2013

Reclaiming Equality to Reframe Indigent Defense Reform

Lauren Sudeall Lucas

Article

Reclaiming Equality to Reframe Indigent Defense Reform

Lauren Sudeall Lucas[†]

† Assistant Professor, Georgia State University College of Law; Harvard Law School, J.D., 2005; Yale University, B.A., 1999. I am thankful to Charlotte Alexander, Derek Black, Anne Emanuel, Russell Covey, Kristi Graunke, Jamal Greene, Seth Grossman, Michael Lucas, Nirej Sekhon, Carol Steiker, and Jonathan Todres for their valuable comments.

INTRODUCTION

In the years since the landmark right to counsel case *Gideon v. Wainwright*[1] was decided, numerous studies have documented the plight of indigent defendants still trying to secure equal treatment, effective representation and a fair trial.[2] Among other things, these studies have highlighted inadequate funding of indigent defense systems across the country and its results: the chronic appointment of "incompetent or inexperienced" counsel, severe delays in the appointment of counsel, discontinuity of attorney representation, a lack of training and oversight for counsel representing indigents, excessive public defender caseloads and understaffing of public defender offices, inadequate or nonexistent expert and investigative resources for defense counsel, and a lack of meaningful attorney-client contact.[3] In other words, they have revealed a two-tier system of justice in which the poor are subject to a completely separate and wholly underresourced experience.

1. 372 U.S. 335 (1963).

2. THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 50 (2009) [hereinafter JUSTICE DENIED], *available at* http://www.constitutionproject.org/manage/file/139.pdf.

3. *Id.* at 7–8, 50–51, 162–65; Cara H. Drinan, Commentary, *Toward a Federal Forum for Systemic Sixth Amendment Claims*, WASH. U. L. REV. (Oct. 22, 2008), http://lawreview.wustl.edu/slip-opinions/toward-a-federal-forum-for-systemic-sixth-amendment-claims/; *see also* Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683 *passim* (2010) (describing the unwillingness of state legislatures and courts to provide adequate resources and effectively enforce indigents' right to counsel); Note, *Simplicity as Equality in Criminal Procedure*, 120 HARV. L. REV. 1585, 1595 (2007) (noting that the average public defender in a large county handles over 530 cases per year and that some public defenders handle up to 2000 cases annually); *id.* at 1595 ("[M]any states apply caps on compensation for indigent defense ranging from $265 to $3,500 per case."); Adam Liptak, *Poor Defendants and a Drained State Budget Cross Paths in Georgia*, N.Y. TIMES, Jul. 6, 2010, at A13 (describing, inter alia, how budget cuts to Georgia's indigent defense system have led to capital representation by attorneys without the time and expertise to handle a capital case and a lack of funding for experts or investigators); Jeff Severns Guntzel, *Minnesota's Public Defender Shortage, "We are fast becoming the courts of McJustice,"* MINNPOST (Oct. 13, 2010), http://www.minnpost.com/intelligencer/2010/10/minnesotas-public-defender-shortage-we-are-fast-becoming-courts-mcjustice (describing funding problems in Minnesota's justice system that have led to repeated attorney substitutions in indigent criminal case and staff cuts in public defender offices and the fact that the remaining public defenders are carrying twice the caseload recommended by the American Bar Association). *See generally* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006) (providing an overview of how the funding crisis has affected indigent defense in many states).

Inadequate funding remains the primary obstacle to ensuring that the poor receive a meaningful defense at trial or on appeal.[4] In recent years, indigent defense systems across America have reached a crisis point, due in part to unprecedented budget shortfalls[5] which, among other things, have threatened indigents' access to the courts by exacerbating the problems listed above.[6] The Justice Policy Institute observed in July 2011 that "[p]ublic defense has been historically underfunded and overburdened since *Gideon*; however, the recent economic downturn and fiscal/budget crises have made it worse."[7] Yet this was not a wholly unanticipated possibility. In 1964, just one year after *Gideon* was decided, a commentator observed the effect of fiscal realities on the exercise of the right to counsel: "Even if *Gideon v. Wainwright* established an unqualified right to representation by counsel at trial, unavailability of funds to pay for costs of investigation and for the services of expert witnesses still frequently frustrates the efforts of assigned counsel, or public defenders, and of judges to achieve justice."[8] Unfortunately, the reality that indigent defendants are promised rights in theory that they are denied as a matter of practice—because adequate funds are not made available to effectuate those

4. *See, e.g.*, JUSTICE DENIED, *supra* note 2, at 6–7 ("[I]nadequate financial support continues to be the greatest obstacle to delivering 'competent' and 'diligent' defense representation . . . .").

5. *See* PHIL OLIFF ET AL., CTR. ON BUDGET & POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT, 1 (2012), *available at* http://www.cbpp.org/files/2-8-08sfp.pdf ("The Great Recession that started in 2007 caused the largest collapse in state revenues on record . . . . [E]ven though the revenue outlook is trending upward, states have addressed large budget shortfalls by historical standards as they considered budgets for 2013.").

6. *See* JUSTICE DENIED, *supra* note 2, at 59–60 (describing "the current funding emergency in indigent defense"); *see also* William Glaberson, *Cuts Could Stall Sluggish Courts at Every Turn*, N.Y. TIMES, May 16, 2011, at A1 (citing The National Center for State Courts' finding that "29 state court systems are experiencing budget reductions this year, with at least five—Georgia, Maine, Nevada, Oklahoma and Oregon—seeing reductions of 10 percent or more").

7. JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 8 (2011).

8. Philip Fahringer, *Equal Protection and the Indigent Defendant:* Griffin *and Its Progeny*, 16 STAN. L. REV. 394, 413 (1964) (citation omitted); *see also* McFarland v. Scott*,* 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[T]he absence of funds to compensate lawyers prevents even qualified lawyers from being able to present an adequate defense."); Argersinger v. Hamlin, 407 U.S. 25, 59 (1972) (Powell, J., concurring) (noting that the "uneven distribution of . . . available funding" constitutes an "acute problem").

rights—remains just as true nearly half a century after *Gideon*.[9] Indeed, there is a "near-consensus that a primary reason . . . for the failure to fulfill this promise [of effective assistance of counsel] is a substantial lack of funding."[10]

In responding to the effects of this crisis, legal advocates have generally based litigation reform efforts on the Sixth Amendment, either through post-conviction ineffective assistance of counsel claims made under *Strickland v. Washington*[11] or civil class-action lawsuits alleging violations of the right to the effective assistance of counsel.[12] Because both vehicles are rooted in the Sixth Amendment, a claimant seeking relief must demonstrate that he has been prejudiced by counsel's deficient conduct, or—in the case of a claimant seeking prospective relief—that the lawyer or lawyers in question are likely to provide the claimant or claimants with ineffective assistance.[13]

This Article suggests that the Sixth Amendment's narrow focus on the right to an effective lawyer is not well suited for reform under the current climate. Framing indigent defense purely as a right to counsel issue may redress the legal and procedural harm done to an individual criminal defendant, but fails to address the deeper causes of why that right is inevitably violated in the context of failing indigent defense systems and the fact that, systemically, these failures affect only the poor.[14] Not only has the Sixth Amendment become bogged down

9. *See* JUSTICE POLICY INST., *supra* note 7, at 6 (explaining that underfunding is a "significant barrier to providing quality public defense" and that although "funding has increased since *Gideon*, it remains insufficient" (footnotes omitted)).

10. GERALD ROSENBERG, THE HOLLOW HOPE 332 (2d ed. 2008) (alteration in original) (internal quotation marks omitted); *see also* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1281 (2002) ("The drastic underfunding of indigent defense systems, and the toll it takes on the quality of representation provided to many defendants, have long been among the criminal justice system's worst-kept secrets.").

11. 466 U.S. 668 (1984).

12. For further discussion, see Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing The Gideon Right to Counsel* (Wash. Univ. Sch. of Law, Working Paper No. 1279185), *available at* http://ssrn.com/abstract=1279185.

13. *See Strickland*, 466 U.S. at 694.

14. For purposes of this Article, discussion will focus on those individuals who are defined as indigent within the legal system and thus entitled to state-funded appointed counsel. Although during hard economic times the middle class struggles to secure adequate criminal representation as well—and face the unique dilemma of not qualifying for a public defender and yet not being able to afford private counsel—the treatment of that class of individuals is outside the scope of this Article.

in legal precedent making it extremely difficult for criminal defendants or civil plaintiffs to obtain relief, but it suffers from inherent doctrinal and conceptual characteristics limiting its ability to do more than evaluate attorney conduct under an objective and deferential standard grounded in norms that do not require much of appointed lawyers. The Sixth Amendment's focus on attorney conduct and the effect of that conduct in a given case or set of cases limits its reach—there is always the requirement that an alleged deprivation of resources be filtered through counsel to determine its effect. As a result, the Sixth Amendment approach can never directly address issues of access or funding. Relying on the Sixth Amendment leaves us chipping away at a much greater underlying problem armed only with a tool that has lost much of its force. And without making any headway as to the underlying problem—inequality of resources—it is unlikely that any success reformers achieve will apply with equal force to all defendants.

In response, this Article suggests a return to the roots of the fundamental right of access to justice, born from *Griffin v. Illinois*[15] and its progeny. In those cases, the Supreme Court emphasized the importance of equality and that every criminal defendant, rich or poor, must receive a meaningful defense.[16] In doing so, the Court was able to reach aspects of indigent criminal representation that would not have been possible under a strict Sixth Amendment approach—necessary elements of a defense which support or reach beyond the lawyer herself—and ensure that defendants of all means have access to such resources. The fact that this strain of equality has survived other cutbacks on equal protection doctrine allows indigent defense advocates to reclaim it as a basis for reform.

Courts and legal reformers should refocus on the salience of equality in the access to justice context because of its doctrinal applicability to an underfunded justice system lacking substantive standards for indigent representation. By reframing the harm done by indigent defense failures—i.e., the creation of a two-tiered system that subjugates poor criminal defendants and frustrates universal rights enforcement—we can create more tailored remedies and evolve doctrine in a manner that is

15. 351 U.S. 12 (1956).

16. *See, e.g.*, *id.* at 17–18 ("In criminal trials a state can no more discriminate on account of poverty than on account of religion, race or color. Plainly the ability to pay costs in advance . . . could not be used as an excuse to deprive a defendant of a fair trial.").

more cognizant of the practical enforcement of rights. Focusing on equality in addition to the vindication of individual rights also integrates a distinct set of norms and societal values into the narrative of indigent defense reform and allows us to attack the roots of the problem rather than slowly chipping away at existing inequalities built upon that foundation.

Part I of the Article describes in more detail the dominant Sixth Amendment approach to protecting indigent defendants' right to effective counsel and the doctrinal shortcomings and limitations of that approach, including its exclusive focus on the lawyer's role, its reliance on a body of restrictive past precedent, and the inability to directly address issues of underfunding or to prospectively set substantive standards for attorney conduct.

Part II provides a brief history of equal protection as it relates to indigent defense, with a focus on the cases that form the basis for protecting indigent defendants' right of access to the courts, including *Griffin* and *Douglas v. California*.[17] The Article posits that although equal protection doctrine has been limited in certain respects over the last half century, the core principles established in *Griffin* and its progeny are still viable despite subsequent legal developments.

Part III of the Article describes the conceptual and doctrinal advantages of an approach based in equal protection. It reframes the central principle of indigent defense reform as equal access and not the effectiveness of the lawyering provided, allowing us to focus on the systemic deprivation of resources rather than on the effect of such resources on "reasonable" attorney conduct.

An approach grounded in equality focuses on differential treatment between groups and recognizes systemic harm, in contrast to the Sixth Amendment approach, which is focused on the vindication of individual substantive rights.[18] It also allows us to expand our understanding of the problem to focus not only on a lawyer failing in his representation of an indigent client, but on the bigger picture of the resources that are necessary to a meaningful defense in every case, such as reasonable attorney workloads and adequate investigative and expert resources. Focusing on the lawyer alone will be a futile exercise unless we provide the attorney with the support she needs to do

17. 372 U.S. 353 (1963).

18. *Strickland*, 466 U.S. at 684–85.

her job effectively. Relying on an equal protection approach allows courts to prospectively define the elements that constitute a meaningful defense, rather than relying on a retrospective reasonableness approach. And, by removing the requirement that resources are relevant only insofar as they directly influence attorney conduct, an equal protection paradigm simplifies the relationship between resource deprivation and constitutional injury and facilitates a more direct path to necessary normative judgments about what tools must be made available to defendants dependent on the state for their defense. Perhaps most significant, an approach that focuses on equal access draws our attention to deeper inequalities that influence, among other things, the quality of representation available to poor defendants, highlights why a singular focus on across the board rights enforcement fails in the midst of fiscal constraint, and targets remedies on assisting the most disadvantaged.

Ultimately, the Article concludes that while the Sixth Amendment plays an important role in protecting every defendant's right to an effective attorney, it does little to recognize or address the obstacles preventing the practical enforcement of that right, particularly those of a fiscal nature. When indigent defense systems fail, it is not everyone who is harmed, but only those whose sole recourse for legal representation is to rely on public defense. Therefore, to effectively address such failures, we must look beyond universal substantive rights enforcement, which often assumes that all defendants stand on equal footing, to other approaches, like equal protection, which consciously ensure that poor defendants are not treated differently or afforded less than their wealthier counterparts.

By presenting equal protection as a meaningful alternative to Sixth Amendment arguments in the context of indigent defense, this Article does not suggest that consideration of equal protection will prompt an immediate doctrinal shift on the part of the Supreme Court or lead to radically different litigation outcomes. Nor does it suggest that the Sixth Amendment lacks value or a significant place in the context of indigent defense. But, it is meant to suggest that the dominant means for litigation reform to date—the Sixth Amendment—is fundamentally limited in its capacity[19] and that a return to equal protection principles may not only shift the evolution of doctrine and gen-

19. *Id.* at 689 ("The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system.").

erate more effective solutions, but also initiate a conceptual shift that has the capacity to influence both societal and legal norms and current discourse about indigent defense.

I. THE SHORTCOMINGS OF THE SIXTH AMENDMENT APPROACH

Over the past several decades, indigent defendants have used two primary vehicles to vindicate their right to an adequate defense, both of which typically rely on the Sixth Amendment: post-conviction claims asserting a violation under *Strickland v. Washington* and civil lawsuits alleging systemic right to counsel violations.[20] Although both vehicles have led to isolated victories, the Sixth Amendment suffers from several doctrinal limitations that prevent it from functioning as an effective tool for indigent defense reform, particularly in the current climate where funding presents the largest obstacle to reform.

This Article highlights several of these limitations: First, the Sixth Amendment's exclusive focus on attorney performance (and, under *Strickland*, the prejudice stemming from such conduct)[21] often renders the underallocation of resources irrelevant and certainly not dispositive. The Sixth Amendment is not designed to account for resource disparities or the misallocation of resources behind systemic failures; therefore, it cannot directly address issues of funding. To the extent the provision of resources is relevant, the analysis is dependent upon linking claims based on the underprovision of resources with counsel's performance.[22] Having to filter resource constraints through the medium of attorney effectiveness allows for other variables—for example, an individual attorney's strategic choices—to distort the analysis.[23] Second, Sixth Amendment

20. For a proposed model for federal habeas review that could be used to address systemic claims, see Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010).

21. *See Strickland*, 466 U.S. at 691–96 (focusing on the requirement that the defendant show prejudice).

22. Although some courts have held the *Strickland* standard inapplicable to prospective Sixth Amendment claims alleging systemic deficiencies, obviating the need to demonstrate actual prejudice, *see infra* Part I.E, there is still a burden under these claims to demonstrate the likelihood that a defendant or defendants will be denied the right to effective counsel.

23. *See, e.g.*, Sklansky, *supra* note 10, at 1282 ("[M]istakes and omissions by defense counsel are excused as 'strategic decisions' or 'isolated' errors—or not even addressed, because the reviewing court finds evidence of guilty so

analysis provides for an objective, neutral inquiry that does not distinguish between those defendants with means and those without; yet the harm created by conditions like those discussed immediately above are inflicted primarily on those who are subjected to underfunded public defense systems. A Sixth Amendment approach is therefore not equipped to facilitate more targeted solutions that specifically address existing inequalities between groups of defendants. The emphasis on an objective "reasonableness" inquiry also prevents courts from prescribing specific guidelines regarding what is required of counsel and prospectively defining what "effective" assistance means. Third, *Strickland*'s prejudice requirement means that certain external factors within the criminal case may override any potential relevance of underfunding. If a criminal defendant's overwhelming guilt can override even the most egregious attorney deficiencies, surely it can also render irrelevant the underallocation of resources. Fourth, the sheer amount of precedent counseling towards a finding that counsel was effective in any given case renders the Sixth Amendment approach an unlikely candidate for relief, let alone reform.

A. NO PLACE FOR FUNDING

To prove a claim of ineffective assistance of counsel under *Strickland*, a post-conviction defendant must show that his counsel's performance was deficient and that, but for such deficient conduct, the outcome of the proceeding would have been different.[24] Due to *Strickland*'s exclusive focus on attorney performance, claims made under *Strickland* do not provide a good vehicle to address funding inequalities or the failure to adequately resource appointed counsel.[25] If the attorney's performance is ultimately found objectively unreasonable, the level of resources made available to that lawyer is irrelevant. Likewise, if the attorney's performance is found constitutionally sufficient

strong that there is no 'reasonable probability' that any deficiencies in the defendant's representation affected the verdict.").

24. *See Strickland*, 466 U.S. at 687.

25. *See* Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1732 (2005) ("[T]he *Strickland* standard is not structured to accommodate an argument related to funding."); *see also* JUSTICE DENIED, *supra* note 2, at 129–30 (noting the difficulty of achieving systemic indigent defense reform through post-conviction litigation in part because of the prejudice requirement (and the rarity of a finding that prejudice will be presumed) and also the unlikelihood that such litigation will ultimately succeed).

in any given case, it is of no consequence that her office is severely underfunded or that other cases on her docket may have suffered as a result. As William Stuntz has observed:

> [N]othing in the law of criminal procedure regulates how much states must spend on lawyers for defendants. This too is a consequence of ineffective assistance doctrine. In order to make out an ineffective-assistance-of-counsel claim, a defendant must show, first, that his lawyer failed to provide constitutionally adequate assistance in his case and, second, that this failure may well have caused the defendant to lose his case. This test rules out claims based on inadequate resources. If defense counsel did indeed fail to provide constitutionally adequate assistance, the state's pay scale is irrelevant—the defendant wins no matter how well or poorly counsel was paid. If, on the other hand, defense counsel met the constitutional performance standard, the state's pay scale is again irrelevant—the defendant loses regardless of attorney pay because he got what the Sixth Amendment guarantees him: constitutionally adequate representation. This doctrinal box explains why very few cases even address the question whether states' compensation of appointed counsel can give rise to a constitutional claim. Existing law simply leaves no room for the claim.[26]

Although the above example focuses on attorney compensation—which might be more relevant under a Sixth Amendment analysis, given its more direct connection to attorney performance—the same is just as true for other resources, such as investigators, sophisticated forensic analyses, or overall office funding allowing for reasonable caseloads, which may not be provided to indigent defendants or their counsel by the state.[27] By focusing on attorney performance and requiring a showing of prejudice stemming from such performance, there is even less room to consider resources not directly tied to the attorney's role that may prevent an indigent defendant from receiving an adequate defense.[28] For example, it is unclear how deprivation of the trial transcript at issue in *Griffin* could have been addressed through a Sixth Amendment analysis alone.[29]

26. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 21 (1997) (citations omitted).

