ARTICLE

THE NATIONAL RIGHT TO COUNSEL ACT: A CONGRESSIONAL SOLUTION TO THE NATION'S INDIGENT DEFENSE CRISIS

CARA H. DRINAN*

For decades, scholars and practitioners have criticized the deplorable quality of legal representation available to poor criminal defendants across the country. Yet states continue to give short shrift to the constitutional rights of poor defendants. This Article proposes a new piece of federal legislation designed to ameliorate the chronic inadequacies of public defense systems, while respecting federalism and leaving intact the states' ability to devise and implement appropriate public defense systems. The centerpiece of this proposed legislation is a new federal cause of action that allows indigent defendants to seek equitable relief for systemic Sixth Amendment violations on a prospective basis. This Article proceeds in three parts. Part II documents the ongoing national crisis in public defense services and makes the case for why Congress should tackle this issue. The habeas system, currently the primary relief valve for policing Sixth Amendment violations, simply is not set up for the task of vindicating the right to counsel. Part III sets forth the text of the proposed statute and addresses the mechanics of the statute in practice. In particular, Part III deals with the issues of who may sue and be sued under the statute, what constitutes a cognizable claim under the statute, and what a judicial remedy under the statute may look like given the abstention and separation of powers concerns in play. Part IV anticipates the reactions of two different camps: those readers who question the practical viability of this proposal and those who advocate alternative reform measures. This Article argues that Congress can enact this legislation pursuant to its civil rights enforcement authority and that there are reasons to be optimistic about its passage and its survival of judicial scrutiny. Finally, the Article concludes by emphasizing that systemic challenges to public defense systems require a federal forum. This legislation is designed to pave the way for such a forum, and even if Congress chooses not to pursue the path described herein, the federal government should continue to explore ways to enable such suits in federal court.

---

* Assistant Professor of Law, Columbus School of Law, The Catholic University of America. This Article was supported by a grant from the Dean's Research Fund. The author is grateful to the members of the law school faculty at the University of Georgia for inviting her to present this Article as part of their Faculty Colloquium Series and for providing valuable comments. She is equally indebted to her own colleagues at Catholic for allowing her to present this Article as a work-in-progress and for their insightful comments. Fred Bloom, Robin Dahlberg, Nora Freeman Engstrom, Ben Herman, Nate Persily, Eve Brensike Primus, and Bo Rutledge provided helpful comments on preliminary versions of this Article. Beth Edinger and Michael Frantz provided excellent research assistance. Special thanks to Jim Neuhard, Michigan's Chief Appellate Defender, for first asking the author to explore congressional solutions to the national indigent defense crisis.

I. INTRODUCTION

Despite voluminous empirical evidence and scholarly research describing the national crisis in indigent defense services, this seemingly intractable crisis persists.[1] As The Constitution Project's 2009 Report, *Justice Denied*, detailed, indigent defense systems across the nation operate with far too little money, resulting in a host of interrelated consequences.[2] Public defenders carry excessive caseloads, they have inadequate, if any, access to investigative and expert assistance, and they cannot meet with and counsel their clients effectively and in a timely manner.[3] Defense counsel working under these circumstances can barely satisfy their professional and ethical obligations, let alone provide zealous representation.[4] Clients of these defenders

---

[1] *See generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006); STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf [hereinafter GIDEON'S BROKEN PROMISE]; NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* http://tcpjusticedenied.org/index.php?option=com_content&view=article&id=53&Itemid=84 [hereinafter JUSTICE DENIED]; ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf (discussing the way in which the growth in misdemeanor crimes exacerbates the ongoing indigent defense crisis).

[2] JUSTICE DENIED, *supra* note 1, at 6–7.

[3] *See infra* Part II.A.

[4] For example, the Model Rules of Professional Conduct require: "In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation." MODEL RULES PROF'L CONDUCT pmbl. (2002); *see also id.* at R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id.* at R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *id.* at R. 1.3 cmt. ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor . . . . A lawyer's work load must be controlled so that each matter can be handled competently . . . . Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed."); *id.* at R. 1.4 (requiring lawyers to keep clients reasonably informed). Moreover, criminal defense lawyers are subject to a host of more specific standards and guidelines. *See* AM. BAR ASS'N, AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/deathpenaltyguidelines2003.pdf; AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 117–248 (3d ed. 1993). Finally, the American Bar Association ("ABA") has established guidelines that govern the administration of public defense systems, and these guidelines require the active participation of the criminal defense attorneys working within the system. *See, e.g.*, STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/eight_guidelines_of_public_defense.pdf (requiring defense counsel, for example, to decline excessive appointments); STANDING COMM. ON LEGAL AID & INDIGENT

suffer a host of otherwise avoidable consequences. Many indigent defendants make unintelligent waivers of their right to counsel, endure months in jail without hearing a status report from their lawyers, fail to secure pre-trial releases from jail, and either agree to plea bargains or go to trial without adequate discussion or preparation.[5] In short, the Sixth Amendment right to counsel has yet to be realized for most indigent defendants across the country.

The findings contained in *Justice Denied* are neither new nor surprising to those who work in the field of indigent defense. Rather, the report serves as a call to action for entities and individuals, both in government and in the private sector, to focus on "the injustices and societal costs entailed by inadequate systems of indigent defense" and to explore solutions.[6] This Article offers a possible solution: a federal bill designed to pave the way for systemic Sixth Amendment claims to be heard in federal court.

This Article argues that Congress can and should pass legislation reinforcing the constitutional right to counsel in order to break the stalemate that has plagued indigent defense reform. The argument proceeds in three steps. Part II of this Article articulates why federal legislation is warranted under the present circumstances. Scholars and policymakers have extensively documented the national scope of the indigent defense crisis.[7] At the same time, no state or federal body has been able to implement lasting reform.[8] State legislative and executive officials often lack either the political will or the financial means to fix a broken defense system. State courts also may lack the required degree of independence to overhaul the indigent defense system,[9] and historically, the federal courts have dismissed systemic Sixth Amendment claims, citing abstention and federalism concerns.[10] Part II urges that Congress may be the last hope for criminal defendants nationwide who seek to vindicate their right to counsel.

Part III sets forth the language of the proposed statute and explores the statute's mechanics in practice. The centerpiece of this legislation is a cause of action in federal court that allows indigent defendants to seek equitable relief for systemic Sixth Amendment violations on a prospective basis. In some jurisdictions, the system is so broken that no defendant can hope to

---

DEFENDANTS, AM. BAR ASS'N, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/resolution107.pdf [hereinafter TEN PRINCIPLES] (same).

[5] *See infra* Part II.A.

[6] JUSTICE DENIED, *supra* note 1, at 14.

[7] *See supra* note 1 and accompanying text; *see also* David A. Simon, Note, *Equal Before the Law: Toward a Restoration of* Gideon*'s Promise*, 43 HARV. C.R.-C.L. L. REV. 581, 581 n.4 (2008) (citing scholarship on this point); Steven N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads*, CHAMPION, June 2009, at 22.

[8] *See infra* Part II.A.

[9] Thirty-nine states elect some or all of their judges. AM. BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, *available at* http://www.abanet.org/leadership/fact_sheet.pdf [hereinafter FACT SHEET]; *see also infra* Part II.B.

[10] *See infra* note 51 and accompanying text.

receive competent—let alone zealous—representation. Forcing a defendant to exhaust his Sixth Amendment claim in state court before pursuing federal habeas relief not only applies the incorrect legal standard to a pre-trial claim, but also, as a practical matter, virtually guarantees that a defendant in a truly broken system will have no opportunity to vindicate his right to the effective assistance of counsel. By the time a defendant wends his way through the system and returns to federal court on a habeas petition, the very inefficacy he challenged at the outset has all but sealed his legal fate. Federal legislation should correct this legal predicament by allowing defendants to seek prospective relief when they are clients in a defense system that fails to provide "counsel acting in the role of an advocate."[11]

Further, any public defense reform statute must accomplish at least four goals: it must (1) squarely place the burden of *Gideon v. Wainwright*[12] on the states; (2) give meaning to the notion of ineffective assistance of counsel without raising a separation of powers concern; (3) address who may sue and be sued pursuant to the statute; and (4) outline appropriate remedies. Part III makes clear how the proposed statute addresses each of these objectives.

Part IV then addresses potential objections to the proposed statute from two different camps: (1) those who question the practical viability of this proposal; and (2) those who advocate alternative reform measures. This Article maintains that Congress has the constitutional authority to enact this statute under Section Five of the Fourteenth Amendment, that there are good incentives for Congress to tackle this issue, and that the Supreme Court would uphold this statute as constitutional under its civil rights enforcement precedent. At the same time, the Article argues that this legislative proposal, while not mutually exclusive of all others in this area, holds distinct appeal for several reasons: (1) it does not require Congress to earmark federal funds for indigent defense on an annual basis; (2) it provides an incentive for states to create lasting reform, which many states have struggled to do; and (3) it respects federalism by allowing each state the opportunity to select its own system for the delivery of public defense services.

Finally, this Article concludes by noting that systemic challenges to public defense systems require a federal forum. Notwithstanding the federal courts' prudential aversion to tinkering with criminal justice at the state level, indigent defense suits are emblematic of precisely the kinds of suits that require federal judicial intervention—that is, suits brought by those who do not have a meaningful voice in the political process. This legislation is designed to pave the way for systemic public defense reform. Thus, even if

---

[11] United States v. Cronic, 466 U.S. 648, 656–57 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.").

[12] Gideon v. Wainwright, 372 U.S. 335 (1963).

Congress chooses not to pursue the path described in this Article, the federal government should continue to explore new ways to allow such suits to be brought in federal court.

II. The Case for Federal Legislation

This Part demonstrates that the indigent defense crisis is national in scope and thus requires a national solution. Section A describes the ongoing shortcomings of public defense systems across the country. Section B then explains why it should be Congress that addresses this issue.

A. The Ongoing National Crisis in Indigent Defense

Scholars have documented the depth and breadth of our nation's crisis in indigent defense services.[13] This Section briefly outlines the contours of that crisis to put the legislative proposal in context.

There are many symptoms of the public defense crisis, but its primary cause is a lack of adequate funding.[14] Even before the country's current economic crisis, already-strapped public defense systems were experiencing budget cuts, which have, predictably, deepened since the beginning of the 2008 recession.[15] "Now, 37 states are facing mid-year budget shortfalls for fiscal year 2009, and 22 of these states fully fund their indigent defense systems."[16]

With persistent funding problems come a host of other conditions that generate chronic and pervasive deprivations of the right to counsel. As a result of funding shortfalls, defense lawyers must manage workloads so excessive that it is literally impossible for them to provide effective representation to all (if any) of their clients.[17] For example, the Minnesota state legislature reduced the public defense budget for the 2009 fiscal year by four million dollars, thereby forcing the layoff of twenty-three public defenders.[18] As a result of these layoffs, public defenders in Minnesota are now expected to manage a caseload of an estimated 550 felony cases per year, instead of the 450 felonies per year that each attorney managed prior to the cuts.[19] Lawyers who carry such excessive workloads are not able to meet with their

---

[13] *See supra* notes 1, 7 and accompanying text.

[14] *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427, 429–30 (2009); *see also* Justice Denied, *supra* note 1, at 52–64 (discussing insufficient funding of defense systems nationwide).

[15] Justice Denied, *supra* note 1, at 59–60.

