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Troubled Wake Behind a Pretty Boat: The Aftermath of *Gideon v. Wainwright*

***PART I: INTRODUCTION: GIDEON AND ITS WAKE***

A boat came out of the horizon. It was large and pretty and lofted a banner high above for all to see as it came closer and closer into view. The banner declared the bold words of Justice Hugo Black of the United States Supreme Court “there can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>1</sup> The boat was one that many had long hoped for, one that America had sorely needed to make berth. That boat came to dock in 1963 and is commonly known as the United States Supreme Court case *Gideon v. Wainwright*. This case established that under the Sixth and Fourteenth Amendments to the Constitution, the states possess an obligation to appoint legal counsel to persons facing felony charges if they cannot afford a private attorney. The High Court ruled in an unanimous 9-0 decision that, in the words of Justice Black, “the right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”<sup>2</sup> The *Gideon* case has been hailed as a landmark case in the history of American jurisprudence and in fact many consider it one of the most significant cases ever decided by the Supreme Court, taking a place alongside such titans as *Brown v. Board of Education*, *Dred Scott v. Sanford*, and *Marbury v. Madison*. This decision marked an important turning point for the question of indigent persons’

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<sup>1</sup> Sloan, Virginia E., Cait Clarke, and Daniel Engelberg. "Gideon's Unfulfilled Mandate: Time for a New Consensus." *Human Rights: Journal of the Section of Individual Rights & Responsibilities* 31, no. 1 (Winter 2004): 3-13

<sup>2</sup> Supreme Court Reporter, *Cases Argued and Decided in the Supreme Court of the United States, Volume 83, Pages 1-916* (St. Paul: West Publishing Co., 1963) p. 796.

right to legal counsel. In the years preceding the *Gideon* decision, the Supreme Court had passed judgment on this same issue multiple times with mixed results. The first such case, 1932's *Powell v. Alabama*, declared that in capital cases, indigent persons had the right to legal counsel. The question of whether or not this right automatically applied to non-capital cases raged on until ten years later when the High Court held in *Betts v. Brady* that it did not. The *Betts* ruling stated that in trials involving non-capital offenses, the right to legal counsel did not automatically apply but could be given in situations in which the case was inordinately complex or where the defendant suffered from mental incapacitation of some sort that would deny him the ability to represent himself. Until the Supreme Court agreed to hear Clarence Earl Gideon's appeal, the *Betts* standard ruled and made it very difficult for poor persons to procure court-appointed legal counsel. In its *Gideon* ruling, the Supreme Court struck down *Betts* and declared "our . . . constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials . . . in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."<sup>3</sup>

*Gideon* will forever remain a substantial ruling because it fully extended the Constitutional guarantees of a fair trial with the assistance of legal counsel and equal protection under the laws to indigent persons accused of felonies. Until this ruling, poor had never been able to fully realize and enjoy these sacred rights, the same rights that accused persons with the income to pay for private counsel had so long possessed. Indeed *Gideon's* impact on the advancement of legal and social justice for the poor is hard to overstate. Also important in the discussion of *Gideon* is the why. Why should society care about the rights of indigent accused

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<sup>3</sup> *ibid.*, pp. 796-797.

and why is it just and necessary that the public foot the bill for their defense? This too shall be considered.

All boats, though especially those as large as *Gideon*, leave a wake and it is this wake that most merits examination. In theory, the *Gideon* ruling offered a great promise of justice and fairness for the indigent and seemed to suggest that no more would poverty condemn a person to face trial without the aid of competent legal counsel. That was the promise, but what does an evaluation of this case's wake reveal about how this promise has been fulfilled? This paper will suggest that in large part, reality does not live up to the rhetoric. Making a promise is relatively easy. Make no mistake, it is a vital first step and often one that is difficult to initiate, as evidenced by how long it took for the Supreme Court to establish the *Gideon* precedent.

However, promising something and seeing it consistently and effectively implemented are two very different things, as many indigent accused came to realize in the years following *Gideon*.

Abe Krash, the original co-counsel for Mr. Gideon, notes that this ruling is remarkable not only for the legal standard that it set, but also in how much it failed to including "what constitutes adequate funding for indigent defense; what effective indigent defense systems should look like; and what standards of quality should be required of a publicly funded lawyer."<sup>4</sup> Practically speaking, the *Gideon* ruling offered indigent persons accused of a crime little other than a guarantee of legal counsel. Of course, that guarantee is hardly insignificant, but in its ruling the High Court offered no guidance on how the states should go about upholding its sweeping mandate. *Gideon* compelled many states to create indigent defense systems, in many cases *ex nihilo*. As can be imagined, the results differed greatly from jurisdiction to jurisdiction and the nation's public defense system soon came to resemble a patchwork quilt that utterly lacked organization, continuity, or any semblance of a code of acceptable standards regarding

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<sup>4</sup> Sloan, et al., "Gideon's Unfulfilled Mandate," p. 3.

quality of the defense.<sup>5</sup> As jurisdictions began to institute public defense systems, almost immediately a concern arose that today remains perhaps the largest bane to public defenders and the clients they seek to serve, lack of proper funding. How much does it take to adequately finance a public defender system at the state level? That question remains unanswered even now, and this paper reports numerous horrific anecdotes regarding the deplorable lack of funding that exists almost universally throughout America. The problem of underfunding appears to be especially endemic in the traditionally conservative South. As Michael Mears, the director of the Georgia Public Defender Standards Council, ruefully noted, “the downside of dealing with fiscally conservative people is that they really mean it.”<sup>6</sup>

As the states began to carry out *Gideon's* directive, yet another tremendous handicap quickly became apparent. There were simply too many cases and too few attorneys to ensure that each case would be given due attention; public defenders are overwhelming overburdened in their case load. The wake of *Gideon* is murky and choppy; the obstacles introduced above simply produce too great of barriers for indigent clients to receive the type of representation Justice Black and his compatriots on the Supreme Court must have envisioned when they handed down their ruling.