27. *See* JUSTICE DENIED, *supra* note 2, at 129 (noting that in *State v. Smith*, 681 P.2d 1374 (Ariz. 1984), the court found indigent defense services defective in part because the county relied on low-bid contract attorneys to pay for their own investigative services, reducing the chances that an investigator would actually be used).

28. *Cf.* Stuntz, *supra* note 26, at 21 (arguing that *Strickland* excludes claims based on inadequate resources).

29. *See* Griffin v. Illinois, 351 U.S. 12, 14–15, 19 (1956) (holding that the failure to provide trial transcripts to indigent defendants who could not otherwise afford them violated equal protection).

To the extent resources are taken into consideration under a Sixth Amendment analysis, they must be filtered through the attorney medium. In other words, a defendant alleging a *Strickland* claim would have to show how the deprivation of resources affected his attorney's performance.[30] This allows for intervening factors—such as the deference to strategic decisions that may justify a lawyer's conduct or an individual lawyer's exceptional talents—to affect the ultimate analysis.[31] It can also be difficult to generalize how different factors may affect different attorneys—for reasons based on individual attorney skill and experience or the resources available to that attorney.[32] By deferring to counsel's strategic reasons for making certain choices or failing to undertake certain tasks[33]—combined with the need of many lawyers who are alleged to be ineffective to defend their prior actions or decisions regardless of their merit—*Strickland* cedes power from the courts to the very lawyers whose effectiveness is being challenged.

30. *See* Strickland v. Washington, 466 U.S. 668, 691–66 (1984) (outlining the prejudice requirement of the Sixth Amendment's test for ineffective assistance).

31. *See* Stuntz, *supra* note 26, at 22 (asserting that the law affords defense counsel to act on his discretion).

32. *Cf.* JUSTICE DENIED, *supra* note 2, at 129 (explaining that the defense system was ineffective due to the county failing to take into account the number of cases, type of cases, the experience of the attorney, or time required for each case).

33. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 690–91; *see* Bell v. Cone, 535 U.S. 685, 698 (2002) ("In *Strickland* we said that [j]udicial scrutiny of a counsel's performance must be highly deferential and that every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Thus . . . when a court is presented with an ineffective-assistance claim . . . a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (internal quotation marks omitted)).

B. THE OBJECTIVE "REASONABLENESS" STANDARD

Under a Sixth Amendment analysis, counsel's conduct is evaluated under an objective reasonableness standard.[34] *Strickland* specifically prohibits a more forward looking approach, by which courts could promulgate prospective guidelines for counsel's conduct or specific requirements for effective assistance: "More specific guidelines are not appropriate . . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[35] The *Strickland* Court made clear that the purpose of the ineffectiveness inquiry was not to improve the quality of legal representation or to specify particular requirements for ineffective assistance.[36]

Given the Court's failure and unwillingness to develop or apply more defined standards, the analysis of *Strickland* claims is highly subjective and the definition of what constitutes ineffective assistance of counsel can and does change on a case-by-case basis.[37] As Justice Thurgood Marshall pointed out in his dissenting opinion in *Strickland*, part of the problem with the assessment of ineffective assistance as the Court defined the inquiry is that the Court "instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes 'professional' representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel."[38] Another problem with relying on "reasonableness under prevailing professional norms" is that the norm may it-

34. *Strickland*, 466 U.S. at 687–88 (finding that a convicted defendant alleging ineffective counsel must show that the representation by counsel failed the objective standard of reasonableness).

35. *Id.* at 688.

36. *Id.* at 686, 688; *see also* Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic's *Call to Presume Prejudice From Representational Absence*, 76 TEMP. L. REV. 827, 839 & n.81 (2003). In his dissenting opinion in *Strickland*, Justice Marshall took issue with this characterization of the right to counsel, challenging the notion that the purpose of the right to counsel is "only . . . to 'reduce the chance that innocent persons will be convicted.'" 466 U.S. at 711 (Marshall, J., dissenting).

37. *Strickland*, 466 U.S. at 707–08 (Marshall, J., dissenting) ("My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonably competent attorney' is to tell them almost nothing." (internal citation omitted)).

38. *Id.* at 708.

self be anemic—i.e., the norm may incorporate the existing lack of funding to the extent practicing lawyers are laboring under such conditions.[39]

Justice Marshall's fears have been realized in lower courts' application of *Strickland*. Although the American Bar Association (ABA) and other national organizations have set forth specific standards by which a lawyer's conduct should be evaluated,[40] courts have been willing to allow much shoddier lawyering to pass muster under the *Strickland* analysis.[41] And although in cases like *Wiggins v. Smith* the Supreme Court used the ABA Guidelines to provide a benchmark for what may constitute reasonable performance,[42] it has more recently demonstrated a renewed unwillingness to be confined to specific standards in assessing ineffectiveness.[43]

39. *See* Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1454–55 (1999) (explaining that many of the lawyers routinely providing representation to indigent defendants—and particularly capital defendants—are often not the best nor the most experienced).

40. *See, e.g.*, AM. BAR ASS'N, ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003) [hereinafter ABA GUIDELINES], *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf (providing a national standard of practice for the defense of capital cases in order to ensure that all capital defendants have a high quality of representation); AM. BAR ASS'N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) [hereinafter TEN PRINCIPLES] *available at* http://www.americanbar.org/content/damlaba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (noting that the supplied Principles should be used to assess the public defense delivery system); CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, (3d ed. 1992) [hereinafter PROVIDING DEFENSE SERVICES], *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html (asserting in Standard 5-1.1 that the objective of providing counsel is to assure that all persons eligible for counsel are afforded quality legal representation); NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES: REPORT OF THE NATIONAL STUDY COMMISSION ON DEFENSE SERVICES (1976); *see also* Wiggins v. Smith, 539 U.S. 510, 522 (2003) (applying ABA Guidelines in assessing counsel's conduct); *Strickland*, 466 U.S. at 688–89 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." (internal citation omitted)).

41. *See infra* Part I.D.

42. *Wiggins*, 539 U.S. at 522 (applying ABA Guidelines when assessing counsel's conduct).

43. *See, e.g.*, Bobby v. Van Hook, 130 S.Ct. 13, 17 (2009) (emphasizing that the Guidelines are "'only guides' to what reasonableness means, not its definition" (quoting *Strickland*, 466 U.S. at 688)); *id.* at 20 (Alito, J. concurring) (contesting the notion that the Guidelines have "special relevance in de-

Related to the objective nature of the *Strickland* inquiry is the fact that it does not distinguish between defendants with means and those without; it applies in equal force to defendants with appointed counsel and defendants with retained counsel.[44] Although this neutral quality of *Strickland* may appear to treat both groups of defendants equally, in practice it results in an inability to develop remedies that will help those who are most in need. *Strickland* assumes a universe in which every lawyer is equally positioned and is unable to distinguish between those lawyers who simply made poor decisions or demonstrated incompetence and those who were forced into their decisions by a lack of necessary resources.[45] That distinction is critical for any defendant who has demonstrated error under *Strickland* and is therefore entitled to reversal and a new trial.[46] For the poor defendant subjected to a failing indigent defense system, and who is, as a result of his victory, sent back into the same underresourced system, the prescribed remedy may be of little value.

C. THE POST-CONVICTION PREJUDICE PROBLEM

Perhaps the greatest obstacle facing defendants raising a post-conviction ineffective assistance of counsel claim is that they must show, under the *Strickland* standard, that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[47] The prejudice prong is a critical part of the *Strickland* analysis because of the Supreme Court's position that the Sixth Amendment right to counsel is meant to ensure a fair outcome: since the purpose of the Sixth Amendment is "to ensure a fair

termining whether an attorney's performance meets the standard required by the Sixth Amendment").

44. "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685; Evitts v. Lucey, 469 U.S. 387, 395 (1985) ("[T]he constitutional guarantee of effective assistance of counsel at trial applies to every criminal prosecution, without regard to whether counsel is retained or appointed.").

45. *Cf*. Stuntz, *supra* note 26, at 20–21 (arguing that the ineffective assistance doctrine includes low activity by defense counsel, making it difficult to separate low activity but good representation from incompetent representation); *see also id.* at 21 (asserting that the *Strickland* standard does not apply to claims based on inadequate resources).

46. *See Strickland*, 466 U.S. at 686 (noting that a successful ineffective assistance claim requires reversal of defendant's conviction or death sentence).

47. *Id.* at 694.

trial . . . [t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having a *just result*."[48]

Because the right to effective counsel was derived from the Due Process Clause as well as the Sixth Amendment, it shares the doctrinal limitations characteristic of other due process rights.[49] In *United States v. Gonzalez-Lopez*, Justice Antonin Scalia explained that early cases defining the right to counsel as the right to the effective assistance of counsel were based on the Due Process Clause's entitlements to a fair trial and just results.[50] Elaborating further, he wrote:

> Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose . . . . The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced.[51]

Under certain circumstances—like those discussed in *United States v. Cronic*[52]—prejudice is presumed, eliminating the need for the defendant to prove prejudice. For example, the actual or constructive denial of counsel results in a presumption of prejudice.[53] Actual denial of counsel may include situations where counsel is absent altogether, where counsel is prevented (by the government) from providing assistance during a critical stage of the proceeding or where the government actively inter-

48. *Id.* at 686 (emphasis added).

49. Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 16 (2009) ("[T]he tests developed by the lower courts for measuring effective assistance of counsel incorporated a significant doctrinal element inherent in a due process analysis: a requirement that defendants demonstrate prejudice.").

50. United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (referring to McMann v. Richardson*,* 397 U.S. 759, 771 n.14 (1970) and Powell v. Alabama, 287 U.S. 45, 57 (1932)).

51. *Id.* at 147 (citations omitted).

52. 466 U.S. 648, 662 (1984) (explaining that certain circumstances can lead to a presumption of ineffectiveness, eliminating the need for further inquiry into counsel's actual performance at trial).

53. *Cronic*, 466 U.S. at 659–60 (describing circumstances warranting a presumption of ineffectiveness); *Strickland*, 466 U.S. at 692 ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

feres with defense counsel's ability to conduct the defense.[54] Constructive denial of counsel may occur where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing."[55] Prejudice may also be presumed under circumstances where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."[56] *Cronic* makes clear, however, that prejudice will not be presumed where counsel has made several missteps, even significant ones; instead, counsel's failure must be "complete."[57]

Ultimately, the relief granted under this framework of presumed prejudice has been relatively rare, even more so than under a more traditional *Strickland* analysis.[58] In one infamous case, the defendant's lawyer slept through parts of the trial and yet a panel of judges on the United States Court of Appeals for the Fifth Circuit refused to apply a presumption of prejudice under *Cronic*.[59] It has also proven ineffective as a means for

54. *Cronic*, 466 U.S. at 659 n.25; *Strickland*, 466 U.S. at 686; *see also* Perry v. Leeke, 488 U.S. 272, 280 (1989). Examples of such state interference may include preventing attorney and client from consulting during an overnight recess, see Geders v. United States, 425 U.S. 80, 91 (1976), or barring defense counsel from making a summation at a bench trial, see Herring v. New York, 422 U.S. 853, 864–65 (1975).

55. *Cronic*, 466 U.S. at 659.

56. *Id.* at 659–60.

57. Bell v. Cone, 535 U.S. 685, 696–97 (2002) (explaining that counsel's failure to oppose the prosecution at several junctures would be insufficient; rather, counsel must have "failed to oppose the prosecution throughout the sentencing proceeding as a whole").

58. Because courts are hesitant to apply *Cronic* and are instead much more likely to apply a *Strickland* analysis, the "requirements for presuming prejudice under *Cronic* are remarkably undeveloped." Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic*'s Call to Presume Prejudice From Representational Absence*, 76 TEMP. L. REV. 827, 831–32 (2003); *see also id.* at 831 (explaining that "[f]or the most part, courts have not embraced *Cronic*"). "Therefore, while *Cronic* provides a viable avenue through which courts can invalidate convictions when defense attorneys manifest especially egregious conduct, it serves as the exception rather than the rule, leaving *Strickland* as virtually the sole standard for evaluating attorney competence." Ryan Riehl, Note, *Double-Talking the Right to Counsel*, 50 WAYNE L. REV. 1019, 1029 (2004).

59. An en banc opinion of the Fifth Circuit later reversed the panel's decision, granting the petitioner's writ of habeas corpus. James M. Donovan, Burdine v. Johnson*–To Sleep, Perchance to Get a New Trial: Presumed Prejudice Arising from Sleeping Counsel*, 47 LOY. L. REV. 1585, 1587 (2001); *see also* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Require-*

addressing systemic flaws that inevitably result in the constructive denial of counsel, such as counsel lacking critical resources or overwhelmed by unmanageable caseloads. As recently as April 2009, a report issued by the National Right to Counsel Committee of the Constitution Project observed that "[w]e are unaware of any cases in which a court has ruled, *based expressly upon analogy to Cronic*, that excessive caseloads render it so unlikely that even a competent lawyer could be expected to render effective assistance that prejudice to clients should be presumed."[60]

The difficulty of focusing on outcomes or the potential prejudice to an individual defendant's case is three-fold. First, an analysis requiring a finding of prejudice will necessitate speculation that is always subject to subjective assessment or interpretation.[61] It is difficult to assess how a different legal presentation may have affected the fact finder's verdict, and—given the policy decision to favor finality—courts in doubt are more likely to assume that a different action on the lawyer's part would not have affected the ultimate conclusion.

Second, focusing on the prejudice that has stemmed from a lawyer's inadequate counsel allows a variety of other more external factors to be taken into account, including the evidence against the accused.[62] Under the current inquiry, if there appears to be clear evidence of a defendant's guilt or—in the capital context—if the defendant's crime is so egregious such that no amount of mitigating evidence could have convinced the jury to choose a life sentence, he would be permitted the worst lawyering possible, given that any degree of lawyering arguably could not overcome the evidence against him.[63] In that sense,

ment, 75 NEB. L. REV. 425, 455–63 (1996) (discussing cases in which courts concluded that counsel was effective under *Strickland* and *Cronic* despite fact that counsel was sleeping or under influence of drugs or alcohol during trial).

60. JUSTICE DENIED, *supra* note 2, at 111 n.29.

61. *See, e.g.*, Klein *supra* note 39, at 1467 (asserting that the transcript does "not reflect what ought to have and would have been done by counsel" if counsel had been competent (emphasis omitted)).

62. Conversely, it is also possible that, by virtue of a lawyer's ineffectiveness, there is evidence that will not be taken into account: "[E]vidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel." Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting); *see also* Klein, *supra* note 39, at 1467 (explaining that the "record may not reveal weaknesses in the prosecutor's case *because* of counsel's incompetence").

63. *See supra* note 18 and accompanying text; *see also* Klein, *supra* note 39, at 1467 (noting that since *Strickland*, courts "may find that when the pros-

Strickland provides the least protection to those accused of committing the most serious crimes—where the stakes are highest—yet, these are the instances where a good lawyer is most needed.[64] It would be preferable, from a rights perspective, not to maintain a "no harm, no foul" system of redress; there is an independent interest in keeping the playing field level, regardless of who wins and who loses.

Third, focusing on the lawyer's conduct (and the harm stemming from such conduct) takes an overly narrow view of the violations occurring within the system and assumes that injury only occurs when an indigent defendant is dealt an adverse outcome.[65] There is an independent interest that is violated when an indigent defendant is deprived of a competent and qualified lawyer at a critical stage of the criminal proceeding.[66] But, the preference to favor finality in the post-conviction context stands in the way of making that harm cognizable.[67]

D. BAD PRECEDENT

Post-conviction defendants claiming that they have received ineffective assistance at trial face an extremely high bar to relief. Although there have been occasional meritorious claims, the vast majority of ineffective assistance claims are

ecutor's case is strong, the verdict would have been a guilty one regardless of how effective counsel's representation was").

64. *See* Klein, *supra* note 39, at 1467 (noting that it is "the defendant confronted with the strongest case against him who is the *most* in need of a competent, aggressive, and effective defense").

65. *See* JUSTICE DENIED, *supra* note 2, at 129 (stating that even if systemic deficiencies are acknowledged, the deficiencies rarely lead to "a presumption of prejudice").

66. *Cf.* Duncan v. State, 774 N.W.2d 89, 98 (Mich. Ct. App. 2009*), aff'd on other grounds* 780 N.W.2d 843 (Mich. 2010), *and reconsideration granted, order vacated*, 784 N.W.2d 51 (Mich. 2010), *and order vacated on reconsideration*, 790 N.W.2d 695 (Mich. 2010), *and order reinstated*, 790 N.W.2d 695 (Mich. 2010), *and rev'd*, 784 N.W.2d 51 (Mich. 2010), *and order vacated on reconsideration*, 790 N.W.2d 695 (Mich. 2010) (holding in the context of a class-action civil suit seeking prospective relief that "when it is shown that court-appointed counsel's representation falls below an objective standard of reasonableness with respect to a critical stage in the proceedings, there has been an invasion of a legally protected interest and harm occurs").

67. Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1822–23 (2000) ("[W]hen the right to counsel is invoked in order to overturn a criminal conviction, concerns about finality and judicial economy compel a narrow understanding of effective assistance of counsel, one in which the facial reliability of the conviction outweighs considerations of the requirements of a fair trial.").

unsuccessful.[68] Both federal and state courts have allowed egregious instances of lawyering to pass muster as effective counsel, leading one commentator to note that "[b]y failing to 'proscribe second-class performances by counsel,' the Court has led us down a path which has constitutionalized the inadequate, incompetent, ineffective assistance of counsel."[69] Another author has summarized the extent to which courts have failed to enforce the Sixth Amendment under *Strickland*:

> The *Strickland* standard has proved virtually impossible to meet. Courts have declined to find ineffective assistance where defense counsel slept during portions of the trial, where counsel used heroin and cocaine throughout the trial, where counsel allowed his client to wear the same sweatshirt and shoes in court that the perpetrator was alleged to have worn on the day of the crime, where counsel stated prior to trial that he was not prepared on the law or the facts of the case, and where counsel appointed in a capital case could not name a single Supreme Court decision on the death penalty.[70]

The precedent developed in the years after *Strickland* was decided has set a high bar for ineffectiveness and has allowed courts to apply a weak interpretation to the Sixth Amendment's right to counsel.[71] Moreover, the additional layer of deference given to state courts a decade and a half ago by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) has made obtaining relief through federal habeas nearly impossible.[72] As

68. *See* Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 5, 33 (noting that "ineffective assistance of counsel claims are difficult to win" and that "the vast majority of individuals pursuing an ineffective assistance of counsel claim are unsuccessful"); *see also* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 6 ("Judges almost never reverse convictions for ineffective assistance of counsel"); Klein, *supra* note 39, at 1471 (citing a 1995 study of nine states and the corresponding federal district courts revealing that the courts granted "only one percent or fewer of the claims of ineffective assistance"); Sklansky, *supra* note 10, at 1282 (noting that the requirements of *Strickland* "have proven almost impossible to meet").

