to continue to invoke the inference of ineffectiveness or to sustain necessary increases in indigent defense funding.³⁸

These early defeats and evanescent victories did not stem the tide of structural litigation to address the continuing indigent defense crisis, and more recent cases have produced more change and suggest a path forward. In my home state of Massachusetts, two different lawsuits, spanning 2004 and 2005, sought to address a shortage of indigent defense lawyers due to the low rate of attorney compensation.³⁹ At one point, the Massachusetts Supreme Judicial Court ordered that indigent defendants detained pretrial must be released if no attorneys could be appointed for them in a specified time period. Although then-Governor Mitt Romney sought to play a game of chicken with the Court by publicly declaring that the judiciary was putting the public's safety at risk,⁴⁰ the threat of judicial action ultimately led the Massachusetts legislature to unanimously pass bills providing for substantially increased funding for counsel and other requested reforms.⁴¹ Earlier litigation in Florida had likewise produced a threat from the Florida Supreme Court to order the "immediate release pending appeal of indigent convicted felons,"⁴² which played a significant role in prompting legislative action to increase funding for the state public defender.⁴³ Structural litigation has produced a number of settlements and consent decrees to address funding and caseload crises in states including Georgia, Washington, Pennsylvania, and Connecticut.⁴⁴

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38. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1117-21 (2006); Note, *Effectively Ineffective: The Failure of Courts To Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1735-41 (2005).
39. See *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 760 n.56 (2010) (citing *Arianna S. ex rel. Weber v. Massachusetts*, No. SJ2004-0282 (Mass. filed June 28, 2004)).
40. Michael Levenson, *Officials Told To Testify in Public Defender Dispute*, BOS. GLOBE, Aug. 19, 2004, http://www.boston.com/news/local/massachusetts/articles/2004/08/19/officials_told_to_testify_in_public_defender_dispute.
41. See Jonathan Saltzman, *Pay-Raise Measure for Court-Appointed Attorneys Becomes Law*, BOS. GLOBE, July 30, 2005, http://www.boston.com/news/local/massachusetts/articles/2005/07/30/pay_raise_measure_for_court_appointed_attorneys_becomes_law.
42. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1139 (Fla. 1990).
43. See Hanlon, *supra* note 39, at 757 (2010).
44. See Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel* 19 (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2008), <http://ssrn.com/abstract=1279185>.

Even in the absence of a formal settlement or consent decree, litigation can play an important role in generating legislative action, as it did in Montana in prompting the creation of a statewide public defender in 2005.⁴⁵ Conversely, legislation can help promote successful litigation: in Missouri, the passage of a statute to address an indigent defense caseload crisis was vetoed by the Governor, but the state's Public Defender Commission convinced the state Supreme Court to use its judicial power to mandate the remedies that the failed statute would have provided.⁴⁶

Commentators have attempted to generalize from this growing list of successes about the features that make structural litigation more likely to succeed. Steve Hanlon, an attorney who has been involved in a number of the successful actions, notes that state constitutional law can play a significant role in promoting the success of Sixth Amendment structural litigation in the more than half of states that "have constitutional provisions which either provide their supreme courts with original jurisdiction to 'superintend' the justice system or permit the issuance of all writs necessary to the complete exercise of their jurisdiction."⁴⁷ Even without explicit constitutional authorization, state courts can and do invoke their inherent authority to oversee the administration of justice within the judicial system.⁴⁸ Other commentators have noted the extralegal conditions that have promoted the success of structural litigation in state courts, from strategic alliances,⁴⁹ to media and public support.⁵⁰ Though it is common to hail a state's noteworthy litigation success as a "model" for other states,⁵¹ the wide differences among jurisdictions along many dimensions—including the nature and extent of their indigent defense problems, their local politics, the insulation of their courts from political pressures, and the availability of potential allies—mean that there can be no one model for successful structural litigation. But the experience of the varied jurisdictions that have achieved some substantial steps forward in this way suggests that structural litigation has potential—perhaps even uniquely

45. See Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 446-47 (2009).

46. See Hanlon, *supra* note 39, at 762-67.

47. *Id.* at 767.

48. *Id.*

49. See Drinan, *supra* note 45, at 457-58.

50. See Adele Bernhard, *Take Courage: What the Courts Can Do To Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 331-32 (2002).