Whole books can be written on the problems that emerged in the wake of *Gideon*. Therefore, I will pare down these larger issues into more specific and manageable concerns that fit into the broader categories outlined above. One particularly striking problem is the great disparity in funding and resources available to prosecutors and defenders. If a prosecutor wants to procure an expert witness or a psychiatrist or some other sort of expert witness, he or she need but ask. However, many judges are wary about extending such measures to defenders lest costs

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<sup>5</sup> Ibid.

<sup>6</sup> Eyal Press, "Keeping Gideon's Promise." *Nation* 282 (April 3, 2006): 22-25.

of the trial reach an unacceptable level. Also, the state's attorneys often have at their disposal professional investigative services, whereas defenders oftentimes have to rely on volunteers, or bear the expenses out of pocket owing to their relative unavailability to public defenders.

*Gideon* may mandate that indigent accused receive counsel, but oftentimes these court-appointed lawyers are dramatically overmatched in both pre-trial preparation and the trials themselves because they are simply not afforded the same leeway to spend state money as the lawyers on the other side.

This paper also considers the so-called contract system in which the state puts cases for indigent clients out on the open market and awards them to private attorneys who are willing to take the case for the lowest fee. The contract system has come under fire for its tendency to attract inadequate or even unscrupulous attorneys who adhere to the "meet 'em and plead 'em" system so they can pick up as many cases, and the corresponding payments, as possible. As stated before, because *Gideon* included no mention of how the states should enact the assigning of counsel, many jurisdictions have adopted the contract system as the cheapest and most expedient option for giving the indigent accused their lawyer.

Another issue that concerns how the justice system itself has responded to the glut of indigent cases that pile up in courtrooms throughout the nation. Many exasperated public defenders and other lawyers that handle indigent cases are too overworked to give each client the attention he or she merits. The aforementioned "Meet 'em and plead 'em" has become the *modus operandi* for many public defenders. One can hardly blame them for that approach; the sheer volume of cases most of them handle dictates little else. However, in cases where the indigent client's counsel does want to slow things down and enter into a trial, many observers of the judicial system have noticed judicial impatience regarding indigent cases. All too often,

judges want their courtroom to operate as more of a turnstile than a place of equitable administration of justice. Reports abound of judges punishing public defenders who are deemed to be a hindrance to the speedy progression of cases throughout the court. Now that we have laid down a brief introduction and roadmap for this paper, let us turn our attention to the meat of this examination of *Gideon v. Wainwright*.

## ***PART II: BACKGROUND AND MORAL JUSTIFICATION***

Because *Gideon* serves as the bedrock for this study the actual case itself merits further explanation, if for no other purpose than to firmly establish background. Clarence Earl Gideon was a poor white drifter who had spent the majority of his adult life in and out of the criminal justice system. Eventually, he landed in Florida. On June 3, 1961 someone broke into the Bay Harbor Pool Room in Panama City, Florida, vandalized the establishment, and stole money from the cash register and alcohol from the supply room. A witness put Gideon leaving the scene with beer and wine. On this basis, he was arrested and tried in state court for breaking and entering and intent to commit petty larceny, a felony in Florida. At his trial, Gideon pled indigence and requested that the state court appoint him legal counsel for his defense. The Court denied his request and the exchange between the court and the defendant has become iconic, owing to Justice Black including the moment in his brief:

THE COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with capital offense. I am sorry, but I will have to deny your request appoint Counsel to defend you in this case.

THE DEFENDANT: The United States Supreme Court says that I am entitled to be represented by Counsel.<sup>7</sup>

Of course, Gideon was incorrect. According to *Powell v. Alabama*, the Supreme Court mandated that the states had to provide counsel to the indigent only in capital, usually rape and murder, cases. Even though Gideon faced a felony charge, it did not automatically grant him court-appointed counsel. At his trial, Gideon “conducted his defense about as well as he could.”<sup>8</sup> However, he was still found guilty and sentenced to five years imprisonment. Yet Gideon did not give up. From his jail cell, he filed a hand-written *writ of certiorari* with the State Supreme Court of Florida, which was rejected. Gideon persisted and filed another writ to the Supreme Court of the United States, which the court accepted. The Court granted him counsel to prepare for this appeal. Gideon’s attorneys prevailed in oral arguments and this victory established the ruling that that will be critically examined in this paper.

In any discussion of the indigent defense systems, the question of why almost always emerges. Why in this era of global insecurity, a stagnate economy, crippling foreign debt to China, and a myriad of other financial concerns should America spend an estimated \$3.5 billion dollars annually on indigent defense?<sup>9</sup> To begin answering this question, consider the words of Cardinal Roger Mahoney who said, “Any society, any nation, is judged on the basis of how it treats its weakest members—the last, the least, the littlest.” The evaluation of the American justice system must begin with a study of the treatment of the most vulnerable accused, the poor, the incapacitated, and the under-educated. It is comparatively nothing for us to claim that our legal system safeguards the rights of the wealthy and the influential, those possessing the means to procure the service of a private attorney to guide them through the courts. However, if we

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<sup>7</sup> Justice Hugh Black, cited in Yale Law School, Liman Public Interest Workshop Reading Packet, pg. 12.

<sup>8</sup> Ibid.

<sup>9</sup> Barbara Mantel, “Public Defenders.” *Congressional Quarterly Researcher* 18 no. 15 (April 2005) p. 339.

seek to possess a justice system that does not belie our claim to be the freest, most just nation on earth, it is imperative to ensure that a person's poverty does not condemn him in the eyes of the law. Making legal counsel readily available to all accused persons is merely the first step in the process. John C. Domino describes well why public defenders and those like them are so vital to ensuring a fair justice system: "Can you imagine yourself, within a few months of preparation, having to selection jurors, cross-examine witnesses, and wrestle with Byzantine world of criminal procedure and rules of evidence? Would you know how to impeach the credibility of a state's witness or when to object to the introduction of evidence?"<sup>10</sup> When considering the issue in such stark, practical terms, the injustice of failing to provide the aid of legal counsel comes into sharper relief.