69. Klein, *supra* note 39, at 1479.

70. DAVID COLE, NO EQUAL JUSTICE 78–79 (1999); *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L. J. 1835, 1841 n.45, 1843 (1994) (providing numerous examples of ineffective assistance of counsel and egregious attorney conduct not found to violate the Sixth Amendment).

71. *See* Stuntz, *supra* note 26, at 6 ("[I]neffective assistance doctrine tolerates a very low activity level by defense attorneys.").

72. *See, e.g.*, Lynn Adelman, *The Great Writ Diminished*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5–6, 36 n.247 (2009) (noting the decline of federal habeas petitions granted and that "AEDPA and other hurdles have made it harder for federal judges to grant habeas relief").

a result of the high number of cases finding subpar lawyering to pass constitutional muster and the limited ability of federal courts post-AEDPA to develop the law, the right to counsel has become fairly entrenched in limiting precedent, and it may be difficult to unmoor the right to make it susceptible to more expansive application.

E. PRE-CONVICTION INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Separate mention should be made of civil pre-conviction claims, which differ in nature from traditional *Strickland* claims made post-conviction. Criminal defendants seeking to allege that their counsel are ineffective may also attempt to do so pre-conviction.[73] Pre-conviction ineffectiveness claims made in the criminal context are relatively rare and have been deemed cognizable with little frequency;[74] these claims are often viewed by courts as reserved for post-conviction review.[75]

73. Some defendants have made pre-conviction criminal claims of ineffective assistance with an eye toward achieving systemic reform. *See, e.g.*, State v. Peart, 621 So. 2d 780 (La. 1993) (raising Sixth Amendment claim in a pretrial motion during the course of an individual criminal prosecution). To the extent defendants in this procedural posture claim, for example, that counsel's lack of adequate compensation violates the Sixth Amendment, the analysis appears relatively similar to the pre-conviction civil claims discussed *infra*, in that there must a showing that the under-compensation will likely result in a denial of Sixth Amendment rights. *See, e.g.*, State v. Young, 172 P.3d 138, 141 (N.M. 2007) (holding, in reliance on *Cronic*, that "[t]he inadequacy of compensation in this case makes it unlikely that any lawyer could provide effective assistance, and therefore . . . ineffectiveness is properly presumed without inquiry into actual performance").

74. As of 2007, there had been just one successful documented case of a prospective *Strickland* claim (even though *Strickland* was decided in 1984). *See* Robin Adler, *Enforcing the Right to Counsel: Can the Courts Do It? The Failure of Systemic Reform Litigation*, 2007 J. INST. JUST. & INT'L STUD. 59, 61; *see also, e.g.*, United States v. Carmichael, 372 F. Supp. 2d 1331, 1334 (M.D. Ala. 2005) (finding pre-conviction ineffectiveness claim premature); *cf.* JUSTICE DENIED, *supra* note 2, at 112–28 (discussing several pre-conviction civil cases filed post-2007—some of which were still pending at the time of the report's publication—and also other cases that were resolved by consent decree or settlement agreement).

75. *See, e.g.*, Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002) (ineffective assistance of counsel claims should be raised on collateral review); Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996) (holding pre-conviction ineffectiveness claims unreviewable); Collins v. State, 477 N.W.2d 374, 376 (Iowa 1991) (ineffective assistance of counsel claims more properly considered in post-conviction proceedings to allow for development of record of counsel's performance); *see also* Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, 24 CRIM. JUST., Fall 2009, at 6, 10 (noting that "a

Therefore, this section will focus on pre-conviction ineffectiveness claims made in the civil context.

Ineffective assistance of counsel claims asserted by individual defendants, whether pre- or post-conviction, are often examples of a systemic failure to provide the indigent with an adequate defense. In response to that reality, civil advocates have attempted to use other vehicles to secure reform of the system as a whole. A commonly used means for obtaining structural reform in this context is for indigent defendants—often banded together as a class—to assert through a civil lawsuit that the indigent defense system at issue is so underresourced or so otherwise flawed as to violate the Sixth Amendment rights of any defendant subject to that system.[76]

Although not uniformly resolved, some courts have held that defendants seeking to obtain systemic or structural indigent defense reform by filing civil suit—pursuant to 42 U.S.C. § 1983, for example—are not subject to the *Strickland* inquiry because they are attempting to show a need for prospective enforcement (i.e., that counsel will perform ineffectively in the future) rather than making a retrospective argument post-conviction.[77] Because civil plaintiffs making such claims are often seeking declaratory or injunctive relief, in assessing such claims, courts typically assess "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies

majority of states require defendants to raise ineffectiveness challenges in state post-conviction proceedings").

76. *See* JUSTICE DENIED, *supra* note 2, at 112–17 (providing examples of class-action litigation seeking injunctive relief for indigent defendants).

77. *See* Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219, 238 & n.102 (2010) ("[A] class action that seeks prospective relief rather than the overturning of a conviction need not meet the *Strickland* test."); *see also* Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988) ("[The *Strickland*] standard is inappropriate for a civil suit seeking prospective relief."); Simmons v. State Pub. Defender, 791 N.W.2d 69, 76 (Iowa 2010) ("In cases involving systemic or structural challenges . . . [w]hat is required is a showing that the structural feature being challenged threatens or is likely to impair realization of the right to effective assistance of counsel."). *But see, e.g.*, State *ex rel.* Stephan v. Smith, 747 P.2d 816, 831 (Kan. 1987) ("While the system thus creates the potential for ineffective assistance of counsel, there is no specific evidence in the record here of any deficient performance that adversely affected the outcome of a trial. . . . Simply because the system *could* result in the appointment of ineffective counsel is not sufficient reason to declare the system unconstitutional; those rare cases where counsel has been ineffective may be handled and determined individually by the appellate courts." (citation omitted) (citing Strickland v. Washington, 466 U.S. 668 (1984))).

at law."[78] So, although plaintiffs in this posture need not show actual harm stemming from the state's failure to provide constitutionally adequate representation,[79] they must show the imminent risk of harm in the future, in the form of potentially diminished attorney effectiveness.[80]

Although the standard applied to these claims is more open than *Strickland*'s case-by-case post hoc analysis to the possibility of systemic reform, they are—by their nature as Sixth Amendment allegations—focused specifically on the lawyer's role and on only those rights that have been specifically delineated under Sixth Amendment case law[81] (they are also indirectly cabined by the bad precedent in the area of right to counsel, as described above).[82] Moreover, many of these cases have been unable to get at the qualitative aspects of ineffective assistance; rather they have focused on a deprivation of resources leading to the complete denial of counsel, meaning that no lawyer is present at all.[83] In the event that the quality (and not mere ex-

78. *Luckey*, 860 F.2d at 1017 (quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974)) (internal quotation marks omitted).

79. *See Simmons*, 791 N.W.2d at 77 ("[A] showing of 'actual prejudice' in a particular case is arguably not applicable; instead, what is required is a showing that the structural feature being challenged threatens or is likely to impair realization of the right to effective assistance of counsel.").

80. In other words, the plaintiff seeking pre-conviction equitable relief must show that his or her "constitutional right to counsel is being denied or will be denied because some aspect of the provision of indigent defense services makes it unlikely that any attorney could provide effective representation under the circumstances." JUSTICE DENIED, *supra* note 2, at 112.

81. Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 451–56 (2010). *But see id.* at 474 (explaining that "[e]vidence of systemic shortcomings in the jurisdiction—such as violations of guidelines, checklists, or administrative standards on issues like caseloads, training, or access to investigators—is relevant insofar as it demonstrates the probability of harm that indigent criminal defendants face, but such probabilistic evidence does not in and of itself constitute constitutional injury").

For a discussion of how the Court's recent application of the Sixth Amendment to the pre-trial context may create more opportunities to demonstrate injury in the context of structural ineffective assistance of counsel claims, see Lauren Sudeall Lucas, *Unintended Consequences: The Impact of the Court's Recent Cases on Structural Ineffective Assistance of Counsel Claims*, 25 FED. SENT'G REP. 106 (2012).

82. *See supra* Part I.D.

83. *See, e.g.*, Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895, 899–900 (Mass. 2004) (addressing situation in which low compensation resulted in shortage of attorneys which led to indigent defendants being without representation); N.Y. Cnty. Lawyers' Ass'n. v. State, 763 N.Y.S.2d 397, 399–400 (N.Y. Sup. Ct. 2003) (addressing statutory fee caps on attorney

istence) of representation is challenged based on the denial of specific resources, any deprivation of resources that is alleged will have to be filtered through the lens of attorney conduct: how might that deprivation of resources inevitably lead to ineffective assistance in the future?

Ineffective assistance of counsel claims, even when asserted in the civil context and not necessarily subject to the confines of *Strickland*, are also handicapped in their ability to provide prospective guidance for how counsel should perform in the future or what resources would be necessary to facilitate such conduct. As the court in *Hurrell-Harring v. State*—one of the more recent courts to adjudicate such a claim—explained:

> [E]ffective assistance is a judicial construct designed to do no more than protect an individual defendant's right to a fair adjudication; it is *not a concept capable of expansive application to remediate systemic deficiencies*. The cases in which the concept has been explicated are in this connection notable for their intentional omission of any broadly applicable defining performance standards. Indeed, *Strickland* is clear that articulation of any standard more specific than that of objective reasonableness is neither warranted by the Sixth Amendment nor compatible with its objectives:
>
> "More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms . . . ."
>
> . . . .
>
> . . . While the imposition of such standards may be highly salutary, it is not under *Strickland* appropriate as an exercise in Sixth Amendment jurisprudence.[84]

Although the *Hurrell-Harring* court ultimately interpreted the plaintiffs' claims in that case as alleging a basic denial of the right to counsel under *Gideon*, its opinion did not bode well for other defendants seeking prospective relief under the Sixth Amendment:

> Inasmuch as general prescriptive relief is unavailable and indeed incompatible with the adjudication of claims alleging constitutionally ineffective assistance of counsel, it follows that plaintiffs' claims for prospective systemic relief cannot stand if their gravamen is only that

compensation, which resulted in an insufficient number of available attorneys for indigent defendants).

84. 930 N.E.2d 217, 221 (N.Y. 2010) (emphasis added) (footnote omitted) (quoting Strickland v. Washington, 466 U.S. 668, 688 (1984)).

> attorneys appointed for them have not, so far, afforded them meaningful and effective representation.[85]

Even more to the detriment of would-be claimants, other courts have held, similarly, that pre-conviction claims of ineffectiveness are not cognizable at all.[86]

II. EQUAL PROTECTION AND INDIGENT DEFENSE

From the outset, it should be clear that this Article's suggestion that indigent defense reformers should reclaim equality is not a suggestion that they should aim to establish wealth as a constitutionally suspect classification. Instead, the understanding of equality in which this Article is based is grounded in the fundamental rights branch of equal protection law[87] and the right of access to the courts that was established in *Griffin*. A description of the creation and evolution of that right follows.

A. A HISTORY OF EQUAL PROTECTION AND THE RIGHT OF MEANINGFUL ACCESS TO THE COURTS

Although the Court's more recent jurisprudence regarding the right to effective counsel has focused exclusively on the Sixth Amendment, earlier cases addressing indigents' right to a meaningful defense in the criminal context were based on equality principles and not a lawyer's ability to effectuate an effective defense.

The first case in which the Court expressed concern about the effect of poverty on defendants' ability to access to the

85. *Id.* at 222. Civil claimants have been more successful where they have alleged the denial of counsel altogether. *See, e.g.*, *Lavallee*, 812 N.E.2d; Amended Complaint at 3–4, White v. Martz, No. CDV-2002-133 (Mont. Dist. Ct. Apr. 1, 2002); *see also Hurrell-Harring*, 930 N.E.2d at 227 ("[T]here is considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel . . . .").

86. *See, e.g.*, Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996) ("[A] violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial. This prejudice is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable. Accordingly, the claims presented here are not reviewable under the Sixth Amendment as we have no proceeding and outcome from which to base our analysis." (footnote omitted) (citation omitted)); Kennedy v. Carlson, 544 N.W.2d 1, 8 (Minn. 1996) (holding Sixth Amendment claims too "speculative and hypothetical" without a showing of actual prejudice).

87. For a discussion of the distinction between suspect classifications and the right to equal access in the same-sex marriage context, see Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1382 (2010).

courts preceded *Gideon* by three decades: *Powell v. Alabama*.[88] Relying on the due process component of the Fourteenth Amendment, and not the Sixth Amendment, the Court held that the Constitution required the appointment of effective counsel in capital cases.[89] Although the primary focus of *Powell* is on the Due Process Clause's requirement of fundamental fairness, the opinion emphasizes the inequitable treatment of indigents in criminal proceedings and expresses a more general concern about indigents' ability to participate in the judicial process.[90] This more expansive view of *Powell* sounds in equal protection as well as due process principles.[91]

Cases following *Powell* and elaborating on or expanding the right to counsel also emphasized equal protection principles, even though the Equal Protection Clause did not formally constitute a basis for the opinions.[92] For example, in *Johnson v. Zerbst*,[93] the Court adopted the reasoning of *Powell*'s more expansive reading and made the right to counsel available to all defendants in federal criminal proceedings.[94] In doing so, the Court acknowledged the equal protection aspect of its ruling, stating that "the humane policy of the modern criminal law" requires that counsel be furnished to those defendants who cannot afford to employ counsel of their own.[95] In the Supreme Court's landmark right to counsel case, *Gideon v. Wainwright*,[96] the Court held that indigent defendants have a right to court-appointed counsel in criminal cases.[97] Although *Gideon* is recognized primarily as a Sixth Amendment case, the *Gideon* Court also recognized the influence of equal protection principles and the importance of substantive as well as procedural fairness.[98] Justice Hugo Black wrote for the Court:

> From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to ensure fair trials before impartial tribunals in

88. 287 U.S. 45 (1932).

89. *Id.* at 71–72.

90. Sundeep Kothari, *And Justice for All: The Role Equal Protection and Due Process Principles Have Played in Providing Indigents with Meaningful Access to the Courts*, 72 TUL. L. REV. 2159, 2163 & n.22 (1998).

91. *Id.* at 2163–64.

92. *Id.* at 2165–68.

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

94. *Id.* at 467–68.

95. *Id.* at 463 (footnote omitted) (internal quotation marks omitted).

96. 372 U.S. 335 (1963).

97. *Id.* at 344.

98. Kothari, *supra* note 90, at 2168.

> which *every defendant stands equal before the law*. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[99]

It is clear from the opinion in *Gideon* that the Court was concerned with the relationship between wealth and fairness: not only between defendants and the state, but also between defendants.[100]

In the years immediately preceding *Gideon*, the Court specifically addressed the importance of equality in the treatment of indigent defendants. In *Griffin v. Illinois*, in which the State of Illinois had conceded that a trial transcript was necessary for adequate appellate review, the Supreme Court held, relying on the Equal Protection and Due Process Clauses, that the State could not deprive indigent appellants of adequate review on appeal because of their inability to pay the cost of a transcript.[101] After *Griffin*, it was clear that every state was constitutionally required to provide a "means of affording adequate and effective appellate review to indigent defendants."[102]

Writing for the Court in *Griffin*, Justice Black found that the ability to pay the cost of a transcript "bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial."[103] Throughout the opinion there are references to the fact that those defendants with means and those without means must be treated as equals in the eyes of the court—for example:

> Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far

99. *Gideon*, 372 U.S. at 344 (emphasis added); *see also Simplicity as Equality in Criminal Procedure*, *supra* note 3, at 1589–90 ("Although the decision relied formally on the Sixth Amendment right to counsel . . . the Court treated equality as a component of fundamental fairness.").

100. *See Gideon*, 372 U.S. at 344 ("Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime . . . . [T]here are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.").

101. 351 U.S. 12, 13–14, 16, 19 (1956) ("Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

102. *Id.* at 20.

103. *Id.* at 17–18.

> as the law is concerned, "stand on an equality before the bar of justice in every American court."[104]
>
> [O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.[105]
>
> There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.[106]

Justice Black's opinion relied on both due process and equal protection principles, but his opinion commanded a plurality of only four justices.[107] Concurring in the judgment, Justice Felix Frankfurter ensured a victory for the defendants; however, his opinion eschewed any reliance on the Due Process Clause.[108] Instead, drawing on his legal realist tendencies, Justice Frankfurter's opinion relied solely on the Equal Protection Clause, observing that "[l]aw addresses itself to actualities"[109] and concluding that "[t]he State is not free to produce such a squalid discrimination. If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity."[110] In essence, Justice Frankfurter's position was that equal protection imposes an affirmative duty upon the state to remedy any inequalities that defeat indigents' ability to access the appellate process.[111]

In *Douglas v. California*, decided the same day as *Gideon*, the Supreme Court turned more explicitly to the Equal Protection Clause, holding that the government must provide indigent defendants with free counsel on direct appeal.[112] In so

104. *Id.* at 17 (citation omitted).

105. *Id.*

106. *Id.* at 19.

107. *Id.* at 13.

108. *Id.* at 21 (Frankfurter, J., concurring in the judgment) ("Thus, it is now settled that due process of law does not require a State to afford review of criminal judgments.").

109. *Id.* at 23.

110. *Id.* at 24.

111. Lloyd C. Anderson, *The Constitutional Right of Poor People to Appeal Without Payment of Fees: Convergence of Due Process and Equal Protection in* M.L.B. v. S.L.J., 32 U. MICH. J.L. REFORM. 441, 448–49 (1999).

112. 372 U.S. 353, 357–58 (1963). The Court has made clear that throughout this line of cases, equal protection and due process have served two distinct roles: "'The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs,' while '[t]he due process concern homes in on the essential fairness of the state-ordered proceedings.'" Halbert v. Michigan, 545 U.S. 605, 610–11 (2005) (quoting M.LB. v. S.L.J., 519 U.S. 102, 120 (1996)).

