

# THE ADVERSARY SYSTEM IS DEAD; LONG LIVE THE ADVERSARY SYSTEM: THE TRIAL JUDGE AS THE GREAT EQUALIZER IN CRIMINAL TRIALS

*Mary Sue Backus\**

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## INTRODUCTION

You have a right to a lawyer. If you cannot afford a lawyer, the government will provide one for you. This simple guarantee is not just drilled into the collective consciousness by television crime dramas; it is a bedrock principal of fairness in our system of criminal justice. This constitutional guarantee promises that our adversary system of justice will function as intended—that the truth will emerge where each party, represented by skilled advocates, has a full opportunity to present their side of the story in a dispute.<sup>1</sup> But in criminal proceedings all across the country, this model of adversarial fairness is near fantasy.

In the landmark case of *Gideon v. Wainwright*,<sup>2</sup> the U.S. Supreme Court unanimously recognized that “in our adversary system of criminal

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\* Associate Professor of Law, University of Oklahoma College of Law.

1. See generally ROBERT A. CARP, RONALD STIDHAM & KENNETH L. MANNING, JUDICIAL PROCESS IN AMERICA 157 (4th ed. 1998) (“The theory (or hope) underlying this model is that the truth will emerge if each party is given unbridled opportunity to present the full panoply of evidence, facts, and arguments before a neutral and attentive judge (and jury).”); STEPHAN LANDSMAN, THE ADVERSARY SYSTEM A DESCRIPTION AND DEFENSE (1984).

2. 372 U.S. 335 (1963).

justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>3</sup> In concluding that states have an obligation under the Sixth and Fourteenth Amendments to provide counsel to defendants accused of a felony who cannot afford a lawyer, the Court observed that “lawyers in criminal courts are necessities, not luxuries.”<sup>4</sup> The necessity is rooted, not only in the complexities of a criminal trial,<sup>5</sup> but in the very requirements of our adversarial system of justice.<sup>6</sup> The state’s obligation to provide counsel ensures that, even where criminal defendants lack the resources to hire a lawyer of their own choosing, the judge (or the jury) will still have the benefit of hearing each side presented by thorough, persuasive advocates. Thus, the accuracy and fairness of our criminal justice system depends upon the capability of the advocates to marshal the facts in support of their position and fully present their evidence. When each side is fully developed and zealously presented, the

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3. *Id.* at 344.

4. *Id.* *Gideon* established the right to counsel in felony trials, but subsequent Supreme Court decisions have significantly expanded the right to include almost any criminal proceeding that potentially may result in a loss of liberty, including: automatic appeals, *Douglas v. California*, 372 U.S. 353, 355-56 (1963); custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436, 470 (1966) (analyzing right to counsel at interrogations under the Fifth Amendment privilege against self-incrimination); juvenile proceedings resulting in confinement, *In Re Gault*, 387 U.S. 1, 36-37 (1967); preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); misdemeanor trials with actual imprisonment, *Argersigner v. Hamlin*, 407 U.S. 25, 37-38 (1972) (using an after-the-fact determination); and misdemeanor trials with a suspended sentence of imprisonment, *Shelton v. Alabama*, 535 U.S. 654, 658 (2002). The Court’s latest right to counsel case confirms that the Sixth Amendment right to counsel is triggered by a criminal defendant’s initial appearance before a judicial officer, who sets the conditions of release and formally apprises the defendant of the charges against him. *See Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2592 (2008).

5. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court particularly noted the unfairness of a layperson navigating the complexities of the courtroom without counsel:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

*Id.* at 68-69.

6. *See* Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 838 (2004) (“The goal in providing lawyers, as *Gideon* emphasized, is to assure fairness in our adversary system of justice and prevent the conviction of innocent persons.”).

judge or jury is in the best position to ascertain the truth.<sup>7</sup> The Supreme Court has repeatedly emphasized that “[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”<sup>8</sup>

In the four and a half decades since *Gideon*, however, a continuous parade of studies and reports have lamented the deplorable condition of indigent defense services throughout the nation and called for reform.<sup>9</sup> Despite

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7. See MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 4 (1975).

8. *Herring v. New York*, 422 U.S. 853, 862 (1975). See also *United States v. Nobles*, 422 U.S. 225, 230-31 (1975) (“We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts . . . .”) (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)).

9. See, e.g., DAVID UDELL & REBEKAH DILLER, Brennan Ctr. for Justice, White Paper, *ACCESS TO JUSTICE: OPENING THE COURTHOUSE DOOR* (2007), available at [http://brennan.3cdn.net/297f4fabb202470c67\\_3vm6i6ar9.pdf](http://brennan.3cdn.net/297f4fabb202470c67_3vm6i6ar9.pdf). A product of the Access to Justice Project at the Brennan Center for Justice at NYU School of Law, this White Paper made key findings and recommendations on whether citizens have meaningful access to the courts, both in a civil and criminal context. The report found that “in the criminal law context, where counsel is guaranteed by the Supreme Court’s 1963 landmark *Gideon v. Wainwright* decision, the promise has gone unfulfilled. Counsel for the indigent is commonly underpaid, under-supervised, under-resourced and, ultimately, unable to provide effective representation.” *Id.* at 2.

ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* (2004) [hereinafter *GIDEON’S BROKEN PROMISE*]. This report is based upon hearings held throughout the country during 2003 on the occasion of *Gideon*’s fortieth anniversary. The report concluded that “indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.” *Id.* at v.

ABA SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOC’Y, *CRIMINAL JUSTICE IN CRISIS* (1988) [hereinafter ABA, *CRIMINAL JUSTICE IN CRISIS*]. The Criminal Justice Section’s Special Committee on Criminal Justice in a Free Society prepared this report, which was based upon public hearings conducted in locations throughout the U.S. It observed that “defense representation is too often inadequate” because “we, as a society, [are] depriving the system of the funds necessary to ensure adequate defense services.”

NORMAN LEFSTEIN, ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING* (1982). This report, on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants, was based upon site visits and a review of empirical evaluations of nearly 40 jurisdictions in which state and local public defense programs had been studied. The report contains this assessment: “Overall, there is abundant evidence in this report that defense services for the poor are inadequately funded. As a result, millions of persons who have a constitutional right to counsel are denied effective legal representation.”

these repeated and urgent calls for reform, and a few notable pockets of improvement, there is near universal agreement that on the whole states have failed to honor the constitutional mandate of *Gideon* to provide poor criminal defendants with adequate defense counsel.<sup>10</sup> This abject failure of the states to provide adequate defense services to those who cannot afford a lawyer means that many criminal defendants enter our adversarial system essentially unarmed. Using the seminal battle analogy inevitably applied to our adversary system, one commentator has observed that “[t]he battle theory does not work well when one of the gladiators is inexperienced, incompetent, woefully under-resourced, drunk or asleep.”<sup>11</sup>

With an overwhelming majority of criminal defendants depending on the state to provide their defense counsel,<sup>12</sup> this failure has significant consequences, not only for huge numbers of individual defendants, but for the legitimacy of our criminal justice system itself.<sup>13</sup> In short, without adequate defense services for criminal defendants, the adversary system is broken and

AM. BAR ASS’N, *GIDEON* UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (1982). This transcript is based upon a hearing conducted by the ABA Standing Committee on Legal Aid and Indigent Defendants—held in cooperation with the National Legal Aid and Defender Association and the General Practice Section of the ABA. Among problems cited by witnesses were public defenders with too many cases; lack of adequate support staff; insufficient compensation for assigned counsel; defendants often not advised of their right to counsel in misdemeanor cases; and waivers of counsel that failed to meet constitutional standards.

NAT’L ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS & GOALS, REP. OF THE TASK FORCE ON COURTS (1973). This chapter of the National Advisory Commission’s report, funded by the federal government, noted that there was “a need for more professional staff resources, supporting resources and staff”—and “a need to insure [sic] that lawyers provided at public expense are experienced and well-educated.” *Id.* at 252. Additionally, the Commission noted that “[d]isappointments with the provision of public representations have been frequent.” *Id.* at 251.

10. See generally Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006) (detailing the crisis in providing effective defense counsel for indigent defendants).

11. Kent Roach, *Wrongful Convictions and Criminal Procedure*, 42 BRANDEIS L.J. 349, 365 (2003-2004). Understandably, a battle analogy is often employed to describe the clash of advocates under our adversary model. As Marvin Frankel observed, “the central theory is what a great jurist, Judge Jerome Frank, called a ‘fight theory,’ what a famous law dean, (Roscoe Pound) in 1906, like others before that, called a ‘sporting theory,’ and what all recognize, by any name, as a grimly combative proposition.” MARVIN E. FRANKEL, *PARTISAN JUSTICE* 11 (1978).

12. See CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, *DEFENSE COUNSEL IN CRIMINAL CASES* 1 (2000); STEVEN K. SMITH & CAROL J. DEFRANCES, U.S. DEP’T OF JUSTICE, *INDIGENT DEFENSE* 1 (1996).

13. Note, *Gideon’s Promise Unfulfilled: The Need For Litigated Reform Of Indigent Defense*, 113 HARV. L. REV. 2062, 2065 (2000) (“According to most estimates, about eighty percent of all criminal defendants are represented by indigent defenders. The skill of indigent defense counsel is thus essential to quality truth-seeking in most criminal cases, and fundamentally affects the legitimacy of the system.”) (citations omitted).

we can no longer depend upon it to reveal the truth in criminal proceedings.<sup>14</sup>

A deeply troubling symptom of the break down of the system is the rising number of wrongful convictions revealed by the Innocence Project and others. The Innocence Project lists over 200 people who have been exonerated as a result of post-conviction DNA testing since 1989.<sup>15</sup> Another recent study identified 340 exonerations in the United States from 1989 through 2003, 196 of which did not involve DNA evidence.<sup>16</sup> As sobering as these numbers are, however, there is good reason to believe that these figures represent only a fraction of wrongful convictions across the nation.<sup>17</sup> While wrongful convictions can be traced to an assortment of underlying causes, including faulty eyewitness identification, prosecutorial

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14. See *Thomas v. Wyrick*, 535 F.2d 407, 413 (8th Cir. 1976) (“[T]he failure of defense counsel to provide adequate assistance is a unique form of constitutional error. It creates a ‘flaw in the adversary process.’”); *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1970) (“Our adversary system is designed to serve the ends of justice; it cannot do that unless accused’s counsel presents an intelligent and knowledgeable defense.”); FRANKLIN STRIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM* 284 (1994) (“When trial counsel is so incompetent that the client’s rights are prejudiced, the adversary process ceases effective functioning.”). Of course, there has been much criticism of the adversary system generally, both in the criminal and civil contexts. For a general discussion of many of the leading criticisms of the adversary system, see *id.*, particularly Chapter Three. Such criticism is not new. See, e.g., JEROME FRANK, *COURTS ON TRIAL MYTH AND REALITY IN AMERICAN JUSTICE* (1949); FRANKEL, *supra* note 11; ANNE STRICK, *INJUSTICE FOR ALL* (1977). And, for perhaps one of the earliest negative critiques of the adversary system, see Roscoe Pound’s 1906 famous address, *The Causes of Popular Dissatisfaction with the Administration of Justice*. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, in *AMERICAN JUDICATURE SOCIETY, HANDBOOK FOR JUDGES* 281-97 (1975). Alternatively, there are vigorous proponents of the adversary system. See, e.g., Monroe Freedman, *Our Constitutional Adversary System*, 1 *CHAP. L. REV.* 57, 57 (1998) (arguing that the adversary system is more than just the best method for determining truth when facts are in dispute; that it embodies “a core of basic rights that recognize and protect the dignity of the individual in a free society”). This Article, however, does not attempt to take a position on the relative effectiveness of the adversary model in finding truth. For better or for worse, the adversary model serves as the infrastructure of our criminal justice system. Thus, this article argues that, given our “exaggerated contentious procedure,” as Roscoe Pound described it, we must take steps to equalize the advocates if our adversarial model of criminal justice is to remain functional and true to its goal of fairness. Pound, *supra*, at 289.

15. See The Innocence Project, *Facts on Post-Conviction DNA Exonerations*, <http://www.innocenceproject.org/Content/351.php> (last visited Mar. 3, 2009).

16. Samuel R. Gross *et al.*, *Exonerations in the United States 1989 Through 2003*, 95 *J. CRIM. L. & CRIMINOLOGY* 523, 524 (2005).

17. See Lawrence C. Marshall, *Do Exonerations Prove that “The System Works?”*, 86 *JUDICATURE* 83, 83-84 (2003) (discussing the reasons to believe that only a small fraction of wrongful convictions are ever uncovered).

misconduct, false confessions, and the unreliability of snitches, ineffective assistance of counsel is at the heart of many of these failures.<sup>18</sup>

One obvious way to restore the legitimacy of the adversarial model in the criminal context is to follow through on the promise of *Gideon* and ensure adequate legal representation to criminal defendants who cannot otherwise afford a lawyer. It is no mystery what is required. Professional organizations have established clear standards for what constitutes an effective criminal defense,<sup>19</sup> and the essentials of a sound indigent defense system are not enigmatic.<sup>20</sup> If, in the forty-five years since *Gideon*, states have

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18. See AD HOC INNOCENCE COMM. TO ENSURE THE INTEGRITY OF THE CRIMINAL PROCESS, ABA CRIMINAL JUSTICE SECTION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* (2006). After an extensive review of the causes for wrongful convictions, the ABA identified inadequate defense counsel as one of the flaws in the system that threatens the integrity of the criminal process. The report noted that “[i]nadequate defense counsel have played a significant contributing role in the wrongful convictions cases.” *Id.* at xxiv. In addition, the resolutions and policy recommendations in the area of defense counsel practices acknowledge the central role of the adversary system in ferreting out the truth: “Given a properly functioning criminal justice process, particularly at the trial stage, an accurate determination can be made as to the defendant’s guilt or innocence, and the role of defense counsel is critical to this determination.” *Id.* at 81.

19. See JAMES R. NEUHARD & SCOTT WALLACE, U.S. DEPT. OF JUSTICE, *COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS: A RESOURCE GUIDE FOR PRACTITIONERS AND POLICYMAKERS, VOL. I, STANDARDS FOR ADMINISTRATION OF DEFENSE SERVICES 6-9* (2000), available at [http://www.nlada.org/Defender/Defender\\_Standards/Defender\\_Standards\\_Comp](http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp) (detailing the “Ten Commandments of Public Defense Delivery Systems”).

20. The ABA distilled several sets of defense standards adopted by a number of prominent national organizations into a practical guide for policymakers entitled, *The Ten Principles of a Public Defense Delivery System*. The guide is intended to identify the fundamental components of a system that provides effective and efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The Ten Principles are based upon early work by the ABA as well as the National Legal Aid and Defender Association, the Institute of Judicial Administration, the National Study Commission on Defense Services, and the President’s National Advisory Commission on Criminal Justice Standards and Goals. See ABA Resolution 107, *The Ten Principles of a Public Defense Delivery System* (adopted Feb. 5, 2002), [http://www.abanet.org/legal\\_services/downloads/sclaid/10principles.pdf](http://www.abanet.org/legal_services/downloads/sclaid/10principles.pdf).

The ten black letter principles are:

- (1) The public defense function, including the selection, funding, and payment of defense counsel, is independent.
- (2) Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
- (3) Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel.
- (4) Defense counsel is provided sufficient time and a confidential space with which to meet with the client.
- (5) Defense counsel’s work load is controlled to permit the rendering of quality representation.

been unable (or unwilling) to provide adequate defense services for poor criminal defendants in the face of an undisputed constitutional mandate, clearly defined essential components of an effective system, and substantial evidence of systemic failure to maintain the essential components, then there is little hope that they will do so now. Although there are some positive signs of reform in a few states,<sup>21</sup> on the whole we simply cannot count on the states to restore balance to the adversary system by providing a proficient defense advocate for those who cannot afford one.