51. See, e.g., Drinan, *supra* note 45, at 445 (noting that the ACLU hailed its success in its Connecticut litigation as a model for other states); Hanlon, *supra* note 39, at 762 (describing Missouri's litigation as a model for other states).

powerful potential—to generate the political will to promote indigent defense reform.

State courts have additional powers, beyond their central authority to decide cases, that can help to promote indigent defense reform. At the trial court level, individual judges often are charged with directly approving or denying requests for defense expenditures and thus control the local fiscal tap, even if not the whole reservoir. Moreover, trial judges are the primary referees on the adversary playing field and can play an important role in policing attorney quality by referring inadequate lawyers (whether they be defense counsel or prosecutors) for bar discipline. Trial judges can also reinforce counsel's duties by directly advising defendants of their rights and by inquiring into prosecutors' compliance with constitutionally mandated discovery. At the more systemic level, state courts can use their rulemaking authority to standardize best practices throughout the judicial system. Incremental judicial measures such as these, though modest in the face of the immensity of the issues facing indigent defense, have the advantage of being incremental—of being within the power of individual judges or court systems and of not requiring major resource infusions.

Also at the state level, and more removed from electoral politics than most state courts, are state bar overseers and associations. These organizations could do more to police attorney quality through bar discipline, especially in some of the lowest-performing jurisdictions that produce the horror stories that are all too easy to find. State bar associations can also be important allies for indigent defense reformers not only in setting standards for attorney performance, but also in promoting information gathering and ultimately in producing legislation or facilitating litigation. For example, the success of indigent defense reform in Missouri owes a large debt to the Missouri Bar, which created a Bar Task Force on the Missouri Public Defender that persuaded state senate leadership to hold hearings on the state's indigent defense crisis and "arranged media tours around the state with the bar president."⁵²

The ABA lacks direct power over attorney licensing and discipline, but it possesses a national voice and commands substantial resources. By generating national standards for the conduct of attorneys in criminal cases, the ABA can improve the quality of defense representation nationwide by promoting the best practices that emerge from bird's-eye study of indigent defense systems across the country. The ABA's potential power to promote change in defense practice norms is illustrated by the Supreme Court's reliance, in a series of landmark rulings on ineffective assistance of counsel in capital cases, on the

52. Hanlon, *supra* note 39, at 762–63.

ABA's general Standards for Criminal Justice and the ABA's more specific Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, first promulgated in 1989 and then revised in 2003. In three key reversals of capital sentences between 2000 and 2005 based on defense counsel's inadequate investigation of mitigating evidence, the Supreme Court cited ABA norms of performance for defense counsel,⁵³ leading both commentators and lower courts to take a new and more demanding view of the baseline requirements for capital defense lawyers.⁵⁴ Since the retirement of Justice O'Connor in 2005, however, the Court has backtracked on its endorsement of the ABA Guidelines as reflections of prevailing norms of practice,⁵⁵ rendering their ongoing influence more equivocal though by no means erased.

Also in the death penalty context, one can see the power of the ABA's resources to sponsor information gathering and dissemination as means of promoting compliance with the best practices that it endorses. In 1997, the ABA adopted a resolution calling for a moratorium on executions until concerns about systemic problems and lack of fairness and reliability in the nation's death penalty practices could be addressed.⁵⁶ In 2001, the ABA created the Death Penalty Moratorium Implementation Project to monitor and promote progress toward a nationwide moratorium. In 2007, the Project completed the first of a series of comprehensive assessments of the operation of several states' capital punishment laws and processes, including their provision of adequate defense counsel services. In each assessed state, the actual practices of the jurisdiction were compared to the ABA's protocols on the administration of the death penalty, and the jurisdictions were rated as "in compliance," "partially in compliance," or "not in compliance" with the ABA's protocols.⁵⁷ The ABA's assessments naturally generated some pushback in the assessed states. For example, Alabama Attorney General Troy King accused the ABA of

53. See *Rompilla v. Beard*, 545 U.S. 374, 387-88 n.6 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

54. See John H. Blume & Stacey D. Neumann, "It's Like Déjà Vu All Over Again": *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127 (2007).

