ESSAY

RATIONING CRIMINAL DEFENSE ENTITLEMENTS: AN ARGUMENT FROM INSTITUTIONAL DESIGN

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Courts define constitutional criminal procedure entitlements, but some rights, such as the right to defense counsel, require money to become reality. Legislatures have responded to judicial definition of criminal procedure rights by underfunding those rights, yet they have not specified how limited funds should be allocated—that is, how rights should be rationed. The Supreme Court has, in fact, effectively barred legislatures from doing so through its construction of constitutional criminal procedure rules. This amounts to a legislative reduction of court-created entitlements that implicitly delegates, largely to defense attorneys but also to trial judges, the task of rationing rights. This Essay argues that underfunding of indigent criminal defense services is a long-term reality, and it outlines a regime by which attorneys and trial judges can most sensibly implement the job that has been delegated to them of allocating scarce entitlements. It proposes a set of default rules to accomplish this allocation task that is guided by two principles: priority to factual innocence over other instrumental goals of criminal procedure, and a harm-reduction principle that gives a qualified preference to suspects facing greater potential punishments. This conscious allocation of resources substantively revises the real meaning of constitutional entitlements and leaves some defendants indisputably with less than judicial pronouncements of constitutional law imply. The Essay argues that rationing rights in light of funding limits nonetheless yields a more coherent, defensible allocation of entitlements, and that defense attorneys' roles in this project fit broadly within collaborative traditions and theories of constitutional lawmaking.

INTRODUCTION

Criminal defense lawyers are private actors[1] whose jobs are constitutionally mandated.[2] The Supreme Court requires state and federal gov-

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1. Cf. Polk County v. Dodson, 454 U.S. 312, 325 (1981) (holding that a public defender performing conventional tasks of an attorney for an indigent client is not a state actor and not subject to section 1983 liability).

2. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding that defense counsel must be provided to defendants in any prosecution that actually leads to imprisonment); Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963) (holding that Sixth Amendment, applied to states through Fourteenth Amendment, requires appointment of counsel for indigent defendants in felony prosecutions).

ernments to provide services to those they accuse of crimes, and governments pay private lawyers to fulfill those obligations.[3] But hiring private actors costs money, and courts don't set budgets.[4] Courts define procedural entitlements, legislatures fund them, and lawyers implement them. Yet in playing linked roles in a common enterprise, each player works within a different set of incentives and constraints, and that creates the ongoing problem. Each player's role is in part to compensate for the failures of others. Without constitutional mandate, legislatures fail to provide adequately for criminal defense. Courts, in mandating defense services, fail to prioritize competing needs within criminal justice as well as between criminal justice and other critical government endeavors that must be funded from limited resources. Lawyers improvise solutions from the contradictory mandate they receive jointly from courts and legislatures, which amounts to "do these tasks within this budget."

Forty years into this tripartite mediation—forty years after *Gideon v. Wainwright*[5]—news about the effectiveness of right to counsel remains discomforting. It is a well-known problem that legislatures often don't provide funding for criminal defense services at levels fair observers would consider adequate. In merely the latest example of a recurrent theme, a 2003 study by Georgia's Supreme Court found that the state's indigent defense system was greatly underfunded and undermined by poor supervision and conflicting pressures on attorneys.[6] Like other localities in earlier actions,[7] jurisdictions in the far

3. Lawyers for indigent defendants are funded in a variety of ways. Some are in private practice and accept per-case fees by localities to represent indigent clients. Many work full-time in public defender offices, which in some jurisdictions formally makes them state or local employees. I use "private" attorneys here even for those public defenders because they function as private attorneys. Their government salaries do not obligate them to carry out state policies. To the contrary, their job is mostly to *oppose* state action—to make state prosecution efforts more difficult. Of course, defense attorneys sometimes (but not always) facilitate broader state interests, such as accurate case outcomes. For my purposes here, public defenders are functionally private actors.

4. But see infra note 43 (noting courts' ability in some contexts to order tax increases and supervise state program administration to correct constitutional violations).

5. *Gideon*, 372 U.S. at 342–44 (holding that Sixth Amendment right to counsel, applicable to the states via Fourteenth Amendment, requires states to provide counsel to every defendant charged with a felony).

6. Report of Chief Justice's Commission on Indigent Defense (2003), available at http://www.georgiacourts.org/aoc/press/idc/idchearings/idcreport.doc (on file with the *Columbia Law Review*) [hereinafter Chief Justice's Report]. That report was based in part on an empirical study of Georgia's indigent defense system. See Spangenberg Group, Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense Pt. I, at ii–iii, 44, 48, 91 & 98 (2003), available at http://www.georgiacourts.org/aoc/press/idc/idchearings/spangenberg.doc (on file with the *Columbia Law Review*) [hereinafter Spangenberg Report].

7. See, e.g., United States ex rel. Green v. Washington, 917 F. Supp. 1238, 1271–82 (N.D. Ill. 1996) (finding delays in appellate representation by state defender office are caused by state underfunding of appellate defenders and that lengthy delays are presumptively unconstitutional); In re Pub. Defender's Certification of Conflict & Motion to Withdraw Due to Excessive Caseload & Motion for Writ of Mandamus, 709 So. 2d 101,

North[8] and deep South[9] face litigation over indigent defense budgets that are so low that counsel necessarily provide grossly insufficient assistance to clients.[10]

Meanwhile, accounts in locales large and small, East and West, confirm ongoing criminal justice problems of the most basic sort: wrongful convictions. In Tulia, Texas, the governor pardoned nearly three dozen people convicted of drug crimes after their common basis—a single police officer's testimony—was found to be unreliable.[11] Defendants wrongly convicted in New York City of assaulting the "Central Park jogger" were freed last year, based in part on DNA evidence.[12] Reports of exonerations from wrongful convictions, often from death row, are now

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103–04 (Fla. 1998) (affirming order that bars a Florida public defender's office from accepting new cases because of excessive backlog); Platt v. State, 664 N.E.2d 357, 362 (Ind. Ct. App. 1996) (claiming that Marion County, Illinois public defender system provides constitutionally inadequate representation to clients); State v. Peart, 621 So. 2d 780, 790 (La. 1993) (holding local defender system presumptively violates *Gideon* due to underfunding and citing similar cases from other states); Kennedy v. Carlson, 544 N.W.2d 1, 8 (Minn. 1996) (rejecting, for failure to show injury in fact, a claim by public defender's office that state's underfunding caused constitutionally inadequate representation of clients).

8. See, e.g., Suzette Hackney, Lawyers Sue Wayne County, Mich., Circuit Court for Raise, Detroit Free Press, Nov. 12, 2002, available at LEXIS, Michigan News Sources File (describing filing of suit by court-appointed defense attorneys against Michigan's Wayne County Circuit Court and its chief judges); Shawn D. Lewis, Lawyers Sue Court For Raise, Detroit News, Nov. 12, 2002, at 1A (noting variations in indigent defense budgets of eight large U.S. counties).

9. Adam Liptak, County Says It's Too Poor to Defend the Poor, N.Y. Times, Apr. 15, 2003, at A1 (reporting that Quitman County, Mississippi, is suing state government for indigent defense funding; county budgets are so insufficient, plaintiffs allege, that appointed counsel can spend only a few minutes with clients indicted on serious felonies); see also Sheppard & White, P.A. v. City of Jacksonville, 827 So. 2d 925, 928, 930–31 (Fla. 2002) (rejecting defense counsel's argument that compensation at forty dollars per hour for representation of capital defendant is unconstitutional and "confiscatory," and holding that such payment does not "materially impair the ability of lawyers to fulfill their roles" nor "unlawfully restrict the overall ability of the judicial branch to secure adequate counsel for indigent defendants in capital cases").

10. See Bruce A. Green, Criminal Neglect: Indigent Defense from a Legal Ethics Perspective, 52 Emory L.J. 1169, 1178–81 (2003) (describing various systems for providing defense services to indigents, noting low pay scales, and arguing that "many lawyers functioning in underfunded defense systems will systematically fail to represent clients diligently in accordance with the rules of professional conduct").

11. See Scott Gold, 35 Are Pardoned in Texas Drug Case, L.A. Times, Aug. 23, 2003, at A11 (noting that state district judge found prosecution's sole witness, officer Thomas Coleman, "simply not a credible witness" and recommended state appeals court vacate the convictions; Coleman was indicted for perjury); Simon Romero & Adam Liptak, Texas Court Acts to Clear 38 in Town-Splitting Drug Case, N.Y. Times, Apr. 2, 2003, at A1 (same).

12. See Susan Saulny, Convictions and Charges Voided in '89 Central Park Jogger Attack, N.Y. Times, Dec. 20, 2002, at A1 (five men freed thirteen years after wrongful convictions based on new DNA and other evidence identifying the actual perpertrator). The "jogger" victim has now revealed her identity. See Trisha Meili, I Am the Central Park Jogger: A Story of Hope and Possibility 5 (2003).

regular news items.[13] In 2002, Illinois's outgoing governor pardoned the state's entire death row population, and his successor has sustained the state's moratorium on the death penalty because risks of wrongful punishment remain unacceptably high.[14]

Not all of these incidents stem from the absence of qualified defense counsel; certainly lawyers in many of these cases did not breach the Court's lax definition of counsel adequacy under *Strickland v. Washington*.[15] But all are the sorts of injustice that *Gideon* once promised to greatly diminish. Defense counsel ought to go a long way toward preventing wrongful convictions (as counsel did for Clarence Gideon himself).[16] Yet wrongful convictions are among the most discussed issues of contemporary criminal justice,[17] and documented wrongful convictions are likely only a small portion of the total number of wrongful convictions. Further, those outcomes are only the worst-case scenarios of deficient criminal justice processes that include poor defense lawyering.[18] More mun-

13. For a comprehensive list of exonerations from wrongful convictions, see the websites of Cardozo School of Law's Innocence Project, at http://innocenceproject.com (last visited Nov. 4, 2003) (on file with the *Columbia Law Review*), and Northwestern University School of Law's Center for Wrongful Convictions: The Exonerated, at http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/index.htm (last modified Jan. 6, 2004) (on file with the *Columbia Law Review*). See generally Jim Dwyer et al., Actual Innocence (2000) (detailing first-hand work on Innocence Project); C. Ronald Huff et al., Convicted *But* Innocent: Wrongful Conviction and Public Policy (1996) (analyzing why wrongful convictions occur and suggesting means of prevention); Wrongly Convicted: Perspectives on Failed Justice, (Saundra D. Westervelt & John A. Humphrey eds., 2001) (collecting articles discussing wrongful convictions).

14. Associated Press, Illinois Keeps a Moratorium on Executions, N.Y. Times, Apr. 25, 2003, at A26.

15. 466 U.S. 668 (1984). To demonstrate assistance of counsel falling below the minimal level guaranteed by the Sixth Amendment, *Strickland* requires defendants to make a two-part showing: "[T]he defendant must show that counsel's representation fell below an objective standard of reasonableness" and also "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 678–96.

16. See Anthony Lewis, Gideon's Trumpet (1964) (recounting story of Gideon's conviction at his first, pro se, trial, his eventual Supreme Court victory, and his subsequent acquittal on retrial with appointed counsel).

17. Two prominent practice-oriented professional associations, the American Bar Association and the American Judicature Society, have both increased efforts to address wrongful conviction issues and recently held conferences or symposia on the topic. See Wrongful Convictions, Crim. Just., Spring 2003, at 1; Wrongful Convictions of the Innocent, 86 Judicature 64–121 (2002); Am. Judicature Soc., Agenda, National Conference on Preventing the Conviction of Innocent Persons, available at http://www.ajs.org/ajs/ajs_natl_conf_summ.asp (last visited Nov. 4, 2003) (on file with the *Columbia Law Review*) (describing January 2003 conference).

18. This is not to assert that most wrongful convictions are due solely to poor defense lawyering, although Cardozo Law School's Innocence Project identifies "bad lawyering" as a factor in twenty-three of its first seventy DNA-based exonerations of wrongly-convicted citizens. Causes and Remedies of Wrongful Convictions, at http://www.innocenceproject.com/causes/index.php (last visited Nov. 4, 2003) (on file with the *Columbia Law Review*). Other important causes of wrongful conviction, however, can be

dane outcomes are more common—defendants who were convicted of worse crimes or received harsher punishments than they would have with effective representation. Also notable are guilty offenders who, with better lawyers, could have won acquittals or reduced punishments through entitlements to evidence suppression that serve functions other than factfinding, or through negotiation for non-criminal dispositions.[19]

The key explanations for the uneven systemic effectiveness of defense counsel are well known. Indigent defense is widely underfunded, and the political structures through which funding decisions are made suggest little hope for improvement.[20] Beginning in earnest with *Gideon v. Wainwright*, the Supreme Court recognized constitutional entitlements to effective counsel and expert assistance,[21] but some components of the doctrine, such as the *Strickland* standard for assessing ineffective assistance,[22] are widely viewed as inadequate.[23] Courts could change this. At some cost, they could engage in greater governance of defense counsel

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reduced through the counteracting effect of good defense lawyering. See, e.g., Romero & Liptak, supra note 11.

