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Mourning and Celebrating Gideon's Fortieth

Penny White

MOURNING AND CELEBRATING *GIDEON'S* FORTIETH

"Each era finds an improvement in law for the benefit of mankind."[1]

Penny J. White[2]

INTRODUCTION

On the fortieth anniversary of my birth, some "friends" asked me to leave my house for the day so they could prepare it for the evening's festivities. I returned to find a tombstone in the front yard which read "Here Lies the Youth of PJW," a casket on the front porch, and a house full of mourners dressed in black, including one "reverend" who presided over the service commemorating the burial of my youth. Someone commented that only self-absorbed yuppies could make what should be a celebration such a sorrowful occasion. In the end, however, even the dark drab of the mourners and the sad sermon eulogizing my youth could not contain the celebration of what was yet to come.

This year, the legal profession recognized the fortieth anniversary of the birth of the right to counsel for the indigent accused.[3] Most of the recognitions could best be described as "mournful,"[4] lamenting the failure to realize the promise for which *Gideon* stood. While the profession uniformly "celebrated" the decision, few found reason to celebrate its application. This poses two obvious questions: is the somber tone surrounding *Gideon's* fortieth anniversary deserved or have we unfairly transformed what should be a celebration into a wake? And if mourning is appropriate at this juncture, forty years after recognizing the right, will progress toward full recognition of the right to counsel ultimately carry the day?

About ten years before the death of my youth and seven years into my practice of largely criminal defense law, I complained publicly[5] about the right to counsel in my home state of Tennessee. Having completed a two-year stint at the Georgetown University Criminal Justice Clinic, "reading, learning, and knowing

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[1] Found on a previously unmarked grave in Hannibal, Missouri. *See infra* text preceding note 298.

[2] Associate Professor, University of Tennessee College of Law. Former Circuit, Court of Criminal Appeals, and Supreme Court Justice in the state of Tennessee. The author enjoyed the assistance of Paul Campbell IV, and of several students, Jeb Beecham, Christopher David, and Riette Lacke on portions of this article. I am extremely indebted to Mark Stephens, Director of the Knox County Public Defenders Community Law Office for hosting the National Gideon Celebration in Knoxville in March 2003 and to Professor Jerry Black and Dean Tom Galligan, along with Mark Stephens and Laura Chambers, CLO Special Project Director, for allowing me to assist in planning the Celebration.

[3] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[4] Some descriptions of the progress of meeting *Gideon's* promise include: "shameful," "something else we are fighting for," "sad," and "unfulfilled." Abe Krash, one of the lawyers who assisted in the case hoped that "before the 50th anniversary of *Gideon* is commemorated, [the] goal will have been realized." Abe Krash, *An Update: Reflections on the Fortieth Anniversary of* Gideon, CHAMPION, Jan.-Feb. 2003, at 12, 13.

[5] Penny J. White, *A Noble Ideal Whose Time has Come*, 18 U. MEM. L. REV. 223 (1988).

cold"[6] all the cases that would keep me from being a "walking violation of the Sixth Amendment,"[7] I wrote that "this noble requirement [of providing counsel in accordance with the dictates of *Gideon*] is far from a reality in Tennessee."[8] I blamed the "diverse methods of representation and the ethical and financial constraints placed upon court-appointed counsel," and concluded that the "indigent defendant [is denied] the promise of equal justice of which our nation so hypocritically boasts, [leaving] [t]he poor accused without a 'lobby' and without the guarantees of due process, equal protection, and effective assistance of counsel."[9]

At the time of my complaints about the quality of indigent defense in Tennessee, the indictment applied and extended well beyond the borders of the Volunteer state to virtually every jurisdiction in the country. In fact, every major study that had been conducted from the late 1970s through the late 1980s concluded that the right to counsel remained largely unfulfilled.[10]

In 1979, for example, indigent defense spending represented less than 3% of all justice spending.[11] Of the state and local dollars spent on the criminal justice system, police were given 53.2%, corrections 24.7%, the judiciary 13.1%, and the prosecution 5.9%.[12] The money spent by state and local governments on indigent defense was approximately one-fourth that given to the prosecution or 1.5% of the total amount spent on the criminal justice system.[13] While

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[6] Professor William Greenhalgh who coined this phrase directed the Georgetown Criminal Justice Clinic during my stint as an E. Barrett Prettyman fellow. Each summer he drilled the new class of Prettyman's (as we were called) with questions about hundreds of Fourth, Fifth, and Sixth Amendment cases. *See* Wallace J. Mlyniec, *The Intersection of Three Visions - Ken Pye, Bill Pincus, and Bill Greenhalgh - and the Development of Clinical Teaching Fellowships*, 64 TENN. L. REV. 963 (1997).

[7] David J. Bazelon, *The Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1, 2 (1973).

[8] White, *supra* note 5, at 227.

[9] *Id.*

[10] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUST., NAT'L CRIM. DEF. SYS. STUDY (1986) [hereinafter DEF. SYS. STUDY]; ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON* UNDONE - THE CRISIS IN INDIGENT DEFENSE SPENDING (John Thomas Moran ed. 1982) [hereinafter *GIDEON* UNDONE], *available at* http://www.abanet.org/legalservices/downloads/sclaid/GideonUndone.pdf; NORMAN LEFSTEIN, ABA STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR (1982); TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL: A REPORT OF THE BLUE RIBBON COMMISSION ON INDIGENT DEFENSE SERVICES (1978); NAT'L STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SERVICES IN THE UNITED STATES (1976) [hereinafter GUIDELINES], *available at* www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems (last visited Jan. 3, 2004); NAT'L LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE (1973) [hereinafter THE OTHER FACE].

[11] DEF. SYS. STUDY, *supra* note 10, at 27.

[12] *Id.*

[13] *Id.* In 1982, the Department of Justice found that twenty-one states spent $251 million dollars on indigent defense (in 1999 dollars). Those same states spent $662 million dollars on indigent defense in 1999. CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, STATE-FUNDED INDIGENT DEFENSE SERVICES (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf.

inadequate funding was largely responsible for the unfulfilled promise, it was not the only culprit. Those who have studied indigent defense systems have described the country as looking like a "huge crazy quilt," with the variations in criminal defense systems among and even within states raising serious "questions of equal protection for indigent defendants."[14] Some of those variations were the result of funding choices, but others existed because of historical or political developments.[15] Regardless of the cause of the differences, the result was the same – a constitutionally recognized right, but with no uniformity in application or substance.

When I realized that *Gideon* was about to celebrate its fortieth anniversary, I thought it deserved a more festive commemoration than my friends had thought I was due. I undertook to learn how *Gideon* had fared in the forty years since its inception in my home state, in the nation, in the High Court, and in reality. After discovering that just like my own, *Gideon*'s forty-year history was far from a total success, I decided to look to the future for purposes of projecting but also to encourage improvement. Those undertakings follow.

The first part of this article discusses *Gideon*'s first forty years. Part one begins with a discussion of *Gideon* in the High Court and reviews U.S. Supreme Court decisions that have impacted *Gideon*.

The second part of the article discusses indigent defense systems presently in operation in several states including my own, Tennessee, with interesting empirical evidence based both upon comprehensive surveying and personal experiences.

Part three focuses on the dark and dismal reality of *Gideon* in 2003, the failure of many states to adhere to its dictates, the corners cut by others, the plight of overworked, under-resourced public defenders, and the resulting miscarriages of justice, including the conviction and execution of the innocent. Set forth in this part is a brief discussion of new threats to *Gideon*.

Part four shifts from eulogizing *Gideon*'s demise to celebrating its future. This part focuses on three of the many creative, sound, defense systems flourishing despite the lack of funding, the jaded history, and the present difficult political atmosphere. It also suggests how creative, holistic representation systems might be used elsewhere.

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[14] 1 Lee Silverstein, *Defense of the Poor, in* CRIMINAL CASES IN AMERICA STATE COURTS, 16-17 (1965).

[15] See White, *supra* note 5, at 243-47, for an example of the discussion of the various systems within Tennessee.

PART I: *GIDEON* – FROM BIRTH TO FORTY

A. *Gideon* at Birth

The U.S. Supreme Court's 1963 pronouncement of the constitutional right to counsel was based on principles of equality and fairness.[16]

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is appointed for him. . . . That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal court are necessities, not luxuries. The right to one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. [W]e have laid great emphasis on procedural and substantive safeguards designed to assure fair trial before impartial tribunals 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.[17]

Gideon's promise of equal justice for the poor accused quickly became difficult to keep. Although an adversary system providing "equal justice under law" required a functioning defense system for *any* accused, the states were slow to "remove the pocketbook from the scales of justice."[18] Despite warnings from

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[16] *See Gideon*, 372 U.S. at 344. If for no other reason but to commend their forward thinking, it is worth mentioning that the first recognition of the right to counsel at the state's expense in this country was in Indiana, 110 years prior to *Gideon*. In *Webb v. Baird*, the Indiana Supreme Court held that the right to counsel was based on the principles of a civilized society.

> It is not to be thought of, in a civilized community, for a Moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he is too poor to employ such aid. No court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty . . . which will at once [be] conceded as essential to the accused, to the Court, and to the public.

6 Ind. 13, 15 (1854), *available at* 1854 WL 3268. Of course, the U.S. Supreme Court had likewise noted such a right in select cases prior to *Gideon*. In *Powell v. Alabama*, 287 U.S. 45, 71 (1932), the Court recognized the right to appointed counsel in capital cases "where the defendant is unable to employ counsel, and is incapable adequately of making his own defense." But a decade later the Court retreated and declared that the Fourteenth Amendment did not incorporate the specific guarantees to counsel in the Sixth Amendment; rather, the appointment of counsel in state criminal cases was required only when a denial would be "shocking to the universal sense of justice." Betts v. Brady, 316 U.S. 455, 462 (1942). Thus, a state court was required until *Gideon* to assess the "totality of the facts" to determine whether the denial of counsel would constitute a denial of "fundamental fairness." *Id.*

[17] *Gideon*, 372 U.S. at 344.

[18] Dennis O'Brien, *Implementing Justice: The National Defender Project*, 1 VAL. U. L. REV. 320, 321 (1967).

great jurists,[19] government leaders,[20] and objective experts,[21] states continued to allocate far too few resources to the delivery of indigent defense.[22]

B. *Gideon* Refined - *Argersinger* and *Scott*

Given that the states were already extremely reticent to pay for the "fundamental and essential" fair trial right, the Court's decisions in *Argersinger v. Hamlin*[23] and *Scott v. Illinois*,[24] holding that "no person may be imprisoned for any offense . . . unless [they were] represented by counsel at . . . trial,"[25] were met with much concern.[26] In what now almost seems an unveiling of what creative defenders would develop,[27] the U.S. Supreme Court warned states soon after *Gideon* that penny pinching on indigent defense would create frustration and hostility "among the most numerous consumers of justice," a risk to the state far greater than the financial burden.[28]

C. *Gideon* Matures - *Alabama v. Shelton*

Two and one-half decades after *Argersinger* and *Scott*, in *Alabama v. Shelton*[29] the Court interpreted the right to counsel in a manner that would directly impact a state's financial resources. LeReed Shelton represented

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[19] Chief Justice Burger warned in *Mayer v. City of Chicago*, 404 U.S. 189, 201 (1971), that "[a]n affluent society ought not be miserly in support of justice, for economy is not an objective of the system." Judge Learned Hand cautioned: "If we are too keep our democracy, there must be one commandment! Thou shalt not ration justice." Learned Hand, 75th Anniversary Address Before the Legal Aid Society of New York (Feb. 16, 1951).

[20] *See* Stephen B. Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1872 (1994) (regarding Robert Kennedy's work as Attorney General); *see also infra* note 295 (regarding Janet Reno's work as Attorney General).

[21] *See e.g.*, THE SPANGENBERG GROUP ET AL., ABA BAR INFO. PROGRAM, COMPARATIVE ANALYSIS OF INDIGENT DEFENSE EXPENDITURES AND CASELOADS IN STATES WITH MIXED STATE AND COUNTY FUNDING (1998), *available at* http://www.gidc.com/spangen.htm.

[22] *See infra* Part II.

[23] 407 U.S. 25 (1972).

[24] 440 U.S. 367 (1979).

[25] *Argersinger*, 407 U.S. at 37; *see also Scott*, 440 U.S. at 373-74 (loss of liberty by incarceration is "different in kind from fines or the mere threat of imprisonment").

[26] *See* LEFSTEIN, *supra* note 10, at 123-35; *see e.g.*, Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 IOWA L. REV. 1249, 1260-61 (1970) (estimating that it would require between 1575-2300 full-time defenders to provide service to indigents charged with misdemeanors); *Argersinger*, 407 U.S. at 56-57 (Powell, J., concurring).

[27] See *infra* Part I.C.

[28] Mayer v. City of Chicago, 404 U.S. 189, 197-98 (1971)("Arbitrary denial of appellate review of proceedings of the State's lowest trial courts may save the State some dollars and cents, but only at the substantial risk of generating frustration and hostility toward its courts among the most numerous consumers of justice.").

[29] 535 U.S. 654 (2002).

himself[30] in an Alabama Circuit Court[31] on a charge of third-degree assault.[32] Upon conviction, Shelton was sentenced to a thirty-day jail term,[33] but the sentence was suspended immediately and Shelton was placed on two years of probation.[34]

After an appeal to the Alabama Court of Criminal Appeals, a remand, and an affirmance by the appellate court, Shelton appealed to the Alabama Supreme Court.[35] That court held that a suspended sentence constituted a "term of imprisonment" within the meaning of *Argersinger* and *Scott*, thereby triggering the Sixth Amendment right to counsel.[36] To remedy the situation, the Alabama Supreme Court treated the sentence portion of the judgment as a nullity, leaving the fine in tact, but vacating the suspended sentence and the term of probation.[37]

Alabama appealed but before the argument in the U.S. Supreme Court, advocates on behalf of Alabama changed their position and argued that the Sixth Amendment did not bar the imposition of a suspended sentence, but only the activation of one.[38] Thus, the Supreme Court was invited to endorse that viewpoint, paving the way for states to try countless individuals without counsel.

That, of course, was not the only alternative that the Court had when it granted certiorari in *Shelton.* A previous decision, *Nichols v. United States*,[39] provided an argument that Shelton's sentence did not fall within the *Argersinger-Scott* actual imprisonment line. Nichols, who represented himself, was subjected to a higher sentence for a federal felony offense because of a previous misdemeanor for which he was only fined.[40] In arguing against the sentence enhancement, Nichols challenged the constitutionality of the prior uncounseled misdemeanor.[41] The Supreme Court rebuffed Nichols' challenge holding that "an uncounseled misdemeanor conviction, valid under *Scott* because no prison term was imposed, is also valid when used to enhance punishment at a subsequent conviction."[42]

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[30] *Id.* at 658 (stating that the trial judge "repeatedly warned Shelton about the problems self-representation entailed, but at no time offered him assistance of counsel at state expense.").

[31] *Id.* Shelton initially represented himself in the District Court, and he appealed in accordance with Alabama law to the Circuit Court. *See id.*

[32] *Id.* In Alabama, the Shelton's offense carried a maximum sentence of one year imprisonment and a $2000 fine. *See* ALA. CODE §§ 13A-6-22, 13A-5-7(a)(1), 13A-5-12(a)(1994).

[33] *Shelton*, 535 U.S. at 658.

[34] *Id.*

[35] *Id.* at 658-59.

[36] *Id.* at 659.

[37] *Id.* at 659.

[38] *Shelton*, 535 U.S. at 661.

[39] 511 U.S. 738 (1994).

[40] *Id.* at 740.

[41] *Id.* at 741.

[42] *Id.* at 749. The majority also noted the "less exacting" standards applicable to sentencing, under which a defendant's prior criminal *behavior* as well as convictions are admissible. *Id.* at 747.

Amicus in *Shelton* argued that the *Nichols* decision[43] established that "only those proceedings resulting in immediate actual imprisonment trigger the right to state-appointed counsel,"[44] giving the Court a second alternative that would result in more uncounseled defendants.