This Article argues that trial court judges must step into the breach and restore the integrity and fairness of the adversary system and, ultimately, the legitimacy of criminal convictions. The trial judge's role in safeguarding the rights of the accused and the interests of the public is not simply a professional duty, but an ethical obligation. Trial judges are uniquely situated to identify substandard defense representation. As guardians of the adversary system, judges have both the authority and the responsibility to act, not only to uphold the Constitution and protect each defendant's Sixth Amendment right to counsel, but to ensure that each side is fully presented so that the truth may emerge. Even in the face of significant obstacles, there are concrete steps trial judges can take immediately that would equalize the enduring disparity between the prosecution and the defense and thereby revitalize the adversary system.

Part I begins by briefly describing the widely known problem: the failure of the states to provide adequate indigent defense services and the lack of effective solutions. Part II details a judge's professional and ethical obligation to act in the face of inadequate defense counsel, along with the power a trial judge has to take action to restore balance to the adversary system. Part III identifies some of the concrete actions trial judges can take to even the playing field. There are, of course, solid reasons why judges have remained relatively passive in the face of an adversary system that is

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(6) Defense counsel's ability, training, and experience match the complexity of the case.

(7) The same attorney continuously represents the client until completion of the case.

(8) There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

(9) Defense counsel is provided with and required to attend continuing legal education.

(10) Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

*Id.*

21. See Georgia N. Vagenas, *Review of National Indigent Defense Developments*, 11 Dialogue 1, Summer 2007, at 17 available at <http://www.abanet.org/legalservices/dialogue/downloads/dialsu07.pdf#page=17>. See also Jessa DeSimone, Comment, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479 (2006).

increasingly out of whack, and so Part IV explores two of the strongest disincentives judges face in intervening to assure an adequate defense. Even in the face of these obstacles, Part V asserts that there are strong reasons why judges still can and should take up the role of equalizer to restore the adversary system. In conclusion, this Article suggests that civic education may be the key to laying the foundation necessary to support judicial efforts to fulfill the role of guardians of the adversary system.

## I. THE PROBLEM AND THE LACK OF EFFECTIVE SOLUTIONS

The disarray of the nation's patchwork of indigent defense systems has been the subject of a vast amount of commentary and criticism.<sup>22</sup> One commentator concluded, "[a] survey of the literature unearths many scholars and practitioners criticizing, and lamenting, the state of indigent defense. Their conclusions are more or less the same: our indigent defense system is in a state of crisis."<sup>23</sup> Indeed, each anniversary of the *Gideon* decision seems to generate symposia and commentary dedicated to cataloging the failures of the states to meet the promise of effective representation for poor criminal defendants.<sup>24</sup> To be fair, not every state system is dysfunctional;

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22. See, e.g., Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1515 (2005); Backus & Marcus, *supra* note 10; Sylvia R. Cooks & Karen Karré Fontenot, *The Messiah is Not Coming: It's Time for Louisiana to Change its Method of Funding Indigent Defense*, 31 S.U. L. REV. 197 (2004); Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 912 (2005); Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1178-85 (2003); Andrew Horwitz, *The Right to Counsel in Criminal Cases: The Law and the Reality in Rhode Island District Court*, 9 ROGER WILLIAMS U. L. REV. 409, 421-24 (2004); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Lefstein, *supra* note 6, at 838; Lawrence C. Marshall, *Gideon's Paradox*, 73 FORDHAM L. REV. 955, 956 (2004); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1636 (2003); George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 544 (2004); Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 149 (2001); Stephen B. Bright, *Gideon's Reality: After Four Decades Where Are We?*, 18 CRIM. JUSTICE 1, 5 (Summer 2003); Allen K. Butcher & Michael K. Moore, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas* (2000), available at <http://www.uta.edu/pols/moore/indigent/last.pdf>; see also reports cited *supra* note 9.

23. Kyung M. Lee, Comment, *Reinventing Gideon v. Wainwright: Holistic Defendants, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 370 (2004).

24. See Lefstein, *supra* note 6, at 838 ("On every major anniversary of *Gideon*, it has become a ritual for national organizations concerned with providing adequate legal representation to recall the extent of the nation's problems in furnishing counsel for the indigent.") See also, e.g., Symposium, *Gideon—A Generation Later*, 58 MD. L. REV. 1333 (1999); *Connecticut Public Interest Law Journal's Symposium Celebrating the Fortieth Anniversary of the United States Supreme Court's Decision in Gideon*, 4 CONN. PUB. INT. L.J. 20 (2004); Symposium, *Gideon Introduction: Debate: Gideon at 40: Facing the Crisis*,

there are pockets of excellence and encouraging signs of reform in a number of states.<sup>25</sup> Additionally, to condemn state efforts with too broad a brush would unfairly denigrate thousands of individual, dedicated professionals who labor under the most challenging of circumstances to provide criminal defendants with skilled representation.

Nevertheless, the overall picture is bleak, and far too many jurisdictions fail to provide adequate representation for defendants who cannot afford to engage a private attorney for their defense.<sup>26</sup> Although truly national studies are rare, numerous comprehensive state investigations have indicted entire state indigent defense systems in unequivocal terms.

For example, in Georgia: “[t]he right to counsel guaranteed by the state and federal constitutions is not being provided for all of Georgia’s citizens;”<sup>27</sup> In Virginia, [the] “indigent defense system is deeply flawed and fails to provide indigent defendants the guarantees of effective assistance of counsel required by federal and state law,”<sup>28</sup> and “[t]he deficiencies in Virginia’s indigent defense system are notorious and have persisted despite production of numerous reports documenting the problems in the last three decades.”<sup>29</sup> In Louisiana, “the indigent defense system devised by the legislature . . . delivers ineffective, inefficient, poor quality, unethical, conflict-ridden representation to the poor.”<sup>30</sup> In North Dakota, “[t]he current system is in danger of failing to fulfill its constitutional mandate of providing indigent defendants with effective assistance of counsel.”<sup>31</sup> In Michigan, “partly due to inexcusable low rates of compensation, more than 33 percent of all assigned defense counsel ask to be removed from the rosters each year.

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*Fulfilling the Promise*, 41 AM. CRIM. L. REV. 131 (2004) (“[A] major focus of the Symposium was on the existing deficiencies in the indigent defense process.”); Symposium, *Muting Gideon’s Trumpet: The Crisis in Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 979 (2001) (a symposium of national and state leaders in the field of indigent defense). Also, in March 2003, Georgetown Law School held a symposium marking the 40th anniversary of *Gideon*.

25. See sources cited *supra* note 21.

26. See generally Backus & Marcus, *supra* note 10.

27. Report of Chief Justice’s [Ga.] Commission on Indigent Defense Part 1, at 3 (2002), available at <http://www.georgiacourts.org/aoc/press/idc/idc.html>.

28. THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/reports.html>.

29. *Id.* at 7.

30. NAT’L LEGAL AID & DEFENDER ASS’N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER GIDEON 56 (2004), available at <http://www.nlada.org/DMS/Documents/1078863541.49/Avoyelles%20Parsh%20Body%20Text.pdf>.

31. THE SPANGENBERG GROUP, REVIEW OF INDIGENT DEFENSE SERVICES IN NORTH DAKOTA 1 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/reports.html>.

This often leaves inexperienced attorneys to represent defendants.”<sup>32</sup> As a result, “[s]ince 1855, Michigan has gone from being a leader in the U.S. regarding providing public defense services, to ranking at the bottom today.”<sup>33</sup> And similarly, in Rhode Island, “the daily practice in the Rhode Island District Court is a far cry from what *Gideon* and its progeny require.”<sup>34</sup> Consequently, “[t]he ‘assembly-line justice’ and the ‘obsession for speedy dispositions’ that the Court decried in *Argersinger v. Hamlin* back in 1972 persist today in Rhode Island.”<sup>35</sup>

The common problems plaguing public defense systems are well-documented.<sup>36</sup> As an example, the findings from the American Bar Association’s (ABA) most recent comprehensive report on indigent defense, *Gideon’s Broken Promise*,<sup>37</sup> echo earlier studies and highlight the central failings of many state systems. The report concluded that “indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction.”<sup>38</sup> The report, based on a series of public hearings in which dozens of expert witnesses testified from all geographic parts of the United States—representing twenty-two large and small states as well as every kind of indigent defense system—provides a national perspective on the widespread difficulties in delivering adequate defense services for the poor. The report identified a host of alarming problems, which result in inadequate legal representation and lead to violations of defendants’ Sixth Amendment right to counsel. Included among the problems were:

- (1) Incompetent and inexperienced lawyers;
- (2) Excessive caseloads;
- (3) Lack of contact with clients and continuity of representation;
- (4) Lack of investigation, research and zealous advocacy;
- (5) Lack of conflict-free representation and other ethical violations;
- (6) Inordinate delays in process and failure to provide counsel at all in some cases;
- (7) Representation so minimal that amounts to mere processing of cases;

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32. TASK FORCE ON IMPROVING PUBLIC DEFENSE SERVICES IN MICH., MODEL PLAN FOR PUBLIC DEFENSE SERVICES IN MICHIGAN 5 (2002), available at <http://www.abanet.org/legalservices/sclaid/defender/reports.html>.

33. *Id.* at 4.

34. Horwitz, *supra* note 22, at 424-25.

35. *Id.* at 427.

36. See sources cited *supra* notes 22, 9.

37. *GIDEON’S BROKEN PROMISE*, *supra* note 9, at iv, available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise> (presenting the report’s nine Main Findings).

38. *Id.* at v.

- (8) Unadvisedly encouraging waiver of the right to counsel and subsequent guilty pleas; and
- (9) Lack of an independent oversight structure to ensure uniform quality services.<sup>39</sup>

In addition to this laundry list of deficiencies, the extensive testimony confirmed what is widely known: funding for indigent defense is shamefully inadequate.<sup>40</sup> Inevitably, the lack of financial resources impacts virtually every aspect of delivering defense services to those who cannot afford to hire their own lawyer.<sup>41</sup> Caseloads are crushing because funds are not available to hire more attorneys to handle the demand for publicly funded defense services. The resulting enormous workload compromises the quality of representation a defense attorney can deliver to an overwhelming number of clients. Faced with too many clients and not enough time to serve them, defense attorneys are forced to take shortcuts and thus often fail to adequately prepare, to investigate or interview witnesses, and to maintain sufficient contact with their clients or prepare and file appropriate motions.<sup>42</sup>

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39. *Id.* at 16-28.

40. *See* Backus & Marcus, *supra* note 10, at 1045 (“By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.”). Peter Neufeld, founder and co-director of the Innocence Project at the Benjamin Cardozo School of Law, New York, has identified inadequate state and local funding of public defender offices as one of the two most significant systemic causes of wrongful convictions. *Criminal Defense Panelists Offer Methods to Prevent, Overturn Wrongful Convictions*, 82 CRIM. L. REP. (BNA) 548 (2008).

A steady stream of reports and articles have found that funding for government funded defense services is grossly insufficient. *See, e.g.*, RICHARD KLEIN & ROBERT SPANGENBERG, *INDIGENT DEFENSE CRISIS* 25 (1993); LEFSTEIN, *supra* note 9, at 56-57; ABA, *CRIMINAL JUSTICE IN CRISIS*, *supra* note 9, at 41; Klein, *supra* note 22, at 625; Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993); Lefstein, *supra* note 6, at 846; Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808 (2000); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, 9 CRIM. JUST. 1, Summer 1994, at 13.

41. *See* Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85 (2007) (describing the indigent defense funding crisis and identifying the problems that result including excessive caseloads, long delays before meeting a lawyer, assembly-line guilty pleas, incompetent and/or under-resourced lawyers and ultimately, wrongful convictions, unjust sentences, and defaulted appeals); *see also* Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 816 (“The most fundamental reason for the poor quality or absence of legal services for the poor in the criminal justice system is the refusal of governments to allocate sufficient funds for indigent defense programs.”); Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615, 1620 (2002) (“Poor training, perverse incentives, and massive caseloads [among many other consequences] all stem from the lack of resources devoted to criminal defense.”); Lee, *supra* note 23, at 373 (“[F]unding is conceivably related to every other problem in indigent defense.”).

42. Backus & Marcus, *supra* note 10, at 1053-60.

These overextended attorneys also have a tendency to use the plea bargaining process to avoid a time consuming trial rather than proceed in the best interest of the client.<sup>43</sup> In addition, compensation is inadequate, making recruitment and retention of experienced attorneys extraordinarily difficult.<sup>44</sup>

In addition to being overworked and underpaid, inadequate funding means that public defense attorneys also face a scarcity of the resources critical to effective representation. The assistance of support staff, investigators, paralegals, social workers, and independent experts is rarely available to the degree necessary to provide competent representation.<sup>45</sup> This dearth of the “raw materials integral to the building of an effective defense,”<sup>46</sup> as the Supreme Court has called them, is exacerbated by the glaring disparity of resources between defense attorneys and prosecutors.<sup>47</sup> Effective training, additionally, is often a casualty of under-funding, even in a field as complex and ever-changing as criminal law, where such training is essential to competent representation.

The grim reality is that few states appear willing to devote the funds necessary to provide experienced lawyers with the time and the resources to enable them to deliver constitutionally mandated criminal defense for poor criminal defendants.<sup>48</sup> The states have had well over forty years to respond to *Gideon*'s trumpet, and the evidence is overwhelming that they have failed to honor the constitutional mandate to provide effective assistance of coun-

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43. *Id.* at 1078.

44. *Id.* at 1059-63.

45. *Id.* at 1096-104.

46. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

47. For example, a FY 2005 study of all sources of both defense and prosecution funding in Tennessee found indigent prosecution funding is between two and two-and-a-half times greater than indigent defense funding. THE SPANGENBERG GROUP, RESOURCES OF THE PROSECUTION AND INDIGENT DEFENSE FUNCTIONS IN TENNESSEE 17 (2007), available at [http://www.abanet.org/legalservices/sclaid/defender/downloads/TN\\_CompStudyFINAL\\_7.30.07.pdf](http://www.abanet.org/legalservices/sclaid/defender/downloads/TN_CompStudyFINAL_7.30.07.pdf). Even without factoring in the additional resources that are provided to the prosecution in the form of federal, state, county, and local in-kind services, the study documented \$130–139 million available to the prosecution function, compared to \$56.4 million available for indigent defense. *Id.* In considering caseloads, the study found that while both prosecution and defense were short-staffed, public defenders needed an additional 122.8 attorney positions to meet standards while district attorneys needed an additional 22 attorney positions. *Id.* at 19; see generally, Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004) (exploring the feasibility of linking the funding available for defense lawyers to the money that the government spends on prosecution lawyers).

48. The funding situation continues to deteriorate. See Vesna Jaksic, ‘Gutted’ Minnesota Public Defender Copes with Lack of Funds, LAW.COM, July 3, 2008, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202422729392>; Tom Loftus, Public Defenders Sue Over State Cutbacks, COURIER-JOURNAL.COM, July 1, 2008, available at <http://dpa.ky.gov/news/Public%20defenders%20sue%20over%20state%20cutback1.pdf>.

sel for those who cannot afford a lawyer. This failure has so impaired the criminal adversary system that it no longer functions as intended.<sup>49</sup> Not only does that dysfunction place the validity of many criminal convictions in doubt, it also calls into question the legitimacy and integrity of the entire court system.

Despite the risk to the legitimacy of criminal convictions and the integrity of the system, it is not particularly surprising that state legislatures have ignored decades of repeated calls for reform of publicly funded defense systems. Appealing to the constitutional sensitivities of legislators has not worked in the face of strained state budgets, political pressures, the lack of a constituency to advocate for poor criminal defendants, and the popularity of tough-on-crime rhetoric that defines so much of the political discourse on criminal justice issues.<sup>50</sup> As Donald Dripps observed, “[l]egislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to the defense function rather than to additional police or prison space. Public choice theory clearly predicts what scholars have consistently observed: the defense function is starved for resources.”<sup>51</sup> Given that money drives many of the reforms required to ensure adequate defense representation—reducing caseloads, providing resources, and increasing compensation and training—it is unrealistic to depend upon state legislatures to restore the adversarial balance.<sup>52</sup>

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49. See Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 214 (2006) (“Our system has already slipped away from the adversarial model and has become instead an ‘administrative system of criminal justice’ managed by the prosecutor’s office rather than the courts.”).

