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Litigation Strategies for Dealing with the Indigent Defense Crisis

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Eve Brensike Primus[*]

The indigent defense delivery system in the United States is in a state of crisis.[1] Public defenders routinely handle well over 1,000 cases a year, more than three times the number of cases that the American Bar Association says one attorney can handle effectively.[2] As a result, many defendants sit in jail for months before even speaking to their court-appointed lawyers.[3] And when defendants do meet their attorneys, they are often disappointed to learn that these lawyers are too overwhelmed to provide adequate representation. With public defenders or assigned counsel representing more than 80% of criminal defendants nationwide,[4] the indigent defense crisis is a problem that our criminal justice system can no longer afford to ignore.

Both the federal executive and legislative branches have begun to study seriously the indigent defense crisis with an eye toward proposed reforms. Attorney General Eric Holder has created an internal working group at the U.S. Department of Justice (DOJ) with instructions "to leave no stone unturned in identifying potential funding sources, legislative initiatives, and other ways we can work with our state and local partners to establish effective public defense systems."[5] Prominent constitutional law professor Laurence Tribe has been appointed the senior

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[1] *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

[2] *See, e.g.*, Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008; *see also* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 686-87 (2007) (documenting the problems of high public defender caseloads); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM at 5 n.19 (2002), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf (noting the figures of the National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, which provide for a maximum caseload per year of 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals).

[3] *See, e.g.*, NAACP LEGAL DEF. & EDUC. FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 6 (2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ms-assemblylinejustice.pdf.

[4] *See* Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, BUREAU OF JUST. STAT. BULL., Feb. 1996, at 4, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/id.pdf.

[5] *See* Eric Holder, U.S. Att'y Gen., Remarks at the Brennan Legacy Awards Dinner, Brennan Center for Justice (Nov. 17, 2009), *available at* http://www.brennancenter.org/content/resource/attorney_general_eric_holder_on_indigent_defense_reform [hereinafter "Holder Remarks"].

counselor for access to justice and is spearheading the effort.[6] And Congress has begun to hold hearings to consider ways to address the indigent defense crisis.[7]

This Issue Brief will explore two potential federal legislative initiatives that could help remedy the indigent defense crisis in this country. Before discussing these proposals, however, the next section will explain why a federal forum for litigating systemic right-to-counsel violations is necessary and why current avenues for federal court review of such claims have proven ineffective.

Section II then proposes the creation of a federal enforcement action that would allow DOJ (or a private litigant deputized to act on its behalf) to seek equitable relief in federal court whenever a state engages in a pattern or practice of conduct that deprives criminal defendants of their right to effective counsel. Similar federal enforcement actions exist in other contexts,[8] and I will discuss how past experience with these statutes can inform the creation of an even more effective enforcement action to remedy right-to-counsel problems.

Of course, the efficacy of any statute empowering DOJ to choose whether to file a federal enforcement action or deputize private citizens to file one is partly contingent on the politics of the incumbent administration. I therefore offer a second proposal in Section III designed to provide backstop protection against an unfriendly administration's curtailing the enforcement action. Specifically, I propose that Congress create a new post-trial federal habeas corpus cause of action designed to redress systemic right-to-counsel problems, and I explain how a systemic habeas cause of action would catalyze state reform without running into the problems that other attempts at structural reform litigation have faced in the past.[9]

I. The Need for a New Federal Cause of Action

With a spotlight now on the indigent defense crisis, there are many proposals for potential reform. Some have argued for better training for public defenders.[10] Others would like to see more federal funding for indigent defense.[11] Still others contend that more data should be

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[6] *See, e.g.*, Carrie Johnson, *Prominent Harvard Law Professor Joins Justice Department*, WASH. POST (Feb. 26, 2010), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/02/25/AR2010022505697.html.

[7] *See Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States, Hearing before the House Comm. on the Judiciary Subcomm. on Crime, Terrorism, and Homeland Sec.*, 111th Cong. (2009); *Indigent Representation: A Growing National Crisis, Hearing before the House Comm. on the Judiciary Subcomm. on Crime, Terrorism, and Homeland Sec.*, 111th Cong. (2009); *see also* Press Release, The Constitution Project, *National Right to Counsel Committee Members Testify on Indigent Defense Crisis and Issue Urgent Call for Reforms* (June 4, 2009), *available at* http://www.constitutionproject.org/newsdetail.asp?id=380 (discussing testimony before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security).

[8] *See* 42 U.S.C. § 14141; 42 U.S.C. § 1997a.

[9] This proposal builds on an idea that I first proposed elsewhere. *See* Eve Brensike Primus, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010).

[10] *See, e.g.*, Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 90-92 (1995).

[11] *See, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 70-71 (1997).

collected and used to encourage states to fix their own indigent defense systems.[12] Although I agree with many of these proposals, they are expensive if the goal is nationwide reform. In Tennessee, for example, one county public defender office had six attorneys handling more than 10,000 misdemeanor cases in one year.[13] Given prevailing standards about how many cases an attorney can handle effectively, that office would have to hire 19 additional attorneys just to get the caseloads down to a manageable level. And that is just one office in one state. In a time of economic recession, it is hard to believe that the federal government would be willing to invest the amount of money that would be required to effectuate long-term nationwide change in the quality of indigent defense representation.