[16] *Id.* at 59.

[17] *Id.* at 65–70 (discussing excessive caseloads nationwide).

[18] *Id.* at 60.

[19] *Id.* It is worth noting that even before this increase, these public defenders were managing a workload well outside accepted caseload limits. *See, e.g.*, Ten Principles, *supra* note 4, at 5 n.19 (2002) (listing recommended national caseload limits, including the maximum of 150 felonies per year).

clients on a regular basis and thus cannot establish the attorney-client relationship necessary for effective advocacy.[20] Further, cash-strapped public defense systems cannot adequately compensate and train their attorneys, which often results in public defenders who lack the requisite skill, training, and experience for the cases they handle.[21]

To make matters worse, in many jurisdictions, there is a lack of independence in the employment of contract and assigned defense counsel, resulting in a system of patronage that betrays the most basic notions of client loyalty.[22] Finally, as scholars have documented, there are serious collateral consequences that flow from ineffective assistance of counsel, or even the complete absence of counsel.[23] In addition to a potentially erroneous sentence or conviction, the wronged defendant stands to lose the right to vote, access to public services, housing, employment opportunities, and social connections.[24]

Today there are class action suits pending in New York[25] and Michigan[26] challenging systemic deprivations of the right to counsel. The named plaintiffs' allegations illustrate how America's public defense systems are broken and under-funded. For example, in the Michigan suit, one of the named plaintiffs alleges that he met with his attorney for "approximately two minutes" at a preliminary examination conference and did not have an opportunity to discuss his valid defenses, even though he was facing more than twenty years in prison.[27] Another named plaintiff in the Michigan suit claims to have met with his public defender for the first time at a pre-examination conference.[28] After speaking for only five minutes, defense counsel allegedly advised his client to plead guilty, even though the attorney had done no investigation into the charge or whether his client had any defenses.[29] In the New York suit, one named plaintiff was charged with bring-

---

[20] JUSTICE DENIED, *supra* note 1, at 95–97.

[21] *Id.* at 91–93 (citing examples in Alabama where brand new attorneys are just as likely to be assigned to serious felony cases as seasoned, capable attorneys, and also citing examples in New York, where some counties have no eligibility requirements for assigned counsel cases); *see also* GIDEON'S BROKEN PROMISE, *supra* note 1, at 7 (describing the link between insufficient funding, lack of training, and poor quality of defense representation).

[22] JUSTICE DENIED, *supra* note 1, at 82 (describing one attorney in Harris County, Texas, who received 250 juvenile court-appointed cases notwithstanding the fact that his license had been suspended twice); *see also* GIDEON'S BROKEN PROMISE, *supra* note 1, at 20–21 (discussing examples of a lack of independence in defense systems across the country).

[23] JUSTICE DENIED, *supra* note 1, at 72.

[24] *Id.*; *see also* Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 254 (2002) ("[C]ollateral sanctions may make it impossible for convicted persons to be employed, to lead law-abiding lives, to complete probation, or to avoid recidivism.").

[25] Complaint, Hurrell-Harring v. State, No. 8866-07 (N.Y. Sup. Ct. Nov. 8, 2007) [hereinafter Hurrell-Harring Complaint].

[26] Complaint, Duncan v. State, No. 07-000242-CZ (Mich. Cir. Ct. Ingham County Feb. 22, 2007) [hereinafter Duncan Complaint].

[27] *Id.* at 16–17.

[28] *Id.* at 8.

[29] *Id.*

ing less than one ounce of marijuana to her husband in prison.[30] She was a nurse with no prior criminal record, and yet her bail was set at ten thousand dollars, arguably, at least in part because she was not represented at her arraignment.[31] She could not pay this amount and subsequently was incarcerated for the period preceding her trial.[32] After spending several weeks in jail without hearing from her attorney, she pled guilty to a first-degree felony charge.[33] Her lawyer had several grounds under New York law upon which he could have argued for probation, yet, according to her allegations, he failed to investigate her case or return her phone calls from jail.[34] As a result of this felony conviction, Mrs. Hurrell-Harring lost her nursing license and has been unemployed for months.[35]

Of course, the worst-case scenario in a dysfunctional public defense system is the conviction of an innocent defendant. For example, Alan J. Crotzer served twenty-four years in Florida prison before DNA evidence exonerated him of his prior conviction for rape and kidnapping.[36] By the time he was freed from prison, Mr. Crotzer had spent nearly half of his life behind bars for a crime he did not commit.[37] Recently, Mr. Crotzer was one of several members of the National Right to Counsel Committee who testified before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security.[38] Mr. Crotzer stated:

> As a defendant, I was in the position of having to file subpoena requests for documents and witnesses while my appointed attorney was literally on vacation. We have a saying for public defenders in Florida: "public pretenders." I am living proof of the need for a significant overhaul of the indigent defense services provided in our nation.[39]

The Michigan and New York class action suits, as well as the example of Mr. Crotzer, underscore the deplorable state of the nation's public defense systems. Across the country, systems are under-funded, resulting in the actual or constructive absence of legal representation at critical stages of the

---

[30] Hurrell-Harring Complaint, *supra* note 25, at 12.

[31] *Id*.

[32] *Id.*

[33] *Id*. at 13.

[34] *Id*. at 12.

[35] Deborah Hastings, *Nationwide, Public Defender Offices Are in Crisis*, Associated Press, June 3, 2009, *available at* http://abcnews.go.com/US/wireStory?id=7749486.

[36] *See* Press Release, The Constitution Project, National Right to Counsel Committee Members Testify on Indigent Defense Crisis and Issue Urgent Call for Reforms (June 4, 2009), *available at* http://www.constitutionproject.org/newsdetail.asp?id=380 [hereinafter Members Testify].

[37] *Id.*

[38] *Indigent Representation: A Growing National Crisis: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 15–16 (2009) (statement of Alan J. Crotzer, Probation and Community Intervention Officer, Florida Department of Juvenile Justice).

[39] Members Testify, *supra* note 36.

adversarial process.[40] As a result, defendants are deprived of their Sixth Amendment right to counsel, and defense lawyers often find it difficult to perform their jobs consistent with the professional ethics guidelines.[41] Individuals may be wrongfully convicted or receive an excessive sentence because of ineffective representation, while at the same time, taxpayers are footing the bill for these systemic inefficiencies.

B. Why Federal Legislation?

There are two primary reasons why Congress should tackle the issue of inadequate indigent defense. First, the crisis is national in scope and thus requires a national solution.[42] Congress has the ability to conduct fact-finding and to gather data on a national scale—a unique power that has made it the appropriate forum for many social reforms.[43] Second, and related, other branches of government at both the state and federal level have been unable to generate meaningful reform in this arena. Given that there is a constitutional right at stake, Congress must act.

Though indigent defense advocates have historically sought relief from state legislators and from both state and federal benches, none of these institutions has been a vehicle for substantive and lasting reform. To begin, seeking indigent defense reform from a state legislative body poses a fundamental political process problem.[44] There are countless demands upon a state treasury, and in the current economic crisis, state fiscal resources are more constrained than ever. As a result, legislators must weigh carefully the competing demands upon those limited funds.[45] Indigent defendants simply do not have a voice in the debate over how to allocate state resources. As

---

[40] *See supra* notes 1, 7 and accompanying text.

[41] *See supra* note 4.

[42] *See* Norman L. Reimer, *A Call to Action in Support of the Right to Counsel: Federal Right—Federal Responsibility*, CHAMPION, June 2009, at 7 (urging Congress to address right-to-counsel issue in a number of ways, including steps to "ensure that clients can vindicate their right to counsel in the federal courts").

[43] *See* Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1178–79 (2001) (describing the traditional view that "[l]egislatures, as compared to courts, 'have substantial staff, funds, time and procedures to devote to effective information gathering and sorting' " (citation omitted)).

[44] Deborah L. Rhode, Gideon*'s Paradox*, 73 FORDHAM L. REV. 955, 962 (2004) ("Perhaps we are dealing with a classic example of a right enjoyed by a 'discrete and insular minorit[y],' which the political process itself cannot be entrusted to protect. Despite our rhetorical commitment to the presumption of innocence, the class of whom we are speaking here—indigent people charged with criminal offenses—is as powerless a class as one could imagine."); *cf. Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1166 (2008) ("Mentally ill defendants cannot rely on local democracy to enforce the proper moral outcome or to protect them. For there is a political process problem: mentally ill defendants systematically lack access to local legislatures that could advocate for their interests. And given that most state judges are elected, they too are too vulnerable to majoritarian pressures to protect the insular rights at issue.").

[45] *See* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (discussing budget cuts and their impact on public defense services).

one public defender described the challenge for legislators considering public defense reform, "there ain't a damn vote in it."[46] Thus, without an external—usually litigation-related—impetus, state legislators lack both the political will and the financial resources to meaningfully reform indigent defense services on a statewide basis.

Similarly, state courts can be a problematic venue for systemic reform of public defense systems. Thirty-nine states elect some or all of their judges,[47] and "[b]etween 2000 and 2007, state Supreme Court contests raised 168 million dollars, more than twice the amount raised in the 1990s."[48] Elected judges are subject to the same majoritarian pressures as elected lawmakers, including the pressure to be tough on crime.[49] Moreover, in many of the worst-off jurisdictions, state court judges are overseeing deficient public defense systems and thus may not be inclined to reform the status quo.[50] Thus, state court judges as a group may not be inclined to take up the cause of public defense reform.

The federal courts traditionally have been hostile to systemic Sixth Amendment challenges, especially on a pre-trial basis. These courts have avoided addressing the merits of these claims, citing abstention and federalism.[51] Although federal judges ought to hear these cases despite those doctrines,[52] plaintiffs' counsel in these types of suits are understandably reluctant to take their chances in federal court. Not only are these systemic lawsuits expensive and time-consuming,[53] but also, the last thing impact attorneys want to do is create precedent that further precludes a federal forum for these suits.

---

[46] Telephone Interview with Jim Neuhard, Dir., Mich. State Appellate Defender Office (May 27, 2009).

[47] FACT SHEET, *supra* note 9.

[48] *Not for Sale, Limiting Money in America's Courts*, ECONOMIST, June 11, 2009, *available at* http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=13832427.

[49] Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1103–09 (2006); *see also* Caperton v. Massey Coal Co., 129 S. Ct. 2252 (2009) (holding that elected judge should have recused himself in case where defendant had donated three million dollars to judge's campaign).

[50] *See, e.g.*, Julie Shaw, *Court-Appointed Defense Lawyers Sue for Better Pay*, PHILA. DAILY NEWS, Apr. 10, 2008, *available at* http://www.nlada.org/DMS/Documents/1207945197.6/20080410_Court-appointed_defense_lawyers_sue_for_better_pay.html (describing a lawsuit brought by court-appointed lawyers challenging the court-run public defense system that has not raised attorney compensation rates since 1993).

[51] *See, e.g.*, Luckey v. Miller, 976 F.2d 673, 676–79 (11th Cir. 1992) (holding that abstention in *Younger v. Harris*, 401 U.S. 37 (1971), barred the federal court from mandating an overhauled public defense system in Georgia); *see also*, Foster v. Kassulke, 898 F.2d 1144 (6th Cir. 1990) (rejecting an inmate's challenge to Kentucky public defense system on abstention grounds); Wallace v. Kern, 499 F.2d 1345 (2d Cir. 1974) (rejecting right to speedy trial of class action by inmates on federalism grounds); Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974) (rejecting a class action challenging the Florida public defense system on abstention grounds).

