THE CONSTITUTION V. THE CONVENTION: THE EVOLUTION OF THE COURT-MANDATED RIGHT TO COUNSEL IN THE UNITED STATES AND EUROPE

SARA SUN BEALE* AND RICHARD E. MYERS II**

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* Charles L.B. Lowndes Professor, Duke University School of Law.

** Henry Brandis Distinguished Professor of Law, University of North Carolina School of Law.

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INTRODUCTION

Like the U.S. Constitution, the European Convention on Human Rights ("the Convention") guarantees both the right to a fair trial and the right to the assistance of counsel. The right to counsel has many dimensions, including a state's obligation to provide counsel to indigents, limits on state interference with counsel, a definition of the stages at which counsel's assistance is required, and standards for the competency of counsel. The U.S. Supreme Court has grappled with each of these dimensions, and right to counsel cases are beginning to reach the European Court of Human Rights ("ECtHR"). For instance, there are strong parallels between the ECtHR's decision in *Salduz v. Turkey*[1] and the U.S. Supreme Court's decision in *Miranda v. Arizona*.[2] Both decisions found that the trial court violated the right to legal assistance and a fair trial by admitting a defendant's statement made in police custody in the absence of a lawyer.[3]

This paper offers a comparative exploration of the enforcement of the right to counsel for indigent defendants in the United States of America and the member states of the Council of Europe, with a special focus on the structures established by the U.S. Constitution and the Convention. We ask the following questions: What roles do the U.S. Supreme Court and the ECtHR play as central courts in enforcing the right to counsel in the sovereign states from which they hear cases? What mechanisms exist to enforce the courts' pronouncements? And to what extent has the evolution of the right to counsel in each system been path dependent?

Although some version of a right to counsel has existed in the United States for more than two centuries,[4] the U.S. Constitution does not specifically address the right to counsel in state criminal proceedings, and the states have never explicitly agreed to a federal mandate providing counsel in criminal cases.[5] In fact, the federal constitutional right to the

1. Salduz v. Turkey, 2008-V Eur. Ct. H.R. 59.

2. Miranda v. Arizona, 384 U.S. 436 (1966).

3. *Id.* at 444–45; *Salduz*, 2008-V Eur. Ct. H.R. at 83. Note, however, that the *Miranda* decision grounded the right to counsel during custodial interrogation in the privilege against self-incrimination.

4. The Bill of Rights, ratified in 1791, guaranteed criminal defendants in federal trials "the right . . . to have the assistance of counsel for [their] defense." U.S. CONST. amend. VI.

5. Note, however, that there may be state constitutional rights to government-compensated counsel. Some state constitutions address the matter explicitly in the text. The Louisiana Constitution provides:

assistance of state-provided counsel was not articulated by the Supreme Court until the 1960s.[6] It was founded on the general guarantee of Due Process first made applicable to the states in 1868 at the conclusion of the Civil War.[7] Perhaps this institutional history helps to explain why the right, though widely recognized as a critical part of the United States' adversarial legal system, has remained more of an ideal than a reality for many American defendants. Criminal defense lawyers are both expensive and controversial, and there has been no consistent political support for adequately funding indigent defense.[8] Many indigent defendants find themselves represented by attorneys whose caseloads make effective representation impossible, and U.S. courts lack the institutional tools to provide this funding.[9]

In contrast, the recognition of a European right[10] to state-compensated defense counsel is more recent, and also more explicit. It is the product of a post-World War II international agreement that specifically guarantees a publicly-funded right to counsel.[11] The Convention that created the ECtHR also established an enforcement mechanism that has been strengthened by subsequent revision of the Convention, decisions of the ECtHR, and the

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> At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.

LA. CONST. art. I, § 13. In other states, the state supreme court has interpreted the state constitution to provide a right to adequate state-provided counsel. *See also* Rodriguez v. Rosenblatt, 277 A.2d 216, 223 (1971) (holding that "as a matter of simple justice, no indigent defendant should be subjected to a conviction entailing imprisonment in fact or other consequence of magnitude without first having had due and fair opportunity to have counsel assigned without cost.").

6. *See infra* Part II.

7. *See infra* text accompanying note 50.

8. *See infra* Part II.B.4.

9. *See infra* Part II.B.1–3.

10. The Criminal Procedure codes of various European states provided for a right to counsel long before the European Convention came into force. *See, e.g.*, STRAFPROZEßORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] sec. 137(1) (Ger.): "The suspect/defendant may make use of the assistance of a defense lawyer at any stage of the proceedings." An English language translation of the German Code provided by the German Ministry of Justice is available at https://urldefense.proofpoint.com/v2/url?u=https-3A__www.gesetze-2Dim-2Dinternet.de_englisch-5Fstpo_englisch-5Fstpo.html-23p1126&d=CwIDaQ&c=imBPVzF25OnBgGmVOlcsiEgHoG1i6YHLR0Sj_gZ4adc&r=GhcwAg0S9sZzdUmSU3EuAQ&m=G3DGH7NDY7rAP0Rz95j4lN_a94hqu4lft2VaA7lqtko&s=nECGADScrvnjT1Z7rqmf_IxwJytSqrDzaCrcUzKcv1I&e= [https://perma.cc/K366-TBY8].

11. *See* Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 6, ¶ (3)(c), Apr. 11, 1950, 213 U.N.T.S. 221 (stating that anyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require").

development of detailed administrative enforcement procedures that now comprise the Strasbourg supervisory system.[12]

Although many U.S. scholars are skeptical of the efficacy of international human rights treaties and courts,[13] the Strasbourg system created by the European Convention appears to offer several advantages over the U.S. constitutional system, which has been plagued by the twin problems of a lack of political will to provide sufficient funding for counsel and courts' inability to address systemic, rather than individual, problems.[14] The Convention reflects the explicit—and relatively recent—political commitment of each member state to publicly-funded counsel. And by placing the responsibility for implementation of the ECtHR's decisions in the hands of a political body, the Committee of Ministers ("CoM"), the Convention addresses—at least to some degree—the question of political will. Moreover, the CoM and the Court itself have now developed a repertoire of enforcement mechanisms that require member states to adopt general or systemic remedies.

But despite the apparent promise of this institutional design and the judicial and administrative developments we describe below, there are still severe limits to what the ECtHR can accomplish. It has limited resources to deal with a massive caseload[15] and ultimately lacks the means to compel recalcitrant member states to comply with the Convention short of expulsion from the Council of Europe. Indeed member states themselves retain the option of exiting from the Convention and the Council of Europe.[16] In contrast, after the seceding states lost the United States Civil War, the Supreme Court held that the union was "indissoluble;" the states had no right of exit.[17]

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12. *See infra* Part III.B. The term Strasbourg refers to the location of the ECtHR in Strasbourg, France, and the "Strasbourg system" refers to the collection of decisions by the Court combined with decisions by the Committee of Ministers.

13. For a trenchant statement of this view, see generally ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014).

14. *See infra* Part II.B.

15. *See infra* note 181 and accompanying text.

16. Statute of the Council of Europe, art. 7, May 5, 1949, 87 U.N.T.S. 103, 108. Greece withdrew from the Council of Europe in 1970, but it was readmitted in 1974 following a change in regime. *See* STATUTE OF THE COUNCIL OF EUROPE, FULL LIST: CHART OF SIGNATURES AND RATIFICATIONS OF TREATY 001, http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001/signatures?p_auth=O0WvDEB0 [https://perma.cc/6FT2-YR64] at n. 12 (last visited Oct. 11, 2016). Russia has reportedly considered withdrawing. *See, e.g.*, Ivan Nechepurenko, *Council of Europe Exit to Cut Russia Away From Europe*, THE MOSCOW TIMES (Feb. 4, 2015, 8:38 PM), https://themoscowtimes.com/news/council-of-europe-exit-to-cut-russia-away-from-europe-43568 [https://perma.cc/3TDN-KZGS].

17. *See* Texas v. White, 74 U.S. 700, 700 (1869) (holding that the Constitution did not permit states to unilaterally secede from the United States).

We begin by contrasting the founding documents of the United States and the Council of Europe. We then turn to a more detailed description of each system's current enforcement mechanisms and the outcomes for defendants in the United States and Europe in relation to the state-funded right to counsel.

I. THE CONSTITUTION AND THE CONVENTION

The framers of the U.S. Constitution did not focus directly on the protection of individual rights, and the Constitution contained no provisions requiring either the states or the new central government to provide counsel, or even to afford individual defendants Due Process or a fair trial. Rather, the framers relied on structural limitations to protect individual liberty by limiting the power delegated to the new federal government and creating an internal system of checks and balances.[18] As adopted by the Constitutional Convention, the proposed U.S. Constitution created the federal government; divided its powers among the executive, legislative, and judicial branches;[19] it also delegated to the new government only authority over enumerated matters of national concern such as foreign affairs, the establishment of a postal service, and the regulation of land, naval forces, and commerce.[20] The proposed Constitution vested all judicial power in the Supreme Court and any lower federal courts that Congress chose to create.[21] The Constitution contained no guarantees of personal rights or freedoms, and indeed this omission was one of the principal grounds of opposition to ratification.[22] The first ten amendments (known as the "Bill of Rights") were added later to address this concern and secure ratification.[23] The Bill of Rights includes the well-known rights to freedom of speech and religion, Due Process, and the

18. *See* William Bradford Reynolds, *Another View: Our Magnificent Constitution*, 40 VAND. L. REV. 1343, 1346 (1987) (discussing the framers' approach to protecting individual liberty).