The Court declined to entertain an expensive third alternative - replacing the actual versus potential imprisonment line drawn in *Argersinger* and *Scott* with one that required counsel for any offense which carried the possibility of imprisonment - because respondent had not argued that position in his response to the petition for certiorari.[45]

Despite the clear economic implications, the Court in *Shelton* refused to be intimidated into retreating from the fundamental and essential right to counsel.[46] Instead, the Court sounded *Gideon*'s trumpet loudly and clearly: "[A] defendant who receives a suspended or probated sentence *to imprisonment* has a constitutional right to counsel."[47]

Like *Gideon, Shelton* runs the risk of providing a right that exists only on paper. While the majority in *Shelton* acknowledged that sixteen states did not provide for counsel in situations like Shelton's, they found "scant reason to believe that [the holding] would affect existing practice in the large majority of the States."[48] In reality however, even those states that *say* they provide counsel for individuals like Shelton, may not actually be doing so.[49]

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[43] *Shelton*, 535 U.S. at 661. Amicus, invited by the Court to argue this position, also relied upon *Gagnon v. Scarpelli*, 411 U.S. 778, 788-91 (1973), in which the Court held that the right to counsel in probation or parole revocation hearings was to be determined on a case-by-case basis. *See* Brief of Amici Curiae at 13, *Shelton* (No. 00-1214), *available at* 2001 WL 1631562.

[44] *Shelton*, 535 U.S. at 663 (quoting Brief of Amici Curiae at 13).

[45] Justice Ginsburg, citing *S. Cent. Bell Tele. Co. v. Alabama*, 526 U.S. 160, 171 (1999), noted that the Court did not "entertain" this alternative due to the petitioner's failure to raise it until the filing of his brief on the merits. *Id.* at 661 n.3 ("We would normally expect notice of an intent to make so far-reaching an argument in the respondent's opposition to a petition for certiorari . . . .").

[46] Amicus argued that "'hundreds of thousands' of uncounseled defendants receive suspended sentences, but only 'thousands'" are ever actually incarcerated because of a violation of the terms of the suspension, thus implying that providing counsel to all those additional defendants would have huge financial ramifications for the states. *Shelton*, 535 U.S. at 665-66 (citing Brief of Amici Curiae at 20-22); *see also* Brief of National Association of Criminal Defense Lawyers in Reply to Brief of Amici Curiae at 5-6, *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/00-1214/00-1214.mer.ami.nacdl.rep.pdf (last visited Jan. 3, 2004).

[47] *Shelton*, 535 U.S. at 674.

[48] *Id.* at 669.

[49] *See* Cait Clarke, *Taking* Alabama v. Shelton *to Heart*, CHAMPION Jan.-Feb. 2003, at 25. For example, in Kentucky, "*Shelton* did not change the question. . . . [M]ost defendant[s] . . . have been . . . asking for the money from the funders who do not give all that is asked for to do the job fairly. The defenders then place the limited, incomplete resources where it does the most good. The last in line are the low level misdemeanor cases and juvenile cases." (quoting Edward Monahan, Deputy Public Advocate with the Kentucky Department of Public Advocacy). *Id.*

D. Other Aging[50] - *Strickland*, *Williams*, and *Wiggins*

Aging is not necessarily lineal. The other Supreme Court decision most significant to this assessment of *Gideon* is a case that was decided before *Shelton* and whose impact on the *Gideon* right to counsel arguably dwarfs all other developments. *Strickland v. Washington*[51] decided in 1984 and two cases that followed it, *Williams v. Taylor*,[52] and *Wiggins v. Smith*,[53] penetrate the right to counsel in an omnipotent way.

After *Gideon*, in addition to determining when the Sixth Amendment right applied, the Court had to decide what the right entailed. Since the early days of recognition of the right, it was clear that merely appointing a "warm body" did not satisfy the constitutional guarantee to counsel. The guarantee would be merely illusory if appointed counsel was not competent.

Before *Strickland*, the Court generally focused on assuring that the state was neither denying nor interfering with an accused's right to counsel.[54] In fact, the Court noted in *Strickland* that with the exception of one case,[55] the Court had not "directly and fully addressed a claim of 'actual ineffectiveness' of counsel's assistance in a case going to trial."[56]

While the Supreme Court had not addressed the issue of trial effectiveness, other courts had. Some courts opined that counsel was fulfilling the Sixth Amendment guarantee so long as counsel's assistance did not make a "sham, farce, or mockery" out of the proceedings.[57] In the opinion of other judges, the

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[50] From the year of the *Gideon* decision to the present day, the U.S. Supreme Court issued other decisions that affected the right to counsel, but most, only tangentially. A discussion of these decisions is not necessary for a full examination of the issues in this article. *See, e.g.*, Glover v. United States, 531 U.S. 198 (2001) (any amount of actual jail time impacts Sixth Amendment right); M.L.B. v. S.L.J., 519 U.S. 102 (1996) (counsel in appeal of parental rights); Landon v. Plasencia, 459 U.S. 21 (1982) (counsel for deportation hearing); Lassiter v. Dep't of Soc. Serv., 452 U.S. 18 (1981) (counsel in parental termination case).

[51] 466 U.S. 668 (1984).

[52] 529 U.S. 362 (2000).

[53] 123 S. Ct. 2527 (2003).

[54] *See, e.g.*, Geders v. United States, 425 U.S. 80 (1976) (barring consultation with client during night recesses); Herring v. New York, 422 U.S. 853 (1975) (barring closing argument in bench trial); Brooks v. Tennessee, 406 U.S. 605 (1972) (requiring defendant to be first defense witness); Hamilton v. Alabama, 368 U.S. 52 (1961) (no right to counsel at arraignment at which insanity plea must be entered); Glasser v. United States, 315 U.S. 60 (1942) (appointing same counsel for codefendants).

[55] Cuyler v. Sullivan, 446 U.S. 335 (1980) (raising issue of effectiveness of counsel who had a conflict of interest).

[56] *Strickland*, 466 U.S. at 691. In one prior decision the Court found that a particular failing on counsel's part "does not demonstrate ineffectiveness." United States v. Agurs, 427 U.S. 97, 102 n.5 (1976).

[57] *See, e.g.*, Frand v. United States, 301 F.2d 102 (10th Cir. 1962); United States v. Tribote, 297 F.2d 598 (2d Cir. 1961); Diggs v. Welch, 148 F.2d 667 (D.C. Cir. 1945).

"farce or mockery" standard was itself a "mockery of the sixth amendment."[58] Most courts by then had adopted a "reasonably effective[59] assistance" standard.[60] However, the courts differed greatly on the degree of prejudice resulting from ineffective assistance necessary to secure relief for the accused.

Notwithstanding the different standards and opinions, two more general camps arose - those that would enumerate duties required of all defense counsel and those that felt such an approach would mechanize and injure the attorney-client relationship.[61] In *Strickland*, the Court seemingly laid to rest the conflict and returned to the "function of counsel" principle first set forth in *Gideon*.[62] The "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[63]

The Court rejected an approach that would define counsel's duties by forming "a checklist for judicial evaluation of attorney performance. . . . Prevailing norms of practice as reflected in the American Bar Association (ABA) standards, and the like, are guides to determining what is reasonable, but they are only guides."[64] Defined duties or standards of conduct, in the Court's opinion, would be impossible to articulate, due to the difference in situations.[65] In the Court's opinion, any attempt to articulate guidelines "could distract counsel from the overriding mission of vigorous advocacy . . . ."[66]

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[58] Bazelon, *supra* note 7, at 28 (noting that this standard of representation "requires such a minimal level of performance . . . that it is itself a mockery of the sixth amendment").

[59] The term "effective" is not found in the Sixth Amendment and was most likely chosen by federal courts devising a standard based on the U.S Supreme Court's articulation of the phrase "effective assistance of counsel" in *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (dealing with the right of one entering a guilty plea to reasonably competent advice of counsel).

[60] *See generally* Gregory Sarno, Annotation, *Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client*, 2 A.L.R. 4th 99 (1980).

[61] *Compare* Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977) (standards as a guide, but not the equivalent of "effective assistance"), *with* United States v. Decoster, 624 F.2d 196, 266 (D.C. Cir. 1979) (Bazelon, J., & Wright, C.J., dissenting).

[62] Strickland v. Washington, 466 U.S. 668, 689 (1984).

[63] *Id.* at 686.

[64] *Id.* at 688 (citing CRIMINAL JUSTICE SECTION, ABA, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) [hereinafter DEFENSE FUNCTION], *available at* www.abanet.org/crimjust/standards/dfunc_toc.html (last visited Jan. 3, 2004)).

[65] The Court noted that the profession had "[p]revailing norms of practice," but said that the Sixth Amendment's promise relied upon counsel's ethical fulfillment of an attorney's role and that "[m]ore specific guidelines are not appropriate." *Strickland*, 466 U.S. at 688. The Court did list six "basic duties" of defense counsel: the duty to assist the defendant; the duty of loyalty; the duty of advocacy; the duty to consult with the client on appropriate decisions; the duty to keep the client informed; and the duty to exercise skill and knowledge necessary to produce a fair trial. *Id.* Notably absent from the list was counsel's duty to have a meaningful relationship with one's client. A year prior to *Strickland*, the Court in *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983), had resolved any issue of whether such a duty or right existed when it allowed new counsel to be substituted for hospitalized counsel six days before the trial despite the client's objection.

[66] *Strickland*, 466 U.S. at 689.

Instead of evaluating counsel's performance by defining specific duties or obligations, the Court chose a functional approach. Since the purpose of the right to counsel was to assure the validity of the adversary system, appointed counsel must provide assistance that was meaningful enough to truly test the case against the accused.[67] Thus, the Court concluded in *Strickland* that the "Sixth Amendment . . . envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair."[68] A claim of ineffective assistance requires a showing that counsel's performance was deficient[69] and, further, that the deficient performance prejudiced the defense.[70]

Despite the ease with which the *Strickland* Court laid out its functional standard, the two-prong ineffectiveness test is not only difficult to apply, but it also yields ironic and unfair results. Surely, a sleeping or intoxicated lawyer does not afford representation vigorous enough to assure the proper functioning of an adversary system, yet courts have divided, sometimes sharply, over just those issues.[71]

Those who favored a more specific approach,[72] including presumably the endorsement of specific performance guidelines, were not deterred by the

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[67] *Id.* at 685.

[68] *Id.*

[69] Deficient performance requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

[70] *Id.* The defendant is prejudiced if "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* A defendant is required to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one that undermines confidence in the outcome. *Id.*

[71] The often-repeated story of Calvin Burdine, represented at trial by a sleeping lawyer, bears one more reiteration. On appeal, the Texas Court of Criminal Appeals held that the sleeping lawyer was sufficient counsel under the Sixth Amendment. *Ex parte* Burdine, 901 S.W.2d 456 (Tex. Crim. App. 1995). The district court on federal habeas corpus granted relief in *Burdine v. Johnson*, 66 F. Supp. 2d 854, 866 (S.D. Tex. 1999), only to be reversed by the Fifth Circuit. Burdine v. Johnson, 231 F.3d 950 (5th Cir. 2000). While an en banc Fifth Circuit ultimately granted relief, five judges on that court would have allowed the conviction to stand because a sleeping lawyer did not offend the *Strickland* effectiveness standard. Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001) (en banc). *See* Steve Bright, *Turning Celebrated Principles Into Reality*, CHAMPION, Jan.-Feb. 2003, at 9 (discussing Burdine's case and the cases of others represented by sleeping and intoxicated lawyers).

[72] Only Justice Marshall spoke in favor of adopting specific standards in *Strickland*. 466 U.S. at 707-09 (Marshall, J., dissenting). Marshall objected to the approach taken by the majority as being "so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts." *Id.* at 707. In Justice Marshall's opinion, "much of the work involved in . . . [criminal defense lawyering (in which he notably had engaged)] could profitably be made the subject of uniform standards." *Id.* at 709 (citing decisions and articles setting forth guidelines as well as the ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980)). Justice Brennan concurred in part and dissented in part but

Strickland majority's emphasis that "guides" were just guides. Virtually every interested organization has promulgated, proposed, or at least debated standards for criminal defense lawyering. Furthermore, government leaders have both invested in and endorsed the standards approach.

The ABA for example through its Criminal Justice Section, has promulgated standards related to the defense function which it periodically updates.[73] The ABA first undertook the project in 1968, five years after the *Gideon* decision. Chief Justice Burger described the effort as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history."[74] In addition to providing meaningful guidance to criminal defense lawyers, the preparation of "black letter" standards contradicted the claim that such an undertaking was impossible. In 1973, close on the heels of the ABA effort, the National Advisory Commission on Criminal Justice issued a set of standards applicable to criminal defense.[75] The following year the U.S. Department of Justice commissioned the National Study Commission on Defense Services, which ultimately released the *Guidelines for Legal Defense Systems in the United States* in 1976.[76]

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specifically agreed with the majority, and disagreed with Justice Marshall, on the issue of specific guidelines. *Id.* at 703 (Brennan, J., concurring in part and dissenting in part) ("I agree with the Court's conclusion that a 'particular set of detailed rules for counsel's conduct' would be inappropriate.").

[73] *See* DEFENSE FUNCTION, *supra* note 64.

[74] Warren Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251 (1974).

[75] *See* NLADA, *Standards for the Defense*, *available at* http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense (last visited Jan. 3, 2004). According to the standards,

> The National Advisory Commission on Criminal Justice Standards and Goals was appointed in 1971 by the Administrator of the Law Enforcement Assistance Administration and supported by $1.75 million in LEAA grants, to formulate for the first time national criminal justice standards and goals for crime reduction and prevention at the State and local levels. The Commission's work was to build upon the report of the 1967 President's Commission on Law Enforcement and Administration of Justice, entitled "The Challenge of Crime in a Free Society," and the reports of its task forces, including the Courts Task Force.

Id.

[76] *See* GUIDELINES, *supra* note 10. The history of the GUIDELINES is described as follows:

> From 1974 to 1976, following consultations with the Attorney General and the Administrator of the Law Enforcement Assistance Administration, the National Legal Aid and Defender Association convened a 35-member National Study Commission on Defense Services, with LEAA grant support. The Commission's charter was to utilize the standards developed by the National Advisory Commission on Criminal Justice Standards and goals in 1973 as a "basic underpinning for an extensive study of defense services aimed at preparing a blueprint of guidelines and procedures which would meet the nation's indigent defense needs." The National Study Commission was divided into six topical Task Forces: 1) Scope of Services, Eligibility and Recoupment; 2) Workload, Manpower and Budget Projections; 3) Defender System

In addition to their general *Standards for Criminal Justice*, the ABA has also adopted *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases.*[77] Most recently, the ABA adopted *The Ten Principles of a Public Defense Delivery System.*[78] Unlike the *Defense Function Standards*, which largely concern the conduct of individual defenders,[79] the *Ten Principles* "constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney."[80]

While the ABA was the first to articulate standards for individual defenders, its "Ten Principles" are largely identical to an earlier document, *The Ten Commandments of Public Defense Delivery Systems.*[81] Among the contributors to that document was the National Legal Aid and Defender Association (NLADA), an organization that has provided much-needed leadership in the development of requirements for lawyers providing civil and criminal representation to the poor.[82]

Structure; 4) Internal Defender Office Structure; 5) Assigned Counsel System Structure; and 6) The Defense Attorney's Role in Diversion and Plea Bargaining. Following extensive study and the preparation of a Draft Report, a three-day National Colloquium on the Future of Defender Services was convened in 1976 in Washington, DC, to which were invited all state chief justices, state bar presidents, LEAA state planning agency executive directors, and defender program heads from around the country. The Colloquium produced some 60 commentaries upon the Draft Report, which was then further reviewed by the Commission and Colloquium participants. The black letter "Summary of Recommendations" printed here constitutes 20 pages of the Commission's 560-page Final Report, omitting extensive commentary and discussion.

Id.