[52] Drinan, *supra* note 14, at 468–70.

[53] Telephone Interview with Robin Dahlberg, Senior Staff Attorney, A.C.L.U. (June 23, 2008).

In a prior work, this author expressed optimism about the trajectory of systemic public defense litigation, the bulk of which has occurred in state court.[54] Some individual judges at the state level have attempted to generate reform,[55] and more recently, state court litigation has generated systemic reform of public defense services.[56] While this author continues to think that there is a place for this type of litigation, it remains to be seen whether the reform generated by these suits can be sustained in the years to come. For example, when this author's last piece went to press the systemic suits pending in New York and Michigan had survived motions to dismiss.[57] Today, both state supreme courts are poised to rule on the question whether a state court may overhaul a public defense system, or whether such a task is a legislative function.[58] In any event, the type of federal legislation proposed herein is not incompatible with these class action suits in state court. Moreover, the proposed legislation may serve as a check on the temptation for states to renege on litigation settlements or reform agreements.

In sum, judicial and legislative officials at the state level have little incentive to reform indigent defense and may face electoral risks when they do so. Currently, state and federal courts offer at best expensive, unpredictable, and perhaps unsustainable relief. Thus, the federal government needs to step in to resuscitate the Sixth Amendment right to counsel. If Congress were to enact a piece of legislation like the one proposed herein, it would follow in the footsteps of brave congressional actions of the past, such as the passage of the Civil Rights Act,[59] the Voting Rights Act,[60] the Americans with Disabilities Act[61] and the Family and Medical Leave Act.[62]

---

[54] *See generally* Drinan, *supra* note 14.

[55] *See*, *e.g.*, State v. Peart, 621 So. 2d 780 (La. 1993) (announcing a rebuttable presumption that indigent defendants in New Orleans were receiving ineffective assistance of counsel); State v. Lynch, 796 P.2d 1150 (Okla. 1990) (setting guidelines for public defense counsel compensation in the absence of legislative action); State v. Smith, 681 P.2d 1374 (Ariz. 1984) (declaring the Mohave County bid system for selection of defense counsel to be in violation of several professional standards).

[56] *See* Drinan, *supra* note 14, at 443–62 (discussing "Second-Generation" systemic Sixth Amendment suits that have gained traction in state courts).

[57] Joel Stashenko, *Suit Proceeds over Providing Criminal Defense to Poor*, N.Y. L.J., Aug. 12, 2008, at 1; Duncan v. State, 774 N.W.2d 89 (Mich. Ct. App. 2009) (affirming a trial court denial of the state's motion to dismiss).

[58] *See* Duncan v. State, 775 N.W.2d 745 (Mich. 2009) (granting defendant leave to appeal the decision of the Michigan Court of Appeals); Hurrell-Harring v. State, 883 N.Y.S.2d 349, 351 (N.Y. App. Div. 2009) ("In our view, any decisions to address [systemic] 'deficiencies' should be made by the executive and legislative branches of government, and not by the Judiciary."); Brief for Plaintiffs-Appellants, *Hurrell-Harring*, No. 8866-07 (N.Y. Sept. 28, 2009) (appealing the decision to the state's highest court) (on file with author).

[59] 42 U.S.C. §§ 2000e to 2000e-17 (2006).

[60] 42 U.S.C. §§ 1973 to 1973gg-9 (2006 & Supp. II 2008).

[61] *Id.* §§ 12101–213 (2006).

[62] 29 U.S.C. §§ 2601–54 (2006 & Supp. II 2008).

III. The Proposed National Right to Counsel Act

Having described the ongoing crisis in indigent defense and having argued that Congress needs to tackle this issue, this Part describes what a congressional solution should look like. Specifically, Section A sets forth a legislative proposal—the National Right to Counsel Act ("NRTCA"). Section B addresses the central elements that any public defense reform statute should include and makes explicit the ways in which the text of the NRTCA advances these goals.

A. The Statutory Text: The National Right to Counsel Act

As described *infra*, in Part IV.A, Congress has the authority to enact national public defense reform legislation. The proposed text of this legislation is as follows:

> An Act to enforce the constitutional right to the assistance of effective counsel at all stages of the adversarial process, to confer jurisdiction upon the district courts of the United States to provide declaratory and injunctive relief against systemic violations of this right, and for other purposes.
>
> *Section 1.*
> (a) All indigent persons facing criminal charges in state court shall be entitled to the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments,[63] at the state's expense.[64]
> (b) The assistance of counsel is considered ineffective when a person can demonstrate one of the following:
>
> (1) the actual denial of appointed counsel after the state's commencement of adversarial proceedings,[65] or
>
> (2) the constructive denial of counsel after the state's commencement of adversarial proceedings,[66] which shall include, but not be limited to, the following:

---

[63] While the statutory language sets forth some, but not all, of the factual scenarios that may constitute a cognizable claim of ineffective assistance of counsel, the statute does not attempt to redefine or add to those rights embodied in the Sixth and Fourteenth Amendments as articulated by the Supreme Court. In fact, as described in Part III, *infra*, the statute specifically tracks the Supreme Court's precedent on right-to-counsel claims so as to avoid a separation of powers problem.

[64] Gideon v. Wainwright, 372 U.S. 335 (1963).

[65] *See* Rothgery v. Gillespie County, 128 S. Ct. 2578 (2008) (confirming that the right to counsel attaches as soon as defendant learns of the charges against him and his liberty is subject to restriction).

[66] *See* Strickland v. Washington, 466 U.S. 668, 692 (1984) ("In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

(A) representation by a lawyer who is operating under an actual conflict of interest;[67]

(B) representation by a lawyer whose workload is so excessive that effective representation is not possible;[68] or

(C) representation by a lawyer who lacks the requisite training, ability, and experience.[69]

(c) Where the state delegates fiscal and/or administrative authority over the public defense function to one of its political subdivisions, the state retains ultimate responsibility for securing the constitutional right to counsel.[70]

Section 2.

(a) Whenever a state or one of its political subdivisions fails on a systemic basis to guarantee the right to the assistance of effective counsel as guaranteed by the Sixth and Fourteenth Amendments, aggrieved persons may commence a civil class action in the district courts of the United States to seek declaratory, injunctive, and other equitable relief as the court sees fit.

(b) A state shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in federal or state court of competent jurisdiction for a violation of this statute.[71]

(c) A federal court entertaining a petition for relief filed under this statute shall not be subject to the abstention restrictions articulated in *Younger v. Harris*.[72]

(d) Where an action pursuant to this statute is filed on a pre-trial basis, members of the class shall have the burden of establishing that the constitutional right to counsel is being violated on an

---

[67] *See* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) (holding that "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance").

[68] *See* United States v. Cronic, 466 U.S. 648, 659 (1984) ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."); *see also* Powell v. Alabama, 287 U.S. 45, 58 (1932) (holding that the defendants were "not accorded the right to counsel in any substantive sense" because of the state supreme court's findings that defendants' counsel's appearance was "pro forma" rather than "zealous and active").

[69] *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[D]efendants facing felony charges are entitled to the effective assistance of competent counsel. . . . [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." (footnote omitted)).

[70] *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963) (imposing upon states the obligation to provide representation to poor defendants).

[71] It is possible to leave this provision out and simply address the Eleventh Amendment issue by requiring litigants to sue the relevant state official under *Ex parte Young*, 209 U.S. 123 (1908). However, the statute would be a better tool for plaintiffs if it bypassed this issue altogether by expressly abrogating the states' sovereign immunity. *See infra* Part III.B.

[72] 401 U.S. 37 (1971); *see also infra* Part III.B.

> ongoing basis and that there is a likelihood of imminent and irreparable injury from that violation.[73]
> (e) In any action or proceeding brought under section (2), the court, in its discretion, may allow the prevailing party, other than a state or a named state official, a reasonable attorney's fee as part of the costs. In awarding an attorney's fee under this section, the court, in its discretion, may include expert fees as part of the attorney's fee.
> (f) Nothing in this section shall restrict any rights that any person may have under any other statute or under common law to seek redress for a violation of the right to counsel.

B. The Statute in Practice

Any legislation designed to generate nationwide public defense reform needs to incorporate several critical elements. First, the statute must confirm that the burden of providing indigent defendants with counsel rests with the states. Second, the statute needs to give some weight to the notion of ineffective assistance of counsel without running afoul of Supreme Court precedent, thereby raising a separation of powers concern. Third, the statute must address who will be appropriate parties to a suit brought under the statute. Finally, the statute needs to address the question of appropriate remedies. This Section discusses how the statute as drafted in Part III.A addresses each of these goals.

1. States Must Comply with the Sixth Amendment

First, any reform statute needs to confirm that the obligation to provide indigent defendants with representation lies with the state. In 1963, the Supreme Court held in *Gideon v. Wainwright* that when a criminal defendant cannot afford an attorney, the state must provide him with counsel.[74] Yet, in sixteen states, more than half of public defense costs are paid for by the county; and in two states, Pennsylvania and Utah, there is no state funding at all.[75] These states abdicate their constitutional obligations under *Gideon*

---

[73] *See* Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988); *see also* Nicholson v. Williams, 203 F. Supp. 2d 153, 240 (E.D.N.Y. 2002) ("Ordinarily, claims of ineffective representation are dealt with on an individualized basis after the fact, because a person must show deficient performance by counsel and actual prejudice arising from that deficiency. . . . But where the state imposes systemic barriers to effective representation, prospective injunctive relief without individualized proof of injury is necessary and appropriate." (citations omitted)).

[74] 372 U.S. 335; *see also* Helen A. Anderson, *Penalizing Poverty: Making Criminal Defendants Pay for Their Court-Appointed Counsel Through Recoupment and Contribution*, 42 U. MICH. J.L. REFORM 323, 328 (2009) (discussing the state's obligation to provide counsel).

[75] JUSTICE DENIED, *supra* note 1, at 54.

when they require counties to fund indigent defense services.[76] Any reform statute must confirm that fiscal responsibility lies with the state, even where public defense services are delivered at the county level. The NRTCA addresses this goal in sections 1(a) and (c) by confirming that the states are required to fund indigent defense.[77] Additionally, it states that even where political sub-divisions are involved in the delivery of public defense services, the state is ultimately responsible for the availability and quality of such services.[78]

2. The Meaning of Ineffective Assistance of Counsel

Second, any reform statute must give weight to the notion of ineffective assistance of counsel. In *Strickland v. Washington*,[79] the Supreme Court held that criminal defendants who claim ineffective assistance of counsel must demonstrate both that their attorney's performance "fell below an objective standard of reasonableness"[80] and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[81] As scholars have documented extensively, the *Strickland* standard for ineffective assistance of counsel has failed to protect the right to the effective assistance of counsel.[82] Moreover, as described *infra* in further detail, the standard is simply inapposite for criminal defendants seeking prospective relief.

Nonetheless, the *Strickland* decision is critical because it is at the analytical core of the Supreme Court's jurisprudence regarding the right to the effective assistance of counsel.[83] To the extent that Congress drafts statutory language in an area where the Supreme Court has already delineated the scope of a constitutional right, as would be the case here, Congress needs to legislate carefully. Specifically, under Section Five of the Fourteenth Amendment, Congress may enact legislation that "deters or remedies constitutional violations," but it may not implement a "substantive change in the

---

[76] *Gideon*, 372 U.S. at 342 (describing the Sixth Amendment right to counsel as "made obligatory upon the *States* by the Fourteenth Amendment" (emphasis added)); Hurrell-Harring Complaint, *supra* note 25, at 4.