50. Gideon’s *Promise Unfulfilled*, *supra* note 13, at 2062 (“The political process failure in this area is unsurprising, for indigent defendants, by definition, lack the financial and political capital necessary to pursue effective reform efforts.”).

51. Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 (1997). For a fuller discussion of public choice theory and the incentives bearing on legislators, see Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993).

52. See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005) (“Forty years after *Gideon v. Wainwright*, this political limit on defense counsel is a fixed component of criminal justice; underfunding of defense counsel will not change except at the margins.”); DAVID COLE, NO EQUAL JUSTICE 6-7 (1999) (“Providing genuinely adequate counsel for poor defendants would require a substantial infusion of money, and indigent defense is the last thing the populace will voluntarily direct its tax dollars to fund. Achieving solutions to this problem through the political process is a pipedream.”); see also Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 699 (2007) (“[I]t is unrealistic to believe that legislatures will intervene . . . to solve the ineffectiveness problem by significantly increasing funding for defense at the trial level.”); Adele Bernhard, *Take Courage: What The Courts Can Do To Improve The Delivery Of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 309 (2002) (“Lack of funding for the defense function is certainly the single greatest factor adversely affecting

When a state's political branches have refused to act in response to evidence of an inadequate indigent defense system, reformers have increasingly turned to the courts for relief.<sup>53</sup> Over the last twenty-five years, cases have targeted such things as attorney compensation, excessive caseloads, lack of funding, and which level of government (state or local) must bear the expense of providing lawyers for poor criminal defendants.<sup>54</sup> There is, however, ongoing debate about the effectiveness of litigation in achieving enduring, systemic reform of indigent defense systems.<sup>55</sup> While there has been some success, sustainable practical results have been hard to come by because, ultimately, funding for any reforms ordered by the courts must be authorized by the legislatures. As an illustration of this dilemma, the Chief Justice of Montana's Supreme Court, Karla Gray, has acknowledged these undeniable fiscal pressures even while heralding as "visionary" Montana's groundbreaking overhaul of its indigent defense system. "The only caution that I concern myself with is appropriate resourcing from the Legislature. Having gone through a 'not terrific' couple of sessions . . . I know the rigors of trying to get adequate resourcing and that's my only caution."<sup>56</sup>

Often, sustaining significant victories may require ongoing monitoring or additional litigation. In Allegheny County, Pennsylvania, for instance, the ACLU initiated a class action lawsuit seeking an order for the county to correct problems of staffing, expertise, and professionalism of the public defender's office. The suit led to a 1998 consent decree by which the county agreed to do just that, but only five years later the ACLU was forced to return to court seeking to hold the county in contempt for failing to implement the consent decree.<sup>57</sup> Court supervision had to be extended for several

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quality. Nonetheless, responding to the perceived anti-crime attitude of the voting public, state legislatures have skimmed on financial support for the defense. Efforts to convince legislators to spend more on defense have been remarkably unsuccessful.").

53. See Lefstein, *supra* note 6, at 849-51.

54. *Id.* at 849-50 nn.66-69 (collecting cases).

55. See Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004); Gideon's *Promise Unfulfilled*, *supra* note 13, at 2064. Compare Wright, *supra*, at 251 (noting that reformers should be "wary about the power of litigation to improve defense funding in the long run"), with Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1751-52 (2005) (litigation has been unsuccessful in generating sustainable structural or fundamental change to indigent systems in the long-run), and compare Bernhard, *supra* note 52, at 335 (arguing that courts can and will act to improve the quality of criminal defense services), with Gideon's *Promise Unfulfilled*, *supra* note 13, at 2063 ("[T]he best short-term means for overcoming this political process failure and improving the quality of indigent defense is litigated reform.").

56. James Park Taylor, *Bespeaking Justice: A History of Indigent Defense in Montana*, 68 MONT. L. REV. 363, 412 (2007).

57. James O'Toole, *Public Defenders Office Battle to Heat Up Again*, PITTSBURGH POST-GAZETTE, June 26, 2003, at B3.

additional years.<sup>58</sup> Even when the judge finally terminated court supervision in 2005, the legal director of the ACLU Pittsburgh Chapter cautioned that the end of court supervision and the inevitable political pressure to cut budgets suggested that serious concerns about backsliding remained.<sup>59</sup>

A similar scenario appears to be unfolding in Georgia, where the long road to reform led to the passage of the Georgia Indigent Defense Act in 2003.<sup>60</sup> This comprehensive, state-wide overhaul of Georgia's patchwork of inadequate county indigent defense system was precipitated in part by the reports generated by the Chief Justice's Commission on Indigent Defense established by the Supreme Court of Georgia in December of 2000.<sup>61</sup> Heralded as a national model when it first passed, the program has suffered from lagging legislative support and several rounds of budget cuts.<sup>62</sup> Now, the Atlanta-based Southern Center for Human Rights has filed suit challenging the system director's actions in scaling back programs, firing staffers, and closing an Atlanta office.<sup>63</sup> At the heart of the legal challenge is an attempt to halt the return to flat fee contracts for indigent criminal representation, "a prescription for dreadful quality of representation," which were dispensed with under the new system.<sup>64</sup>

At the federal level, courts have been unreceptive to systemic challenges to state indigent defense systems and have consistently rejected such challenges on abstention grounds.<sup>65</sup> Likewise, state courts have erected a myriad of barriers to individual ineffective assistance of counsel claims, based on the inadequacy of state indigent defense efforts, as well as to broader systemic challenges. These litigation efforts have repeatedly failed

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58. Lillian Thomas, *Over Sight of Public Defenders Ends; Staff Cuts in Office in 1996 Led to Lawsuit and Consent Decree*, PITTSBURGH POST-GAZETTE, Apr. 7, 2005, at B-4.

59. *Id.*

60. H.B. 770, 2003 Gen. Assem., Reg. Sess. (Ga. 2003), available at [http://www.legis.state.ga.us/legis/2003\\_04/versions/hb770\\_HB\\_770\\_APP\\_12.htm](http://www.legis.state.ga.us/legis/2003_04/versions/hb770_HB_770_APP_12.htm).

61. JUDICIAL BRANCH OF GEORGIA, REPORT OF THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART I, 1 (2002), available at <http://www.georgiacourts.org/aoc/press/idc/idchearings/idcreport.doc>.

62. Greg Bluestein, *Ga. Public Defender System in Tug-of-War*, FLA. TIMES-UNION, July 24, 2008, available at [http://www.jacksonville.com/tu-online/stories/072408/geo\\_309207249.shtml](http://www.jacksonville.com/tu-online/stories/072408/geo_309207249.shtml).

63. *Id.*

64. Bill Rankin, *Public Defenders Denounce Flat Fees*, ATLANTA JOURNAL-CONSTITUTION, July 27, 2008.

65. Under the *Younger* abstention doctrine, federal courts have refused to interfere with an ongoing state criminal prosecution, since an available state court remedy exists. See *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992); *Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975). See also Rodger Citron, Note, *(Un)Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481 (1991) (criticizing federal courts' reluctance to intervene).

across the nation in Virginia,<sup>66</sup> Connecticut,<sup>67</sup> Indiana,<sup>68</sup> Mississippi,<sup>69</sup> Alabama,<sup>70</sup> Iowa,<sup>71</sup> Michigan,<sup>72</sup> New Jersey,<sup>73</sup> Utah,<sup>74</sup> and Vermont.<sup>75</sup>

In spite of these failures, there have been a handful of significant decisions in which state courts have acknowledged the constitutional inadequacy of indigent defense systems and either ordered or sparked reform.<sup>76</sup> But even the most heralded among successful state court decisions have failed to achieve lasting reform in the face of funding decisions by state legislatures. Celebrated state supreme court decisions in Arizona,<sup>77</sup> Oklahoma,<sup>78</sup> and Louisiana,<sup>79</sup> each of which found their state indigent defense systems deficient, are a powerful illustration that even strong judicial rheto-

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66. *Webb v. Commonwealth*, 528 S.E.2d 138 (Va. Ct. App. 2000) (finding that the state's court-appointed compensation scheme was not so inadequate as to violate the Sixth or Fourteenth Amendments because Webb's own attorney had represented him so well that no actual conflict existed and thus no ineffective assistance of counsel was proven).

67. *Juvenile Matters Trial Lawyers Ass'n v. Judicial Dep't*, 363 F. Supp. 2d 239 (D. Conn. 2005) (dismissing a trial lawyers' association challenge to the compensation system for appointed counsel representing indigent families and children). The Connecticut chapter of the American Civil Liberties Union had some success in the late 1990s with a class action suit, which may have compelled legislative action.

68. *Coleman v. State*, 703 N.E.2d 1022 (Ind. 1998) (providing evidence of systemic defects in county public defender program does not support presumption of prejudice). Circumstances giving rise to presumption must affect defendant's attorney individually. *Id.*

69. *Quitman County v. Mississippi*, 910 So. 2d 1032 (Miss. 2005) (finding county unsuccessful in challenging Mississippi's statutes requiring the counties to provide legal services for indigent criminal defendants).

70. *See Ex parte Grayson*, 479 So. 2d 76 (Ala. 1985).

71. *See Lewis v. District Court*, 555 N.W.2d 216 (Iowa 1996).

72. *See Wayne County Criminal Def. Bar Ass'n v. Chief Judges of Wayne Circuit Court*, 663 N.W.2d 471 (Mich. 2003).

73. *See Madden v. Twp. of Delran*, 601 A.2d 211 (N.J. 1992).

74. *See State v. Taylor*, 947 P.2d 681 (Utah 1997).

75. *See State v. Bacon*, 658 A.2d 54 (Vt. 1995).

76. *See, e.g., In re Pub. Defender's Certification of Conflict & Motion to Withdraw Due to Excessive Caseload & Motion for Writ of Mandamus*, 709 So. 2d 101, 103-04 (Fla. 1998) (barring a public defender's office from accepting new cases because of excessive backlog); *United States ex rel. Green v. Washington*, 917 F. Supp. 1238, 1271-82 (N.D. Ill. 1996) (declaring lengthy delays in appellate representation by state defender office caused by underfunding presumptively unconstitutional); *Arnold v. Kemp*, 813 S.W.2d 770, 771 (Ark. 1991) (finding legislatively imposed fee caps on court-appointed attorneys for indigent clients unconstitutional); *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1139 (Fla. 1990) (holding if funds were not provided within adequate time the court would order the immediate release, pending appeal, of certain felons); *State ex rel. Stephan v. Smith*, 747 P.2d 816, 849 (Kan. 1987) (holding that the state has an obligation to provide counsel for indigents charged with felonies and to pay such counsel at non-confiscatory rates).

77. *State v. Smith*, 681 P.2d 1374 (Ariz. 1984).

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

79. *State v. Peart*, 621 So. 2d 780 (La. 1993).

ric must be supported by legislative action.<sup>80</sup> More recently, initial litigation victories in New York and Massachusetts have failed to deliver on the promise of enduring reform.<sup>81</sup>

These significant cases provided the impetus for much needed reform, compelled states to provide some additional funding in the short term, and focused sharp attention on serious systemic deficiencies. In the long run, however, even strong judicial pronouncements have been unable to bring about enduring structural or fundamental change to indigent defense systems. The adversarial system remains at risk without any indication from state legislatures that they are willing to adequately fund indigent defense services and with little progress generated by litigation and other attempts at reform. Trial judges can, and should, step into the breach and restore the balance.

## II. A JUDGE'S PROFESSIONAL AND ETHICAL OBLIGATION

Decades of reform efforts and litigation have fallen woefully short of achieving any lasting impact on the nationwide crisis in indigent defense. The resulting breakdown in the adversary system, caused by the widespread inadequacies of publicly funded defense, threatens to undermine the integrity of the entire criminal justice system. If we are to continue to place our faith in the adversary system, we must find a way to correct the blatant inequalities of the adversaries so that the system functions as a dependable truth-seeking mechanism. Trial judges are the answer. Trial judges are not only in the best position to restore the correct balance to the adversary system, but they also have both a professional and ethical obligation to do so.

A trial court judge "is not a passive by-stander in the arena of justice, a spectator at a 'sporting event;' rather he or she has the most pressing affirmative responsibility to see that justice is done in every case."<sup>82</sup> That affirmative responsibility arises from a judge's professional duty to uphold the Constitution and safeguard the rights of defendants. Courts explicitly recognize this professional duty to actively participate in a trial to assure fairness, a duty that also is reflected in the oath that every judge takes upon assuming the bench. In addition, applicable judicial codes of conduct delineate a judge's ethical obligations in this regard.

The closest thing a criminal trial court judge has to a detailed job description is the *ABA Standards for Criminal Justice Special Functions of the*

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80. See Marcus & Backus, *supra* note 10, at 1117-21 (describing the lack of sustainable practical results achieved despite the strong language of the *Smith*, *Lynch*, and *Pearl* cases).

81. Gershowitz, *supra* note 41, at 100-03 (describing the hollow litigation victories in New York and Massachusetts).

82. *United States v. McCord*, 509 F.2d 334, 347 (D.C. Cir. 1974).

*Trial Judge.* Standard 6-1.1(a), General Responsibility of the Trial Judge, states in part:

The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.<sup>83</sup>

Courts consistently echo this view of a trial judge as an active guardian of the adversary process. The Supreme Court, along with every federal circuit,<sup>84</sup> has explicitly recognized that a trial judge has a much broader role than a mere umpire because “[i]t is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial.”<sup>85</sup> Meeting that responsibility often requires that a trial judge abandon a stereotypical umpire role and intervene in an assortment of ways. The Second Circuit’s articulation of this duty is typical:

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83. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-1.1 (3d ed. 2000). Although ABA standards are not mandatory in any jurisdiction, two recent Supreme Court cases support giving them considerable weight. The ABA Standards for Criminal Justice were cited in *Williams v. Taylor* in finding ineffective assistance of counsel because trial counsel did not fulfill the obligation to conduct a thorough investigation of the defendant’s background. 529 U.S. 362, 396 (2000). In *Wiggins v. Smith* the Court utilized the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in evaluating defense counsel’s performance and finding it ineffective. 539 U.S. 510, 524 (2003).

84. *Logue v. Dore*, 103 F.3d 1040, 1045 (1st Cir. 1997) (“It is well-established that a judge is not a mere umpire; he is ‘the governor of the trial for the purpose of assuring its proper conduct,’ and has a perfect right—albeit a right that should be exercised with care—to participate actively in the trial proper.”) (citations omitted); *United States v. Filani*, 74 F.3d 378, 385 (2d Cir. 1996) (rejecting limited role for trial judge); *United States v. Wilensky*, 757 F.2d 594, 597 (3d Cir. 1985) (“The federal judge is more than a ‘mere moderator’ or umpire in the proceeding.”); *Simon v. United States*, 123 F.2d 80, 83 (4th Cir. 1941); *United States v. Dopf*, 434 F.2d 205, 209 (5th Cir. 1970) (A judge’s “role is not limited to that of moderator or umpire. Nor is he a ‘mere automatic oracle of the law, but a living participant in the trial.’”) (internal citations omitted); *United States v. Frazier*, 584 F.2d 790, 793 (6th Cir. 1978) (rejecting rule placing judges in the role of mere umpires); *United States v. Martin*, 189 F.3d 547, 553 (7th Cir. 1999) (“[T]he function of a federal trial judge is not that of an umpire or of a moderator at a town meeting.”) (citations omitted); *Czajka v. Black*, 901 F.2d 1484, 1486 (8th Cir. 1990) (“A federal judge is more than a ‘mere moderator’ or umpire in the proceedings and he may take an active role in conducting the trial and developing the evidence.”) (citations omitted); *United States v. McDonald*, 576 F.2d 1350, 1358 (9th Cir. 1978) (“[T]rial judges are more than moderators or umpires.”); *Glazerman v. United States*, 421 F.2d 547, 553 (10th Cir. 1970) (“[T]he trial judge is not a mere moderator or umpire and within reasonable bounds has the right to participate in eliciting the truth.”); *United States v. Patterson*, 652 F.3d 1046, 1048 (D.C. Cir. 1981) (“A trial judge historically is not just an impartial umpire.”).

85. *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978).