Moreover, additional funding and better training would not solve many of the problems that states have had in living up to the promise of *Gideon v. Wainwright*, where the Supreme Court first held that indigent criminal defendants are constitutionally entitled to the assistance of counsel at the state's expense.[14] Consider the problem of insufficient independence and oversight. In some jurisdictions where judges assign lawyers to the indigent, there have been complaints about judges refusing to appoint lawyers who take their clients' cases to trial more often than the judges would like.[15] Of course, federal funding could be conditioned on a state's agreement to meet minimal standards of quality and independence, but we cannot rely on the states' elected branches to police their own compliance with those standards. The public is not exactly clamoring for greater safeguards for criminal defendants, and state legislators who advocate for defense-friendly reforms are often accused of being soft on crime and voted out of office.

Nor are the state judiciaries well-equipped to police the quality of indigent defense representation. As an initial matter, many state judges are elected[16] and, as a result, they are subject to the same political pressures to be tough on crime as their legislative and executive counterparts. Moreover, in the vast majority of states, the very structure of the state criminal justice system prevents most litigants from having a realistic opportunity to challenge the effectiveness of their trial attorneys.[17] In most jurisdictions, defendants are not permitted to challenge their trial attorneys' effectiveness on direct appeal. Rather, they must wait until the state collateral review process to present such a challenge.[18] But collateral review often comes years after the original conviction, when the defendant is no longer constitutionally entitled to the assistance of counsel.[19] As a result, forcing defendants to wait until collateral review

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[12] *See, e.g.*, Erica J. Hashimoto, *Assessing the Indigent Defense System*, AM. CONSTITUTION SOC'Y ISSUE BRIEF, Sept. 2010, *available at* http://acslaw.org/node/16836.
[13] *See* Holder Remarks, *supra* note 5 (discussing this jurisdiction).
[14] Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the state must provide indigent felony defendants with counsel); *see also* Scott v. Illinois, 440 U.S. 367 (1979) (extending the rule in *Gideon* to misdemeanor cases involving a punishment of actual imprisonment).
[15] *See* Holder Remarks, *supra* note 5.
[16] *See* AMERICAN BAR ASS'N, FACT SHEET ON JUDICIAL SELECTION METHODS IN THE STATES, *available at* http://www.abanet.org/leadership/fact_sheet.pdf; *see also* Steven P. Croley, *The Majoritarian Difficulty: Elected Judges and the Rule of Law*, 61 U. CHI. L. REV. 689 (1995).
[17] *See generally* Primus, *supra* note 2.
[18] *See* Primus, *supra* note 2, at 691.
[19] *See id.* at 680-81.

effectively means that most defendants never have a realistic opportunity to challenge their trial attorneys' performance in state court.

Some defendants have attempted to avoid this problem by joining together to file civil rights class actions in state courts in an effort to remedy systemic right-to-counsel problems.[20] Although some state courts have been receptive to these claims, they have to-date generated little actual change in the delivery of indigent defense services nationwide.[21]

In short, the states have had more than 45 years to live up to *Gideon*'s promise, and they have failed. It is time for the federal government to step in to protect this most fundamental right. Criminal defendants need to have realistic access to a federal judicial forum to enforce their Sixth Amendment right to effective trial counsel. Unfortunately, private litigants who try to vindicate their right to effective counsel in federal court now are routinely thwarted by procedural barriers. Perhaps most notably, federal courts have relied on abstention doctrine to refuse to hear federal civil rights cases that allege systemic right-to-counsel violations.[22]

Under *Younger v. Harris*,[23] federal courts must abstain from enjoining or providing declaratory relief in pending state court criminal proceedings. To interfere with ongoing state criminal proceedings, it is thought, would only promote needless conflict with a state's administration of its criminal justice system in violation of federalism principles. Moreover, such interference would increase federal court congestion, require the federal courts to answer difficult federal constitutional questions that might otherwise be disposed of on state law grounds, and entangle the federal courts in intricate questions of unsettled state law. As a result,

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[20] *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009) (discussing these lawsuits).

[21] I do not mean to suggest that these lawsuits cannot be effective. In some cases, they have resulted in consent decrees that effectuate some change or in legislative reforms. *See* Cara H. Drinan, *A Legislative Approach to Indigent Defense Reform*, AM. CONSTITUTION SOC'Y ISSUE BRIEF, July 2010, at 3-4 (discussing these cases), *available at* http://acslaw.org/node/16509. However, the New York Court of Appeals's recent decision in *Hurrell-Harring v. State*, 930 N.E.2d 217, 904 N.Y.S.2d 296 (2010), is a good example of the current ways in which state courts limit defendants' ability to obtain systemic indigent defense reform. Although that court did recognize the cognizability of a systemic right-to-counsel claim that alleged actual or constructive denial of counsel altogether, it also implicitly suggested that claims alleging systemic problems of ineffectiveness in attorney performance would not be cognizable. *See Hurrell-Harring*, 930 N.E.2d at 225-26, 904 N.Y.S.2d at 304-05 ("Given the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason . . . why such a claim cannot or should not be brought without the context of a completed prosecution."). Consider also the Michigan Supreme Court's recent ruling in *Duncan v. State*, 784 N.W.2d 51 (Mich. 2010), a case involving a constitutional challenge to the "systematic deficiencies" of Michigan's indigent defense system. The trial court and the Michigan Court of Appeals had ruled that the alleged deficiencies in Michigan's indigent defense system would, if proven, violate the plaintiffs' constitutional rights. Initially, the Michigan Supreme Court agreed that the case should be allowed to proceed. However, upon the state's request for reconsideration, the Court reversed its previous denial of summary disposition and dismissed the case on the grounds that the plaintiffs' claims were not justiciable.