19. U.S. CONST. art. I (legislative), art. II (executive), and art. III (judicial).

20. U.S. CONST. art. I, § 8, cl. 3 (interstate and foreign commerce), art. I, § 8, cl. 12–14 (raising and supporting armies, providing and maintaining a navy, and making rules for land and naval forces, respectively), art. II, § 2, cl. 1–2 (President is the Commander-in-Chief and has power to make treaties provided that two-thirds of Senate concurs).

21. U.S. CONST. art. III.

22. *See* Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 353–54 (1998). The text did contain one provision that is understood to be a personal right. Article III, Section 2 included the right to a trial by jury. Justice Scalia called this limitation on the judiciary "the spinal column of American democracy," as opposed to the "Johnny-come-lately" constitutional rights, like the right to counsel, which were added to the Constitution through the Bill of Rights. Neder v. United States, 527 U.S. 1, 30–31 (1999) (Scalia, J., concurring in part and dissenting in part).

23. *See* Bogus, *supra* note 22, at 353–54 (explaining that Virginia, the last state to ratify the Constitution, did not do so until after delegates to the state's constitutional convention had been assured that the creation of a bill of rights would follow ratification).

right to the assistance of counsel in criminal proceedings.[24] But the right to the assistance of counsel in the Bill of Rights applied only to the nascent federal government, not to the States, and it did not guarantee attorneys for defendants who could not afford them. The Sixth Amendment simply allowed defendants to retain and use private counsel in federal criminal prosecutions.[25]

The mechanisms to enforce decisions of the Supreme Court in criminal cases have evolved over the past 200 years, expanding significantly but also generating countervailing federalism constraints. In the Judiciary Act of 1789,[26] Congress created the lower federal courts. Although initially limited to matters such as suits in admiralty and actions involving citizens of different states or subjects of foreign nations, the jurisdiction of the lower federal courts was later expanded to provide a forum for claims arising under the federal constitution.[27] The Judiciary Act also provided that the new federal courts had the power to issue writs of habeas corpus.[28] Following the Civil War, the Constitution for the first time required the states to provide Due Process of law and to extend the privileges and immunities of federal citizenship to all Americans.[29] At that time, Congress also extended the writ of habeas corpus to state cases,[30] though the scope of review was initially understood to be very narrow.[31] These developments set the stage for the Supreme Court and the lower federal courts to review individual state convictions for federal constitutional error[32] either upon direct review of the

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24. U.S. CONST. amends. I, V, VI.

25. *See* John D. King, *Beyond "Life and Liberty": The Evolving Right to Counsel*, 48 HARV. C.R-C.L. L. REV. 1, 6–8 (2013).

26. Judiciary Act of 1789, 1 Stat. 73, ch. 20, §§ 2–3.

27. *See generally* Wythe Holt, "*To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421.

28. *See* Judiciary Act of 1789, 1 Stat. 73, ch. 20, § 14. Article I of the Constitution provides that Congress may not suspend the writ of habeas corpus. U.S. CONST. art. I, § 9.

29. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment also gave Congress the authority to pass legislation to enforce those rights through its enforcement clause. U.S. CONST. amend. XIV, § 5. In 1979, Congress enacted legislation providing a civil cause of action for "the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983 (2012).

30. RICHARD H. FALLON, JR., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1197 (7th ed. 2015) (calling the Habeas Corpus Act of 1867 the "most significant expansion of the writ"); *see also* BRIAN R. MEANS, INTRODUCTION TO HABEAS CORPUS: A PRIMER ON COLLATERAL REVIEW 28 (2015).

31. This initial legislative expansion of the writ for state prisoners could only be used to challenge the state court's jurisdiction in the matter and was not an available avenue to challenge other elements of the prisoner's detention. MEANS, *supra* note 30, at 28.

32. The Court formally recognized this power in *Brown v. Allen*, 344 U.S. 443, 485–87 (1953). In his concurring opinion, Justice Frankfurter noted that, "the prior State determination of a claim under the United States Constitution cannot foreclose [a federal court's] consideration of such a claim, else the State court would have the final say, which the Congress, by the Act of 1867, provided it should not

conviction in the Supreme Court or in a habeas action initiated in federal district court.[33] With nearly 700 federal court judges currently on the bench,[34] these developments allow defendants to seek habeas corpus relief in local courts that have the time and capacity to hear their cases. Upon a finding of such a constitutional error, the federal court can—depending on the procedure used to seek review—reverse a state conviction or order a state prisoner's release.[35]

The enforcement of the right to counsel in Europe reflects the very different history, purpose, and structure of the Council of Europe and the Convention. The Council of Europe was created following World War II, as Europe recovered from atrocities and widespread human rights abuses and responded to the beginning of the Cold War.[36] The Council's core purposes are more narrowly defined than those of the United States government or the European Union.[37] From its inception in 1949,[38] the Council identified the protection of rule of law, human rights, and fundamental freedoms as among

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have." *Id.* at 500 (Frankfurter, J., concurring). Even at this point, however, the justices remained anxious about disrupting the balance between federal and state courts. Justice Frankfurter emphasized that "a casual, unrestricted opening of the doors of the federal courts to these claims not only would cast an undue burden upon those courts, but would also disregard our duty to support and not weaken the sturdy enforcement of their criminal laws by the States." *Id.* at 498.

33. The Supreme Court has jurisdiction to issue a writ of certiorari to review judgments of the highest state court. 28 U.S.C. § 1257(a) (2012) (reviewing for claim of right, privilege, or immunity under the Constitution). The district courts have jurisdiction to entertain applications by state prisoners for a writ of habeas corpus under 28 U.S.C. § 2254 (2012).

34. U.S. COURTS, *Chronological History of Authorized Judgeships - District Courts*, http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts [https://perma.cc/GZ3R-QMYK] (last visited Oct. 11, 2016) (listing 667 district judges).

35. If a case reaches the Supreme Court on certiorari from the state judgment of conviction, the Court may hold that the conviction is invalid. But the Supreme Court hears fewer than 100 cases per year, and accordingly the vast majority of state convictions are challenged in habeas actions in the federal district court. As a technical matter, a habeas action brought by a state prisoner under 28 U.S.C. § 2254 is a civil action challenging the legality of the prisoner's detention. If the court finds a constitutional defect in the conviction, the prisoner's detention is unlawful, and the remedy is to order the state to release the defendant or retry him within a specified period of time. *See generally* CHARLES DOYLE, CONG. RESEARCH SERV., RL33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW (2006).

36. A full account of these issues is beyond the scope of this article, but another author has discussed the ebb and flow of the ECtHR's authority and legitimacy. *See generally* Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 LAW & CONTEMP. PROBS. 141 (2016).

37. The Council of Europe is not a "government" in the conventional sense. It consists of representatives of the member states and has only the limited function assigned to it by the treaty.

38. The Council of Europe was founded on May 5, 1949, by the Treaty of London (or Statute of the Council of Europe), which was signed on that day by ten states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103, http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680306052 [https://perma.cc/3S54-YCAK].

its principle functions.[39] Those purposes were implemented by the adoption in 1950 of the European Convention on Human Rights,[40] to which all forty-seven members of the Council are now signatories.[41] Human rights are the exclusive subject of the Convention, which defined the protected rights and created a court to adjudicate them (but no system of subsidiary human rights courts). Finally, the Convention provided—without further amplification—that the Committee of Ministers would supervise the execution of the Court's judgments. Although the initial cost of ratifying the Convention was low, because it did not require member states to submit to the jurisdiction of the ECtHR or provide for individual petitions, all major states later accepted these now compulsory features.[42]

From this rudimentary beginning, the Convention's enforcement mechanisms have been developed and strengthened by amendments to the Convention,[43] the development of detailed administrative procedures,[44] and further actions of the ECtHR as well as other organs of the Council of Europe.[45] And in recent years, the European Union has adopted measures that are based in part on the same principles underlying the ECtHR's judgments protecting human rights, including the right to counsel.[46]

II. ENFORCING THE RIGHT TO COUNSEL IN THE UNITED STATES

The U.S. constitutional right to counsel, as it is now understood, subjects the states to federal oversight. Pursuant to the Supremacy Clause,[47]

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39. In the preamble, the signatories reaffirmed "their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy." *Id.* Article 3 stated that "[e]very member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim . . . ." *Id.*

40. *See supra* note 11.

41. A list of the 47 signatories may be found at *Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL OF EUROPE TREATY OFFICE, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=1&DF=14/05/2015&CL=ENG [https://perma.cc/77GU-G8AM] (last visited Oct. 11, 2016).

42. *See* Madsen, *supra* note 36.

43. *See infra* Part III.B.1.

44. *See infra* Part III.B.2.

45. *See infra* Part III.B.3–4.

46. *See infra* Part III.C. *See* Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of Access to a Lawyer in Criminal Proceedings and in European Arrest Warrant Proceedings, and on the Right to Have a Third Party Informed upon Deprivation of Liberty and to Communicate with Third Persons and with Consular Authorities while Deprived of Liberty, 2013 O.J. (L 294) 1 (EC).

47. U.S. CONST. art. VI, cl. 2.

state convictions are invalid if they do not meet the standards of the federal Constitution.[48] However, as noted, the right to counsel was not a part of the original design of the U.S. Constitution. The current positive right to the assistance of government-paid counsel developed as a result of significant changes to both the text of the Constitution and the Supreme Court's interpretation of the text.[49] In the 1860s, following the U.S. Civil War, the Constitution was amended to impose new restrictions on states, including the requirement that they not deprive any person of life or liberty without Due Process of law.[50] A century later, in the 1960s, the Supreme Court read Due Process to incorporate most of the Bill of Rights—including the Sixth Amendment right to counsel—against the states.[51] In the landmark case of *Gideon v. Wainwright*,[52] the Court held that a right to state-compensated counsel was implicit in the general requirement of Due Process.[53] Then, for the first time, the Supreme Court and the lower federal courts[54] were faced with the task of enforcing the Court's right to counsel precedents in state proceedings.