[77] *See supra* notes 63, 64, and accompanying text.

[78] *See id.*

[79] 466 U.S. 668 (1984).

[80] *Id.* at 688.

[81] *Id.* at 694.

[82] *See, e.g.*, John H. Blume & Stacey 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); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1857–66 (1994) (criticizing the *Strickland* standard); Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 19 (describing why the *Strickland* test is so difficult for a defendant to meet, even when the defendant is actually innocent).

[83] *See, e.g.*, Porter v. McCollum, 130 S. Ct. 447 (2009); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000).

governing law."[84] If it were to redefine or enlarge the scope of the Sixth Amendment, Congress would violate the separation of powers doctrine by usurping the Supreme Court's power as the final interpreter of the Constitution.[85]

The NRTCA as drafted in Part III seeks to avoid this separation of powers problem by defining ineffective assistance of counsel in a way that tracks the Supreme Court's precedent. In section 1(b), the statute defines ineffective assistance of counsel as the absence of counsel—both actual and constructive—after the initiation of adversarial proceedings.[86] The first claim—that the actual absence of counsel violates the Sixth Amendment—is entirely uncontroversial; in fact, the Supreme Court confirmed this principle last term.[87]

The Supreme Court has also held that the constructive absence of counsel at trial violates the Constitution. For example, in *Avery v. Alabama*, the Court clarified that the constitutional right to counsel required active assistance, rather than mere appointment.[88] The *Avery* Court explained: "[T]he 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's requirement that an accused be given the assistance of counsel."[89]

However, the Supreme Court has been less explicit with respect to precisely what circumstances constitute constructive absence of counsel. Section 1(b)(2) sets forth three circumstances that may constitute constructive absence of counsel under the statute. The first scenario—where the criminal defense attorney is operating under an actual conflict of interest—is based upon well-established Supreme Court precedent.[90] The two additional circumstances—where defense counsel's workload is so excessive that effective representation is not possible and where the lawyer lacks the requisite training, ability, and expertise—draw upon a broader and more robust line of Supreme Court cases. That is, the Court has recognized that there are some scenarios where structural factors make a fair trial impossible. In *United*

---

[84] City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

[85] *Id.* ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of [the Fourteenth Amendment].'" (alteration in original)).

[86] *See supra* notes 65–69 and accompanying text.

[87] Rothgery v. Gillespie County, 128 S. Ct. 2578, 2581 (2008); *see also* Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986); Brewer v. Williams, 430 U.S. 387, 398–99 (1977).

[88] 308 U.S. 444 (1940).

[89] *Id.* at 446.

[90] *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest."); Cuyler v. Sullivan, 446 U.S. 335, 346 (1980).

States v. Cronic, the Court explained: "[O]n some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[91] Further, the *Cronic* Court declared that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."[92] Congress may reasonably argue that when an attorney's workload exceeds all recognized standards[93] and when criminal defense attorneys are appointed on the basis of their expedience rather than their skill or experience, this line of cases controls. In sum, even though federal legislation regarding the Sixth Amendment must be drafted delicately so as to avoid a separation of powers violation, the NRTCA meets that requirement in its delineation of what constitutes actionable ineffective assistance of counsel.

3. Appropriate Plaintiffs and Defendants

Third, any public defense reform statute, the centerpiece of which is a proposed cause of action in federal court, needs to address the question of who may sue and be sued under the statute. The history of systemic public defense litigation demonstrates that it is important for the state to be a named defendant.[94] This is true both because there is symbolic importance in holding the state accountable for its own constitutional failings and because, if the state itself is a named defendant, reform implementation may follow more smoothly. Of course, a suit could (and likely would) name other defendants, such as relevant state executive officials and perhaps state judges,[95] but naming the state qua state as a defendant is nonetheless still critical.

Toward this end, section 2(b) of the NRTCA expressly abrogates the states' sovereign immunity, thereby allowing states to be sued in federal court. Critics may argue that the NRTCA offends federalism by subjecting the states to suit in federal court without their consent, thereby violating the

---

[91] 466 U.S. 648, 659–60 (1984).

[92] *Id.* at 659; *see also* Powell v. Alabama, 287 U.S. 45, 58 (1932) ("'The record indicates that the appearance was rather pro forma than zealous and active . . . .' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities.").

[93] Generally accepted guidelines for annual workload limits provide that no lawyer should handle on an annual basis more than 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals. TEN PRINCIPLES, *supra* note 4, at 5 n.19.

[94] *See* Drinan, *supra* note 14, at 458–59 (describing the evolving trend to target states rather than counties in these kinds of suits). This is also illustrated by the suits pending today in Michigan and New York, as described in Part II.A, *supra*, both of which name the state as a defendant.

[95] *See, e.g.*, Amended Complaint, White v. Martz, No. C DV-2002-133 (D. Mont. Apr. 1, 2002) (naming as defendants Governor Martz, the state Supreme Court Administrator, a district court judge in one of the named defendant counties, and several other officials).

Eleventh Amendment.[96] This argument fails for two reasons. First, the Eleventh Amendment's bar against suing the states in federal court is not without exception. Already, under *Ex parte Young*, litigants can circumvent this bar by naming relevant state officials as defendants.[97] Second, Congress may abrogate the Eleventh Amendment when it does so expressly and pursuant to a valid exercise of its civil rights enforcement authority.[98] The proposed language of the NRTCA makes clear the congressional intent to allow the states to be sued in federal court. And, as discussed in Part IV.A, *infra*, because this Article proposes legislation pursuant to Congress's civil rights enforcement authority, this express abrogation is permissible.[99]

From the plaintiffs' perspective, there are two questions that must be addressed: (1) at what point do plaintiffs have a cause of action, and (2) who may bring suits. Historically, federal courts dismissed systemic challenges to defense systems by requiring criminal defendants to exhaust their claim in state court before turning to the federal forum.[100] As a practical matter, this meant that defendants could only challenge the efficacy of their representation under *Strickland* in a post-conviction proceeding.[101] Some state courts have come to the same conclusion under similar circumstances.[102]

These cases err in at least two respects. First, the *Strickland* test is simply inapposite when a defendant (or a class of defendants) is seeking prospective relief to guard against an irreparable injury. By definition, the *Strickland* test is backward-looking and cannot provide prospective relief.[103] Second, when courts dismiss these claims on *Strickland* grounds, they virtually guarantee that a defendant can never vindicate the merits of his claim because by the time his case makes it back to federal court, the very inefficacy he challenged has sealed his fate.[104] The legislative proposal discussed herein makes explicit that criminal defendants bringing suit under the NRTCA do not need to demonstrate that the ineffective assistance of counsel

---

[96] U.S. CONST. amend. XI.

[97] 209 U.S. 123 (1908).

[98] Tennessee v. Lane, 541 U.S. 509, 518 (2004).

[99] *See infra* Part IV.A.

[100] *See* Drinan, *supra* note 14, at 440–42, 467–75.

[101] *Id.*

[102] *See, e.g.*, Hurrell-Harring v. State, 883 N.Y.S.2d 349, 351–52 (N.Y. App. Div. 2009) (emphasizing the individual nature of ineffective assistance of counsel claims and rejecting a suit seeking systemic relief); *see also* Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn. 1996) (rejecting a systemic Sixth Amendment suit in Minnesota for failure to show individual harm).

[103] *See* Strickland v. Washington, 466 U.S. 668 (1984); Blume & Neumann, *supra* note 82 and accompanying text.

[104] *See* Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 322–23 (2009) ("As Justice Marshall pointed out in his dissenting opinion in *Strickland*, this standard is unworkable because evidence that may establish the defendant's innocence 'may be missing from the record precisely because of the incompetence of defense counsel.' Documenting ineffective assistance therefore often requires the development of additional evidence at a post-conviction hearing. As a recent study of federal habeas petitions by Professors Nancy J. King and Joseph L. Hoffman points out, however, relief at this stage is largely hypothetical." (citation omitted)).

had a prejudicial effect on the outcome of their case, as courts traditionally require when considering an ineffective assistance of counsel claim.[105] Instead, under the NRTCA, a class of plaintiffs seeking prospective relief needs to show that its right to counsel is being violated on an ongoing basis and that there is a likelihood of imminent and irreparable injury from that violation.[106]

Additionally, there is still the question of who may bring suit. That concern may very well be the primary criticism leveled by opponents of the proposed legislation. That is, if every criminal defendant with a case pending in state court were able to bring a pretrial claim in federal court alleging ineffective assistance of counsel and seeking prospective relief, this statute would authorize a flood of litigation that could bring state criminal justice systems to a grinding halt and overwhelm the already-burdened federal courts. However, the statute is carefully drafted to avoid both negative outcomes. Several sections of the statute—the prelude, which references "systemic violation," section 2(a), which explicitly refers to a "civil class action," and section 2(d), which refers to class "members"—make clear that this statute does not create an *individual* cause of action. The statute allows criminal defendants to aggregate their claims in a class action, thereby preventing the flood of individual suits that some critics might predict.

The statute's class action element also makes sense for several additional reasons. First, the Supreme Court has been reluctant to support an individual's attempt to collaterally attack a state criminal conviction with a § 1983 suit in federal court.[107] While these earlier cases are factually distinguishable from the cause of action embodied in the NRTCA in that they dealt with suits seeking money damages and/or release from prison, they are nonetheless optically problematic for an individual cause of action. Second, the most recent systemic public defense suits have demonstrated that a class action suit offers several practical benefits. For example, by definition, a class of plaintiffs can provide more robust proof of harm than can an individual.[108] Also, a class action is procedurally desirable because as the cases

---

[105] *See supra* Part III.A.

[106] There is precedent for courts applying this standard to systemic public defense suits. *See, e.g.*, Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988); Nicholson v. Williams, 203 F. Supp. 2d 153, 240 (E.D.N.Y. 2002); Duncan v. State, 774 N.W.2d 89 (Mich. Ct. App. 2009). One may ask whether this standard is any easier for the criminal defendant to prove. Even if, in fact, this revised standard is itself challenging for a defendant, it at least recognizes that the appropriate time to review a request for prospective relief is before the alleged harm has been inflicted.

[107] *See* Heck v. Humphrey, 512 U.S. 477 (1994) (rejecting petitioner's civil claim for money damages before termination of criminal proceeding); Preiser v. Rodriguez, 411 U.S. 475 (1973) (rejecting civil suit seeking immediate or speedier release and citing federal habeas relief as the appropriate avenue).

[108] *Cf.* Parham v. Sw. Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970) (finding that plaintiff failed to establish employment discrimination on the basis of race, but that statistical evidence of the suit overall did establish employer discrimination against blacks as a class).

of the named plaintiffs are resolved in a state criminal proceeding, the class still represents justiciable claims.[109]

4. Remedies

The final issue that any public defense reform statute must address is the question of appropriate remedies. As a preliminary matter, it is important to note that the abstention doctrine has been an impediment to previous systemic Sixth Amendment civil rights actions.[110] Traditionally, the federal courts have refused to rule on the merits of public defense civil rights suits, arguing that to do so would constitute an unseemly interference with ongoing state criminal proceedings.[111] Accordingly, section 2(c) of the proposed statute expressly allows federal courts to provide a prospective remedy by declaring *Younger* abstention inapplicable in these types of suits.