[22] *See, e.g.*, Luckey v. Miller, 976 F.2d 673, 676-79 (11th Cir. 1992) (affirming the district court's decision to dismiss a class action brought to challenge the adequacy of Georgia's indigent criminal defense delivery system citing abstention doctrine).

[23] 401 U.S. 37 (1971).

federal courts routinely refuse to address the merits of Section 1983 class actions that allege ongoing systemic right-to-counsel violations.[24]

Of course, some litigants may wait until after their criminal cases are over in the state courts to file federal Section 1983 class actions. However, abstention doctrine further provides that federal courts may not interfere with state court criminal judgments after the fact, except in habeas corpus proceedings.[25] Federal courts, with the exception of the U.S. Supreme Court on direct review, are not appellate courts charged with overseeing state court decisions. Rather, they have jurisdiction to review state court judgments when Congress has created such jurisdiction, and Congress has established federal habeas corpus review as the primary mechanism for reviewing state court criminal judgments.

As currently structured, however, federal habeas corpus review does little to remedy systemic right-to-counsel problems in the states.[26] Federal judges expend enormous amounts of time reviewing habeas petitions from state prisoners, but most of that time is spent dismissing petitions on procedural grounds. Even when a federal court addresses the merits, deferential standards of review all but ensure that the state conviction will stand. In the extremely rare case where a federal court grants relief, the judgment comes years after the petitioner was wrongly imprisoned. Given the rarity of such judgments and the long time lag between rights violations and any possible federal relief, federal habeas review has no real deterrent effect on state actors who create systemic problems in the first instance.

For any proposed legislation to be effective, therefore, it must address these obstacles to federal court review. In the sections that follow, I outline two new statutes that would do just that. One would establish a federal enforcement action in which DOJ or a private litigant acting on its behalf can seek equitable relief in federal court. The other would create a new federal habeas corpus cause of action designed to redress systemic right-to-counsel problems. Proposed language for both of these statutes can be found in the appendix to this Issue Brief.

II. A Federal Enforcement Action with a Deputization Provision

DOJ should support, and Congress should enact, federal legislation that would prohibit any state from engaging in a pattern or practice of conduct that deprives criminal defendants of their right to effective counsel as protected by the Sixth and Fourteenth Amendments. To be effective, such legislation should establish two different mechanisms for obtaining equitable relief in federal court. First, DOJ should be able to file federal enforcement actions to obtain equitable relief from systemic right-to-counsel violations throughout the country. Second, DOJ should also be authorized to deputize private citizens and interest groups to file enforcement actions on its behalf.

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[24] *See* 42 U.S.C. § 1983.
[25] *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).
[26] *See* 28 U.S.C. § 2254; Primus, *supra* note 9.

A. Federal Enforcement Action

First, the statute should create the possibility of federal enforcement actions initiated by DOJ against state actors who systematically violate defendants' constitutional right to effective counsel. In these federal enforcement actions, DOJ would be authorized to seek appropriate equitable relief, including injunctive relief, to stop states from engaging in practices that result in these systemic violations.

Congress has created similar federal enforcement actions to stop state officials from engaging in systemic violations of other civil rights. For example, after the Rodney King beatings, Congress enacted 42 U.S.C. § 14141, which authorized DOJ to file civil actions in federal court against state law enforcement officials who violate citizens' constitutional rights. Congress has also created a federal enforcement action to stop state actors from violating institutionalized persons' civil rights.[27]

In fact, DOJ already has the authority to file federal enforcement actions against state officials who engage in a pattern or practice of conduct that deprives individuals involved in the juvenile justice system of their constitutional rights.[28] The Department can and should use its enforcement power to stop states from systematically violating juveniles' due process right to effective trial counsel. And Congress should extend the Department's authority to file federal enforcement actions to include systemic violations of adult criminal defendants' rights as well as those of juveniles.

A federal enforcement action is attractive for a couple of reasons. First, a statute that provides for a federal enforcement action does not raise the same abstention concerns as does a statute that authorizes citizen suits. A citizen suit provision would allow every criminal defendant who wanted to allege before trial that his appointed public defender was ineffective to file a federal action. The federal courts would be inundated with cases, and there would be no check on frivolous claims. Moreover, such a system would contravene the federalism principles that animate abstention doctrine. Admittedly, most experts believe that *Younger* abstention is a prudential doctrine that could be displaced by statute. However, some have argued that implicit limits on federal judicial power contained in the Supremacy Clause, Article III, and the Tenth Amendment constitutionally require *Younger* abstention.[29] To the extent that there is any argument that *Younger* abstention is constitutionally required, the onslaught of federal filings and the potential disruption of an entire criminal justice system that would accompany a citizen suit provision would make the constitutional argument attractive to an overburdened federal judiciary that was concerned with maintaining the federalist balance.[30] In contrast, giving DOJ the authority to file an action in a limited number of cases allows a small number of suits to go forward – enough suits to fix the problems, but without the same abstention concerns.