As Justice Sutherland noted in his opinion in *Powell v. Alabama*: "Without it [the assistance of an attorney] though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."<sup>11</sup> The laws governing the criminal justice are complex enough to require three years of rigorous education and training in law school before someone can be deemed a practitioner of them. Even the most intelligent and educated layman would be hard pressed to give himself competent representation due to his ignorance of the law. How much more prejudiced, then, are the poor and uneducated defendants like Clarence Earl Gideon?

The indigent must be provided counsel because failure to do so would take what the Fourteenth Amendment makes clear is a right, "equal protection of the laws," and turn it into a mere market commodity. If assistance of counsel, something that the Sixth Amendment makes clear is a necessary component of a fair trial, is available only to those with the income to afford

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<sup>10</sup> Gary Rose, *Shaping a Nation: Twenty-five Supreme Court Cases That Changed the United States*, (Bethesda: Academia Press, 2010) pp. 145-146.

<sup>11</sup> Cited in Liman Public Interest Reading Packet, p. 14.



an attorney, then criminal justice becomes effectively like a car, candy bar, or any other sort of good or service bought and sold on the open market. Framing this issue under John Rawls' fair equality of opportunity standard helps to elucidate this further. According to Rawls, for an outcome to be deemed fair, the process that generated the outcome must also be fair. In the court of law, there will always be differences in outcomes. Some will be guilty, some will innocent, and people may even receive different sanctions for a similar crime. However, unless an error or deviation from normal procedure occurred, one can state that justice was nevertheless served since the verdicts were reached according to the judicial process. Norman Daniels, a student of Rawls, describes Rawls' theory thus: "if the basic structure of society works to the advantage of all and in a way that is open to all, then the distribution of goods and the resulting life prospects for individuals will be the outcome of a fair process."<sup>12</sup> Daniels applied Rawls' theory in the context of healthcare, but his explanation is useful in this study because, like healthcare, access to fair criminal justice must be understood as a right and set firmly apart from the market forces of buying and selling where they might be rendered commodities.

Using Daniel's analysis, one can understand assistance of counsel as the means to ensure that the criminal justice system acts in a way that is open to all and working to the advantage of all. Legal counsel is vital ensuring that the criminal justice system operates in this manner. As an example of how important legal counsel can be, consider that when Gideon received a retrial with the assistance of an attorney, the jury returned a verdict of not guilty.<sup>13</sup> While much more could be written in an attempt to justify the existence of indigent defense systems, this paper does not principally confront this issue. Therefore, from this point forward, we will examine the

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<sup>12</sup> Norman Daniels, *Just Health* (Cambridge: Cambridge University Press, 2008) p. 51.

<sup>13</sup> Glenn, Richard. "GIDEON V. WAINWRIGHT (1963)." In *Encyclopedia of American Civil Rights and Liberties*. Edited by John M. Scheb, Kara Stooksbury, Otis H. Stephens. Santa Barbara, CA: Greenwood, 2006. <http://ebooks.abc-clio.com/reader.aspx?isbn=9780313084003&id=GR2759-11093>

concerns and limitations that have arisen from attempts to implement the ruling of *Gideon v. Wainwright*.

Importantly, the Court had to answer the why question and set into the motion the establishment of a guarantee to assistance of counsel. The lawmakers had offered little to no opinion on the matter. In a way, though, this shouldn't be surprising "due to the political unpopularity of criminal defendants and their lack of financial and political capital."<sup>14</sup> Before the Supreme Court mandated state legislatures to do so, what politically-minded representative would propose a bill to expand and fund programs to provide defense for indigent criminals? The constituents who voted that legislator into his or her seat were decidedly not the same constituents who would necessitate the services of public defenders. It may be the oldest rule in politics—he who pays the piper calls the tune and in society little desire to call for an expansion of indigent defense programs exists. It seems extremely unlikely that the states would ever have arrived at *Gideon's* mandate for themselves without the Supreme Court's ruling. However, because this mandate came from the Court, it created the conditions that allowed the problems that came about in *Gideon's* wake to exist. As stated before, the Court offered no guidelines regarding how to implement its directive and no means to test the competency and effectiveness of the assigned counsel. Furthermore, even if it did, the Court lacks any real means of enforcing its decisions. These grey areas created the problems that will be explored further. Many feel that the wake of *Gideon* contains enough problems to claim that the case has been "effectively ineffective" at ensuring its guarantee of effective assistance of counsel.<sup>15</sup> In the contrast between the ideals and rhetoric surrounding *Gideon* and the realities of its wake, weighing the relative accuracy of the above claim will be a useful tool in this evaluation.

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<sup>14</sup> "Effectively Ineffective: The Failure of Courts to Address the Underfunded Indigent Defense Systems," *The Harvard Law Review* 118, no. 5, p. 1731.