For other accounts of the effects of underfunded and inadequate criminal defense services, see, e.g., Stephen B. Bright, Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake, 1997 Ann. Surv. Am. L. 783; Richard Klein, *Gideon*—A Generation Later: The Constitutionalization of *In*effective Assistance of Counsel, 58 Md. L. Rev. 1433 (1999).

19. For a discussion of how options for non-criminal dispositions reduce the prospect of criminal charges for conduct that violates criminal statutes, see Darryl K. Brown, Street Crime, Corporate Crime, and the Contingency of Criminal Liability, 149 U. Pa. L. Rev. 1295, 1327–32 (2001).

20. See 4 Lord Windlesham, Dispensing Justice: Responses to Crime 168 (2001) (briefly discussing precarious American funding mechanisms for criminal defense); Chief Justice's Report, supra note 6, at 3, 44–48, 55–56 (finding Georgia indigent defense system too underfunded to provide constitutionally adequate assistance); Spangenberg Report, supra note 6, at ii–v (same). Criminal defendants also are an easy group to classify as a "discrete and insular minorit[y]" that is unlikely to prevail in legislative funding battles. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). See generally John Hart Ely, Democracy & Distrust 148–70 (1980) (discussing discrete and insular minorities and suspect classifications).

21. 372 U.S. 335, 339–45 (1963) (recognizing indigent defendant's constitutional right to assistance of counsel in state court); see also, e.g., Alabama v. Shelton, 535 U.S. 654, 662, 674 (2002) (extending right to counsel to cases in which punishment includes suspended sentence of incarceration); Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (recognizing indigent defendant's right to expert assistance in some cases); Argersinger v. Hemlin, 407 U.S. 25, 37 (1972) (holding indigent defendant's right to counsel in criminal trial not affected by classification of offense as petty or misdemeanor).

22. Strickland v. Washington, 466 U.S. 668, 691–96 (1984) (finding that "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance").

23. Criticisms of *Strickland* abound. See, e.g., Donald A. Dripps, About Guilt and Innocence 58, 130 (2003); William S. Geimer, A Decade of *Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 Wm. & Mary Bill Rts. J. 91, 93–155 (1995); Richard L. Gabriel, Comment, The *Strickland* Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process, 134 U. Pa. L. Rev. 1259, 1272–81 (1986); Amy R. Murphy, The Constitutional

funding through the *Gideon* doctrine[24] and could make *Strickland* a more meaningful regulator of requirements of attorney competence.[25] But those are, at present, unlikely projects.

Some constitutional rights are unfunded mandates to legislatures.[26] Rights such as effective defense counsel require money to become reality: Not surprisingly, underfunding the primary enforcers of rights (defense attorneys) results in those rights being exercised less frequently and effectively.[27] Courts create formal entitlements, but legislative funding defines the real content and scope of those rights. Legislatures have responded to these judicial mandates by constricting budgets for items such as defense lawyers that are required for exercising those rights. Courts have been unwilling (and may be politically unable) to govern those funding decisions so as to reinforce legal guarantees.[28]

Failure of the *Strickland* Standard in Capital Cases Under the Eighth Amendment, 63 L. & Contemp. Probs. 179, 193–99 (2000).

24. For examples of such litigation, see State v. Peart, 621 So. 2d 780, 790–91 (La. 1993) (holding local defender system presumptively violates *Gideon* due to underfunding and citing similar holdings in other states); see also supra notes 7–9.

25. The Supreme Court's decision last term in Wiggins v. Smith, 123 S. Ct. 2527 (2003), might be an indication that *Strickland* should be more rigorously applied, at least in capital cases. In *Wiggins*, the Court overturned a death sentence, despite the heightened standard in habeas review that required the Court to find the state courts' application of *Strickland* was "contrary to" or an "unreasonable application of" that constitutional standard. Id. at 2538–39.

26. Others, such as *Miranda* warnings, are nearly cost-free to implement. See Miranda v. Arizona, 384 U.S. 436 (1966). Once it became clear there were few opportunity costs to *Miranda* as well—that it impeded few confessions and convictions—its implementation became widespread and well accepted. See, e.g., Stephen J. Schulhofer, *Miranda* and Clearance Rates, 91 Nw. U. L. Rev. 278, 280 (1996) (stating that increased violent crime rates and lack of adequate police resources "easily explain" decreasing clearance rates after *Miranda*); Stephen J. Schulhofer, *Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs, 90 Nw. U. L. Rev. 500, 544–47 (1996) (summarizing data that show virtually no adverse impact on law enforcement resulting from *Miranda*). For the contrary view, see Paul G. Cassell, All Benefits, No Costs: The Grand Illusion of *Miranda*'s Defenders, 90 Nw. U. L. Rev. 1084, 1084–86 (1996) (concluding that *Miranda* causes loss of 3.8% of criminal cases each year); Paul G. Cassell & Richard Fowles, Falling Clearance Rates After *Miranda*: Coincidence or Consequence?, 50 Stan. L. Rev. 1181, 1186–87 (1998) (suggesting that fall in crime clearance rates can be attributed to *Miranda*).

27. On the longstanding problem of constrained implementation funding across a range of civil and regulatory enforcement contexts, see Robert A. Kagan, Regulatory Enforcement, *in* Handbook of Regulation and Administrative Law 383, 383–85 (David H. Rosenbloom & Richard D. Schwartz eds., 1994). For an influential discussion of this point in the criminal justice context, see William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 31–32 (1997). One of many examples of this "uneasy relationship" is documented in detail in Chief Justice's Report, supra note 6, at 45–48, 55–56, and Spangenberg Report, supra note 6, at 64–70.

28. There are a few successful efforts to litigate court-mandated funding increases for indigent defense. See, e.g., Arnold v. Kemp, 813 S.W.2d 770, 771 (Ark. 1991) (finding legislatively imposed fee caps on court-appointed attorneys for indigent clients unconstitutional); In re Order on Prosecution of Criminal Appeals, 561 So. 2d 1130, 1139 (Fla. 1990) (stating that although court cannot order legislature to provide certain funds

Yet funding is a blunt policy tool. Legislatures cannot constrict the content of rights more specifically; they cannot, for example, order defense lawyers to interview witnesses but not file suppression motions. They cannot specify *how* limited funds should be allocated—that is, how rights should be rationed—because constitutional criminal procedure rules forbid that. In that sense broad constitutional rules stifle innovation in the management of criminal justice even though innovation is critical to managing the tension between entitlements and inadequate funding.[29] Consequently, legislatures implicitly delegate that task. Funding decisions, in effect, delegate to trial attorneys and judges the job of rationing rights. That is, these actors have the job of choosing which of the formal entitlements courts have created will see practical implementation, and in which cases.[30] Underfunding ensures that rights will be less than the full promise of their formal statement and that counsel and trial courts will define the practical content of those constrained entitlements.

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for criminal defense, if funds are not provided within adequate time court will order immediate release pending appeal of certain bondable felons); State ex rel. Stephan v. Smith, 747 P.2d 816, 849 (Kan. 1987) (holding that state has obligation to provide counsel for indigents charged with felonies and to pay such counsel at non-confiscatory rate); Peart, 621 So. 2d at 791 (holding that underfunding of indigent defense in a New Orleans judicial district creates a rebuttable presumption of ineffective assistance for every indigent defendant until legislative action changes defense provision); State v. Robinson, 465 A.2d 1214, 1217 (N.H. 1983) (holding failure to reimburse criminal defense attorneys for their services constitutes a taking in violation of state and federal constitutions).

29. It is a plausible but prohibited innovation, for example, to allocate scarce dollars by eliminating jury trials for misdemeanors or providing expert witnesses only in certain classes of serious felonies. As discussed further below, judicial doctrine forbids those innovations, though lawyers and courts sometimes implement them informally and sub silencio. There is a defensible reason for this constraint on innovation: Courts do not trust majoritarian legislatures to innovate such solutions in a manner fair to defendants.

There are ways, however, of addressing this concern more innovatively. Courts could mandate budgets for criminal justice along average levels and give legislatures or their delegates a free hand to design the specifics. A judicially mandated requirement to spend this full budget might frustrate much of the inclination to unfairly disadvantage indigent defendants.

30. "Delegation" here describes a different sort of legislative action than those governed (or more accurately, ungoverned) by the remnants of the nondelegation doctrine. That constitutional doctrine governs Congress's decisions—usually quite explicit—to invest a public body (such as an agency or executive-branch office) or a private group (such as Internet Corporation for Assigned Names and Numbers (ICANN) or coal companies) with policymaking power. See, e.g., Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543, 580–86 (2000) (describing nondelegation doctrine's regulation of delegation to public and private entities); A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution, 50 Duke L.J. 17, 141–53 (2000) (describing doctrine's failure to regulate power given to ICANN); Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 328–34 (2002) (providing overview of nondelegation doctrine). For a classic case invalidating congressional delegation to a private group, see Carter v. Carter Coal Co., 298 U.S. 238, 278, 311–12 (1936) (holding Bituminous Coal Conservation Act of 1935 unconstitutional delegation of legislative power to large coal producers).

This underfunding of criminal defense is, in effect, a permanent feature of American criminal justice. It requires (and has long required) a permanent, ongoing process of defining the working parameters of constitutional entitlements and allocating those rights among defendants and within cases. Trial judges and attorneys distribute defense funding among cases within a given funding system, and they allocate rights within cases. In this way, trial lawyers take the lead role in an ongoing collaboration with courts and legislatures to define the real meaning and effect of constitutional rights, a process that fits the broader pattern of collaborative constitutional lawmaking among judicial and political actors identified by scholars in a wide range of settings.[31]

In this Essay, I argue for more explicit acknowledgement of this permanent process of managing scarce resources—which defines the working content of criminal procedure rights—and sketch a means to improve it. I argue that trial lawyers and, to a lesser extent, trial judges should consciously devise policies for implementing choices about entitlement allocation, and I suggest a particular approach to that task. The specifics of the approach adapt insights from recent research on the causes of wrongful convictions, and it urges factual innocence as a predominant concern of criminal procedure over other competing goals, such as regulation of police conduct.

As a prelude, Part I suggests that underfunding, despite its tragic implications for defendants, is not morally indefensible. Part II describes how we already ration indigent defense resources but often do so poorly. Then, Part III offers a regime of guiding principles and default rules, based on research on the causes of wrongful convictions and common sources of trial error. Part IV identifies this means of rights allocation as an ongoing process of entitlement revision that fits a larger pattern of democratic experimentalism.

I. WHY RIGHTS ARE UNDERFUNDED

A. *Competing Demands for Scarce Funds*

Consider first why underfunding occurs. There is little doubt that, in extreme cases,[32] the reason is largely ideological or populist opposition from legislators to adequate defense funding and to criminal procedure

31. For discussion of democratic experimentalism, see generally Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 267–68 (1998); Michael C. Dorf, Legal Indeterminacy and Institutional Design, 78 N.Y.U. L. Rev. 875, 886, 935–37 (2003); infra Part IV.A.

32. Such cases include the worst funded jurisdictions and decisions such as Congress's 1995 elimination of federal funds for capital representation. For information on the latter, see Post-Conviction DNA Testing: When is Justice Served?: Hearing Before the Senate Comm. on the Judiciary, 106th Cong. 108–15 (2001) (testimony of Bryan A. Stevenson, Director, Equal Justice Initiative of Alabama).

entitlements.[33] But that is not the only reason. Other poorly funded localities are simply poor generally: Many public services are underfunded, including foster care, medical care, indigent defense, and public schools.