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[27] *See* 42 U.S.C. § 1997a.
[28] *See* 42 U.S.C. § 14141.
[29] *See, e.g.*, Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 B.Y.U. L. REV. 811, 812-43 (1991); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 13.2 at 828-29 (5th ed. 2007) (explaining that it is an open question whether *Younger* abstention is constitutional or prudential and summarizing the arguments on both sides).
[30] *See* Primus, *supra* note 9, at 50-51.

Additionally, the involvement of the United States carries a certain gravitas that federal courts take quite seriously. As a result, when DOJ has filed enforcement actions in other contexts, it has often brought the offending state officials to the negotiating table.[31] Once engaged in negotiations, the offending state can think creatively about ways to solve its indigent defense problems without incurring prohibitive costs. For example, a state that routinely denies counsel to traffic offenders who face imprisonment could choose to decriminalize its traffic offenses or remove the potential for incarceration as a penalty for the traffic offenses. Either move would obviate the state's obligation to provide counsel to the traffic offenders with little fiscal penalty to the state. A federal enforcement action would allow DOJ to work with the states in devising creative solutions.

B. Deputization Provision

In addition to a federal enforcement action, the proposed statute has a deputization provision under which DOJ could authorize private litigants to file federal enforcement actions in the name of the United States. The deputization concept, originally proposed by Professor Myriam Gilles in the Section 14141 context, allows DOJ to spread the costs of filing these enforcement actions by enlisting the help of nongovernmental actors who are expert in these areas (*e.g.*, the ACLU).[32] To give these nongovernmental actors an incentive to file these actions, a fee-shifting provision in the statute would allow them to recover attorneys' fees if they win. This feature is typical in civil rights statutes.[33] Because these actors are "deputized" to act on the behalf of the United States, they enjoy the same privileges with respect to standing and abstention that the United States would. That is, they stand in the shoes of the United States for purposes of these lawsuits.

The precise format of deputization proposed here is new, but the general approach of federal deputization is well established across several litigation contexts. Qui tam actions provide one salient example: The False Claims Act authorizes the government to bring civil actions against those who defraud it,[34] and the Act's qui tam provision authorizes private citizens with independent knowledge of fraud perpetrated against the government to sue and recover a portion of the claim. When individuals sue under that provision, they stand in the shoes of the United States. Other examples of deputization include the independent counsel statute, the judicial practice of deputizing private security personnel to enforce federal labor injunctions, and DOJ's tapping a private attorney (David Boies) to direct its antitrust suit against the Microsoft Corporation. As these examples illustrate, the general authority to deputize is grounded in practice and history.

Past experience with federal enforcement actions filed under Section 14141 demonstrate why a deputization provision is needed here. As discussed earlier, DOJ currently has the authority under Section 14141 to file federal enforcement actions against states that are

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[31] *See* Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1404-06 (2000) (collecting cases).
[32] *See id.*
[33] *See, e.g.*, 42 U.S.C. § 1988.
[34] *See* 31 U.S.C. § 3730.

systematically depriving juveniles of their due process right to effective trial counsel. However, the problem of states systematically violating juveniles' constitutional right to counsel persists. Some states routinely deny juveniles access to counsel altogether.[35] Others have imposed unrealistic caps on the fees that they will pay to attorneys who handle juvenile delinquency cases, regardless of the severity of the charges.[36] DOJ should be filing more enforcement actions to stop these systemic violations. However, DOJ has limited resources. A private attorney general provision would allow DOJ to do more to achieve its goal of enforcing defendants' constitutional right to effective trial counsel without requiring as much expenditure of federal resources.

A federal enforcement action (even with a deputization provision) retains a fair amount of political accountability with respect to the decision to sue and seek relief. DOJ has to approve each lawsuit that is filed on its behalf and would have the authority to quash a lawsuit filed in its name at any time. As a result, the efficacy of a federal enforcement action is contingent on different administrations' political priorities. I therefore offer a second proposal designed to provide backstop protection against any administration that would curtail enforcement actions. That second proposal is a new post-trial federal habeas corpus action.

III. A Post-Trial Systemic Habeas Corpus Cause of Action[37]

In addition to a federal enforcement action with a deputization provision, Congress should add a new chapter to Title 28 that would create a specific habeas corpus cause of action for systemic right-to-counsel violations. A post-trial habeas cause of action would avoid all of the abstention problems that until now have prevented litigants from successfully asserting systemic challenges in federal court. Moreover, if designed properly, a systemic habeas cause of action is more insulated from constitutional attack than other forms of potential structural reform litigation and, as a result, has the best chance of promoting lasting indigent defense reform. In the sections that follow, I will address both how to design a systemic habeas cause of action and why a habeas cause of action is preferable to a modified-1983 cause of action or other citizen suit provision.