<sup>15</sup> "Effectively Ineffective," p. 1731

### ***PART III: ANALYSIS OF THE ISSUES IN THE WAKE***

#### ***Issue 1: General Lack of Funding and Funding Disparity between Prosecutors and Defenders***

The first issue in the wake of *Gideon* is in many ways the most significant and forms the ultimate root cause from which the other problems derive. A tremendous financial and resource disparity continues to exist between public defenders and the prosecution. A chancery clerk in the poor, rural Quitman County, Mississippi likened the gap to “fielding a high school team to play the Green Bay Packers.”<sup>16</sup> Everyone can imagine how badly the professionals would overwhelm the teenagers; the massive inequalities would all but determine the outcome before the players stepped onto the field. Equivalent disparities in the courtroom are a bane to justice because differences this severe interfere with the public defender’s ability to accomplish his duty of zealously representing his client. The importance of investigation in criminal cases bore mention in the introduction. From my own time in the world of indigent defense, I witnessed firsthand how a case’s outcome can depend on it. Consider the following example: One evening a young woman walks home from work alone and a young man approaches her, brandishes a weapon, takes her purse, and flees. When police arrive at the scene, the victim describes her attacker as wearing dark jeans and red hooded sweatshirt. Police then put the victim in the car and canvas the area and pick up an individual matching the description. This procedure is called “drive-by identification” and happens with appalling regularity. The person the police detain is indigent and requests assistance of court-appointed counsel. The court assigns him a public defender whose office is dramatically underfunded and therefore lacks an in-house investigative service or the ability to pay an outside party. The accused may have an alibi for the time of the robbery, and simply possessed the misfortune of being in the vicinity and bearing a resemblance to the robber. The accused might very well be innocent, but because the appointed counsel

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<sup>16</sup> Sloan, et al., “*Gideon’s Unfulfilled Mandate*,” pp. 3-4.

lacked the ability to investigate his client's case and the circumstantial evidence does not look good, the best the attorney can do for his client is plead him to a lesser charge.<sup>17</sup>

It should be troubling that a plea deal is the best that the attorney in our anecdote can offer his client, and every day in America, indigent defendants must endure a similar nightmare. The current laws regarding court-appointed counsel's ability to procure investigators and other outside services suggests as much. Title 18 of the United States Code concerning indigent defense reads:

Counsel for a person financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application. Upon finding, after appropriate inquiry in an *ex parte* proceeding, that such services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain services.<sup>18</sup>

According to federal law, court-appointed counsel must undergo a separate hearing just to obtain services that most prosecutors inherently possess or need but ask to procure. Consider this reality and apply it to John Rawls's principle of fair equality of opportunity. Rawls' thinking proves useful in an attempt to justify the existence the indigent defense system, but can also be applied to study of the system itself. If Rawls understands an outcome to be fair only if the process itself was fair, then what of a funding and resource disparity so great that it renders the gap between defense and prosecution almost insurmountable? It is not simply enough to guarantee the indigent an attorney to ensure that Rawls's standards are met; public defenders must have the ability to adequately represent their clients before the judicial system can be deemed fair. Courts disenfranchise the indigent accused by assigning counsel so financially

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<sup>17</sup> The example is based on a true event that occurred during my time at the Public Defender Service for the District of Columbia.

<sup>18</sup> Title 18 United States Code Annotated, Section 3006A, Subsection 5e, Accessed at Westlaw

constrained that these attorneys are unable to undertake basic legal actions necessary to provide their clients an adequate defense.

Justice Black said that the amount of money a defendant possessed should not influence his ability to receive a just hearing. Black and his colleagues saw the availability of court-appointed counsel as the surest way to receive a fair trial, but seemed to give little thought to the quality of that counsel. Criminal attorneys swear to give their clients a zealous defense, but how *effectively zealous* can a public defender be given the gross underfunding for his or her cause? Black argued that a defendant's poverty should not prejudice his ability to receive a fair trial, but perhaps now the time has come to apply that standard to a defendant's *attorney* and not just the defendant. Consider the stark facts presented by David Cole, a scholar of indigent defense law: "Nationwide, we spend more than \$97.5 billion on criminal justice. More than half of that goes to police and prosecution . . . Indigent defense, by contrast, receives only 1.3 percent of annual federal criminal justice expenditures"<sup>19</sup> When presented with the raw numbers, the likening of the contest between prosecutors and indigent defenders to the high school team versus the Green Bay Packers seems more plausible. To present the actual amount, 1.3 percent of 97.5 billion comes out to a mere \$1.2 billion; compare that to the more than \$49 billion made available to the prosecution. This gap prejudices public defenders' ability to represent their clients in a way that substantially calls into the question the fairness of the process. How can we conclude otherwise when critical undertakings such as investigation are reduced to what one public defender in Montana called "aspirational activities"?<sup>20</sup> Worse still, another Montana public defender reported he lacked the funding to purchase even basic office supplies.<sup>21</sup>

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<sup>19</sup> "Effectively Ineffective," pg. 1734.

<sup>20</sup> Press, "Keeping *Gideon's Promise*," p. 22.

<sup>21</sup> *Ibid.*

In taking stock of the crisis of funding for the indigent defense systems nationwide, many have been forced to conclude: “even though the right to counsel still exists doctrinally, the inadequate funding of indigent defense threatens what remains of the right.”<sup>22</sup> Rights are sacred, beautiful things and the language of Justice Black surrounding the fundamental right to effective assistance of counsel rings true; however, rights do not ensure themselves. It is good and well to say that the indigent have a right to counsel, but what good is that right *per se* if the means to enforce that right are consistently and universally tested and found wanting?

How did this vast gulf between Justice Black’s high-minded ideals and the rather sorry way in which they have been implemented arise? Dennis Keefe, the managing director of a public defender office in Nebraska, suggests that its origins lie in the nationwide increase of tough-on-crime attitudes in the years following *Gideon*.<sup>23</sup> This outlook led to adoptions of mandatory sentencing guidelines that resulted in “more people going to jail for longer periods.”<sup>24</sup> Those that received the brunt of these guidelines were, predictably, those utilizing the services of indigent defenders. This makes sense given that 80% of persons charged with felonies in state court received court-appointed counsel.<sup>25</sup> Keefe further elaborates that the dimmer views towards and harsher punishments for crime fueled the opinions that “prevents indigent defense from being regarded as important.”<sup>26</sup> Any jurisdiction that focuses on strengthening sentencing guidelines is not very likely to increase funding for the defense of the same people they desire to further incarcerate. Marci Crawford, an attorney with the National Legal Aid and Defender Association, furthers Keefe’s assertion in stating “jurisdictions frequently tighten their purse strings when it comes to providing more money for indigent defense . . . because of a basic

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<sup>22</sup> “Effectively Ineffective,” p. 1734.