In the context of widespread budget shortfalls, we cannot clearly infer legislative disfavor of criminal defense as compared to other underfunded programs. Most criminal law scholars, defense practitioners, and lawyer groups such as the ABA justify arguments for higher funding levels by defining standards for very good representation practices and case loads; they argue for money to implement those aspirational standards. But legislators face these arguments many times over in an array of programs. A legislator's decision is more typically a set of choices about which worthy programs to fund less than fully, often much less than fully. Even legislators who concede indigent defense is worthy and important must still rank its priority for marginal budget dollars relative to funds for medical care for the poor, foster care services, improvement of substandard schools, or toxic clean-up of grave environmental health risks.[34] Underfunding of criminal defense can be morally defensible if resources are so scarce that programs with equally worthy claims to public funds are also underfunded. This point leaves aside a broader debate about taxation levels that affect revenue availability. But if we accept that some funding scarcity for worthy programs will exist either because higher tax rates are not politically feasible, or because scarcity remains even under the highest plausible rates, then the problem remains. Rights cost money, just as medical care and good schools cost money, and in many places we do not have enough money to go around.[35]

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33. Even in times of tight public budgets, prison populations continue to rise. See Paige M. Harrison & Allen J. Beck, Bureau of Justice Statistics, U.S. Dep't of Justice, Bulletin NJC 200248, Prisoners in 2002, at 1–3 (July 2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf (on file with the *Columbia Law Review*) (reporting increases in state and federal prison populations for 2002); Fox Butterfield, Study Finds 2.6% Increase in U.S. Prison Population, N.Y. Times, July 28, 2003, at A12 (reporting on U.S. Department of Justice study). Public defense is underfunded as other parts of the criminal justice system grow, resulting in a system that processes more cases and incarcerates more offenders while restricting defense services. One inference which could be drawn from this imbalance is a political preference for criminal law on the cheap.

34. On the extent of recent state budget cuts across a range of programs, see, e.g., Timothy Egan, States, Facing Budget Shortfalls, Cut the Major and the Mundane, N.Y. Times, Apr. 21, 2003, at A1 (noting funding cuts to prisons, health care for poor mothers, prosecutors, and other state programs). On cutbacks for health coverage in particular, see Robin Toner & Robert Pear, Cutbacks Imperil Health Coverage for States' Poor, N.Y. Times, Apr. 28, 2003, at A1.

35. It is hard to distinguish real budget constraints from political unpopularity as the primary reasons for the underfunding of some institutions. There are numerous examples of political branches failing to sufficiently fund and administer public programs at least as much because they are politically unpopular as because of funding scarcity. Unconstitutional conditions in prisons, mental hospitals, and racially integrated schools are prominent examples that have prompted courts to intervene when political administration of these institutions failed to remedy constitutional rights, and funding proved not to be an insurmountable problem. Cf. Frank M. Johnson, Jr., The Alabama

That moral argument may not be persuasive, especially if one refuses to bracket the larger political debate about taxation levels, the appropriate size of government, or the structuring of some budget decisions at local rather than state and national levels.[36] Moreover, there is plenty of evidence that part of the explanation for funding allocations is legislative opposition to vigorous criminal defense; criminal defendants fit a classic process-theory description of an insular minority unlikely to find favor in legislatures.[37] Whether morally defensible or not, some combination of those causes yields the reality for many American jurisdictions of significant underfunding for indigent defense.

B. *The Outcome of Underfunding: Rationing*

Regardless of whether underfunding is a fiscal necessity or an entrenched political choice, criminal defense resources in many jurisdictions are available at levels much lower than those necessary under any plausible definition of need. Thus, defense will be rationed, and it will be rationed in a way that shortchanges some entitlements and parties. But note the legislative decision is only at the most general level: It allocates some percentage (20%? 30%? 50%?) below need, but does not define what aspects of criminal defense are to be unserved. Shall counsel go only to felony defendants? Shall indigent parties lose access to expert witnesses, scientific analysis, or investigators?

Many of these decisions are regulated by constitutional rules, tying legislators' hands in targeting budget cuts. Legislators cannot give more funds to counsel for felons by cutting counsel for misdemeanants; *Argersinger v. Hamlin*[38] and *Alabama v. Shelton*[39] require counsel for minor crimes that carry any risk of jail time. Misdemeanor offenders also get

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Punting Syndrome: When Elected Officials Kick Their Problems to the Courts, Judges' J. Spring 1979, at 4 (describing state governments' pattern of ignoring politically difficult responsibilities with such institutions as prisons and mental hospitals until forced to address constitutional violations by court order).

36. Indigent defense and public schools, for example, are often funded in large portion from local rather than state or federal revenue sources, which results in greater variation in funding levels across jurisdictions. In 2003, Georgia established a state public defender system that provides a structure for state funding for indigent defense; no funding has yet been appropriated for the new system. See supra note 6 (discussing status of indigent defense in Georgia). School funding has been an object of litigation in many states for years, with a key issue being the mix of state and local funding. See James E. Ryan, Schools, Race, and Money, 109 Yale L.J. 249, 258–60, 266–72 (1999).

37. The classic statement of process theory is in John Hart Ely's *Democracy and Distrust.* Ely, supra note 20.

38. 407 U.S. 25, 37 (1972) (extending right to counsel to any offense that carries a possible sentence of incarceration).

39. 535 U.S. 654, 672–74 (2002) (holding defendant entitled to counsel when "his vulnerability to imprisonment is determined").

costly jury trials rather than cheaper bench trials; *Baldwin v. New York*[40] and *Blanton v. City of North Las Vegas*[41] mandate that. Legislators cannot prohibit funds for expert witnesses in certain classes of cases (say, DUIs); *Ake* forecloses that categorical approach.[42] They cannot bar defenders from spending money or time on evidence suppression motions. Thus, legislators both decline to fine-tune their underfunding decisions and, to a significant degree, are constitutionally restricted from fine-tuning them. As a result, legislators say, in effect: "It may be that fully adequate indigent defense costs x, but the funding is nonetheless set at $2/3x$. Trial judges and attorneys must manage the shortfall." Legislators can crudely restrict rights through funding levels, but budgets in this context are a blunt tool.[43] Thus legislators are forced implicitly to leave the task of defining the real content and scope of rights to others. The people making the decisions on how to ration rights—to allocate resources and thus entitlements—are largely defense attorneys and trial judges.

Despite this responsibility, practitioners and scholars have given little explicit consideration to how that rationing process ought to be done, even though in criminal justice, as in other areas where rationing is required, allocation of scarce resources is fraught with difficult moral choices and policy options. In this respect, criminal justice is comparable to health care policy. Health care is significantly underfunded; in 2001, 14.6% of the population (and 30.7% of the poor) lacked health insur-

40. 399 U.S. 66, 69 (1970) (holding Sixth Amendment jury trial right, applied to the states, extends only to non-petty charges carrying potential prison terms of six months or more).

41. 489 U.S. 538, 541–43 (1989) (revising *Baldwin* standard to clarify that jury trial right generally applies if, together with incarceration, statutory penalties reflect crime to be "serious" offense).

42. Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (requiring that indigent defendant have access to a psychiatrist if "his sanity at the time of the offense is to be a significant factor at trial").

43. This discussion holds aside the instances in which courts can order local governments to raise taxes to fund a remedy for a constitutional violation. There is thus a limit to legislatures' ability to deny constitutional rights by denying adequate funding. See Missouri v. Jenkins, 495 U.S. 33, 54–57 (1990) (holding that federal court can order local government to raise taxes to fund school desegregation remedy, even when state law bars local entity from enacting such a tax increase). Moreover, through the use of structural injunctions, federal courts have taken long-term control of state institutions such as school districts, prisons, and mental hospitals to supervise institutional reorganizations required to remedy constitutional violations. For examples, see, e.g., Ronald J. Krotoszynski, Equal Justice Under Law: The Jurisprudential Legacy of Judge Frank M. Johnson, Jr., 109 Yale L.J. 1237, 1242–43 (2000) (describing and citing examples of Judge Johnson's supervision of Alabama prisons and mental hospitals through long-term structural injunctions); Karla Grossenbacher, Note, Implementing Structural Injunctions: Getting a Remedy When Local Officials Resist, 80 Geo. L.J. 2227, 2252–58 (1992) (discussing *Jenkins* and structural injunctions in housing, prison, and other contexts). I am unaware of a court ordering a tax increase to fund indigent defense, but for examples of courts using other strategies to force legislative action remedying inadequate defense resources, see cases cited supra note 7.

ance.[44] Because full services are not available to everyone, medical care is rationed, but it is done so on grounds that do not correlate well with medical need and notions of fairness. That is because we ration largely on the basis of whether one has been able to obtain employer- or government-provided insurance, rather than by difficult but more defensible processes of prioritizing needs and linking those criteria to choices about equitable distribution.[45] As is the case with medical care, we need to think more about not only how to get adequate funding for indigent defense, but how (at least in the meantime, and probably for the foreseeable future) most appropriately to *shortchange* some demands for indigent defense. It turns out that, despite constitutional requirements, rights are quite rationable in practice.

II. How We Already Ration Rights

Courts and other funding allocators (county and city governments or indigent defense boards, depending on local arrangements) already ration defense funds in some obvious ways as well as some slightly less obvious ones. Most plainly, public defenders or court-appointed attorneys are assigned more cases than they can plausibly handle well; underfunding simply means too few lawyers for too many cases. Almost as obviously, courts may give preference in appointments to attorneys who dispatch cases expeditiously, without a level of motion practice, investigation, or pleas for expert assistance that would slow dockets and drain limited funds.[46] The famously lax standard of effective assistance under *Strick-*

44. See Press Release, U.S. Census Bureau, U.S. Dep't of Commerce, Health Insurance in America: Numbers of Americans with and Without Health Insurance Rise, Census Bureau Reports (Sept. 30, 2003) (on file with the *Columbia Law Review*) (summarizing health-care related census data for 2001).

45. There are scattered examples of more rational approaches to allocation of medical care. The Oregon legislature required the state's health services commission to devise a basis for rationing care by creating "a list of health services . . . ranked by priority, from the most important to the least important, representing the comparative benefits of each service to the entire population to be served." Or. Rev. Stat. § 414.720(3) (2001). For a description of the Oregon Health Plan's system of rationing medical services, see Oregon Health Services Commission, Prioritized List of Health Services, at http://www.ohppr.state.or.us/hsc/prioritized_hsc.htm (last visited Jan. 16, 2004) (on file with the *Columbia Law Review*). Rationing gets much more attention in public health scholarship than in criminal justice scholarship, in part because other nations have more explicit rationing policies. See generally Warren Greenberg, Competition, Regulation, and Rationing in Health Care (1991) (discussing rationing from the perspectives of health economics); Rationing in Medicine: Ethical, Legal and Practical Aspects (Friedrich Breyer et al. eds., 2002) (discussing rationing of health services in Europe).

46. A classic article on this point is Abraham S. Blumberg, The Practice of Law as a Confidence Game, 1 L. & Soc. Rev. 15, 18–31 (1967) (describing defense attorneys as "double agent[s]" who cooperate with judges and prosecutors and influence client choices to serve systemic efficiency and their own fee-gathering). See also Alison Frankel, Too Independent, Am. Law., Jan./Feb. 1993, at 67, 68 (discussing proposals by committee appointed by Chief Justice Rehnquist to reduce district judges' ability to limit appointments of aggressive lawyers who create more work for judges). Note that judges

land v. Washington indirectly serves this rationing function as well.[47] It signals to attorneys and trial courts how little assistance will pass constitutional muster, allowing defense functions to be funded more thinly.[48] It also prevents greater resources from going to more frequent retrials that might be necessary under a more stringent effectiveness standard.[49]

Finally, the crucial, related entitlement to expert assistance for indigent defendants under *Ake v. Oklahoma*[50] poses a potentially substantial financial commitment, which states and localities often underfund at levels comparable to funding for defense counsel. Trial judges are largely responsible for allocating (though not setting) *Ake* budgets.[51] Faced with limited funding, they have basically two mechanisms to manage that budget. One is to read the doctrine narrowly (or disingenuously) and conclude that any given defendant's request for expert assis-

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may distribute appointments for other illicit reasons as well, such as following their own ideological preferences or favoring contributors to their judicial campaigns. On the latter, see, e.g., David Ashenfelter, Plan Would Hurt Funds to Judges, Detroit Free Press, Jan. 18, 2000, at http://www.freep.com/newslibrary (on file with the *Columbia Law Review*) (reporting a Michigan Supreme Court proposal to bar elected judges from giving court appointments to attorneys who contribute to their campaigns).