A. How to Structure a Systemic Habeas Cause of Action

Under a systemic habeas model, habeas petitions would still be filed by individual petitioners. The petitioner would initially have two burdens. First, he would have to demonstrate that his constitutional right to the effective assistance of counsel was violated. Second, he would have the burden of producing some evidence that the error was not an isolated one, but rather part of a larger pattern or practice of state actors systematically violating defendants' right to effective counsel. The first requirement is merely a standing requirement. The petitioner would have to show that his federal rights were prejudicially violated both to ensure that he has a sufficient stake in the outcome to be a motivated litigant and to provide the

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[35] *See, e.g.*, NAT'L LEGAL AID & DEFENDER ASS'N, "A RACE TO THE BOTTOM," EVALUATION OF THE TRIAL-LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN, EXECUTIVE SUMMARY, at ii (2008).
[36] *See, e.g.*, Georgia N. Vagenas, *Review of National Indigent Defense Developments*, 11 DIALOGUE 19 (2007).
[37] This section builds upon an idea for a post-trial systemic habeas corpus cause of action that I first proposed in *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1 (2010), and borrows heavily from that article.

federal courts with a representative example of the larger systemic problem. The second requirement is meant to impose a modest burden of production on the petitioner. In essence, the habeas court should ask whether, taking all of the petitioner's statements as true and drawing all inferences in his favor, there was *some* evidence of a systemic state problem. Because much of the data about the state's practices in other cases is in the hands of the state rather than the petitioner, this burden is intentionally not a high one. Petitioners could rely on trial transcripts or extra-record affidavits filed by public defenders, prosecutors, or others to document systemic right-to-counsel problems.

Once the petitioner carries this initial burden, the burden of proof would shift to the state to prove that no such systemic state practice exists. If the federal court finds no systemic right-to-counsel violation, it should dismiss the petition. But if the court finds a systemic problem, it should order the form of relief that is traditional in habeas corpus: conditional release of the petitioner. Specifically, the federal judge should remand the petitioner's case to the state courts with an order documenting the systemic right-to-counsel problem and giving the state two options: either (1) remedy the systemic error within a reasonable period of time and apply the remedy to the instant petitioner's case, or (2) release the petitioner from custody.

If the state chooses to remedy the systemic right-to-counsel error, the federal court would reset the case for a second hearing after a reasonable period of time has passed in order to give the state the opportunity to redress the problem. At the later federal court hearing, the state would explain how it had fixed the problem and how it had applied its remedy to the petitioner's case, and the federal court would either approve the proposed solution and dismiss the petitioner's habeas action or tell the state that the proposed solution is constitutionally insufficient. At that point, the court would either order the petitioner released or extend the time to give the state a second chance to come up with a remedy. If an extension were granted, the process would repeat until (1) the state came up with a constitutionally satisfactory alternative, (2) the state chose to release the petitioner, or (3) the federal court ordered the state to release the petitioner.

If the state fails to remedy the systemic right-to-counsel violation and the petitioner is released, all future petitions in which petitioners allege that they were victims of the same systemic right-to-counsel violation would be fast-tracked in the federal district court. Upon a finding of prejudice in each particular case, the federal courts would issue the same order of conditional release. Thus, state prisoners would be released on an expedited basis until the state chose to fix the problem. The prospect of a wave of conditional release orders would substantially increase the state's incentive to reform. But the conditional release order allows the state to choose its own approach to solving the problem.

In order to ensure that these systemic habeas actions are effectively presented to the federal courts, the statute should have a fee-shifting provision to ensure that private interest groups will represent petitioners with potentially meritorious claims. If there is adequate representation of the petitioners' interests by effective counsel and a systemic challenge is rejected or if the state remedies the systemic problem, the ban on successive petitions should prohibit other petitioners from raising the same challenge in later proceedings (unless there is a change in state practices in the interim).

Importantly, the proposed statute should eliminate the exhaustion barrier to review that currently plagues federal habeas adjudication. Under current exhaustion doctrine, a habeas petitioner must first present her federal claims to the highest state court in accordance with state procedural rules before the federal courts will entertain the claim.[38] The exhaustion doctrine, like its abstention counterpart in the Section 1983 context, is premised on principles of federalism as well as concerns about conserving federal judicial resources. However, habeas petitioners are not required to exhaust state remedies if there is no available state corrective process or if the state process is ineffective at protecting their rights.[39] Systemic state violations of the right to counsel are, by definition, circumstances under which the state process is ineffective. It would accordingly be futile for litigants to present their claims of systemic right-to-counsel violations to the states, and litigants should not be required to exhaust state remedies before presenting these systemic challenges on federal habeas.