Although this provision of the statute may provoke criticism by states' rights advocates,[112] it is nonetheless defensible. Critics will contend that the NRTCA unlawfully declares *Younger* abstention inapplicable to a whole class of suits, and that even if Congress is acting within the bounds of the Constitution, the provision is an ill-advised measure because it threatens to bring all state prosecutions to a grinding halt. Each objection is surmountable. With respect to the question of whether Congress can declare *Younger* abstention inapplicable to this class of suits in federal court, case law and scholarship on this issue indicate that Congress has such authority. "Federal courts do not abstain on *Younger* grounds because they lack jurisdiction; rather, *Younger* abstention 'reflects a court's prudential decision not to exercise [equity] jurisdiction which it in fact possesses.'"[113] Moreover, scholars

---

[109] If, for example, a named plaintiff accepts a plea agreement and thus is no longer a suitable representative of the class of similarly situated indigent defendants, a court could allow another class member to replace the now-absent named plaintiff. *See, e.g.*, Phillips v. Ford Motor Co., 435 F.3d 785, 787 (7th Cir. 2006) ("Substitution of unnamed class members for named plaintiffs who fall out of the case because of settlement or other reasons is a common and normally an unexceptionable ('routine') feature of class action litigation."). The case is somewhat more complex if the case has yet to be certified as a class action when the named plaintiff drops out for one reason or another; at that point, the named plaintiff technically is the only party with a claim before the court. However, courts do not always take such a technical approach. *See, e.g.*, *id.* ("Unless jurisdiction never attached . . . or the attempt to substitute comes long after the claims of the named plaintiffs were dismissed . . . substitution for the named plaintiffs is allowed." (citations omitted)).

[110] *See supra* note 51 and accompanying text.

[111] Luckey v. Miller, 976 F.2d 673, 678–79; *see also* Younger v. Harris, 401 U.S. 37, 43–45 (1971) (explaining the federalism principles underlying the federal courts' abstention from cases that involve ongoing state criminal proceedings).

[112] *Younger*, 401 U.S. at 44 ("This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief 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.").

[113] Weekly v. Morrow, 204 F.3d 613, 614–15 (5th Cir. 2000) (citing Benavidez v. Eu, 34 F.3d 825, 829 (9th Cir. 1994)); Kaufman v. Kaye, 466 F.3d 83, 88 n.1 (2d Cir. 2006); E.

have recognized the prudential, rather than constitutional, nature of the abstention doctrine and have argued that when applying the prudential abstention doctrine, "courts should be careful to maintain access for those who cannot expect a fair hearing from the political branches."[114] Criminal defendants are precisely the kind of group "who cannot expect a fair hearing from the political branches."[115] Thus, because of its prudential nature, Congress can declare the *Younger* abstention doctrine inapposite in a class of suits without raising a separation of powers concern.[116]

A related concern may be that even if Congress has the constitutional authority to declare *Younger* abstention inapplicable in suits brought under the NRTCA, practically speaking this provision could bring all ongoing state prosecutions to a halt—a detrimental outcome for all parties. But this consequence need not follow. It is possible for a federal district court judge to hear a civil claim under the NRTCA without staying state criminal proceedings.

The public defense class action pending in Michigan today provides an example of how this could work.[117] Two components are vital. First, the suit needs to be brought as a class action so that even as the cases of the named plaintiffs are resolved in a state criminal proceeding, the class still represents justiciable claims.[118] Second, the federal district court needs to recognize that the class itself will be "fluid" because the state criminal proceedings are ongoing.[119] In some ways, this is akin to a court applying the "capable of repetition yet evading review" exception to the mootness doctrine.[120] That is, any class representing a group of criminal defendants will be constantly evolving; cases will be resolved and new cases will emerge. The composition of the class is in constant flux, and if the court refused to tolerate the fluidity of the class, there would never be an opportunity for the court to reach the merits of the case. These are not insignificant procedural considerations; but, the Michigan example demonstrates that a court can entertain a civil complaint that implicates state criminal proceedings without entirely stalling those proceedings.[121]

Once one recognizes that the statute dispenses with the threshold issue of abstention, and that the federal courts can reach the merits of these suits,

---

Martin Estrada, *Pushing Doctrinal Limits: The Trend Toward Applying* Younger *Abstention to Claims for Monetary Damages and Raising* Younger *Abstention Sua Sponte on Appeal*, 81 N.D. L. REV. 475, 476 (2005) (describing *Younger* abstention as "discretionary").

[114] Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 512 (2008).

[115] *Id.*

[116] *But see* Dickerson v. United States, 530 U.S. 428 (2000) (*Miranda* warnings held constitutional in nature such that Congress was not free to legislatively overrule their application).

[117] Duncan v. Michigan, 774 N.W.2d 89 (Mich. Ct. App. 2009).

[118] *See supra* note 109 and accompanying text.

[119] *See, e.g.*, *Duncan*, 774 N.W.2d 89, 141.

[120] *See* Davis v. Fed. Election Comm'n, 128 S. Ct. 2759, 2770 (2008) ("That 'exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" (citations omitted)).

[121] *See generally Duncan*, 774 N.W.2d 89.

the next question is what remedies are appropriate under the statute. Section 2(a) grants federal judges wide latitude in crafting appropriate remedies. On one end of the spectrum, the district court judge could issue a declaratory judgment confirming the state's obligations under the Sixth Amendment to provide adequate representation and notifying the state that it has not met those obligations. This remedy is not very contentious, but it is equally unhelpful to defendants in a broken system. Specifically, a declaratory judgment standing alone is not likely to create an adequate incentive for reform.

On the other end of the spectrum, a district court judge may issue a broad injunction requiring prompt reform from the state or ordering the release of defendants and dismissal of charges if the state fails to appoint counsel for qualifying indigent defendants or if counsel fail to meet with their clients within a certain period of time. Such a decision would certainly be more contentious, but it would also be much more likely to incentivize prompt and meaningful change.[122] Given that such a decision immediately raises federalism concerns, and given the historical failure of the federal bench to reach the merits of these suits, this kind of remedy is unlikely under the NRTCA.

However, under the NRTCA, there is an attractive middle ground option for a federal judge navigating federalism and separation of powers concerns that are implicated when a state's criminal justice system is at the heart of civil litigation. For example, the district court judge could hold evidentiary hearings and, if appropriate, declare the state action (or inaction) to be in violation of the Sixth Amendment. At that point, the judge could order the state to develop a remedial plan within a specified time frame. It would then be incumbent upon state legislators and executive officials to make the hard choices related to improving a public defense system. A state could choose to increase the number of public defenders and the resources available to them (admittedly at the cost of reducing other public outlays or increasing taxes), or it could reduce the number of defendants who require representation.[123] The district court judge would retain jurisdiction over the suit while the state worked to reform its public defense system. Presumably only if and

---

[122] *Cf.* Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004) (limiting the time during which indigent defendants could be held without appointment and appearance of counsel before the defendants' release).

[123] For example, in some states, the misdemeanor of speeding may carry a potential jail sentence. *See, e.g.*, Johnston v. City of Pine Bluff, 525 S.W.2d 76 (Ark. 1975) (dealing with such an ordinance in Arkansas). The Sixth Amendment right to counsel applies to misdemeanor defendants who face a possible jail sentence. Argersinger v. Hamlin, 407 U.S. 25, 33 (1972). Thus, states could reduce the number of defendants who require representation under the Constitution by eliminating possible jail sentences for some misdemeanor offenses. Moreover, states which retain the death penalty could also generate significant defense savings by replacing the death penalty with life-without-parole. *See* Cara H. Drinan, *'Backlog' Death-Penalty Rationale Fatally Flawed,* ATLANTA J.-CONST., May 16, 2008. For example, a recent study demonstrated that North Carolina could save eleven million dollars annually if it abolished the death penalty. Philip J. Cook, *Potential Savings from Abolition of the Death Penalty in North Carolina*, 11 AM. L. & ECON. REV. 498, 498 (2009).

when the state failed to cooperate would the district court judge need to order a more drastic remedy, such as the dismissal of charges for defendants who have not been assigned counsel within a designated period of time.[124]

In sum, the NRTCA achieves several important goals. The statute confirms that the burden of *Gideon* is on the states; it gives meaning to the notion of ineffective assistance of counsel; it addresses appropriate parties to a suit brought under the statute; and it addresses remedies for plaintiffs bringing claims.

The next Part focuses on addressing the most likely questions from skeptical readers.

IV. Addressing Potential Skeptics

This Part aims to address two different sets of readers: those who question the practical viability of this proposal and those who would advocate alternative reform measures. Section A addresses the question of whether this proposal is workable, and demonstrates that: (1) Congress has the authority to pass this legislation; (2) Congress has good reason to pass this legislation; and (3) the current Supreme Court should uphold the statute as constitutional. Section B addresses the question of whether alternative reform suggestions are preferable, and argues that this proposal holds unique appeal, but that it need not be viewed as mutually exclusive of other promising proposals.

A. Practical Viability Issues

1. Congressional Authority to Enact the NRTCA

Even one who appreciates the appeal of congressional reform in the abstract may read this proposed legislation and question whether Congress has the constitutional authority to enact such a measure. Congress does have such authority under its civil rights enforcement authority—Section Five of the Fourteenth Amendment.[125]

Theoretically, Congress could enact legislation directed at public defense reform pursuant to a number of constitutional grants of authority. Congress could legislate pursuant to its Article I powers, namely, the Spending and Commerce Clauses, or Congress could act under Section Five of the Fourteenth Amendment. However, the textual basis upon which Congress

---

[124] *Cf.* Coleman v. Schwarzenegger, No. Civ. S-90-0520, 2009 WL 330960 (E.D. Cal. Aug. 4, 2009). In *Coleman*, a three-judge panel ordered the reduction of California's prison population, but only after decades of the state's being on notice of its ongoing Eighth Amendment violations related to prison overcrowding and only after the state's chronic failure to meet narrow remedial orders and timeline objectives. *Id.*

[125] U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

acts necessarily defines, at least to some extent, the contours of permissible legislation. Thus, it is most prudent for Congress to act pursuant to its authority under Section Five of the Fourteenth Amendment.

The Constitution permits Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[126] Pursuant to this tax and spending power, Congress may make fiscal grants to the states and condition the receipt of those grants on compliance with federally-set regulations.[127] However, there are limits on the ways in which Congress can exercise its spending power. For example, when acting pursuant to its spending power, Congress must be acting in pursuit of the nation's general welfare.[128] Moreover, the Supreme Court has held that when Congress attaches conditions to the receipt of federal funds it "must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation."[129] The Court has also explained that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[130] Finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[131] Yet, despite these articulated limitations, Congress's spending power is vast.[132]

Congress could enact legislation designed to improve public defense services nationwide pursuant to its spending power. The legislation could create a program under which states are eligible to receive federal grant money if they comport with professionally established guidelines for the delivery of indigent defense services. For example, Congress could condition receipt of federal funds on the state's compliance with the ABA's *Ten Principles of a Public Defense Delivery System*.[133] Given that such a program would be designed to improve the quality and equity of criminal justice systems nationwide, it would satisfy the general welfare requirement.[134] Moreover, Congress could easily meet the requirement that it "'speak with a clear

---

[126] U.S. CONST. art. I, § 8, cl. 1.