Both the Supreme Court and this Court have repeatedly stated that a district judge is not a moderator, umpire, or passive spectator, but is obligated to intervene whenever necessary to ensure that proceedings over which the judge presides are fairly conducted, even if that intervention conflicts with the intended strategy of one of the parties or attorneys.<sup>86</sup>

This rejection of the “sporting model” of the judiciary is grounded in a judge’s responsibility to ensure a process that is both accurate and fair.<sup>87</sup> Courts expect a trial judge to manage a trial to secure basic accuracy,<sup>88</sup> elicit truth,<sup>89</sup> see the law correctly administered,<sup>90</sup> keep a trial within reasonable bounds,<sup>91</sup> and see that justice is done.<sup>92</sup> As the Supreme Court has recognized, “[i]f truth and fairness are not to be sacrificed, the judge must exert substantial control over the proceedings.”<sup>93</sup> More specifically, the Court has proclaimed that “if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.”<sup>94</sup>

Near universal agreement among the federal circuits is echoed in state courts as well,<sup>95</sup> with several states specifically referencing the ABA Standards with approval.<sup>96</sup> In addition, noted jurists and commentators have also

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86. *In re Charges of Judicial Misconduct*, 465 F.3d 532, 547 (2d Cir. 2006) (citing *Lakeside*, 435 U.S. at 342).

87. See BENNETT L. GERSHMAN, *TRIAL ERROR AND MISCONDUCT* (2d ed. LexisNexis 2007) at 5 (“[A] judge is not simply a moderator or umpire. Rather, a judge has the duty to take an active role in the proceedings to assure that they are conducted in a fair, orderly, and expeditious manner.”) (footnotes omitted).

88. *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 670 (7th Cir. 2003).

89. *Duncan v. Colo. Dep’t of Corr.*, 15 Fed. App’x 730, 733 (10th Cir. 2001).

90. *United States v. Filani*, 74 F.3d 378, 385 (2d Cir. 1996).

91. *United States v. Smith*, 433 F.2d 1266, 1272 (5th Cir. 1970).

92. *Simon v. United States*, 123 F.2d 80, 83 (4th Cir. 1941).

93. *Geders v. United States*, 425 U.S. 80, 87 (1976).

94. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

95. See, e.g., *State v. Loyal*, 899 A.2d 1009, 1016 (N.J. Super. Ct. App. Div. 2006) (“We have long since receded from the arbitrary and artificial methods of the pure adversary system of litigation which regards the opposing lawyers as players and the judge as a mere umpire whose only duty is to determine whether infractions of the rules of the game have been committed.”) (citations omitted); *State v. Davis*, 607 N.E.2d 543, 547 (Ohio Ct. App. 1992) (“In regard to the examination of witnesses, the trial judge is something more than a mere umpire or sergeant at arms to preserve order in the courtroom; he has active duties to perform in maintaining justice and in seeing that the truth is developed. . . .”).

96. *State v. Dunn*, No. P1/96-1005-A, 1997 WL 1526537, at \*1 (R.I. Aug. 6, 1997); *State v. Salitros*, 499 N.W.2d 815, 817 (Minn. 1993) (quoting ABA Standards for Criminal Justice, Special Functions of the Trial Judge with approval); *State v. Tucker*, 602 P.2d 501, 503 (Ariz. Ct. App. 1979) (quoting ABA Standards, *The Function of the Trial Judge*, with approval).

long supported the concept of a broad role for a criminal trial judge.<sup>97</sup> In 1966, Judge Alfred Gitelson and his co-author rejected the idea of a judge as merely an umpire, a referee, a symbol, or an ornament and asserted that “[a] trial judge’s credo must include his affirmative duty to be an instrumentality of justice.”<sup>98</sup> Gitelson’s Credo detailed nearly a dozen affirmative duties and powers judges should exercise in seeking to promote the ends of justice and to serve as “[t]he only possible equalizer, the only assurance that justice may be done.”<sup>99</sup> Similarly, in the early 1970s, Judge Charles E. Wyzanski, a famous federal trial judge, gave a number of prominent lectures suggesting that a trial judge should assume an active role in seeking just results.<sup>100</sup>

By 1978, commentators were characterizing the broader role of trial judges as a trend,<sup>101</sup> and the debate centered on the proper mode of judicial intervention in trials.<sup>102</sup> In a widely cited Harvard Law Review article,

97. The call for shifting the paradigm of judge as passive umpire to a more active manager is also heard in the Access to Justice movement, which seeks to address the lack of access to legal services for the poor. See, e.g., Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *FORDHAM L. REV.* 969, 970 (2004).

98. Alfred Gitelson & Bruce L. Gitelson, *A Trial Judge’s Credo Must Include His Affirmative Duty to be an Instrumentality of Justice*, 7 *SANTA CLARA LAW.* 7, 7 (1967).

99. *Id.* at 8.

100. See, e.g., Charles E. Wyzanski Jr., *An Activist Judge: Mea Maxima Culpa, Apologia Pro Vita Mea*, 7 *GA. L. REV.* 202 (1973); Charles E. Wyzanski Jr., *Equal Justice Through Law*, 47 *TUL. L. REV.* 951 (1973).

101. Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 *VA. L. REV.* 1, 80 (1978) (“The trend seems to be to let the judge become more active, to let the judge search for truth, to let the judge do what he believes must be done in order to provide a ‘fair trial’ for the litigants.”). A similar trend has been noted in the civil context. See Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 *CAL. L. REV.* 1585, 1632-33 (2005) (“There has been a much-noted trend over the past thirty-plus years in which judges in civil litigation have taken a much more active role in pretrial discovery and negotiation than was traditional for common law judges.”); see also Judith Resnik, *Managerial Judges: The Potential Costs*, 45 *PUB. ADMIN. REV.* 686 (1985).

102. See Saltzburg, *supra* note 101. While Saltzburg rejects the need for judges to exercise the power to sum up or comment on evidence or call witnesses, he contends, despite the title of his article, that there are many things a judge can do to assist the litigants in trying their cases. Trial judges “should be permitted to act in an effort to improve the quality of courtroom justice. But this action almost always should be channeled through the attorneys for the parties, even in nonjury cases.” *Id.* at 9; see also William W. Schwarzer, *Dealing with Incompetent Counsel—The Trial Judge’s Role*, 93 *HARV. L. REV.* 633, 639 (1980) (“If the process by which justice is administered is to work as intended, lawyers must perform their functions adequately. When it appears in the course of litigation that a lawyer’s performance is falling short, it should be the trial judge’s responsibility, as the person responsible for the manner in which justice is administered in his court, to take appropriate action. The question confronting the trial judge, therefore, is not whether intervention can be recon-

Judge William W. Schwarzer specifically addressed the question of a judge's role when confronted with incompetent counsel and asserted that direct action by the trial judge to assure the competence of trial counsel is both desirable and necessary.<sup>103</sup> Schwarzer argued that "prophylactic action by the trial judge is consistent with our commitment to the adversary system and with relevant constitutional principles."<sup>104</sup> While insisting that trial judges must take steps to ensure that counsel is competent, Schwarzer also acknowledged that the mode and the extent of the intervention must be handled "with caution lest its exercise defeat its purpose: fairness in the administration of justice."<sup>105</sup> In that vein, he offered guidelines for intervention in both criminal and civil litigation.<sup>106</sup>

A quarter century after Schwarzer's influential article on a trial judge's role, the ABA noted this trend in the changing role of trial judges in its 2003 Report of the Commission on the 21st Century Judiciary:

The traditional image of a judge . . . is that of a disinterested referee. An emerging trend that several witnesses brought to the Commission's attention, however, calls upon judges to roll up their sleeves and serve as engaged problem solvers on a disparate array of issues ranging from crime, juvenile delinquency, and drug and alcohol dependency to divorce and child support.<sup>107</sup>

More recently, Bill Stuntz, in his call for radical constitutional reform from the bottom-up, argues that criminal justice reform would be best served by, in part, shifting power to trial judges.<sup>108</sup> Stuntz views trial judges as having significant informational advantages over appellate judges (who usually are

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*ciled with the adversary process, but how to exercise the discretion to intervene so as to accommodate the competing demands of that process.*") (emphasis added).

103. Schwarzer, *supra* note 102, at 633.

104. *Id.* at 636.

105. *Id.* at 649.

106. *Id.* at 649-69. Other commentators have also proposed specific judicial intervention actions. See, e.g., Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 580-82 (1988) (proposing judicial monitoring of attorney preparation through a pretrial conference or worksheet).

107. ABA COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 58 (2003) [hereinafter JUSTICE IN JEOPARDY]. The report makes note of the well-documented changes in the role of courts over time and explores the concept of "problem solving" courts as an example of the changing role of the trial judge. *Id.* at 47-48.

108. William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 824 (2006) ("Constitutional regulation is a top-down enterprise; it needs to be more bottom-up. That requires taking power away from appellate judges (especially the nine who sit at the top of the judicial pyramid), and giving more of it to trial judges."). Others have also suggested that a trial judges must lead the way to reform. See, e.g., Franklin D. Strier, *Major Problems Endemic to the Adversary System and Proposed Reforms*, 19 W. ST. U. L. REV. 463 (1992) (proposing a redistribution of some of the attorneys' control over the conduct of the trial to the judge); Pearce, *supra* note 97 (proposing replacing the paradigm of judge as passive umpire with the paradigm of judge as active umpire).

responsible for considering ineffective assistance of counsel claims in post conviction proceedings). As a result, “[t]rial judges are . . . well positioned to see patterns of good and bad conduct by those institutions [police, prosecutors, defense attorneys].”<sup>109</sup> His proposal seeks to address the problems plaguing the criminal justice system through reform sparked by the increased discretion of trial judges.<sup>110</sup>

There is, of course, significant opposition to the widely supported belief in a broad role for trial judges.<sup>111</sup> The debate over the proper role for judges has been ongoing throughout our history and it is fair to say that “there is a deep division among scholars and on the bench as to the appropriate role for the judiciary.”<sup>112</sup> Notably, Chief Justice Roberts employed the umpire analogy to great effect in his confirmation hearings before the Senate in 2005.<sup>113</sup> In his opening statement, Roberts, as nominee to be the Chief Justice of the United States, stated:

Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.<sup>114</sup>

Insisting that a trial judge has a professional obligation to actively manage a criminal proceeding to ensure fairness raises the dreaded specter of the “Judicial Activism” label. As Judge Frank Easterbrook observed, “[e]veryone scorns judicial ‘activism,’ that notoriously slippery term.”<sup>115</sup> Despite the lack of a clear definition,<sup>116</sup> the term remains ignominious, whatever its substantive meaning. But even those who reject “activist judges” acknowledge that a judge’s duty extends to upholding the law and applying the rules fairly and consistently without seeking a particular result. The law is clear

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109. Stuntz, *supra* note 108, at 825.

110. *Id.* (“A set of trial judges making discretionary decision in a given jurisdiction can create something like a market, to which government institutions can then respond. . .”).

111. *See, e.g.*, ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003).

112. Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593, 598 (1991). For a general description of the varying perspectives on the role of judges see Roger Hansen, *The Changing Role of a Judge and Its Implications*, CT. REV., Winter 2002, available at <http://aja.ncsc.dni.us/courtrv/cr38-4/CR38-4Hanson.pdf>.

113. For a short description of Chief Justice Roberts’s use of the umpire analogy in his confirmation hearings, see Caprice L. Roberts, *In Search of Judicial Activism: Dangers in Quantifying the Qualitative*, 74 TENN. L. REV. 567, 617-19 (2006).

114. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005).

115. Hon. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1401 (2002).

116. *See generally* Keenan D. Kmiec, Comment, *The Origin and Current Meanings of “Judicial Activism”*, 92 CALIF. L. REV. 1441 (2004).

on a defendant's Sixth Amendment right to counsel, and its "peculiar sacredness"<sup>117</sup> is often heralded as a cornerstone of our criminal justice system. Judges who insist on adequate counsel for criminal defendants are merely, in Chief Justice Roberts' words, making sure everyone plays by the rules. Even Judge Learned Hand, who is known as an advocate for judicial restraint and argued for a limited role for judges,<sup>118</sup> wrote that "[a] judge is more than a moderator; he is charged to see that the law is properly administered and it is a duty which he cannot discharge by remaining inert."<sup>119</sup>

A judge's professional duty to actively participate in a trial to assure fairness is also reflected in the oath that every judge takes upon assuming the bench. The United States Constitution requires that all judicial officers, both federal and state, must swear an oath to uphold the Constitution.<sup>120</sup> Federal judges must swear or affirm the following:

I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_\_ under the Constitution and laws of the United States. So help me God.<sup>121</sup>

Each state has a similar oath.<sup>122</sup> It is not uncommon for court opinions to explicitly reference the oath in explaining a holding or a court's rationale in reaching a decision, particularly one that might be unpopular or distasteful. The Fifth Circuit, for instance, in granting a stay of execution for a man convicted of murdering his eight-year-old son with cyanide-laced Halloween candy, ended the opinion with this observation:

As federal judges, we are sworn to uphold the Constitution and laws of the United States, as they have been construed by the Supreme Court, and to apply those laws evenly with respect to all people. We believe that our sworn obligation is to grant a stay of Petitioner's execution.<sup>123</sup>

Similarly, a Sixth Circuit judge in dissent defended his efforts to stay an execution by citing the oath:

As a Federal Appellate Judge, I have tried, in keeping with my oath to uphold the Constitution of the United States, to prevent the taking of the life of a not-so-

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117. *Avery v. Alabama*, 308 U.S. 444, 447 (1940).

118. *See generally* KATHRYN GRIFFITH, *JUDGE LEARNED HAND AND THE ROLE OF THE FEDERAL JUDICIARY* (1973).

119. *United States v. Marzano*, 149 F.2d 923, 925 (2d Cir. 1945).

120. U.S. CONST. art. VI, cl. 3 ("[A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . .").

121. 28 U.S.C. § 453 (2006).

122. *See, e.g.*, FLA. CONST. art. II, § 5; VA. CONST. art. II, § 7 (2008); MICH. CONST. art. XI, § 1 (2008); OKLA. CONST. art. XV, § 1 (2008).

123. *O'Bryan v. Estelle*, 691 F.2d 706, 710 (5th Cir. 1982).

decent man, but one, who, with all his of flaws, was, nevertheless, entitled to all of the rights guaranteed by the Constitution.<sup>124</sup>

The D.C. District Court relied upon the oath as evidence that plaintiffs could receive a fair and impartial trial in a court other than their preferred choice of venue even in the face of allegations of harassment and retaliation over the action. In a bitter environmental action over sea turtles and tree boas, the court placed their faith in the oath as the key to ensuring that justice could be done, “despite the political overtones of the case and the sometimes racially-charged rhetoric of the public debate.”<sup>125</sup> The court insisted:

There is no question that this type of heated atmosphere puts additional pressure on judges. But that is far from saying that a federal judge in the Virgin Islands cannot hold a fair trial or render a fair judgment. When federal judges take their oath of office they swear to impartially administer justice and uphold the Constitution of the United States. In difficult cases like this one, that oath is particularly compelling, and no evidence has been presented to establish that it will not be carried out in the finest tradition of the federal bench.<sup>126</sup>

State court judges, too, often invoke their oath as the explanation for a holding. Justice Houston, of the Alabama Supreme Court, repeatedly used the same language and rationale to dissent from his court’s majority decisions. Compare Justice Houston’s dissent in *Ex parte Coleman*:

If I were writing on a clean slate, freed from the deference that I do and must give to the opinions of the United States Supreme Court, I would vote to deny the petition for a writ of prohibition. However, I have given my solemn oath to uphold the Constitution of the United States, as I understand it, and that includes the second paragraph of Article VI; therefore, I must dissent.<sup>127</sup>

with his dissent in *HealthAmerica v. Menton*:

If I were writing on a clean slate, freed from the deference that I do and must give to the opinions of the United States Supreme Court, I could reach the result reached by the majority of this Court in this case . . . . However, I have given my solemn oath to uphold the Constitution of the United States, and that includes the second paragraph of Article VI; therefore, I must dissent.<sup>128</sup>

124. *Byrd v. Bagley*, 37 Fed. App’x 94, 96 (6th Cir. 2002) (Jones, J., dissenting).