[77] *See* ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (Rev. ed. 2003), *available at* www.abanet.org/deathpenalty/DPGuidelines42003.pdf. (Oct. 20, 2003) [hereinafter GUIDELINES FOR DEATH PENALTY CASES].

[78] These principles were adopted in February, 2002 by the ABA House of Delegates. *See* STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS ET AL., ABA, REPORT TO THE HOUSE OF DELEGATES (Feb. 5, 2002) [hereinafter STANDING COMMITTEE], *available at* http://www.abanet.org/legalservices/downloads/sclaid/10principles.pdf.

[79] For example, the DEFENSE FUNCTION, *supra* note 64, at 4-1.1, asserts that the "standards are intended to be used as a guide to professional conduct and performance." Included are standards related to investigation, workload, public statements, and trial preparation and performance. *See id.*

[80] STANDING COMMITTEE, *supra* note 78.

[81] James Neuhard & Scott Wallace, *The Ten Commandments of Public Defense Delivery Systems*, *in* COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS 12-15 (2000) [hereinafter COMPENDIUM] *available at* http://www.ojp.usdoj.gov/indigentdefense/compendium/pdftxt/vol1.pdf.

[82] Close on the heels of the ABA's CRIMINAL JUSTICE STANDARDS were numerous standards developed by the NLADA, including GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS, STANDARDS FOR THE APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES, DEFENDER TRAINING AND DEVELOPMENT STANDARDS, and the GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENT CONTRACTS FOR CRIMINAL DEFENSE SERVICES. These and related standards are available at www.nlada.org/Defender/Defender_Standards/Defender_Standards_NLADA (last visited Jan. 3, 2004).

What is very significant about the *Ten Commandments* and the much larger *Compendium of Standards for Indigent Defense Systems*[83] of which it is a part, (at least for purposes of this article) is its impetus. According to the Foreword, at least a partial motivation for the collection and articulation of standards was the commitment on the part of the Department of Justice to the "principle that all Americans should have equal access to quality legal defense" and the recognition that the "[i]mplementation of standards governing all aspects of indigent defense systems can enhance the fairness and credibility of our justice system."[84]

Of additional historical significance, and in stark contrast to some policies of the present Justice Department,[85] the former Attorney General of the United States encouraged cooperative efforts "to strive to implement helpful standards that cover . . . skills, experience, and appropriate workloads for indigent defense offices."[86]

Against this backdrop – the continual promulgation and endorsement of indigent defense standards by lawyers, researchers, and policy makers – the U.S. Supreme Court was invited to reconsider its standoffish approach to specific standards. Less than six months after *Strickland*, for example, the Court was again asked to consider the ineffective assistance claim of a death-sentenced defendant. Gary Alvord had been previously adjudicated insane, but his trial counsel in a subsequent case did not investigate an insanity defense,[87] deferring totally to the client's alibi defense strategy.[88] Although a majority of the Court declined the invitation, and denied certiorari, two dissenting justices quoted at length from the *ABA Standards of Criminal Justice*, *the ABA Code of Professional Responsibility* and the *ABA/BNA Lawyer's Manual on Professional Conduct*.[89]

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[83] *See* COMPENDIUM, *supra* note 81. The COMPENDIUM is a five-volume work which was prepared by the Institute for Law and Justice under a Bureau of Justice Assistance, U.S. Department of Justice contract. According to its introduction, "[t]he Compendium of Standards for Indigent Defense Systems presents national, state, and local standards related to five major aspects of indigent defense. . . . [a]dministration of delivery services . . . , [a]ttorney performance . . . , [c]apital case representation . . . , [a]ppellate representation . . . , [and] [j]uvenile justice defense." *Id.* at 7. The standards are described as "non-case specific statements that help policymakers assess the adequacy or appropriateness of the provision of defense services to indigent defendants." *Id.* The COMPENDIUM'S purpose is multi-faceted: "for persons dealing with funding sources; for agencies or organizations that are developing criminal defense standards; and for academics and courts that need a reference point." *Id.*

[84] *Id.* at Foreword.

[85] *See infra*, Part IV.B.

[86] COMPENDIUM, *supra* note 81.

[87] *See* Alvord v. Wainwright, 469 U.S. 956, 956-57 (1984). Although counsel did file a motion for a mental examination after which Alvord was found competent to stand trial, counsel did not conduct an independent investigation of Alvord's mental illness; did not advise the trial court of the previous adjudication of insanity; did not secure most of Alvord's medical records; and did not inform Alvord of the effect of the previous adjudication under Florida law. *Id.* at 957.

[88] *Id.* 956-63 (Marshall and Brennan, JJ., dissenting from denial of certiorari).

[89] *Id.* at 960. While the opinion by Justice Marshall retreats to the majority language in *Strickland* that the standards are "only guides," 466 U.S. at 688, his reliance on specific provisions of the

From 1984 until 2000, when the Court undertook to review two claims of ineffectiveness assistance of counsel, the Court often cited standards as support for some substantive legal proposition.[90] In none of those cases, however, did the Court confront the issue of adopting specific standards for attorney performance.

In the first of the two 2000 decisions, the Court rejected a clear opportunity to adopt a specific standard of conduct.[91] Lucio Flores-Ortega entered a guilty plea to second-degree murder in a California state court.[92] Although Flores-Ortega was advised of his right to appeal and his right to court-appointed counsel on appeal, no notice of appeal was filed.[93] After losing his state habeas claims, Flores-Ortega filed a federal habeas petition which likewise was denied.[94] But the Ninth Circuit Court of Appeals granted relief because of precedent in that circuit that "a defendant need only show that he did not consent to counsel's failure to file a notice of appeal to be entitled to relief."[95] Thus, on certiorari the Court was squarely faced with a choice – apply *Strickland's* "reasonably effective assistance" standard or adopt the Ninth Circuit's *per se*, bright-line rule,[96] a specific standard requiring the filing of a notice of appeal unless a defendant specifically instructs otherwise.

The Supreme Court majority adhered to the *Strickland* standard and continued the Court's rejection of a specific standard approach.

> We reject this *per se* rule as inconsistent with *Strickland's* holding that "the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." The Court of Appeals failed to engage in the circumstance-specific reasonableness inquiry required by *Strickland*, and that alone mandates vacatur and remand.[97]

While the Court acknowledged that a "best practices" approach would follow both the *per se* rule of the Ninth Circuit as well as the standards set out in the *ABA Standards for Criminal Justice*,[98] it reiterated *Strickland's* mandates that "guides . . . are only guides" and that "imposing 'specific guidelines' on counsel is 'not appropriate.'"[99] Reminding the states that they were free to adopt specific rules "to ensure that criminal defendants are well represented," the Court

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ABA Standards as a basis for concluding that the lower court's significantly misunderstood counsel's obligations is significant.

[90] The Court, for example, cited the ABA STANDARDS OF CRIMINAL JUSTICE thirty-one times in the sixteen years between *Strickland* and *Williams*. In many of those cases, the Court used the *Standards* to define appropriate conduct.

[91] Roe v. Flores-Ortega, 528 U.S. 470 (2000).

[92] *Id.* at 473.

[93] *Id.* at 474.

[94] *Id.*

[95] *Id.* at 475 (citing United States v. Stearns, 68 F.3d 328 (9th Cir. 1995)).

[96] In addition to the Ninth Circuit, the First Circuit has adopted a *per se* rule. *See* United States v. Tajeddini, 945 F.2d 458 (1st Cir. 1991) (per curiam).

[97] 528 U.S. at 478 (citations omitted).

[98] DEFENSE FUNCTION, *supra* note 64, at 4-8.2(a).

[99] *Roe*, 528 U.S. at 479 (citing DEFENSE FUNCTION, *supra* note 64; quoting Strickland v. Washington, 466 U.S. 668, at 688 (1984)).

reiterated that the "Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices."[100]

In the second decision, *Williams v. Taylor*,[101] the Court did not directly address the issue of the application of standards but, as in prior decisions, cited the *ABA Standards* as a reference for appropriate conduct.[102] Both the reiteration in *Flores-Ortega* and the avoidance in *Williams* make the Court's decision three years later in *Wiggins v. Smith*[103] even more significant.

Wiggins was a death-sentenced state defendant whose counsel, based upon a planned sentencing strategy, neglected to investigate and present mitigating evidence of Wiggins' traumatic childhood.[104] Both the state and federal appeals courts denied relief, basing their decisions on counsel's reasonable strategic choice to forego a mitigation defense in favor of a defense that Wiggins was not directly responsible for the murder.[105] The U.S. Supreme Court reversed, holding that counsel's investigation into Wiggins' background was "neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence . . . that would have led a reasonably competent attorney to investigate further."[106]

What *seems* significant is the Court's acknowledgment that one basis for its holding that the Federal Constitution's reasonableness standard was violated[107] was counsel's failure to adhere to "professional standards that prevailed in 1989."[108] Specifically, the Court noted that counsel's conduct was inconsistent with practice standards in Maryland as well as under the *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*[109] and the

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[100] *Id.* Having rejected the Ninth Circuit's *per se* standard requiring the filing of a notice of appeal absent a client's instructions otherwise and the ABA standard requiring counsel to inform and advise a client and then abide by a client's choice regarding appeal, the Court sets out its own standard: "counsel has a constitutionally-imposed duty to consult with the defendant about an appeal when there is reason to think (1) that a rational defendant would want to appeal . . . , or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing." *Id.* at 480.

[101] 529 U.S. 362 (2000).

[102] *Id.* at 396.

[103] 123 S. Ct. 2527 (2003).

[104] *Id.* at 2529.

[105] *Id.* at 2529-30.

[106] *Id.* at 2542. The Court noted that it was not establishing a standard that required investigation of "every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing" nor requiring defense counsel to present mitigating evidence at sentencing in every case. *Id.* at 2541.

[107] *See supra* text accompanying note 97.

[108] *Wiggins*, 123 S. Ct. at 2542. The majority noted early in the opinion that counsel's decision "fell short of the professional standards that prevailed in Maryland in 1989" and then linked that finding with a finding of unreasonableness to conclude that counsel's conduct did not reflect reasonable professional judgment. *Id.* at 2536, 2541.

[109] GUIDELINES FOR DEATH PENALTY CASES, *supra* note 77, at 11.4.1(C).

ABA Guidelines for Criminal Justice.[110] These standards, noted the dissent, were the very ones that *Strickland* had "eschewed" as "only guides."[111]

Those who have committed their resources and energy to the development of criminal justice standards see *Wiggins* as signaling a demand for state standards. The President of NLADA commented that the ruling "makes clear that jurisdictions which do not adhere to clear national standards regarding public defense services do so at their own peril," and demonstrates the Court's recognition that "standards developed by the National Legal Aid and Defender Association, regarding the appointment and performance of counsel in death penalty cases [define] . . . a reasonable and necessary professional standard of performance."[112]

One thing is clear. From the beginning it has been recognized that *Gideon*'s promise could not be fulfilled given the crazy-quilt variations of criminal defense systems existing in the states. Uniformity is necessary not only to assure equal protection, but also to assure that the funds were being put to good uses. The implementation of standards, standards that address but do not micromanage, is the surest way to an efficient, fair, and credible justice system.

As Justice Marshall, who had previously *practiced* law[113] noted in his dissent in *Strickland*:

> [T]he performance standard adopted by the Court . . . will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. . . . In essence, the majority has instructed judges . . . to advert to their own intuitions . . . and has discouraged them from trying to develop more detailed standards . . . . [T]he Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.[114]

Thus, after first outlining the promise of *Gideon* in 1963, the Court, twenty years later, in *Strickland,* denied substance to the right in a way that would

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[110] DEFENSE FUNCTION, *supra* note 64, at 4-4-1, commentary.

[111] *Wiggins,* 123 S. Ct. at 2546, 2548 (Scalia, J., dissenting) (citing the majority opinion as "treating the ABA Guidelines as 'well-defined norms.'").

[112] Press Release, Clinton Lyons, Statement of Clinton Lyons, President and CEO, on Supreme Court's Ruling in *Wiggins v. Smith* (June 26, 2003), *available at* www.nlada.org/News/News_Press_Releases/2003062613585815.

[113] Abe Krash suggests the lack of real lawyering experience on the part of the Court's members as one explanation for the Court's failure to intervene to insure adequate representation. *See* Krash, *supra* note 4.

> I regard it as noteworthy that none of the justices presently on the Court, have extensive experience as a criminal trial lawyer. Justice Black [the author of *Gideon*] had been a county prosecutor, a police court judge, and a practicing lawyer . . . who frequently represented defendants. He knew from personal knowledge how important it is to have a competent lawyer at one's side in the courtroom. Judges who have not had such experience may tend to underestimate the importance of competent counsel

Id. at 13.

[114] Strickland v. Washington, 466 U.S. 668, at 707-08 (1984) (Marshall, J., dissenting).

severely impair the promise itself. Perhaps the sign from *Wiggins*, now that another twenty years have passed, is that the Court is, at last, realizing the merit of Justice Marshall's warnings.

PART II: *GIDEON* AT WORK IN STATES ON THEIR OWN

A. The First Twenty Years

How did the states react to the *Gideon* mandate? Most of those who studied state reaction in the decade that followed *Gideon* were not complimentary. Their predictions for the promise of *Gideon* were in fact quite dire. For example, a report by the NLADA, released a decade after *Gideon* predicted that "unless a massive commitment is made . . . to the goals of equality and fairness, we will not in our lifetime witness the day when any American, regardless of wealth, has the ability to adequately defend his liberty if called before the bar of justice."[115]

A similar study concluded that "millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation . . . as our nation's goal of equal treatment for the accused, whether wealthy or poor, remains unattained."[116] Even those with ringside seats were highly critical of the progress: "the battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon* and *Argersinger* goes unfulfilled. The casualties of those defeats are easy to identify . . . . They are the persons being represented . . . by 'walking violations of the Sixth Amendment.'"[117]

What exactly were the states doing to attempt to satisfy the *Gideon* guarantee? In 1982 and 1986, the Department of Justice commissioned a study of indigent defense in the states. The 1986 study, published in 1988, found that the states used a myriad of methods to provide representation to indigent defendants.[118] In 52% of the counties, counsel for the indigent was provided through an assigned counsel program.[119] Public defender programs[120] operated in

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[115] THE OTHER FACE, *supra* note 10, at 70.

[116] LEFSTEIN, *supra* note 10, at 2.

[117] David Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811-12 (1976) (quoting Bazelon, *supra* note 7, at 2).

[118] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: CRIMINAL DEFENSE FOR THE POOR 1986, at 1 (1988) [hereinafter CRIMINAL DEFENSE FOR THE POOR].

[119] *Id.* The essential aspect of an assigned counsel program is the utilization of private attorneys on a random basis to represent indigent defendants. *Id.* Counsel are either assigned on an ad hoc basis, usually by the judge of the court, or on a coordinated basis, in which some administrative body is responsible for assignments. CRIMINAL JUSTICE SECTION, ABA, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 5-2.1 (3d ed. 1992), *available at* http://www.abanet.org/crimjust/standards/defsvcs_toc.html. In the latter method, some rotational scheme is generally in place. *Id.* Both methods require that counsel petition for the payment of fees, usually, but not always on an hourly basis. *Id.* The ABA endorses the use of a coordinated assigned counsel program over an ad hoc one and comments in its standards that "the selection of

a little more than one-third of the counties and the remainder provided counsel via a contract system.[121]

B. Thirty Years After *Gideon*

A 1995 study found that the ad hoc method for assigning counsel remained the "predominant indigent defense system used in the country, particularly in smaller, less populated counties . . . ."[122] Additionally, because of its ability to help stabilize and reduce the expense, the contract method has increased in use in the past few years.[123] While the number of public defender offices has also increased in the last ten years, many of those offices are understaffed and underfunded.[124]

The specifics of the 1995 study demonstrate, perhaps, more of a shift than a substantive change. More than half of the states now have some form of a statewide indigent defense program with sixteen states operating with a state public defender who has complete authority statewide for providing indigent defense services.[125] Another twelve states have statewide systems administered by a commission, rather than by a statewide public defender.[126] Fourteen states have no statewide system, but operate instead with county or local systems.[127]

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lawyers . . . should not be made by the judiciary or elected officials, but should be arranged for by administrators . . . ." *Id.* at 5-1.3(a).