55. See *Bobby v. Van Hook*, 130 S. Ct. 13, 17 n.1 (2009).

56. See Death Penalty Moratorium Implementation Project, *About Us*, A.B.A., http://www.americanbar.org/groups/individual_rights/projects/death_penalty_moratorium_implementation_project/about_us.html (last visited Apr. 14, 2013).

57. See Death Penalty Moratorium Implementation Project, *Compliance with ABA Policies*, A.B.A. (Oct. 2007), <http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/chartallstates.authcheckdam.pdf>.

bias against the death penalty in assembling an assessment team that had only one prosecutor and no representative of crime victims.⁵⁸ But the assessments also created the opportunity for supportive political intervention by influential voices. For example, former First Lady Rosalynn Carter issued a written statement joining the call for a death penalty moratorium in Georgia, specifically supporting the Georgia assessment team's report.⁵⁹ In addition to evoking political support, the ABA's Death Penalty Implementation Project and other similar endeavors have the capacity to provide important benchmarks and practical suggestions for ongoing reform efforts.

The defense bar itself—the very entity in dire need of reform—can also be a crucial source of standard setting and advocacy for reform. I saw this clearly in my work for one of the nation's "flagship" public defender organizations. PDS not only plays an important role in setting practice norms and providing support for all indigent defense lawyers in the District, including the many private lawyers who take court appointments to represent indigent defendants, but it also serves as a national model of client-centered, zealous advocacy. Moreover, NGOs that specialize in criminal defense work similarly serve the indigent defense cause not only in the particular cases that they litigate, but also in their own modeling of criminal defense practice norms. Stephen Bright, a PDS alumnus, and Bryan Stephenson, along with some other exemplary capital defense organizations around the country, have played at least as influential a role as the ABA Guidelines in resetting the norms of practice for capital defense lawyers. One can see the distance travelled from the 1980s, when the Supreme Court in *Burger v. Kemp*,⁶⁰ in an opinion written by Justice Stevens, upheld a capital sentence imposed despite the inexcusable absence of any presentation of mitigating evidence, to the early 2000s, when Justice Stevens joined a seven-member majority in *Wiggins v. Smith*⁶¹ to reverse a capital conviction on the grounds that the defendant's reasonably competent and well-funded public defenders failed to *fully* investigate his social history. It is impossible to make sense of these two holdings without recognizing the profound transformation of the norms of capital defense produced by exemplary specialized lawyers, both in government-funded offices and privately funded NGOs. The ability to model exemplary defense services helps

58. See Phillip Rawls, *ABA: Stop the Executions*, ASSOCIATED PRESS, June 11, 2006, <http://sentencing.nj.gov/downloads/pdf/articles/2006/Jun2006/story14.pdf>.

59. See Press Release, Carter Ctr., Former First Lady Rosalynn Carter on a Georgia Death Penalty Moratorium, (Feb. 24, 2006), <http://www.cartercenter.org/news/documents/doc2305.html>.

60. 483 U.S. 776 (1987).

61. 539 U.S. 510 (2003).

to generate the knowledge of what to change in less exemplary service settings. Leaders in the indigent defense bar also play critical roles, therefore, in lobbying for legislative change and helping to mount structural litigation to promote reform.

The wide range of quality in the provision of indigent defense services across the fifty states and even across counties within some individual states suggests that the promulgation of statewide and national standards should be accompanied by some public method of ranking or evaluation. As noted above, the ABA's Death Penalty Moratorium Project provides a form of such evaluation in its state assessment reports, which include extensive coverage of indigent capital defense services. On a broader level, lawyer and reporter Amy Bach has founded an NGO, Measures for Justice, to establish a "Justice Index" that will rank criminal justice systems by county on the measures of public safety, fairness and accuracy, and fiscal responsibility. Her hope is that such rankings will engender competition, innovation, and ultimately collaboration to embrace best practices.⁶² Bach's project parallels Professor Heather Gerken's proposal for a "Democracy Index" to rank voting systems. As Gerken has explained, in urging the efficacy of ranking as a means of spurring reluctant reformers in the voting context: "if the goal is to improve the policy-making process – to correct a failure in the political market – the only thing that beats a good ranking is a better one."⁶³

Although the primary responsibility for creating and maintaining adequate indigent defense systems lies with the states, the federal government could play a much more substantial role than it currently does in fostering such systems. Obviously, as the anniversary of *Gideon* reminds us, one important role is that of the U.S. Supreme Court in elaborating federal constitutional norms. Modulating the *Strickland* deficiency standard, as the Court has done to some degree in the capital investigative context, or revisiting *Cronic*'s almost wholesale bar to demonstrating systemic prejudice, would boost the power of both individual case review and structural litigation. Unfortunately, though, neither development seems at all likely in the foreseeable future.