125. *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 939 F. Supp. 1, 5 (D.D.C. 1996).

126. *Id.*

127. 584 So. 2d 455, 458 (Ala. 1991). The paragraph in Article VI of the Constitution to which he refers states: “This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

128. 551 So. 2d 235, 249 (Ala. 1989) (Houston, J., dissenting).

State judges have recognized that abiding by their solemn oath is the “very core of [their] judicial responsibility”<sup>129</sup> and that failing to uphold their constitutions (federal and state) would be an abrogation of the judicial power conveyed to them by those documents.<sup>130</sup> A judge’s duty under the oath does not permit him to merely follow his personal preferences,<sup>131</sup> take the easier course,<sup>132</sup> selectively pick and choose which provisions to uphold,<sup>133</sup> or simply do what a majority thinks is fair.<sup>134</sup> The significance of the oath cannot be understated. Torn between his oath to “uphold the Constitution and laws of this nation and this state” and his “conscience and sense of justice,” one state judge resigned rather than sentence a defendant to a sentence, mandatory by law, that he found unconscionable.<sup>135</sup>

The professional obligation trial judges have to actively guard the rights of defendants and preserve the adversary system is not only recognized by state and federal courts and reflected in the judicial oath, but is an ethical imperative as well. Judicial conduct is generally regulated by Codes of Judicial Conduct, promulgated primarily by the American Bar Association.<sup>136</sup> Although the ABA’s model codes must be adopted by a particular jurisdiction to have effect, the vast majority of state and federal judges are subject to some version of the code.<sup>137</sup> The codes all preface the ethical rules with the admonition that the role of the judiciary is central to the American concepts of justice and the rule of law, and that all judges “must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.”<sup>138</sup>

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129. *People v. Tanner*, 596 P.2d 328, 359 (Cal. 1979) (internal citations omitted) (Bird, J., concurring and dissenting).

130. *Holly Care Ctr. v. Dep’t. of Employment*, 714 P.2d 45, 51 (Idaho 1986).

131. *State ex rel. Ohio AFL-CIO v. Voinovich*, 631 N.E.2d 582, 598 (Ohio 1994) (Douglas, J., dissenting); *City of Greenwood v. Telfair*, 42 So. 2d 120, 122 (Miss. 1949).

132. *Poppen v. Walker*, 520 N.W.2d 238, 250 (S.D. 1994) (Miller, J., concurring).

133. *W.V. Trust Fund v. Bailey*, 485 S.E.2d 407, 433 (W. Va. 1997) (Workman, J., concurring).

134. *Ex parte McGinn*, 54 S.W.3d 324, 333 (Tex. Crim. App. 2000) (Womack, J., concurring).

135. Gene E. Franchini, *Conscience, Judging and Conscientious Judging*, 2 J. APP. PRAC. & PROCESS 19, 20 (2000).

136. JAMES J. ALFINI ET AL., *JUDICIAL CONDUCT AND ETHICS* § 1.03 (4th ed., LexisNexis 2007). The original ABA Canons of Judicial Ethics were adopted in 1924 followed by the Model Code of Judicial Conduct in 1972, with revisions in 1990 and most recently in 2007. *Id.*

137. *Id.* Before 1990, the 1972 Code had been largely adopted by 47 states, D.C., and the Federal Judicial Conference. Since then, nearly two dozen jurisdictions have essentially adopted the 1990 revision in some form. The newest revision was just adopted by the ABA in February of 2007.

138. MODEL CODE OF JUDICIAL CONDUCT, PREAMBLE (1990) (amended 1999). The 2007 revision uses similar language.

Like the oath that all judges take, the Judicial Code requires that judges be faithful to and uphold the law.<sup>139</sup> This duty is to be carried out even in the face of “public clamor or fear of criticism.”<sup>140</sup> In addition, a judge is obliged to ensure that criminal defendants are heard according to law.<sup>141</sup> In short, judges can be held accountable, and disciplined under the applicable Judicial Code, for failing to protect a defendant’s right to counsel even when it may be unpopular or inconvenient to do so.<sup>142</sup>

For instance, a municipal court judge was disciplined by the New Jersey Supreme Court for demeaning a defendant’s right to counsel with this scornful explanation:

I have to go through this drill and ask you if you wanted a lawyer or not. . . . They make me do it. I know you don’t want one, you know you don’t want one, but I have to go through this and waste your time anyhow. Do you want one or don’t you?<sup>143</sup>

The court noted that “a judge’s obligation to inform defendants of their right to counsel is of paramount importance” and concluded that “[w]e cannot expect the public to maintain confidence in the judicial system if judges treat constitutional rights as minor obstacles to the disposition of cases.”<sup>144</sup> The judge’s disparaging remarks about the defendant’s right to counsel were ruled a violation of the New Jersey Code of Judicial Conduct.

Judges subject to discipline for failure to advise the accused of the right to counsel have argued that such failings are mistakes and errors of law that should be corrected on appeal rather than treated as a matter of judicial misconduct.<sup>145</sup> However, while such a remedy may exist, a judge’s failure to appropriately guard litigants’ constitutional and statutory rights is also serious misconduct under the ethics code that governs judges. The damage is viewed as much further reaching than simply the harm inflicted upon individual defendants. In removing one judge from office for, in part, denying a defendant’s Sixth Amendment right to counsel, the Georgia Supreme Court explained the broader harm:

Judge Vaughn’s cavalier disregard of these defendants’ basic and fundamental constitutional rights exhibits an intolerable degree of judicial incompetence, and a failure to comprehend and safeguard the very basis of our constitutional structure. Further, we find that these instances of Judge Vaughn’s conduct have brought dis-

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139. MODEL CODE OF JUDICIAL CONDUCT CANON 3(B)(2) (1990) (amended 1999); MODEL CODE OF JUDICIAL CONDUCT R 2.2 (2007).

140. MODEL CODE OF JUDICIAL CONDUCT R 2.4(A) (2007).

141. MODEL CODE OF JUDICIAL CONDUCT R 2.6(A) (2007).

142. For a discussion of a judge’s general responsibility to protect litigants’ rights, see ALFINI ET AL, *supra* note 136, at § 2.04C.

143. *In re Bozarth*, 604 A.2d 100, 102 (N.J. 1992).

144. *Id.* at 106.

145. *In re Reeves*, 469 N.E.2d 1321, 1323 (N.Y. 1984).

repute upon the judicial office, and served to diminish public confidence in that office, in violation of Canons One, Two, and Three of the Code.<sup>146</sup>

An ethical violation arises, then, not just because a trial judge makes a mistake of law in failing to uphold a defendant's right to counsel, but because that failure undermines the entire judicial system.

### III. CONCRETE ACTIONS TO EVEN THE PLAYING FIELD

If trial judges have a professional and ethical obligation to act to uphold the law and protect a defendant's right to counsel, particularly in the face of dysfunctional indigent defense systems, what precisely should they be doing? It is true that no intervention by the trial judge on behalf of an accused can eliminate the need for competent counsel. As the Supreme Court noted in *Powell v. Alabama*:

But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.<sup>147</sup>

However, trial judges can take concrete steps to equalize the caliber of the advocates on either side. While directly ordering state legislatures to increase funding would be a welcome judicial intervention (and some courts have done just that),<sup>148</sup> there may be no need for courts to risk usurping the legislative function to effect change.<sup>149</sup> Individual judges can do much to

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146. *In re Inquiry Concerning a Judge*, 462 S.E.2d 728, 735 (Ga. 1995).

147. 287 U.S. 45, 61 (1932).

148. *See, e.g., N.Y. County Lawyers' Ass'n v. State*, 763 N.Y.S.2d 397, 410 (N.Y. Sup. Ct. 2003) (finding compensation rates unconstitutional and issuing a mandatory permanent injunction and directing assigned counsel be paid \$90 an hour until the Legislature acts).

149. Although some courts have ordered additional funding, many courts have balked at intruding on what is seen as a legislative function. *See, e.g., In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1136 (Fla. 1990) ("Further, while it is true that the legislature's failure to adequately fund the public defenders' offices is at the heart of this problem, and the legislature should live up to its responsibilities and appropriate an adequate amount for this purpose, it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function."). *See also State v. Ruiz*, 602 S.W.2d 625, 627 (Ark. 1980) ("We do not imply that the present statutory allowances even come close to providing adequate compensation for the services performed in this case. However, this question of adequate compensation is not a matter to be addressed by the court but is within the province of the legislature. It is obvious that most counties are unable to pay the type of fee required in such cases. The counties did not do anything to incur the obligation; and, no doubt, every county would prefer that if a crime is to be committed that it be done elsewhere. It would appear logical that

prod reform and restore the balance to the adversary system that is now lacking. Indeed, the burden of intervening to prevent ineffective assistance of counsel, and thus correcting the adversarial imbalance, falls to trial court judges in part because the remedy of the appellate process is inadequate.<sup>150</sup> The highly criticized standard set by *Strickland v. Washington* has effectively quashed any real shot a defendant has at establishing on appeal that defense counsel was ineffective.<sup>151</sup> With no realistic appellate remedy, the trial judge remains the key guardian of the Sixth Amendment right to counsel and the adversary system.

Trial judges have considerable powers, both inherent and under specific procedural rules, to control the proceedings within their own courtrooms and to administer justice. For instance, evidence rules allow both civil and criminal judges not only to examine witnesses,<sup>152</sup> but to call their own witnesses and supplement the parties' evidence.<sup>153</sup> It is entirely proper for criminal trial judges to engage in questioning to bring out the facts,<sup>154</sup> to elicit the truth, and to give a defendant an opportunity to explain certain statements or reconcile, if possible, apparently conflicting statements.<sup>155</sup> In addition, a trial judge may ask questions to clarify the evidence and even engage in a rather extensive examination if the judge has reason to believe that a witness is not telling the truth.<sup>156</sup>

In addition to rule-based powers, the inherent powers of the judiciary recognized by both federal and state courts are wide ranging, constrained only by a judge's discretion and the requirement that a judge remain impartial.<sup>157</sup> The doctrine of inherent judicial power permits the judicial branch to take necessary actions to fulfill its constitutional functions, even when those actions are not expressly authorized by constitution or statute.<sup>158</sup> The doc-

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the state owes an obligation to pay under circumstances such as presented here; however, this is a matter which must be left to the sound discretion of the General Assembly.”)

150. See Klein, *supra* note 22, at 630-49 (discussing the obstacles and the limitations imposed on defendants seeking appellate relief for claims of ineffective assistance of counsel).

151. For a comprehensive critique of *Strickland* and how the standard has eroded the right to counsel, see William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

152. See, e.g., FED. R. EVID. 614(b).

153. See, e.g., FED. R. EVID. 614(a), 706.

154. See *People v. Mortensen*, 26 Cal. Rptr. 746, 751 (Cal. Dist. Ct. App. 1962).

155. *People v. Morris*, 292 P.2d 15, 21 (Cal. Dist. Ct. App. 1956).

156. *People v. Schuldt*, 577 N.E.2d 870, 877 (Ill. App. Ct. 1991).

157. See *Carlisle v. United States*, 517 U.S. 416, 437 (U.S. 1996) (“There is a ‘power ‘inherent in every court of justice so long as it retains control of the subject matter and of the parties, to correct that which has been wrongfully done by virtue of its process.’”).

158. G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12, 14 (2004).

trine rests on the constitutional notion that the judiciary must remain a separate, effective, and independent branch of government.<sup>159</sup>

Even though the exact contours of a court's inherent powers are unsettled, "courts under their inherent powers have developed a wide range of tools to promote efficiency in their courtroom and to achieve justice in their results."<sup>160</sup> The Supreme Court has recognized that courts have implied powers arising from the very nature of the institution. A court can utilize those powers to control admission to the bar, discipline attorneys, punish for contempt, vacate its own judgments upon a finding of fraud, bar a criminal defendant from a courtroom for disruptive behavior, assess attorney's fees, and dismiss a suit on *forum non conveniens* grounds or for failure to prosecute.<sup>161</sup> For more than a century, judiciaries have used the doctrine both in noncontroversial ways, such as permitting photographers access to courtrooms, and in more aggressive ways, such as requiring legislatures to adequately fund and protect their essential functions.<sup>162</sup>

In short, courts have the inherent power to do what is reasonably necessary for the proper administration of justice<sup>163</sup> and to protect the court's dignity, independence, and integrity.<sup>164</sup> Additionally, the abysmal state of publically-funded defense services fueling the failure of the adversary system certainly undermines the integrity of the court and, ultimately, the legitimacy of criminal convictions.<sup>165</sup>

A trial judge is in a unique position to observe the performance of the advocates appearing before the court and assess whether the adversary system is functioning as intended. As one court has observed, "It is undeniable that trial judges are particularly well suited to observe courtroom performance and to rule on the adequacy of counsel in criminal cases tried before them."<sup>166</sup> In fact, appellate courts frequently defer to the better position of trial judges in determining whether a claim for ineffective assistance of

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159. See Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 227 (1993).

160. *Spencer v. Steinman*, No. 2:96-CV-1792 ER, 1999 WL 33957391, at \*3 (E.D. Pa. Feb. 26, 1999) (citations omitted).

161. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991).

162. See Jackson, *supra* note 159, at 227.

163. *Beard v. N.C. State Bar*, 357 S.E.2d 694, 696 (N.C. 1987).

164. *Bd. of County Comm'rs of Weld County v. Nineteenth Judicial Dist.*, 895 P.2d 545, 547-48 (Colo. 1995).

165. Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. REV. L. & SOC. CHANGE 425, 442-43 (2004) ("The concern with public confidence in the integrity of the judicial process has been explicitly relevant in the right-to-counsel jurisprudence.").

166. *People v. Fosselman*, 659 P.2d 1144, 1150 (Cal. 1983).

counsel is meritorious.<sup>167</sup> Without the intervention of trial judges, the imbalance in the adversary system will only intensify.

The kinds of substantive errors by defense counsel that support a claim of ineffective assistance of counsel also suggest that a trial judge should often be aware at the time of trial that an advocate is falling short. Professor Bennett Gershman's treatise, *Trial Error and Misconduct*, lists the following eight substantive violations of a defense counsel's duty of competent representation:

- (1) Failing to investigate potential defense;
- (2) Failing to present crucial evidence;
- (3) Failing to impeach prosecution witnesses;
- (4) Opening door to damaging evidence;
- (5) Not objecting to prosecution misconduct;
- (6) Not objecting to discriminatory jury strikes;
- (7) Failure to communicate plea deal; and
- (8) Abandoning client.<sup>168</sup>

Lacking investigative resources of their own, it is true that judges are not always in a position to fully evaluate the credibility of the prosecution's evidence or assess the strength of the defense.<sup>169</sup> However, "they are certainly aware in general terms how conscientiously lawyers represent their clients."<sup>170</sup> A few simple inquiries as to the level of preparation of the defense attorney—the extent of the communication between the lawyer and the client, potential motions, and scope of investigation, if any—would reveal enough for a trial judge to be alert to most of the above violations.

The thoroughness of the preparation and investigation, often the key to effective representation,<sup>171</sup> is an area ripe for judicial monitoring. The difficulty in determining the proper level of investigation has led the law of inef-

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167. Klein, *supra* note 106, at 566 ("Appellate courts consistently have ruled that although a defendant's claim on appeal that he was denied effective assistance may appear to have merit, the trial court was in a better position to have made that judgment.").

168. GERSHMAN, *supra* note 87, at §§ 3-3(b)(1)-(8).

169. Green, *supra* note 22, at 1194.

170. *Id.* at 1193.

171. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (citing *Strickland* to reiterate that "counsel has a duty to make reasonable investigations"); *United States v. Shetterly*, 971 F.2d 67, 74 (7th Cir. 1992) ("Effective representation of a criminal defendant requires pre-trial preparation and investigation."); *Wolfs v. Britton*, 509 F.2d 304, 309 (8th Cir. 1975) ("[E]ffective assistance refers not only to forensic skills but to painstaking investigation in preparation for trial"); *Gueldner v. Heyd*, 311 F. Supp. 1168, 1171 (E.D. La. 1970) ("It is axiomatic that effective presentation of a case before a jury is premised on diligent and adequate trial preparation. Thus, the right for an accused to be represented at trial means the accused has a right to an attorney who has adequate time to prepare the case.").

fective assistance of counsel to essentially ignore the problem of insufficient preparation.<sup>172</sup> Although it may be true that establishing firm categories of appropriate preparation for different types of cases is impossible because “some cases may call for almost no effort while others require a lot,”<sup>173</sup> a trial judge is in a position to make that assessment on a case-by-case basis. As a result, scholars have consistently proposed that trial judges monitor defense counsel in just this way to ensure competence.<sup>174</sup> This type of inquiry by the court would send a strong signal to defense attorneys that preparation and investigation are expected and that “meet ’em and plead ’em” representation is inadequate and unacceptable. Lawyers would eventually conform their actions to a judge’s expectations.<sup>175</sup>

Closely related to monitoring defense preparation and investigation is the discovery process, another area where a few simple changes could reap results. Justice William Brennan was an early proponent of expanded criminal discovery to “keep[] the scales evenly balanced in [the defendant’s] contest with the state.”<sup>176</sup> In a 1963 lecture, Justice Brennan asserted that

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172. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 70 (1997) (“No one has yet figured out a good mechanism for defining a reasonable level of representation—more importantly, no one has figured out a way to define a reasonable level of attorney investigation. The difficulty is that some cases may call for almost no effort while others require a lot; separating the categories is at least expensive, and at most impossible. The law has responded by retreating to the model of the discrete attorney error. Insufficient investigation is basically left alone. The upshot is that Gideon, while not trivial, means vastly less than it seems. Defendants receive counsel, but counsel must bear caseloads that require them to start with a strong presumption against any significant investment in any given case.”).

173. *Id.*

174. See Klein, *supra* note 106, at 564-84 (recommending trial court monitoring of criminal defense attorneys); Barbara R. Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275, 1426-35 (1984) (recommending trial court monitoring of criminal defense attorneys); Schwarzer, *supra* note 103, at 633 (recommending that the trial court monitor trial counsel); Peter W. Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 161-65 (1977) (recommending trial court monitoring of criminal defense attorneys). For a proposal to monitor capital postconviction counsel, see Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. PITT. L. REV. 521 (2005).

175. There is evidence that judicial behavior significantly impacts a defendant’s behavior as well. Recent studies suggest that defendants are more likely to comply with court orders where they have more interaction with the judge. See Center for Court Innovation, *Changing the Court: The Role of the Judge*, Jan. 9, 2007, <http://www.changingthecourt.blogspot.com/2007/01role-of-judge.html>.

176. William J. Brennan, Jr., *Criminal Prosecution: Sporting Event or Quest For Truth?*, 1963 WASH. U. L.Q. 279, 285 (1963). Interestingly, some make the opposite argument—that broadened criminal discovery undermines the adversary system. See Hon. H. Lee Sarokin & William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1090-91 (1991)

“[c]riminal discovery would be one tool whereby [defendants] would have a better chance to meet on more equal terms what the state, at its leisure and without real concern for expense gathers to convict them.”<sup>177</sup> After evaluating and rejecting the standard arguments against liberal criminal discovery—the dangers of perjury, witness intimidation, and lack of reciprocal disclosure from defendants claiming the right against self incrimination—Justice Brennan concluded that the primary responsibility for administering expanded criminal discovery should fall to trial judges and the exercise of their sound discretion.<sup>178</sup>

Others have echoed Justice Brennan’s call for expanded discovery as a means to ensuring effective assistance of counsel.<sup>179</sup> Although discovery rules are often prescribed by statute, judges do retain some inherent power to order discovery when necessary to achieve justice.<sup>180</sup> At a very basic level, judges can respond positively to defense motions for discovery, which may not only serve the defense function, but may also assist the prosecution in securing plea deals and resolving cases more efficiently. Alternatively, judges can craft standing discovery orders that address problem areas like the reliability of jailhouse informants.<sup>181</sup> In navigating the complex landscape of *Brady* disclosures,<sup>182</sup> judges can insist that prosecutors respond, on the record, to the judge’s specific questions about disclosure of witness

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(“[T]he argument in favor of continued restrictions on criminal discovery is usually premised on the theory that to allow criminal defendants greater access to the government’s evidence is to undermine the adversary system of trial.”).

177. Brennan, *supra* note 176, at 286.

178. *Id.* at 289-95.

179. See, e.g., Jenny Roberts, *Special Feature: A Conference on New York City’s Criminal Courts: Too Little Too Late: Ineffective Assistance of Counsel, The Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 *FORDHAM URB. L.J.* 1097 (2004) (arguing that broad and early discovery is necessary for the effective assistance of counsel and that it ameliorates the resource imbalance between state and defendant); see also Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 *GEO. MASON L. REV.* 257 (2008) (arguing for the paramount importance of a broad and sure disclosure requirement in criminal cases that, in the first instance, helps prevent failures of ethical standards).

180. Roger J. Traynor, *Ground Lost & Found in Criminal Discovery*, 39 *N.Y.U. L. REV.* 228, 231 (1964).

181. Peter A. Joy, *Symposium: Prosecutorial Ethics and the Right to a Fair Trial: The Role of the Brady Rule in the Modern Criminal Justice System: Brady and Jailhouse Informants: Responding to Injustice*, 57 *CASE W. RES. L. REV.* 619, 648 (2007).

182. In *Brady v. Maryland*, the Supreme Court held that prosecutors have a constitutional duty to disclose exculpatory evidence to defendants: “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” 373 U.S. 83, 87 (1963). This principal has led to great confusion and inconsistency in the application and enforcement of *Brady* disclosures. See Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 *CASE W. RES. L. REV.* 531 (2007).

statements or physical evidence and can order in camera review of documents to make an independent determination of a document's materiality. This type of inquiry by the judge not only signals to the prosecutor that disclosure rules will be enforced, but provides a record that might be useful should an appeal be warranted.

Monitoring and supporting defense investigation, preparation, and discovery can certainly help put indigent defendants on more equal footing with the state. But there is another area where judges may make an even more significant contribution—ensuring that defendants actually *have* an advocate through a more vigilant inquiry into waivers of counsel.<sup>183</sup> A recent ABA study found that judges too often seek or accept invalid waivers of counsel and guilty pleas from unrepresented accused persons:

Lawyers are not provided in numerous proceedings in which a right to counsel exists in accordance with the Constitution and/or state law. Too often, prosecutors seek to obtain waivers of counsel and guilty pleas from unrepresented accused persons, while judges accept and sometimes even encourage waivers of counsel that are not knowing, voluntary, intelligent, and on the record. Throughout the country, indigent defendants who have not knowingly, voluntarily, and intelligently waived their right to counsel are denied representation at critical stages of the criminal process, in violation of constitutional requirements. To make matters worse, prosecutors and judges sometimes improperly encourage waivers of the right to counsel and subsequent pleas of guilty from unrepresented indigent defendants, in violation of disciplinary rules and national standards.<sup>184</sup>

To ensure a functional adversary system, judges must fulfill their obligation to make a thorough inquiry into the particular facts of the case, including the background, experience, and conduct of the accused before finding that a defendant has waived the right to an attorney.<sup>185</sup> A perfunctory inquiry, using a form or a videotape, is not sufficient to determine that a waiver of counsel is voluntary, knowing, and intelligent.<sup>186</sup> In most instances, a defendant needs to speak with a lawyer to know whether it makes sense to

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183. The National Council of Juvenile and Family Court Judges (NCJFCJ) also recognizes the central role individual judges play in protecting an individual's right to counsel. One of the core principles of the Juvenile Delinquency Guidelines is the critical importance of qualified defense counsel. The Guidelines acknowledge that accused children's right to counsel is often compromised by frequent and inappropriate waiver and that, as a result, other elements of a fair trial are imperiled. "NCJFCJ therefore holds delinquency judges responsible for providing children with access to counsel at every stage of the proceedings, from before the initial hearing through post-disposition and reentry." NCJFCJ has created a special publication, *Encouraging Judges to Support Zealous Defense Advocacy from Detention to Post-Disposition An Overview of the Juvenile Delinquency Guidelines of the National Council of Juvenile and Family Court Judges*, available at [http://www.njdc.info/pdf/ncjfcj\\_fact\\_sheet.pdf](http://www.njdc.info/pdf/ncjfcj_fact_sheet.pdf) (last visited Mar. 3, 2009), which is designed to help attorneys educate judges on their responsibilities regarding ensuring the right to counsel.

184. *GIDEON'S BROKEN PROMISE*, *supra* note 9, at 39.

185. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

186. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

agree to waive representation. Judges can insist that prosecutors not speak with un-counseled defendants. Additionally, although the U.S. Supreme Court has declined to prescribe a specific script or formula for determining a valid waiver of counsel,<sup>187</sup> judges can also insist on making a real inquiry to determine that a defendant knows what he is doing and that his choice is made with eyes open.<sup>188</sup>

The additional time these assorted inquiries and interventions would take in an already overburdened system is not an insignificant concern.<sup>189</sup> And yet, weighed against the constitutional rights of the accused, we cannot allow claims of docket pressure to nullify the central feature of the adversary system.<sup>190</sup> In *Powell v. Alabama*, the Supreme Court recognized the time pressures within the system but refused to accept that as an excuse for shortchanging defendants:

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. . . . The prompt disposition of criminal cases is

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187. *Iowa v. Tovar*, 541 U.S. 77, 88 (2004).

188. Similarly, judges can ensure that plea bargaining process is free from coercion and that defendants have complete information before accepting a plea bargain. For a comprehensive look at coercive tactics employed by some judges in plea bargaining, and the negative impact of unprepared lawyers in the process, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004), and Richard Klein, *Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349 (2004).

189. Klein has suggested that such monitoring might actually save time and resources in the long run:

If judicial monitoring were to be institutionalized, accepted, and anticipated, one could expect lawyers to attempt, to the extent time permits, to prepare and investigate each case fully. The result might very well be that after a while, less court time would be required for intervention. There might even be some economic gain for the system: as judges ensure that counsel are prepared, there may be fewer reversals of convictions on ineffective assistance grounds, with a corresponding decrease in costs for retrials.

Klein, *supra* note 106, at 581 n.333.

According to Judge Judy Harris Kluger, an administrative judge in New York City Criminal Court, dedicating more time to each defendant may also make a judge more effective:

You know, for a long time my claim to fame was that I arraigned 200 cases in one session. That's ridiculous. When I was arraigning cases, I'd be handed the papers, say the sentence is going to be five days, ten days, whatever, never even looking at the defendant. At a community court, I'm able to look up from the papers and see the person standing in front of me. It takes two or three more minutes, but I think a judge is much more effective that way.

Greg Berman, *What is a Traditional Judge Anyway? Problem Solving in the State Courts*, 84 JUDICATURE 78, 81 (2000).

190. In the context of limiting the introduction of evidence and the length of trial, see *Sims v. ANR Freight Sys.*, 77 F.3d 846, 849 (5th Cir. 1996) (“[I]f the goal of expediency is given higher priority than the pursuit of justice, then the bench and the bar both will have failed in their duty to uphold the Constitution and the underlying principles upon which our profession is founded.”).

to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to . . . prepare his defense.<sup>191</sup>

Similarly, the Court has warned that “a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.”<sup>192</sup> Thus, the Bill of Rights does not guarantee an accused effective assistance of counsel only when the state has time to provide it. In the words of one state supreme court, “[t]here is no place in the judiciary for one who will not take equal pains with each and every case and litigant, no matter how small or humble, to ensure that they are guaranteed the same fundamental rights as the greatest and mightiest in our State.”<sup>193</sup>

Even setting the issue of available time aside, there are limits on the degree of intervention a judge may exercise. Employing a court’s inherent powers to control the courtroom and administer justice requires a judge to exhibit evenhandedness and maintain impartiality.<sup>194</sup> Impartial, however, does not mean inert. A judge abuses his discretion only when he exhibits bias or appears to the jury to be an advocate.<sup>195</sup> There are any number of ways a judge can avoid the appearance of advocating for the defense, the most simple of which may be to conduct any intervention, questioning, or discussions relating to the defense outside the presence of the jury.

The tools a judge has to guard the adversary system are, of course, not limited to the arenas of investigation, preparation, discovery, and waiver. Judges can equalize the contest between the defendant and the state in countless other ways—big and small. For instance, a judge can engage in rather significant actions by policing prosecutor ethics<sup>196</sup> or agreeing to substitute counsel when an indigent defendant is not satisfied with the representation provided by assigned counsel.<sup>197</sup> Alternatively, a judge can take the relatively simple step of providing equal access to courtroom resources, like a Houston judge who recently had a computer, capable of accessing county

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191. *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

192. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964).

193. *In re Inquiry Concerning a Judge*, 462 S.E.2d 728, 736 (Ga. 1995).

194. *Davis v. United States*, 567 A.2d 36, 39 (D.C. 1989). In some circumstances a trial judge may play a more active role, but when that happens, he or she must at all times “remain a disinterested and objective participant in the proceeding. . . . Once [the judge’s] neutral position has been jeopardized, the judicial evenhandedness that should pervade the courtroom disappears, and ‘the right to a fair trial may be imperiled.’” *Id.* (citations omitted).

195. *Swinton v. Potomac Corp.*, 270 F.3d 794, 808 (9th Cir. 2001).

196. See generally Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors’ Ethics*, 55 VAND. L. REV. 381 (2002).

197. Anne Bowen Poulin, *Strengthening the Criminal Defendant’s Right to Counsel*, 28 CARDOZO L. REV. 1213, 1216 (2006).

criminal databases and the internet, installed at the defense table.<sup>198</sup> The prosecution has had such computer access in the courtroom since 2000.<sup>199</sup>

Trial judges have an impressive inventory of tools available to use to level the playing field and restore the balance to the adversary system. A judge's actions can obviously make an enormous difference for an individual defendant. But can individual judges precipitate true systemic change, especially in the face of enormous systemic pressures like overloaded dockets and under-funded public defense? Professor Adele Bernhard agrees that individual judges have the tools to act, but she contends that isolated actions by individual judges are simply not enough to make a real difference:

To be sure, courts have an arsenal of tools that could be aimed at improving the defense function. Judges are often aware that an individual assigned counsel or public defender is performing poorly for a client. When that occurs, the court may threaten the lawyer with sanctions, report the inadequacies to the appropriate administrative body, or substitute one counsel for another. Such action may or may not improve the lot of the particular defendant, but it most certainly does not affect broader change.<sup>200</sup>

Rather, Professor Bernhard contends that systemic challenges are the better vehicle for reform.<sup>201</sup> While broader challenges are indeed important and necessary,<sup>202</sup> there is still some question about their long term effect.<sup>203</sup> In

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198. Brian Rogers, *This Judge's Order is a Computer for Defense*, HOUSTON CHRONICLE, July 28, 2008.

199. *Id.*

200. Bernhard, *supra* note 52, at 300 n.48.

201. *Id.* at 300.

202. In advocating that individual judges have an obligation to act to restore the balance to our adversary system, I am not rejecting the value of other approaches to reforming the abysmal state of public defense services. Systemic litigation has been a mixed bag at best, however, and has not resulted in the anticipated long term gains. At times, in fact, litigation has been counterproductive as the Quitman County case in Mississippi illustrates. Despite the sophisticated pro bono representation of the Washington D.C. law firm of Arnold and Porter, the Mississippi state Supreme Court rejected an impoverished county's challenge to the state's refusal to provide any funding to pay for lawyers for indigent criminal defendants. *Quitman County v. State*, 910 So. 2d 1032, 1048 (Miss. 2005). In rather stark language, the court's majority refused to find unconstitutional the state's failure to provide any funding for indigent defense and said that if the county was concerned about indigent defense, it could have budgeted more for it.

Similarly, an Arizona federal judge dismissed a three-year-old lawsuit brought by former and current county-paid defense attorneys against Pima County seeking parity in pay with prosecutors. There, the court ruled that the county had a "legitimate interest in favoring the public's interest in vigorously prosecuting crime over the country's duty to provide indigent criminal defense, and that paying prosecutors more than public defenders is rationally related to that interest." Kim Smith, *Defense Attorneys' Suit Dismissed*, ARIZ. DAILY STAR, May 9, 2006, available at <http://www.azstarnet.com/sn/printDS/128266>.