Eliminating the delays arising from the exhaustion requirement would yield many benefits. Perhaps most importantly for the project of correcting systemic misbehavior, permitting petitioners to commence their habeas actions with less delay would improve the feedback mechanism to the offending states, thus increasing the deterrent value of the federal decisions. It often takes years to exhaust a federal claim in the state courts.[40] If a federal court grants habeas relief only years after a state errs, the case may have been forgotten, and the personnel may have changed, such that the federal decision has effectively no deterrent or reforming value. Moreover, reducing delay would make it easier for federal judges to grant relief in deserving cases without fear that states would be unable to retry the petitioners. Finally, shortening the timeline would bring habeas within the reach of large numbers of convicted defendants whom the custody requirement now prevents from seeking habeas relief at all.[41] A habeas corpus petition is, by definition, only available to persons who are currently being held in violation of federal law. Most people who are convicted of state crimes complete their sentences, and are thus no longer in state custody, before they finish exhausting all possible avenues of relief in the state courts. The exhaustion requirement therefore ensures that very few defendants ever have the opportunity to file habeas petitions. Eliminating the exhaustion requirement would enable many more defendants to seek habeas relief. In short, without an exhaustion requirement, federal habeas relief could come more swiftly in those cases where it is warranted. That increased speed would improve the feedback mechanism to the states, thus increasing the corrective value of the federal decisions.

B. Comparisons to Citizen-Suit Provisions and Modified Section 1983 Causes of Action

If Congress is inclined to enact legislation that creates a new cause of action designed to redress systemic right-to-counsel violations, it is logical to question why that statute should be a systemic habeas corpus statute rather than a modified Section 1983 cause of action or some other

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[38] *See* Rose v. Lundy, 455 U.S. 509 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).
[39] *See* 28 U.S.C. § 2254(b).
[40] *See* Primus, *supra* note 2, at 680.
[41] *See* 28 U.S.C. § 2254(a) (requiring custody).

form of citizen suit. The structural habeas solution proposed here might be a better alternative for both constitutional and prudential reasons.

1. Constitutional Reasons

A post-trial systemic habeas cause of action is less susceptible to constitutional challenge than a pre-trial citizen suit or a modified Section 1983 statute. Because a habeas cause of action is a post-trial cause of action, it does not raise any of the abstention concerns that are raised by citizen suits and Section 1983 litigation. To the extent that there is an argument that abstention is a constitutional principle, therefore, a systemic habeas cause of action is not subject to challenge in the way that a citizen suit or Section 1983 action would be. Moreover, there is some debate right now about the precise contours of the *Strickland v. Washington* right to effective trial counsel and how the standard is to be applied to pre-trial actions by counsel. Any statute that defined the contours of that right in a way that goes beyond what the Supreme Court has said may exceed Congress's authority under Section 5 of the Fourteenth Amendment.[42] Congress may enact legislation that remedies a constitutional violation, but it may not substantively change the governing law by expanding the definition of what is a constitutional violation.[43] A post-trial habeas cause of action does not pose a similar risk of being struck down on these grounds.

2. Prudential Reasons

Many helpful elements of the desired systemic scheme map onto core aspects of traditional habeas. First, there is an important difference in pleading requirements between Section 1983 and habeas review. Because there is no vicarious liability in Section 1983 lawsuits, states have been held to be inappropriate defendants. As a result, plaintiffs filing Section 1983 lawsuits must sue individual officers for relief. Such rules are problematic in the context of redressing systemic state right-to-counsel violations given that such problems typically exist because of the action or inaction of multiple state actors. The responsibility for a systemic problem is often much more diffuse, which compromises the defendant's ability to name each officer responsible for the alleged systemic problem. Moreover, to the extent that the defendant is able to name each person, the number of defendants involved is likely to be high in many cases, which results in more complex litigation and requires more federal judicial time, energy, and resources.

In contrast, a habeas corpus petition is directed to the custodian holding the petitioner, because the requested remedy is release from the custodian's facility. It is generally understood that filing a civil habeas corpus petition against the custodian of a facility is tantamount to filing against the state. The custodian is represented by the state attorney general's office, and the state is the party with the vested interest in protecting its conviction and preventing release. Pleading against a custodian who putatively represents the state is much simpler.

There is also the matter of remedy. The traditional habeas remedy – conditional or outright release of a single petitioner – is less likely than the injunctive relief associated with

[42] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).
[43] *See id.* at 518-19.

Section 1983 or a similar citizen-suit provision to create the kinds of problems that characterized early efforts at judicially-imposed structural reform. First, the fact that the relief provided by the federal court is individualized (that is, that conditional orders of release come one by one) makes it more politically palatable for a judge to grant relief. There is no requirement of immediate relief for all affected prisoners, and the state is not ordered to take expensive and time-consuming action. Rather, a systemic habeas approach gives the state the option of releasing prisoners and taking its time to think about how, and even whether, to devise a more comprehensive remedy. In the Section 1983 context, although the offending state institution plays an active role in crafting remedial orders, an unelected federal judge is still forcing the state to enact reforms. In contrast, a judge who orders a habeas petitioner released does not bypass democratic institutions in the states and does not force the state to enact reforms. The state does not have to enact *any* reforms. Instead, the threat of more conditional release orders gives the state an incentive to fix its procedures in its own way. It also gives the state the time and flexibility to distribute the costs of reform as it sees fit. If a state wants to decriminalize certain behavior or legislatively remove imprisonment as a possible penalty so as to decrease its constitutional obligations to provide counsel, it can decrease its costs by doing so. The offending state can choose a judicial, legislative, or executive solution to the problem or can just opt to leave the problem intact and release prisoners whose rights were prejudicially affected. This system is much more deferential to the state than a judicial order instructing the state to change and specifying how the reform must proceed.