One commentator has suggested that "when a strong due process interest

holding, the Court relied on a clear equality rationale,[113] invoking comparison between those with means and those without:

> There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.[114]

Although the Court made later attempts to limit the *Griffin-Douglas* line of cases to a due process rationale,[115] equal protection remained a critical element of its related holdings. As recently as 2005, the Court reaffirmed that this line of cases "reflect[s] 'both equal protection and due process concerns'"[116] but acknowledged also that most of its decisions in this area rely on equal protection principles.[117] Even when the verbalized basis for an opinion has been something other than equal protection—most often due process—there is a clear narrative throughout the access to courts' line of cases that contemplates the notion of equality and its centrality to fair treatment within the criminal justice system.

In the years following *Griffin*, *Gideon* and *Douglas*, the Court has repeatedly emphasized: (1) the idea that wealth should not influence defendants' treatment by the courts; and (2) the notion that indigent defendants are entitled to as adequate and effective review as defendants with means.[118] In

is present, equal protection scrutiny of wealth differentiation is triggered." Kothari, *supra* note 90, at 2192. Another way of thinking about that observation recognizes that fundamental rights are treated differently within the equal protection analysis. To the extent that access to the courts is a fundamental right, many of these cases can be viewed as protecting equal access to the courts (and requiring a heightened level of scrutiny in justifying a departure from such equality), given the fundamental nature of that right; when the "right" sought by the defendant does not rise to the same fundamental level, the Court is not as concerned with equal treatment and instead retreats to a more traditional due process inquiry.

113. The Court in *Douglas* required a rationale other than the Sixth Amendment, on which it had relied in *Gideon*, because the Sixth Amendment applies only to trial and not the appeal.

114. *Douglas*, 372 U.S. at 357–58.

115. *See infra* Part II.C.

116. *Halbert*, 545 U.S. at 610.

117. *M.L.B.*, 519 U.S. at 120 (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983)).

118. *See, e.g.*, Draper v. Washington, 372 U.S. 487, 496 (1963) ("In all cases the duty of the State is to provide the indigent *as adequate and effective an*

Entsminger v. Iowa, for example, the Court relied heavily on *Griffin* and *Douglas* in the case of an indigent defendant whose court-appointed lawyer failed to file the entire record of the defendant's trial even though it had been prepared and even though he had informed the defendant that he would do so.[119] Although the failure was on the part of counsel appointed by the state and not on the state itself, the Court held that the defendant had been denied adequate and effective review.[120] The *Entsminger* Court further stated: "[T]he Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each."[121]

In *Mayer v. Chicago*, the Court applied the logic of *Griffin* to misdemeanor appeals, holding that indigent defendants cannot be required to pay costs in order to appeal a misdemeanor conviction, even when the defendant has not been sentenced to a term of incarceration.[122] In so holding, the Court again emphasized the need to afford defendants an "effective" appeal: "*Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of *as effective an appeal* as would be available to others able to pay their own way."[123] The Court's holding in *Mayer* makes clear—echoing Justice Frankfurter's opinion in *Griffin*—that "imposing costs upon indigents as a condition of appeal constitutes invidious discrimination, regardless of the interest at stake's gravity."[124]

In *Britt v. North Carolina*, the Court again reaffirmed its basic holding in *Griffin*, explaining that "*Griffin v. Illinois* and its progeny establish the principle that the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, *when those tools*

appellate review as that given appellants with funds—the State must provide the indigent defendant with means of presenting his contentions to the appellate court *which are as good* as those available to a nonindigent defendant with similar contentions." (emphasis added)); Eskridge v. Washington, 357 U.S. 214, 216 (1958) ("[D]estitute defendants must be afforded *as adequate appellate review* as defendants who have money enough to buy transcripts." (emphasis added) (citation omitted)).

119. 386 U.S. 748, 750 (1967).

120. *Id.* at 752.

121. *Id.* (citation and internal quotation marks omitted).

122. 404 U.S. 189, 195–96 (1971).

123. *Id.* at 196–97 (emphasis added).

124. Anderson, *supra* note 111, at 450. Anderson points out that *Mayer* did not rely on the conclusion that a "fundamental interest" was at stake, but reached the same conclusion as *Griffin* nonetheless. *Id.* at 451.

are available for a price to other prisoners."[125] In so holding, the Court emphasized yet again—in the context of facing criminal charges and the potential loss of one's liberty—the importance of equal treatment of rich and poor.

In following years—and after the close of the Warren Court era—the Court has continued to emphasize the principles established in *Griffin*. In *Ake v. Oklahoma*, the Court held that, when a need is shown, the State must provide competent psychiatric assistance to aid in "evaluation, preparation, and presentation of the defense."[126] Although relying primarily on a due process rationale, *Ake* also invoked equal protection principles. Citing *Griffin*, the Court held that "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake."[127] Recognizing that an indigent defendant is entitled to an adequately-resourced defense team and not only access in its simplest form, the Court observed that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense."[128] On the basis of that holding, both federal and state courts have invoked *Ake* to "require that other kinds of assistance, both expert and non-expert, are provided to indigent defendants . . . to ensure that the accused receives meaningful legal representation."[129]

Elsewhere in the criminal justice context, the Court has relied on equal protection principles to hold that indigents may not be incarcerated based on their status—or, in other words, for their inability to pay judicially-imposed fines.[130] In *Bearden v. Georgia*, for example, the Court held that revoking an indigent defendant's probation for non-willfully failing to pay a court-imposed fine violated both equal protection and due process.[131] In doing so, however, the Court also recognized that

125. 404 U.S. 226, 227 (1971) (emphasis added).

126. 470 U.S. 68, 83 (1985).

127. *Id.* at 76.

128. *Id.* at 77; *see also* JUSTICE DENIED, *supra* note 2, at 25 (explaining that the "principle of *Griffin*" was applied in *Ake*).

129. JUSTICE DENIED, *supra* note 2, at 25 (listing federal and state cases in which such assistance was granted).

130. *See, e.g.*, Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

131. 461 U.S. 660, 665–66 (1983). The Court found the two inquiries to be substantially similar in the context of the question presented. *Id.* ("To deter-

"[m]ost decisions in this area have rested on an equal protection framework."[132]

The cases discussed above demonstrate that equal protection has been used to guarantee a general right of access to the courts and also to establish certain entitlements for the indigent defendant, such as a trial transcript and necessary defense experts. In the last couple of decades, however, and specifically in the context of those attempting to reform struggling indigent defense systems, equal protection has given way to the dominant Sixth Amendment approach, which has limited our ability to understand and respond to the ways in which poor defendants are uniquely harmed by systemic indigent defense failures. This shift is likely due to advocates' cognizance of the courts' return to a more restrictive view of equal protection and their refusal to recognize the poor as a suspect class.[133] As the Article explains below, however, equality remains a viable basis for challenging measures that deprive defendants of access to justice and should not be dismissed lightly or forgotten.

B. GRIFFIN'S LIMITING PRINCIPLES

Griffin was a groundbreaking case, and not just for its role in securing indigent defendants' fundamental right to adequate appellate review. In contrast to equal protection cases that had focused on outward discrimination by state actors, *Griffin* marked the first occasion on which the Court imposed "affirmative obligations on government to redress inequalities not of its own making."[134] Michael Klarman has posited that *Griffin* "significantly expanded, if not actually conceived" the fundamental rights strand of equal protection.[135] Archibald Cox referred to *Griffin* and its progeny's imposition of affirmative obligations on government to address wealth discrimination as the "most creative force in constitutional law."[136] *Griffin* continues to

mine whether this differential treatment violates the Equal Protection Clause, one must determine whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation. This is substantially similar to asking directly the due process question of whether and when it is fundamentally unfair or arbitrary for the State to revoke probation when an indigent is unable to pay the fine.").

132. *Id.* at 665; *see also* M.L.B. v. S.L.J., 519 U.S. 102, 120 (1996).

133. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 283–84 (1991).

134. *Id.* at 266.

135. *Id.* at 286.

136. Archibald Cox, *Foreword: Constitutional Adjudication and the Promo-*

stand for the proposition that access to the courts is a fundamental right, and it has remained true since *Griffin* was decided that discrimination in allowing access to the courts is subject to heightened scrutiny under the Equal Protection Clause.[137]

If we are to accept the notion that such discrimination is impermissible under the Equal Protection Clause, the obvious next question is: where does that "slippery slope" end? The critique that has been leveled against the *Griffin* rationale since its inception has been that the State can simply not be required to provide the poor with legal services that only the rich can afford. In articulating this position in his dissent in *Douglas*, Justice John Marshall Harlan invoked a dramatic slippery slope argument, suggesting that the same rationale could easily be applied to other government expenses and that the government is not responsible for making every state-provided service equally accessible as a financial matter:

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Yet I take it that no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, to impose a standard fine for criminal violations, or to establish minimum bail for various categories of offenses.[138]

In his dissenting opinions in both *Douglas* and *Griffin*, Justice Harlan emphasized that the state is not responsible for providing affirmative assistance to the indigent defendant: "Laws such as these do not deny equal protection to the less fortunate for one essential reason: the Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.'"[139]

The majority in *Douglas* responded to these critiques by stating that "[a]bsolute equality is not required; lines can be and are drawn and we often sustain them."[140] Although it has not required the state to provide equal access to every service that it offers—for example, state-funded higher education or

tion of Human Rights, 80 HARV. L. REV. 91, 93 (1966).

137. *See, e.g.*, Johnson v. Bredesen, 624 F.3d 742, 749 (6th Cir. 2010) (contrasting *Griffin* as a case involving a fundamental interest subject to heightened scrutiny).

138. Douglas v. California, 372 U.S. 353, 361–62 (1963) (Harlan, J., dissenting).

139. *Id.* at 362 (Harlan, J. dissenting) (citing Griffin v. Illinois, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting)).

140. *Id.* at 357 (majority opinion).

public utilities—the Court has concluded that certain rights, such as those that stand between a defendant and the wrongful deprivation of his liberty, fall into a different category. The line that the Court has chosen to draw with regard to equal protection as it applies to the poor is that which demarcates fundamental rights: certain rights are just too important for their provision or protection to turn on one's wealth. Such line drawing is not a novel legal concept and we do not always take rights at their most literal meaning. Indeed, without the ability to make distinctions or to draw lines of this type, it would be difficult to enforce many rights, such as the right to free speech.

Another response to the argument that *Griffin*'s rationale would require equality in every instance is that the *Griffin* line of cases has provided its own limiting principle to the right defined in *Griffin*. Cases like *Douglas*, *Britt*, *Entsminger*, and *Mayer* have made clear that poor defendants are not entitled to every resource imaginable; rather, they cannot be deprived of a tool or resource available "for a price" to other defendants *only* if that tool or resource is needed for an adequate or meaningful defense. At their essence, these cases presuppose that there is some body of resources required to gain meaningful access to the courts—albeit a body that may evolve over time, given changing legal and economic realities—and hold that an indigent defendant may not be deprived of any of those resources if they are available to wealthier defendants.

As to the critique that if equal protection applies, it must apply across the board and without limitation,[141] the Equal Protection Clause has never been interpreted in such a manner. Instead, it has most often been used merely to guarantee access and not to dictate the precise contours of that access. For example, when the Court applied the Equal Protection Clause in *Brown v. Board of Education*,[142] it held not that black schoolchildren must be treated exactly like white schoolchildren, but only that they were entitled to equal treatment insofar as they could not be excluded from white schools. As to other fundamental rights, such as the right to vote or the right to marry,

141. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting); *Douglas*, 372 U.S. at 361–62 (Harlan, J., dissenting); *Griffin*, 351 U.S. at 35–36 (Harlan, J., dissenting) ("It is no answer to say that equal protection is not an absolute, and that in other than criminal cases the differentiation is 'reasonable.' The resulting *classification* would be invidious in all cases, and an invidious classification offends equal protection regardless of the seriousness of the consequences.").

142. 347 U.S. 483, 495 (1954).

the Court has always maintained that these rights can be regulated and subject to certain regulatory procedures, but that the right cannot be denied altogether.[143] In the same manner, indigents may not be entitled to the best defense money can buy, but they cannot be excluded from the realm of meaningfulness that the Court envisions for a criminal trial or appeal.

Unlike other fundamental rights—i.e., the right to privacy or interstate travel—the right to a meaningful defense is a right that is provided to indigent defendants by the state in a system maintained by the state and in which the state serves as the prosecutor; that also makes it unique and distinguishable from other rights to which individuals are independently entitled but which the state can merely burden (or perhaps more easily facilitate—i.e., by providing funding). Ironically, the distinction is similar to that drawn by Justice Harlan himself in *Boddie v. Connecticut*.[144] The criminal justice system is created, maintained and overseen by the state; it compels the participation of indigent defendants who, within that system, are presumed innocent and have specific constitutional and procedural rights to which they are entitled. States can qualify and add process or procedure to the satisfaction of the right—i.e., by controlling the means by which a defendant may avail himself of that right, for example, by requiring that he be represented by a public defender and not the lawyer of his choosing—but they may not deprive the indigent of the right altogether based on an inability to pay. By failing to provide adequate resources to indigent defense, the state is directly burdening the fundamental right of access to the courts;[145] under this scenario, the state is the only entity that can remedy the wrong and the only way for the state to lift that burden is to provide adequate funding for indigent defense. That may appear to be an affirmative obligation, but that is only because

143. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 386 (1978) (observing that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed"); Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (noting that the right to vote "is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways").

144. 401 U.S. 371, 383 (1971) (observing that "[t]he requirement that these appellants resort to the judicial process is entirely a state-created matter"); *see also infra* Part II.C.

145. *Cf. Griffin*, 351 U.S. at 18 ("There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance.").

the state is in the rare position of being both the provider and regulator of the right as well as the opposing party in the context of the litigation (who may benefit from the deprivation of the right). The benefit being made available by the state is not just the provision of counsel, but meaningful access to the judicial process; because certain tools are needed to navigate that process, it would be wrong for the Court to allow the state to deny the poor that benefit merely because of their inability to afford such tools, particularly when it is the state itself who would benefit from such a denial.

Another compelling justification for treating this right as different from others and affording it additional protection is the fact that so much is at stake. Many other rights—including even other fundamental rights—do not potentially implicate the absolute loss of liberty or, in some cases, life.[146] This context is thus clearly distinguishable from others in which the Court has been unwilling to extend equal treatment to the poor.[147] Here, when the failure to protect the right at issue may result in the incarceration or even execution of an innocent person—it is critical that equal treatment be applied to prevent the poor from being at risk.

One last note: although *Griffin*'s holding may seem far-reaching, its approach is actually far more limited than some of the alternatives that could be advanced to protect the rights of the poor in this context, such as providing heightened scrutiny to all wealth classifications discriminating against the poor.[148] Moreover, the fundamental rights approach advanced by cases like *Griffin* only implicates certain state action, and not all state action that has a disparate economic effect.[149]

146. *See* discussion *infra* note 172 (presenting Kenji Yoshino's thesis that liberty has become a central theme of protected rights).

147. *See infra* notes 151–56 and accompanying text.

148. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 322 (1980) (rejecting explicitly heightened scrutiny for poverty discrimination).

149. Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 342 (1999). The fundamental rights approach is limited by the fact that "only that state action which burdens certain defined economic equality rights merits heightened scrutiny, leaving the government free to institute programs beneficial to the economically disadvantaged in other areas [without being subjected to the same level of scrutiny]." *Id; see also supra* text accompanying notes 141–49.

C. EQUAL PROTECTION'S LIMITATIONS LEAVE GRIFFIN'S HOLDING INTACT

In the decades since *Griffin* was decided, the Court has limited the scope of equal protection in several ways.[150] However, none of those developments have diminished indigent defendants' ability to marshal equal protection principles in supporting their claim to a meaningful defense.

First, since *Griffin*, the Court has limited the application of heightened scrutiny to only "fundamental" rights or interests.[151] Under the Warren Court, the strand of equal protection that aimed to eliminate disparate wealth effects resulting from state action, and which encompassed cases like *Griffin* and *Douglas*, flourished.[152] Perhaps it was inevitable that with a change in Court personnel would come an increasing apprehension about an exception that might swallow the rule, and a wariness of the slippery slope that might be initiated if the court were to acknowledge the poor as a suspect class warranting heightened protection.[153] As one commentator has observed: "The virtually limitless reach of a constitutional rule condemning disparate wealth effects pressured the Court to restrict its wealth discrimination rationale to 'fundamental' rights, which . . . *Griffin* . . . clearly involved."[154] Although there has been hesitation on the Court's part to expand the "fundamental right" in *Griffin* to other stages of the criminal appeal or to the civil context,[155] or to add new rights to this category,[156] it has not signifi-

150. One commentator recently observed that in the past several decades, the Court has limited its equal protection jurisprudence in "at least three ways—it has limited the number of formally protected classifications, it has curtailed its solicitude for classes within already protected classifications, and it has restricted Congress's power to enact antidiscrimination legislation." Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755 (2011).

151. *See* Klarman, *supra* note 133, at 266.

152. *Id.* at 265–68.

153. Shapiro v. Thompson, 394 U.S. 618, 661 (Harlan, J., dissenting) (labeling the fundamental rights category "an exception which threatens to swallow the standard equal protection rule").

154. Klarman, *supra* note 133, at 266.

155. In the wake of *Griffin*, the Court not only refused to extend *Griffin*'s equal protection analysis to other contexts; it also refused to extend such an analysis to further stages of the criminal appeal. After guaranteeing that indigent defendants would have the assistance of court-appointed counsel at both the trial and appellate stages, the Court subsequently refused to extend the right to counsel into post-conviction. *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 10 (1989) (finding no right to appointed counsel in federal post-conviction, even for capital cases); Pennsylvania v. Finley, 481 U.S. 551, 556 (1987) (finding no right to the appointment of counsel in post-conviction appeals post-

cantly curtailed or eliminated the right established in *Griffin* itself.

Second, the Court has made clear that it will not as a general matter, recognize poverty as a suspect classification deserving heightened scrutiny.[157] In *Griffin* and also in *Harper v. Virginia Board of Elections*—both decided during the heyday of the Warren Court—the Court seemed to suggest that it would apply heightened scrutiny to laws discriminating against the poor.[158] In later years, however, the Court held that only rational basis review would be applied to classifications based on wealth. In *Dandridge v. Williams* and *San Antonio School District v. Rodriguez*, the Court held that it would not second guess state decisions regarding the allocation of limited public

direct appeal); Ross v. Moffitt, 417 U.S. 600, 617 (1974) (holding there is no right to appointed counsel in discretionary appellate proceedings). In so deciding, the Court privileged federalism concerns over the same strong liberty interest that was given credence in *Gideon* and *Douglas*. In *Ross v. Moffitt*, the Court explained that "[t]he duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." 417 U.S. at 616. The Court also refused to extend *Griffin*'s rationale to create a per se right to counsel in civil cases. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25–27 (1981) (drawing a distinction between criminal cases, where a loss of personal liberty is at stake, and civil cases, in which there are not the same concerns).