In the following section, we describe how the right to counsel has been interpreted within the constraints of the American political system.

A. Due Process as a Basis for the Right to Counsel

1. The Right to Publicly-Compensated Counsel in a Criminal Case

In *Gideon*, the Supreme Court held that the Sixth Amendment imposes an affirmative duty on the states to provide publicly-compensated counsel to indigent defendants in any case where the defendant upon conviction might

48. *See infra* note 54. State courts are also obliged by the Supremacy Clause to apply federal constitutional standards. *See* U.S. CONST. art. VI, cl. 2.

49. We draw the discussion in this section, in part, from earlier work on this topic by one of us. *See generally* Richard E. Myers II, *Adversarial Counsel in an Inquisitorial System*, 37 N.C. J. INT'L L. & COM. REG. 411 (2011).

50. U.S. CONST. amend. XIV, § 1.

51. *See generally, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (incorporating the protection against double jeopardy); Klopfer v. North Carolina, 386 U.S. 213 (1967) (incorporating the right to a speedy trial); Malloy v. Hogan, 378 U.S. 1 (1964) (incorporating the protection against self-incrimination).

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

53. *Id.* at 341–44.

54. There are two avenues for federal review of state criminal convictions. A defendant whose conviction is affirmed by the state court on direct appeal may seek discretionary review by a petition for certiorari to the U.S. Supreme Court. If the defendant's appeal is unsuccessful, he may bring a separate collateral attack (commonly referred to as habeas proceedings), which is filed in federal district court under 28 U.S.C. § 2254. An adverse decision in the habeas proceeding may be appealed to the U.S. Court of Appeals, and certiorari may again be sought in the Supreme Court.

be incarcerated.[55] The Court reasoned that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[56] The Court subsequently ruled that the right to state-funded counsel is applicable not only at trial, but also at any critical stage after the commencement of adversarial proceedings.[57] It also held that defendants have the right to the "effective" assistance of counsel.[58] Finally, in its famous *Miranda*[59] ruling, the Court held that a defendant subject to custodial interrogation must be informed that he has a right to consult counsel and that if he cannot afford counsel one will be provided for him.[60]

2. The Test for the Adequacy of Counsel

As interpreted by the Supreme Court, the Sixth Amendment does not guarantee indigent defendants access to excellent lawyers or an error-free defense. As long as counsel is sufficiently competent to ensure that the judicial process was adversarial in nature, the constitutional standard has been met.[61] The Court has also held that representation should not be ruled ineffective unless "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[62]

In general,[63] the Supreme Court has held that ineffectiveness is to be judged by a two-pronged test.[64] First, the attorney's performance must be deficient, falling below an objective standard of reasonableness; and second,

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55. *See Gideon*, 372 U.S. at 345.

56. *Id.* at 344.

57. *See* Coleman v. Alabama, 399 U.S. 1, 11 (1970).

58. *Id.* at 7.

59. Miranda v. Arizona, 384 U.S. 436 (1966).

60. *Id.* at 467. Note, however, that *Miranda*'s holding on the right to counsel was grounded on the Fifth Amendment's protection against self-incrimination rather than the Sixth Amendment right to a fair trial, because adversarial proceedings had not yet commenced.

61. *See* United States v. Cronic, 466 U.S. 648, 656 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred.").

62. United States v. Strickland, 466 U.S. 668, 686 (1984).

63. There are a limited number of circumstances where the prejudicial effect required in the second prong will be presumed—the complete denial of counsel, counsel's refusal to participate, and perhaps cases where there is an unwaived conflict of interest that would so substantially interfere with counsel's ability to act as an advocate that he would be deemed not to have participated. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.7 (5th ed. 2009).

64. *Strickland*, 466 U.S. at 686.

counsel's failure must have prejudiced the defendant.[65] To demonstrate prejudice, the defendant must show a reasonable probability that the outcome of the case might have been different absent the deficient performance. In applying this test, defense counsel must be given wide latitude to represent the defendant, and judicial scrutiny must be "highly deferential."[66]

The combined effect of these rulings is that a defense attorney who barely passes the minimal threshold of competence meets the Sixth Amendment standard, as long as the attorney was allowed to contest the prosecution's case and in fact did so. Although federal courts found violations of the right to counsel in a limited number of instances where a defendant was systematically deprived of defense counsel,[67] for the most part the courts have found ineffectiveness only when the actions of counsel were so deficient as to reduce the trial to a "mockery of justice."[68]

3. The Reality of the Right to Counsel

Many indigent defendants in the United States are represented by attorneys who are demonstrably ineffective, and insufficient funding is directly related to inadequacy of representation.[69] Because public defense systems in most states are chronically underfunded,[70] defenders must represent their clients with only a fraction of the time and resources required to do their job well.[71] As the Right to Counsel Committee stated:

> Frequently, public defenders are asked to represent far too many clients. Sometimes the defenders have well over 100 clients at a time, with many clients charged with serious offenses, and their cases moving quickly through the court system. As a consequence, defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads

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65. *Id.*

66. *Id.* at 689. The Court declined to establish specific requirements that counsel must meet, stating:

> No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Id. at 688–89.

67. *See* RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 169 (2d ed. 2005).

68. *Id.*

69. *See* NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009) [hereinafter RIGHT TO COUNSEL COMMITTEE].

70. To illustrate, consider the funding scheme in Louisiana, where close to 70% of the budget for public defenders comes from minor court fees of $45 each, creating a system that inevitably prohibits defenders from spending sufficient time with their clients. Dylan Walsh, *On the Defensive*, THE ATLANTIC (June 2, 2016), http://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/ [https://perma.cc/TJ4D-QN7D].

71. *See* 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, 1844–49 (1994).

> make it impossible for them to practice law as they are required to do according to the profession's rules. They cannot interview their clients properly, effectively seek their pretrial release, file appropriate motions, conduct necessary fact investigations, negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources.[72]

Critics have called the current state of indigent defense a tragedy[73] and a "national disgrace."[74] The system, they argue, is one-sided, and it substitutes expediency for accuracy, and economy for justice.

B. Barriers to Enforcement

Constitutional rights should be enforced without regard to the public appetite for such enforcement, but there are structural, constitutional, and political reasons why the Supreme Court and the lower federal courts have not taken more steps to enforce the constitutional guarantee of access to effective counsel.

1. The Limitations Imposed by Federalism

The federal courts do not have a general supervisory power over state courts in the United States, and federalism limits the federal courts' role in constitutional enforcement. Although the Supreme Court has binding authority over state courts on constitutional questions, each of the fifty states is a separate sovereign in the U.S. structure. National power exists only to the extent that the states have delegated such power to the national government under a constitutional provision.[75] Federalism concerns have led the federal courts to construe narrowly both the right to counsel and the scope of federal judicial review. The limitations on federal judicial review have

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72. *See* RIGHT TO COUNSEL COMMITTEE, *supra* note 69, at 7.

73. *See*, *e.g.*, Lawrence C. Marshall, Gideon*'s Paradox*, 73 FORDHAM L. REV. 955, 968 (2004) (stating "grossly incompetent lawyers whom none of us would trust with traffic offenses are being entrusted with the lives and liberty of indigent defendants"); Anthony C. Thompson, *The Promise of* Gideon*: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 713 (2013) (calling indigent defense "the proverbial neglected child in the justice system");. *see generally, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2006) (describing multiple instances in which innocent defendants languished in jail without the ability to even contact a public defender).

74. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 894 (2009); *see also* Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right of Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 625 (1986).

75. The emphasis Supreme Court justices place on the concept of delegated powers varies. Strict constructionists treat it as a significant limitation, while others have been more willing to expand the Court's power to enforce a flexible, "living constitution." *See generally, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976).

affected both individual relief—particularly habeas corpus for state prisoners—as well as more sweeping remedies.

Although the scope of review available in habeas corpus actions expanded in the 1960s, beginning in the 1970s federalism concerns led the courts and Congress to retrench and severely limit judicial review of state convictions. In a series of 1960s decisions, the Supreme Court allowed state prisoners to challenge the constitutionality of their detention.[76] This seemed to lay the groundwork for a requirement that the states provide fully effective counsel.[77] But within a decade the Supreme Court cut back on the scope of post-conviction judicial review in response to countervailing federalism concerns,[78] and in the 1990s Congress further restricted habeas relief.[79]

Similarly, the principles of federalism pose a substantial barrier to federal courts ordering any state to engage in deep structural reform. Requiring a more fully-realized right to counsel would force state legislatures to engage in massive spending. As the bipartisan National Right to Counsel Committee notes: "Taken together, the Court's historic rulings, based upon the *federal* Constitution's Sixth Amendment counsel provision, are a significant, high-cost, unfunded mandate imposed upon state and/or local governments."[80] State budget crises across the nation[81] make it particularly unpopular for courts to order the level of spending that the commitment requires.[82]

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76. *See generally*, *e.g.*, Brown v. Allen, 344 U.S. 443 (1953).