<sup>23</sup> George M. Anderson, “Defending the Poor: A Harder Task,” *American* 160 (January 1989), pp. 4-5.

<sup>24</sup> *Ibid.*, p. 5.

<sup>25</sup> “Effectively Ineffective,” p. 1734.

<sup>26</sup> Anderson, “Defending the Poor,” p. 6.

prejudice against accused persons.”<sup>27</sup> State legislatures bent on ratcheting up their states’ stances on crime seem to offer little hope for increasing funding for indigent accused. Fear of and bias towards indigent criminals offers a compelling explanation for the increasing funding disparity between the prosecution and public defenders.

If the meager resource pools for public defenders do not hamper them enough, many jurisdictions further compromise their ability adequately to defend their clients by instituting caps on the amount that can be spent on any one case.<sup>28</sup> Furthermore, many states have also instituted ceilings on public defenders’ fees, “paying some attorneys, even in capital cases, as little as \$11.84 an hour.”<sup>29</sup> In states that opt for a flat payment up front, public defenders that work even the minimum number of hours on a case can drive their hourly compensation rate to below minimum wage.<sup>30</sup> These facts prompted the Department of Justice to conclude in a 2003 report that “Indigent defense today is in a state of crisis.”<sup>31</sup>

## Issue #2: Overwhelming Caseloads

Pointing to a lack of funding as the primary cause of the current crisis draws support from the fact so many other issues that arose in *Gideon*’s wake can be traced back to it. Take, for example, the horrendous problem of case-overload that burdens nearly all indigent defenders. The financial realities of life as a public defender undoubtedly contribute to “a shortage of attorneys available for appointment to indigent defendants.”<sup>32</sup> Because indigent persons are guaranteed counsel, jurisdictions must compensate for a lack of attorneys by assigning more cases to existing defenders. Pressure to assign court-appointed counsel also comes from the

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<sup>27</sup> Ibid., p. 4.

<sup>28</sup> Ibid., p. 7.

<sup>29</sup> “Effectively Ineffective,” p. 1734.

<sup>30</sup> Ibid.

<sup>31</sup> Sloan, et. al., “*Gideon*’s Unfulfilled Mandate,” p. 3.

<sup>32</sup> “Effectively Ineffective,” p. 1735.

lawyers themselves in many instances. Because the pay per case is so low, many “underfunded attorneys may need to take on more clients than they can represent effectively.”<sup>33</sup> This creates a vicious Catch-22 that has ensnared both the accused and their attorneys. The attorneys need to accept more cases because they need to fees to remain solvent, yet the more cases they take on, the less effective they become. In the reverse, purposefully keeping a more manageable caseload could push many defenders into financial hardship. Public defenders are then presented with a dilemma: do they take on more cases than they ought to stave off financial ruin and further disenfranchise their clients, or do they risk falling into the red through maintaining a slightly more reasonable caseload? Court-appointed counsel should not have to face this dilemma, yet everyday they must make this choice, one in which someone almost always loses. Not surprisingly, many attorneys choose to take on more cases.

This overburdening presents a predictably large number of horrific anecdotes regarding the attention that the accused receive. One public defender in California estimated that he pleads over 70% of his clients guilty at the first court appearance within 30 seconds of having met them; his caseload presents him with few other recourses.<sup>34</sup> Consider the implications of this statement. Thirty seconds offers barely enough time for two people to exchange names and the briefest of pleasantries. How can this attorney possibly gain an understanding of his client’s case necessary to make a fair assessment of its merits in that amount of time? That this defender most likely lacked the resources to adequately defend his clients must now take a secondary concern. The fact that he spends only 30 seconds per client before making decisions that could dramatically impact their lives poses a much greater obstacle. Even if this defender possessed all the resources he could ever want, they would be rendered comparatively useless given his gross

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<sup>33</sup> Ibid.

<sup>34</sup> Sloan, et. al., “*Gideon’s Unfulfilled Mandate*,” p. 4.



lack of time to properly utilize them. This example presents one of the most egregious circumstances, but is still emblematic of the nationwide problem. In a rural Montana county, public defenders reported being so overwhelmed that they could spare only 45 minutes on felony cases; one attorney was so overworked he admitted he did not even realize his client suffered from schizophrenia.<sup>35</sup>

In 2006, the American Bar Association's Ethics Committee, alarmed at the mushrooming caseload number, issued a report stating "If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new cases."<sup>36</sup> The chief public defender of Knoxville, Tennessee agreed with the Bar Association, noting that the caseloads his attorneys carried oftentimes forced them "to compromise their professional and ethical responsibly."<sup>37</sup> While few can disagree with the principle underlying the ABA's report, the day-to-day realities in most public defender offices leave little room for such considerations. In the state of Missouri, for example, workloads have increased 12,000 cases in the past six years with no increase in staff.<sup>38</sup> How can Missouri's public defenders refuse new cases in light of such realities? In this particular instance, the practice simply cannot live up to the stated ideals.

The aforementioned toughening attitudes against crime also contribute to the unfairly excessive caseloads public defenders face. A stricter outlook towards crime, particularly drug-related crime, has catalyzed a growth in the nation's prison population over the last three decades.<sup>39</sup> Robert Johnson, a prosecutor in Minnesota, notes: "What was once bad or reckless behavior, such as child endangerment or failure to secure a firearm, which might have exposed

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<sup>35</sup> Press, "Keeping Gideon's Promise," p. 22.