[120] CRIMINAL DEFENSE FOR THE POOR, *supra* note 118. A public defender program is a program that is staffed by full-time or part-time attorneys who provide indigent representation in a given location. *Id.* at 3; *see also* Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 34 (1995). Many different variations exist among public defender programs. Some are funded by the state; others by counties; still others by private, nonprofit funding. CRIMINAL DEFENSE FOR THE POOR, *supra* note 118, at 3. Even if a jurisdiction has a full-time public defender officer, other counsel must be utilized to represent individuals when a conflict of interest arises that prohibits representation by the organization.

[121] *Id.* at 3. A contract system is one in which the governmental entity enters into a contract with an individual or individuals to provide legal representation for the indigent accused. *Id.* The two main types of contract systems are fixed-price contracts (i.e., the government contracts to pay a set amount for all cases that happen to demand services within a given time period), and fee-per-case contracts, (i.e., the government agrees to pay a set amount per type of case during a set time period). *Id.* at 6. The contract system for providing indigent defense is problematic for numerous reasons and has been condemned by the ABA's House of Delegates. *See* Spangenberg & Beeman, *supra* note 120, at 34; *see also* THE SPANGENBERG GROUP, U.S. DEP'T OF JUST., CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT (2000), *available at* http://www.ncjrs.org/pdffiles1/ bja/181160.pdf. While a criticism of different systems is not the focus of this article, see *State v. Smith*, 681 P.2d 1374 (Ariz. 1984), for one court's view as to why such a system is unconstitutional.

[122] Spangenberg & Beeman, *supra* note 1201, at 33.

[123] *Id.* at 35.

[124] *Id.* at 33.

[125] *Id.* at 37.

[126] *Id.* at 38.

[127] Spangenberg & Beeman, *supra* note 1201, at 40.

The remaining eight states are varied but include some states with a complete contract system and others with legislative option.[128]

Thus, three decades after *Gideon* the country's indigent defense systems were still very much that "crazy quilt" in which the quality of representation depended not only upon the state, but perhaps even, the county of the prosecution.[129] Not only might the type of justice a defendant receive depend upon the size of his or her pocketbook, it might also depend on the place of the prosecution.

A simple example proves the point. Most of those who have studied the various methods for providing indigent defense agree that the public defender model is preferable to the assigned counsel or contract model for several reasons, including the quality representation that inures from a core group of lawyers experienced in criminal defense work.[130] Imagine then the difference in the quality of representation in Los Angeles, for example, where the first public defender officer was established in 1913,[131] and in Dallas where, until very recently, "unchecked judicial discretion in the appointment of counsel created perverse incentives for elected judges and sometimes resulted in appointment of unqualified and low-paid counsel who did not zealously represent their clients."[132]

Obviously no one would claim that history alone would guarantee quality legal services. In fact, it is ironic that in California, where the notion of a public defender system was born fifty years before *Gideon*, state resources for public defense were cut in half twenty years after *Gideon*.[133]

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[128] *Id* at 37-41.

[129] LEFSTEIN, *supra* note 10, at 16-17.

[130] The preference for a public defender model depends on many factors of course including adequate funding, enforceable standards, fair caseloads, and political independence. *See, e.g.*, COMPENDIUM, *supra* note 81; NLADA, *Five Problems Facing Public Defense on the 40th Anniversary of* Gideon v. Wainwright, *at* http://www.nlada.org/Defender/Defender_Gideon/five_problems.pdf (last visited Jan. 3, 2004).

[131] The history of the Los Angeles Public Defender Office can be read at http://pd.co.la.ca.us/History.html (last modified, June 10, 2003). The office was referenced in a 1965 *Readers' Digest* article in which one of its clients was quoted as saying, "'Even if I had $10,000 I couldn't buy that kind of defense – for that kind of money,' says Rossi today. 'And here I am a nobody, just a 52-year old bartender in a jam. When a plain nobody gets a defense only a rich somebody could buy, you got a real great country.'" *Id.*

[132] Rodney Ellis & Hanna Liebman Dershowitz, *Slouching Toward Defense in Texas*, CHAMPION, Jan.-Feb. 2003, at 52, 53. Texas recently passed the Texas Fair Defense Act which requires appointment of counsel from either a public defender office or a list of qualified counsel in a "fair, neutral and nondiscriminatory manner." *Id.*

[133] Charles M. Sevilla, Gideon *and the Short Happy Life of California's Public Defender Officer*, CHAMPION, Jan.-Feb. 2003, at 44. The State-wide California Public Defender Office, created in 1976 to defend indigent defendants on appeal, "provided high quality legal assistance [to clients], but also spread the expertise to the private sector by running training seminars, publishing inexpensive how-to-do-it manuals, creating a brief bank . . . , and participating in bar committees . . . ." *Id.* These, of course are other significant advantages that a public defender system has over either an assigned counsel or contract system. *Id.* In 1983, the California office's funding was cut

Inadequate funding is, perhaps, the most consistent barrier to fulfilling *Gideon's* promise. While the first two decades of the *Gideon* experience included a steady demand for funding, the last decade has seen a "marked increase[] in the need for state-funded counsel."[134] This dramatic increase is a result of several factors including both a significant increase in the number of criminal cases as well as in the number of indigent criminal cases.[135] Again a patchwork quilt emerges. States fund their indigent defense systems in numerous ways. Twenty-three states fund their systems solely through state funds.[136] Eleven states utilize only county funds.[137] The remaining sixteen states use a combination of state and county funds.[138] The source of the funds vary as well with some states relying on court costs, others on filing fees, and others on special fees assessed upon civil or criminal litigants.[139]

Those who would find the silver lining suggest that the delivery of indigent defense services in the last decade has undergone "important reform," "[t]he most significant trend [of which] is the movement toward some type of state oversight for indigent defense services . . . and often state funds to ensure that uniform, quality representation is provided in every county in the state."[140]

In 1999, the Justice Department surveyed indigent defense funding methods in twenty-one states for purposes of comparing the results with those obtained for the same states twenty-one years earlier.[141] The major shift that had occurred since the 1982 study was that state government, at least in the states surveyed, had taken over the responsibility for funding indigent defense.[142] Four states that had not previously utilized state funding methods now did so and in eleven states, state funding constituted 100 percent of the funding.[143]

In 1999, then, twenty-one states had indigent defense systems funded almost entirely by the state government; twenty states had systems funded by state and county governments; and nine states relied solely on county funds.[144] It was reported that nineteen of the twenty-one state-funded programs had public defender models; nineteen states used assigned counsel models; and eleven funded contract attorney programs.[145] Though the Justice Department report

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in half primarily for political reasons, despite opposition from the courts and outside consultants. *Id.*

[134] Spangenberg & Beeman, *supra* note 1201, at 31.

[135] *Id.*

[136] *Id.* at 41-45.

[137] *Id.*

[138] *Id.*

[139] For a discussion of the varieties of methods used, and tables illustrating the funding sources, see Spangenberg & Beeman, *supra* note 1201, at 41-45.

[140] *Id.* at 48.

[141] DEFRANCES, *supra* note 13, at 1.

[142] *Id.* The states surveyed were Alaska, Colorado, Connecticut, Delaware, Hawaii, Iowa, Maryland, Massachusetts, Minnesota, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin. *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

speaks glowingly about these advances, they may be summarized somewhat differently, though accurately as follows: thirty-six years after *Gideon*, almost half of the states had undertaken the responsibility it mandates and almost 20% utilized the recommended method for providing indigent services.[146]

C. A Representative State

Long before *Gideon*, Tennessee provided for the right to counsel for those "unable to employ counsel."[147] Notwithstanding the statutory mandate, Tennessee did not provide counsel to those charged with misdemeanors before 1972.[148] The lack of fulfillment was basically a lack of commitment to fund what the Tennessee statutes guaranteed.[149]

The delivery of indigent defense services in Tennessee more than two decades after *Gideon* could not be labeled a "system" at all. It was instead a maze of uncoordinated, haphazard, county or district based programs.[150] Prior to 1986, for example, only three counties had public defender programs. The majority of the remaining ninety-two counties used an ad hoc, usually judicially-controlled, appointment system.[151] The absence of an established system had the unwanted effect of producing a disrespect for, and distrust of, the Tennessee criminal justice system.[152]

Twenty-three years after *Gideon*, the Tennessee legislature decided to create three public defender pilot projects to "provide services and protection to indigent defendants."[153] The legislation began as a proposal for a state-wide public defender system, but was amended to provide for only three offices, one in each of the grand divisions of the state.[154] Eventually, the pilot projects became

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[146] DEFRANCES, *supra* note 13, at 1. While *Gideon* obviously did not dictate the manner in which counsel was to be provided and funded, it did require that states honor the federal constitutional right, and not delegate that responsibility to subdivisions of government that could not afford the right. *See* 372 U.S. 335, 344 (1963).

[147] TENN. CONST. art. I, § 9; TENN. CODE ANN. §§ 40-14-102, 103 (1982). The statutes have provided for the right to counsel for the indigent in Tennessee since 1834.

[148] William G. Haemmel, *The Poor Man Before the Bar of Justice in Tennessee - Legal Aid and Services, Public Defenders, and the Criminal Indigent Defendant Act*, 38 TENN. L. REV. 33, 43-46 (1970).

[149] CRIMINAL DEFENSE FOR THE POOR, *supra* note 118, at 25. Tennessee ranked fiftieth in per capita indigent costs and thirty-fifth in per capita justice spending. The study showed a general correlation between the two figures in other states, so that states that ranked higher in overall justice spending generally ranked higher in indigent spending as well. The imbalance in Tennessee between the two figures indicates a greater lack of parity than usual between prosecution and defense spending.

[150] *See* Haemmel, *supra* note 148.

[151] *See id.*

[152] *See, e.g., id.* at 53-54.

[153] 1986 Tenn. Pub. Acts 909.

[154] Tenn. H.R. 1232 and Tenn. S.R. 1588, section 1 originally provided for the creation of a "public defender system for the State of Tennessee . . . ." On April 9, 1986, the bill was amended to provide instead for the creation of the three pilot projects. After several amendments, Chapter 909

permanent and public defender offices were created in each of the judicial districts in Tennessee in 1989.

Though not to be commended for its swiftness, Tennessee thus joined the ranks of those states with a statewide public defender system, the preferred method of delivery for indigent defense services. Although Tennessee's system is commission controlled and has other idiosyncrasies – the most significant of which is the election of the district public defenders[155] – it nonetheless represented an effort, albeit a late one, to comply with *Gideon*.

Like other states, Tennessee desired to monitor the effectiveness of its own system. As originally created, the system tied the allocation of public defender office resources to the amount allocated to district attorneys offices, providing public defenders with approximately one-half the resources.[156] Additionally, the public defenders, unlike their prosecutor counterparts, were required to represent their clients both at trial and on appeal.[157] The justification for the lack of parity was that while district attorneys prosecuted all of the criminal cases in a judicial district, the public defenders only represented those who qualified as indigent.[158] As should have been expected, the caseloads of public defenders in Tennessee

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of the Tennessee Public Acts was passed creating three pilot projects in three Tennessee judicial districts. During legislative hearings, the bill's sponsors announced that the pilot projects would be placed in districts where judges and district attorneys had requested them because of difficulty in finding counsel to appoint. This implied "ask and it shall be given" criteria resulted in the addition of four pilot projects in September, 1987.

[155] In Tennessee, district public defenders are elected every eight years in the August general election. Election methods vary. In some districts, candidates seek the position on a partisan ticket; in others, though no partisan label is attached, one is generally known. In still others, the race for public defender is totally nonpartisan. Florida also has an elected public defender system, but evidently one that differs significantly from the one in place in Tennessee. *See* Trisha Renaud, *Elected Pds Claim Power, Independence*, FULTON COUNTY DAILY REP., Apr. 4, 2003, at 1 ("[A] Daily Report look at elected public defenders in Florida shows that political power often has embroiled them as advocates, sometimes to the extent of campaigning against judges. In Tennessee, defenders are hampered not so much by a lack of political independence, but by a lack of money.").

[156] Specifically, the number of public defenders allocated for each judicial district was one-half the number of district attorneys by statute. THE SPANGENBERG GROUP, THE TENNESSEE COMPTROLLER OF THE TREASURY, TENNESSEE PUBLIC DEFENDER CASE-WEIGHTING STUDY: FINAL REPORT (1999) [hereinafter CASE-WEIGHTING STUDY], *available at* http://www.comptroller.state.tn.us/orea/reports/publdef.pdf; *see also* OFFICE OF JUSTICE PROGRAMS & BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS: REPORT OF THE NATIONAL SYMPOSIUM ON INDIGENT DEFENSE 30 (1999) [hereinafter IMPROVING CRIM. JUST. SYS.], *available at* http://www.ojp.usdoj.gov/indigentdefense/icjs.pdf.

[157] *See* CASE-WEIGHTING STUDY, *supra* note 156.

[158] At a national conference on the crisis in indigent defense funding sponsored by the NLADA in 1982, one prominent national expert noted that, "In today's economy, more people require the appointment of counsel. In the recent past, 48% of all felony defendants required the appointment of counsel. Today, that figure has been going towards 55% to 60%." *GIDEON* UNDONE, *supra* note 10, at 10. In Tennessee, at the time of the creation of the system, the number was closer to 55%; today it is closer to 85-90%.

soared.[159] By 1992, it was reported that the average public defender had 653 cases, more than twice the caseload recommended in national standards.[160] As a result of the staggering workloads and the failure of the state to do anything to alleviate the problem, one public defender's office declined to take any more cases.[161] The judges in the district's lower level court, the General Sessions Court, began appointing lawyers randomly to represent the indigent accused.[162] Because the judges appointed everyone in the county with a law license, many prominent individuals who were not engaged in the practice of criminal law were included.[163] The complaints of the prominent were heard by Tennessee politicians who eventually increased the number of public defenders across the state.[164]

Despite the increases, caseloads continued to hover around an average of 670 cases per attorney.[165] Capital prosecutions were increasing the workload of local public defender offices; overloads were causing delay in trial proceedings and, in turn creating a disgruntled judiciary.[166] In order to have what it considered an "objective, fact-driven formula to rely upon over time to link and project workloads and budgets," the Tennessee General Assembly commissioned a study for purposes of developing a "funding formula for equitable and proportionate funding among" the courts, the prosecutors, and the public defenders.[167] The *Tennessee Weighted Caseload Study* found that Tennessee was in need of fifty-six additional public defenders.[168] No funding to add those defenders was ever allocated by the General Assembly.[169]

What has been the result of the underfunded state-wide public defender system in Tennessee? How does the quality of representation differ, if at all, from that provided under the ad hoc appointment system?

In order to make some general observations and comparisons about the quality of defense services in Tennessee with and without a public defender system, significant members[170] of the Tennessee criminal justice system were

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[159] *See* John B. Arango, *Defense Services for the Poor: Tennessee Indigent Defense System in Crisis*, CRIM. JUST., Spring 1992, at 42; *see also* Mark Curriden, *Tenn. Defense for Poor Called Inadequate*, ATLANTA J. CONST., July 9, 1993, at C2 (quoting Robert Spangenberg).

[160] *See* IMPROVING CRIM. JUST. SYS., *supra* note 156.

[161] *Id.*

[162] *Id.*

[163] *Id.* Both U.S. Senator Howard Baker and Secretary of the U.S. Department of Education, now Senator Lamar Alexander, were reportedly appointed to represent individuals in Knox County General Sessions Court. *Id.*

[164] *See id.*

[165] *See* IMPROVING CRIM. JUST. SYS., *supra* note 156.

[166] *Id.*

[167] *Id.*; *see also In re* Indigent Criminal Justice System, 883 S.W.2d 133 (Tenn. 1994).