Also on any wish list for powerful but unlikely federal interventions would be greater use of the federal funding and federal enforcement powers, or at least the opening of the federal courts to nongovernmental efforts to protect federal constitutional rights prospectively through structural litigation. As for federal funding, although a major infusion of new federal funding to support

62. See *The Justice Index*, MEASURES FOR JUST., <http://measuresforjustice.org/know-more/the-justice-index> (last visited Apr. 14, 2013).

63. Heather K. Gerken, *In Praise of Rankings*, 19 WIDENER L.J. 1, 19 (2009).

indigent criminal defense in the states would be a welcome balm to the many jurisdictions afflicted by fiscal crises, the federal government currently faces its own fiscal crisis, and, in any event, the primary responsibility for funding state criminal justice systems will always lie with the states and their local units. However, it is not so unrealistic to suggest that, of the substantial funding that the federal government already provides to support state and local criminal justice projects, a greater share should go to indigent defense. Estimates of recent Justice Assistance Grants exceed a billion dollars, of which only a quarter of one percent went to support public defense.⁶⁴ Moreover, Congress has not hesitated in other contexts to tie its spending to state compliance with important federal standards (consider why all fifty states raised the drinking age to twenty-one). Conditioning the disbursement of federal funds in the criminal justice context upon state compliance with minimal standards for the provision of indigent defense services would be another way that the federal government could promote needed reform without substantial new infusions of federal money.

As for federal enforcement, the Department of Justice has played a major role in promoting state compliance with federal constitutional and statutory civil rights guarantees. Similar federal enforcement actions could be a potentially powerful force for breathing life into the Sixth Amendment guarantees that are currently honored in name only in many jurisdictions throughout the country. However, facilitating any such federal enforcement would require enabling legislation⁶⁵ and some way around the *Younger* abstention doctrine—either statutory abrogation of it as a merely prudential rather than constitutionally mandated doctrine, or judicial interpretation that creates an exception for actions for prospective or declaratory relief in the criminal justice context. These changes to abstention doctrine alone would also open up the federal courts as a forum for structural litigation by nongovernmental actors. Because most state judges are elected, and indigent defense reform is rarely popular, especially during times of fiscal crisis, legislative or judicial assaults on *Younger* abstention are worth pursuing in order to open up the more politically insulated federal courts to structural litigation.⁶⁶

64. See Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. PA. J.L. & SOC. CHANGE 331, 355 (2009).

65. See Primus, *supra* note 33 (proposing federal legislation to enable federal enforcement).

66. See, e.g., Drinan, *supra* note 45, at 467-75; Rapping, *supra* note 64, at 332-34. See generally Primus, *supra* note 33 (urging the importance of a federal forum for litigating systemic Sixth Amendment claims and proposing legislation to create it).

Even in the absence of these major changes, one can hope that President Obama's creation of an Access to Justice Initiative within the Justice Department in 2010, originally headed by my colleague Professor Larry Tribe, will lead to a greater role of the federal government in leveraging its funding, convening, reporting, and modeling powers to support reform of indigent defense. Identifying best practices, funding model projects, convening and convincing state actors, collaborating with national and state bar organizations, and helping to support and direct the pro bono efforts of the private bar are all roles that the Access to Justice Initiative can usefully play. To enable it do so, however, the President needs to appoint a powerful new leader now that both Tribe and his successor, Mark Childress, have departed.⁶⁷

The private bar, too, has contributions to make to indigent defense reform. Criminal defense provides excellent pro bono opportunities for private law firms, because it rarely conflicts with the commercial work of most large law firms, comes in relatively small projects, is popular with many young associates, and provides otherwise rare courtroom experience. However, throwing unprepared young associates into criminal court is good for neither them nor the clients they serve. One model to be emulated is Arnold and Porter's creation of the position of "trial training counsel," currently staffed by Mary Kennedy, another exemplary PDS alumna, who guides the firm's associates through criminal trials in the D.C. courts.⁶⁸ Another model is Holland & Knight's Community Services Team, the largest full-time, private-practice pro bono department in the nation, according to a profile of its founder Stephen Hanlon,⁶⁹ who did extraordinary work on structural Sixth Amendment litigation from this perch.⁷⁰