[127] South Dakota v. Dole, 483 U.S. 203, 206 (1987).

[128] *Id.* at 207 (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[129] *Id.*; *see also* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 190 (2005) ("This Court has repeatedly held that the obligations Congress imposes on States in spending power legislation must be clear. Such legislation is 'in the nature of a contract' and funding recipients' acceptance of the terms of that contract must be 'voluntar[y] and knowin[g].'" (citations omitted)).

[130] *Dole*, 483 U.S. at 207 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978)).

[131] *Id.* at 208.

[132] *See* David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism and the Administrative State*, 82 TEX. L. REV. 1197, 1209 (2004) (noting that "the Court has not struck down a statute as unconstitutional under the spending power in the modern era." (citations omitted)).

[133] *See* TEN PRINCIPLES, *supra* note 4.

[134] The "general welfare" test is an elastic one. In fact, the *Dole* Court noted that "[t]he level of deference to the congressional decision is such that the Court has more recently ques-

voice'" regarding the conditions it may place on the states' receipt of funding.[135] Finally, there would be a clear nexus between the conditions on the federal grants and the federal interest at stake.

Despite the fact that Congress conceivably could act pursuant to its spending power, there are a number of reasons why this might not be the best approach. First, in order for the federal legislation to have a meaningful impact at the state level, Congress would have to spend a great deal of money.[136] Second, there is the concern that federal money could have a "crowding-out" effect on state spending.[137] Third, if Congress grants money to the states on conditional terms, it must oversee the states' compliance with those conditions, thereby creating a further drain on federal resources. Thus, legislative action pursuant to Congress's spending power is not the best tool with which to seek national, lasting public defense reform.

The case for congressional action under the Commerce Clause is weaker still. The Constitution grants Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[138] "Modern Commerce Clause jurisprudence has 'identified three broad categories of activity that Congress may regulate under its commerce power.'"[139] Congress can regulate the channels of interstate commerce, it can regulate the "instrumentalities of interstate commerce, or persons or things in interstate commerce," and it can regulate those activities that substantially affect interstate commerce.[140] In recent years, the Court has significantly narrowed its vision of appropriate legislation under the Commerce Clause, refusing to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[141] Where Congress has regulated economic activity under the Commerce Clause, the Court has given legislators a wide berth.[142] Yet when Congress has attempted to legislate in areas that have a purported "substantial effect" on interstate commerce, the Court has required a well-developed empirical record of that

---

tioned whether 'general welfare' is a judicially enforceable restriction at all." *Dole*, 483 U.S. at 207 n.2 (citation omitted).

[135] *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 191 (2005).

[136] *See infra* note 210 and accompanying text. Also, funding for public defense tends to be insufficient and fleeting. *See, e.g.*, Bill Rankin, *Without a Lawyer, Indigent's Case Stalls*, ATLANTA J.-CONST., Jan. 6, 2009 (describing Georgia's repeated funding crises even in the wake of a newly created state system).

[137] JUSTICE DENIED, *supra* note 1, at 59 (explaining dynamic whereby newly created alternative sources of funding for public defense systems supplant rather than supplement general support for indigent defense).

[138] U.S. CONST. art. I, § 8, cl. 3.

[139] United States v. Morrison, 529 U.S. 598, 608 (2000) (quoting United States v. Lopez, 514 U.S. 549, 558 (1995)).

[140] *Id.* at 609 (citations omitted).

[141] *Lopez*, 514 U.S. at 567.

[142] *See* Gonzalez v. Raich, 545 U.S. 1, 32–33 (2005) (upholding a federal drug law even as it applied to California residents whose medical marijuana use was lawful under state law because the law addressed "quintessentially economic" activities).

effect and a tight nexus between the regulated activity and interstate commerce.[143]

This recent line of cases suggests that congressional attempts to reform public defense under the Commerce Clause would be ill-advised. To begin, public defense services are not economic or commercial in nature, and given the Supreme Court's emphasis in *Gonzalez v. Raich* upon economic activity per se, that fact alone likely ends the discussion.[144] Theoretically, Congress could point to a host of collateral consequences that flow from broken public defense systems, and argue that, in the aggregate, these consequences do have a substantial effect on interstate commerce.[145] But the Supreme Court's most recent cases on Commerce Clause legislation indicate an exacting review of legislation that looks for a tight, well-documented nexus between the regulated activity and interstate commerce.[146] Public defense reform legislation probably cannot meet that test.

Finally, even if Congress could legislate in the area of indigent defense under its Article I powers, doing so would close at least one important door to legislators. As argued in Part III, *supra*, the heart of a successful piece of federal reform legislation must be the creation of a private cause of action in federal court. In order for the statute to have as much of an effect as possible, lawmakers should include a provision that expressly abrogates the Eleventh Amendment, permitting the States to be named as defendants. Congress cannot abrogate the Eleventh Amendment when it acts under its Article I authority, but it can do so when it acts pursuant to its civil rights enforcement authority.[147] As the Court explained in *Seminole Tribe of Florida v. Florida*, "the Fourteenth Amendment, by expanding federal power at the expense of state autonomy . . . fundamentally altered the balance of state and federal power struck by the Constitution."[148] The fact that Congress cannot abrogate the states' sovereign immunity when it acts under Article I is there-

---

[143] *Lopez*, 514 U.S. at 561 (holding that Congress exceeded the scope of its Commerce Clause authority in passing a statute that made it a federal crime to knowingly possess a gun in a school zone because the statute at issue was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms" and that it was "not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated"); *see also Morrison*, 529 U.S. at 617–18 (holding that Congress lacked the authority to pass the civil remedy provision of the Violence Against Women Act under the Commerce Clause because the provision did not regulate an activity that had a substantial effect on interstate commerce).

[144] *See supra* note 142 and accompanying text.

[145] *See supra* notes 23–24 and accompanying text.

[146] *Morrison*, 529 U.S. at 615 (ruling that gender motivated violence was not connected closely enough with interstate commerce to permit Congress to regulate it via the Commerce Clause).

[147] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 64–66 (1996) (explaining why abrogation may be permissible when Congress acts pursuant to the Fourteenth Amendment but not permissible under Article I).

[148] *Id.* at 59.

fore a final reason why action pursuant to the Commerce or Spending Clauses would not be a viable path for federal lawmakers.

Congress may, however, enact the NRTCA pursuant to its civil rights enforcement authority—that is, under Section Five of the Fourteenth Amendment. Section Five provides that Congress shall have the power to "enforce, by appropriate legislation, the provisions" of the Amendment itself.[149] In early cases addressing the scope of congressional authority under the Enforcement Clause, the Supreme Court "recognized the importance of allowing congressional flexibility when enforcing the post-Civil War Amendments."[150] Further, the Court recognized that it needed "to give Congress the means to enforce the objectives of the Amendments with effective legislation and to prevent the Amendments from becoming vehicles for mere declaratory judgments that the states could subsequently ignore."[151]

Applying this flexible standard of review, the Supreme Court upheld a panoply of federal legislation passed pursuant to the Fourteenth Amendment's Enforcement Clause. In *Ex parte Virginia*, the Court upheld a federal law that criminalized racial discrimination by state judges in the jury selection process.[152] In *South Carolina v. Katzenbach*, the Court found the Voting Rights Act of 1965 constitutional, even though the statute provided for substantial federal involvement in state-run election protocols.[153] Similarly, in *Katzenbach v. Morgan*, the Court upheld section 4(e) of the Voting Rights Act of 1965, even though it directly contradicted New York's English-literacy voting requirement.[154] In each of these cases, the Supreme Court affirmed congressional action to reform invidious discrimination, even when such action targeted facially neutral state laws, and even where it inserted the federal government into historically state functions, such as criminal justice and voting procedures.

Recent Supreme Court case law evaluating the scope of congressional authority under Section Five of the Fourteenth Amendment reveals a much narrower vision for congressional authority under the Enforcement Clause. In *City of Boerne v. Flores*, the Supreme Court announced a critical distinction between what it deemed permissible "remedial" legislation and impermissible "substantive" legislation.[155] Under Section Five, Congress is free to enact legislation that "deters or remedies constitutional violations . . . even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the

---

[149] U.S. CONST. amend. XIV, § 5.

[150] Rachel Toker, *Tying the Hands of Congress:* City of Boerne v. Flores, 33 HARV. C.R.-C.L. L. REV. 273, 277 (1998).

[151] *Id.* at 278.

[152] *Ex parte* Virginia, 100 U.S. 339 (1879).

[153] 383 U.S. 301, 315–16 (1966) (describing provisions such as the suspension of literacy tests and other voter qualifications, suspension of all new voting regulations pending review, and the assignment of federal examiners to list qualified voters).

[154] 384 U.S. 641 (1966).

[155] City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

States.'"[156] Congress may not, however, implement a "substantive change in the governing law."[157] Legitimate remedial legislation addresses discrimination that is "flagrant"[158]; it targets "the widespread and persisting deprivation of constitutional rights"[159] and it "exhibit[s] 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[160]

Applying this more stringent test, the Supreme Court struck down a number of congressional attempts to target discrimination under its enforcement authority. For example, the Court found unconstitutional Congress's Patent Remedy Act, holding that the statute failed for lack of congruence under *Boerne* because Congress failed to demonstrate a pattern of state patent infringement.[161] Recently, the Court struck down the civil remedy provision of the Violence Against Women Act, holding that the provision failed to address state actors and was not a congruent and proportional response to gender-based discrimination in the prosecution of state crimes.[162] On similar grounds, the Court struck down the Age Discrimination in Employment Act ("ADEA") and Title I of the Americans with Disabilities Act ("ADA").[163] Accordingly, when Congress passes legislation under its civil rights enforcement authority, it must do so cautiously. Not only must it be careful to remedy the violation of a known, documented constitutional violation, but it also must narrowly tailor its statutory remedy to fit the targeted injury or threat.

Despite the suggestion that *Boerne* marked the demise of congressional authority under Section Five,[164] Congress has been able to legislate under this "positive grant of legislative power"[165] and withstand judicial scrutiny post-*Boerne*. In 2003, the Supreme Court upheld a provision of the Family and Medical Leave Act ("FMLA") that permitted state employees to recover money damages in federal court where the state failed to comply with the "family-care provision" of the FMLA.[166] According to the Court, Congress had complied with the *Boerne* mandate in creating a federal cause of action for state employees because the remedy was congruent and propor-

---

[156] *Id.* at 518.
[157] *Id.* at 519.
[158] *Id.* at 525.
[159] *Id.* at 526.
[160] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) (quoting *Boerne*, 521 U.S. at 520).
[161] Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999).
[162] United States v. Morrison, 529 U.S. 598, 619–27 (2000).
[163] Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (finding Title I of ADA unconstitutional because Congress did not demonstrate a record of irrational employment discrimination against disabled persons by states); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that ADEA failed congruence and proportionality test of *Boerne*).
[164] *See, e.g.*, Charles E. Schumer, *Under Attack: Congressional Power in the Twenty-First Century*, 1 HARV. L. & POL'Y REV. 3, 31–33 (2007) (describing a "conservative judicial activist attack on congressional legislative authority" under Section Five).
[165] Tennessee v. Lane, 541 U.S. 509, 555.
[166] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 735.

tional to the targeted harm.[167] Specifically, the legislative record indicated that "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread."[168]

Most recently, the Supreme Court upheld an action pursuant to Title II of the ADA.[169] Two disabled persons brought suit under Title II arguing that they had been denied access to the courts because of Tennessee's failure to make reasonable accommodations for them as required by the ADA.[170] The Court held that, in enacting Title II, Congress did not exceed its power under Section Five of the Fourteenth Amendment.[171] First, "[i]n the deliberations that led up to the enactment of the ADA, Congress identified important shortcomings in existing laws that rendered them 'inadequate to address the pervasive problems of discrimination that people with disabilities are facing.'"[172] Second, because Title II required "only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service," Congress had responded appropriately to the identified pattern of discrimination.[173] Thus, Title II of the ADA was found to be a congruent and proportional response to the nationwide problem of discrimination against persons with disabilities.