[168] CASE-WEIGHTING STUDY, *supra* note 156; *see also* IMPROVING CRIM. JUST. SYS., *supra* note 156.

[169] *Id.*

[170] A judge's survey was sent to every Circuit Court judge in Tennessee with criminal jurisdiction. All elected district public defenders and district attorneys were also surveyed.

surveyed in late 2002 and early 2003.[171] The results confirm that despite the use of a statewide public defender system, the preferred system of providing indigent defense, the quality of justice suffers when the state does not fund the system adequately.[172] In order for the justice system to function properly, it must be adequately funded; otherwise, justice becomes little more than a commodity, the relevant issue only its affordability.

What is most astonishing about the survey is the viewpoint of the prosecutors, in comparison to that of the judges and public defenders.[173] One would expect public defenders to favor higher salaries, better funding, and greater resources. And in fact they do. Of the public defenders who responded,[174] approximately 75% disagreed that funding was adequate to provide 'competent legal representation.'"[175] Almost one-half of the judges surveyed shared that view.[176] Notwithstanding this response, 100% of the prosecutors who responded believed that funding was adequate to allow public defenders to provide effective representation.[177]

The results were similar on questions pertaining to resources and funds for investigation and expert witnesses.[178] Slightly more than 10% of the public defenders felt their offices had adequate resources to provide appropriate pretrial investigations.[179] More than one-half of the judges agreed that pretrial resources were inadequate, but all but one of the prosecutors who responded thought that the resources were adequate.[180] On only one question did the judges' opinions more closely mirror those of the prosecutors' than those of the public defenders'.[181] On the issue of whether public defenders' offices received adequate funding to engage expert witnesses and conduct expert examinations, 70% of the judges and 95% of the prosecutors found the expert resources adequate, while less than one-half of the public defenders agreed.[182]

The survey also attempted, in general terms, to evaluate the state's investment in a public defender system.[183] Was the public defender system an improvement over the former patchwork system, consisting mostly of judicially-controlled court appointments? Overwhelmingly, all constituencies agreed that it was.[184] Interestingly, the prosecutors were least certain of the improvement, with only slightly more than 60% agreeing that the public defender system "provides a

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[171] Copies of the three surveys follow this article as Appendix A.
[172] *See* Appendix B.
[173] *See id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *See* Appendix B.
[178] *Id.*
[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *See* Appendix B.
[183] *Id.*
[184] *Id.*

higher quality of representation to indigent defendants than was provided prior to the adoption of the current system."[185] Eighty percent of the judges and 100% of the public defenders who responded to this question[186] agreed that the public defender system was an improvement over its predecessor.[187]

PART III: *GIDEON* IN 2003 - SPEAKING OUT, STUDYING, SUING, AND SURVEYING THE FUTURE CHALLENGES

If Tennessee's experience is not unique, then the obvious question is: is it all about money? The Justice Department's 1986 study showed that indigent defense received a little more than one billion dollars in state, local, and federal funding.[188] That same study placed the dollar amount on funding for prosecutor's offices at $3.2 billion.[189] Fourteen years later, in the Justice Department's 100-county study, indigent defense spending had increased but only to the point of constituting less than 3% of the county's criminal justice budget.[190]

Abe Krash, one of the lawyers who assisted in the *Gideon* case laments that,

> at the time, many of us did not fully appreciate that it is not enough to guarantee that a defendant has a lawyer . . . ; the critical questions are whether the lawyer is qualified to try a criminal case, and whether the accused has the financial resources to conduct an investigation and to retain expert witnesses.[191]

Yet Krash notes the difficulty in getting those needed resources because of the absence of a "politically effective constituency pressing legislative bodies to appropriate the necessary funds. . . . Effective assistance of counsel is unlikely to be provided until a sufficiently effective political alliance is mobilized and the organized bar speaks out more forcefully."[192]

A. Speaking Out and Suing in the States

In Pennsylvania, one of only two states that provides no state funding for indigent defense services, members of the bench and the bar have begun to speak

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[185] *Id.*

[186] Respondents were directed not to respond to the question unless they were "familiar with the indigent defense system in [the] judicial district prior to the adoption of the current public defender system." *Id.*

[187] *See* Appendix B.

[188] CRIMINAL DEFENSE FOR THE POOR, *supra* note 118, at 1.

[189] Douglas McCollam, *The Ghost of* Gideon, AM. LAW., Mar. 2003. Law enforcement in 1986 accounted for $22 billion, an obvious asset to the prosecution. *Id.* Corrections was funded at $13 billion. *Id.*

[190] *Id.*

[191] Krash, *supra* note 4, at 17.

[192] *Id.* at 13.

out. A judge on the Allegheny Court of Common Pleas very eloquently drew the battle lines:

> Governments pay hundreds of dollars per hour to oxford cloth buttoned-down pinstriped-suited corporate types from large civil law firms to do the government's legal work and balk at budgets for public defenders and appointed counsel in criminal cases because their clients are impoverished, underprivileged and disrespected. Those who control the public offers find it far more palatable paying high hourly fees to lawyers whose names appear on political contribution lists in order to protect government from its own citizens, than paying to see a single constituent's rights protected against the government.[193]

Harboring little hope that state government in Pennsylvania[194] would ultimately "do the right thing," attorneys brought a class action lawsuit, alleging that indigent defendants do not receive the constitutionally guaranteed right to counsel.[195] Five years after the case settled with provisions requiring larger staffs, better training, and compliance with defined standards for representation, the case is again before the courts; this time, the plaintiffs allege that the county failed to live up to the agreement.[196] The petition for contempt focuses on the county's failure to enforce minimum standards of representation, hire adequate staff, require training, and supervise attorneys.[197]

Pennsylvania is not the only state in which defenders or clients have resorted to lawsuits in order to force state government to cough up adequate funds for indigent defense. In 1993, in a slightly different context,[198] the

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[193] Jeffrey Manning, *The Right to a Lawyer*, CHAMPION, Jan.-Feb. 2003, at 54, 56.

[194] Suits have been threatened in other Pennsylvania counties as well. In 2001, the ACLU and NACDL announced that they would sue Vennango County, located north of Pittsburgh, for failing to provide adequate defense services.

[195] Press Release, ACLU, ACLU Asks Court to Hold Allegheny County in Contempt for Failing to Improve Public Defender's Office (June 26, 2003), http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=13065&c=48. The case was filed in September 1996 by the ACLU in Allegheny County, which includes Pittsburgh, and was settled in May 1998. *Id.*; *see* Casey Combs, *Pittsburgh to Get More Public Defenders*, HARRISBURG PATRIOT & EVENING NEWS, May 14, 1998, at B6, 1998 WL 6466655. According to press releases, the Consent Decree provided for increased staff, development of practice standards, adoption of training programs, and the supervision of lawyers to assure compliance with standards. *See, e.g.*, Combs, *supra*.

[196] *See* ACLU, *supra* note 195.

[197] The contempt petition was filed on June 26, 2003. *See id.*

[198] In *State v. Peart*, 621 So.2d 780, 784 (La. 1993), a state trial court in ruling on a "Motion for Relief to Provide Constitutionally Mandated Protection and Resources," found the state's "system for securing and compensating" court-appointed counsel to be "unconstitutional as applied in the city of New Orleans." *Id.* The trial judge ordered the legislature to provide funding for improved defense services, and, further ordered a reduction in the case loads of those lawyers representing the indigent in his court. *Id.* at 784-85. The Supreme Court reversed the finding of unconstitutionality and the ordered relief, but remanded after commenting on the deficiencies of indigent defense services. *Id.* at 785-92.

Louisiana Supreme Court found that "the services being provided to indigent defendants [in a particular court] do not in all cases meet constitutionally mandated standards for effective assistance of counsel" and remanded a case to the trial court directing that the trial judge apply a "rebuttable presumption that indigents are not receiving assistance of counsel sufficiently effective to meet constitutionally required standards."[199] Notwithstanding this bold stance, Louisiana again finds itself in the news, acclaimed by the ABA as violating nine out of ten basic standards for indigent defense. Lawsuits were expected to be filed in five parishes before the end of 2003 alleging excessive caseloads, disparate funding, judicial interference, absence of continuity, and disparate resources.[200]

From that extraordinary ruling in 1993, to the present, literally dozens of states have faced funding crises that resulted in lawsuits,[201] settlements, [202] or

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[199] *Id.* The lawyer appointed to represent Peart on his charges of armed robbery, aggravated rape, aggravated burglary, attempted armed robbery, and first degree murder, was currently handling seventy felony cases. *Id.* at 784. In an eight month period immediately preceding this appointment, the lawyer had represented 418 clients, entering 130 guilty pleas at arraignment. *Id.* For every trial date in that period, he had at least one case (for which a suspended sentence was not a permissible punishment) set for trial. *Id.* Generally, the attorney received no investigative assistance and no money was allocated for expert witnesses. *Id.*

[200] According to a Shreveport Times article quoting a Baton Rouge lawyer, "lawsuits will be filed in five parishes - Caddo, Calcasieu, Orleans, Baton Rouge, and an as yet unchosen rural parish - within the next six months." John Hill, *Indigent Defender Program Under Fire*, SHREVEPORT TIMES, Apr. 9, 2003.

[201] Lawrence Goldman, Gideon *at 40: A Realistic View*, CHAMPION, Jan.-Feb. 2003, at 56. Some of the country's most prominent criminal defense lawyers advocate litigation to accomplish *Gideon*'s goals. The president of the National Association of Criminal Defense Lawyers, Lawrence Goldman, a criminal defense lawyer in New York has put it this way: "We should do what we do best - litigate. We should challenge constitutionally inadequate funding as we and our allies have begun to do . . . . It is in court, not the legislature, that Clarence Gideon succeeded, and where we as the champions of the Gideons of this century are most likely to succeed." *Id.* Goldman also recommends refusing to participate "in court assignment programs with paltry and insulting compensation for assigned attorneys, such as New York." *Id.* In New York, assigned counsel make $40 an hour for in court and $25 an hour for out-of-court time. *Id.*

Massachusetts has the lowest rates for assigned counsel (around $30 per hour) and has been sued as well. *See* Scott Dolan, *Lawyers in Taunton District Court who Represent Indigent Defendants Joined a Grass Roots Labor Strike Yesterday, Refusing to Accept New Cases Until the State Pays Them*, TAUNTON GAZETTE, July 26, 2003. The pleadings and latest updates are available at http://www.bristolcpcs.org/lawsuit.html (last updated Jan. 4, 2004).

[202] For example, on July 7, 1999 the ACLU announced the settlement of a class action lawsuit filed against Connecticut in 1995 for failing to fund its public defender system adequately. That settlement included increased staffing, higher hourly rates for appointed counsel, and enhanced training. In Mississippi, a settlement was not reached, requiring a trial in the case of *State v. Quitman County*, 807 So.2d 401 (Miss. 2001). Similarly, a case was filed in the Michigan Supreme Court by the Wayne County Criminal Defense Bar Association and NACDL challenging the assigned counsel system in Wayne County (Detroit). Shawn D. Lewis, *Lawyers Sue Court for Raise*, DETROIT NEWS, Nov. 12, 2002.

walk outs.[203] While the plaintiffs are frequently special interest groups, sometimes a government entity harmed by a state's indifference finds it necessary to institute the action. In Mississippi for example, Quitman County sued the State for failing to fund representation of indigent criminal defendants.[204] In 2001, the Mississippi Supreme Court denied the State's motion to dismiss, paving the way for trial.[205] The case was awaiting trial as of May, 2003.[206]

In a few jurisdictions, interested members of the community or the press raise the issue of unfairness in indigent defense. In Virginia for example, the Virginia Indigent Defense Coalition, an organization that was initiated by law groups but soon attracted other community organizations, struggles to educate the public about the need for reform in Virginia.[207] In Wisconsin, the *Milwaukee*

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[203] Lawyers threatened walk outs or office closures in several jurisdictions. In February, 2004, lawyers across Louisiana asked courts to remove them from cases citing an inability to represent their clients. Julia Robb, *Public Defender System on Trial in Louisiana*, TOWN TALK, Feb. 9, 2004, *available at* 2004 WL 60351128. In May, 2003, the Federal Trade Commission announced that it would investigate whether forty-three contract lawyers in Clark County, Washington, violated laws by refusing to take additional murder cases unless their pay was increased. *See FTC Probing Clark Co. Lawyers Who Refuse to Take Cases*, ASSOC. PRESS, May 21, 2003, http://www.katu.com/news/story.asp?ID=57738. In Oregon, public defender offices announced closures as a result of a legislative decision to cut more than $22 million from funding. Andres Harris, *Oregon Can't Afford Indigents Right To Counsel*, NAT'L L.J., Mar. 20, 2003; *see also* State *ex rel.* Metro. Pub. Defenders Servs. Inc. v. Courtney, 64 P.3d 1138 (Or. 2003) (seeking writ of mandamus to require adequate funding). In addition, Boston lawyers ceased taking new defense cases, citing the State's refusal to pay them for last year's defense work. David Kibbe, *Lawyers for Poor Cry Foul*, STND. TIMES, July 5, 2003, at A1, http://www.southcoasttoday.com/daily/07-03/07-25-03/a01sr002.htm.

[204] State v. Quitman County, 807 S.2d 401 (Miss. 2001); *see also* McCollam, *supra* note 189.

[205] *See Quitman County*, 807 S.2d 401.

[206] *Id.* The *Quitman County* case has been highly publicized, perhaps because of the involvement of Arnold and Porter, a large Washington D.C. law firm, and particularly, Abe Krash, the lawyer who assisted in the *Gideon* case. *Id.* The firm is funding the case through its Gideon Project, a team of lawyers who work pro bono on indigent defense issues. *See id.* For more examples of Mississippi's inadequate indigent defense system, see NAACP LEGAL DEFENSE & EDUCATIONAL FUND, ASSEMBLY LINE JUSTICE, MISSISSIPPI'S INDIGENT DEFENSE CRISIS (2003), http://www.naacpldf.org/whatsnew/Assembly_Line_Justice.pdf.

[207] Virginia Indigent Defense Coalition, *Indigent Defense in Virginia*, *at* http://www.vidcoalition.org/crisis.html (last visited Oct. 4, 2003). The Coalition characterizes the Virginia indigent defense system as in "crisis" and as "seriously deficient." *Id.*

> Virginia provides the lowest compensation for court-appointed attorneys in the country. . . . Public Defenders' salaries and benefits are not on par with Commonwealth's Attorneys. . . .
>
> . . . Ultimately, the consequences are devastating: innocent people end up behind bars, leaving the truly guilty out on the street and undermining the public's confidence in the integrity of the system.

Id. at http://www.vidcoalition.org/pdf/VIDC-ACallforAction.pdf. Some counties in Virginia have extremely well recognized public defender systems as a result of the work of certain legislators and citizens. In Charlottesville and Albemarle County, according to State Delegate Mitch Van Yahres,

Journal Sentinel produced a series on the large number of citizens who were totally denied access to counsel in the Wisconsin courts.[208] And one of the nation's most respected newspaper, *The New York Times,* assailed the American indigent defense system quite succinctly in the title of its article issued during the week of the anniversary of the *Gideon* decision: Gideon's *Trumpet Stilled.*[209]

B. Studies

In some states, the critiques and lawsuits have been preceded by objective studies that found the defender systems woefully lacking. In many, the legislature commissioned the study to determine how it was faring and then promptly rejected, or at least ignored, the report card when it revealed failings. Perhaps no state is more illustrative of this chronology than Georgia.