203. See *supra* text accompanying notes 51-60. See also Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005).

the meantime, there is no question that judges can affect the performance of the attorneys appearing before them through their demeanor and expectations and the considerable discretion a judge enjoys in managing her courtroom.<sup>204</sup> The author of an early empirical study on ineffective assistance of counsel claims concluded the data suggested that, “through the performance norms they convey to lawyers, the trial judges themselves affect to some degree the probability that ineffective assistance of counsel claims will be raised on appeal.”<sup>205</sup> Because it is always in the best interest of the lawyers and their clients to please the judge, lawyers adapt their behavior to match the expectations, and sometimes even the quirks, of trial judges. A judge’s behavior, therefore, may either encourage or discourage effective representation. A judge encourages effective representation when she actively monitors cases, demands preparation, inquires about discovery or pretrial motions, is rigorous in ensuring that waivers of counsel or jury trial are knowing and voluntary, and intervenes when things appear off track.<sup>206</sup> On the other hand:

[T]he judge who shows impatience with detailed cross-examination, who appears irritated by objections, who seems predisposed to deny suppression motions or who is uniformly unresponsive to defense arguments at sentencing may actually discourage vigorous defense representation. Trial attorneys may avoid “wasting time” on apparently futile efforts without considering whether they are waiving issues for appeal. Even if conscious of the need to make a record, defense counsel may feel compelled to avoid confrontation with the court, particularly in front of a jury, in order to protect the possibility of winning at trial. Above all, defense attorneys wish not to antagonize the judges who may ultimately sentence their clients. While the lawyer who feels the atmosphere in the courtroom may be able to explain his or her failure to take particular steps, on the cold record such omissions may nonetheless give rise to ineffective assistance claims.<sup>207</sup>

Perhaps more common, judges can shape the performance of attorneys through tolerance of slipshod representation. This happens where the processing of cases is the order of the day and upholding the Constitution has taken a back seat to the crushing reality of an overcrowded docket and an under-resourced defense function.

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204. There is some evidence that a judge’s actions can have a positive impact on a defendant’s behavior.

205. Barbara R. Levine, *Preventing Defense Counsel Error—An Analysis of Some Ineffective Assistance of Counsel Claims and Their Implications for Professional Regulation*, 15 U. TOL. L. REV. 1275, 1333 (1984).

206. *Id.* at 1332.

207. *Id.*

Judges can and do shape the norms of the criminal justice system.<sup>208</sup> A recent example can be found in Ron Wright and Wayne Logan's examination of the collection of application fees for indigent defense services.<sup>209</sup> They observed that "[j]udges . . . on a daily basis operate the buttons and levers of the criminal justice machinery in U.S. courthouses."<sup>210</sup> Wright and Logan found that through the individual actions of trial court judges, "[j]udges have erected practical obstacles to the collection of application fees in the everyday routines of the courtroom."<sup>211</sup> Thus, judges have altered a component of criminal procedure—collecting fees for defense services—by exercising the discretion judges enjoy in managing their own courtrooms, rather than through any formal court decision. In the same way, judges are fully capable of changing the landscape of publicly funded defense.

To ensure a fair trial and a just outcome, judges must become the guardians of the adversary system by taking concrete steps to restore the balance to the adversary that is so sorely lacking with our inadequate patchwork of indigent defense systems. Trial judges have the obligation and the tools. The remaining question is what it will take to compel them to act.

#### IV. ROADBLOCKS AND DISINCENTIVES

Criminal trial court judges are in a position to insist that the promise of *Gideon* be fulfilled in their courtrooms. Why, then, have they failed to act to insist that criminal defendants truly have effective assistance of counsel, thus restoring balance to the adversary system?<sup>212</sup> To paraphrase Monroe Freedman's blunt call to action: isn't forty years of constitutional and ethical hypocrisy enough?<sup>213</sup>

Unfortunately, the complicity of judges in the abysmal state of publicly funded defense is somewhat understandable. Much like state legislators who face significant disincentives to fully fund the defense function, state court judges must confront their own substantial obstacles to acting.

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208. For an interesting discussion of the capacity of state court judges to change a non-constitutional rule, see H. Mitchell Caldwell, *Fixing the Constable's Blunder: Can One Trial Judge in One County in One State Nudge a Nation Beyond the Exclusionary Rule?*, 2006 BYU L. REV. 1.

209. Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2072 (2006).

210. *Id.*

211. *Id.*

212. See Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1193 (2003) ("But there is nothing to suggest that trial judges criticize lawyers, replace them, or otherwise intercede when it is evident that lawyers are neglecting their clients.").

213. Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 923 (2005).

Of course there are judges, perhaps like Chief Justice Roberts, who embrace the judge-as-umpire paradigm and view any action other than serving as a neutral moderator as beyond the scope of their professional role. However, even trial judges who agree that their professional and ethical obligations demand action in response to an increasingly dysfunctional adversarial system will find it difficult to act. Two of the most significant hurdles facing judges are the increasing politicization of the judiciary and unrelenting docket pressure.

The judiciary is under attack—both literally<sup>214</sup> and figuratively.<sup>215</sup> Nearly ten years ago Stephen Bright lamented that “[t]he increasing political attacks on the judiciary by both major political parties and by candidates for judicial office are diminishing the independence of the judiciary and, equally important, the public’s confidence in it.”<sup>216</sup> If anything, the situation has deteriorated with a rising tide of money, special interest groups, and attack ads engulfing judicial campaigns.<sup>217</sup> In fact, this escalating political pressure is one of the trends identified by a special ABA commission as jeopardizing the judiciary’s ability to deliver fair and impartial justice. The ABA Commission on the 21<sup>st</sup> Century Judiciary found that: “The politics of crime imposes intense pressure on judges to decide criminal matters in a manner that satisfies popular expectations.”<sup>218</sup>

Courts in a democratic system, of course, should not be totally immune from fair criticism from the populace.<sup>219</sup> However, the *Ten Principles for Preserving Courts’ Role in American Democracy* recognize that “[w]hile criticism of judges and their decisions is protected and even encouraged in our free society, we must be careful to avoid threats to or in-

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214. See generally Neil Alan Weiner & Don Hardenbergh, *Understanding and Controlling Violence Against the Judiciary and Judicial Officials*, 576 ANNALS AM. ACAD. POL. & SOC. SCI. 23, 35 (2001) (“According to every available measure, the American judiciary has been and still is under attack.”); see also Mike McKee, *Judges on ABA Panel Describe Living in Fear, Years After Unpopular Rulings*, THE RECORDER, Aug. 13, 2007; Sandra Day O’Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept. 27, 2006, at A18 (“In the last decade, threats and inappropriate communications directed toward the federal bench have more than quadrupled.”); Jeff Coen & David Heinzmann, *Federal Judge’s Family Killed*, CHI. TRIB., Mar. 1, 2005, at § 1 p.1.

215. See generally Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661 (2006); Meghan K. Jacobson, Note, *Assault on the Judiciary: Judicial Responses to Criticism Post-Schiavo*, 61 U. MIAMI L. REV. 931 (2007).

216. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997).

217. Robert Tanner, *New Report Shows Money, Negative Ads Spreading to State Judicial Elections*, May 18, 2007, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1179392701490>.

218. JUSTICE IN JEOPARDY, *supra* note 107, at ix.

219. For a description and a myriad of illustrations of the difference between fair criticism and irresponsible intimidation, see Bright, *supra* note 216, at 308.

timidation of judges that might jeopardize the impartiality of their decision-making.<sup>220</sup> The judicial branch, though essential to our democratic system, is a different creature than the other two branches of government. As former FBI director and federal Judge William S. Sessions has explained:

The judiciary, although an equal branch of government, is nevertheless fundamentally different in a very important way from the executive and legislative branches. Judges, even when elected, do not represent us. Their decisions must be guided not by public opinion, but by the rule of law and the protection of individual rights. And while we all disagree with court decisions at one time or another, we must resist the urge to evaluate the judiciary based on the popularity of individual decisions.<sup>221</sup>

In short, we insulate judges from popular opinion in order to guarantee the protection of individual rights against political pressure from other branches of government, interest groups, or even the popular will of citizens themselves.

A clear majority of state court judges, who hear the overwhelming majority of criminal cases in this country, are elected.<sup>222</sup> Given the tension between maintaining the impartiality and independence essential to the judiciary and the need for judges to campaign for office every few years, there is ongoing debate about the merit of the popular election of judges. Justice Sandra Day O'Connor, an outspoken critic of judicial elections since her retirement, took the opportunity in her concurring opinion in *Republican Party of Minnesota v. White*<sup>223</sup> to highlight the troubling aspects of electing judges.<sup>224</sup> In addition to her concerns about campaign fundraising and the

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220. In 2006, an ideologically diverse committee of experts, led by former FBI Director and federal judge William S. Sessions and former Congressman Mickey Edwards (R-OK), released *Ten Principles for Preserving Courts' Role in American Democracy*. These principles, articulated by the Steering Committee of the Constitution Project's Courts Initiative, recommend that legislative and executive branch officials work to preserve courts' ability to decide cases impartially and to ensure meaningful access to the courts for all individuals. See THE CONSTITUTION PROJECT'S COURTS INITIATIVE, TEN PRINCIPALS FOR PRESERVING COURTS' ROLE IN AMERICAN DEMOCRACY 2 (2006), available at [http://www.constitutionproject.org/pdf/Judicial\\_Independence\\_Principles.pdf](http://www.constitutionproject.org/pdf/Judicial_Independence_Principles.pdf).

221. The Constitution Project, DISTINGUISHED BIPARTISAN GROUP RELEASES GUIDING PRINCIPLES FOR PRESERVING INDEPENDENT COURTS, SESSIONS, EDWARDS RECOMMEND TAKING AFFIRMATIVE STEPS TO ENSURE COURTS' IMPARTIALITY AND INDIVIDUALS' EQUAL ACCESS TO JUSTICE, May 9, 2006, available at [http://www.constitutionproject.org/pdf/Press\\_release\\_Judicial\\_Independence\\_Principles.pdf](http://www.constitutionproject.org/pdf/Press_release_Judicial_Independence_Principles.pdf).

222. For a description of the wide assortment of mechanisms used to select state judges across the country, see LARRY C. BERKSON, UPDATED BY RACHEL CAUFIELD, JUDICIAL SELECTION IN THE UNITED STATES: A SPECIAL REPORT, available at <http://www.ajs.org/selection/docs/Berkson.pdf> (last visited Mar. 3, 2009). Even with the endless combination of selection schemes, however, "[i]n total, 30 states choose some, most or all of their judges using some form of contestable popular election." *Id.* at 2.

223. 536 U.S. 765 (2002).

224. *Id.* at 788-91 (O'Connor, J., concurring).

pressure special interest groups and campaign donors may seek to bring on a judge, Justice O'Connor notes the deeply troubling notion that elected judges will find it nearly impossible to ignore the political consequences of their decisions. Additionally, compounding the problem, "[e]ven if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so."<sup>225</sup>

Although voters certainly have the right to elect whomever they choose, serious problems arise when "[s]tate court trial and appellate judges' ability to make unfettered decisions is compromised when they must be concerned about challengers accusing them of being soft on crime."<sup>226</sup> State court judges around the country have been targeted for "cuddling criminals"<sup>227</sup> and being "soft on crime."<sup>228</sup> As a result, "[j]udges live in fear of 'soft on crime' headlines."<sup>229</sup> The danger is that a judge's ability to make independent decisions, to protect the rights of unpopular defendants in criminal cases, and to uphold the rule of law is threatened when he or she succumbs to the pressure to win votes for reelection. A judge who vigilantly guards a criminal defendant's right to counsel runs the risk of being tarred with the fatal "soft on crime" label and losing the election. In short, "[j]udges who fail to heed voter messages may soon find themselves replaced by those with better hearing."<sup>230</sup>

Nearly ninety-five percent of Florida judges recently surveyed by The League of Women Voters indicated that they are conscious of the consequences that will follow from an unpopular decision; a quarter of the respondents said those negative consequences happened frequently.<sup>231</sup> This kind of political pressure not only flies in the face of the core principles of

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225. *Id.* at 789.

226. Jeannine Bell, *The Politics of Crime and the Threat to Judicial Independence*, in JUSTICE IN JEOPARDY, *supra* note 107, App'x F, at 7.

227. For instance, an Alaskan gubernatorial candidate delivered a campaign speech in 2002 in which he criticized state judges for "cuddling criminals," and he promised to alter the judicial selection process to favor tough-on-crime judges. *Tough on . . . Judges?*, ANCHORAGE DAILY NEWS, Aug. 16, 2002, at B8.

228. For example, in 1995, for the first time in over a century, a sitting South Carolina justice was challenged on the grounds that she was soft on crime.

229. DAVID FEIGE, *INDEFENSIBLE: ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* 77 (2006) ("There are very few judges who will ever consider releasing someone charged with murder. It is, quite simply, an unacceptable political risk. Judges live in fear of 'soft on crime' headlines, and one of the surefire ways to wind up on the front page of the New York Post is to release an alleged murderer, whatever the evidence or lack of evidence.").

230. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1584 (1990).

231. JUSTICE IN JEOPARDY, *supra* note 107, App'x F, at 14.

our judiciary—independence, impartiality, and the rule of law—it provides a strong disincentive for judges to act to protect the rights of criminal defendants. As U.S. Supreme Court Justice John Paul Stevens has said, “[i]t was ‘never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.’”<sup>232</sup>

Judges who desire to intervene and bolster the deficient performance of inadequate defense counsel in order to re-balance the adversary system must not only overcome significant political pressure, but must also find the time in their increasingly overloaded dockets to do it. Although caseloads are notoriously difficult to measure, given the variances in state court data, there is no question that state court caseloads have increased significantly over time.<sup>233</sup> The National Center for State Courts (NCSC) reports that criminal filings increased thirty percent from 1984 to 1993.<sup>234</sup> This upward trend is even more evident with felony caseloads and perhaps even more alarming given the societal impact and substantial court resources felonies consume. NCSC reports an increase of thirty-six percent in felony caseloads over the ten-year period from 1996 through 2005.<sup>235</sup>

The crush of court business is a powerful disincentive to devoting precious time to monitor defense counsel, and on occasion even intervene.<sup>236</sup> In some instances, that pressure is even more intense because docket statistics are used for judges’ internal evaluations and for rotation appointments.<sup>237</sup> Thus, a heightened concern for efficiency may prompt judges to concentrate on clearing the docket to avoid negative evaluations and secure preferred assignments rather than concentrating on whether the adversary system is functioning appropriately.

## V. OVERCOMING THE OBSTACLES

Although there are solid reasons why judges might choose not to act even in the face of woefully inadequate defense counsel, there are also compelling reasons for judges to overcome these hurdles (and institutional reluctance) while acting to restore the balance to the adversary system.

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232. Bright, *supra* note 216, at 310.

233. JUSTICE IN JEOPARDY, *supra* note 107, at 39.

234. National State Court Caseload Trends, 1984-1993 CASELOAD HIGHLIGHTS (Nat’l Ctr. for State Courts, Williamsburg, Va.), Vol. 1 No. 1, Aug. 1995, available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/ctadmin&CISOPTR=663>.

235. Caseload Trends in State Courts, 1996-2005, NCSC, available at [http://www.ncsconline.org/D\\_Research/csp/2007\\_files/State%20Court%20Caseload%20Statistics%202007.pdf](http://www.ncsconline.org/D_Research/csp/2007_files/State%20Court%20Caseload%20Statistics%202007.pdf).

236. Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 253 (2006).