<sup>36</sup> Mantel, "Public Defenders," p. 342.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid., p. 341.

the wrongdoer to civil liability, is now punishable by incarceration or fines.”<sup>40</sup> As governmental policy has evolved, caseloads for public defenders have correspondingly increased. America possesses the world’s highest incarceration rates, ahead of such nations as Cuba, China, and even Soviet-era Russia.<sup>41</sup> As of 2004, 726 out of every 100,000 Americans resided in jail.<sup>42</sup> African Americans suffer the brunt of incarceration. Data suggests that blacks are incarcerated at nearly six times the rate of whites and comprise 900,000 out of the 2.2 million national prison population.<sup>43</sup> Furthermore, one in six African American males has been jailed at some point in his life.<sup>44</sup> Given such information, it should come as no surprise that public defenders bear such crushingly high caseloads. Evolving governmental policy regarding the charging and jailing of offenders dictates no other reality.

The taxed public defenders serving the ever-growing number of accused, are often reduced “to just warm bodies who [don’t] have the chance to vigorously represent their clients.”<sup>45</sup> As has been suggested, rare is the indigent accused person who receives vigorous representation; most destitute clients are lucky if they get any more attention and time than in the minutes before entering their plea before the court. In fact, in some particularly poor and underserved jurisdictions, some clients even receive no counsel at all. As an attorney from a rural Louisiana parish recalls “I actually saw a defendant plead guilty with no lawyer present to advise him. I was shocked.”<sup>46</sup> Of course, on some piece of paper, clients like this man have nominally received counsel, but with crippling caseloads, attorneys may be too overworked to

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<sup>40</sup> Ibid.

<sup>41</sup> <http://www.publiceye.org/defendingjustice/pdfs/factsheets/9-Fact%20Sheet%20-%20US%20vs%20World.pdf>

<sup>42</sup> Ibid.

<sup>43</sup> [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofincbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofincbyraceandethnicity.pdf)

<sup>44</sup> Ibid.

<sup>45</sup> Steve Keeva, “Gideon’s Unmet Ideal” *ABA Journal* (October 1991), p. 40.

<sup>46</sup> Anderson, “Defending the Poor,” p. 6.

notice that they have received another case or so overscheduled that they physically cannot be in court to stand by their clients. Sometimes, however, defendants' lack of attorney arises by much more insidious means. In an effort to decrease defenders' work, in some parts of Georgia, impecunious accused are forced to meet with a prosecutor and encouraged to plead guilty before deciding if they want a lawyer.<sup>47</sup>

High caseload volume also creates a situation in which public defenders often have to rob Peter to pay Paul—by taking time away from other cases in order to give the most serious cases a modicum of decent attention. Say a public defender has a fixed amount of time and must choose between two cases, one for capital rape and the other for receiving stolen property. The latter charge is still quite serious; it can carry multiple years in prison, but not nearly as many as the rape charge.<sup>48</sup> Invariably, an overworked defender will take time and resources away from the less serious charge and dedicate the attention it deserves towards the more serious case.

Certainly, all defendants merit a zealous, thoughtful defense, but no public defender possess the ability to offer that to all clients, and must make hard choices about how to allocate precious time and energy. Examining the systematic way in which public defenders short-change the majority of their clients for the sake of the few with headline cases presents one of the greatest problems emerging from the larger issue of case overload.

### **Issue #3-Judicial Outlook**

Conversations regarding the linked problems of caseloads and effectiveness of counsel are incomplete without considering judicial outlooks towards these issues. As Abe Krash notes, “many judges want their courtrooms to be assembly lines.”<sup>49</sup> But when one considers that judges must hear every case the state charges, they can hardly be blamed for such an outlook.

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<sup>47</sup> Sloan, et. al., “*Gideon’s Unfulfilled Mandate*,” p. 3.

<sup>48</sup> Ibid.

<sup>49</sup> Keeva, “*Gideon’s Unmet Ideal*,” p. 40.

The natural response to a high number of cases is to decrease the time given to each case. While running a courtroom with high-speed efficiency may be conducive for chewing through a stacked docket, it is ruinous for ensuring that each defendant receives a fair shot at justice. Crafting effective arguments and presenting a vigorous defense takes time, and many judges are increasingly unwilling to afford public defenders the necessary time to undertake such measures. Sadly, this conversation has been reduced to all but theoretical since so few public defenders possess the time to offer a dynamic defense even if judges afforded them the time to do so. The caseload problem has locked the judicial system into a vicious, self-perpetuating cycle in which the focus has shifted to the process and not the individual defendants. With so many cases, all officers of the court, judges, prosecutors, and defenders, have become fixated on resolving cases as quickly as possible while sparing too little thought each individual human being each case file represents. This is a travesty and gross miscarriage of justice, but given the sheer volume of cases, the reality cannot really be anything but.

#### **Issue #4-The Contract System**

Because public defenders face tremendous funding disparities and staggering caseloads, in recent times, indigent defense systems have witnessed increased use of the so-called contract system, the final problem we will analyzed this study. In an attempt to ease the strain on public defenders, some jurisdictions have begun to place indigent defendants' cases on the open market and award the case to the private attorney willing to accept the lowest fee. While this theory presents no inherent problem, the quality of the attorneys bidding on these cases is oftentimes suspect. Contrary to popular belief, most full-time public defenders did not graduate at the bottom of their law school classes, but are in fact intelligent, competent lawyers and competition

for jobs at public defender offices is typically quite keen. In many cases, these public defenders offer a much better quality counsel than that provided by the low-rent private practice attorneys that bid on these excess cases. Observers of the contract system note that oftentimes less scrupulous attorneys will pocket the indigent defense fee merely to cover the overhead for their private practices.<sup>50</sup>