77. Indeed, habeas review of state court criminal proceedings reached its "high water mark" in the 1960s under Chief Justice Earl Warren. *See* MEANS, *supra* note 30, at 34. For example, in *Townsend v. Sain*, the Court held that the federal courts could not only review the findings of law made by state courts, but they could also review findings of fact and order evidentiary hearings to uncover underlying facts. 372 U.S. 293, 313 (1963).

78. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (establishing a more stringent standard of reviewing constitutional violations for a "substantial and injurious effect" on the verdict as opposed to a harmless error standard); Stone v. Powell, 428 U.S. 465, 482 (1976) ("[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."); *see generally* MEANS, *supra* note 30, at 37.

79. *See* MEANS, *supra* note 30, at 40 (discussing the Antiterrorism and Effective Death Penalty Act of 1996, which Congress passed following the bombing of an Oklahoma City federal building amid concerns that federal habeas petitions hindered a swift response to such crimes); *see generally* FALLON, *supra* note 30, at 1198.

80. RIGHT TO COUNSEL COMMITTEE, *supra* note 69, at 29–30.

81. Tracy Gordon, *State and Local Finance: Where We're Going*, THE BROOKINGS INSTITUTION (Jan. 31, 2011) ("U.S. state governments are facing budgetary shortfalls that threaten important public services and state employee pensions. From New York to Texas to California, states across the country must deal with revenue and spending imbalances, forcing governments to make hard choices on how to meet basic needs.").

82. In fact, in the budget passed by the Louisiana state legislature for 2017, the funding for public

2. The Case or Controversy Limitation

Article III of the U.S. Constitution authorizes the federal courts to hear cases related to specific "cases" or "controversies."[83] As a result, remedies for violations of the right to counsel are administered by the courts on an *ad hoc* basis. Remedies usually take the form of conviction reversals or habeas relief, both of which apply only to the defendant in the case at bar. Even if a court recognizes that the violation of an individual defendant's right to counsel is part of a systemic problem, it will not ordinarily order a remedy beyond the reversal of that defendant's conviction.

What would it take to overcome the case or controversy limitation? It depends on whom you ask. Some scholars suggest that the federal courts would actually be exceeding their power to order relief unless they could establish that an actual violation occurred.[84] Other commentators believe that the federal courts have artificially limited class-action access to injunctive relief through abstention doctrines.[85]

Could a defendant prosecuted in state court persuade a federal court to issue an order enforcing the right to effective counsel for himself and all other similarly situated defendants if he could demonstrate that the state public defenders are so overworked that they cannot properly investigate and try cases, and that the lack of funding for experts and investigators necessitates triage among defendants? As the law now stands, such an order seems unlikely. The federal courts have been reluctant to enforce the right to counsel through injunctive relief. Instead, the courts have refused to hear such cases, invoking so-called *Younger* abstention to avoid the issue.[86] In *Younger v. Harris,*[87] the Supreme Court held that the lower federal courts should avoid hearing cases that unduly interfere with the legitimate activities of state courts. In cases involving access to counsel, the *Younger* doctrine usually means that the federal courts will not interfere until an individual

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defenders was cut by 62%. *See* Walsh, *supra* note 70.

83. U.S. CONST. art. III, § 2.

84. *See, e.g.*, Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 453–55 (2009) (noting the "proposition that plaintiffs seeking injunctive relief in federal court must assert an ongoing violation or one that is likely to occur again in the future." (citing Los Angeles v. Lyons, 461 U.S. 95, 96 (1983))).

85. *See, e.g.*, Eve Brensike Primus, *Litigation Strategies for Dealing with the Indigent Defense Crisis*, AM. CONST. SOC'Y FOR L. & POL'Y 4–5 (Sept. 2010).

86. *See generally* Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992). The case that suggested the most promise for a federal 42 U.S.C. § 1983 (1982) lawsuit was *Luckey v. Harris*, where the court recognized that prospective relief in a civil suit required a different standard than an ineffective assistance claim under *Strickland* and *Cronic*, but ultimately dismissed the case on abstention grounds. 860 F.2d 1012 (11th Cir. 1988).

87. Younger v. Harris, 401 U.S. 37, 44–45 (1971).

defendant has exhausted all possible remedies under state law.[88] As a result, structural reform litigation challenging the adequacy of indigent defense systems has seen little success in federal courts,[89] although there have been changes in several states attributed to settlements or consent decrees.[90]

3. The Limitations of Institutional Reform Litigation

Structural reform litigation also generates concerns about the institutional capacity of the federal courts and the related question of whether such judicial reforms can be effective. These concerns are heightened when state institutions are involved. Criminal justice reform also raises special concerns about public safety.

The Supreme Court's ruling in *Brown v. Plata*[91] provides a vivid example of the interaction of these concerns. The decision in *Brown* to require California to dramatically reduce its prison population deeply divided the Court. Critics questioned the legitimacy of the Court's action,[92] and it remains uncertain how effective the Court's ruling has been. A majority of the Court accepted the lower court's finding that California's grossly overloaded prison medical system was causing needless fatalities among inmates and was "broken beyond repair."[93] Accordingly, the majority upheld the lower court's order requiring California to reduce its prison population to 137.5% of design capacity within two years.[94] The ruling prompted two passionate dissents. Justice Scalia characterized the order as "the most radical injunction issued by a court in our Nation's history: an

88. *See* Primus, *supra* note 85, at 4–5 ("Federal courts have relied on abstention doctrine to refuse to hear federal civil rights cases that allege systemic right-to-counsel violations.").

89. *See* Drinan, *supra* note 84, at 468.

90. *See id.* at 443–62 (describing more successful "second generation" indigent defense litigation); Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2701–04 (2013) (discussing litigation in Florida, Virginia, Massachusetts, Georgia, Washington, Pennsylvania and Connecticut) ("[T]he wide differences among jurisdictions along many dimensions—including the nature and extent of their indigent defense problems, their local politics, the insulation of their courts from political pressures, and the availability of potential allies—mean that there can be no one model for successful structural litigation. But the experience of the varied jurisdictions that have achieved some substantial steps forward in this way suggests that structural litigation has potential . . . to generate the political will to promote indigent defense reform."); Anthony C. Thompson, *The Promise of* Gideon*: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 741 (2013) (discussing generally successful litigation in Connecticut, Georgia, Maryland, Massachusetts, Michigan, New York, and Washington, but noting the cases take years to complete and longer to implement any remedies).

91. Brown v. Plata, 563 U.S. 493, 493 (2011).

92. *See, e.g.*, Hans Bader, *Supreme Court Upholds Radical Court Ruling Releasing Thousands of California Prisoners*, WASH. EXAMINER (May 23, 2011), http://www.washingtonexaminer.com/supreme-court-upholds-radical-court-ruling-releasing-thousands-of-california-prisoners/article/145491 [https://perma.cc/8JXY-QSJ2].

93. *Brown*, 563 U.S. at 507.

94. *Id.* at 541.

order requiring California to release the staggering number of 46,000 convicted criminals," and stated that "the institutional reform the District Court has undertaken . . . ignores bedrock limitations on the power of Article III judges, and takes federal courts wildly beyond their institutional capacity."[95] Justice Alito emphasized that "[t]he Constitution does not give federal judges the authority to run state penal systems. Decisions regarding state prisons have profound public safety and financial implications, and the States are generally free to make these decisions as they choose."[96] Moreover, five years after the decision, it is unclear whether the Court's mandate has been effective. Although there was an initial reduction in overcrowding when state prisoners were moved to local jails—which may themselves have become overcrowded—progress stalled, and the state sought multiple extensions that some considered nothing more than a delay tactic.[97]

Similar questions have been raised about other forms of institutional reform litigation, such as public school desegregation, another area in which the federal judiciary imposed unfunded mandates on states. The Supreme Court ordered the desegregation of public schools in *Brown v. Board of Education*,[98] one of the most-heralded decisions in its history. But the decision had little immediate impact, particularly in the Jim Crow South, until Congress passed the Civil Rights Act in 1964.[99] A wave of lawsuits designed to desegregate southern public schools followed. Even with congressional action, long-lasting change has been elusive.[100] In the 1960s and 1970s, factors like racially segregated neighborhoods and "white flight" made desegregation difficult to enforce.[101] Now, even districts that had once been relatively integrated are seeing racial disparities in schools rise.[102]

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95. *Id.* at 550 (Scalia, J., dissenting).

96. *Id.* at 565 (Alito, J., dissenting).

97. *See* Lawrence K. Karlton, *Prison Litigation and District Court's Effect on the Electoral Process*, 69 U. MIAMI L. REV. 377, 383 (2015) (noting that the court denied California's request for adjustments of the prisoner population reduction target in 2012 and 2013, and later granted a two-year extension on the condition that the state bring no more appeals).

98. Brown v. Bd. of Educ. of Topeka, Kan., 349 U.S. 294 (1955).

99. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1022 (2004); *see generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (concluding that in the absence of action by Congress and the executive branch, U.S. courts were unsuccessful in desegregating schools, and more generally that courts have very limited means to bring about social change).

100. *See* Cowan v. Bolivar Cnty. Bd. of Educ., No. 2:65-CV-31-DMB, 2016 U.S. Dist. LEXIS 63480, at *157 (N.D. Miss. May 13, 2016) (requiring a school district that had avoided integration in the fifty years since *Brown v. Board* to consolidate its schools to remedy the unconstitutional segregation of its students).