Of course, Congress could create a modified Section 1983 action with the conditional release remedy proposed here, but release from confinement is the quintessential remedy for habeas actions. The difference in remedies is one of the key distinctions between habeas and Section 1983, and this proposal's use of the traditional habeas remedy is one of its central features. It therefore makes sense to locate this proposal in the framework of habeas rather than that of Section 1983.

IV. Conclusion

As Attorney General Eric Holder recently stated, "[p]utting politics aside, we must address the fact that there is a crisis within our nation's system of indigent defense."[44] Admittedly, legislative reforms that aid indigent defendants are typically difficult to enact given the pressure to be tough on crime. But the indigent defense crisis has reached such epidemic proportions that the federal executive and legislative branches are now willing to intervene. We should take advantage of this rare moment to ensure the passage of meaningful reforms.

Part of ensuring meaningful long-term reform requires giving indigent defendants access to a federal forum to challenge systemic state practices that routinely violate their right to effective trial counsel. The combined effect of the federal enforcement action with a deputization provision and the post-trial systemic habeas corpus cause of action that I propose in this Issue Brief will do just that.

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[44] *See* Eric Holder, U.S. Att'y Gen., Remarks at the 2009 American Bar Association Convention, Chicago, IL (Aug. 3, 2009), *available at* http://www.abanet.org/legalservices/sclaid/defender/downloads/Attorney_General_Eric_Holder_2009_ABA_HOD.pdf.

The proposed habeas statute, if enacted, could redress systemic right-to-counsel problems regardless of whether any pre-trial civil action is enacted. To the extent that there is support for pre-trial intervention, the proposed federal enforcement action with a deputization provision is the most viable option politically as well as the least expensive option. If DOJ uses its power under the federal enforcement action statute effectively, there will be fewer successful post-trial systemic habeas challenges. But it is important to have the post-trial actions available in case DOJ chooses not to file enforcement actions or deputize others to do so.

Appendix

Proposal 1: A Federal Enforcement Action with a Deputization Provision

TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 136. VIOLENT CRIME CONTROL AND LAW ENFORCEMENT
SUBCHAPTER IX – STATE AND LOCAL LAW ENFORCEMENT
Section F – Redressing Systemic State Violations of the Right to Counsel

§ 14165. Cause of Action.

(a) Unlawful Conduct. It shall be unlawful for any state judge, state legislator, state executive official, and/or any other state or local employee with responsibility for establishing, administering, monitoring, or evaluating the provision of indigent defense services in a state to engage in a pattern or practice of conduct that deprives criminal defendants of their right to effective counsel as protected by the Sixth and Fourteenth Amendments to the Constitution.

(b) Civil Action by Attorney General. Whenever the Attorney General has reasonable cause to believe that a violation of subsection (a) of this section has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice. Such relief may include injunctive relief when appropriate.

(c) Deputization Provision. The Attorney General may authorize or deputize private litigants to file civil actions under subsection (b) in the name of the United States.

(1) Procedure. A private person who has been the victim of a state pattern or practice of conduct that has deprived or threatens to deprive that person of the right to effective counsel and who wishes to file a civil action under this section shall file a petition with the United States explaining the nature of the alleged unconstitutional pattern or practice. The United States shall investigate the allegations and shall decide whether to (i) file a civil action under subsection (b); (ii) deputize the petitioner to file a civil action under subsection (c); or (iii) quash the petition and prohibit the private litigant from filing a civil action under this section. The United States shall notify the petitioner of its decision within 180 days from the date on which it receives the petition.

(2) United States Involvement. The United States may intervene in any civil action that it authorizes a petitioner to file under subsection (c). The United States may, at any time, remove its authorization and quash a civil action filed under subsection (c).

(d) Attorney's Fees. In any action or proceeding brought under subsection (c), the court, in its discretion, may allow the prevailing party a reasonable attorney's fee

as part of the costs. In awarding an attorney's fee under this section, the court, in its discretion, may include expert fees as part of the attorney's fee.

(e) Nonrestriction of Other Rights. Nothing in this section shall restrict any right which any person (or class of persons) may have under any other statute or under the common law to seek redress for an unconstitutional violation of the right to effective counsel.

(f) Abstention Exception. A federal court entertaining a petition for relief filed under this section shall not be subject to the restrictions in *Younger v. Harris*, 401 U.S. 37 (1971).

(g) Severability of Provisions. If any provision of this section is held to be invalid, the remainder of this section shall not be affected.

Proposal 2: A Post-Trial Systemic Habeas Cause of Action that can be Filed by Individual Petitioners

TITLE 28. Judiciary and Judicial Procedure
Part VI. Particular Proceedings
CHAPTER 154A. Special Habeas Corpus Procedures in State Cases Involving Systemic State Violations of the Constitutional Right to Counsel

§ 2267. Prisoners in State Custody Due to Systemic State Violations of the Constitutional Right to Counsel; Applicability of Chapter; Definitions.

(a) This chapter shall apply to cases brought by prisoners in state custody who allege that they have been victims of a systemic state practice that violates their right to effective counsel under the Sixth Amendment to the Constitution as incorporated through the Fourteenth Amendment.