These recent cases suggest that, while Section Five congressional authority may not be as strong as it was under *Ex parte Virginia*,[174] it remains a viable source of legislative authority given the right circumstances, such as the nationwide crisis in indigent defense services. Public defense legislation, like the proposed NRTCA, addresses a well-articulated fundamental right that states are violating on a systematic basis.[175] Since 1963, when the Supreme Court rendered its decision in *Gideon* thereby requiring appointed counsel for defendants who could not afford representation, the states have known that the Sixth Amendment right to counsel is applicable to them.[176] Moreover, only a few years later, the Supreme Court confirmed that there is "no doubt of 'the power of Congress to enforce by appropriate criminal sanction every right guaranteed by the Due Process Clause of the Fourteenth Amendment.'"[177] Subsequent cases have reaffirmed the principle that a state cannot hale a person into court without providing them the tools for an ade-

---

[167] *Id.* at 727–35 (citing *Boerne* and applying its approach).
[168] *Id.* at 730.
[169] *See Lane*, 541 U.S. 509.
[170] *Id.* at 513.
[171] *Id.* at 531–34.
[172] *Id.* at 526 (citation omitted).
[173] *Id.* at 511.
[174] 100 U.S. 339 (1879).
[175] *See supra* Part II.A.
[176] Gideon v. Wainwright, 372 U.S. 335 (1963).
[177] United States v. Price, 383 U.S. 787, 789 (1966) (quoting United States v. Williams, 341 U.S. 70, 72 (1951)).

quate defense.[178] And yet, nearly four decades later, the states (with rare exception)[179] have failed to heed this instruction.[180]

Second, Congress has ample data to justify the legislation under the *Boerne* test. Lawmakers could hear testimony—as they are currently[181]—from policymakers who have been tracking the states' progress on this front for decades. The ABA, the National Legal Aid & Defender Association, the National Right to Counsel Committee, and local public defender offices, for example, could offer oral testimony regarding the inadequate public defense systems across the country. Moreover, legislators would have access to decades of written reports documenting the plight of poor defendants.[182] In short, there would be no dearth of evidence to support the claim that the states have neglected to secure the right to counsel as the Sixth Amendment requires.[183]

Third, the NRTCA proposed in Part III.A, *supra*, is a congruent and proportional response to the states' ongoing Sixth Amendment violations. The heart of the NRTCA is the creation of a cause of action that permits individuals to vindicate their right to counsel in federal court. This measure is appropriate given the documented decades of violations of the right to counsel.[184] Moreover, the proposed legislation does not entail the same types

---

[178] *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 76–77 (1985) (listing the decisions where the Court has taken steps to ensure "meaningful access to justice"); Douglas v. California, 372 U.S. 353 (1963) (holding that the Equal Protection Clause requires the states to provide indigent defense counsel for direct appeal); Griffin v. Illinois, 351 U.S. 12 (1956) (holding that the Due Process and Equal Protection Clauses require states to provide transcripts to indigent defendants for appellate process).

[179] For example, in California, public defense services are provided on a county basis, and some counties fare much better than others. *See* Lauren McSherry, *County Caseload Piling Up*, INLAND VALLEY DAILY BULL., Apr. 20, 2008 (citing disparity in caseloads, rates of trial, and numbers of available judges across counties). Still, as a whole, the nation's public defense systems suffer from resource disparity compared to prosecutor functions, as well as inadequate access to technology and investigative services. *See* GIDEON'S BROKEN PROMISE, *supra* note 1, at 13–14.

[180] *See supra* Part II.A.

[181] *See* Members Testify, *supra* note 36.

[182] *See, e.g.*, GIDEON'S BROKEN PROMISE, *supra* note 1 (documenting the longstanding nature of the defense crisis).

[183] In fact, the historical record regarding state constitutional violations in the public defense realm provides an even stronger basis for congressional action than in other cases where the Supreme Court has upheld congressional action. For example, in *Nevada Department of Human Resources v. Hibbs*, where a majority of the Court upheld a provision of the FMLA that allowed state employees to recover money damages in federal court, the evidence of gender discrimination before Congress concerned private sector employment and leave practices, rather than the practices of the states themselves. 538 U.S. 721, 746–47 (2008) (Kennedy, J., dissenting). As Justice Kennedy urged in his dissent, the question was not whether a pattern of gender-based discrimination existed in society at large, which Congress should attempt to remedy with legislation, but rather whether there exists a pattern "of unconstitutional discrimination by *States* in the grant of family leave." *Id.* at 749 (emphasis added). In contrast, if Congress were to conduct hearings in order to enact legislation such as the NRTCA, it would have at its disposal ample evidence demonstrating that the states have themselves failed to secure the Sixth Amendment right to counsel for indigent defendants.

[184] For example, in New York, where litigation challenging the county-based public defense system is pending, lawmakers had been on notice that the system was broken for decades

of elaborate federal measures that were upheld in the Voting Rights Cases, for example, federal examiners involved in state voting practices.[185] In contrast, this proposed legislation demonstrates congressional restraint. The proposed statute does not, for example, define indigency, nor does it articulate the precise manner in which states must provide public defense. Notwithstanding the fact that many experts in the public defense field agree that a statewide, state-funded oversight commission is the optimal method for the delivery of defense services,[186] the statute leaves the states free to experiment and determine what system best meets the demands of the Sixth Amendment. By granting the states flexibility in this manner, Congress can craft a proportional remedy to rampant Sixth Amendment violations, while at the same time reflecting the "etiquette of federalism."[187]

In sum, recent civil rights enforcement cases reveal the Court's willingness to defer to congressional remedies that seek to protect suspect classes and/or fundamental rights, and the NRTCA falls within the latter category. Thus, the NRTCA could be enacted on firm constitutional footing.

2. Congressional Incentives to Enact the NRTCA

Some critics may also wonder why Congress would even attempt to pass this piece of legislation. If, as argued in Part II of this Article, there are no votes to be gained in reforming public defense at the state legislative level, why would federal lawmakers be any more inclined to take up this issue? At first blush, this criticism seems well-founded. Certainly, no member of Congress will win reelection because of her tremendous support among the indigent defendant population. However, there are several reasons to think that Congress may, in fact, pursue legislation like the NRTCA.[188]

First, federal legislators have a duty to remedy the national deprivation of a fundamental right. Members of Congress take an oath to uphold the United States Constitution,[189] and, if the states choose to disregard ongoing violations of a fundamental right, the federal government has not only the

---

prior to the lawsuit's initiation. Hurrell-Harring Complaint, *supra* note 25, at 2. Michigan's defense crisis had also been well-documented for years prior to the filing of the class action suit pending in that state. Duncan Complaint, *supra* note 26, at 23–25.

[185] South Carolina v. Katzenbach, 383 U.S. 301, 315–16 (1966).

[186] *See* THE SPANGENBERG GROUP, STATE INDIGENT DEFENSE COMMISSIONS (2006) (describing the different funding systems in the various states and endorsing full state funding, with few exceptions); *see also* GIDEON'S BROKEN PROMISE, *supra* note 1 at 21–22 (citing the need for statewide oversight of defense services).

[187] Printz v. United States, 521 U.S. 898, 964 (1997) (quoting United States v. Lopez, 514 U.S. 549, 583 (1995)).

[188] As a preliminary matter, it is also worth noting that, regardless of whether Congress views this particular proposal as politically viable, it is the role of the academy to explore the contours of permissible legislative solutions, even if that means pushing the envelope in the process.

[189] U.S. CONST., art. VI, § 3.

authority, but also the responsibility, to enact legislation that creates the incentive for reform.[190]

Second, there may be good incentives for members of Congress to take up this cause. Under-funded and inadequate public defense systems may result in conviction and sentencing errors, and all taxpayers have an interest in criminal adjudications that are timely, efficient, and accurate. One study in Michigan demonstrated that ill-equipped and over-burdened defense counsel lead to expensive sentencing errors.[191] Specifically, the study showed that Michigan prisoners serve, on average, 127% of their minimum terms.[192] Over a five-year period, these elongated sentences can cost the state up to seventy million dollars.[193] Given their geographic breadth and diversity,[194] members of Congress may see a national picture of the public defense crisis and be inclined to act. Thus, members of Congress may appropriately frame this issue as one of prudent economics and not just the constitutional rights of criminal defendants.

Finally, it is worth noting that, historically, there have been instances where Congress has acted out of moral imperative rather than political expediency. For example, when Congress enacted the Civil Rights Act of 1964, there was entrenched racial animus in many parts of the country,[195] and when Congress enacted reforms to enhance the rights of mentally ill persons, it sought to protect a historically voiceless group.[196] The fact that members of Congress heard testimony in 2009 regarding the state of public defense nationwide indicates that at least some federal legislators are aware of the depth of this issue and are amenable to reform proposals.[197]

3. The Statute Under Judicial Scrutiny

Even if Congress has the authority and the political will to pass legislation like the NRTCA, it remains an open question whether the current Su-

---

[190] Reimer, *supra* note 42, at 2 ("The right to counsel is a federal right that must be secured by federal action. In the five decades since *Gideon*, the federal government has largely remained on the sidelines as the states have struggled, with varying degrees of commitment, to guarantee this fundamental constitutional right. As report after report documents the enormous costs of this neglect, the government can no longer afford inaction.").

[191] *See* Carol Lundberg, *Sentencing Errors Cost the State Millions*, LAW. WKLY., May 11, 2009, *available at* http://www.sado.org/sado_news/sentencing_errors_mlw_5_11_09.htm.

[192] *Id.*

[193] *Id.*

[194] Devins, *supra* note 43, at 1179.

[195] United Steel Workers of Am. v. Weber, 443 U.S. 193, 208 (1979) (citing as goals of Title VII "to break down old patterns of racial segregation and hierarchy" and to "open employment opportunities for Negroes in occupations which have been traditionally closed to them" (citation omitted)); *see also* 110 CONG. REC. 6556 (1964) ("Every American is aware that discrimination in public accommodations is what has motivated most of the 2,100 demonstrations which occurred in the last half of 1963.").

[196] *See, e.g.*, Protection and Advocacy for Individuals with Mental Illness Act, 42 U.S.C. §§ 10801–51 (2006).

[197] *See* Members Testify, *supra* note 36.

preme Court would uphold this legislation if challenged as unconstitutional. It is inevitable that, if this legislation were to pass, states would challenge the act as unconstitutional on one of several federalism grounds.[198] Given the current Supreme Court's conservative majority,[199] why should one think that the NRTCA would survive constitutional scrutiny?

First, this statute is eminently defensible under the Supreme Court's civil rights enforcement precedent, as discussed in Part III.A., *supra*. Moreover, the doctrine of stare decisis requires the Court to defer to its own precedent absent extraordinary circumstances.[200] Thus, one may be optimistic that this Court would view the NRTCA as consistent with its prior civil rights enforcement precedent.