101. Sabel & Simon, *supra* note 99, at 1023.

102. *See generally* Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating*

Despite the promise of *Brown*, "[s]ince the late 1970s, a sense of fatigue and futility has hung over large-scale desegregation efforts."[103]

4. The Interaction of Legal and Political Barriers

The underlying problem in enforcing a robust right to state-funded counsel is political: criminal defendants are a constituency without a champion. Barry Scheck explains the problem:

> [I]ndigent defense remains the neglected stepchild of the criminal justice system. It lacks a natural base, a core constituency with legislative influence—poor people charged with crimes, often disenfranchised by criminal convictions, and disproportionately from racial minorities, have limited political power in the first place. And there is a vicious cycle at work as well—the worse the representation of institutional defenders and court-appointed counsel, the less the community wants to rally for a larger defender budget or higher counsel fees.[104]

Thus the problem is one of political will, especially in a time of competing claims for limited government resources.[105] Lawyers are expensive, and the level of defense funding required to meet the demands of the most outspoken critics would be massive.

The Supreme Court's decisions can be seen as a response to this political reality. As Darryl Brown put it, "*Strickland* represents the [Supreme] Court's acquiescence to a widespread legislative judgment against the institutionalization of zealous defense counsel."[106] Moreover, since the problems in right to counsel cases arise principally in state—not federal—prosecutions, the federal courts are limited by principles of federalism. Congress may have the constitutional authority to pass a national right to counsel law,[107] but it has not done so.

III. ENFORCING THE RIGHT TO COUNSEL IN EUROPE

The right to counsel developed very differently in Europe than in the United States. In the United States, the right to state-compensated counsel

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Schools: The Retreat from School Desegregation in the South 1990–2000, 81 N.C. L. REV. 1563 (2003).

103. Sabel & Simon, *supra* note 99, at 1023.

104. Barry Scheck, *Four Reforms for the Twenty-First Century*, 96 JUDICATURE 323, 324 (May–June 2013) (footnotes omitted).

105. Carol Steiker states the problem this way: "With clamoring demand for dwindling public funds for schools, hospitals, roads and bridges, public transportation, firefighters, and police officers, it is not surprising that more money for lawyers representing alleged criminals is not high on anyone's list. Generating the will to provide these crucial resources is an enormous challenge." Steiker, *supra* note 90, at 2700.

106. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1604 (2005).

107. *See* Cara H. Drinan, *The National Right to Counsel: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 489 (2010).

was extended to state prosecutions long after adoption of the U.S. Constitution, and it has since been severely limited by the judiciary's inability (or unwillingness) to impose systemic reforms on the states. Despite formal recognition of the right, resource constraints have crippled the representation of indigent defendants in state prosecutions, and the courts repeatedly face serious questions about the sufficiency of that representation, its limitations, and its requirements. As a practical matter, the right to counsel has been a hollow promise: most indigent defendants do not receive truly effective representation. On the other hand, an independent European right to counsel was created only sixty-five years ago by a treaty that explicitly guaranteed state-funded counsel, and this understanding of the right was ratified by each of the Council of Europe's member states. Although initially there were few methods to enforce the judgments of the ECtHR, multiple enforcement mechanisms have been developed over the last few decades. Both the Court itself and the Committee of Ministers ("CoM"), the Council of Europe's decision-making body,[108] have expanded their repertoire of enforcement mechanisms, which now make up the modern Strasbourg supervisory system. The Court's judgments now include not only specific remedies for individual claimants, but also general remedies mandating systemic change.[109] Further, the CoM now asserts the authority to instruct member states to develop general, forward-looking remedies for violations of rights, assuring that systemic problems are addressed.[110] The CoM can make recommendations as to how states should safeguard rights, particularly when a single member state is repeatedly the source of cases before the Court. Other Council of Europe organs, including the Parliamentary Assembly and the Commissioner for Human Rights, can also exert pressure on noncompliant states.[111] In addition to the Council of Europe, the European Union—an independent body with overlapping membership—has created further pressure for states to recognize the right to counsel with a directive instructing its member states to provide suspects with access to an attorney.[112]

Although these changes in the Strasbourg supervisory system (and the EU directives) lay the groundwork for more robust implementation of the right to counsel in Europe than in the United States, the responses of member states to the Court's judgment in *Salduz* have been uneven. This may be due

108. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 46, ¶¶ 1–2.

109. *See infra* Part III.B.3.

110. *See infra* Part III.B.2.

111. *See infra* Part III.B.4.

112. *See generally supra* note 46.

to the lack of consequences with any real bite for member states that refuse to comply with the ECtHR's judgments. Moreover, the determination that counsel must be provided in the pretrial phase does not pose the most difficult task for courts. The Strasbourg system has not yet faced the even more difficult task of determining whether counsel, if provided, is adequate.

A. The Convention's Original Enforcement Mechanism

The initial Convention provided only a skeletal framework for the enforcement of the ECtHR's judgments. Article 46 committed all contracting states to "abide by the final judgment of the Court in any case to which they are parties," and stated that the final judgment of the ECtHR "shall be transmitted to the Committee of Ministers, which shall supervise its execution."[113] The CoM is made up of the foreign ministers of all member states (or their permanent representatives). In practice, the foreign ministers quickly delegated this supervisory authority. In May 1951 the Committee invited each state to appoint a permanent representative who would reside in Strasbourg, and in 1952 the Committee decided that each minister could appoint a deputy with the same decision-making powers as the minister. The deputy usually serves as a state's permanent representative.[114]

Prior to 1998, the CoM had only four methods of enforcement at its disposal if a member state appeared unwilling or unable to comply with a ECtHR judgment: applying diplomatic pressure, issuing "interim resolutions" encouraging states to comply, publishing press releases highlighting compliance issues, and expelling the offending member state from the Council of Europe.[115] The first three methods were not always effective in ensuring compliance, and the last was so extreme that it has only been used once, and then in response to a military takeover, not an ECtHR compliance issue.[116]

B. The Convention's Current Enforcement Regime

The original bare-bones provisions of the Convention have been supplemented by amendments to the Convention, a variety of new

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113. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 46, ¶¶ 1–2.

114. *See* COUNCIL OF EUROPE, *About the Committee of Ministers* (2016), http://www.coe.int/t/cm/aboutCM_en.asp [https://perma.cc/7MS7-UFBK] (last visited Oct. 11, 2016).

115. Déborah Forst, *The Execution of Judgments of the European Court of Human Rights, Limits and Ways Ahead*, 7 VIENNA J. ON INT'L CONST. L. 1, 3, 14–15 (2013).

116. Greece was on the verge of being expelled from the Council in 1967, after a military junta took control of the government. But at the last minute, the junta itself withdrew Greece from the Council. *See* B. VIVEKANANDAN, INTERNATIONAL CONCERNS OF EUROPEAN SOCIAL DEMOCRATS 123 (1997).

administrative measures ("working methods"), new judicial processes, and actions by other organs of the Council.

1. Amendments to the Convention

Amendments to the Convention made the Court's jurisdiction mandatory and gave the CoM additional enforcement options. Protocol 11,[117] which entered into force in 1998, allowed individuals to apply directly to the Court when they believed their rights had been violated by member states and made acceptance of the Court's jurisdiction mandatory for all member states.[118] Protocol 14, which entered into force in 2010,[119] made two changes in Article 46. First, if the CoM determines that uncertainty regarding the meaning of a judgment is hindering its enforcement, it can seek an interpretation of the ruling from the ECtHR.[120] This change is intended to resolve deadlocks when the Court's jurisprudence is unclear.[121] Second, in a case in which the CoM believes a state is refusing to abide by a judgment to which it is a party, the CoM can refer to the Court the question whether the state has failed to fulfill its obligation.[122] This provision is intended to be applied in exceptional circumstances when the respondent state and the CoM have failed to reach agreement on adequate measures, or the respondent state

117. Protocols to the Convention are similar in some respects to amendments to the U.S. Constitution in that they may revise, supplement, or redefine sections of the original document's text. Just as amendments must be ratified by states, the protocols are similarly ratified as separate treaties by member states. *See* EUROPEAN COURT OF HUMAN RIGHTS, THE ECHR IN 50 QUESTIONS 3 (2014), http://www.echr.coe.int/Documents/50Questions_ENG.pdf [https://perma.cc/B5KN-5L7U]. Protocol 11 has been signed and ratified by all forty-seven member states. *See Chart of Signatures and Ratifications of Treaty 155 – Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* EUROPEAN COURT OF HUMAN RIGHTS (2016), http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/155/signatures?p_auth=9vH3s4r1 [https://perma.cc/V9T9-7WKJ] (last visited Oct. 11, 2016).

118. *See generally* Ed Bates, *The UK and Strasbourg: A Strained Relationship—The Long View*, 12 UNIV. OF LEISCESTER SCH. OF LAW. No. 15-05 (2015) (describing the opposition to this change in the United Kingdom).

119. All forty-seven member states have signed and ratified this protocol. *See Chart of Signatures and Ratifications of Treaty 194 – Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* EUROPEAN COURT OF HUMAN RIGHTS (2016), http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/194/signatures?p_auth=NKH3Mvl2 [https://perma.cc/24J2-9JQ8] (last visited Oct. 11, 2016).

120. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 46, ¶ 3.

121. Forst, *supra* note 115, at 15.

122. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 11, at art. 46, ¶ 4. Referral to the Court under art. 46, ¶ 4, by itself, has no consequences other than a possible finding of the Court that the State has failed to comply, under art. 46, ¶ 5. The case is then referred back to the Committee of Ministers "for consideration of the measures to be taken." The Convention does not indicate what those measures might be. That is where the administrative procedures, discussed in Part III.B.2, come into play.

is unable (or unwilling) to take the necessary measures. It therefore fills a gap between what one author has called "the soft (interim resolutions) and nuclear (expulsion from the Council of Europe) means at the disposal of the Committee of Ministers."[123] The changes were intended to have a deterrent effect on the states and to increase the legitimacy at the national level of necessary but unpopular measures, such as budgetary allocations.[124] Actions by the CoM could give national lawmakers an incentive to adequately fund counsel for indigent defendants, even in the absence of strong public support for such a program.