The Georgia legislature was asked to fund a statewide public defender system in 1976.[210] Because of strong opposition from publicly elected and politically connected prosecutors, the legislature declined, leaving Georgia without a system at all.[211] Instead, Georgia left the defense of the indigent to the counties.[212]

On more than one occasion, stories of the unrepresented and the resulting miscarriages of justice surfaced in Georgia newspapers.[213] Defenders consistently brought attention to their inability to provide effective representation. Despite the obvious political backlash, Georgia's Chief Justice appointed in 2000 the Georgia Commission on Indigent Defense, consisting of twenty-four members drawn from the judiciary, the public sector, the business community, law firms, and elected officials.[214] After numerous public hearings, the Commission issued a final report with several findings and recommendations.[215] Succinctly stated, the Commission concluded that Georgia

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a "newspaper wrote a story about the problem, and the public picked up on the issue. We worked a bill through the legislative process, overcame many obstacles, and eventually had a public defender's office." James Hingeley, Gideon *Belongs to the Community in Virginia*, CHAMPION, Jan.-Feb. 2003, at 48, 49. The article was actually one in a series of articles by Bob Gibson entitled *Separate Justice. Id.* at 48.

[208] MILWAUKEE J. SENTINEL, Dec. 7-8, 2002.

[209] N.Y. TIMES, Mar. 21, 2003, at A18.

[210] Bright, *supra* note 71, at 8.

[211] *Id.*

[212] *See* THE SOUTHERN CENTER FOR HUMAN RIGHTS, "IF YOU CANNOT AFFORD A LAWYER . . .": A REPORT ON GEORGIA'S FAILED INDIGENT DEFENSE SYSTEM (2003), http://www.schr.org/reports/docs/jan.%202003.%20report.pdf.

[213] One such chilling story is repeated by Stephen Bright. *See supra* note 71, at 10; *see, e.g.*, Bill Rankin, *Right to Lawyer Still Not Given for Poor Defendants*, ATLANTA J. CONST., Mar. 24, 2003, at B1; *Find Funding for Indigent Defense*, ATLANTA J. CONST., May 12, 2003, at A8; Bill Rankin, *Legal Aid for Poor Still Has Big Gaps*, ATLANTA J. CONST., June 5, 2003, at B1.

[214] *See* NLADA, Gideon's *Heroes: Honoring Those Who Do Justice to* Gideon's *Promise, at* http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_Heroes_Benham (last visited Jan. 4, 2004).

[215] REPORT OF THE CHIEF JUSTICE'S BLUE RIBBON COMMISSION ON INDIGENT DEFENSE (2002) [hereinafter BLUE RIBBON COMMISSION], *available at* http://www.georgiacourts.org/aoc/press/idc/

should develop a state-wide, state-funded, politically independent public defender system with a state oversight board.[215] Such a system was necessary to comply with constitutional requirements and would also save money and deter future litigation.[217]

In addition to the evidence adduced by the Georgia Indigent Defense Commission, the Administrative Office of the Courts in Georgia commissioned a study from the Spangenberg Group, the country's most prominent consulting firm in the field of indigent defense research.[218] That study undertook on-site assessments of a representative sampling of the indigent defense systems in operation in Georgia, analyzed available data prepared by state and private agencies, and compared Georgia's systems with those in similar states.[219]

The independent report was more detailed but bore a striking resemblance to the Commission's report.[220] It identified a lack of program oversight and insufficient funding as the two chief problems with the existing Georgia structure.[221] It criticized the lack of state funding, the lack of independence from the judiciary, and the lack of consistency and accountability.[222] The report also compared Georgia, mostly disfavorably, with seven similar states.[223]

After much tumultuous debate, the Georgia Legislature passed and the governor signed the Georgia Indigent Defense Act of 2003,[224] which will

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idchearings/idcreport.doc. Some of the Commission's findings included: (1) Not enough money is allocated to indigent defense to satisfy the constitutional mandate under *Gideon*, and *Shelton* will greatly "expand[] the burden on the already-inadequate Georgia system"; (2) Indigent defenders must be independent of political and judicial control; (3) Quality public defense can save money; (4) Lawsuits against the state will continue unless the state implements reform. *Id.* The Commission recommended changes consistent with ABA and NLADA Standards including state responsibility for and funding of the system and a state oversight board. *Id.*

[216] *Id.*

[217] *Id.*

[218] BLUE RIBBON COMMISSION, *supra* note 215.

[219] THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART I, (Dec. 12, 2002) *at* http://www.georgiacourts.org/aoc/press/idc/ idchearings/spangenberg.doc.

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] "Of the eight states surveyed, Georgia ranks third in population size of the sample group, yet last in total state dollars spent on indigent defense. The state with the highest population . . . is almost twice the size of Georgia, yet spent over 40 times more on indigent defense than did Georgia in the same year. . . . Georgia ranks sixth out of the eight sample states in total indigent defense expenditure per capita. . . . Georgia ranks fifth out of eight for indigent defense cost per case [despite the fact that Georgia has a very high felony to misdemeanor representation ratio]." *Id.*

[224] GA. CODE ANN. §§ 17-12-1, -128 (2002).

ultimately create forty-nine circuit public defender systems.[225] To date, no funding has been approved but promises are on the table.[226]

Will Georgia, like Tennessee, have before it some solutions to its problems and yet refuse to take steps to implement them? The question remains unanswered. One legislator put it this way: "Its like finding a pristine porcelain doll in the rubble of a war-torn battlefield."[227] Hopefully, the legislature will recognize the need to preserve such a doll as they have found.

C. Surveying Future Challenges

Criminal "justice" has become more expensive. As the state utilizes more sophisticated law enforcement techniques, so too must the defense. One measure of the failure to do so is the conviction of innocent defendants. The Innocence Project at Northwestern Law School has to date exonerated 142 individuals, many with the use of post-conviction DNA evidence.[228] But it isn't only the use of sophisticated, scientific evidence that will result in a more fair, more reliable criminal justice system. In a recent study of convictions in New York, *Newsday* assigned a team of reporters to study the exoneration of thirteen defendants, only one of which involved post-conviction DNA evidence.[229] What they discovered was that ten of the thirteen accused had been represented by court-appointed lawyers, each of whom received only the paltry compensation paid by the State of New York.[230]

Because it is politically unpopular, funding indigent defense will remain a future challenge. Some will continue to mislead the public with headlines focusing on the dollars spent for indigent defense, rather than upon the constitutional rights thereby protected. In Seattle, for example, the public is undoubtedly enraged on a daily basis by the articles that focus on the resources

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[225] *See* Bill Rankin, *Indigent Defense Gets Force but Needs Funds*, ATLANTA J. CONST., May 23, 2003, at F1; *Legislative Success Story: Indigent Defense Reform*, GA. CT. J., July 2003, at 1, http://www.georgiacourts.org/aoc/publications/july03-web.pdf.

[226] Perhaps Georgia should take note of the situation in Mississippi. The legislature created a statewide public defender system that mirrored the prosecutor's system but never funded it. They rescinded its enabling legislation in 2002. The suit against the State by one of its own counties remains pending. *See, e.g.*, David E. Ravella, *Unclogging* Gideon's *Trumpet*, NAT'L L.J., Jan. 6, 2000.

[227] Bill Rankin, *Indigent Defense Bill Beats the Odds; Lawmakers' Unity on Reform Measure Called "Remarkable,"* ATLANTA J. CONST., Apr. 27, 2003, at C9 (quoting House Judiciary Committee Chair Tom Bordeaux).

[228] Barry C. Sheck & Sara L. Tofte, Gideon's *Promise and the Innocent Defendant*, CHAMPION, Jan.-Feb. 2003, at 38. The number of exonerations is current as of March 1, 2004. *See* www.innocenceproject.org (last visited Feb. 10, 2004).

[229] *Id.*

[230] *Id.* Two of the lawyers had been suspended from the practice of law for commingling client funds. *Id.*

allocated to the defense of Gary Ridgway.[231] Headlines like "*Defense team seeks 1.9 million more,*"[232] and "*Ridgway lawyer seeks to double his team,*"[233] encourage the public to reflect only on the issue of dollars and cents. These misleading articles not only generate public anger, they motivate ill-purposed individuals and groups to rally against criminal defense lawyers.

In Tennessee, newspaper articles about the cost of defense for one capital case led to litigation over public access to fee records.[234] More recently, the Tennessee Supreme Court has shown an active disinterest in the plight of defenders, notwithstanding their knowledge of the significant shortage of defenders by sua sponte, and arguably, unconstitutionally limiting access to experts and funds in capital cases.[235] So long as courts are willing to play the political card, rather than require adequate and equal funding of indigent defense systems, those who try to keep *Gideon's* promise will have a difficult time indeed.

PART IV: *GIDEON* IN THE HANDS OF THOSE WHO DREAM

Even a fortieth birthday party staged as a funeral has some upturns. So, too, it is with the fortieth anniversary of *Gideon v. Wainwright.* Despite the funding crises, despite the absence of enforceable standards, and despite the decreased morale that accompanies both, offices providing indigent defense across the country have been creative, imaginative, and restorative in their approach. They have proven what many have recognized: even absent funding and support, great deeds can be accomplished with determination and innovation.

What many who are committed to representing the accused have learned is that traditional public defender offices are a "revolving door." Clients who are represented today on petty, juvenile offenses, are all too often represented tomorrow on serious adult felonies. More often than not, locating the office is not difficult because siblings, or parents, have likewise been represented. Limited resources are stretched more and more thin with repetitive representation of recidivists.

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[231] In December, 2003, Gary Ridgway pled guilty to forty-two murders and was sentenced to life in prison without parole, amidst great public outcry. *See Green River plea; fix isn't needed,* SEATTLE POST-INTELLIGENCER, Jan. 25, 2004, *at* http://seattlepi.nwsource.com/opinion/157859_murdered.html.

[232] Lynn Thompson, *Defense Team Seeks 1.9 Million More,* SEATTLE TIMES, June 14, 2002, at B1.

[233] Nancy Bartley, *Ridgway Lawyer Asks to Double His Team,* SEATTLE TIMES, Apr. 6, 2002, at B2.

[234] *See* Moncier v. Ferrell, 990 S.W.2d 710 (Tenn. 1998). The public's ire was in no way alleviated by the court's opinion which criticized the lawyer for using associates to work on the case, chided the trial court for signing "blank checks" by granting prior approval for ongoing expense, and noted that the court rule "was not designed to have the state 'pick up the tab' at a local restaurant or subsidize a law practice." *Id.* at 712.

[235] *See* TENN. SUP. CT. R. 13. The court is currently considering comments filed in reaction to the rule change.

A. Turning from Tradition to Innovation

The traditional model of public defense wherein a lawyer views herself as fighting for a client on a particular case in the courtroom has given way in some parts of the country to a more community-based approach.[236] Rather than focusing solely on courtroom defense strategies, community-based defenders think about community-based solutions to a client's problems.[237] Perhaps the client will be less likely to reoffend if the client is working and earning a reasonable wage. Maybe the client is acting out of depression or anger, which can be redirected with the help of short-term counseling or appropriate medication. Perhaps if the client felt a connection with the neighborhood, facilitated by working with a community club or organization, the client would feel invested in its resources and be deterred from misusing or abusing them. Maybe if the client felt more self-respect and esteem, the client would have less of a need to lash out at others.

B. Community-Based Lawyering

Community-based lawyering is not about forcing lawyers to act as doctors, social workers, or vocational counselors. It is about coordinating legal services for a client, together with social services and community assistance.[238] In some circumstances, it is about bringing together different professionals under one roof who can assess and assist in devising a plan not only for the client's case, but for the client's life.[239] In other circumstances, it is about utilizing the collaboration to advocate for criminal justice system reform. "Community-oriented defense can take a variety of forms and can serve a defense function,[240] a 'holistic' or 'client-centered' function,[241] or a policy advocacy/systemic reform function."[242]

The forces behind community-based lawyering are many. The most profound, and most rewarding, is the chance to affect *real, permanent* change in an individual's life.[243] Nothing is more disheartening to a defender than to win in the courtroom with an acquittal or suspended sentence only to find the client in

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[236] *See, e.g.*, COMMUNITY JUSTICE INSTITUTE, BRENNAN CENTER FOR JUSTICE, TAKING PUBLIC DEFENSE TO THE STREETS 1-3 (2003), *available at* http://www.brennancenter.org/resources/cji/cji1.pdf (last visited Jan. 4, 2004).

[237] *Id.*

[238] *Id.* KIRSTEN D. LEVINGSTON, BRENNAN CENTER FOR JUSTICE, INDIGENT DEFENSE.

[239] *Id.*

[240] Levingston, *supra* note 238, at 34. Reaching out into the community assists the traditional defense function by creating contacts in the client's neighborhood, contacts which in turn make conducting investigations and securing both evidence and witnesses easier. *Id.*

[241] *Id.* at 34, 36. Client-centered representation requires knowledge of community services and how to secure them for one's client. *Id.*

[242] *Id.* at 36. Those who utilize community lawyering to assist with systemic policy reform will be benefitted by a knowledge of community resources, but will also have had the opportunity to educate those in the community about the realities of criminal defense work. *Id.*

[243] *See id.* at 34, 36, 54.

lock-up the next morning.[244] Even a lawyer who has provided a brilliant defense and utilized all of his or her legal training cannot help but feel less than good about this frequent occurrence. A public defender in Miami described the "pull" on the lawyer to do well in the courtroom and in the community this way: "[we] went into this work because we wanted to do good and simply getting a not guilty verdict or busting someone on cross is not enough. It is less than good advocacy to merely defend the legal nuts and bolts of a case."[245]

The Director of the Youth Advocacy Project in Roxbury, Massachusetts, describes the goal of the program, which defends those charged as juveniles in this way:

> Like all defenders, we advocate for a positive legal outcome in each individual case; a crucial part of that advocacy is directed toward assuring long-term life success. It is particularly clear in the case of children that a positive legal outcome is inextricably linked to a positive life outcome. If we were to focus entirely on the legal aspect of the case, unaddressed risk factors at home and in the school could easily doom the child to a life of chronic court involvement. How do we get the kids the help they need . . . ? We go to the communities. That's where the services are.[246]

While the benefit of community-based lawyering to young offenders is obvious, its benefits to adults are no less.

A second drive behind the community-lawyering approach is the opportunity it provides defenders to feel that they are contributing to the overall good of society. Far removed from the oft-asked "how can you defend those people" question is the recognition that those who are brought into the criminal justice system will suffer repercussions from it, regardless of their guilt or innocence. Their reputations will be affected irrespective of the outcome and often, and understandably, they will be angry and vengeful after the experience. Lawyers who devise positive solutions are contributing far more than those who appear in court, try or plead the case, and go home.

Many defenders express this view: "we have an obligation to address broader issues that affect our clients' lives."[247] "We are best suited by virtue of our client relationship - particularly our sense of who comes into the system and

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[244] In 1981, three juveniles and several adults were arrested in a rural, east Tennessee town for murder. *See* State v. Causby, 706 S.W.2d 628 (Tenn. 1986). The three juveniles were ultimately convicted, but two of them received a new trial due to juror misconduct. *See id.* at 633-34. After a retrial, both of the defendants, now twenty-five years of age and having each spent seven years in jail, were acquitted. *See id.* Within a month, one of those individuals was rearrested and ultimately reincarcerated. The other remained arrest free and, despite the odds, built a successful life for himself.

[245] Levingston, *supra* note 238, at 54 (quoting Marie Osborne, Chief of the Miami Public Defender Office's Juvenile Division).

[246] *Id.* (quoting Josh Dohan).

[247] *Id.* (quoting Bruce Brown, Assistant Director at the Society of Counsel Representing Accused Persons in Seattle Washington).

why - to come up with positive solutions . . . ."[248] In fact, in a recent survey sent to more than 900 public defenders across the country, more than half responded that they were engaging in some community-based lawyering.[249]

A third reason that community lawyering is beginning to flourish is that defenders realize its potential for helping to balance the uneven political playing field. By coordinating with community organizations, and educating them about the work of the defender in the process, the offices "forge alliances that at once build a constituency and [produce] political leverage."[250]

> Building strong ties with community-based organizations gives [defender] offices more leverage with legislators. . . . [On a particular piece of legislation that we opposed] we mobilized community-based organizations and groups that recognize our public value . . . . We succeeded because of our active participation in the community and bar activities and our lobbying efforts. Legislators understand the public defender's function, the support we enjoy in our community, and our expertise with issues beyond criminal justice.[251]

While there are dozens of these programs across the country,[252] for purposes of demonstrating what *can* be done, only three will be discussed. Ironically, these three are in states in which state funding is paltry to say the least.[253] In each situation, defenders reached beyond their state or local budgets to outside funding sources; in each situation they succeeded because of community outreach.