47. See 466 U.S. 668, 687–96 (1984) (discussing standards to be used in deciding ineffective assistance claims).

48. See Green, supra note 10, at 1170 ("[A]s a practical matter the constitutional right to competent counsel rarely affords a remedy when a criminal defense lawyer does little more than encourage the client to plead guilty."); id. at 1185–89 (developing the argument that *Strickland* and other relevant case law lower "professional standards" of indigent defense representation).

49. "Might be" because it is possible that counsel and courts would eventually learn the content of a more rigorous standard and generally meet it; hence there might be no more reversals under a tough *Strickland* standard than under the current lax one. There would remain the increased cost of consistently meeting that higher standard. Maintaining *Strickland*'s ex post review of attorney conduct, rather than adopting Donald Dripps's proposal for ex ante enforcement of adequate defense resources measured by a parity standard with prosecution resources, Dripps, supra note 23, at 179, also makes underfunding, and thus rationing, easier.

50. 470 U.S. 68, 83 (1985) ("[W]hen a defendant demonstrates . . . that his sanity at the time of the offense is to be a significant factor at trial, the State must . . . assure the defendant access to a competent psychiatrist . . . ."). But see Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985) (holding that denial of investigator, fingerprint expert, and ballistics expert to defendant under state law predicating access to such expert assistance on a finding of reasonableness was not unconstitutional).

51. The study of Georgia indigent defense has strong evidence on this point. See, e.g., Spangenberg Report, supra note 6, at 69 (reporting experience of an appointed attorney in one county who had not received an expert "out of the 20 times he has applied for [one]" and stated that "'[i]f there was more money for experts, by God, my clients would not be in jail.'"); id. (noting that a superior court judge in a large urban county "puts an initial cap on the investigator expense" and explains that "[a]s far as experts are concerned, I am as cheap as possible. This is a Chevy operation, not a Mercedes operation. We are under extreme pressure from the county to hold our expenses down."); id. at 71 (explaining that the chief superior court judge in a rural circuit felt "acute pressure from the counties to cut back on expenditures on counsel, experts and investigators"); see also Chief Justice's Report, supra note 6, at 55–56 (summarizing similar findings in Georgia).

tance does not meet *Ake*'s due process standard of assistance on issues that are "significant factors" in the trial.[52] Or, they can read the doctrine more honestly, grant funds on all fair readings of the doctrine, but send signals to local practitioners in other ways that *Ake* funds should not be requested in all cases for which the formal entitlement exists—particularly for lower-level crimes (say, DUIs).[53] There is strong anecdotal evidence that this sort of signaling—consider it a local practice norm—occurs through, for instance, a greater trial penalty for defendants who demand *Ake* funds and lose.[54] That is, courts gain practitioners' cooperation with an informal rule that limits expert funds to certain sorts of cases, perhaps serious felonies with particular sorts of evidence. In this way, lower courts implicitly revise the formal *Ake* entitlement to a more limited one that accords with fiscal reality. Analogously, there is strong evidence that this occurs for jury trials.[55] Cooperative attorneys fail to move for such entitlements, and ineffective-assistance doctrine generally protects them.[56]

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52. *Ake*, 470 U.S. at 83. Some jurisdictions have explicitly extended *Ake* to misdemeanor cases, see, e.g., Elmore v. State, 968 S.W.2d 462, 464 (Tex. App. 1998), while others have limited the entitlement to felonies, see, e.g., Husske v. Commonwealth, 448 S.E.2d 331, 339–40 (Va. Ct. App. 1994).

53. In Georgia, a 2003 study found:

> [E]ven attorneys who feel that an investigator or expert would help in their cases are reluctant to file motions securing investigative help a) because it will be a waste of time, as such requests are routinely denied and/or b) because it might annoy judges. In Clayton County, attorneys told us that even in death penalty cases to get approval for investigators was akin to "pulling teeth."

Spangenberg Report, supra note 6, at 67; see also id. (noting that judges in one Georgia county openly admit to unconstitutional rationing by granting experts and investigators only in capital cases, despite *Ake* doctrine).

54. See Darryl K. Brown, Criminal Procedure Entitlements, Professionalism, and Lawyering Norms, 61 Ohio St. L.J. 801, 828–31 (2000) (noting that "[f]airness requires a sanction to discourage *Ake* motions by indigent defendants who insist on more entitlements than others receive").

55. While sociological studies of this phenomenon are thin, comparable signaling mechanisms to ration other costly rights, such as jury trials, are well documented. See Roy B. Fleming et al., The Craft of Justice: Politics and Work in Criminal Court Communities 110, 118–19 (1992) (showing data documenting trial judges' views of "illegitimate" trials); Milton Heumann, Plea Bargaining: The Experience of Prosecutors, Judges and Defense Attorneys 142–43 (1975) (recounting trial judge's insistence that any defendant "deserves to be penalized for the trial" and consuming court resources unless "he has got a reasonable position" for insisting on one); see also In re Inquiry Concerning Judge Darmon, 487 So. 2d 1, 3–5 (Fla. 1985) (removing a trial judge from office for, among other things, telling defendants on the record that they would incur sentence enhancements for insisting upon jury trials or appointment of defense attorneys in certain cases).

56. The Supreme Court's recent decision in Wiggins v. Smith, 123 S. Ct. 2527 (2003), might signal a shift in the doctrine to hold attorneys to a higher standard; counsel there was found ineffective for failure to investigate and present mitigation evidence relevant to sentencing. Id. at 2542–43. But *Wiggins* was a capital case and it is unlikely to cause a shift in local practice norms restricting *Ake* funds to serious felonies.

III. How We Ought to Ration Rights

A. *When Rationing Makes Sense*

There are certainly jurisdictions in which funding levels are *so* low that rationing can not be done in any meaningful manner; there simply is not enough to ration. Quitman County, Mississippi, is currently making this argument in a suit against the state government seeking more funding for indigent defense. County budgets, plaintiffs claim, are so insufficient that appointed counsel are forced to spend only a few minutes with clients facing serious felony charges; counsel must proceed with no fact investigation or motions practice.[57] Quitman County is far from the only jurisdiction to make such a claim.[58] That paucity of funding makes any plausible allocation process by trial-level attorneys impossible.

Note also the other end of the spectrum. Even where funding levels are adequate, they are not ample; they do not provide "rich man's justice." The indigent defense system that Indiana established in the 1990s might be an example here. Indiana funds indigent defense through county budgets as well, but it created a state Public Defender Commission to establish standards for indigent defense practice (first in capital cases, later also in non-capital felonies). For counties that adhered to the standards, the state reimbursed up to 50% of indigent defense costs.[59] Even in such a system that increases the likelihood of adequate funding, allocation choices must be made between representation that is good enough and the best representation unlimited funds could support. Adequate resources are not unlimited resources. Yet from the examples of wealthy defendants, we know that parties and their lawyers could spend tremendous amounts of money defending themselves—often to great effect. Merely adequate funding, then, means budgeting resources to eliminate those defense strategies that wealthy defendants would pursue.

In systems for which funding is adequate, rights are allocated but not, in a meaningful sense, sbortchanged. Lawyers simply make the sorts of professional decisions lawyers are trained to make. On the basis of preliminary information, one may conclude a suppression motion is worth the effort but a challenge to the jury venire is not; interviewing witnesses and seeking out more are critical, but employing an expert witness is not. This is the sort of discretionary professional judgment that *Strickland* strongly protects.[60] Attorneys, especially in public defender of-

57. See Liptak, supra note 9.

58. See, e.g., State v. Peart, 621 So. 2d 780, 784 (La. 1993) (discussing inadequate funding for indigent defense in Louisiana); Hackney, supra note 8 (noting variations in indigent defense budgets of eight large U.S. counties); Lewis, supra note 8 (same).

59. For a description of the program, see 4 Windlesham, supra note 20, at 171–75.

60. Strickland v. Washington, 466 U.S. 668, 680–81, 688–89 (1984) (eschewing "detailed rules for counsel's conduct" and mandating that "[j]udicial scrutiny of counsel's performance must be highly deferential" and "must indulge a strong presumption . . . that, under the circumstances, the challenged action 'might be considered sound trial strategy'"). This view accords with Justice O'Connor's premise, in the majority opinion,

fices, make these allocations among cases as well. Of two clients with equivalent charges, one merits greater investigative and preparation time because of initial assessments about the veracity or complexity of the evidence or plausibility of a given defense. The allocation begins necessarily at early stages of the litigation process, before attorneys have full information about facts and legal issues. Although subject to reallocation when new information arises, part of what we ration are the resources we will spend to obtain factual and legal knowledge.

In between the surpassing inadequacy of funding that defies plausible rationing and the adequate funding of some locales that calls merely for ordinary lawyering decisions about allocation of resources, there is a large middle range. In some jurisdictions, funding levels are inadequate, but not so scandalous that there is too little even to ration sensibly—or so low that defense funding necessarily should prevail over other worthy state programs and social needs. This middle range presents the greatest challenge. These far-less-than-ideal resources are all we can reasonably expect for now; how should lawyers distribute them? Consider the implications of several common choices: forgoing investigation, which raises the risk of erroneous outcomes; forgoing legal claims that serve instrumental purposes other than factfinding (such as evidence suppression that discourages police misconduct) yet also have important consequences for clients (such as dismissal of charges or more favorable plea bargains); and expert assistance, which can improve factfinding. Again, these trade-offs occur among cases as well as within cases.

B. *How to Ration: Default Rules for Defense Lawyers*

In the range of settings in which rationing is both necessary and feasible, attorneys can adopt informal practice guidelines—default rules—that improve resource allocation. Overburdened attorneys who cannot provide thorough representation for all clients have to sort by some criteria. No system is feasible unless attorneys have resources for initial case evaluations. But evaluate on what criteria? The basic options, arising from traditional, competing notions of defense lawyers' functions,[61] are to give priority (1) to cases of likely factual innocence or (2) to cases in which the prospect of defense litigation success is highest *regardless of factual innocence.* The paradigm for the latter are cases in which the defense can enforce exclusionary rules, or employ related tactics such as "greymail,"[62] that frustrate prosecution and serve systemic functions such as deterrence of unconstitutional police conduct.

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that the role of the defense attorney is to ensure a reliably functioning adversarial process and thereby an accurate trial outcome. Id. at 686–87.

61. For discussion of these competing views as expressed in the majority and dissenting opinions in *Strickland*, see infra text accompanying notes 75–76.

62. "Greymail" refers to threats to disclose facts unrelated to the case but embarrassing or injurious to the state or its witnesses, such as the identity of an undercover

I will argue the better approach is the former. Beyond its intuitive normative appeal, an approach giving priority to factual innocence draws its legitimacy from both core constitutional values and its correlation with plausible assumptions about legislative preferences. Legislative choices need not bind attorneys' professional judgment, especially if the legislature seeks to frustrate constitutional rights. But just as we can infer from underfunding that legislatures disapprove of some criminal procedure entitlements, it is plausible to assume they do not want limitations on rights such as access to counsel to hurt the factually innocent. And to the extent errors are inevitable, we would rather those errors be small than large. Those two assumptions correlate with a view of defense lawyers as critical components of an adversary process with a primary goal of truth-finding,[63] and they merit adoption regardless of whether they reflect a legislative preference.

Furthermore, prevention of wrongful convictions is a central goal of constitutional commitments to due process and fundamental fairness. The constitutionally-based requirement of proof beyond a reasonable doubt serves to reduce the risk that "innocent men are being condemned."[64] Appellate review of sufficiency of the evidence that support convictions is a further means to prevent wrongful conviction. The requirement of *Brady v. Maryland* that the prosecution reveal any evidence tending to exculpate the defendant serves the same purpose of reducing the risk of punishing the innocent.[65] And evidence of actual innocence is the only claim that has a chance to overcome otherwise prohibitive procedural bars to collateral relief of convictions.[66] In short, protection

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agent that the state needs to keep confidential beyond this case. See William H. Simon, The Ethics of Criminal Defense, 91 Mich. L. Rev. 1703, 1705 (1993).

63. This is the Court's implicit view of defense counsel in *Strickland*. See 466 U.S. at 686–87; see also infra text accompanying notes 75–76 (discussing Justice O'Connor's opinion in *Strickland*).

64. In re Winship, 397 U.S. 358, 364 (1970) (arguing that moral force requires that the standard of proof leave no reasonable doubt as to the accused's guilt).