The contract system presents a strong incentive for the bidding attorneys to take on and quickly process cases—why would an attorney go through the laborious, time-consuming tasks of filing motions or attempting an investigation when he could plead the client out and accept a new case and pocket yet another fee? An ugly scene in 2000 highlights the dangers of the contract system. Illinois Governor George Ryan commuted the death sentences of several prisoners to life when it came to light that their cases had been bought by lawyers who had disbarred or suspended by the Illinois Bar for repeated violations.<sup>51</sup> Illinois is by no means the only state bearing problems with the farming out cases to private counsel. In Michigan for example, in place of a contract system, judges themselves divvy out excess cases to private attorneys and charges of political cronyism abound. As one witness reports, “the elected judges still pass out the assignments for indigent defense cases to help their political fundraising as much as anything else.”<sup>52</sup> The contract system presents such a danger to *Gideon’s* ideals because it takes attorneys that frequently lack the talent and passion of public defenders—typically the one advantage most defenders have going for them—and plugs them into the same justice system that so confounds even the most dedicated public defenders. The contract system simply presents too many holes that can lead to disservice or even exploitation of clients to deem it anything but yet another issue in *Gideon’s* wake. Contract attorneys are an even cheaper way

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<sup>50</sup> Anderson, “Defending the Poor,” p. 6.

<sup>51</sup> Sloan et. al., “*Gideon’s* Unfulfilled Mandate,” p. 3.

<sup>52</sup> Mantel, “Public Defenders,” p. 343.

for jurisdictions to fulfill the High Court's mandate and because of this all-consuming desire to attain an even lower bottom-line for justice, "the minimum standard for legal assistance has sunk to new lows."<sup>53</sup>

#### ***PART IV: WHERE TO GO FROM HERE***

The study of *Gideon* presents a heartbreaking gulf between the Supreme Court's high-minded, hopeful rhetoric and the horrendously poor manner in which the states have typically gone about seeing the Court's vision fulfilled. The degree to which ideal and reality are divorced hits home in analyzing the problems detailed in this paper—a daunting list, to be sure, but one that is by no means exhaustive. The issues that trail in *Gideon*'s wake combine to offer many indigent persons that come into contact with the justice system an experience that falls far short of what Americans expect from their courts of law. Is it any wonder then, that so many poor Americans, especially African American males, possess a dim view of the judicial system when it consistently fails to provide them what the Supreme Court says is a basic, fundamental right?

As one public defender notes, "If I were in their position, I'd feel underserved, too."<sup>54</sup> Those that *Gideon* supposedly protects are woefully underserved—few rational observers of the justice system would deny that. The question then remains, what can the nation do to ensure that reality more fully meshes with the dream?

Finding the appropriate agent to bring about the needed changes and even where to begin these reforms present large obstacles. As previously noted, while the High Court mandated *Gideon* be enacted, it offered no guidance about how the states should carry out the mandate or even a basic definition of what "effective assistance of counsel" actually entailed. So far in *Gideon*'s life course, the indigent defendants have seen numerous examples of what it is not and

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<sup>53</sup> Amy Bach, "Justice on the Cheap," *The Nation* online edition. Accessed at: <http://www.thenation.com/article/justice-cheap>.

<sup>54</sup> Anderson, "Defending the Poor," p. 5.

too few examples of its successful fulfillment. So should reform come from the courts?

Perhaps, although even if the Supreme Court were to go back and offer further clarification of the *Gideon* standard, courts lack any enforcement ability *per se*. The burden of fulfilling this new directive would still fall to the jurisdictions. The underfunding for indigent defense comes from two main sources: the prejudices and biases against indigent defendants and the simple fact that many states find themselves embroiled in intense budget crises. In an age of striking teachers in Wisconsin and numerous other state-budget deficit headlines, many states lack the money to ensure even basic financial stability, let alone a robust indigent defense system. The two most obvious actors both face large barriers towards bringing about the changes on their own. The courts lack the power to act unilaterally and the states lack the resources to give the system as it currently stands the needed influxes of cash. The answer, then, lies either in changing the current composition of the indigent defense system entirely or in adjusting public policy in a manner that can reduce crushing caseload volume and make more money available for redirection to indigent defense.

Such an undertaking looms a difficult challenge, but hope can be found in the example of Montana, a state that once possessed a terrible public defense system, but after a program of reform, transformed it into perhaps the nation's ideal model. In 2002, the American Civil Liberties Union filed a class-action lawsuit against seven different Montana counties for gross and repeated failures regarding indigent defense. By 2005, however, Montana, through working alongside the ACLU, which dropped the lawsuit in favor of working with state officials, became the first state to model legislation based upon the American Bar Association's "Ten Principles of a Public Defense Delivery System." The legislation, which garnered bipartisan support in the Montana state legislature, created an Office of the State Public Defender "that, among other

things, would provide indigent defendants with lawyers as soon as possible, keep attorney caseloads reasonable, and rigorously supervise performance to insure that the constitutional rights of anyone accused of a crime in Montana are upheld.”<sup>55</sup>

Montana utilized a team of politicians, state defenders and prosecutors, judges, and outside academics and experts to work together to craft this piece of legislation. Certainly, as many in Montana have acknowledged, the threat of the ACLU lawsuit spurred the state to action by necessity. One would hope that it would not take such a direct threat to see reform enacted, but those Montana counties are most assuredly not the only jurisdictions where the realities of indigent defense fail to meet the constitutional guarantees. Perhaps threats of lawsuit in other states whose systems have undergone thorough scrutiny by a third party and been found wanting holds the answer to getting other areas to follow Montana’s lead. Montana’s example demonstrates that the best way to improve indigent defense systems comes not from unilateral action by any one party, but a broad-coalition effort. Jurisdictions everywhere are flush with judges, lawyers, politicians, academics, and others who recognize the present state of crisis in many public defenders offices and possess the desire to see the problems alleviated.