156. The Court has been fairly stingy in its willingness to expand the "fundamental rights" view of equal protection to other spheres—i.e., welfare, housing and education funding. *See* San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) (educational funding); Lindsey v. Normet, 405 U.S. 56, 74 (1972) (housing); Dandridge v. Williams, 397 U.S. 471, 487 (1970) (welfare); *see also* Jeffrey, *supra* note 149, at 262 (noting that the Court has declined to recognize as fundamental rights the right to welfare benefits, housing, federal employment, funded education and pregnancy-related medical care); Klarman, *supra* note 133, at 267 (noting that the Court has declined to apply the same equal protection analysis to the contexts of food, housing and medical care). Some have argued that those rights are not as fundamental as the right to counsel, which has always been strictly protected. Yale Kamisar, *Has the Court Left the Attorney General Behind?–The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice*, 54 KY. L.J. 464, 468–69 (1966). In any event, in cases like *Dandridge* and *Rodriguez*, it became apparent that after the Warren Court era, the "door to discovery of new fundamental rights was firmly shut." Klarman, *supra* note 133, at 287.

157. *See* Jeffrey, *supra* note 149, at 291–92 ("[W]hile the Supreme Court had at times indicated that wealth is a suspect classification meriting heightened scrutiny, it is now relatively well established that such classifications are not suspect.").

158. Harper v. Va. Bd. of Elections, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth and property, like those of race, are traditionally disfavored.").

funds[159] and that discrimination against the poor did not warrant heightened scrutiny.[160] In *Rodriguez*, however, the Court specifically identified *Griffin* as an exception to the general rule that wealth classifications will be treated under rational basis review, treating indigency (in the context of *Griffin* and defined as the inability to pay) as a classification warranting heightened scrutiny.[161] Therefore, although the Court has made clear that it will not generally recognize the poor as a protected class for purposes of equal protection analysis,[162] it seems to have carved out and maintained a special exception for indigency, at

159. *Dandridge*, 387 U.S. at 487.

160. *Id.* at 485; *Rodriguez*, 411 U.S. at 55. In *Lindsey v. Normet*, the Court reaffirmed its new stance, stating that the "Constitution does not provide judicial remedies for every social and economic ill." *Lindsey*, 405 U.S. at 74. A few years later, in *Maher v. Roe*, the Court unequivocally stated that it "has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." 432 U.S. 464, 471 (1977).

161. *Rodriguez*, 411 U.S. at 20–22; *see also id.* at 61 & n.6 (Stewart, J., concurring). In *Rodriguez*, the Court's two threshold objections to applying strict scrutiny were that (1) the plaintiffs were suffering a relative and not absolute deprivation and (2) the class of disadvantaged poor was not easily defined. *See id.* at 19. In the indigent defense context, the affected class is easily defined as "indigent," as the term is used in practice; these individuals have already been deemed unable to pay for a defense. As for the question whether the "relative—rather than absolute—nature of the asserted deprivation is of significant consequence," *id.*, *Griffin* sets a bar whereby the deprivation of any element critical to a meaningful defense or appeal—such as a trial transcript—constitutes a sufficient deprivation for purposes of equal protection analysis. Griffin v. Illinois, 351 U.S. 12, 18–19 (1955). In *Rodriguez* itself, the Court distinguished *Griffin*, holding that the individuals affected in that case were in the category of those "completely unable to pay for some desired benefit" and who "sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." *Rodriguez,* 411 U.S. at 20. Another distinction not highlighted by the *Rodriguez* Court—not surprisingly, as *Rodriguez* was decided more than a decade before *Strickland*—is that cases like *Strickland* and *McMann* have rendered the denial of effective counsel and the absolute deprivation of counsel both constitutionally significant violations demanding redress. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984) (holding that the "right to counsel is the right to the effective assistance of counsel" (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (internal quotation marks omitted))).

162. The Burger Court rejected the idea of using the Equal Protection Clause as a means to ensure equal entitlements to government benefits, leaving it primarily as a means for prohibiting intentional discrimination by the state. *See* Klarman, *supra* note 133, at 289–90 ("[T]he Justices were more comfortable forbidding state regulation of certain spheres [i.e., abortion] than requiring government equalization (or at least 'minimum protection') of fundamental interests such as education, food, shelter, and medical care. The unpalatable aspect of fundamental rights equal protection, in other words, was not its recognition of enumerated rights, but its reconceptualization of equal protection as an entitlement to affirmative governmental assistance.").

least in the context of poor criminal defendants attempting to ensure that they are entitled to a meaningful defense.

In the years following *Griffin*, and as part of its desire to lessen the scope of equal protection's reach, the Court has also made efforts to recharacterize *Griffin* and the cases that followed in its wake as relying solely on due process and not equal protection.[163] Justice Harlan dissented vigorously from the Court's reliance on the Equal Protection Clause in *Griffin*, contending that *Griffin*'s ruling was based solely in procedural due process principles. In *Boddie v. Connecticut*, Justice Harlan vindicated his point of view, writing for the Court to invalidate divorce court filing fees as applied to indigent persons solely on due process grounds.[164] To reconcile the Court's decision in *Boddie* with that in *Griffin*, Justice Harlan characterized both *Boddie* and *Griffin* as implicating elements of state coercion and monopolization; because only the courts can grant divorce and because those accused of crimes are forced into the court system, indigent individuals in both contexts are compelled to participate in the judicial process.[165] In the years that followed, the Court continued to move away from any expansion of equal protection analysis and more often utilized a due process analysis that would allow states to differentiate based on wealth.[166]

163. Klarman, *supra* note 133, at 287 ("[The Burger Court] reconceptualized *Griffin* and progeny as due process cases.").

164. 401 U.S. 371, 382–83.

165. *See id.* at 376–77; *see also* Klarman, *supra* note 133, at 267. The rest of the Burger Court did not find this rationale compelling. In *United States v. Kras*, 409 U.S. 434, 444–46 (1973), the Court refused to apply the state monopolization/coercion rationale in the context of bankruptcy filing fees. Justice Douglas's conference notes reveal that many of the Justices questioned *Boddie*'s validity and wished to keep it extremely restricted in its application or scope. *See* Klarman, *supra* note 133, at 287.

166. In several cases limiting the expansion of the right to trial and appellate counsel, the Court resurrected the due process rationale that had been utilized in *Betts v. Brady*, 316 U.S. 455, 473 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963), much to the detriment of criminal defendants. In cases like *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (no per se right to counsel in probation or parole proceedings); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (right to counsel applies in cases of actual imprisonment but not in cases where there is a threat of imprisonment); and *Scott v. Illinois*, 440 U.S. 367, 374 (1979) (no right to counsel where imprisonment upon conviction is authorized but not imposed), the Court applied a more traditional Sixth Amendment/due process analysis and found that the infringement on liberty—the loss of conditional liberty, the threat of imprisonment (as opposed to actual imprisonment), or the imposition of a fine—was not sufficient to trigger heightened scrutiny or to override federalism concerns and declined to require the appointment of counsel. *See* Kothari, *supra* note 90, at 2182; *see*

The emphasis on equal protection, however, resurfaced in Justice Ginsburg's opinion in *M.L.B. v. S.L.J.*[167] In *M.L.B.*, the Court held that the state could not require parents to pay a fee for preparation of the trial record in order to appeal a custody termination.[168] In her opinion for the Court, Justice Ginsburg stressed the nature of the fundamental rights involved—here, choices about one's family and marital life.[169] She also emphasized that the right of access to the courts invoked "both equal protection and due process concerns."[170] In so holding, *M.L.B.* extended *Griffin*'s intertwined equal protection and due process analysis into the civil arena and resurrected equal protection principles as they related to access to the courts.[171] *M.L.B.* also reemphasized the idea that where strong due process concerns are present, an element of equal protection must be present as well.[172] And, according to at least one commentator, the Court

also, e.g., *Scott*, 440 U.S. at 373 ("*Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."). Similarly, in *Lassiter v. Department of Social Services*, which involved the right to counsel in parental rights termination proceedings, the Court "employed a deferential due process analysis that found neither a per se right nor a due process right to counsel." Kothari, *supra* note 90, at 2184.

167. *See* 519 U.S. 102, 120 (1996).

168. *Id.* at 107.

169. *Id.* at 116 ("Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society.'" (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971))).

170. *Id.* at 104.

171. *See* Kothari, *supra* note 90, at 2194–97, 2200–01; *see also M.L.B.*, 519 U.S. at 133 (Thomas, J., dissenting) (explaining that the majority's opinion "not only adopts the equal protection theory of *Griffin v. Illinois* . . . but extends it").

172. Kothari, *supra* note 90, at 2195 ("The Court asserted that the presence of a strong liberty interest mandated heightened scrutiny that emphasized both equal protection and due process principles.").

Kenji Yoshino has recently put forth a different analysis of the apparent trend away from explicit reliance on equal protection and towards due process; his thesis that the Court is moving away from pure group-based equality claims to "liberty-based dignity claims," *see* Yoshino, *supra* note 150, at 150, aligns with the idea that the rights acknowledged in *Griffin* and *Douglas* are still vital and prime for renewal. Yoshino describes liberty-based dignity claims as "hybrid equality/liberty claims" and explains that his use of the term "dignity" is meant to encapsulate the two and acknowledge "what academic commentary has long apprehended—that constitutional equality and liberty claims are often intertwined." *Id.* at 749.

Like many of the examples discussed in Yoshino's article, the right central to the *Griffin-Douglas* line of cases is inherently tied to the protection of liberty. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("Thus to deny adequate

actually "gave greater emphasis to the equal protection feature" of its analysis.[173]

In addition to imposing the above boundaries on the reach of equal protection, the Court has limited its broader application by requiring a showing of intent. In *Washington v. Davis*,[174] the Court held that state action would not be held unconstitutional merely because it results in a disproportionate impact among members of different groups.[175] Instead, the Court held that facially neutral government conduct producing disparate impacts will be held to violate the Equal Protection Clause only if illicitly motivated.[176] *Davis* is emblematic of what Michael Klarman has described as the "understanding of equal protection rights as checks upon deliberate governmental disadvantaging rather than entitlements to particular substantive outcomes."[177]

review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."). In fact, Yoshino ties the upsurge in liberty-based dignity claims to the doctrinal antecedent of the "rights" strand of equal protection jurisprudence, which includes the right of access to the courts. *See* Yoshino, *supra* note 150, at 790; *see also id.* at 790–91 (noting that in deciding cases like *Douglas*, the Court "vindicated the rights of the poor even when it was ultimately unwilling to take the more far-reaching step of granting heightened scrutiny to wealth-based classifications"). Under Yoshino's theory, fundamental rights that give the appearance of being based in due process—i.e., the liberty-based dignity claim, which is his new equal protection paradigm—have the advantage of seeming to apply universally, so they avoid the issue of defining wealth as a constitutionally protected status. *See id.* at 793.

173. William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1198 n.95 (2000). In contrast, Justice Kennedy's concurrence relied solely on the Due Process Clause and the dissenters argued against any extension of *Boddie* or *Griffin*. *Id.*

174. 426 U.S. 229 (1976).

175. *Id.* at 239, 242 ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

176. *Id.* at 239–41; *see also* Yoshino, *supra* note 150, at 764 (stating that a disparate impact violates the Equal Protection Clause only if the disparate impact "operate[d] as at least a partial incentive for the state action"). This runs counter to dicta in several Warren Court decisions suggesting that legislative motivation may be irrelevant in determining whether facially neutral legislation producing disparate impacts violated the Equal Protection Clause. Klarman, *supra* note 133, at 295.

177. Klarman, *supra* note 133, at 217. The Warren Court had been evolving its jurisprudence towards "reconceptualizing equal protection rights as entitlements to particular outcomes." *Id.* at 291. The advent of the Burger Court,

Yet the requirement to demonstrate intent has never posed an obstacle when striking down barriers to indigent defendants' access to the courts.[178] This is in large part because the Court has defined the harm resulting from these barriers is not mere disproportionate impact, but rather the cabining of a distinct group to which equal application is denied by definition. In *Williams v. Illinois*, the Court held that

> [A]s we said in *Griffin v. Illinois*, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." Here the Illinois statute[] as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment.[179]

This interpretation of equal protection as applied to access to the courts remains unchanged several decades later—even after the Court's decision in *Washington v. Davis*. In *M.L.B.*, Justice Thomas dissented from the Court's opinion, arguing that *Davis* foreclosed any equal protection relief for the petitioner as the filing fee requirements at issue were facially neutral and the petitioner had not demonstrated any intent to discriminate.[180] The *M.L.B.* majority rejected this view, holding that the instant case could be distinguished from *Davis* because the filing fee provisions at issue were "not merely *disproportionate* in impact. Rather, they are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons'; they apply to all indigents and do not reach anyone

however, brought a seeming end to the establishment of new fundamental rights and a return to a more traditional understanding of equal protection rights, which required deliberate discrimination against or disadvantaging of a particular group. *Id.* at 291–92.

178. For a more explicit argument for a fundamental rights "exception" to *Davis*'s intent requirement, see Brad Snyder, Note, *Disparate Impact on Death Row:* M.L.B. *and the Indigent's Right to Counsel at Capital State Postconviction Proceedings*, 107 YALE L.J. 2211 (1998).

179. 399 U.S. 235, 242 (1970) (footnote omitted) (internal citations omitted).

180. M.L.B. v. S.L.J., 519 U.S. 102, 135–39 (1996) (Thomas, J., dissenting).

outside that class."[181] The same rationale applies to any financial barrier posed to obstruct indigents from obtaining equal access to the courts—or, as the *M.L.B.* Court described, any "procedures which [deny] an indigent [a] meaningful [defense or] appeal."[182] Moreover, it should be noted that because the right recognized in *Griffin* is a fundamental right,[183] the state must meet a heightened burden in order to restrict the application of that right to any group of persons.[184]

A public defense system to which only indigent defendants are subject and which fails to provide necessary elements for a defense satisfies the same measure as described in *Williams* and *M.L.B.*: the State has constructed and underfunded a system in which the poor—i.e., those defined as legally indigent[185]—face a barrier to access and a fair trial; overcoming that barrier is contingent on one's ability to opt out of the system and retain private counsel.[186] Enacting a filing fee that cuts off access by shutting certain people out,[187] applying a punishment only to those who cannot pay a fine[188] and constructing a deficient system that, by definition, bars certain individuals

181. *Id.* at 127 (majority opinion) (citation omitted).

182. *Id.* at 127 n.16 (internal quotation marks omitted) ("Six of the seven Justices in the majority in *Washington v. Davis*, 426 U.S. 229 (1976), had two Terms before *Davis* read our decisions in *Griffin* and related cases to hold that [t]he State cannot adopt procedures which leave an indigent defendant entirely cut off from any appeal at all, by virtue of his indigency, or extend to such indigent defendants merely a meaningless ritual while others in better economic circumstances have a meaningful appeal." (citing Ross v. Moffitt, 417 U.S. 600, 612 (1974) (internal quotation marks omitted))).

183. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977) (recognizing "the fundamental constitutional right of access to the courts").

184. *See, e.g.*, Johnson v. Bredesen, 624 F.3d 742, 749 (6th Cir. 2010) (highlighting *Griffin* as concerning a fundamental interest subject to heightened scrutiny).

185. For a discussion of standards for determining eligibility for legal assistance, see PROVIDING DEFENSE SERVICES, *supra* note 40, Standard 5-7.1, at 87–90.

186. In his dissent, Justice Thomas recognized that *Williams*'s rationale survived *Davis*. *M.L.B.*, 519 U.S. at 137 (Thomas, J., dissenting). He reconciled the cases under the theory that the law did not merely have a disproportionate impact, but rather applied to all and only indigents. *Id.* The dilemma faced by indigent defendants is clearly analogous to *Williams* and the same rationale would apply: by definition, the harms worked by dysfunctional indigent defense systems are applicable to all and only those defendants who cannot afford to hire their own counsel. Justice Thomas also expressed a desire in that same dissent to overrule *Griffin* and its progeny. *Id.* at 139. However, his is clearly a minority view.

187. *Id.* at 106 (majority opinion).

188. Williams v. Illinois, 399 U.S. 235, 242 (1970).

from access to a meaningful defense, are barriers of differing types, but they all have the same effect: visiting different consequences on two different categories of persons, based solely on their inability to pay.[189]

III. WHY EQUAL PROTECTION?

Although the Court has, in many ways, attempted to redefine, reframe and restrict the application of equal protection, the fundamental right established by the *Griffin-Douglas* line of cases has survived and equal protection still applies to that right with the same force: no defendant may be denied the right to a meaningful defense based solely on what he or she can afford.[190] Collectively, the cases described above could be read to support a far more robust principle that poor defendants cannot be subjected to a different criminal justice system—one that is severely resource-deprived—or treated differently (in certain respects) because of their inability to fund their own defense. It is true that the resources need not be equivalent in every respect—but the playing field has to be leveled to the extent that both groups have access to all of the critical "tools" of a defense.[191]

In this context, the injury suffered by the poor is not only the deprivation of resources vis-à-vis a wealthier class, but a deprivation which, by definition, denies them access to a fair

189. If anything, the relevant class in the latter scenario is more clearly defined, given the specific guidelines for indigency. *See* PROVIDING DEFENSE SERVICES, *supra* note 40, Standard 5-7.1, at 87–90.

190. Lower courts still apply the same equal protection framework set forth in *Griffin* and *Douglas* to claims regarding access to the courts and wealth-based discrimination in the criminal context. *See, e.g.*, Miller v. Smith, 115 F.3d 1136, 1140–41 (4th Cir. 1997) (noting that *Griffin* has been applied "beyond the transcript and fee context to cases involving the adequacy of an indigent's access to the appellate system" and that *Griffin* and its progeny are based in equal protection as well as due process); State v. Adams, 91 So.3d 724, 741 (Ala. Crim. App. 2010) ("The statutory scheme at issue here produces the same type of discrimination condemned by the United States Supreme Court in *Griffin* and its progeny—discrimination resulting in deprivation of a fundamental right that is based, in actuality, on poverty."). To allow jurisdictions some leeway in fulfilling the right, however, they have allowed for alternative means of reaching the same end. For example, a state can require an indigent to apply for representation by the public defender's office as a prerequisite to providing him a transcript free of charge. *Miller*, 115 F.3d at 1141.

191. *See, e.g.*, Britt v. North Carolina, 404 U.S. 226, 227 (1971) (noting that equal protection requires the State to provide indigents "with the basic tools of an adequate defense or appeal").

adversarial proceeding.[192] In that sense, the equal protection injury is a gateway injury, barring access to resources that are necessary to pursue justice on equal terms. In contrast, the Sixth Amendment injury, once a lawyer has been provided in some form, is defined by what happens once the defendant is already in pursuit of justice, ignoring any relevant yet fundamental differences that occurred prior to initiating the pursuit. Imagine that all of the soldiers being sent into war were issued guns, but for those who were poor the gun was immediately exchanged for a knife. It makes little sense to focus on what occurs once on the field or on what any given soldier is able to accomplish with the knife. The question is not whether each soldier is capable of killing or whether the soldier would have died regardless of the weapon brandished (under the Sixth Amendment) but whether there was some more fundamental violation that immediately deprived the poor soldiers of a fighting chance at the outset. The injury is not death, but the selective deprivation of a gun.