65. Brady v. Maryland, 373 U.S. 83, 86 (1963).

66. In a line of cases defining the limitations of habeas corpus, the Supreme Court has indicated that conviction of the factually innocent is a fundamental miscarriage of justice that justifies a habeas forum for constitutional claims that otherwise might be barred by procedural rules. In *McCleskey v. Zant*, the Court noted that the filing of successive habeas petitions should be permitted when necessary to avert a "fundamental miscarriage of justice." 499 U.S. 467, 495 (1991). That requirement can be satisfied by presenting "new facts [that] raise[ ] sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial." Schlup v. Delo, 513 U.S. 298, 317 (1995). In *Herrera v. Collins*, the Court said its habeas jurisprudence does not

> cast[ ] a blind eye toward innocence. In a series of cases . . . , we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if be makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

of factual innocence is a primary function of a range of criminal procedure rules. With these constitutional guideposts in mind, we should distribute limited defense resources (1) toward strategies more likely to vindicate factual innocence, and (2) toward charges and clients who have the most at stake or are likely to gain the greatest life benefit.[67] Both principles have substantial costs and face considerable implementation challenges.

The latter principle is a complex commitment to harm reduction. It posits as a first step that we should do more to help serious-felony clients than misdemeanor and minor-felony clients—in doctrinal terms, we should implicitly restrict *Argesinger* rights to the extent necessary to make *Gideon* more meaningful. Rationing defense services means a higher risk of error in some cases, and that risk should be allocated toward parties with less to lose. That means clients facing lower-level offenses, who should far outnumber serious felony clients, get deliberately poorer representation and thus face greater likelihood of conviction and punishment than they otherwise would.[68]

Yet the commitment is not simply a rule of preference for clients with more serious charges. Another concern carries weight. This measure can be mediated by assessments of the odds of prevailing for different clients. Attorneys should be reluctant to trade off low-level offenders whose prospects for reduced sanction or acquittal initially look promising

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506 U.S. 390, 404 (1993).

The Court cited Sawyer v. Whitley, 505 U.S. 333 (1992), in which it interpreted the doctrine permitting repetitive review, consistent with the "ends of justice," as authorizing the filing of a successive claim in any case in which the petitioner made a "colorable claim of factual innocence." Id. at 339. The *Herrara* Court left open the possibility that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Herrara*, 506 U.S. at 417; accord *Schlup*, 513 U.S. at 314 n. 28; see also Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 159—60 (1997) (arguing for wide-ranging revision of constitutional criminal procedure that gives strong priority to protection of factual innocence). For a pointed critique of Amar's argument, see Susan Bandes, "We The People" and Our Enduring Values, 96 Mich. L. Rev. 1376, 1383 (1998) (arguing "there are serious normative problems with claiming innocence-protection as a core constitutional value—either historically or currently").

67. The argument for the priority of these two commitments may be stronger if based upon independent normative claims, rather than clear inferences of legislative intent. To note just one response to this latter argument, if legislators were more concerned about errors in grave cases such as capital murder rather than cases with lesser penalties, we ought to see more commitment to capital defense funding. We do sometimes see capital funding getting a distinct priority treatment by legislatures. See, e.g., 4 Windlesham, supra note 20, at 172–75 (describing Indiana's legislative efforts to improve indigent defense, which started with higher standards and funding for capital defense). But that is hardly a uniform, or even widespread, legislative trend. The classic article is 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 (1994).

68. *Strickland* gives much practical leeway for this practice. See Green, supra note 10, at 1170.

in favor of serious offenders with great exposure but (after some investigation) little chance of prevailing. This refines the commitment to harm reduction: It is often better to put resources toward a project with a high chance of reducing small harms than a small chance of preventing a great harm.[69]

Additionally, lawyers might be tempted to give certain lesser offenders priority over some serious offenders who have equal prospects of acquittal. Reduced sanctions or acquittals for younger offenders with good life prospects (e.g., because this criminal charge is their first) that could be greatly harmed by relatively short prison terms may deserve priority over similar reductions for serious offenders who have substantial records and thereby less promising post-conviction life prospects. Adopting such criteria is an ethical minefield. It entails complicated, if not indefensible, judgments of interpersonal utility and the comparative values of lives. It requires answering such questions as: "Who would enjoy freedom more, or make better use of it?" While attorneys can be tempted to favor the young first-offender over the older recidivist when each is wrongly accused, it is more defensible, in an already ethically fraught project of rationing resources among clients, to limit decisionmaking criteria to the risk and degree of wrongful harm threatened by the state, rather than the full, particularized effects of such harm on individuals.

The first principle—the primacy of factual innocence—has significant costs as well and it is also much harder to implement. To put the point sharply, consider that this principle can mean forgoing the investment of pursuing a *Miranda* or illegal-search claim to exclude critical evidence that could result in dismissal, acquittal, or reduced punishment. That is a substantial cost for a client. But if we hold aside cases involving false confessions and planted evidence, those are acquittals of clients who are, by hypothesis, factually guilty and who, again by the hypothesis of resource constraints, take counsel resources away from clients who are more likely to be factually innocent (or at least over charged, meaning partly factually innocent). Again, the question is not what zealous attorneys would do with adequate resources. The issue is, when one is forced to choose by resource constraints, which right does one enforce? Investments in advocacy that pursues plausible claims of actual innocence

69. Note that it is not always better. A 75% chance of preventing a wrongful one-year incarceration is formally the same as a 10% chance of preventing a 7.5-year wrongful sentence or a 1% chance of preventing a seventy-five-year term. It is unclear as a practical matter whether one of these categories—wrongful small punishments or wrongful large ones—is realistically more likely. We have certainly learned in recent years that wrongful convictions happen even in cases involving the most serious crime—capital murder. But it may be that the factual nature of serious cases makes them more prone to erroneous outcomes than simpler, low-level cases. On the other hand, more resources are probably committed to investigating and prosecuting serious cases, which might mean a higher error rate in the investigation and charging of low-level crimes. Similarly, political pressure for conviction should be greater in serious cases, but public (and defense-side) scrutiny of the prosecution is probably greater as well.

should supercede investments in advocacy that advances plausible claims for factually guilty clients who have a strong legal basis for avoiding conviction. All of these are complicated judgments to be sure, and in practice will sometimes be made quite roughly. But they are not different in kind from the judgments defense attorneys have long made when faced with resource constraints that force choices between cases.

One of my premises here bears resemblance to William Simon's controversial thesis of ethical discretion in lawyering: Attorneys must make initial judgments on the merits about their clients' guilt or innocence.[70] Both Simon's agenda and rationale for this judgment are different from the proposal here. Simon argues for an overarching imperative for lawyers to further serve justice, which he equates with legal merit, rather than solely with client interests; he urges lawyers to calibrate their advocacy roles according to the likely reliability of a local justice system in achieving just outcomes.[71] The more procedurally reliable the system, the more one can adhere to the traditional role of a partisan advocate; the less reliable that system, the greater one's duty to mediate advocacy with the pursuit of justice.[72]

In contrast, a factual innocence commitment in rationing is, at the first level, a basis for distributing insufficient resources in a mode of practice that does not meet an ethical standard of fully zealous and adequate representation.[73] Simon and other ethics scholars debate ethics with the foundational assumption that lawyers might calibrate zealousness only after meeting a standard of fully adequate representation.[74] But a world of perpetually underfunded indigent defense is one in which some clients inevitably get inadequate representation. The policy of giving preference to clients with plausible innocence claims is a way to organize allocation choices that attorneys, forced by material circumstances, make regardless

70. William H. Simon, The Practice of Justice: A Theory of Lawyers' Ethics 138–39, 194 (1998).

71. Id. at 138–42.

72. A well-known statement of the main opposing view to Simon's—that of the uncompromising zealous advocate—is Monroe H. Freedman, Understanding Lawyers' Ethics 65–86 (1990); see also David Luban, Are Criminal Defenders Different?, 91 Mich. L. Rev. 1729, 1762–66 (1993) (responding to Simon's argument); Stephen L. Pepper, The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities, 1986 Am. B. Found. Res. J. 613, 614 (arguing for client autonomy and attorney's amoral commitment to client interests).

73. I forgo here a full argument defending the ethics of this approach to rationing. For now I note only the consequentialist point that woefully less than zealous representation occurs routinely, commonly passes *Strickland*'s post-hoc assessment of effectiveness, and rarely prompts professional disciplinary consequences for attorneys. The rationing regime outlined here merely proposes a better way, by both instrumental and noninstrumental criteria, of doing a suboptimal job within the existing context of both constrained resources and lax real-world professional discipline enforcement.

74. See William H. Simon, The Ethics of Criminal Defense, 91 Mich. L. Rev. 1703, 1712–13 (1993); Luban, supra note 72, at 1759–62. For further discussion of this point, see Darryl K. Brown, Criminal Procedure, Justice, Ethics, and Zeal, 96 Mich. L. Rev. 2146, 2148 (1998).

of whether they are well-conceived decisions. It organizes choices compelled by legislatures' funding decisions and distributes resources in service of an overarching justice principle. Further, in contrast to Simon's thesis, the justice principle here is not fully co-extensive with legal merit; it gives priority to factual innocence. A suppression motion may have legal merit and serve to free the guilty. The factual innocence principle would counsel for forgoing that motion if it comes at the cost of representation efforts on behalf of a client more likely to be innocent, even if the latter's chances of ultimate success are lower.

Rationing on the basis of factual innocence accords with the underlying vision of the defense attorney's role in *Strickland*. Justice O'Connor's opinion for the majority stresses that defense counsel's role is to ensure proper functioning of the adversary process and thereby to contribute to accurate and just outcomes.[75] This vision contrasts with a well-established alternative view of the defender's role as an advocate committed solely to client liberty rather than accurate outcomes or procedural reliability, both of which may not be in the client's interest. We find hints of this view in Justice Marshall's *Strickland* dissent,[76] and Monroe Freedman has made a classic argument for this position.[77] The rationing ethic entails an explicit choice not to attempt zealous representation for every client, although it does so only in contexts in which such representation is not possible for all clients.

Carrying out defense practice in accord with these commitments moves the allocation of counsel resources toward a more explicit model of triage.[78] Real triage—medical triage—after all, is often a well-conceived, research-based, deliberate approach to allocating scarce medical

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75. Strickland v. Washington, 466 U.S. 668, 686–687 (1984).

76. See *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting) (arguing that even the "manifestly guilty defendant" is "entitled to a trial in which his interests are vigorously and conscientiously advocated by an ahle lawyer," and disagreeing that "the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted").

77. See Freedman, supra note 72, at 57 (arguing that an "attorney acts unprofessionally and immorally by depriving clients of their autonomy . . . hy otherwise preempting their moral decisions, or by depriving them of the ability to carry out their lawful decisions"); see also Pepper, supra note 72, at 614 (arguing for client autonomy and attorney's amoral commitment to client interests).

78. "Triage" is a common description of indigent defense practices. See, e.g., Bright, supra note 18, at 790 ("Lawyers there are in effect either forced to spend their own money or to perform 'a sort of uninformed legal triage,' ignoring some issues, lines of investigation, and defenses because of the lack of adequate compensation and resources." (citing Jeff Rosenzweig, The Crisis in Indigent Defense: An Arkansas Commentary, 44 Ark. L. Rev. 409, 412 (1991))); Green, supra note 10, at 1181 (identifying "pleading out the overwhelming majority of cases" as triage strategy of defense lawyers); Michael Mello, Outlaw Executive: "Crazy Joe," the Hypnotized Witness, and the Mirage of Clemency in Florida, 23 J. Contemp. L. 1, 37 (1997) (describing "triage" as allocating most resources for capital cases in post-conviction stages rather than pre-trial). For an extensive development of ethical issues in criminal defense triage, see generally John B. Mitchell, Redefining the Sixth Amendment, 67 S. Cal. L. Rev. 1215 (1994).

care to the cases that can most benefit, even in light of knowledge that some will suffer from the distribution. The same is true for other rationing practices in medical services.[79] Attorneys need comparable, research-based guidelines for implementing these principles in practice. Trial lawyers face information deficits that are not fully surmountable. Attorneys rarely know, especially early in representation, who is wrongly accused. (It is more common to be able to identify quickly those who are factually guilty, although lawyers' instincts on that point become less trustworthy when developed in a practice environment with little case preparation.[80]) Gathering that information on factual innocence requires an investment of resources—exactly those resources we are forced to ration, such as witness interviews, crime scene visitation, or expert analysis. In light of overall demands on their time, attorneys must calibrate investments in information gathering based on assessments of the amount of information needed to make a reliable guess about innocence.