Second, even if the Court were to adopt a more restrictive view of permissible Section Five legislation, the NRTCA would still pass muster. One can glean from the dissents in cases where the Supreme Court upheld congressional action under Section Five, a sense of what a more conservative articulation of congressional authority under Section Five would look like. For example, in his dissent in *Tennessee v. Lane*, Justice Scalia explained that he would replace the "flabby" "congruence and proportionality" test from *Boerne* with a narrower test for whether congressional action under Section Five is legitimate.[201] Justice Scalia argued:

> Section 5 grants Congress the power "to *enforce*, by appropriate legislation," the other provisions of the Fourteenth Amendment . . . one does not, within any normal meaning of the term, "enforce" a prohibition by issuing a still broader prohibition directed to the same end. One does not, for example, "enforce" a 55-mile-per-hour speed limit by imposing a 45-mile-per-hour speed limit—even though that is indeed directed to the same end of automotive safety and will undoubtedly result in many fewer violations of the 55-mile-per-hour limit.[202]

Unlike the speed limit analogy that Justice Scalia employs, the NRTCA is not a statute that seeks to vindicate the Sixth Amendment right to counsel by increasing what is required of the states. Instead, the NRTCA tracks the language that the Supreme Court itself has used in defining the right to counsel (e.g., in defining a violation as the absence of counsel, both constructive and actual, after the initiation of adversarial proceedings).[203] Further, the statute

---

[198] *See supra* notes 96–99, 112–119 and accompanying text.

[199] Linda Greenhouse, *In Steps Big and Small, Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.

[200] Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) ("Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

[201] 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting).

[202] *Id.* at 558 (emphasis added).

[203] *See supra* notes 65–69 and accompanying text.

allows the states independently to determine precisely how to meet the requirements of the Sixth Amendment. Thus, legislators should be optimistic about the results of a constitutional challenge to the NRTCA before the current Court, even if the Court were to adopt a more restrictive view of congressional authority under Section Five.

B. Alternative Reform Measures

Given that there is a finite amount of political capital to be spent on public defense reform, one may wonder whether the NRTCA represents the optimal reform effort. Scholars have recognized that the Sixth Amendment crisis is national in scope, and they have offered myriad solutions.[204] One prevalent suggestion for national reform is the creation of a national defense center that would serve as a repository of best-practice data, offer conditional funds to states, and provide expertise regarding defense services. For example, Professors Hoffman and King have argued for the abolition of federal habeas review of state criminal judgments, except in a small set of cases, so that federal habeas funding could instead be channeled to the states where trial counsel services are desperately lacking.[205] Under their plan, which builds on a concept originally put forth by the ABA in 1979,[206] the federal government would create an independent, not-for-profit "Center for Defense Services."[207] The Constitution Project's 2009 Report, *Justice Denied*, also promotes the idea of a "National Center for Defense Services to assist and strengthen the ability of state governments to provide quality legal representation."[208] Similarly, Professor Lefstein has urged the federal government to look to the public defense system in England and model national reforms on that system.[209] While this author is not conceptually opposed to the creation of a national Center for Defense Services, she nevertheless thinks that this suggestion suffers from a critical infirmity: it costs a great deal of money.[210] In the current economic climate, any federal action that

---

[204] *See supra* notes 1, 7 and accompanying text.

[205] *See* Joseph L. Hoffman & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791 (2009).

[206] AM. BAR ASS'N, REPORT WITH RECOMMENDATION (1979), *available at*: http://www.abanet.org/legalservices/downloads/sclaid/121.pdf.

[207] Hoffman & King, *supra* note 205 at 828–29.

[208] JUSTICE DENIED, *supra* note 1, at 200; *see also* Backus & Marcus, *supra* note 1, at 1127.

[209] Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835 (2004).

[210] To understand why the federal government would have to spend vast sums of money in order to make a meaningful difference at the state level, one need only look at what states are spending and what states actually need. For example, Georgia has allocated $40.4 million for its statewide indigent defense services in 2009, and in the past annual allocations have been insufficient. JUSTICE DENIED, *supra* note 1, at 57–58. Similarly, one study estimates that Tennessee spent $56.4 million on public defense, and still this is less than half what was spent by the state's prosecutorial arm. *Id.* at 61. Even if the federal government made a modest grant to each of the fifty states on the condition that states comport with public defense guidelines, this

requires an annual allocation of federal dollars will meet extraordinary resistance.

Professor Gershowitz has urged that the Supreme Court set a minimum definition of indigency for Sixth Amendment purposes.[211] Indeed, there are disparate and insufficient notions of what qualifies as "indigent" at the state level. However, even if the Court were to grant certiorari in a case that presented this question, the states would still need to grapple with how to provide effective assistance of counsel to a potentially expanded pool of indigent defendants.

Professor Brensike Primus has suggested several novel structural reforms that would address the national public defense crisis. Under one of her reform proposals, appellate attorneys would be able to raise ineffective assistance of counsel claims on appeal, rather than requiring defendants to raise such claims in a collateral, post-conviction proceeding.[212] While this measure would indeed make better use of appellate counsel in state systems, it does not create an incentive for lawmakers to improve a state's defense function through greater funding, training, and oversight for trial counsel. In another piece, Professor Brensike Primus also argued for congressional reform of the federal habeas statute, under which federal habeas relief would be available only when a state routinely violates criminal defendants' rights as part of a systemic practice.[213] While this proposal offers great efficiency gains and may be politically more attractive than the NRTCA,[214] it generates these gains at the expense of an individual habeas cause of action in federal court. Not only may it be unconstitutional to eliminate individualized habeas review, as she acknowledges,[215] but more important, the reform leaves the individual defendant who happens to be in a jurisdiction without systemic errors with no viable federal check on his state court conviction.[216]

---

would be a large, and ever-growing, annual expense for the federal government. For example, if each state received a $500,000 grant—only one percent of a $50 million budget—the federal government would spend $25 million a year. Further, it is not even clear that a one percent budget increase would be adequate to effect meaningful change across the nation.

[211] Adam Gershowitz, *The Invisible Pillar of* Gideon, 80 IND. L.J. 571 (2005).

[212] Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007).

[213] Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CAL. L. REV. (forthcoming 2010), *available at* http://ssrn.com/abstract=1351495.

[214] It may be more politically attractive because, while Professor Brensike Primus intends for her reform measure to improve the general state of affairs for criminal defendants, her legislative reform further restricts the ability of prisoners to bring cases in federal court. *Id.* A statute perceived as a further restriction on the rights of criminal defendants certainly may be more palatable to politicians than the NRTCA set forth herein.

[215] *Id.* at 172–74.

[216] Professor Brensike Primus argues that the criminal defendant theoretically could petition the U.S. Supreme Court for review upon completion of direct review or during state court post-conviction proceedings, or he could seek an original writ of habeas corpus. *Id.* Yet it would be the rare defendant who succeeded in petitioning the Supreme Court in any of these postures. In 2009, when the Court granted an original writ for a death row inmate in Georgia, it was the Court's first grant of an original writ in almost fifty years. *In re* Davis, 130 S. Ct. 1, 2 (2009) (Scalia, J., dissenting).

Another reform measure is illustrated by the recently passed Innocence Protection Act, a part of the Justice for All Act of 2004.[217] The bill

> provides access to post-conviction DNA testing in Federal cases, helps States improve the quality of legal representation in capital cases . . . increases compensation in Federal cases of wrongful conviction [and] . . . establishes the Kirk Bloodsworth Post-Conviction DNA Testing Program, which authorizes $25 million over five years to defray the costs of post-conviction DNA testing.[218]

While these are laudable goals, the legislation fails to target those cases that constitute the majority of public defense cases. The majority of public defenders are not handling capital cases,[219] and the majority of criminal cases are not ones where DNA evidence is the central issue.[220] Thus, there is still a dire need for the states to improve public defense services in the majority of non-capital cases.

The legislation proposed herein is not mutually exclusive of these other reform measures, but it does attempt to do something new. Because the proposed statute allows defendants to vindicate their Sixth Amendment rights in federal court, it provides a long-term incentive for states to reform and *maintain* their reform, which many states have struggled to do. Moreover, this proposed legislation has another element that distinguishes it from many other proposals: because it creates a cause of action, and therefore achieves its end through an incentive mechanism, it does not require recurring appropriations from Congress. Finally, unlike proposals that create a national center for defense services and set guidelines for the states' delivery of defense services, under the regime proposed, states are free to serve as "laboratories of democracy"[221] to find whichever system best meets the Constitution's demands.

---

[217] 18 U.S.C. § 3600A (2006).

[218] 150 CONG. REC. S11,609 (daily ed. Nov. 19, 2004) (statement of Sen. Patrick Leahy (D-Vt.)).

[219] For example, one study regarding Colorado's administration of the death penalty revealed that, on a statewide basis, only 2.8% of homicide cases were capital cases. Stephanie Hindson et al., *Race, Gender, Region and Death Sentencing in Colorado, 1980–1999*, 77 U. COLO. L. REV. 549, 575–76 (2006). This, of course, does not take into account non-homicide felonies and misdemeanors for which defendants receive representation.

[220] Lauren C. Boucher, *Advancing the Argument in Favor of State Compensation for the Erroneously Convicted and Wrongfully Incarcerated*, 56 CATH. U. L. REV. 1069, 1075 (2007) (noting that "in the first 130 DNA exonerations in the United States, mistaken identification was a factor in 101 of the original wrongful convictions" (citations omitted)). Thus mistaken identification, and not DNA evidence, is a much more common issue, and can only be attacked through zealous representation.

[221] New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory.").

V. Conclusion

This Article argues that there is a need for a national, legislative solution to the indigent defense crisis and that Congress can and should pass such legislation. A recent Nevada news story reinforces the need for the type of reform advanced in this Article. A report in Washoe County, Nevada, found that the public defender's office required thirty more public defenders in order to handle its caseload of more than ten thousand clients per year.[222] In response to the report, and ACLU allegations of related constitutional violations, Washoe County District Attorney Dick Gammick maintained that there was nothing wrong with the current system, notwithstanding defenders' excessive caseloads.[223] In defense of his position, Gammick was quoted as asking: "Where are the federal lawsuits that people aren't being properly represented . . . . Where are the actions being taken against defense attorneys by either the state bar or the state supreme court because they are not adequately representing defendants?"[224] The notion that all is fine if there are not federal lawsuits raising systemic deprivations of the right to counsel is probably not unique to Washoe County, Nevada. For the reasons described in Part II of this Article, to date, such lawsuits have not been consistently successful in state court, and they have been almost entirely unsuccessful in federal court. Consequently, parties are discouraged from even bringing these suits. As a result, miscarriages of justice like the ones described in Part II of this Article persist across the country. This legislation proposes to end the chronic deprivation of the fundamental right to effective counsel by allowing federal courts (1) to hear pre-trial Sixth Amendment cases and (2) to grant the necessary equitable relief. Until the federal courts are open to these suits, naysayers like District Attorney Gammick will continue to perpetuate the myth that *Gideon* is alive and well.

---

[222] *Report: More Public Defenders Are Needed in Washoe County* (KTVN Reno Channel 2 News television broadcast July 9, 2009), *available at* http://www.ktvn.com/Global/story.asp?S=10673027&nav=menu549_2.

[223] *Id.*

[224] *Id.*