There is also exciting work being done by other social entrepreneurs in this field. In particular, Gideon's Promise, formerly named the Southern Public Defender Training Center, created by PDS alumnus Jonathan Rapping in 2007 with support from the Soros Foundation, uses a "Teach for America" model to

67. See Richard Zorza, *What We Need Now at DOJ*, RICHARD ZORZA'S ACCESS TO JUST. BLOG (Nov. 28, 2012), <http://accesstojustice.net/2012/11/28/what-we-need-now-at-doj>.

68. See Mary C. Kennedy, ARNOLD & PORTER LLP, <http://www.arnoldporter.com/professionals.cfm?action=view&id=858&u=KennedyMaryC> (last visited Apr. 14, 2013).

69. See Stephen F. Hanlon, GEORGETOWN LAW, <http://www.law.georgetown.edu/faculty/hanlon-stephen-f.cfm> (last visited Apr. 14, 2013).

70. Hanlon announced in December 2012 that he was leaving Holland & Knight after twenty-three years to teach a practicum at Georgetown on litigation challenges to indigent defense systems. Marcia Coyle, *Holland & Knight Partner Leaving Firm to Teach Indigent Defense at Georgetown*, THE BLT: THE BLOG OF LEGALTIMES (Dec. 27, 2012, 11:20 am), <http://legaltimes.typepad.com/blt/2012/12/holland-knight-partner-leaving-firm-to-teach-indigent-defense-at-georgetown.html>.

infuse struggling public defense offices throughout the South with young lawyers trained in PDS-style, client-centered, zealous advocacy. Gideon's Promise aims to "inspire, mobilize and train" young public defenders with the hope of raising the standard of indigent defense practice nationwide.⁷¹ The organization offers continuing "graduate training" for its lawyers after they complete their initial training and take on regular public defense positions, and it also works closely with the chief public defenders from its partner offices, holding an annual indigent defense leadership summit. This is an exciting model for directing and supporting change in the places where it is most needed.

Actors outside of the worlds of law and politics can nonetheless have tremendous influence on those worlds, and the most powerful such actors are in the media, as the enormous success of the book and movie *Gideon's Trumpet* so well illustrates. Successful indigent defense reform has always been accompanied by media attention that brings the urgency of the problems to public attention. Learning to harness the power of the traditional media, as well as the new, disaggregated power of social media, is central to creating the political will necessary to move indigent defense reform forward. In this vein, I note the premiere at the Sundance Film Festival this year of a film about Gideon's Promise that follows closely several of its young attorneys, entitled—aptly, in the anniversary year—*Gideon's Army*. The film will also air on HBO in the summer of 2013, and it has been shown to student audiences already at Harvard and Yale Law Schools, among others.

Which brings me, last but not least, to us. The legal academy has the privilege and responsibility of initiating young lawyers into the norms of the legal profession and educating them about the gaps between the system's ideals and its realities. My students are always shocked and frankly a little disbelieving when I explain some of the profound deficiencies of indigent defense services in our criminal justice system—until they go to volunteer in New Orleans or Montgomery or other jurisdictions where *Gideon's* promise is profoundly neglected. We need to make the most of the opportunities we have as educators to ensure that the next generation does a better job at working to keep that promise.

Here, I salute *The Yale Law Journal*, which is part of both the media and the legal academy, for lending its institutional prestige and influential platform to a discussion of *Gideon* in this anniversary year. The importance of fifty owes perhaps too much to the happenstance of the number of fingers on most

71. *Goal & Mission*, GIDEON'S PROMISE, <http://gideonspromise.org/about/goal-mission> (last visited Apr. 14, 2013).

human hands, but it is not an opportunity that we should let go to waste. Just as the turn of the new year inspires many of us to renew resolutions for personal change, we should use these landmark case anniversaries to renew our commitment to legal change—not merely through hortatory speeches, but through my favorite device for personal change: list making. I hope that this catalog of strategies for generating political will to promote indigent defense reform will help advance both conversation and action so that we can begin to retire some of our broken trumpet metaphors before the next big birthday.