This is not as unusual or as consistently difficult as it may sound. Litigators routinely and soundly make strategic judgments with incomplete information. Criminal attorneys make these sorts of ad hoc judgments, often based on initial case files with little more than police reports, about whether clients are guilty. This is, in fact, part of the problem of inadequate defense: Attorneys make these decisions sometimes *too* quickly and firmly. Even in a constrained-resource environment,[81] a factual innocence commitment counsels for more than minimal case-file review in most cases, particularly serious ones. When that effort can be made by trading off time otherwise put toward evidence suppression efforts or a range of other pretrial tasks unrelated to fact discovery, such as venue and jury venire challenges, rigorous case-file review is even more preferable. But the level of that investigation, beyond a minimum, is not clearly definable beyond an attorney's firmly held professional judgment that further investigation would not reveal factual innocence.

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79. Medical triage comes in many forms, from quickly formulated criteria in battlefield or natural disaster conditions to thoroughly considered plans for rationing scarce treatments such as dialysis or organ transplants. See Gerald R. Winslow, Triage and Justice 1–21 (1982) (describing history and evolution of triage concept). See generally Rudolph Klein et al., Managing Scarcity: Priority Setting and Rationing in the National Health Service 9, 11–12 (1996) (summarizing forms of health-service rationing); Rationing of Medical Care for the Critically Ill 44, 47–50, 70, 75 (Martin A. Strosberg et al. eds., 1989) (discussing rationing of limited resources in intensive units). For a broader ethical discussion, see 1 F. M. Kamm, Morality, Mortality: Death and Whom to Save from It 99–122 (1993). For a brief discussion of ethical issues in triage applied to legal questions, see Leo Katz, A Look at Tort Law with Criminal Law Blinders, 76 B.U. L. Rev. 307, 311–12 (1996) (relying on Kamm).

80. See infra text accompanying notes 98–100 (discussing how attorneys develop heuristics for making judgments that conflict with empirical evidence).

81. Again, this holds aside localities with such gross underfunding that there is too little to ration meaningfully.

Even if that principle is acceptable and its level of generality moderately useful, rationing entails a further challenge. Which investigative options does one pursue? Locating and interviewing witnesses, securing expert assistance and analysis, investigating crime scenes, challenging confessions clients now deny, or litigating for greater discovery from the state? Financial constraints may dictate some of these choices. Attorneys may have time to pursue investigative options they can perform themselves but find the trial court unwilling to fund expert assistance. Other times, attorneys must trade off even investigative efforts they can conduct themselves due to time constraints.

To manage such constrained choices, we can refine the priority for factual innocence by devising default rules that accord with likely sources of wrongful convictions. We have a growing literature on practices, such as witness identification methods, that are prone to error and that largely accord with our improving knowledge of the causes of wrongful convictions. From that research we can identify which of those causes (a) occur most frequently and (b) can be prevented with pretrial defense strategies directed toward them.

An initial picture of such a default-rule regime is easy to sketch. In the minority of cases in which DNA and other scientific evidence is both available and arises in a manner that strongly suggests the identity of the offender,[82] counsel should seek testing of that evidence. If state lab results return incriminating reports,[83] counsel should seek independent testing of that evidence. At the same time, attorneys should be more skeptical of scientific evidence for which there is weak empirical support, such as fingerprint analysis,[84] firearms identifica-

82. DNA evidence can, of course, be available and yet tell us relatively little about the identity of the offender.

83. In the past several years there have been documented cases of deliberately fraudulent results manufactured by state and federal crime lab personnel. The case of Fred Zain, director of the West Virginia State Police Crime Laboratory, may be the best known; Zain falsified lab results, and testified about them, for more than ten years. For a description of the Zain case and state crime lab fraud in four states as well as in the FBI crime lab during the past dozen years, see George Castelle & Elizabeth F. Loftus, Misinformation and Wrongful Convictions, *in* Wrongly Convicted: Perspectives on Failed Justice 17, 27–28 (Saundra D. Westervelt & John A. Humphrey eds., 2001). Poor scientific standards, including lack of basic research to support the accuracy of some procedures, and insufficient resources, which affect preservation of evidence as well as quality of testing, are probably of greater concern in state crime labs than deliberate falsification of lab results. For an overview, see generally Paul C. Giannelli, The "Science" of Wrongful Convictions, Crim. Just., Spring 2003, at 55 (attributing poor standards to flawed criminal lab regulation and lack of basic research); Edward Imwinkelried, Flawed Expert Testimony: Striking the Right Balance in Admissibility Standards, Crim. Just., Spring 2003, at 28 (comparing flawed expert testimony to flawed lay testimony and advocating reform rather than exclusion).

84. See Robert Epstein, Fingerprints Meet *Daubert*: The Myth of Fingerprint "Science" Is Revealed, 75 S. Cal. L. Rev. 605, 607 (2002) (describing the "science of fingerprints" as "an unfounded creation of law enforcement fingerprint examiners").

tion,[85] and bite-mark comparisons.[86] Note some of this is counterintuitive to long-established practice. Fingerprint evidence has long been accepted by courts and lawyers as more reliable than recent studies show it to be.[87] Research-based default rules combat those established assumptions and thereby redirect attorney efforts.

A much more common source of wrongful conviction is eyewitness testimony. A large body of research suggests that eyewitnesses selecting suspects from live or photographic line-ups have error rates in the range of thirty to forty percent.[88] Error rates are higher in some circumstances, especially in cross-racial identifications, identifications of suspects previously unknown to the witness, and identifications made under difficult or suggestive circumstances,[89] including police line-ups that do not meet protocols for high reliability.[90] When such testimony is critical to the state's case, counsel should employ a default rule of putting limited resources into close examination of that evidence.

Similarly, jailhouse informants with critical state evidence are sources with higher-than-average rates of unreliability.[91] Those witnesses pre-

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85. See Lisa J. Steele, "All We Want You To Do Is Confirm What We Already Know": A *Daubert* Challenge to Firearms Identifications, 38 Crim. L. Bull. 466, 481 (2002) (arguing that firearm identification theory has not been proven "with sufficient rigor to pass a *Daubert* challenge").

86. See I.A. Pretty & D. Sweet, The Scientific Basis for Human Bitemark Analyses—A Critical Review, 41 Sci. & Just. 85, 91 (2001) (concluding there is a "lack of hard scientific evidence to support the assumptions made" in bitemark analysis).

87. One federal judge, on the basis of such studies, recently excluded opinion testimony that a fingerprint belonged to a particular person under the admissibility standard of Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), though he later withdrew the opinion. See United States v. Llera Plaza, 179 F. Supp. 2d 492 (E.D. Pa. 2002), withdrawn and vacated, 188 F. Supp. 2d 549, 576 (E.D. Pa. 2002). For a discussion of the rapid and widespread acceptance of fingerprint evidence, see Jennifer L. Mnookin, Fingerprint Evidence in the Age of DNA Profiling, 67 Brook. L. Rev. 13 (2001).

88. See Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law 12–13 (1995) (surveying multiple studies of eyewitnesses and finding mistaken identification rates of thirty-four to thirty-six percent); Bruce W. Behrman & Sherrie L. Davey, Eyewitness Identification in Actual Criminal Cases: An Archival Analysis, 25 Law & Hum. Behav. 475, 482 (2001) (studying results of real identification procedures employed by police in real cases and finding mistaken identification rate of more than 20% in live line-ups).

89. See generally Elizabeth F. Loftus & James M. Doyle, Eyewitness Testimony: Civil and Criminal 75–93 (3d ed. 1997) (discussing how different factors can lead to errors in recognition).

90. For a description of these protocols, see U.S. Dep't of Justice, Nat'l Inst. of Justice Report NCJ 178240, Eyewitness Evidence: A Guide for Law Enforcement 11–38 (1999) (offering national guidelines); Gary L. Wells et al., From the Lab to the Police Station: A Successful Application of Eyewitness Research, 55 Am. Psychologist 581, 592–95 (2000) (describing and criticizing Justice Department guidelines); see also Steven Penrod, How Well Are Witnesses and Police Performing?, Crim. Just., Spring 2003, at 37, 37–40 (utilizing studies to analyze frequency and impact of mistaken identifications).

91. See Robert M. Bloom, Ratting: The Use and Abuse of Informants in the American Justice System 63–80 (2002) (discussing problems associated with use of

sumptively deserve special background investigation in a way other witnesses often do not, even when the state denies a cooperation agreement, and especially if the client's account contradicts the informant's.[92] Further, attorneys may have local knowledge of particular police officers' or prosecutors' poor reputations for veracity or fair dealing. In those instances, they should put more effort into evidence related to that actor, whether it be a confession taken by the officer or a prosecutor's denial that *Brady*[93] evidence exists (again, especially if the client or other source suggests it may exist). Finally, while documented false confessions are relatively rare as a percentage of all criminal cases, they are nonetheless clearly recurrent contributions to wrongful convictions. Again, we have some contextual indicators for when they are likely to occur: when suspects are young or of marginal intellectual capacity, when interrogation extends for long periods, when the state is under public pressure to resolve a high-profile crime and other evidence is relatively weak.[94] (Note this indicator could overlap with knowledge of a particular officer's track record for custodial investigations.) Practitioners can follow an empirically grounded default rule here as well and invest effort in suspect confessions when circumstances indicate a higher-than-average risk of suspect confessions.[95]

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jailhouse informants through examples); Comm'n on Capital Punishment, Report of the Governor's Commission on Capital Punishment 8, 14, 96–97, 120–22, 158–59 (2002), available at http://www.state.il.us/defender/report/complete_report.pdf (on file with the *Columbia Law Review*) (examining use of jailhouse informants in Illinois capital cases); Robert M. Bloom, Jailhouse Informants, Crim. Just., Spring 2003, at 20, 20–22 (collecting and describing studies on informants); Steve Mills & Ken Armstrong, The Failure of the Deatb Penalty in Illinois: The Inside Informant, Chi. Trib., Nov. 16, 1999, at A1 (reporting that prosecutors concede jailhouse informants are unreliable yet were used in forty-six capital cases); Frontline: Snitch (PBS television broadcast, Jan. 12 1999), transcript available at bttp://www.pbs.org/wgbb/pages/frontline/shows/snitch/etc/script.html (on file with the *Columbia Law Review*) (reporting on use of informants in drug cases).

92. Tbis effort can be balanced, however, against tbe defense attorney's odds (perhaps slim) of uncovering and disclosing an informant's lie or secret agreement with the state.

93. Brady v. Maryland, 373 U.S. 83, 87 (1963) (stating that due process clause requires prosecution to disclose "evidence favorable to an accused upon request").

94. See Richard A. Leo & Richard J. Ofshe, The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation, 88 J. Crim. L. & Criminology 429, 491–95 (1998) (noting lack of adequate safeguards to prevent police-induced false confessions); Richard J. Ofshe & Richard A. Leo, The Decision to Confess Falsely: Rational Choice and Irrational Action, 74 Denv. U. L. Rev. 979, 985–1000 (1997) (illustrating how police elicit confessions from suspects); Ricbard J. Ofsbe & Richard A. Leo, The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions, 16 Stud. L. Pol. & Soc'y 189, 197–207 (1997) (explaining how interrogators elicit confessions).

95. It bears emphasis here, however, that improving allocation of advocacy and entitlements in this way changes the distribution, but not (much) the quantity, of individualized justice. Resource scarcity compromises individualized adjudication. Even empirically grounded rules that allocate counsel attention nonetheless displace an individualized with a categorical judgment. But that problem is not solved by abandoning

There is a practical tension between refining the efficacy of such guidelines with greater detail and keeping such rules simple enough for practitioners to employ easily. By way of example, consider that we know several ways to improve eyewitness misidentifications. Accuracy of identification from line-ups improves if witnesses must choose from larger numbers, if the presenter guiding the witness does not know the perpetrator's identity, if proper cautionary instructions are given, if "foils" closely match the perpetrator's description (so no one member of a line-up stands out), and if witness confidence in the identification is recorded at the time, so that it cannot strengthen over time.[96] These guidelines suggest indicators of when identifications are most likely to be unreliable. Ideally, lawyers would target investigation efforts not only when an identification is crucial evidence, but also when an increasing number of these indicators accompany an identification. More diligent and well-funded counsel can do so. But those counsel who are less well trained in such a default rule regime, or who are working under the greatest material constraints and case pressure, must sacrifice the refinements of this model for the more general rule.