2. Administrative Procedures

Many administrative measures have been implemented to streamline the Court's processes and to provide greater oversight of states' execution of judgments. The CoM holds four Human Rights meetings a year, and day-to-day supervision is in the hands of the Deputies, who meet weekly, and receive assistance from the CoM Secretariat.

In 2010, the Deputies instructed the Secretariat to prepare detailed plans for a twin-track approach to continuous supervision.[125] Under the new system, all cases are considered under the standard procedure, unless specific factors warrant the enhanced procedure.[126] Factors calling for the enhanced procedure include judgments requiring urgent individual measures, "pilot judgments,"[127] and "judgments raising structural and/or complex problems as identified by the Court or by the Committee of Ministers."[128]

When the ECtHR has found a violation by a member state, that state is required to go through a supervised process to prevent similar violations in the future. In cases falling under the "standard" procedures, member states that are found to be in violation of the Convention are expected to present an "action plan" or a series of action plans.[129] Action plans detail the steps the state intends to take to implement a judgment by individual measures

123. Forst, *supra* note 115, at 16.

124. *Id.*

125. COUNCIL OF EUROPE, DEPARTMENT FOR THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS, SUPERVISION OF THE EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS: IMPLEMENTATION OF THE INTERLAKEN ACTION PLAN—MODALITIES FOR A TWIN-TRACK SUPERVISION SYSTEM, Doc. No. CM/Inf/DH (2010) 37, at 2 (Sept. 6, 2010), https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804a327f [hereinafter SUPERVISION OF EXECUTION].

126. *Id.* For data on the classification of the cases under the supervision of the CoM in 2015, see EUR. COMM. OF MINISTERS, 9TH ANNUAL REPORT:SUPERVISION OF THE EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS 58–61 (2015).

127. *See infra* Part III.B.3(a).

128. SUPERVISION OF EXECUTION, *supra* note 125.

129. *Id.* at 3.

affecting the case at bar and more general measures, no later than six months after a judgment becomes final.[130] The Secretariat reviews and assesses all proposed action plans.[131] Member states then produce an "action report" when they believe all necessary measures have been taken.[132] If the state and the Secretariat agree that the measures adopted or implemented are satisfactory, then the Secretariat will propose that the Committee adopt a final resolution closing the case at the next Human Rights meeting of the CoM.[133]

For cases falling under the "enhanced" procedures, the Secretariat assumes a "more intensive and proactive" role.[134] It may assist in the preparation or implementation of action plans, provide expertise, and develop bilateral or multilateral cooperation programs to address complex and substantive issues.[135] A standard timetable is provided, and the new procedures also deal with the failure of a state to present an action plan or report, and for the resolution of disagreements between the member state and the Secretariat.[136]

Thus, while U.S. courts will generally take no action beyond reversing an individual conviction, in Europe, the CoM and the other agencies of the Council of Europe have asserted the authority to announce that systemic changes are required, to monitor progress, and to reward compliance. When necessary, they can also become closely involved in developing solutions and ensuring that rights are respected.

3. Judicial Enforcement

Although the ECtHR initially had a "modest conception of its remedial powers," in recent years the Court has expanded its orders to include not only specific remedies for the individual claimant, but also more general remedies to prevent future violations.[137] To prevent similar violations in the future, states may be required to repeal or revise offending legislation, modify jurisprudence, or enact "practical measures" such as the building of new prisons, the appointment of more judges, or the modifications of budgetary

130. SUPERVISION OF EXECUTION, *supra* note 125.

131. *Id.* at 3–4.

132. *Id.* at 4.

133. SUPERVISION OF EXECUTION, *supra* note 125.

134. *Id.* at 5.

135. SUPERVISION OF EXECUTION, *supra* note 125.

136. *Id.* at 6–7.

137. Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT'L L. 125, 146–47 (2008); *see also* Forst, *supra* note 115, at 3–10.

arrangements.[138] Surveying thirty-one decisions involving sixteen nations between 2013 and 2014, the Open Society Justice Initiative found twenty-seven ECtHR-ordered "general measures."[139] These included ordering states to reform their system of judicial discipline, implement reforms in legislation and administrative practices, set specific time limits, and introduce, as soon as possible, a specific and clearly regulated compensatory remedy. Five decisions were pilot judgments and four directed the CoM to take further action.[140] The ECtHR's most significant procedural development is the pilot judgment system.

a. Pilot Judgments

In response to a growing number of repetitive cases from the same member states, which contributed to backlogs and delays, the Court introduced the system of pilot judgments.[141] This system has been incorporated in the Court's rules, but not into the Convention. Under the pilot judgment procedure, the Court identifies the cause of systemic violations giving rise to many similar cases in a given state. The Court then suspends examination of the repetitive judgments while supervising general measures intended to correct the deficiency giving rise to the cases. The pilot case is subject to the aforementioned enhanced procedures, and respondent states remain responsible for identifying measures to implement the judgment. This procedure has been used with some success in a few cases and variants have also been employed in a larger number of cases.[142] The new procedure has been described as an "important weapon" and a "shift away from the individualized-justice notion" that puts the Court in a "potentially more dynamic, 'constitutional' role."[143] But the pilot judgment procedure has also been criticized as exceeding the authority conferred by the Convention and interfering with the latitude states should have to implement the Court's judgments.[144] Although there is no system of sanctions for non-

138. Forst, *supra* note 115, at 9–10.

139. OPEN SOCIETY JUSTICE INITIATIVE, RECENT REMEDIES DECISIONS FROM THE EUROPEAN COURT OF HUMAN RIGHTS (June 2015), https://www.opensocietyfoundations.org/sites/default/files/case-digests-echr-remedies-2013-2014-20150708.pdf [https://perma.cc/U25C-MUXM].

140. *Id.*

141. *See* ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: FROM ITS INCEPTION TO THE CREATION OF A PERMANENT COURT OF HUMAN RIGHTS 490–91 (2010) (describing the pilot system); Forst, *supra* note 115, at 19. The seminal case was *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 3.

142. BATES, *supra* note 141, at 491.

143. *Id.*

144. Forst, *supra* note 115, at 20 (citing PHILIP LEACH ET AL., RESPONDING TO SYSTEMATIC HUMAN RIGHTS VIOLATIONS: AN ANALYSIS OF 'PILOT JUDGMENTS' OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THEIR IMPACT AT NATIONAL LEVEL 29 (2010)); Markus Fyrnys, *Expanding Competences*

implementation of pilot judgments, the Court retains the authority to unfreeze all of the similar cases if no satisfactory solution is adopted.[145]

b. Other Judicial Techniques

In a number of cases the Court has shown an increasing willingness to use its judgments to condemn a state when a new violation results from the state's failure to implement a previous judgment of the Court and to call on national courts to implement its jurisprudence. Thus in *Greens and M.T. v. U.K.*[146] the Court expressly stated that the new violation originated in the failure of the UK to execute an earlier judgment in *Hirst v. U.K. (No. 2)*.[147] Decisions of this nature contrast with the Court's earlier statements that it would not control in a second judgment how a state had implemented an earlier judgment.[148] The Court has also pointed out that domestic courts are obligated to give effect to Convention standards as interpreted by the Court itself.[149]

4. Actions by Other Institutions of the Council of Europe

Both the Parliamentary Assembly and the Commissioner for Human Rights have also undertaken activities intended to help implement the Court's judgments. "Since 2000, the Parliamentary Assembly has engaged in a monitoring procedure for the execution of judgments," with the idea that delegations to the Parliamentary Assembly should put pressure on national powers to execute the Court's judgments.[150] The Parliamentary Assembly's Commission for Legal Affairs and Human Rights produces reports, and it drafts both resolutions for the Assembly and questions for the CoM. The Commissioner for Human Rights also participates in these activities. Additionally, under Protocol 14 the Commissioner can intervene in cases before the CoM as a third party, and he has done so.[151]

5. Pushback: Challenges to the ECtHR's Legitimacy

The changes in the ECtHR's jurisprudence and procedures have been controversial. In the Brighton Declaration in 2012, all member states called

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by the Judicial Lawmaking: The Pilot-Judgment Procedure of the European Court of Human Rights, 12 GERMAN L.J. 1231, 1249 (2011).

145. Forst, *supra* note 115, at 21.

146. Greens and M.T. v. U.K., 2010-VI Eur. Ct. H.R. 57.

147. Hirst v. U.K. (No. 2), 2005-IX Eur. Ct. H.R. 187.

148. *See* Mehemi v. France (No. 2), 2003-IV Eur. Ct. H.R. 311.

149. *See* Forst, *supra* note 115, at 22.

150. *Id.* at 23.