1. The Bronx Defenders

In 1997, eight individuals founded the Bronx Defenders to provide legal representation to residents of the Bronx charged with crime.[254] Directed by Robin Steinberg, the Bronx Defenders describes itself as having a "broad vision

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[248] *Id.* at 36 (quoting Marie Osborne, Chief of the Miami Public Defender Office's Juvenile Division).

[249] *Id.* at 54; *see* BRENNAN CENTER FOR JUSTICE, CONNECTIONS TO COMMUNITY SURVEY (2001).

[250] Levingston, *supra* note 238, at 54.

[251] *Id.* (quoting Carlos J. Martinez, Chief Assistant Public Defender in Miami, Florida).

[252] Other programs include those in Miami-Dade County, http://www.pdmiami.com (last revised Dec. 1, 2003), the Youth Advocacy Project in Roxbury, Massachusetts, http://www.youthadvocacyproject.org (last visited Jan. 5, 2004), and the Society of Counsel Representing Accused Persons in Kent and Seattle, Washington, http://www.societyofcounsel.org/about_scrap.htm (last visited Jan. 5, 2004).

[253] For a discussion on the lack of state coordination and support in Georgia, *see supra* text accompanying notes 215-31. For a discussion on the situation in Tennessee, *see supra* text accompanying notes 150-90. For a discussion on the low hourly rates in New York for appointed counsel, *see supra* text accompanying note 235.

[254] The Bronx Defenders, *A History of the Bronx Defenders, at* http://www.bronxdefenders.org/whow/ index.cfm?cod=004 (last visited Jan. 5, 2004).

of public defense work."[255] The office offers comprehensive social service assistance to its clients in addition to legal services, which requires a deep familiarity with community-based support organizations and their attendant services.[256] This process is aided by a coalition of workers – committed lawyers, trained investigators, and "Client Advocates," who hold Masters of Social Work degrees.[257]

Although the office was viewed suspiciously in its beginning, it has become nationally recognized as a pioneer in holistic advocacy:

> Today, we can say without exaggeration, that we have begun the task of redefining the role of the public defender. Today we address the underlying problems that bring clients into the system, respond to broader justice issues that affect clients and underserved communities, work . . . to prevent crime and enhance public safety and understand the value of working with clients well after the court cases are closed. And we've only just begun.[258]

The office has been praised for its work by the *National Law Journal* which describes it as "the most extreme example" of the "whole client . . . holistic advocacy" approach.[259]

2. Knox County Public Defenders Community Law Office[260]

The Knox County Public Defenders Community Law Office (CLO) was created[261] in response to the realization that indigent defense in Knox County, Tennessee, required qualitative and quantitative improvement.[262] The CLO considers itself a holistic, rather than traditional, representation model, and is similar at least in offerings to the Bronx Defender Program.

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[255] The Bronx Defenders, *Welcome to the Bronx Defenders*, at http://www.bronxdefenders.org/home/index.cfm (last visited Jan. 5, 2004).

[256] The Bronx Defenders, *Who We Are*, *at* http://www.bronxdefenders.org/whow/index.cfm? (last visited Oct. 5, 2003).

[257] *Id.*

[258] *History of the Bronx Defenders, supra* note 254.

[259] David E. Ravella, *The Best Defense*, NAT'L L.J., Jan. 31, 2000, at A1.

[260] All of the information about the Knox County Public Defenders Community Law Office is derived from personal knowledge, as well as from the CLO's Concept Paper, *available at* http://www.pdknox.org/Downloadable/CLOconcept.pdf (last visited Jan. 5, 2004), and Organizational Strategies Paper, *available at* http://www.pdknox.org/Downloadable/CLOorg.pdf (last visited Jan. 5, 2004).

[261] The creation was largely due to the innovation and determination of the Knox County Public Defender, Mark Stephens. Stephens would, however, attribute much to the tutelage and mentoring he received from those in attendance with him at the Harvard Program in Criminal Justice Policy and Management, Kennedy School of Government, Executive Session on Public Defense. The papers from the session are available at http://www.ksg.harvard.edu/criminaljustice/executive_sessions/espd.htm (last modified Dec. 9, 2003).

[262] *See* Organizational Strategies Paper, *supra* note 260.

The CLO lists five primary goals: "[t]o prevent crime; [t]o reduce recidivism; [t]o empower clients to live a fuller, more meaningful, independent life; [t]o increase community involvement in the criminal justice system; [and] [t]o demonstrate an innovative, effective service model."[263] To the extent it meets its third and fourth goals, it has accomplished its first and second goal. By involving the community, connecting the client to the community, and enhancing the client's life, the CLO will positively impact recidivism rates.[264] Further, to the extent this occurs, resources in all other components of the criminal justice system will be conserved.[265] Judicial resources will be saved because of the reduced number of cases; corrections costs will be saved because of the reduction in pretrial and post-trial detention; and prosecution and law enforcement resources will be saved due to a reduction in the amount of crime.[266]

How then does the CLO propose to reach these lofty goals? According to its Director, the CLO begins with the philosophy that "it is in the best interests of our clients and the community to empower our clients . . . and to accept a certain responsibility for the future lives of our clients."[267]

In order to do so, the CLO strives to address not only the client's immediate advocacy and representation-related needs, but also strives to provide the client with a range of social services, which may include rehabilitative, vocational, and educational services.[268] To this end, the CLO has a proactive social program.

The social services aspect of the CLO identifies the client's outstanding needs and then undertakes to fulfill those needs by designing an individual plan of action.[269] As soon as the client becomes a client of the CLO, the social services staff assesses his or her requirements through a number of voluntary questionnaires and interviews.[270] The staff then works in collaboration with the client to create an individual plan of action.[271]

A client's needs are ranked by urgency.[272] The plan first addresses basic needs, such as medical or psychological treatment, food, shelter, and clothing, and then attempts to fulfill intermediate and long-term needs through various educational and vocational programs.[273] The client's plan is reevaluated at least quarterly with the client.

The CLO has integrated a broad range of social rehabilitation programs at the office to assist with constructing and accomplishing the client's plan.[274] In

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[263] Concept Paper, *supra* note 260.
[264] *See id.*
[265] *See id.*
[266] *Id.*
[267] *Id.*
[268] *See* CLO, *Social Services: Providing a Framework to Build Upon, at* http://www.pdknox.org/800main.htm (last visited Jan. 5, 2004).
[269] *See* Organizational Strategies Paper, *supra* note 260, at 5, 9.
[270] *Id.* at 10.
[271] *Id.*
[272] *Id.* at 11.
[273] *Id.*
[274] *See* Organizational Strategies Paper, *supra* note 260, at 11.

addition to mental health and substance abuse programs, the office offers child and adult education programs, vocational programs, family life education, and even social and recreational activities.[275]

The CLO facilitates adult and adolescent education programs for its clients.[276] A client works with a mentor or counselor to set goals. The goals may involve education, vocational skills, or family and life skills.[277] The client then works to accomplish these goals through classes and counseling sessions.[278] By proceeding in this fashion, the CLO hopes that the client will develop a vested interest in his or her plan of action such that they form a personal stake in success.[279] Once the client has the tools for self improvement and a personal stake in the outcome, the client is less likely to risk a return to the criminal justice system, with its potential for incarceration, by reoffending.[280] Similarly, by providing healthy recreational activities, the CLO hopes to prevent opportunistic crimes: if the client is engaged in constructive, healthy, legal pastimes, the temptation to resort to illegal activities or unhealthy practices will be lessened.

The real question naturally is how the CLO can accomplishes its goals in a state like Tennessee, where legislators are not generous and policy-makers ignore recommendations from national experts on providing indigent defense. The CLO receives state and local funds but also solicits public funds, private foundation grants, private investment capital, and federal funds.[281] In addition, it hopes to make a profit in some of its endeavors and business initiatives. Most attributable to the hard work and determination of its director, the CLO has successfully partnered with local government, despite the fact that the local government has no obligation to assist.[282]

By providing a comprehensive intervention program in addition to legal representation on criminal cases, the CLO avoids service fragmentation and duplication and also improves communication between providers. This should result in additional savings, allowing the county to run a more efficient, streamlined social services program. In addition to the positive impact on both clients and the community, the Director of the CLO sees the office's approach as positively impacting the lives of those who work at the CLO, improving morale, and creating a "team"spirit:

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[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *See generally* Organizational Strategies Paper, *supra* note 260.

[280] *Id.* at 6.

[281] *Id.*

[282] One of the more impressive stories of the CLO is its new building located on Liberty Street in Knoxville, Tennessee. Knox County allocated nearly one-half million dollars to prepare the land and allowed the CLO to borrow $2.7 million to build a 25,000 square foot building which was completed in the spring of 2003. While the numbers seem staggering, in the end the CLO and the county will pay less than they paid to rent office space and will now own the property and structure.

> Th[e] change to a holistic model of representation has brought about a transformation in the professional lives of the staff here at the Public Defenders Office, as well as the community agencies with which we work. Criminal justice agencies, the mental health community and social services providers in our area have seen this transformation. But most importantly, this representation model seems to bring about real and meaningful changes in the lives of our clients.[283]

3. The Georgia Justice Project

The Georgia Justice Project[284] is a non-traditional indigent representation organization but is significantly different from the Bronx Defenders and the CLO. The Georgia Justice Project is a private, not-for-profit organization that seeks to rehabilitate accused offenders and reduce recidivism.[285] Because it functions solely on private funds, the Georgia Justice Project is extremely selective in determining who it will represent and ultimately serve.[286]

At the Georgia Justice Project, clients are chosen after an interview process. Most of those who apply are rejected.[287] This selectivity stems from the Project's goal of reducing recidivism:

> The individuals who become our clients have a criminal case in its beginning stages; however, they are selected as a client because they want to make life changes . . . . When evaluating a potential client, we examine their commitment to changing their lives; we find individuals who will take maximum advantage of the opportunities available to them.[288]

Once the project accepts a client, the client signs a contract detailing the commitments to be made in exchange for legal representation.[289] Following the signing of the contract, the client begins a trial period, during which the "match" between the client and the project is assessed.[290] If the client completes the trial period, the client enters into a probationary period, during which the client must complete individually selected programs.[291]

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[283] Letter from Mark Stephens, Knox County Public Defender, to Members of the Executive Session on Public Defense (Apr. 4, 2003) (on file with author).

[284] *See* Georgia Justice Project, http://www.gjp.org/legal.html (last visited Jan. 5, 2004). Though it is called the Georgia Justice Project, it serves clients in Fulton and DeKalb County, Georgia. *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.* For example, the Georgia Justice Project announces that it will not take cases involving drug trafficking, sex crimes, family violence, child abuse, or vehicle violations, absent exceptional circumstances.

[288] *Id.*

[289] Georgia Justice Project, *Social Services Provides Support for Clients and Their Families!*, http://www.gjp.org/social.html (last visited Jan. 5, 2004).

[290] *Id.*

[291] *Id.*

The Project is a totally private organization, dependent on donations and grants for its operational costs.[292] It operates a business enterprise, New Horizon Landscaping Company, staffed entirely by former and present clients, which provides an additional source of funding for the program.[293] The Project views the absence of state and federal funding as a positive element of its program:

> G[eorgia] J[ustice] P[rogram] receives no tax dollars. [It] feels strongly that in order to provide adequate legal defense for its clients, it must remain outside the "system." Public Defenders are suppose to defend clients against charges from the DA, but both the Public Defender and DA are funded by the same group.[294]

Both its private nature and its rejection of public funding distinguish the Georgia Justice Project from the other community-based lawyering programs discussed.

C. Return to Reality

Even after an upturn in a fortieth birthday party, you're still forty. The reality once again begins to sink in. So, too, with shedding light on the positive inroads that some creative, energetic defenders are making in demonstrating the true potential impact of *Gideon*. But at the end of the day, *Gideon* is still forty; the promise is still unfulfilled. And like any promise unrealized, one must make an honest assessment of what lies ahead. No doubt future funding crises and political gamespersonship will hamper the ability of defenders to provide effective representation of counsel, much less to provide holistic life solutions, as some are doing. But what other future impediments are there for which we must prepare? At least one is obvious. In addition to fighting funding battles, we must vigilantly guard the right to counsel itself against efforts to eliminate its application altogether or to so frustrate the right that it becomes devoid of meaning.

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[292] Georgia Justice Project, *Without Donations, GJP Cannot Provide Services!*, http://www.gjp.org/support.html (last visited Jan. 5, 2004).
[293] *Id.*
[294] *Id.*

The new Department of Justice,[295] at the direction of Attorney General John Ashcroft, has decided that any citizen can be detained indefinitely without the benefit of counsel if the President designates the individual an "enemy combatant."[296] The Fourth Circuit has upheld the denial of access in *Hamdi v. Rumsfeld*.[297] These and other reactions to an increasingly violent world – claimed as necessary to make our lives more secure – must be carefully measured against the potential they hold for abuse and the ultimate loss of freedom for all.

CONCLUSION

It has been reported that Clarence Earl Gideon was buried in a nondescript grave in Hannibal, Missouri for more than a dozen years after his death. In 1984, the same year that the Justice Department was reporting the categorical failure of state's to make good the promise of counsel, the same year that the U.S. Supreme Court was beginning its diminishment of the right to counsel by its definition of effective assistance, the Eastern Missouri Chapter of the American Civil Liberties Union placed a marker upon Gideon's grave. The marker reads: "Each era finds an improvement in law for the benefit of mankind." For every American who believes that justice should be equal, that it should depend no more on the state in which you were born as it should on the size of your checkbook, the next era invites us to find a way to convince our governors that to improve the law for this era, and for all future ones, we must honor the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."[298]

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[295] I use the word "new" purposefully. Janet Reno, Attorney General under the "old" Department of Justice, made the following remarks while participating in the National Symposium on Indigent Defense in April 1999:

> My experiences as a prosecutor and as Attorney General have taught me just how important it is for every leg of the criminal justice system to stand strong. All of us here recognize that the defense is an equally essential element of the criminal justice process, one which should be appropriately structured and funded, and operating with effective standards. . . . [I]t is not just poor defendants who have a stake in our system of justice. . . . Our criminal justice system is interdependent: if one leg of the system is weaker than others, the whole system will ultimately falter.
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> . . .
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> The bottom line is our system of justice will only work, and will only inspire complete confidence and trust in the people if we have strong prosecutors, an impartial judiciary, *and* a strong system of indigent criminal defense.

IMPROVING CRIM. JUST. SYS., *supra* note 156, at xii; *see also Six Building Blocks for Indigent Defense*, CHAMPION, Apr. 1999, at 28.

[296] *See* Hamdi v. Rumsfeld, 296 F.3d 279 (4th Cir. 2002); *see also* Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003) (reversing district court's grant of habeas corpus after remand and holding that a defense department advisor's affidavit was sufficient for constitutional detention under article II, section 2 of the U.S. Constitution), *cert. granted*, 124 S. Ct. 981 (2004).

[297] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981.

[298] U.S. CONST. amend. VI.

APPENDIX A

Gideon Project November 2002
District Attorney Generals' Survey

Part I: Judicial District No. _____ (please insert the number)

Instructions: Please use the scale below to answer the following questions with regard to the judicial district in which you practice. Should you wish to add additional comments, please do attach a separate sheet of paper to the survey.

1 = Strongly Disagree	2 = Disagree	3 = Somewhat Disagree
4 = Somewhat Agree	5 = Agree	6 = Strongly Agree

In each question, "public defender" refers to the state public defender's office. "Appointed counsel" refers to counsel appointed to represent indigent defendants in the place of the public defender's office as, for example, when a conflict of interest exists.