Other problems arise. Attorneys, like everyone else, are susceptible to cognitive biases. There are well-established patterns of poor probabilistic judgment, for example, that likely affect attorneys who handle lots of cases. Lawyers, like others, devise heuristics for quick judgments that will sometimes conflict with default rules and empirically grounded probabilities about risks.[97] "Belief perseverance" and "confirmatory biases" are also common; once we form hypotheses or explanations about how things work, those understandings are hard to revise—we tend to ignore or downplay contradictory evidence and misread information as support-

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such allocative tools or increasing representational zeal. Individualized justice requires greater resources.

96. See Penrod, supra note 90, at 45–47 (explaining ways to improve value of eyewitness identification).

97. The seminal work in the field is Judgment Under Uncertainty: Heuristics and Biases (Daniel Kahneman et al. eds., 1982) [hereinafter Judgment Under Uncertainty]. See also Paul Slovic, Judgment, Choice and Societal Risk Taking, *in* Judgment and Decision in Public Policy Formation 98, 99–102 (Kenneth R. Hammond ed., 1978) (discussing cognitive biases and their causes). For a useful overview of this cognitive bias research in the legal literature, see Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. Rev. 630, 643–87 (1999).

One source of the error in probabilistic judgment is the "availability heuristic," which describes the tendency to ignore statistical data and instead to follow contradictory anecdotal evidence that is especially vivid or salient, such as easily recalled previous experiences. Another is the "representativeness heuristic," which describes the tendency to assume that a small-number sample is representative, and that a specific sample strongly resembles a larger class regardless of contextual information that causes variation. See Hanson & Kysar, supra, at 662–67; Amos Tversky & Daniel Kahneman, *Introduction to* Judgment Under Uncertainty, supra, at 3, 4–14.

ive of the initial idea.[98] Related to this is widespread "optimistic bias," which describes the tendency of people to think they are better than average at many tasks, or that future events are likely to turn out better than actuarial probabilities predict.[99] This can lead lawyers to assume their practice of quick file review with little investigation results in few errors, on the assumption that a veteran's insights compensate for time-consuming diligence.

Defense attorneys' cognitive biases can make well-conceived rationing strategies appear cost-inefficient relative to hunches or heuristics developed from their practice experience. Thirty percent of eyewitness identifications may be mistaken, but an attorney's personal experience can be quite different. One's routine experience will be that most defendants are guilty (at least of some charges); add to this that attorneys often do not know when they have facilitated wrongful convictions, so they *think* those defendants were guilty as well. Eyewitness accounts, even when faulty, can be hard to impeach or disprove. Framed in this context, new cases that are comparable to old ones—similar sorts of identifications or confessions, lack of information gained from a crime scene visit—can lead attorneys to become comfortable with minimal investigation. Default rules may, as a practical matter, become hard to employ consistently.

Even without the hurdle of cognitive biases, default rules are hardly a panacea. Pursuing a suspicion of misidentification hardly means one can definitively prove the witness's error, especially given the phenomenon of "memory hardening" that leads witnesses genuinely and honestly to believe their misidentification is correct.[100] Attorneys cannot test DNA evidence that was not preserved and have a hard time challenging the reliability of confessions when interrogations were not recorded. Informant or police perjury is hard to disprove.

Such deficiencies are additional fodder for those who object to this rationing model out of commitment to a traditional model of zealous defense advocacy. Yet defenders of that view are obligated to explain how

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98. Hanson & Kysar, supra note 97, at 646–50. Related patterns are "hypothesis-based filtering," by which individuals interpret ambiguous data to accord with a favored explanation, and "motivated reasoning," by which people reach conclusions they privately desired through a process of seemingly unbiased reasoning. Id. at 650, 653–54.

99. Id. at 654–57 (summarizing studies of optimistic biases such as people predicting their own chance of future divorce, drinking problems, and other adverse outcomes to be much below average, and their driving ability, future job satisfaction, and odds of having a gifted child at much above average). In light of this data, consider claims of individual prosecutors never to have convicted a suspect whose guilt they were not certain of, or defenders' claims never to have represented a client in a wrongful conviction.

100. See generally Memory Distortion: How Minds, Brains, and Societies Reconstruct the Past (Daniel L. Schacter ed., 1995); Frontline: What Jennifer Saw (PBS television broadcast, Feb. 25, 1997), transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/dna (on file with the *Columbia Law Review*) (describing rape victim's experience wrongly identifying her attacker). For a criticism of defense counsel as an adequate safeguard against misidentifications, see Dripps, supra note 23, at 118.

attorneys can zealously represent every client in an environment of severely constrained resources. They cannot,[101] as demonstrated by the well-documented track record that, collectively, they have not. The choice in underfunded systems is not between zealous advocacy and rights rationing. It is between haphazard, ad hoc rationing and thoughtful, well-conceived allocation.

Despite their inadequacy as a means for greatly stretching inadequate defense resources, default rules are a promising basis for practice protocols. Much as medical doctors follow standard diagnostic protocols—checklists of diagnostic strategies—when faced with initial symptom indicators, lawyers can rely on such default rules for improving the distribution of scarce resources over indigent cases in ways that maximize protection of the innocent. Scholars can help formulate these default rules by furthering empirical work on the most common sources of wrongful convictions and then adapting and disseminating it for practitioners' use. Nonetheless, there remains much room for (and need to rely on) attorneys' considered judgments about entitlement allocation. Rationing means leaving some needs unfilled; in criminal litigation, that means leaving more possibilities for inaccurate and unjust outcomes.

IV. Institutional Legitimacy

A. *Experimentalism in Institutional Roles*

The argument here may sound like a radical one: Attorneys are obligated to manage the allocation of defense entitlements because appellate courts and legislatures are functionally incapable of ongoing responsibility for the task and have implicitly delegated it to practicing lawyers, who collectively are well situated for this project and in fact already execute it in an ad hoc manner. This approach fits, not entirely comfortably, in the broader tradition of constitutional development as a process or collaboration among courts, political officials, and, to a lesser degree, private actors.

A large body of constitutional scholarship describes constitutional law, in various ways, as a process of shared elaboration among political as well as judicial branches of government.[102] Without attempting to de-

101. One can find clear evidence of attorneys failing to provide adequate representation in severely underfunded jurisdictions in studies on indigent defense systems, see, e.g., Spangenberg Report, supra note 6 (study of Georgia indigent defense system), and from litigation challenging inadequate funding systems, see supra notes 7–9. While there is no irrefutable evidence that every attorney in those settings made maximal efforts of zealous representation, it's an implausible assumption that simply more attorney zeal would cure the problem of inadequate representation.

102. For examples of this vast literature, see generally, e.g., Bruce Ackerman, We the People: Foundations (1991) (describing changes in constitutional law as critical "constitutional moments" outside the Article V amendment process); Louis Fisher, Constitutional Dialogues: Interpretation as Political Process (1988) (describing participation of political branches in formulating constitutional law); Louis Fisher & Neal

scribe that vast body of work here, I will simply note the widely-discussed view that "political officials participate in constitutional decision making in a myriad of ways," that "constitutional rules often are reshaped by the [Supreme] Court in response to forces exerted by the political branches and the public at large," and the Court often directly engages other actors in a process of "shared elaboration of constitutional rights" by "'remand[ing]' constitutionally controversial programs to the political branches."[103] In one aspect of this collaborative process, the Court aims to devise and check "quality-enhancing processes and structures" for constitutional elaboration by political actors and safeguards constitutional rights by focusing on how they are developed and implemented by actors beyond the judiciary.[104]

A recent and especially relevant model in this tradition is Michael Dorf and Charles Sabel's thesis of democratic experimentalism.[105] The experimentalist thesis is too rich to summarize adequately here. For reference, I will simply note that it describes "a model of participatory administration"[106] that includes a range of administrative and policymaking strategies by local actors, public and private, that implement broadly defined constitutional rights or governmental goals. Local actors take constitutional considerations into account in devising innovative means to meet general policy goals.[107] They are monitored by public entities—agencies, courts, legislatures—and in dynamic interchanges with these entities may gradually help redefine ends (government policies or constitutional commitments) as well as means.[108] Constitutional rights are not

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Devins, Political Dynamics of Constitutional Law 1 (1992) (describing "complex and pervasive interactions among the branches of government in making constitutional law"); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577 (1993) (arguing that "everyday process of constitutional interpretation integrates all three branches of government").

103. Dan T. Coenen, A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue, 42 Wm. & Mary L. Rev. 1575, 1580–82 (2001).

104. Id. at 1583–92.

105. See generally Dorf & Sabel, supra note 31.

106. Dorf, supra note 31, at 886.

107. As Dorf has described:

> In democratic experimentalism, local units of government are broadly free to set goals and to choose the means to attain them. Within these units, citizens—acting as individuals, through stakeholder organizations and through (relatively) local elected officials—engage in a form of practical deliberation that permits the discovery of novel solutions to their shared problems, thereby at least partially relaxing the grip of familiar political animosities.

Id. at 884–85.

108. See Dorf & Sabel, supra note 31, at 314–22, 354–73. Elsewhere Dorf explains:

> [M]eans and ends . . . [may be] in a continual state of disequilibrium. A court or agency attempting to satisfy a general legislative mandate may discover that the problem as defined by the legislature—such as nonviolent crime, to give an example I develop below—can only be addressed by focusing on factors outside the original mandate—such as drug addiction, to continue the example—

excluded from this process; rights gain their substantive content and operative meaning not merely from Court pronouncements but from the ongoing social processes by which they are specified, implemented, contested, and revised by legislative, executive, and private actors as well as courts.

The most explicit examples in the criminal procedure context are "prophylactic" rules governing searches and suspect interrogation. The Court invited federal and state political branches to fashion a remedy other than the exclusionary rule imposed in *Mapp v. Ohio*[109] as the means to discourage searches that are unconstitutional under the Fourth Amendment. It did the same with regard to the Fifth Amendment, encouraging legislatures to create a means to protect the right against self-incrimination during custodial interrogation other than the warnings the Court outlined in *Miranda v. Arizona*.[110] Dorf and Sabel offer an explanation for why this collaboration never yielded alternative remedial schemes[111] and suggest means by which the Court could better facilitate a more collaborative, democratic elaboration of constitutional rights—even those whose remedies are not explicitly prophylactic and contingent as in *Mapp* and *Miranda*—while still preserving the core function of rights as checks against governmental and majoritarian oppression.[112]

The dynamic responses of courts, legislatures, and defense attorneys in the ongoing construction of defendants' rights resemble such models of shared elaboration and democratic experimentation. The rationing principles I urge defense attorneys to implement would improve this interactive construction of rights by prompting defense attorneys to embrace openly their roles in the process and ground their rationing choices in defensible moral and constitutional values. But even an explicit and thoughtful embrace of this forced rationing task does not create a perfect process of rights construction, nor one that fits easily in models of collaboration and democratic experimentation. The Court has not structured a process of rights definition in which "[a]ll identifiable parties, including groups representing the interests of future defendants, [are] permitted to participate in the formulation and monitoring"[113] of

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resulting in a legislative redefinition of the problem, which in turn calls for another iteration of practical efforts, which in turn leads to further refinements of the problem, and so on, ad infinitum.

Dorf, supra note 31, at 882.

109. 367 U.S. 643, 655–60 (1961).

110. 384 U.S. 436, 445–58 (1966).

111. See Dorf & Sabel, supra note 31, at 459–63.

112. See id. at 463–69.

113. Id. at 464. The rationing project also fits uneasily in the Dorf-Sabel model because defense attorneys would have a hard time fulfilling two requirements of that approach: publicly stating goals and identifying measures of implementation progress. See id. at 288 (noting "those who engage in the experiment [must] publicly declare their goals and propose measures of their progress" while courts must ensure such experiments "respect the rights of citizens").

experiments in revision of defense entitlements. And in this context in which many entitlements depend on legislative action that the judiciary cannot control, the Court may not fully be able to do so.[114]

The irony of contemporary criminal adjudication policy is that trial lawyers, rather than being inappropriate candidates to make such policy, are the best institutional alternative with the capacity to do so. In the unique context of American politics, legislatures are too often untrustworthy to take full control of defining and allocating criminal defense entitlements.[115] In response to this institutional deficiency, the Supreme Court has dictated broad entitlements for criminal suspects that constrain legislative innovation.[116] Yet the Court's institutional limitations, along with the particular ways it has chosen to define constitutional criminal procedure entitlements, make the judiciary incapable of fine-tuning the allocation of rights in response to legislatively-imposed resource constraints.