Given its availability, applying an equal protection approach to the problem at hand would have several distinct benefits in the context of indigent defense reform. Some of those benefits are inherent to equal protection doctrine—particularly as it is distinguished from Sixth Amendment doctrine. Other benefits—and arguably the more significant, if also more abstract—are the conceptual benefits gained not only by courts but also by reform movements and the evolution of public perception as a result of applying equality principles to the indigent defense context.

A. DOCTRINAL ADVANTAGES OF AN EQUAL PROTECTION APPROACH

Before delving into the doctrinal advantages of an equal protection approach, a note of acknowledgment about the limitations of such an argument is necessary. Some courts will be hostile to this new use of the doctrine, just as they have been hostile to Sixth Amendment claims and other equal protection claims,[193] but willing courts could use equal protection to create

192. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 17 (1956) (noting that such a deprivation would "make the constitutional promise of a fair trial a worthless thing").

193. *See, e.g.*, Klarman, *supra* note 133, at 291–304 (discussing the Burger Court's stricter, less-expansive interpretation of equal protection as compared to the Warren Court).

a more robust model for access to justice, one that keeps the equality principles in the *Griffin-Douglas* line of cases alive.[194] This would have ramifications not only for indigent defendants in the present day, but also for the future evolution of access to the courts, under conditions that we cannot predict or anticipate today.

1. Systemic Recognition vs. Individual Vindication

One clear difference between the Sixth and Fourteenth Amendment approaches is that the Sixth Amendment focuses on the protection of an individual right while equal protection focuses on differential treatment among groups. In the indigent defense context, the Sixth Amendment can at best recognize that there is a need for a more robust right to counsel and then hope that right will be applied consistently across the board.[195] The Sixth Amendment and the *Strickland* analysis in particular do not make any distinction between different types or classes of defendants; the test is a neutral, objective test that applies to all defendants, whether they are indigent or not and whether their counsel is appointed or retained.[196]

An equal protection approach, in contrast, recognizes that a certain class of individuals[197]—poor criminal defendants—is

194. This is especially true in considering that many cases involving indigent defense reform play out on the state level, where courts may have more latitude, given that they can rely on their own state constitutional provisions regarding equal protection as well as the federal constitutional guarantee. *See, e.g.*, Eric Wolf, *The Theory and Application of Equal Protection: Developments in the Right to Counsel*, 5 WM. MITCHELL J. L. & PRAC. 1 (2012), *available at* http://lawandpractice.wordpress.com/2012/01/17/the-theory-and-application-of-equal-protection-developments-in-the-right-to-counsel/ (discussing the Minnesota Supreme Court's recent decision in *Morris v. State*, extending the right to counsel to misdemeanor defendants seeking a first review by postconviction proceeding based on the Minnesota Constitution's equal protection provision).

195. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 688 (1984) ("The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance.").

196. *See supra* note 44.

197. Jeremy M. Miller, *The Potential for an Equal Protection Revolution*, 25 QUINNIPIAC L. REV. 287, 298 (2006) ("[A]lthough [the] Equal Protection Clause and Due Process Clause analyses similarly seek to preserve the rights of individuals, equal protection focuses on the characteristics of the group that is discriminated against, while due process focuses on the characteristic of the individual right that is allegedly individually infringed."); *cf. The Supreme Court, 1982 Term*, 97 HARV. L. REV. 86, 93 (1983) (discussing the criminal sentencing of indigents and stating, "[b]y focusing on the state's treatment of the individual defendant [under a due process approach], the Court can avoid assessing the relative impact a fine has on classes of indigent and nonindigent defend-

being systemically deprived of the right to a meaningful defense.[198] Rather than thinking about whether or not a lawyer can do her job effectively under certain resource constraints—a paradigm in which exceptionally talented lawyers may anecdotally harm defendants making such a claim—an equal protection approach shifts attention away from what any individual lawyer or group of lawyers may be able to make of a certain fact scenario and redirects it to the need to remedy differential treatment of the poor. One benefit of this approach may be that it is more palatable to lawyers. The shift from an individual to a structural focus shifts the blame from individual lawyers and prevents them from having to "fall on their sword" or admit ineffectiveness (which some proud lawyers may be hesitant to do) to obtain relief. More important, however, framing the problem in this way encourages solutions that are specifically aimed at raising the level of resources available to indigents—to ensure that they are not being deprived of the initial access to a fair playing field—and not solutions that attempt to hone the objective analysis applied to both rich and poor defendants.

Whether we view the problem of access to justice as one requiring only individual rights vindication or one requiring recognition of much broader and deeply ingrained social and economic inequity matters not only because of how that choice will influence the direction of evolving doctrine but also because of the nature of the remedies that will be applied to eliminate the harm and how directly they address the source of the problem.[199] Individual right to counsel cases—even those that

ants.").

198. *See* AM. BAR ASS'N & NAT'L LEGAL AID & DEFENDER ASS'N, GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 3 (John Thomas Moran ed., 1983) (focusing, in part, on the inequalities that result when indigent defendants are forced to rely on underfunded systems of representation); *cf.* Frank Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 57–58 (1969) (discussing the relationship between "minimum protection"—i.e., protection against severe deprivation—and equal protection, concluding that the two are intertwined, that the differences between the two are "practically inconsequential" and that equal protection can provide a justiciable framework for the duty of minimum protection, which is more difficult to enforce); *id.* at 45 (noting that "a court's inability to enforce minimum protection duties directly [by, for example, dictating legislative conduct] . . . does not mean that minimum-protection thinking might not contribute to the issuance of a more regular judicial remedy").

199. For elaboration on the argument that guarantees of the Fourteenth Amendment cannot be realized in a society characterized by class subordination and that law should therefore aim to reform institutions and practices

are fairly egregious—can easily be isolated and painted as anomalies not necessitating broader systemic relief. Even if there is recognition that a stronger right to counsel is needed, there is no acknowledgment within that analysis of how it may apply to different groups or how intervening circumstances such as wealth may affect access. The Sixth Amendment remedy does not alter anything about the system structurally; it merely addresses process issues by allowing the defendant another bite at the apple. It is concerned about outcome,[200] but in providing a remedy, does nothing affirmative to ensure a different outcome or process the second time around.

In contrast, the equal protection approach is focused directly on the underlying question of resources, which will inevitably transform not only a defendant's second bite at the apple, but also the bites of other poor defendants. To remedy the unevenness of the stances from which the two groups begin, resources must be recalibrated so that other rights—such as the right to counsel, which does not become wholly inapplicable—can be applied with equal force in various contexts. Under this paradigm, those without resources are not accidental beneficiaries of broader rights enforcement or of a case-by-case litigation strategy built on individual right to counsel claims, but rather the direct beneficiaries from recognition of their disadvantaged status. Even if a "trickle-down" Sixth Amendment approach would slowly chip away at the problem of access by mandating the enforcement of individual aspects of the Sixth Amendment right to counsel, that approach is not as direct in its application and lacks the same capacity for broader, deeper structural change.

2. Equal Resources vs. "Effective" Lawyering

Another benefit of the equal protection approach is that it takes a more holistic view of access to justice and can therefore better address factors beyond the lawyer appointed to represent an indigent defendant, including issues of funding.

There is an important distinction to be made between the Sixth Amendment and equal protection frameworks when thinking about how to evaluate the availability of specific re-

that enforce a social caste system, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

200. *See id.* at 694 ("The defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.").

sources in the indigent defense context. Under a Sixth Amendment analysis, a deficiency must be identified and then the defendant must prove that the absence of the resource or tool at issue will lead to actual or likely ineffective assistance.[201] So, any question of resources will have to be filtered through the attorney standing between the defendant and those needed resources. This additional level of analysis allows a variety of intermediary factors—e.g., the attorney's decisions about case strategy and the attorney's individual capabilities—to affect the ultimate question of whether a rights violation has occurred. In the equal protection context, however, the resource question does not have to be filtered through the attorney medium. Instead, an equal protection analysis can go directly to the question of resources, asking whether indigent defendants have access to the same resources as defendants with means.

The two approaches appear to overlap conceptually where a tool required for a meaningful defense is the same tool needed by a lawyer to do his or her job effectively. Resources that are not tied directly to a lawyer's abilities or action taken by a lawyer in a given case—such as compensation or caseloads—however, will fit comfortably within the equal protection framework whereas they cannot be addressed easily under the Sixth Amendment. Similarly, equal protection can better address structural elements such as funding over which the state, but not the attorney, has control, whereas the Sixth Amendment's effectiveness may be limited to those matters within the attorney's control, such as when and how much to investigate a case. Furthermore, thinking about whether something is (or was, post hoc) necessary for attorney "effectiveness," given the way in which that term has been defined by Sixth Amendment case law,[202] is different from asking under the ex ante equal protection paradigm what is needed to meaningfully contest a criminal charge and whether those resources are being made available regardless of a defendant's wealth. The comparative element that is introduced in the equal protection context—asking whether an indigent defendant is on equal footing with his wealthier counterparts or whether a resource is available and would unquestionably be employed by those with means—adds a helpful angle to the inquiry.

201. *See id.* at 687.

202. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 687–96 (1984) (discussing how a defendant must establish that he or she was provided ineffective assistance of counsel).

The transcript at issue in *Griffin*[203] is a paradigmatic example of something that would fall into this category. Like the transcript in *Griffin*, other aspects of pre-trial preparation are essential and yet today are routinely unavailable to defendants subject to underfunded defense systems.[204] Any lawyer representing an indigent criminal defendant needs resources—either in the form of an investigator or adequate time to conduct the investigation him or herself—to investigate the facts of the crime (and mitigation, in capital cases) and to investigate and interview potential prosecution witnesses.[205] The latter is particularly important given the critical role of cross-examination in undermining the case against the defendant. Similarly, if the state intends to introduce certain forensic evidence, the defense needs its own forensic experts to provide for true adversarial testing of such evidence.[206] If one is a defendant with means, these are basic "tools" one would employ—they provide the foundation for investigation and cross-examination, two of the most fundamental aspects of defense representation.[207]

203. Griffin v. Illinois, 351 U.S. 12, 13–16 (1956).

204. *See* JUST. POL'Y INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE (2011) (discussing the overwhelmed and underfunded public defense system).

205. When the office responsible for representing capital defendants across the state has attorneys and investigators carrying caseloads of twelve to twenty-five capital cases at a time, those defendants could hardly be said to have the resources necessary for a meaningful defense, yet the availability of an investigator or the amount of time an attorney has available to work on any one case (given his or her overall caseload) is not likely to bear on the analysis of an individual attorney's effectiveness under the current analysis. *See, e.g.*, Kyle Martin, *Caseloads, Funding Main Reasons for Death Penalty Case Delays, Say Capital Defenders*, AUGUSTA CHRON., July 27, 2012, *available at* http://chronicle.augusta.com/news/crime-courts/2012-07-27/caseloads-funding-main-reasons-death-penalty-case-delays-say-capital (observing that in Kentucky, the "state's capital defenders, investigators and mitigation specialists are . . . carrying caseloads ranging from 12 to 25 capital cases at any given time" (internal quotation marks omitted)).

206. Although *Ake* provides for expert resources in the mental health context and has been more expansively interpreted by some lower courts, it has often been interpreted more narrowly and its implementation has "fall[en] far short of what is needed." *See* Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 CORNELL L. REV. 1305, 1311, 1311–12 n.36 (2004).

207. *See, e.g.*, 3 JOHN H. WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367 (1923) ("For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law . . . . [I]t is beyond any doubt the greatest legal engine ever invented for the discovery of truth."); James Carey, *Charles Laughton, Marlene Dietrich and the Prior In-*

Equal protection analysis can expand to include newly available technologies and techniques that are independent of lawyering ability but still related to the meaningfulness of an overall defense. For example, as new DNA-based technology is made available, but is not as easily accessible to indigent defendants represented by a public defender, *Griffin* could guarantee the provision of such a technology or category of technology, given its increasing centrality to proving innocence claims.[208] There are limits, of course: although a wealthy defendant might also employ jury consultants, there is no suggestion here that an indigent defendant must have access to every tool that might be useful or provide an advantage to the defense—only those that are held to be critical to a defense or without which the adversarial process is undermined.[209]

Other claims based on disparities in resources or capacity but which are only indirectly related to lawyering—such as caseloads and training—are more complicated, but may also be better suited to equal protection analysis. Take the problem of excessive caseloads, an issue that Sixth Amendment litigation has not effectively addressed.[210] In some public defender offices,

consistent Statement, 36 LOY. U. CHI. L. J. 433, 441 (2005) ("Cross-examination is the single most important feature of this adversarial system, and impeachment with a prior statement is the quintessence of cross-examination."); Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk*," 14 WIDENER L. REV. 427, 427 (2009) ("Cross-examination is regarded as the *sine qua non* of the American trial system.").

Regarding the importance of investigation, see Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L. J. 1097, 1099 (2004) ("Investigation of the prosecution's case and possible defenses has long been recognized as a core function of defense counsel in a criminal case, one that is necessary to the testing of the facts in our adversarial system."); Rodney J. Uphoff, *The Physical Evidence Dilemma: Does ABA Standard 4-4.6 Offer Appropriate Guidance?*, 62 HASTINGS L. J. 1177, 1213–14 (2011) ("Thus, it is not so much the danger of defense lawyers rushing to the crime scene to disturb evidence that threatens the integrity of the criminal justice system, but a failure of many defense lawyers to do an adequate, timely investigation that undermines the functioning of the adversarial system.").

208. *See, e.g.*, Giannelli, *supra* note 206, at 1313–16 (discussing the rising importance of DNA evidence and the need for expert assistance in interpreting such evidence).

209. This category is not so limited as to be meaningless—it could still encapsulate a wide variety of tools, and certainly more than what is required today. The limiting principle ensures, however, that the measure for that to which indigents are entitled is not anything that a rich defendant could afford.

210. *See* Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, 26 CRIM. JUST. 24, 25 (Summer 2011) (explaining how reliance on post-conviction Sixth Amendment claims has failed to adequately address the prob-

lawyers handle more than 1,000 cases per year; far beyond what national standards recommend.[211] For example, as recently as 2004, public defenders in New York were "handl[ing] 1,000, 1,200, 1,600 cases" per year,[212] whereas national standards suggest a maximum caseload per year of 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals.[213] Yet there is no Sixth Amendment right to a lawyer with a manageable caseload or adequate training.[214] As one commentator has explained, in the Sixth Amendment context, high caseloads demonstrate the probability of harm but do not themselves constitute injury.[215]

In contrast, equal protection concerns may be invoked when structural harms such as excessive caseloads exist only in the context of public defender systems because, like the transcript in *Griffin*, the provision of a lawyer with a reasonable amount of time to spend on one's case is a gateway factor to equal access.[216] Moreover, the distinction between the two is often not a matter of slight degree—public defenders often have caseloads that would far exceed any reasonable standard and more than any responsible attorney would take on in private practice.[217] Under an equal protection analysis, the court could decide that access to a lawyer with adequate time to work on a case (meaning the absence of excessive caseloads) is a threshold factor placing the indigent and non-indigent on unequal footing at the outset and that a meaningful defense requires a lawyer

lem of excessive caseloads); *see also* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 277 (2011) (noting that legal challenges brought by indigent defendants based on excessive workloads "have mostly been unsuccessful").

211. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 17 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

212. *Id.*

213. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE, STANDARDS AND GOALS: COURTS 276–77 (1973) (promulgating Standard 13.12) [hereinafter COURTS].

214. Chiang, *supra* note 81, at 474.

215. *Id.*

216. *Cf.* Williams v. Illinois, 399 U.S. 235, 242 (1970) (where only indigents are at risk of certain deprivations, the State has "visited different consequences on two categories of persons," violating equal protection).

217. *Cf. supra* note 3.

who is logistically able to spend more than a few hours on any given case.

Under a Sixth Amendment approach, a fact-based inquiry into the likelihood that an excessive caseload would result in ineffective assistance would necessarily be employed, opening up the door to other variables, such as lawyering capability and the inherent subjectivity in determining how varying caseloads affect different lawyers, which may affect the ultimate analysis. To complicate the analysis, *Strickland*'s reliance on "prevailing professional norms"[218] could do such claimants a disservice if the standard for indigent representation is low (and therefore achievable under a crushing caseload), as it is today. And, under *Strickland*, the vindication of the right may ultimately be trumped by the fact that, for example, a defendant's guilt has been so clearly established that no lawyer—even one with a much more reasonable caseload—could have achieved a different result.[219]

For similar reasons, equal protection is a much more apt doctrinal tool for addressing the issue of underfunding, which arguably poses the largest obstacle to indigent defense reform. As explained in Part I, the Sixth Amendment approach is not well-designed to account for issues of funding.[220]

The deficient performance prong of the *Strickland* analysis asks whether counsel's conduct was reasonable under prevailing professional standards;[221] it is not designed to govern the provision of external resources to counsel. Even if a court were to somehow factor into its consideration the fact that counsel's performance was deficient due to a lack of resources, the prejudice inquiry would have the force to render that finding a nullity, because the defendant claiming ineffective assistance would have to prove that his or her case was prejudiced by counsel's deficient conduct;[222] if the defendant were unable to do so, any consideration of underfunding at *Strickland*'s first prong would be irrelevant to the ultimate holding. And, by its nature, the Sixth Amendment has nothing to say about those resources

218. Strickland v. Washington, 466 U.S. 668, 688 (1984).

219. *Id.* at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.").

220. *See supra* Part I.A.

221. *Strickland*, 466 U.S. at 687–88.

222. *See id.* at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

which do not directly affect attorney conduct. In addition to being poorly designed to incorporate the ways in which funding affects the provision of legal representation in pending cases, the *Strickland* test is not designed to provide guidance as to how much funding or which resources would be necessary in future cases to guarantee effective assistance of counsel.[223]

What about prospective Sixth Amendment claims made in the civil context? In such cases, a defendant could argue that systemic underfunding created a situation in which any lawyer subject to that system would be likely to provide ineffective assistance. Although claimants seeking injunctive relief are in a better position to make the funding argument than appellants making post-conviction *Strickland* claims, they are still limited by the fact that they must demonstrate a link between inadequate funding and the likelihood of ineffectiveness.[224] This is not only a fact-specific claim that may be difficult to prove,[225] but it also requires a lot of assumptions about how one factor will affect attorney conduct across the board and in many different kinds of cases; it therefore seeks a conclusion that may be difficult to draw with any definitiveness.