(b) Definitions. In this chapter, the term "systemic state practice" refers to any routine pattern or practice of conduct by state judges, state legislators, state executive officials, and/or any other state or local employees with responsibility for establishing, administering, monitoring, or evaluating the provision of indigent defense services in the state. The term "systemic state violation" refers to a systemic state practice that results in the routine violation of defendants' right to effective counsel under the Sixth Amendment to the Constitution as incorporated through the Fourteenth Amendment.

§ 2268. Remedies in Federal Court.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in state custody who alleges that he is in custody pursuant to the judgment of a state court issued after proceedings in which he was the victim of a systemic state practice

that violated his right to effective counsel under the Sixth and/or Fourteenth Amendments to the Constitution.

(b) Counsel.

(1) In all proceedings brought under this chapter, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Counsel should be appointed to *pro se* applicants, when practicable, unless the application and supporting materials conclusively show that the applicant is entitled to no relief. Counsel must be appointed for an applicant who qualifies to have counsel appointed under 18 U.S.C. § 3006A.

(2) The court, in its discretion, may award a reasonable attorney's fee to the applicant should he prevail in a special habeas corpus action filed under this chapter. In awarding an attorney's fee under this section, the court, in its discretion, may include expert fees as part of the attorney's fee.

(c) Burdens.

(1) The applicant shall have the burden of establishing that his right to effective counsel under the Sixth Amendment to the Constitution as incorporated through the Fourteenth Amendment either is currently being violated or was violated in the state court proceedings pursuant to which he is in custody.

(2) The applicant shall also have the burden of producing some evidence that the violation of his right to effective counsel was part of a systemic state practice that violates defendants' right to effective counsel under the Sixth Amendment to the Constitution as incorporated through the Fourteenth Amendment. The applicant may rely on affidavits or other documents attached to his application to satisfy this burden of production.

(3) Once the applicant has satisfied his burden of production under clause (2), the burden of persuasion shall be on the state to prove that there is no systemic state violation.

(d) Evidentiary Hearings and Discovery.

(1) Once an application is filed, unless the application and supporting materials conclusively show that the applicant is entitled to no relief, the court shall grant a prompt hearing thereon.

(2) The court may, *sua sponte* or on request of a party, authorize discovery under the Federal Rules of Civil Procedure.

(e) Remedies.

(1) An application for a writ of habeas corpus filed under this chapter shall be granted if the applicant's right to effective counsel under the Sixth Amendment to the Constitution as incorporated through the Fourteenth Amendment was violated and the violation is part of a systemic state violation.

(2) The only remedy that the court may grant is conditional release of the applicant. When issuing an order of conditional release under this chapter, the court shall notify the state of the nature of the systemic state violation and explain how the systemic state violation resulted in a violation of the applicant's rights. The state shall be given a reasonable period of time in which to eliminate the systemic state practice, find a constitutionally acceptable alternative practice, and apply its alternative practice to the applicant. If within the reasonable time given the state fails to eliminate the systemic state practice, find a constitutionally acceptable alternative practice, and apply its new practice to the applicant, the court shall order the immediate release of the applicant.

(3) Once an applicant is ordered released pursuant to the procedures described in subsection (e)(1)-(2), all future applications alleging the same systemic state violation shall be directed to the court that issued the order finding a systemic state violation. Such applications shall be given priority by that court over all noncapital matters. Each applicant whose state court judgment was prejudiced by the systemic state violation shall obtain the same relief described in subsection (e)(1)-(2).

(f) Stay and Abeyance. A court may stay consideration of an application filed under this chapter pending resolution of a hearing in another case involving the same alleged systemic state violation.

(g) Transfer of Cases. If a federal court finds a systemic state violation, all pending and future applications that allege the same systemic state violation shall be transferred to the court that found the systemic state violation for resolution pursuant to subsection (e)(3).

(h) Exhaustion Not Required. An applicant shall not be required to present his claims to the courts of the state before filing an application in federal court under this chapter.

(i) Relationship to Section 2254. An applicant may file a petition under this chapter and also file a petition under Section 2254. In a habeas corpus proceeding filed under Section 2254, a prior judgment under this chapter shall be conclusive as to all issues of fact or law that were actually adjudicated and decided by the court in

> the proceedings under this chapter, unless the applicant shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceedings under this chapter and the court shall further find that the applicant for the writ of habeas corpus under Section 2254 could not have caused such fact to appear in such record by the exercise of reasonable diligence. This provision shall not be interpreted to bar an individual ineffective assistance of counsel claim filed in a proceeding under Section 2254 on different grounds of ineffectiveness from those raised in the proceedings under this chapter.

In an action filed under this chapter, a prior determination in a habeas corpus proceeding filed under Section 2254 shall be conclusive as to all issues of fact or law that were actually adjudicated and decided by the court in the Section 2254 proceedings, unless the applicant shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceedings under Section 2254 and the court shall further find that the applicant under this chapter could not have caused such fact to appear in such record by the exercise of reasonable diligence. This provision shall not be interpreted to bar an ineffective assistance of counsel claim filed under this chapter on different grounds of ineffectiveness than were raised in the proceedings under Section 2254.