151. *See id.* at 24.

for significant reforms,[152] and scholars have raised a variety of concerns about the Court. Although a full description of the criticism of the ECtHR is beyond the scope of this article, we note briefly some key points. First, some critics suggest that the Court has given insufficient weight to state sovereignty.[153] Second, they say the Court is not sufficiently attuned to the intricacies of the various national systems and issues orders that are both ill-suited to those systems and beyond the Court's power.[154] Third, they say the Court lacks the institutional capacity to manage its own caseload.[155] Finally, some critics question the competency of the Court's judges.[156]

C. The European Union Directive

As the Council of Europe has enhanced its enforcement mechanisms and expanded its role in protecting defendants' rights, the European Union has independently pursued some of the same goals, providing a strong additional incentive for states to guarantee a right to counsel for defendants. In an effort to buttress the legitimacy of the European Arrest Warrant, which provides for the arrest and transfer of suspects throughout the European Union, the EU has endeavored to standardize the pre-trial rights afforded to suspects across the Continent. In 2009, it issued a resolution laying out a Roadmap with the purpose of "strengthen[ing] the rights of suspected or accused persons in criminal proceedings."[157] The Roadmap announced several unifying procedural measures and provided that nations would have

152. *See* Madsen, *supra* note 36, at 144.

153. Madsen, *supra* note 36, at 144 ("With the Court increasingly overburdened and backlogged—yet still progressively expanding the scope of the Convention—a number of member states launched, for the first time since the Court's creation in 1959, a systematic critique of both the Court's power over national law and politics and the quality of the Court's judges and their judgments."); *see also* JONAS CHRISTOFFERSON & MIKAEL R. MADSEN, *Postscript: Understanding the Past, Present and Future of the European Court of Human Rights*, in THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS 230, 239 (2013); COUNCIL OF EUROPE, BRIGHTON DECLARATION (Apr. 20, 2012). See particularly Part B, Interaction Between the Court and National Authorities, calling for increased attention to the margin of appreciation and the subsidiarity of the Convention system to national courts; Part D, Processing of Applications, noting the backlog of the Court; and Part E, Judges and Jurisprudence of the Court ("The authority and credibility of the Court depend in large part on the quality of its judges and the judgments they deliver.").

154. *See, e.g.*, Madsen, *supra* note 36, at 165 ("The response from French judges was that the ECtHR simply failed to grasp the complexity of French justice in the Court's pursuit of a superficial and formalist attempt to set uniform European standards.").

155. *See id.* at 172–73.

156. Madsen, *supra* note 36, at 169 ("[T]he 2012 Brighton Summit further underscored that the power of the ECtHR was no longer beyond political debate . . . [I]t openly raised the political question of the future role of the Court with a series of negative comments on the quality of the judges and their judgments.") (citing Brighton Declaration, ¶¶ 23 and 25c (Apr. 20, 2012)).

157. Council Resolution 295/01 of Nov. 30, 2009, on a Roadmap for Strengthening Procedural Rights of Suspected or Accused Persons in Criminal Proceedings, 2009 O.J. (C 295) 1.

three years to comply with any attendant directives. Thus far, three directives have been issued relating to interpretation and translation (2010),[158] the right to information in criminal proceedings (2012),[159] and the right of access to a lawyer (2013).[160] The 2013 directive mandates that suspects have access to a lawyer, including during police questioning, and that the lawyer be able "to be present and participate effectively" during questioning.[161]

Although the Roadmap directives were issued independently of the Convention and the ECtHR,[162] they place additional pressure to comply with the Convention's pre-trial counsel requirement on countries that are members of both the Council of Europe and the European Union. There is evidence that this pressure has already had an impact in countries that were reluctant to act on the basis of *Salduz* alone. In France, the reforms that followed *Salduz* allowed attorneys to be present at questioning, but not to speak or to examine the most important documents relating to suspects' arrests.[163] Despite French attorneys' protests that these restrictions were inconsistent with *Salduz*, French courts approved the reforms several times. But after the EU issued its 2013 directive on the right to information in a criminal proceeding, the attorneys revived their protests, arguing that Article 7 of the directive established their right to access a suspect's entire file. As a result, France's implementing law, which was eventually passed in 2014, "was under the microscope before it was even promulgated."[164] And while the implementing law did not go as far in opening up suspects' files as many in France desired, the law did slightly expand the information that must be made available to attorneys.[165]

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158. Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the Right to Interpretation and Translation in Criminal Proceedings, 2010 O.J. (L 280) 1.

159. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in Criminal Proceedings, 2012 O.J. (L 142) 1.

160. Directive 2013/48/EU, *supra* note 46.

161. Directive 2013/48/EU, *supra* note 46, at art. 3, ¶¶ 1–3.

162. Although the EU and the ECtHR are independent bodies, the directive does refer, explicitly and approvingly, to the ECtHR's work on pre-trial rights, stating that it is "building upon Articles 3, 5, 6 and 8" of the Convention and that the ECtHR's case-law "sets standards on the right of access to a lawyer." Directive 2013/48/EU, *supra* note 46, at ¶ 12.

163. Jessica Finelle & Alex Tinsley, *Access to the Criminal Case File: French Example Shows Potential Impact of Roadmap Directives*, EUTOPIA LAW (June 3, 2014), http://eutopialaw.com/2014/06/03/access-to-the-criminal-case-file-french-example-shows-potential-impact-of-roadmap-directives [https://perma.cc/MC89-ZF2P].

164. *Id.*

165. *Id.*

D. Evaluating the Implementation of ECtHR Decisions

To evaluate the success of these mechanisms in implementing the right to counsel decision in *Salduz*, and more generally, we need to ask several questions. First, did the state party to the case comply with the judgment? And what does compliance entail? Do other states comply with the decisions of the ECtHR? We find a mixed picture. Although Turkey adopted corrective legislation, it is unclear whether it fully addresses the issues. Several other member states have taken actions to implement *Salduz*, but the measures they have adopted may not guarantee a right as robust as that envisioned by the ECtHR. Finally, member states that do not respond may face no real consequences.

1. Compliance with *Salduz* in Turkey

One measure of success focuses on the individual applicant, and perhaps other similarly situated applicants from the same member state Despite the adoption of corrective legislation in Turkey and sustained attention from the ECtHR and the CoM, it remains unclear whether the general problems brought to light in *Salduz* have been satisfactorily addressed. The *Salduz* case was not an isolated incident. An anti-terror law had denied the minor applicant the assistance of counsel during his interrogation, and additional Turkish cases came to the ECtHR after *Salduz* revealing systematic violations of the right to counsel. The ECtHR ordered relief in these cases as well,[166] and for purposes of implementation by the CoM, these cases have been treated as a group. Turkey adopted legislative changes repealing the law that had denied counsel to the applicant in *Salduz* and providing more generally for pretrial assistance of counsel.[167] The Turkish government argued that this satisfied its obligations. However, the *Salduz* group of cases remained under the supervision of the CoM. In 2012 and 2013, non-government organizations ("NGO"s) filed requests that the cases be subject to enhanced supervision and that the Turkish Government be required to provide additional information and undertake additional activities.[168] The NGOs noted that although *Salduz* had eventually been

166. EUROPEAN COURT OF HUMAN RIGHTS, FACTSHEET—POLICE ARREST AND ASSISTANCE OF A LAWYER (Apr. 2015) (on file with author) (citing Turkish cases involving both juveniles and adults from 2009 and 2010 in which damages were awarded).

167. For a detailed description of the additional cases and the measures taken by Turkey, see Kerem Altıparmak, *Implementation of the Judgment of Salduz/Turkey: Monitoring Report*, HUMAN RIGHTS JOINT PLATFORM (Ayşegül Bahçıvan trans., July 2013), http://www.aihmiz.org.tr/files/06_Salduz_Report_EN.pdf.

168. *Id.* at 8 (making recommendations and noting earlier Open Society Institute Justice Initiative's request that the *Salduz* cases be given enhanced supervision).

granted a retrial,[169] other defendants were not retried due to various procedural issues, and in general the percentage of cases in which counsel was actually provided was extremely low.[170]

2. Compliance with *Salduz* in Other Member States

Another measure of success is the implementation of ECtHR decisions by other states. Again, the picture is mixed. A case brief for the Open Society Justice Initiative expressed optimism in 2011, describing a "*Salduz* Fever Sweep[ing] Europe" and stating that the *Salduz* reforms "are finally taking hold."[171] National courts and prosecutorial authorities have taken action to implement *Salduz*. In Belgium, where Attorneys General and the police originally resisted efforts to provide indigent defendants with attorneys during interrogations, the legislature passed the so-called "*Salduz* bill," which gave defendants the right to an attorney at the initial stages of police proceedings. Scotland initially seemed resistant to the idea of implementing the ECtHR's judgment, but after being "slammed" by the UK Supreme Court, it passed emergency legislation guaranteeing the right to counsel.[172] France's *Cour de Cassation* ruled that the ECtHR's decision in *Salduz* required legislation allowing attorneys to be present during interrogations to go into effect immediately.[173]

However, it is important to note that the legislation other states passed in response to *Salduz* did not necessarily guarantee a right to counsel as robust as the one the ECtHR might have envisioned. In France, as discussed above, post-*Salduz* legislation gave attorneys the right to be present at interrogations but not to ask questions or see documents related to the suspect's arrest.[174] In Scotland, suspects may now consult a state-paid attorney prior to interrogation, but the vast majority of such consultations take place over the phone, without the attorney ever coming to the station

169. In *Salduz*, four judges concurred to express concern about the relief to be afforded. Although paragraph 72 of the ECtHR's judgment stated that the "most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded," the concurring judges expressed concern that this statement was not included in the operative portion of the judgment, which ordered Turkey to pay the applicant €2,000 in damages and €1,000 in costs. Salduz v. Turkey, 2008-V Eur. Ct. H.R. 59, 81, 85–88.

170. It is estimated that only 10 percent of criminal defendants in Turkey exercise their right to legal assistance. *See* Altıparmak, *supra* note 167, at 12.