A funding argument in the equal protection context would focus not on the likelihood that a structural deficiency—such as funding—may lead to ineffective assistance of counsel, but rather on whether indigent defendants are denied access to tools that wealthier defendants can obtain "for a price." Funding disparities are facially discriminatory, as the Court recognized in cases like *Williams* and *M.L.B.*, because they visit "different

223. *See, e.g.*, Jennifer M. Allen, *Free for All a Free for All: The Supreme Court's Abdication of Duty in Failing to Establish Standards for Indigent Defense*, 27 LAW & INEQ. 365, 379 (2009) (noting that *Gideon* and *Strickland* provide "no guidance for states on the minimum standards and funding that the Court would find appropriate to achieve the ends that the decisions mandate").

224. *See, e.g.*, Quitman Cnty. v. State, 910 So. 2d 1032, 1048 (Miss. 2005) ("Quitman County did not [meet] its burden of proving that the funding mechanism established by statute led to systemic ineffective assistance of counsel."); *cf. id.* at 1048–49 (Graves, J., dissenting) (noting that the trial court was misguided in taking a case-by-case approach rather than looking at how the system as a whole adversely affected attorney conduct).

225. *See, e.g.*, *id*. at 1037–48 (majority opinion) (upholding the trial court's decision that the county had not "met its burden" in part because the county had not produced "specific examples of when the public defenders' legal representation fell below the objective standard of professional reasonableness"); State v. Smith, 747 P.2d 816, 831 (Kan. 1987) (requiring "specific evidence in the record . . . of deficient performance" in order to find an indigent defense system unconstitutional).

consequences on two categories of persons."[226] And in this context, funding disparities have meant not that the government provides funding to one group and not another, but instead that it makes some benefit—or a certain kind of access—available for a price, or deprives those unable to pay.[227] The equal protection lesson gleaned from cases like *Griffin*, *Williams* and *M.L.B.* is that the indigent cannot, by virtue of the tools they have (or do not have) at hand, be effectively barred from the justice system to which the rich have access.[228] Because the equal protection approach is focused directly on the question of resources, it has greater potential to generate judicial mandates requiring the expenditure of funds to satisfy stated resource requirements and to force other branches of government to respond in ways that directly address identified resource inequalities—i.e., by appropriating the necessary funds or initiating broader systemic reforms that make such appropriations unnecessary (e.g., reclassification of crimes or alternative sentencing).

The obvious next question is: which tools—and, therefore, what level of resources—are necessary? (The fact that such a question remains does not change the validity of the initial lesson, regardless of the answer.) Defining all of the parameters and the precise content of what would or could be protected under an equal protection approach—aside from the illustrative suggestions made above regarding the availability of investigative and expert resources, access to forensic technology, and maintenance of reasonable caseloads—is beyond the scope of this Article. The analysis as to which "basic tools" fall within its protection is a normative one but would not be a wholly abstract endeavor; such an analysis would be grounded in factual

226. Williams v. Illinois, 399 U.S. 235, 242 (1970); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 127 (1996) (quoting *Williams*, 399 U.S. at 242).

227. *See* Bearden v. Georgia, 461 U.S. 660, 665 (1983) (explaining that the equal protection analysis focuses on "whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants").

228. There are of course limitations on the extent to which a Court can actually order funding to be appropriated, *see infra* note 278, and this Article does not take on all concerns regarding the ultimate implementation of remedies under the Sixth Amendment or the Equal Protection Clause. This is an ever present problem in the discussion about how courts can improve indigent defense systems—given that the devil often lies in the dollars—but since that dilemma is applicable to any discussion of reform, it is at most a neutral issue and does not alone counsel for or against a Sixth Amendment or equal protection approach.

evidence presented to the court (such evidence would likely include expert testimony on the necessity of certain elements to the defense).[229] The ultimate limiting principle to the court's analysis—as expressed in *Griffin* and its progeny—would be that the tool at issue must be deemed critical to a meaningful defense.[230] The equal protection approach at least gives willing courts latitude to engage in the substantive inquiry of what a defendant would need to satisfy that standard, whether it relates directly to a lawyer's performance or not. In contrast, the body of *Strickland* precedent that has been developed in the last several decades presents a much higher barrier to courts that wish to contribute to reform and to specify what is required to meet the same end.[231]

What might an order from a court granting relief in the form of resources critical to a "meaningful defense" look like? Although drawn from a completely different context, the order issued by the Federal District Court for the Middle District of Alabama in *Pugh v. Locke* might serve as an example.[232] Having found that the living conditions in Alabama prisons violated the Eighth Amendment's guarantee against cruel and unusual

229. It is not impossible to conceive of a court reaching the conclusion that the deprivation of a particular resource violates a defendant's equal protection rights. Less than a decade after *Griffin*, but years before *Ake v. Oklahoma* was decided, the Fourth Circuit held in *Jacobs v. United States*, 350 F.2d 571 (4th Cir. 1965), that, as a matter of equal protection, a defendant was entitled to the appointment of a psychiatrist at the government's expense. *Id.* at 573; *see also* Williams v. Martin, 618 F.2d 1021, 1026 (4th Cir. 1980) ("[In *Jacobs*,] we recognized that the obligation of the government to provide an indigent defendant with the assistance of an expert was firmly based on the equal protection clause."). Citing *Griffin*, *Gideon*, and *Douglas*, the *Jacobs* court explained:

> Unquestionably in the proceedings below the defendant, if financially able, would have had the right to call a privately retained psychiatrist as a witness. It is obvious that only his inability to pay for the services of a psychiatrist prevented a proper presentation of his case. The Supreme Court has unmistakably held that in criminal proceedings it will not tolerate discrimination between indigents and those who possess the means to protect their rights.

Jacobs, 350 F.2d at 573.

As a limiting principle, courts may require a threshold showing of need before providing a defendant with any given resource. *See, e.g.*, *Williams*, 618 F.2d at 1026 ("The determination of the defendant's need for expert assistance is committed to the sound discretion of the trial judge."); *see also supra* note 185 (describing eligibility requirements for legal assistance).

230. *See, e.g.*, *Jacobs*, 350 F.2d at 573 (finding that a psychiatrist is a critical tool to a defense).

231. *See supra* Part I.

232. 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd*, 559 F.2d 283 (5th Cir. 1977), *rev'd in part on other grounds*, 438 U.S. 781 (1978) (per curiam).

punishment, the district court in *Pugh* "promulgated a detailed set of Minimum Constitutional Standards for Inmates of Alabama Penal System and ordered the defendants to report to the court in 6 months concerning their programs in the implementation of each and every standard."[233] These standards covered a wide range of substantive areas, including prison population, cell size, conditions of isolation, sanitation and hygiene, nutrition, and staffing.[234] If a court were to find, based on the evidence before it, systemic equal protection violations depriving indigent defendants of a meaningful defense, one could envision a similar issuance of "minimum constitutional standards for indigent defense," perhaps including standards for minimum compensation, maximum workload, and the availability of investigative and expert resources.

3. Prospectively Defining a Meaningful Defense

As discussed above, the Sixth Amendment presents an obstacle to the promulgation of specific guidelines or requirements for "effective" lawyering, given *Strickland*'s focus on assessing only the retrospective reasonableness of counsel's performance.[235] Moreover, under the Sixth Amendment, an indigent defendant is entitled only to an effective attorney and not necessarily to an adequate defense, which may include resources beyond the attorney him or herself. To the extent some have viewed civil class actions as a way to reach beyond individual attorney conduct, some courts have explicitly stated that *Strickland* claims cannot be addressed prospectively.[236] Instead, some courts will only address such claims in post-conviction, which raises a host of problems for those seeking reform—

233. Ira P. Robbins & Michael B. Buser, *Punitive Conditions of Prison Confinement: An Analysis of* Pugh v. Locke *and Federal Court Supervision of State Penal Administration Under the Eighth Amendment*, 29 STAN. L. REV. 893, 896–97 (1977) (internal quotation marks omitted).

234. *See* Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 605–08 (2006) (describing the *Pugh* order, including its substantive coverage and its incorporation by reference of other detailed standards, including those drafted by other government authorities and academics).

235. *See* Strickland v. Washington, 466 U.S. 668, 687–91 (1984) (discussing the retrospective reasonableness approach).

236. *See, e.g.*, United States v. Carmichael, 372 F. Supp. 2d 1331, 1333–34 (M.D. Ala. 2005) (finding that an ineffective assistance claim raised prior to or during a defendant's criminal trial is premature); Platt v. State, 664 N.E.2d 357, 363–64 (Ind. Ct. App. 1996) (declaring a pre-trial ineffectiveness claim unripe because the defendant had not yet been to trial and therefore had no record on which to litigate his claim).

including the need to show prejudice—and have held that effectiveness is "not a concept capable of expansive application to remediate systemic deficiencies" but instead only to protect an individual's right to a fair adjudication.[237]

Under an equal protection approach, in contrast, the "meaningful defense" standard all but invites courts to affirmatively state the elements of such a defense—or, at the very least, creates a welcome opportunity for them to do so. Also important is that while the Sixth Amendment approach holds defense counsel accountable under more objective "prevailing professional norms"—norms which themselves may have developed in an economically anemic context—equal protection more comfortably allows courts to challenge or define the norm, taking a more active approach towards establishing what a meaningful defense should and must entail. Once that norm is established, equal protection also carves a clearer path towards leveling up those who have not reached that norm and, if necessary, providing those defendants with specific entitlements.

Courts attempting to tackle this inquiry need not reinvent the wheel or start from scratch. There is plenty of guidance on the issue of what resources or systemic requirements should underlie any functional public defense system. Many organizations, including the ABA, the National Legal Aid and Defender Association (NLADA), and special commissions, such as the President's National Advisory Commission on Criminal Justice Standards and Goals, have released professional guidelines for the provision of indigent defense.[238] These standards provide guidance on a variety of matters, including counsel's specific responsibilities at different stages of the case and necessary contact with the client,[239] the timing of appointments and conditions for meeting with the client,[240] defense counsel's broader duties (including sufficient time, resources, knowledge and experience to work on his or her assigned cases),[241] the workload

237. Hurrell-Harring v. State, 930 N.E.2d 217, 221 (N.Y. 2010).

238. *See, e.g.*, AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION (3d ed. 1993); COURTS, *supra* note 213; NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995); PROVIDING DEFENSE SERVICES, *supra* note 40; TEN PRINCIPLES, *supra* note 40.

239. COURTS, *supra* note 213, at 259–60.

240. *Id*. at 270.

241. TEN PRINCIPLES, *supra* note 40, at 2–3.

and compensation of individual public defenders,[242] and supporting personnel and facilities.[243]

Courts need not prescribe highly specific or numerical rules, but they can certainly declare what is before them unreasonable, provide general guidance as to the elements required for a meaningful defense, and force actors on the ground to come up with workable, jurisdiction-specific solutions.[244] Moreover, this guidance could bleed over to affect the quality of lawyering itself, broadening equal protection's potential impact and reaching aspects of attorney representation not typically accessed as part of the Sixth Amendment analysis. For example, a court could—perhaps by deeming the lawyer herself a necessary "tool" to the provision of a meaningful defense (and therefore that the poor must have equal access to that tool)—require that a lawyer maintain a reasonable caseload of appointed cases (and restricted private caseload, in the case of an attorney who is not a full-time public defender) such that he or she has adequate time to devote to investigating and preparing for each case.[245] In other words, the court could declare that if both rich and poor have the right to an attorney, but the indigent defendant has access to that attorney for only minutes just before entering a plea, the poor are being denied equal access to a full attorney by the state. National standards for maximum caseloads—150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals per year[246]—could be provided as a guideline for what might be reasonable, much as the ABA Guidelines regarding the importance of investigation in capital cases were used to support the Court's holding that a reasonable investigation be conducted in every capital case.[247]

There may be, under an approach focused on equality, a concern that equal protection does not specify the level at which such equalization should occur. Generally, under equal protection analysis, "inequality may be remedied either by leveling up and improving the treatment of the disadvantaged

242. COURTS, *supra* note 213, at 253–75.

243. TEN PRINCIPLES, *supra* note 40, at 2–3.

244. *See, e.g.*, Williams v. Martin, 618 F.2d 1021, 1025–26 (4th Cir. 1980) (finding that funds must be provided to supply the defendant with a pathologist for him to have an effective defense).

245. *See* TEN PRINCIPLES, *supra* note 40, at 2–3.

246. COURTS, *supra* note 213, at 276–77.

247. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 522 (2003) (quoting Strickland v. Washington, 466 U.S. 668, 688–89 (1984)) (relying on ABA standards as "guides to determining what [attorney conduct] is reasonable").

class, or by leveling down and bringing the group that is better off down to the level of those worse off."[248] Because the choice to "level down" would satisfy an equal protection claim to the same degree as "leveling up," some commentators have warned of the danger that equal protection claims may actually leave those seeking equality worse off.[249] The equal protection claim at issue in *Griffin*, however, avoids this dilemma: there is no ability for the state to level down because it cannot control the resources that well-off defendants bring to bear in providing their own access to the courts.[250] Because the state must ensure that all defendants have an equally meaningful opportunity to assert a meaningful defense at trial or to contest their conviction on appeal, it can respond only by providing the poor—when required under *Griffin*'s limiting principles—the resources available to those with means.

4. A More Direct Path to Normative Judgments

As instruments of reform, both Sixth Amendment and equal protection approaches will involve some element of normative assessment as to whether a certain resource, tool, or structural feature is necessary to vindicate the right at issue. There is an important difference, however, between the two analyses as to when and how that decision is made.

Under a Sixth Amendment approach, the inquiry demanding of a normative assessment lies in the causal finding linking deficiency and ineffective attorney conduct.[251] In the equal protection context, the initial inquiry is merely whether the resource is available only to those who can afford it.[252] Assuming an affirmative answer—which will be the case by definition when we are talking about a defendant who has been classified

248. Deborah L. Brake, *When Equality Leaves Everyone Worse Off: The Problem of Leveling Down in Equality Law*, 46 WM. & MARY L. REV. 513, 515 (2004).

249. *See, e.g.*, *id.* at 515–16.

250. *Compare* Yoshino, *supra* note 150, at 787 (arguing that, as a general matter, an equality norm allows the state to level down while a liberty-based (due process) approach will lead to less leveling down), *with The Supreme Court, 1982 Term*, *supra* note 197, at 90–94 (arguing that *Bearden*'s "'fundamental fairness' standard allows the Court greater freedom to choose exactly how much protection it will extend to the poor than does a rule of equal treatment for rich and poor" and that *Bearden*'s focus on "'fundamental fairness' rather than equal treatment allows the Court to limit that protection in the future").

251. *See supra* Part I.

252. *See* discussion *supra* Part III.A.

as indigent in the criminal context—a normative assessment must be made as to whether the same tool is critical to a meaningful defense.

It is true that equal protection offers a more open-ended inquiry and requires a more normative judgment on the part of the courts (which, for some tribunals, may be a lot to ask).[253] But, for those courts willing to embrace and make substantive policy judgments, they will have one less hurdle to overcome—a hurdle that under the Sixth Amendment requires fact-intensive exploration of the link between funding and ineffectiveness. As a result, equal protection provides a more direct path to the point at which courts must make a normative decision about what level of funding is necessary to ensure an adequate defense and what tools are indispensable in any criminal case. The need to filter factors through the attorney medium is eliminated and the external factors that could cloud the effect of resource deprivation through that process are avoided. In some ways, the normative judgment also requires less speculation—courts are not expected to suggest how the deprivation of a resource will affect a wide range of attorneys in a variety of different contexts. And to the extent Sixth Amendment jurisprudence has been unfriendly to defendants seeking relief because of their perceived status as "criminals," the shift in focus to protecting the poor might be more palatable (as a relative matter). These choices are certainly tough ones to make, and courts' avoidance of such choices may happen in any context, but this Article posits that they are necessary for courts to maintain a relevant role in indigent defense reform.[254] For courts that are

253. *See* Bibas, *supra* note 68, at 10 (noting that while judges are capable of "promot[ing] effective assistance of counsel via systemic reform, they are reluctant to flex their muscles" and hesitant to make policy judgments).

254. Any wariness of requiring equal treatment of rich and poor in the context of criminal defense likely shares common roots with what William Stuntz describes as the hesitance of courts to make substantive, as opposed to procedural, legal rules: when making such judgments—particularly about the allocation of resources—there is "no nonarbitrary way to arrive at the proper legal rules, no way to get to sensible bottom lines by something that looks and feels like legal analysis." Stuntz, *supra* note 26, at 73. Stuntz posited that the "only way to set [substantive criminal law and funding standards—such as sentencing guidelines and] funding floors is to set them." *Id.* Similarly, the only way for courts to effectively apply an equal protection analysis to the indigent defense context will be for them to define the specific tools which indigent defendants are being denied and which are required to satisfy the constitutional requirements of a meaningful defense. While defining the contours of criminal procedure—the Sixth Amendment analysis—may feel like a safer and more acceptable route, creating substantive constitutional parameters may be, as

willing to do so,[255] the equal protection approach provides a more direct path.

Another advantage of the equal protection approach is that once a resource is established as critical to a meaningful defense under a *Griffin*-type analysis, that substantive rule can more easily be consistently applied to future cases, creating the benefit of predictability.[256] If courts hold that indigent defendants are entitled as a matter of equal protection to specific tools that ensure a meaningful defense, the extent to which the inquiry is subjective can be minimized in the future.[257]

The availability of specific "basic tools" necessary to a meaningful defense or appeal is more easily discerned and generalized to an entire class than the amorphous concept of effective representation. And once an entitlement is defined as a "tool," it is less vulnerable to subjective analysis. It may be hard to gauge what level of assistance will be necessary in any given criminal case to provide meaningful representation, but surely experts can agree on a subset of tools and conditions (i.e., full compensation, necessary support services and a reasonable workload) necessary for counsel to provide adequate assistance as a general matter; indeed, many already have.[258]

Stuntz suggests, a more powerful way to "address serious and common injustices." *Id.* at 71.

255. *See, e.g.*, Simmons v. State Pub. Defender, 791 N.W.2d 69, 86 (Iowa 2010) ("While it is true that an adverse ruling will have some fiscal impact on the state, this is true in many situations. If the court was constrained any time a ruling had fiscal impact, *Gideon* itself, which has been characterized as an 'enormous unfunded mandate imposed upon the states,' would have been wrongly decided." (citation omitted)). *Cf.* Mayer v. City of Chi., 404 U.S. 189, 201 (1971) (Burger, C.J., concurring) ("An affluent society ought not be miserly in support of justice, for economy is not an objective of the system.").

256. *See, e.g.*, Williams v. Martin, 618 F.2d 1021, 1026 (4th Cir. 1980) (following the *Jacobs* court in requiring, upon an adequate demonstration of need, that an indigent defendant be provided with the assistance of an expert as a matter of equal protection).