However, even if other states pushed through a collaborative effort resembling Montana’s, the guarantees that it would succeed to the degree that it has in Montana are few. Montana is one of the largest, least populated states in America and differs demographically from much of the rest of the nation. For instance, consider the case of Camden, New Jersey. Camden and Montana are about as unlike as any two jurisdictions could be. Camden is a large, disintegrating city with a population consisting principally of poor African Americans and Latinos. One can expect the demographic differences between Camden and Montana to manifest themselves in both the amount and types of crimes perpetrated in these respective jurisdictions.

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<sup>55</sup> Press, “Keeping *Gideon’s* Promise,” p. 23.



One must wonder if the reformation of the indigent defense system of Montana could be seamlessly applied to places like Camden. Or consider Harlan County, Kentucky, a very poor coal mining area in rural Appalachia. In Kentucky, the funding and maintenance of indigent defense systems are left to each individual county. Unless Kentucky was to overhaul its entire system and begin state-level directing of indigent defense, each county would have to undertake reform efforts on its own. Even if each county followed a similar blueprint, disparities would still exist from county to county. A wealthier area such as Bourbon County will always have more resources available than will a Harlan County. Therefore, states such as Kentucky who operate on a county system will most likely always possess an inequitable distribution of resources available to public defenders. Establishing uniformity and parity between all of Kentucky's jurisdictions will be all but impossible. So while other states can take heart from Montana's leadership, simply mirroring its efforts for themselves may not necessarily result in the same beneficial results. The differences between the manner in which each area has sought to uphold *Gideon's* directive are simply too great for there to exist one reform plan that will cure the indigent defense system of every state or county.

While broad-based, theoretical reforms might not be the answer, concrete, specific policy changes could hold the answer to addressing and alleviating the strain put upon the indigent defense system. The issues of case overload and freeing up more money to distribute to public defenders seem the easiest to address. If policymakers want to see a drastic reduction in the amount of cases the judicial system must process, backing away from the aforementioned tough-on-crime attitude might hold the answer. Consider that in American today, taxpayers spend an average of \$80 per inmate per day to incarcerate people for offenses such as turnstile jumping, hunting and fishing violations, minor in possession of alcohol, dog leash violations, driving with

a suspended license, and feeding the homeless.<sup>56</sup> Granted, very few people stand to be locked up for the first violation of these types of offenses; those going to jail for driving on suspended license or the like are either frequent offenders or those with checkered criminal backgrounds. Nevertheless, the fact that America spends so much effort and money to jail people for these relatively minor violations helps answer why indigent defense systems suffer from both a lack of funding and a glut of cases. Data reveals that the justice system diverts a staggering amount of resources towards efforts that may not necessarily merit them. In 2009, for example, the Federal Bureau of Investigation reported that nationwide law enforcement arrested 758,593 people for possession of marijuana, 8,067 for gambling, 26,380 for vagrancy, 518,374 for disorderly conduct, and 89,733 for loitering or curfew violations.<sup>57</sup> While the breakdown in income levels for those arrested is not available, one need not be a criminal law scholar to surmise that the vast majority were people necessitating the services of a public defender.

Arresting so many for relatively minor, non-violent offences commands a significant portion of the funding available for the criminal justice system. As mentioned, only 1.3% of the total criminal justice budget goes towards indigent defense. Given that police exert so much effort arresting and courts spend so much time charging people for loafing in a parking lot or being too loud after curfew, this figure starts to make more sense. As it stands, if only half of the total arrests for marijuana possession, disorderly conduct, public drunkenness, vagrancy, and curfew and loitering were diverted or treated as non-criminal offenses, an estimated 932,453 cases could be removed from the criminal justice system and save more than \$1.5 billion per

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<sup>56</sup> Robert C. Boruchowitz, "Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need for and Cost of Appointed Counsel," p. 1. (paper presented at the annual meeting of the American Constitution Society for Law and Policy, Washington, D.C., April 2010)

<sup>57</sup> Ibid., p. 2.

year.<sup>58</sup> Such measures would tremendously alleviate the problems of lack of funding and case overload. By freeing money spent on prosecuting these crimes, more could be directed toward the indigent defense systems so desperate for it. By redirecting and de-criminalizing more than 900,000 cases, public defenders, who the mathematics suggests would receive the vast majority of these cases, will see a drop off in the number of cases they must handle. Crimes such as loitering, driving on a suspended license, public intoxication, and even petty marijuana possession are non-violent and pose no substantial threat to public health and safety, yet a disproportion amount of time and resources are dedicated towards their prosecution and defense. Backing off tough-on-crime attitudes and decriminalizing minor offenses and instead making them punishable by civil fine—like a parking or speeding ticket—may not necessarily be the best method for alleviating the crisis of the public defense systems, but must be given serious consideration in light of the data surrounding these issues.

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### ***Part V: Conclusions***

The arguments for ensuring that all people, regardless of income level, receive effective assistance of counsel bear tremendous moral weight. The Supreme Court of the United State recognized as much in its historic ruling in *Gideon v. Wainwright*. As it stands today, however, the wake of that case has brought to light many issues that the Justices on the High Court did not foresee in handing down their judgment. These issues present real barriers to seeing that income truly does not bear on an individual's ability to receive a fair trial. The issues are complex and multi-layered; each may be likened to a Russian *matryoshka* doll in that they all bear inside them smaller issues that derive from the parent issue. Though grave the threat the lack of funding and funding disparities, case overload, judicial outlook, and the contract system present to the current

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<sup>58</sup> *Ibid.*, p. 3.

state of indigent defense, our criminal justice system need not placidly submit to them. There is still time to rescue poor defendants from the travesty of justice that all too many of them are made to face. By frankly acknowledging the system's current shortcomings and committing to reform efforts and policy changes, those who care about this issue can cooperate to create a new indigent defense system that can ensure that quality counsel, with manageable caseloads and adequate funding and resources, will be assigned to each man, woman, and child necessitating a public defender. When this occurs, Americans can point, with due pride, to a criminal justice system in which reality finally measures up to the high ideals established by the Supreme Court because of the courage of a man named Gideon.

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