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114. Defense entitlements may be a context more comparable to racial integration, in which the Court's realistic options are effectively constrained by prevailing social mores reflected in the political branches. For an argument on the Court's limited institutional capacity to force racial integration in conflict with popular sentiment, see generally Michael J. Klarman, *Brown*, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7 (1994).

115. My claim here is not that legislatures, despite their historical setting and institutional design, could never be trusted with constructing criminal procedure entitlements. Rather, the claim is only that, in modern American society, especially since the mid-twentieth century, our unique combination of cultural dynamics and institutional designs for legislatures makes anti-crime populism an exceedingly difficult obstacle for sensible criminal justice policymaking. For accounts that describe many of these components, see generally David Garland, The Culture of Control X (2001) (arguing that "the distinctive social organization of late modernity, . . . the free market, [and] socially conservative politics" dominate America and shape contemporary crime control arguments); Robert A. Kagan, Adversarial Legalism 61–96 (2001) (describing distinctions in European and American political structures, such as political party discipline and election of prosecutors, that help account for different criminal justice policies); James Q. Whitman, Harsh Justice (2003) (comparing American popular culture's historical preference for broad criminalization and degrading criminal punishment to Europe's trend towards narrower criminal liability and less demeaning punishments that preserve dignity for offenders); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 523–79 (2001) (describing the "political economy of crime definition" and the political incentives to consistently expand the scope of the criminal law in light of legislators' relationships with prosecutors, interest groups, and constituents). For an argument of how criminal procedure can become less controlled by courts and more democratically constructed, see generally Dan M. Kahan & Tracey L. Meares, Foreword: The Coming Crisis of Criminal Procedure, 86 Geo. L.J. 1153 (1998).

116. I do not deny here the well-known examples of constitutional holdings that set mere default rules and invite legislatures to devise acceptable alternatives. See Dorf & Sabel, supra note 31, at 452–64 (citing *Miranda* and *Mapp* as holdings that dictate specific procedural practices—warning and evidence exclusion, respectively—until legislatures create substitute remedies). But those rights relating to investigative practices have proved in reality to give legislatures little room for adequate alternatives, and the adjudicative rights I have focused on here—primarily counsel, jury trials, and expert assistance even for minor offenses—are doctrines that leave less room for legislative maneuvering.

Defense lawyers have the best knowledge of the implications of those constraints and of the contexts in which rights are implemented. At the same time, they are the least bound institutionally by incentives comparable to the populist politics that restrict legislatures on crime issues. Collectively defense attorneys have a particular commitment to zealous representation that could make them reluctant to adopt this explicit rationing project. But my sense is that the culture of zealous representation has been substantially diminished by widespread underfunding of defenders' practice settings.[117] Key restraints on attorneys—*Strickland*, ethical rules, and malpractice liability—are too weak to prevent their taking on this rationing role. Nonetheless, *Strickland* doctrine and trial courts' supervisory powers provide at least weak mechanisms for the judiciary to monitor and influence the ongoing process of rights allocation. This may, in fact, be the implication of *Wiggins v. Smith*, the Court's 2003 decision that vacated a capital murder conviction due to defense counsel's ineffective assistance.[118] If *Wiggins* works as a signal to lower courts to put more teeth in *Strickland* and tighten courts' notoriously lax monitoring of defense counsel conduct, the decision could be a well-timed development to re-engage the judiciary as a player in the construction of defendant entitlements in a world of scarce funding.[119]

As an example of constitutional collaboration, then, attorney allocation of procedural entitlements gains legitimacy from monitoring by courts and implicit delegation from legislatures as well as the grounding of its core premise—priority of factual innocence—in constitutional values. In the model of democratic experimentalism, this approach has the virtue of being implemented in a series of local experiments that can be, to a limited degree, monitored and refined.[120] Nonetheless, the project is more problematic than, say, drug courts or innovative policing. At some point, extreme underfunding of defense crosses the gray line between legitimate management of tight budgets and legislative defiance of constitutional criminal procedure. Forgoing beneficial strategies for some clients to help others is a troubling practice as a matter of profes-

117. We can make some inferences on this point from accounts of excessive caseloads and minimal attorney diligence in Georgia's recent study of its indigent defense system, see supra note 6, from the many actions brought against funding entities by defenders, see cases cited supra notes 7–9, and from the anecdotal accounts found in ineffective-assistance litigation.

118. See 123 S. Ct. 2527, 2542–44 (2003) (finding capital defendant's counsel ineffective under Sixth Amendment for failing to investigate and present mitigation evidence for defendant's sentencing proceeding).

119. For another argument that the judiciary can and should play an active role in alleviating the deficiencies of indigent representation in underfunded contexts, see Green, supra note 10, at 1193–95.

120. Monitoring is limited for reasons noted above: Attorneys face information deficits that limit their ability to know whether they are giving priority to the cases that most benefit from it. But trial courts and attorneys together can glean at least a partial sense of whether an explicit change in allocation of limited defense resources seems to work better than prior practices.

sional ethics, even if it is merely an improved version of a widespread existing practice. Courts' complicity in that process through a weak application of the *Strickland* doctrine and management of indigent defense funding takes back with one hand what the Supreme Court has given earlier, through constitutional interpretation, with the other. It is democratic experimentalism, but experimentalism of the second best. Attorneys' explicit rationing of rights is mandated by judicial and legislative action, and is monitored by those branches, so rationing must go on as thoughtfully as possible. But the collaborative nature of the project nonetheless leaves open troubling first-order issues about this means of constructing the real-life meaning of constitutional rights. And it risks the practical implication of relieving some pressure for reform by ameliorating the worst deficiencies of an inadequate, and unjust, system.[121]

B. *A Note on Judicial Rationing*

I have concentrated on defense attorneys, but trial judges play a significant role in resource rationing and will need to work from a comparable regime of default guidelines, both to monitor attorneys and to manage their distinct tasks in rights rationing. Trial judges control limited budgets from which they allocate funds for experts, investigators, and other defense support services; many also control funds for appointment of counsel. They also regulate, to a large extent, the pace of case disposition, which constricts or expands attorneys' investigation time and affects case strategy (by, for example, defining pressure for settlement).

Formally, judges grant or deny funding requests for experts based on doctrinal criteria governing those entitlements. But in the real world of mandated rationing, judges allocate those funds on the bases of case seriousness and, to a lesser degree, likelihood of innocence. Judges have basic information about offense seriousness; they know the charges and possible sentences. They typically have much less information about the possibility of innocence, though here again, strong cases for guilt are often easy to spot early on from the records of preliminary hearings and other early-stage information available to judges; counsel may be able to improve that knowledge at an early stage. For a large range of cases, though, judges will have little reliable information on innocence. To guide a wide range of discretionary judgments, they also have established heuristics that could benefit from empirically-based default rules on likely sources of error. Again, traditional over-confidence in fingerprint evidence and eyewitnesses are examples. In this way they can at least modestly give counsel more leeway for developing avenues most likely to reveal factual innocence.

121. On this last concern, a partial response is that reform is unlikely for reasons noted earlier—substantial increases in funding are politically unlikely (and are not clearly morally superior claims to other programs' funding claims), and systemic reforms that might allow the system to work more defensibly within resource constraints require unlikely revision by the Supreme Court of constitutional criminal defense entitlements.

The other guiding principle of harm reduction may be more useful for judges. In a forced-rationing regime, judges should—as they often likely do[122]—allocate *Ake* funds largely on the basis of case seriousness, with less emphasis on initial impressions of innocence. That should mean some favoritism for, say, rape, homicide, or drug distribution cases over, say, DUI and burglary cases, even when (a) the latter have equally meritorious arguments on the doctrinal merits, and (b) the odds of innocence look slightly (but not greatly) better in the latter, less serious, cases. In the context of forced rationing, the formally condemnable becomes, if not exactly good, a defensible choice of the least bad option. Local court norms that employ informal pressure to restrict *Blanton* entitlements to jury trials, or *Ake* entitlements to experts in minor cases,[123] are plausible rationing mechanisms when implemented to distribute limited resources to cases with greater liberty interests, and greater factual innocence claims, at stake. Trial judges' budget and docket control gives them a dominant role in those processes. The *Strickland* doctrine, if reinvigorated by *Wiggins v. Smith*,[124] as well as control of attorney appointments give them means to influence defense lawyers' dominant role in rights allocation.

V. CONCLUSION

Without a consensus between the judicial and legislative branches on the scope and content of constitutional rights, legislatures can restrict the practical access to and meaning of entitlements that cost money. Yet they are barred from doing so with much specificity. The task of allocating scarce entitlements among criminal cases is left largely to attorneys and trial judges.

A world of insufficient resources for indigent defense is not pretty. In this world, rationing occurs whether or not it is thoughtful and deliberate. The likely improvement we can expect from a more deliberate, well-conceived approach to rationing criminal defense is probably moderate at best. A policy for rationing brings to light the harsh choices that underfunding imposes. It does so while leaving open broader distributive issues, such as different qualities of justice for the rich and poor; it does little to undermine the policy argument for greater funding of indigent defense. Rationing parameters that give priority to innocence and harm reduction also accord with criminal law's commitment to just deserts.[125]

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122. See, e.g., Spangenberg Report, supra note 6, at 67 (stating that in Baldwin County, Georgia, judges openly told reporters that "they grant requests for experts and investigators only in death cases").

123. Examples of such rationing regimes, imposed by judges and understood by attorneys, are documented. Id. at 66–69.

124. 123 S. Ct. 2527 (2003).

125. Less obviously, it serves a "welfarist" goal. That is, it increases overall well-being, even if, through rationing strategies, reductions in wrongful conviction rates for innocents, and legal acquittals for the guilty, are only modest. For a discussion of cost-benefit

Rationing is a limited response. Regardless of improvements in American criminal justice on other fronts, we can improve defense practices of triage. This rationing regime can hardly compensate for necessary improvements in a range of criminal justice practices, such as better line-up and witness-interview procedures for minimizing misidentifications, revised suspect interrogations to prevent false confessions, more reliable and independent testing of forensic evidence, and greater caution using evidence (such as fingerprints) whose reliability has been overrated. Rationing defense practices does not fully compensate for deficiencies in police, prosecution, and judicial practices. It does not displace the strong arguments for greater criminal justice resources.

Rationing is also unlikely to facilitate those needed reforms. Even if implemented publicly—loudly and blatantly—it is hard to imagine explicit shortchanging of some defendants would prompt legislative attention that current tales of underfunded offices, excessive caseloads, and grossly ineffective assistance do not. But rationing can be implemented independently of those other practices, and the modest improvement we would get from intelligent rationing is unlikely to ameliorate the deficiencies of criminal justice to a degree that would reduce whatever political pressure exists for broader improvements.[126] It is likewise unlikely to damage client confidence in defense counsel, given the tenuous nature of that confidence under the current regime of scarce funding, which is made clear to defendants by the limited time many attorneys devote to their cases. Rationing criminal defense entitlements is both a long-standing court practice and, as a practical matter, inevitable. As such, it should be brought into the light of day and carried out thoughtfully as well as deliberately.

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analysis's capacity to serve overall well-being as a welfarist decision procedure in the administrative context, see Matthew D. Adler & Eric A. Posner, Rethinking Cost-Benefit Analysis, 109 Yale L.J. 165, 194–97 (1999). For an extensive philosophical defense of welfarism and an explanation of how it differs from traditional utilitarianism, see generally Matthew D. Adler, Beyond Efficiency and Procedure: A Welfarist Theory of Regulation, 28 Fla. St. U. L. Rev. 241 (2000).

126. And again, improvements in the provision of criminal defense services do succeed in state legislatures at times, as they did in Georgia in 2003 (although so far without any funding appropriation) and Texas in 2001. The Georgia governor signed the Georgia Indigent Defense Act on May 22, 2003. See Georgia General Assembly, Signed by Governor List, available at http://www.legis.state.ga.us/legis/2003_04/leg/govsign.html (last visited Nov. 6, 2003) (on file with the *Columbia Law Review*). The Texas governor signed the Texas Fair Defense Act on June 14, 2001. See Press Release from State Senator Rodney Ellis, Perry Signs Landmark Texas Fair Defense Act (June 14, 2001), available at http://www.senate.state.tx.us/75r/Senate/Members/Dist13/pr01/p061401a.htm (on file with the *Columbia Law Review*); see also Dana Tofig, ACLU Drops Public-Defender Suit, Hartford Courant, July 8, 1999, at A5 (noting ACLU withdrawal of an action against state of Connecticut for underfunding public defenders after legislature increased funding for indigent defense).