171. Marion Isobel, *Case Watch: Salduz Fever Sweeps Europe*, OPEN SOCIETY FOUNDATIONS (Apr. 26, 2011), http://www.opensocietyfoundations.org/voices/case-watch-salduz-fever-sweeps-europe [https://perma.cc/G5SF-53V4].

172. *See* Ed Cape & Jacqueline Hodgson, *The Right to Access to a Lawyer at Police Stations: Making the European Directive Work in Practice*, 5 NEW J. EUR. CRIM. L. 450, 453 (2014).

173. *Id.* at 453–54.

174. *See* Finelle & Tinsley, *supra* note 163.

house.[175] In France and the Netherlands, attorneys are limited to thirty-minute consultations with suspects before interrogations begin.[176]

It is uncertain whether these limited extensions of the right to counsel will be deemed sufficient by the ECtHR. Even if they are deemed insufficient, it is unclear what consequences, if any, will await states that do not comply with the Court's judgments. Ultimately, implementation of the ECtHR's judgments relies on what Ed Bates calls "the political 'peer' pressure that the Committee [of Ministers], and so the Convention system more generally, may exert."[177] In effect, the Strasbourg system depends on "the good will and cooperation of the States themselves."[178]

There appear to be limits to what good will and peer pressure can accomplish. The UK, for example, has steadfastly refused to comply with an ECtHR ruling that convicted prisoners may not be disenfranchised.[179] Despite the enforcement mechanisms described above, to date there have been no real consequences for this refusal. Indeed, instead of the Council of Europe threatening to expel the UK from the European body, leaders in the UK who are concerned about national sovereignty and democratic control have called for the UK to withdraw from the Convention and the jurisdiction of the ECtHR.[180]

The UK's experience indicates that states that have not responded to *Salduz* by guaranteeing a meaningful right to counsel during interrogation may never face real consequences for their failure to comply. Thus, despite the many layers of "enforcement" developed by the Council of Europe, the lack of stiff penalties for states that don't comply with ECtHR judgments may render the Council incapable of ensuring that every European defendant has access to an attorney during interrogation.

3. The Limitations of the Strasbourg System

Although it appears that the Strasbourg system has advantages over the U.S. system, it is unclear whether its advantages are sufficient to support the emergence of a fully-matured right to counsel. The Strasbourg supervisory system certainly has some elements that are lacking in the U.S. system. For

175. *See* Cape & Hodgson, *supra* note 172, at 462.

176. *See id.*

177. BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 141, at 493.

178. *Id.*

179. *See* Bates, THE UK AND STRASBOURG: A STRAINED RELATIONSHIP, *supra* note 118, at 1–2.

180. *See* Nicholas Watt & Owen Bowcott, *Tories Plan to Withdraw UK from European Convention on Human Rights*, THE GUARDIAN (Oct. 3, 2014), http://www.theguardian.com/politics/2014/oct/03/tories-plan-uk-withdrawal-european-convention-on-human-rights [https://perma.cc/FPK7-9X87].

example, the Strasbourg system has developed an administrative and judicial regime for ordering general remedies and supervising their implementation. But the Strasbourg system has not yet demonstrated that it can ensure that counsel will be provided in member states at all designated stages of a criminal case. And it has not undertaken or been tested in cases involving the more nuanced question whether counsel was adequate. Moreover, there are danger signals on the horizon. Even with its new administrative procedures, the Court's caseload is unmanageable,[181] the rates of compliance with its decisions appear to be declining,[182] the Court's legitimacy has been seriously challenged, and a few member states are seriously considering whether to exit.[183]

CONCLUSION

Both the U.S. and Strasbourg systems charge a high court with defining and enforcing the right to counsel in criminal proceedings. But there are major differences in the founding documents, institutional design, and historical development of the right to counsel in the two systems. Each system has distinctive advantages and limitations.

The more recent and specialized Strasbourg system has several advantages that hold promise for enforcing a robust right to counsel for indigent defendants. First, unlike the U.S. Constitution, the Strasbourg system was designed to implement human rights, including the right to counsel. The European Convention on Human Rights explicitly stated the right to state-funded counsel, created a court to interpret and enforce that right (as well as others created by the Convention), and provided a framework for the enforcement of the court's judgments. Member states voluntarily accepted the mandate to fund the right to counsel under the supervision of the ECtHR. Second, the delegation of enforcement authority to the CoM provides political and diplomatic mechanisms to induce member states to comply with ECtHR judgments. Third, the CoM and Secretariat have developed a system of administrative procedures that bring pressure to bear on recalcitrant member states. Finally, ECtHR judgments now frequently order member states to develop general remedies as well as remedies for the individual party before it, and these general remedies are subject to administrative follow-up by the Secretariat and the CoM.

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181. For the most recent caseload statistics and a discussion of their implications, see EUR. CT. H.R., ANNUAL REPORT 2015 (provisional version) 65 (69,900 applications pending at the end of 2014); Madsen, *supra* note 36, at 177–78.

182. *See* Madsen, *supra* note 36, at 172.

183. *See id.* at 170–73 (discussing Russia and UK).

But the ECtHR's structure also imposes significant limitations. First, the Convention created only a single court, with no possibility of adding lower human rights courts. A European defendant must bring his case in Strasbourg, where the ECtHR—even after the adoption of reforms such as the pilot judgment system—remains encumbered by an enormous caseload and backlog. Moreover, each case is brought as a complaint against a particular member state, not as a challenge to the legality of the defendant's conviction or detention. The ECtHR can declare that an individual's rights were violated, it can order the member state to compensate him, and it can declare that the most effective relief would be retrial. But the ECtHR cannot itself reverse the individual's conviction or order his release. The Convention itself provides no procedure for seeking class-wide relief[184] or structural reform, and serious questions have been raised about the legitimacy of the ECtHR's requirement that member states adopt general remedies subject to the oversight of the Secretariat and CoM. Perhaps it is not surprising that the rate of compliance with ECtHR judgments has declined. And finally, at the end of the day, if bureaucratic, political, and diplomatic pressures are insufficient to bring about compliance with an ECtHR judgment, there is no remedy other than expulsion of a recalcitrant member state that refuses to comply with either a general or a specific remedy.

The U.S. system has very different advantages and limitations. It was not originally designed for this purpose, but the U.S. constitutional system evolved, over time, to provide a basis for judicial decisions creating and enforcing individual rights, including the right to counsel, in state prosecutions. The original constitutional design contained two features—neither of which is present in the Strasbourg system—that later proved to be critical to the enforcement of individual rights in state criminal prosecutions: congressional authority to create lower federal courts and judicial authority to issue writs of habeas corpus. The Constitution was twice amended, first by the Bill of Rights, which recognized a narrow right to counsel applicable in federal cases, and later, by the Civil War amendments, which required Due Process in state proceedings. Eventually, the Supreme Court held that Due Process includes the right to state-compensated counsel. Taken together, these developments created a system that affords significant advantages to individual defendants. Unlike a defendant in a European country, who must

184. For a discussion of the ECtHR's lack of a class action mechanism and the limitations of the pilot-judgment mechanism as a substitute, see generally Tatiana Sainati, *Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights*, 56 HARV. INT'L L.J. 147 (2015). Sainati observes that "the legal basis for the pilot-judgment procedure remains contested; the rules and procedures governing the pilot-judgment mechanism lack clarity and predictability; and . . . [they lack the] procedural safeguards necessary" to protect individual rights. *Id.* at 149–50.

bring a case in Strasbourg, an individual defendant in the United States has two options. He may seek review of a state conviction by the Supreme Court as the final step in the appellate process in his original criminal case, though such review is granted in only a tiny fraction of cases. But an individual defendant can also challenge his state conviction by bringing a habeas action in the local federal district court where he is incarcerated. Those courts can order the relief that an individual most values, reversing his conviction or ordering his retrial or release. In addition, the federal courts also have jurisdiction to entertain class actions and actions seeking injunctive relief.

Unfortunately, the structural advantages of the U.S. system have been largely nullified by judicial decisions that have narrowed the scope of habeas review, restricted institutional reform litigation, and failed to put any teeth in the definition of constitutionally adequate representation. The lower federal courts provide a forum for constitutional litigation, but neither habeas nor structural reform litigation has been able to make a federal right to the effective assistance of counsel a reality in state prosecutions. The U.S. Constitution does not guarantee a truly effective right to counsel in state proceedings.

At a sufficient level of abstraction, the commitment to the right to counsel seems easy to make, and easy to defend. Trials involve complex procedural matters, making it nearly impossible for defendants to adequately represent themselves. In order to provide a fair and just trial, each criminal defendant should have a lawyer, even if he or she is too poor to pay for one. Those lawyers should protect the fundamental rights of all citizens and prevent wrongful convictions, but should not unduly interfere with the accurate determination of guilt. But in practice, questions arise that are harder to answer. Defense lawyers are expensive, in treasure, time, and the potential for lost convictions of the factually guilty. They are therefore politically controversial. Moreover, determining how these rights are best implemented across varied jurisdictions is difficult for appellate courts.

Under both the Constitution and the Convention a central court bears the responsibility of ensuring that the right to counsel is honored. Neither system has fully answered the difficult questions of detail. For example, the binary question—did you have a lawyer?—is more readily susceptible to judicial decision making by a central reviewing court than are the more complex questions—was a lawyer necessary at a particular stage for the decision to be fair or reliable, and was the particular lawyer you actually got effective under the circumstances? And neither system has demonstrated that the judiciary can create money or political will. Like many difficult political problems, defining and enforcing the right to counsel has been resistant to a

variety of solutions. In both systems, therefore, the evolution of the right remains a work in progress.