257. *See* Miller, *supra* note 197, at 302 ("[A] critical legal benefit to using equal protection, as opposed to due process, is predictability . . . . Once the classification [of a distinguished group] and the analysis [i.e., level of scrutiny] have been determined, a similarly situated group can better predict the outcome of equal protection challenges in the future."); *see also The Supreme Court, 1982 Term*, *supra* note 197, at 90 ("Insistence on equality establishes the state's treatment of nonindigent defendants as a standard by which to measure its treatment of indigents; insistence simply on fairness, however, allows the Court to make its own determinations of what is fair in various contexts."); *id.* at 92 (contrasting an equality approach with "ad hoc determinations of fairness").

258. *See, e.g.*, PROVIDING DEFENSE SERVICES, *supra* note 40, at 1–42 (providing, *inter alia*, for reasonable and prompt compensation, training and

For example, courts might conclude that a lawyer handle no more than a set number of cases per year[259] or that states provide one hundred percent of indigent defense funding (as opposed to a mix of state and local funding).[260] In contrast, and as discussed above, the Sixth Amendment approach is a more fact-dependent inquiry and not intended or designed to create substantive entitlements or set specific requirements for attorney conduct that can easily be applied to future cases.

B. CONCEPTUAL ADVANTAGES OF AN EQUAL PROTECTION APPROACH

Conceiving of indigent defense reform as a matter of equal protection rather than a pure right to counsel issue has some doctrinal advantages, as discussed above. But perhaps the greater value lies in the conceptual benefits and potential societal value gained by thinking about the issue as one of equality. Doing so highlights the disparities present in the current indigent defense system and the fact that harm that is being done to an entire class of people without access to a meaningful defense. Once we acknowledge that the right to counsel does not protect everyone equally, we can more clearly define who is being harmed by gross underfunding of public defense and be more direct about how that discrepancy in harm must be remedied. It also helps reformers to focus on a broad-based attack at

professional development, maintenance of reasonable caseloads, and the provision of investigatory, expert, and other services necessary to quality legal representation); ABA GUIDELINES, *supra* note 40, at 939–88 (providing, inter alia, for specific staff members to be included in the defense team, such as an investigator and a mitigation specialist; reasonable workloads; funds for training, professional development and continuing education; and full compensation, commensurate with prevailing rates for similar services). Some have attempted to adopt these guidelines as measurements of adequate performance in the Sixth Amendment context; but, in many cases, they have not been successful. *See, e.g.*, *supra* note 43 and accompanying text.

259. *See, e.g.*, COURTS, *supra* note 213, at 276–77 (setting a standard for maximum caseloads per year of 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, and 25 appeals); NAT'L LEGAL AID & DEFENDER ASS'N, *supra* note 40, at 424 (stating that caseloads should "reflect national standards and guidelines").

260. One major issue of indigent defense funding has been that in many states, states only partially fund indigent defense for the states (even though providing indigent defense is and should be a state function). This has led to disparate and underfunding in many states, including Georgia, where counties are not required and often fail to fill the resulting funding gap. JUSTICE DENIED, *supra* note 2, at 53–57.

the roots of the underlying problem, rather than incrementally chipping away from the top down.

Some critics claim that equality is a superfluous proposition aside from the substantive right ultimately sought to be enforced. For example, Peter Westen has argued that equality is merely "a 'form' for stating moral and legal propositions whose substance originates elsewhere, a 'form' of discourse with no substantive content of its own."[261] Westen further contends that "the remedies entailed by equality are identical to the substantive remedies that would exist in its absence"[262] and that "equality cannot produce substantive results unattainable under other forms of analysis."[263] Similarly, another commentator suggests that in the criminal context, equality is not appropriately used as a prescriptive ideal, but instead only "as a directive to follow the substantive standard" of how people should be treated.[264]

In the context of indigent defense reform, equality is not as meaningless as these commentators would suggest, particularly in light of courts' demonstrated failures to use the Sixth Amendment to further delineate substantive standards for what indigent legal representation should be. Equality in this context serves an important purpose, which is not only to enforce the right in a different way—i.e., with a specific focus on those elements that are made available to wealthy defendants but not to poor defendants—but also to fill in the gaps between the specific substantive rights carved out by the courts under the Sixth Amendment. Assume the basic proposition that underfunding of indigent defense systems affects not just the binary question of whether someone has a lawyer, or even whether that lawyer is constitutionally effective, but the entirety of a defendant's experience within the criminal justice process—from the time that passes before he is appointed a lawyer, to the amount of time he spends with the lawyer and the amount of time available to the lawyer to spend on his case, to the caseloads of the lawyers who are appointed to indigents, to the resources available to those lawyers to undertake adequate

261. Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 577–78 (1982).

262. *Id.* at 593.

263. *Id.* at 579.

264. Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda*,* Furman *and Beyond*, 54 VAND. L. REV. 359, 363 (2001).

investigations, employ necessary experts and the like, and so on. Under the Sixth Amendment, one would have to carve out individual duties or responsibilities of counsel at every point along the way. At best, this would result in incrementally chipping away at the problem, one aspect of counsel's deficient performance at a time, without recognizing or directly addressing the underlying causes of such performance. It is only once myriad individual aspects of the right have been established—i.e., the right to lawyer with a reasonable caseload, the right to an investigator, etc.—that the bigger picture and the pervasive inequality that belies the under-enforcement of these individual rights would be revealed.

In contrast, an equal protection approach would start at the other end of the equation, recognizing at the outset that the problem is one of equal access based on wealth disparities and that the differential in access necessarily leads to disparate representation. Once the root of the problem is recognized, the necessary elements to remedy that inequity flow from that foundation. For example, once it has been held that indigent defendants require equal access to a meaningful defense, we can direct our attention to the aspects of indigent defense representation most affected by wealth disparities—i.e., overwhelmed attorneys without the necessary time to devote to each case and a dearth of critical investigative and expert resources—and address those as a priority. In doing so, many aspects of any individual attorney's performance would inevitably be affected and improved. Another way of thinking about the problem is that the faults of an underfunded system manifest themselves through the lawyer's conduct: the Sixth Amendment targets the outcomes or end results of unequal access by focusing on the lawyer's performance while equal protection delves earlier into the process, attacking the causes of unequal access.

If each approach reached its natural end, would the result be the same? In some respects, yes—certain aspects of indigent defense representation could theoretically be addressed through either avenue. The background aspects not as clearly tied to specific attorney conduct, however, would more likely be recognized only through an equal protection approach, which can encompass the broader experience of a group of defendants while the Sixth Amendment remains focused on the procedural mechanics of representation. Moreover, there is the reality that the Sixth Amendment has a fixed interpretation in the indigent

defense context, given years of reliance and resulting precedent. While the likelihood of success of an equal protection approach may be unclear, it is more likely than a reversal of entrenched Sixth Amendment law.

By taking a broader view of the problem and focusing on its root causes, the equal protection approach also has the power to ultimately expand the rights of the affected class beyond the substantive contours of the Sixth Amendment. For example, although *Douglas v. California* is on its face a decision about the right to a lawyer on appeal, that right could not be grounded in the Sixth Amendment and could only be expanded in this way by turning to equal protection and the recognition that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'"[265] One can think of other aspects of representation—such as excessive caseloads—that do not fit easily into the Sixth Amendment paradigm, but do fit more naturally into the idea of a two-tiered justice system that makes certain things—like a lawyer with adequate time to devote to a case—available only to those who can pay the price.

The questions we ask ourselves about the problems we see—who is being harmed, why and how—and the answers that follow have the potential to alter the trajectory of the indigent defense reform movement.[266] If we do not acknowledge that the quality of defense representation provided by the state is not merely a subset of the more broadly applicable right to counsel but instead a poor people's problem, how can we expect our solutions to do anything other than perpetuate, or at least not address, the particular ways in which rights enforcement bypasses the poor? Beyond any purely legal benefit that the notion of equality may offer, framing access to justice as an equal protection issue has the capacity to influence not only the development of the law and the way in which courts reach their conclusions, but also inform the way we, as a polity, understand the rights involved and structure our societal values.[267]

265. 372 U.S. 353, 355 (1963) (citation omitted).

266. The exploration of how the legal approach taken to reform indigent defense could influence not only the trajectory of reform itself, but also society's views on the issue of indigent defense and of those affected by indigent defense failures, could well serve as the topic for an entirely separate paper. I merely raise the issue here to demonstrate the power of equality in this context.

267. *See, e.g.*, Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions and Social Change*, 94 MARQ. L. REV. 263, 294–95 (2010) (de-

Another way to think about the difference between the two approaches is to recast the landmark case of *Brown v. Board of Education*[268] as a substantive rights case: what if *Brown* had been a case about whether African-Americans are entitled to the substantive right to a quality education or a diverse student body? Of course *Brown* cannot be wholly removed from its historical or political context, but no one would dispute that the understanding of equality stemming from that case has been one of the most influential messaging mechanisms in the relationship between law and society.

A culture that values only individual rights is not necessarily concerned about public welfare and is more prone to the notion that all citizens are capable of equal success, provided that they have the will. A society that values equality in addition to individual rights is more likely to recognize when those rights are not being or cannot be enforced equally and will take additional steps to ensure that all citizens have access to the same opportunities.

CONCLUSION

Questions of equality, society and justice are massive and cannot be taken lightly. Therefore, this Article does not purport to address everything that may fall within those concepts or fully resolve detailed questions of implementation. Instead, the Article makes a plea to not abandon the principle of equality as meaningless or as superfluous—particularly in the context of indigent defense, where poor defendants have few other protections against the loss of their freedom. It aims here to provide a broader picture of how we would incorporate equality back into indigent defense reform and the benefits that such reincorporation would yield.

In spite of judicial efforts to scale back equal protection and to lessen its influence, the fundamental right of access to the courts still receives special treatment under equal protection analysis. *Griffin* and its progeny have required and continue to require that, as a matter of equal protection, the basic tools necessary for a meaningful defense must be provided to indigents "when those tools are available for a price" to other defendants.[269] Unlike the *Strickland* inquiry, which is not for-

scribing the ways in which *Roe v. Wade* shaped the politics of and popular opinion regarding the abortion debate).

268. 347 U.S. 483 (1954).

269. Britt v. North Carolina, 404 U.S. 226, 227 (1971).

ward-looking and not intended to improve the quality of legal representation or to specify particular requirements for ineffective assistance,[270] equal protection is a means not only to provide prospective guidance regarding the substantive requirements for a meaningful defense, but also to acknowledge fundamental differences in how the rich and poor are treated in the context of criminal defense. Viewing the problem through the lens of equal protection, and not just a matter of substantive rights, allows us to focus not just on the quality of lawyering provided but on how the poor are treated more broadly in terms of resources and conditions that may directly or indirectly impede their access to the courts.

It may take time for courts and other actors to recognize equal protection as a viable basis for vindicating poor defendants' right to a meaningful defense. One benefit of such a shift, however, is that while courts are familiar with the Sixth Amendment paradigm and have therefore staked out their positions and entrenched themselves in bad precedent, equal protection offers a chance to start from a relatively clean slate. Ultimately, courts that incorporate equality principles in this context will be able to influence how we think about practical aspects of rights enforcement going forward and help to refocus solutions on the provision of necessary resources ex ante rather than merely evaluating the post hoc results of resource deprivation.

Critics will inevitably declare that regardless of the analysis used, courts will be just as unwilling to determine that some resource is required for a meaningful defense and must therefore be available to those who cannot otherwise afford it as they are to insist that certain resources are critical to ensure a lawyer's effectiveness. The same critics may claim that such an argument puts too much faith in the courts to make decisions based on such doctrinal distinctions rather than external facts or a guttural feeling about the proper outcome.[271] Legal realists may have come by their skepticism honestly, and relying on

270. Strickland v. Washington, 466 U.S. 668, 689 (1984) ("[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.").

271. *Cf.* Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 267 (1997) (cataloguing various descriptions of legal realism, which emphasize the importance of factors external to the law in determining judicial decisions).

doctrinal solutions will require judicial acceptance, but the fact that indigent defense is an issue so judicial in nature and that the judiciary stands as the ultimate protector of political minorities and the otherwise disempowered should prevent us from giving up on courts entirely.

An equal protection approach can serve as a tool in the hands of more receptive or sympathetic courts that would otherwise feel burdened by *Strickland* and other precedent grounded in the Sixth Amendment.[272] And even if the current judiciary is not sympathetic to such claims, its composition is "neither static nor permanent."[273] Abandoning the courts altogether as a vehicle for reform is simply not a feasible option for defendants subject to such failing systems; given their lack of political power to encourage changes by other means—i.e., legislative reform—and the political unpopularity of their cause, they have little other recourse.[274] Moreover, we would be well served to have courts driving indigent defense reform efforts rather than the legislative or executive branches, which may also be vulnerable to other motivations, such as the need to control budgets or to balance indigent defense against other state-provided services.[275]

Moreover, courts are uniquely situated to afford relief in the area of indigent defense. They have a high degree of institutional competence in this context, given their expertise relative to other branches of government about the workings of the

272. *See* Ryan Riehl, Note, *Double-Talking the Right to Counsel*, 50 WAYNE L. REV. 1019, 1029 (2004) ("The Court's willingness to condone such inept conduct by lawyers, as falling within the permissible range of professional discretion afforded to defense attorneys, has further entrenched these insurmountable factors of presumed competence, performance and prejudice into Sixth Amendment jurisprudence.").

273. Drinan, *supra* note 3.

274. *See* Sklansky, *supra* note 10, at 1290 (noting that the "political process does a notoriously bad job protecting the rights of criminal defendants" and that, therefore, in this context "the presumption is weaker . . . than elsewhere that judges should defer to legislative allocations of public resources").

275. *See* Rodger Citron, Note, *(Un)* Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 498–99 (1991) (explaining that legislatures are particularly ill-suited to undertake indigent defense reform, given its political unpopularity, and that because indigent defense is a definitively legal institution, courts are best positioned to enact and oversee reform); *see also* JUSTICE POLICY INST., *supra* note 7, at 8 (2011) (noting that many local governments are "having to choose between funding needed services such as health care and human services and upholding the constitutional commitment to guarantee adequate public defense services").

indigent defense system.[276] And, unlike in other areas—like education or prison conditions—where the judiciary seeks to change other institutions, in the area of indigent defense, the judiciary is largely self-regulating, alleviating concerns about the its ability to effectively direct external institutions toward reform.[277] Although still one route a court might take, the approach suggested here does not necessarily require the direction of legislative appropriations, which is deemed by some courts as outside their purview.[278] Courts can also control the consequences of underfunding by ordering remedies that exist wholly within the realm of the judiciary, such as disallowing certain consequences (i.e., the imposition of maximum or capital sentences or the initiation of criminal proceedings) unless certain standards—i.e., those generated by an equal protection approach—have been met.[279]

276. *See* Drinan, *supra* note 3 (explaining that "judges would be uniquely skilled at overseeing the implementation of a revamped public defense system," given their expertise in lawyering); *see also* Brensike Primus, *supra* note 20, at 47 (describing the unique positioning of the federal judiciary with regard to criminal justice reforms and why it is better equipped to redress criminal justice violations than those in other areas, such as education or prison conditions).

Some state courts may also be in a position to adopt standards governing indigent defense as a matter of state rule. The Washington Supreme Court recently adopted standards of this sort which, among other things, limit the number of cases any public defender in the state may handle. *In the Matter of the Adoption of New Standards for Indigent Defense and Certification of Compliance*, Order No. 25700-A-1004 (Wash. June 15, 2012).

277. Such concerns may include the courts' limited ability to implement rulings and the need for political or external support. ROSENBERG, *supra* note 10, at 35, 332 (discussing in the context of the right to counsel two of the three general constraints he has identified on courts' ability to produce significant social reform: the lack of judicial independence and the judiciary's lack of implementation powers). *Cf.* Sklansky, *supra* note 10, at 1291 (explaining that "the distinctive remedial structure of constitutional criminal law" allows courts to create remedies within the judicial realm and eliminates the need for external enforcement mechanisms, alleviating concerns about the "feasibility and political acceptability" of such mechanisms).

278. Courts are often hesitant to compel legislative appropriations, in part because of separation of powers concerns. *See, e.g.*, Sklansky, *supra* note 10, at 1284; *see also* JUSTICE DENIED, *supra* note 2, at 130–34 (explaining that separation of powers concerns have prevented some courts from fashioning remedies that require the appropriation of funds, either directly or indirectly); *Effectively Ineffective*, *supra* note 25, at 1744–45.

279. Because the nature of criminal prosecution involves the active participation of the judiciary, the enforcement of what David Sklansky has termed "quasi-affirmative" rights and systemic rights minimizes concerns about the judiciary encroaching on territory properly reserved for the political branches of government. *See* Sklansky, *supra* note 10, at 1291 (noting that "[t]he steady

The path this Article sets out will involve making tough choices about which resources are critical to a meaningful defense. But there is nothing preventing courts from making those choices;[280] courts need to overcome their hesitance to make normative judgments about the rights to which the poor are entitled. Equal protection provides an opportunity—if courts are willing to seize it—to not only provide the substantive guidance that has been missing from Sixth Amendment jurisprudence about what a meaningful defense should entail, but also recognize present inequities and ensure that both rich and poor are in a position to benefit from substantive rights enforcement.

stream of criminal cases and the normal processes of criminal adjudication . . . provide the vehicle for enforcing the rights granted to criminal suspects and criminal defendants"); *see, e.g.*, Lavallee v. Justices in Hamden Superior Court, 812 N.E.2d 895, 901 (Mass. 2004) (ordering, if counsel was not available to provide representation within a specified time frame, that criminal defendants be released or that charges be dismissed). Sklansky suggests that one way to promote the enforcement of quasi-affirmative rights—rights that obligate the government to do something, but only if the government first takes action against the holder of the right (i.e., charging the holder with a crime)—is for courts to set substantive rules that can be overridden by the legislature and thereby encourage an inter-branch dialogue that can lead to stronger enforcement of constitutional criminal rights. Sklansky, *supra* note 10, at 1234, 1294. Without getting into the wisdom of such an approach, it is also possible that, as in *Brown v. Bd. of Educ. of Topeka, Kan. (Brown II)*, 349 U.S. 294 (1955), courts could endorse more general principles of equality and allow the other branches to meet that end.

280. Even if the Supreme Court is unwilling to expand its application of the *Griffin* principle, state courts can construe state constitutional provisions to apply more broadly than their federal constitutional counterparts. Therefore, the expanded application of the *Griffin-Douglas* right is fertile ground for state courts to explore—perhaps more so than federal courts, who will ultimately be constrained by the Supreme Court's direction on this topic. *See* Jeffrey, *supra* note 149, at 254 (explaining that states are free to "guarantee more expansive equal protection than that provided by federal law" and that twenty-one of forty eight states that specifically guarantee equal protection in their own state constitutions have explicitly held that the scope of that protection is broader than that provided under federal law).