237. *Id.*

Taking action to ensure that criminal defendants have an equal advocate in the courtroom is not dangerous judicial activism for which judges will be vilified. In fact, polling data indicates that the public is highly supportive of the right to counsel.<sup>238</sup> In a 2002 national poll, a compelling majority (eighty-eight percent) were convinced that “[p]roviding competent legal representation is one of our most fundamental rights in the U.S.”<sup>239</sup> Sixty-five percent of those polled found that statement very convincing.<sup>240</sup> The report also found that a majority of Americans believe that low-income people who are charged with a crime should be represented by attorneys with small enough caseloads to provide the necessary time to prepare a defense for each person they represent. Ninety-four percent think such representation is important, and fifty-seven percent say it should be guaranteed.<sup>241</sup> A majority of Americans also support providing the same resources to the attorneys of low-income persons that are provided to prosecutors. Eighty-eight percent support the idea, sixty-four percent support it strongly.<sup>242</sup> In addition, the public supports providing the resources for low-income persons to hire investigators to check evidence and find witnesses. Ninety-one percent think this aid is important and fifty-five percent think it should be guaranteed. Also, the public supports giving low-income persons the resources to obtain DNA and other scientific testing. Ninety-four percent think this is important, and sixty-eight percent think it should be guaranteed.<sup>243</sup>

Strong support from the public for the right to counsel and, essentially, for the fair fight demanded by the adversary system, should give judges the courage to act. Although state court judges are in a remarkably different position than Supreme Court justices, Michael Klarman’s persuasive argument that “the Court’s institutional standing ultimately depends on producing decisions that garner the long-term approval of the American public” seems applicable to elected state court judges as well.<sup>244</sup> Public opinion data suggest that state court judges, who must be even more cognizant of public attitudes given that most are subject to periodic election, should be in no real danger if they act to preserve the balance in the adversary system by

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238. BELDEN, RUSSONELLO & STEWART, AMERICANS CONSIDER INDIGENT DEFENSE: ANALYSIS OF A NATIONAL STUDY OF PUBLIC OPINION 1 (2002), *available at* <http://www.nlada.org/DMS/Documents/1075394127.32/Belden%20Russonello%20Polling%20short%20report.pdf>.

239. *Id.* at 5. Polling data from the Commonwealth of Virginia reflects a similar level of support. *See* VIRGINIA INDIGENT DEFENSE COALITION, PUBLIC OPINION IN VIRGINIA ON INDIGENT DEFENSE (2004), *available at* <http://www.vafairtrialproject.org/OpinionPoll.pdf>.

240. BELDEN, RUSSONELLO & STEWART, *supra* note 238, at 5.

241. *Id.* at 3.

242. *Id.* at 4.

243. *Id.* at 3.

244. Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CAL. L. REV. 1721, 1748 (2001).

supporting the right to counsel. It seems, then, that judges who act to protect that right will be viewed as acting legitimately.

And yet, though the public appears to support the fundamental right to competent counsel, paradoxically, the public also embraces the “tough-on-crime” rhetoric, and a strong majority believes that courts treat criminals too leniently.<sup>245</sup> How are state judges to reconcile those seemingly contradictory positions? How can we ensure that elected state court trial judges can do their jobs without incurring the wrath of voters and state legislators? The deceptively simple answer may be civic education.

At a recent conference on the judiciary, conference participants most frequently mentioned education as the solution to the problems plaguing the judiciary.<sup>246</sup> Participants from corporate, media, education, and non-profit sectors recommended expanded and improved education on the role of the courts at every level, including primary and secondary schools, general education of the public, and even education of the media.<sup>247</sup>

There is no question that there is a gaping ignorance among the electorate as to the functioning of government in general, and the courts in particular. A variety of national studies indicate that American students know little about American history or concepts fundamental to our democracy and that they feel disengaged from and distrustful of government.<sup>248</sup> “More than

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245. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 200314-41, tbl.2.47 (Ann L. Pastore & Kathleen Maquire eds.) (2003), available at <http://www.albany.edu/sourcebook/pdf/t247.pdf>.

246. The conference, entitled *Fair and Independent Courts: A Conference on the State of the Judiciary*, was a two-day conference, chaired by United States Supreme Court Justice Stephen Breyer and retired Justice Sandra Day O'Connor. Co-sponsored by Georgetown University Law Center and the American Law Institute, it took place September 28 and 29, 2006 on the Georgetown University Law Center campus. See Conference, *Fair and Independent Courts: Conference Conclusions*, 95 GEO. L.J. 1175, 1176 (2006).

247. *Id.* at 1176-77.

248. See, e.g., NAT'L CTR. FOR EDUC. SERVS., U.S. DEPT. OF EDUC., THE NATION'S REPORT CARD CIVICS 2006 1 (2007), available at <http://nces.ed.gov/nationsreportcard/pdf/main2006/2007476.pdf>. While the Report Card showed a slight improvement in fourth-grade students' 2006 scores from the 1998 data, civics scores have remained essentially unchanged since 1998 for eighth- and twelfth-graders. *Id.* In 2006, performance that is considered to be at or above the Proficient level was demonstrated by only twenty-two percent of eighth graders and by only twenty-seven percent of twelfth-graders. *Id.* See also CIRCLE & CARNEGIE CORP. OF N.Y., THE CIVIC MISSION OF SCHOOLS 19 (2003), available at [http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/36/2d/6e.pdf](http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/36/2d/6e.pdf) (finding that American students were not especially knowledgeable in certain areas—for example, principles of democracy (on which they ranked tenth out of 28 countries)). The picture is equally bleak at the college level. See INTERCOLLEGIATE STUDIES INST.'S NAT'L CIVIC LITERACY BD., FAILING OUR STUDENTS, FAILING AMERICA 2 (2007), available at [http://www.americancivilliteracy.org/report/pdf/09-18-07/civic\\_literacy\\_report\\_07-08.pdf](http://www.americancivilliteracy.org/report/pdf/09-18-07/civic_literacy_report_07-08.pdf). This report found that “[t]he average college senior knows astoundingly little about America’s history, government, international relations and market economy, earning an “F” on the American civic literacy exam with a score of 54.2%.” *Id.* at 6.

half the states have no requirement for students to take a course—even for one semester—in American government.<sup>249</sup> If the public does not understand the importance of having skilled advocates represent both the prosecution and the defense in a criminal trial, judges will be vilified as coddling criminals or being soft on crime for insisting that defendants have adequate representation. This ignorance may explain why a clear majority of people can express strong support for the right to counsel in the abstract and still insist that local courts are not treating “criminals” harshly enough.

Ironically, the media, while often a catalyst for reform in highlighting failing indigent defense systems,<sup>250</sup> contributes to the public’s skewed perception of indigent defense. Extensive coverage of high profile, and insanely expensive, death penalty cases where millions of public dollars are dedicated to a single defendant may leave the impression that such largesse is the norm.<sup>251</sup> These gold-plated, budget-busting examples of publicly funded defense are in a different universe than the thousands of run of the mill criminal defendants who just need a single decent advocate with the skill and resources to stand up for them in court—challenging the government to prove its case beyond a reasonable doubt. However, without an understanding of the adversary system or our critical constitutional due process protections, the public understandably bristles at having to foot the bill for teams of defense lawyers, investigators, and experts for a single high profile defendant.

These high profile, expensive cases further sour public perception about the purpose and need of the Sixth Amendment right to counsel, which translates into hostility aimed at judges who act to protect a defendant’s rights. Judges, then, dare not risk their reelection chances by being perceived as “favoring” criminal defendants. To free judges from this threat of public disapproval for doing exactly what their oath and professional and ethical obligations require—upholding the law—requires that we break the cycle of public ignorance on the role of judges, the foundations of the adversary system, and the purpose of our Constitutional due process protections. A tall order, to be sure, but our system of government cannot survive

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249. Stephen Goldsmith, *The State of Our Civic Union*, in Report on the 2005 Annual Conference 7, 8, available at [http://www.civicerprises.net/pdfs/ncoc\\_report2005.pdf](http://www.civicerprises.net/pdfs/ncoc_report2005.pdf).

250. See Backus & Marcus, *supra* note 10, at 1128 (“This type of sustained, negative attention serves as both a public education campaign and a shaming process and has been successful in states as diverse as Massachusetts, Georgia, and Washington.”).

251. For instance, the cost to defend Oklahoma City bombing conspirators Terry Nichols and Timothy McVeigh was reported to be \$19.2 million. Jennifer Liberto, *Trial’s Cost: Still Counting*, ST. PETERSBURG TIMES, Dec. 8, 2005, at 11.A. See also Bill Rankin, *Prosecution of Nichols Also Costly; Fulton’s Tab May Be Twice That of Defense*, THE ATLANTA J.-CONSTITUTION, Mar. 23, 2007, at D1; Robert Tharp, *Is Death Penalty Losing Capital? Sentences Drop in Dallas, Across U.S. as Courts Face New Limits, Alternatives*, DALLAS MORNING NEWS, Dec. 30, 2005, at 1A.

unless citizens understand, value, and protect it. There is already work underway to build the foundation of an informed citizenry from which judges can safely act to protect the adversary system; however, more needs to be done.

The judiciary itself has a significant role to play in this (re)education process. Judges do not often explain their decisions; in fact, the Canons may preclude it to some degree. But, the Canons also allow judges to engage in educating the public about the judiciary and the legal system. A recent ABA study highlighted the importance of that role. Included among the recommendations embraced by the ABA's Commission on the 21st Century Judiciary for preserving the legitimacy of the judiciary are a series of proposals aimed at improving court-community relations.<sup>252</sup> Significantly, the Commission's call to action "to address and counteract the developments that are adversely affecting the fair and impartial administration of justice" recognized that the judiciary must actively engage in public education.<sup>253</sup> The report stated: Courts should take steps to promote public understanding of and confidence in the courts among jurors, witnesses and litigants. Courts should engage and collaborate with the communities of which they are a part, by hosting trips to the courthouses and by judges and court administrators speaking in schools and other community settings.<sup>254</sup>

Individual judges can take the initiative to educate the public. The tragic legal battle over the removal of Terri Schiavo's feeding tube in 2005, which played out in both Florida state and federal courts as well as in the halls of the Florida state legislature and Congress, provides an example of one judge using his concurring opinion as a teaching tool.<sup>255</sup> Judge Birch of the Eleventh Circuit attempted to remind the public, as well as certain congressmen who had threatened impeachment and budget cuts, of the proper role of the courts:

The Framers established a constitutional design based on the principles of separation of powers. . . [They] established three coequal but separate branches of government, each with the ability to exercise checks and balances on the two others. And to preserve this dynamic, the Constitution mandates that 'each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others.'<sup>256</sup>

The Chief Justice of the California Supreme Court, motivated by "the rise of nasty political campaigns targeting elected state judges nationally, coupled with the cost of judicial elections and a potential backlash over the gay mar-

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252. JUSTICE IN JEOPARDY, *supra* note 107, at 65-66.

253. *Id.* at i.

254. *Id.* at v.

255. See *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1271-76 (11th Cir. 2005) (Birch, J., concurring).

256. *Id.*

riage decision,” turned to public education to circumvent a backlash against the judiciary.<sup>257</sup> Chief Justice Ron George organized a forum on “Preserving Impartial Courts in California” to help members of the public, who may not be sophisticated about the importance of judicial independence, understand the role of judges.<sup>258</sup>

The judiciary alone need not bear the burden of civic education, however; the task can be spread among many, including bar associations, law schools, journalists, and special interest groups. For instance, the Virginia Fair Trial Project (VFTP), formerly the Virginia Indigent Defense Coalition, has made educating the public a primary part of its mission in order to achieve reform of the indigent defenses system in Virginia.<sup>259</sup> VFTP recognizes that pushing the legislature to act to support indigent defense reforms in Virginia requires motivating voters to exert pressure on their representatives, and motivating those voters to action first requires educating them as to the seriousness of the problem and the costs of not acting. Many other nonprofit groups have also joined in with their own initiatives to educate the public on the importance of protecting the independence of the judiciary.<sup>260</sup>

Retired Supreme Court Justice Sandra Day O’Connor has made civic education the cornerstone of her campaign to call attention to the importance of judicial independence.<sup>261</sup> Justice O’Connor has asserted that “[t]he key to maintaining our system of judicial independence lies in educating our citizens.”<sup>262</sup> If public education is the answer, then constructing an envi-

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257. Pamela A. MacLean, *Fearing Political Backlash, Judges Decide to Go Public*, July 14, 2008, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202422941397>.

258. *Id.*

259. VFTP’s website declares: “Through intensive community outreach and development and implementation of a strategic public education campaign, the Fair Trial Project will be able to achieve significant reform in a state that has thus far been intractable and create a strong, broad-based, and unified voice for indigent defense reform in Virginia.” Virginia Fair Trial Project, <http://www.vafairtrialproject.org/ASystem.php> (last visited Mar. 3, 2009).

260. For instance, the Constitution Project’s Courts Initiative “conducts public education and advocacy on the importance of our courts as protectors of Americans’ essential constitutional freedoms, while working to ensure that our judicial system is accountable through appropriate and established means.” See The Constitution Project, <http://www.constitutionproject.org/courts/index.cfm?categoryId=5> (last visited Mar. 3, 2009). Included among the goals of the ABA’s Standing Committee on Judicial Independence is to improve public understanding of, and confidence in, the judiciary. See ABA, <http://www.abanet.org/judind/home.html>. Similarly, increasing public understanding of the justice system is central to the mission of the American Judicature Society, which, on its website, offers model educational materials on the judicial branch and innovative models for presenting these lesson plans and resources in schools and to the public. See American Judicature Society, <http://www.ajs.org/pe/index.asp> (last visited Mar. 3, 2009).

261. Mark Hornbeck, *Ex-Justice Says Kids Don’t Respect Courts*, THE DETROIT NEWS, online ed., July 24, 2007.

262. Tanya Mannes, *‘Icon’ of U.S. Judicial System Inspires USD Crowd; O’Connor is Guest at Judges Conference*, THE S.D. UNION-TRIB., Aug. 26, 2007, at B-3.

ronment in which judges can act freely to ensure adequate defense for an accused may be a long time in coming.<sup>263</sup> Like any judicial reform, this is a task not for the short winded.<sup>264</sup> But it must be done if we are to create an environment where judges can act to resuscitate the adversary system and ensure that it functions as intended.

#### CONCLUSION

It is somewhat perplexing that the problem of providing competent defense to criminal defendants who cannot afford a lawyer has remained an intractable problem since the soaring rhetoric of *Gideon* established it as a constitutional imperative.<sup>265</sup> It is not that we don't know there is a problem or understand the contours of the failure—we do. It is not that we don't know how to provide an adequate defense—we do. It is not that we don't believe in a poor criminal defendant's constitutional right to adequate legal representation—we do. The challenging part of the problem remains just how to spark reform and deliver on the promise of *Gideon*. Laying the foundation of civic understanding of the independent role of the judiciary will provide the security judges need to protect the rights of defendants and restore the balance to the adversary system.

Of course, it may be seriously naive to hope that judges will actually step into the breach and revive the adversary system just because they can and just because they should. There are those who argue persuasively that many judges are “bad”<sup>266</sup>—unfair, biased, and prejudiced. Like any occupation, there are certainly those who bring dishonor to the profession.<sup>267</sup> But

263. The call for public education to preserve judicial independence is not new. For instance, over twenty years ago, when California Supreme Court Chief Justice Rose Bird faced a highly politicized campaign to oust her from the bench because of her opposition to the death penalty, a half dozen California lawyer groups urged the California Bar to condemn organized political assaults on the justices, recommending that the conference start a public education campaign to promote judicial independence. Ann Levin, *Bird Re-election Bid Focus of National Concern, Steinem Says*, THE S.D. UNION-TRIB., Sept. 28, 1985, at A-4.

264. See Chief Justice Arthur Vanderbilt's admonition, “Judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat.” Arthur T. Vanderbilt, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* xix (Arthur T. Vanderbilt ed., 1949).

265. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

266. Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 522-23 (2006) (“Instead of neutral and detached jurists who fairly and impartially apply the law, a significant number of judges are “bad judges” whose strong biases and prejudices usually control their decision making. Consequently, I believe it is biased judging, not misjudging, that poses a major obstacle to the fair administration of justice.”)

267. For a chilling description of some truly bitter and vindictive judges, see DAVID FEIGE, *INDEFENSIBLE ONE LAWYER'S JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* 77 (2006).

on the whole, American judges take seriously their duty to uphold the Constitution and the law and are committed to equal justice. We should be able to depend upon them to fulfill their role as guardians of the adversary system and spark the reform in indigent defense that is so desperately needed.