1. The public defender's office is adequately funded so as to allow the office to provide competent legal representation to those the office is appointed to represent.
   1 2 3 4 5 6

2. The public defender's office has a sufficient number of assistant public defenders to provide competent legal representation to those the office is appointed to represent.
   1 2 3 4 5 6

3. The public defender's office has a sufficient number of non-attorney staff members to assure that the office is able to provide competent legal representation to those the office is appointed to represent.
   1 2 3 4 5 6

4. The public defender's office has adequate resources to conduct appropriate pretrial investigations in the cases in which the office is appointed.
   1 2 3 4 5 6

5. The public defender office receives adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which the office is appointed.
   1 2 3 4 5 6

6. Appointed counsel receive adequate compensation so as to allow counsel to provide competent legal representation to those counsel is appointed to represent.
   1 2 3 4 5 6

7. Appointed counsel receive adequate resources to conduct appropriate pretrial investigation in the cases in which counsel is appointed.
   1 2 3 4 5 6

8. Appointed counsel receive adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which counsel is appointed.
   1 2 3 4 5 6

9. As a whole, the current public defender and court-appointed counsel system provides competent legal representation to the accused.
   1 2 3 4 5 6

10. Answer this question only if you were familiar with the indigent defense system in your judicial district prior to the adoption of the current public defender system.

    As a whole, the current public defender and appointed counsel system provides a higher quality of representation to indigent defendants than was provided prior to the adoption of the current system.
    1 2 3 4 5 6

Part II:
Instructions: Please provide the following information about your office. If you are uncertain as to an answer, please give your best estimate.

1. How many full-time employees does your office currently have?

____ Lawyers	_____ Clerical/Administrative Staff
____ Paralegals	_____ Social Workers or Related Staff
____ Private Investigators	_____ Other (please specify)

2. How many part-time employees does your office currently have?

____ Lawyers	_____ Clerical/Administrative Staff
____ Paralegals	_____ Social Workers or Related Staff
____ Private Investigators	_____ Other (please specify)

3. Please estimate the percentage of funding for a total of 100% that your office receives from each of the following sources.

____ State Government
____ City/County Government
____ Federal Government/ Grants
_____ Private Individuals/Foundations
_____ Corporations
_____ Other (please specify)

4. This question is for the purpose of identifying other survey respondents only.
Who are the private criminal defense lawyers who most regularly appear in criminal cases in your judicial district?

5. If your opinion is that the public defender system and court-appointed counsel system currently in operation in you judicial district is not providing a higher quality of representation to indigent defendants than was provided prior to the adoption of the current system, what are the reasons?

Gideon Project November 2002
Judges' Survey

Part I: Judicial District No. _____ (please insert the number)

Instructions: Please use the scale below to answer the following questions **with regard to the judicial district in which you practice.** Should you wish to add additional comments, please attach a separate sheet of paper to the survey.

1 = Strongly Disagree	2 = Disagree	3 = Somewhat Disagree
4 = Somewhat Agree	5 = Agree	6 = Strongly Agree

In each question, "public defender" refers to the state public defender's office. "Appointed counsel" refers to counsel appointed to represent indigent defendants in the place of the public defender's office as, for example, when a conflict of interest exists.

1. The public defender's office is adequately funded so as to allow the office to provide competent legal representation to those the office is appointed to represent.
   1 2 3 4 5 6

2. The public defender's office has a sufficient number of assistant public defenders to provide competent legal representation to those the office is appointed to represent.
   1 2 3 4 5 6

3. The public defender's office has a sufficient number of non-attorney staff members to assure that the office is able to provide competent legal representation to those the office is appointed to represent.
   1 2 3 4 5 6

4. The public defender's office has adequate resources to conduct appropriate pretrial investigations in the cases in which the office is appointed.
   1 2 3 4 5 6

5. The public defender office receives adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which the office is appointed.
   1 2 3 4 5 6

6. Appointed counsel receive adequate compensation so as to allow counsel to provide competent legal representation to those counsel is appointed to represent.
   1 2 3 4 5 6

7. Appointed counsel receive adequate resources to conduct appropriate pretrial investigation in the cases in which counsel is appointed.
1 2 3 4 5 6

8. Appointed counsel receive adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which counsel is appointed.
1 2 3 4 5 6

9. As a whole, the current public defender and court-appointed counsel system provides competent legal representation to the accused.
1 2 3 4 5 6

10. Answer this question only if you were familiar with the indigent defense system in your judicial district prior to the adoption of the current public defender system.

As a whole, the current public defender and appointed counsel system provides a higher quality of representation to indigent defendants than was provided prior to the adoption of the current system.
1 2 3 4 5 6

Part II:
Instructions: Please provide the following information about your judicial district. If you are uncertain as to an answer, please give your best estimate.

1. If, in your opinion, the number of attorneys or staff in the public defender's office is inadequate to provide competent legal representation to those the office is appointed to represent, please indicate what additions are needed.

2. In your judicial district, in approximately what percentage of the criminal cases is the public defender's system appointed as counsel?
_____ less than 50%
_____ 50% - 60%
_____ 60% - 70%
_____ 70% - 80%
_____ 80% - 90%
_____ more than 90%

3. Please indicate the frequency with which public defenders request the court to approve additional funds or resources for cases in which they are appointed.
_____ never
_____ less than 10% of the cases
_____ 10 - 25% of the cases
_____ more than 25% of the cases

4. Which of the following most accurately describes the method used to appoint counsel for indigent defendants when the public defender's office is not appointed because of a conflict of interest or other reasons?

_____ judicial appointment from a list
_____ public defender's office assignment from a list
_____ judicial appointment at judge's discretion
_____ public defender's office assignment
_____ other

5. Please indicate the frequency with which appointed counsel request the court to approve funds for experts or investigation for cases in which they are appointed.

_____ less than 10% of the cases
_____ 10% - 25% of the cases
_____ 25% - 50% of the cases
_____ more than 50% of the cases

6. This question is for the purpose of identifying other survey respondents only.

Who are the private criminal defense lawyers who most regularly appear in criminal cases in your judicial district?

7. If your opinion is that the public defender system and court-appointed counsel system currently in operation in you judicial district is not providing a higher quality of representation to indigent defendants than was provided prior to the adoption of the current system, what are the reasons?

_____
_____
_____

Gideon Project November 2002
Public Defenders' Survey

Part I: Judicial District No. _____ (please insert the number)

Instructions: Please use the scale below to answer the following questions with regard to the judicial district in which you practice. Should you wish to add additional comments, please attach a separate sheet of paper to the survey.

1 = Strongly Disagree	2 = Disagree	3 = Somewhat Disagree
4 = Somewhat Agree	5 = Agree	6 = Strongly Agree

In each question, "public defender" refers to the state public defender's office. "Appointed counsel" refers to counsel appointed to represent indigent defendants in the place of the public defender's office as, for example, when a conflict of interest exists.

1. The public defender's office is adequately funded so as to allow the office to provide competent legal representation to those the office is appointed to represent.
   1 2 3 4 5 6

2. The public defender's office has a sufficient number of assistant public defenders to provide competent legal representation to those the office is appointed to represent.
   1 2 3 4 5 6

3. The public defender's office has a sufficient number of non-attorney staff members to assure that the office is able to provide competent legal representation to those the office is appointed to represent.
   1 2 3 4 5 6

4. The public defender's office has adequate resources to conduct appropriate pretrial investigations in the cases in which the office is appointed.
   1 2 3 4 5 6

5. The public defender's office receives adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which the office is appointed.
   1 2 3 4 5 6

6. Appointed counsel receive adequate compensation so as to allow counsel to provide competent legal representation to those counsel is appointed to represent.
   1 2 3 4 5 6

7. Appointed counsel receive adequate resources to conduct appropriate pretrial investigation in the cases in which counsel is appointed.
   1 2 3 4 5 6

8. Appointed counsel receive adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which counsel is appointed.
   1 2 3 4 5 6

9. As a whole, the current public defender and court-appointed counsel system provides competent legal representation to the accused.
   1 2 3 4 5 6

10. Answer this question only if you were familiar with the indigent defense system in your judicial district prior to the adoption of the current public defender system.

    As a whole, the current public defender and appointed counsel system provides a higher quality of representation to indigent defendants than was provided prior to the adoption of the current system.
    1 2 3 4 5 6

Part II:
Instructions: Please provide the following information about your office. If you are uncertain as to an answer, please give your best estimate.

1. How many full-time employees does your office currently have?

____ Lawyers	_____ Clerical/ Administrative Staff
____ Paralegals	_____ Social Workers or Related Staff
____ Private Investigators	_____ Other (please specify)

2. How many part-time employees does your office currently have?

____ Lawyers	_____ Clerical/ Administrative Staff
____ Paralegals	_____ Social Workers or Related Staff
____ Private Investigators	_____ Other (please specify)

3. If, in your opinion, the number is inadequate to provide competent legal representation to those the office is appointed to represent, please indicate what additions are needed

_____
_____
_____
_____
_____
_____

4. Please estimate the percentage of funding for a total of 100% that your office receives from each of the following sources.

____ State Government
____ City/ County Government
____ Federal Government/ Grants
_____ Private Individuals/ Foundations
_____ Corporations
_____ Other (please specify)

5. If, in your opinion, current funding levels are inadequate to allow your office to provide competent representation to those the office is appointed to represent, please indicate what additions are needed.

_____

_____

6. In your judicial district, in approximately what percentage of the criminal cases is the public defender's system appointed as counsel?

_____ less than 50%
_____ 50% - 60%
_____ 60% - 70%
_____ 70% - 80%
_____ 80% - 90%
_____ more than 90%

7. This question is for the purpose of identifying other survey respondents only.
Who are the private criminal defense lawyers who most regularly appear in criminal cases in your judicial district?

_____

_____

_____

8. Which of the following most accurately describes the method used to appoint counsel for indigent defendants when the public defender's office is not appointed because of a conflict of interest or other reasons?

_____ judicial appointment from a list
_____ public defender's office assignment from a list
_____ judicial appointment at judge's discretion
_____ public defender's office assignment at office's discretion
_____ other

9. Which of the following most accurately describes the method used for handling criminal appeals in your office?

_____ assistants handle their own appeals
_____ designated assistants handle own appeals
_____ other

10. If your opinion is that the public defender system and court-appointed counsel system currently in operation in you judicial district is not providing a higher quality of representation to indigent defendants than was provided prior to the adoption of the current system, what are the reasons?

APPENDIX B

Gideon Project November 2002
District Attorney Generals' Survey

SURVEY RESULTS

The bold figures beneath the response numbers represent the number of survey respondents for each response.

Part I: Judicial District No. _____ (please insert the number)

Instructions: Please use the scale below to answer the following questions with regard to the judicial district in which you practice. Should you wish to add additional comments, please do attach a separate sheet of paper to the survey.

1 = Strongly Disagree	2 = Disagree	3 = Somewhat Disagree
4 = Somewhat Agree	5 = Agree	6 = Strongly Agree

In each question, "public defender" refers to the state public defender's office. "Appointed counsel" refers to counsel appointed to represent indigent defendants in the place of the public defender's office as, for example, when a conflict of interest exists.

1. The public defender's office is adequately funded so as to allow the office to provide competent legal representation to those the office is appointed to represent.

1	2	3	4	5	6
0	**0**	**0**	**6**	**10**	**9**

2. The public defender's office has a sufficient number of assistant public defenders to provide competent legal representation to those the office is appointed to represent.

1	2	3	4	5	6
0	**1**	**3**	**5**	**7**	**10**

3. The public defender's office has a sufficient number of non-attorney staff members to assure that the office is able to provide competent legal representation to those the office is appointed to represent.

1	2	3	4	5	6
0	**2**	**0**	**11**	**4**	**8**

4. The public defender's office has adequate resources to conduct appropriate pretrial investigations in the cases in which the office is appointed.

1	2	3	4	5	6
0	**0**	**1**	**4**	**11**	**9**

5. The public defender office receives adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which the office is appointed.

1	2	3	4	5	6
0	**0**	**0**	**2**	**6**	**17**

6. Appointed counsel receive adequate compensation so as to allow counsel to provide competent legal representation to those counsel is appointed to represent.

1	2	3	4	5	6
0	**2**	**7**	**6**	**5**	**6**

7. Appointed counsel receive adequate resources to conduct appropriate pretrial investigation in the cases in which counsel is appointed.

1	2	3	4	5	6
0	**2**	**1**	**4**	**8**	**11**

8. Appointed counsel receive adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which counsel is appointed.

1	2	3	4	5	6
0	**1**	**0**	**1**	**7**	**17**

9. As a whole, the current public defender and court-appointed counsel system provides competent legal representation to the accused.

1	2	3	4	5	6
1	**0**	**0**	**2**	**13**	**7**

10. Answer this question only if you were familiar with the indigent defense system in your judicial district prior to the adoption of the current public defender system.

    As a whole, the current public defender and appointed counsel system provides a higher quality of representation to indigent defendants than was provided prior to the adoption of the current system.

1	2	3	4	5	6
4	**4**	**0**	**2**	**8**	**4**

Gideon Project November 2002
Judges' Survey

SURVEY RESULTS

The bold figures beneath the response numbers represent the number of survey respondents for each response.

Part I: Judicial District No. _____(please insert the number)

Instructions: Please use the scale below to answer the following questions with regard to the judicial district in which you practice. Should you wish to add additional comments, please do attach a separate sheet of paper to the survey.

1 = Strongly Disagree	2 = Disagree	3 = Somewhat Disagree
4 = Somewhat Agree	5 = Agree	6 = Strongly Agree

In each question, "public defender" refers to the state public defender's office. "Appointed counsel" refers to counsel appointed to represent indigent defendants in the place of the public defender's office as, for example, when a conflict of interest exists.

1. The public defender's office is adequately funded so as to allow the office to provide competent legal representation to those the office is appointed to represent.

1	2	3	4	5	6
8	**10**	**8**	**11**	**11**	**6**

2. The public defender's office has a sufficient number of assistant public defenders to provide competent legal representation to those the office is appointed to represent.

1	2	3	4	5	6
9	**10**	**10**	**8**	**12**	**5**

3. The public defender's office has a sufficient number of non-attorney staff members to assure that the office is able to provide competent legal representation to those the office is appointed to represent.

1	2	3	4	5	6
2	**9**	**13**	**11**	**12**	**4**

4. The public defender's office has adequate resources to conduct appropriate pretrial investigations in the cases in which the office is appointed.

1	2	3	4	5	6
3	**8**	**15**	**16**	**7**	**5**

5. The public defender office receives adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which the office is appointed.

1	2	3	4	5	6
3	**9**	**5**	**15**	**13**	**9**

6. Appointed counsel receive adequate compensation so as to allow counsel to provide competent legal representation to those counsel is appointed to represent.

1	2	3	4	5	6
7	**15**	**13**	**12**	**6**	**2**

7. Appointed counsel receive adequate resources to conduct appropriate pretrial investigation in the cases in which counsel is appointed.

1	2	3	4	5	6
5	**15**	**12**	**10**	**9**	**3**

8. Appointed counsel receive adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which counsel is appointed.

1	2	3	4	5	6
3	**11**	**10**	**11**	**14**	**4**

9. As a whole, the current public defender and court-appointed counsel system provides competent legal representation to the accused.

1	2	3	4	5	6
1	**1**	**13**	**15**	**14**	**10**

10. Answer this question only if you were familiar with the indigent defense system in your judicial district prior to the adoption of the current public defender system.

As a whole, the current public defender and appointed counsel system provides a higher quality of representation to indigent defendants than was provided prior to the adoption of the current system.

1	2	3	4	5	6
1	**2**	**2**	**8**	**15**	**17**

Gideon Project November 2002
Public Defenders' Survey

SURVEY RESULTS

The bold figures beneath the response numbers represent the number of survey respondents for each response.

Part I: Judicial District No. _____ (please insert the number)

Instructions: Please use the scale below to answer the following questions with regard to the judicial district in which you practice. Should you wish to add additional comments, please attach a separate sheet of paper to the survey.

1 = Strongly Disagree	2 = Disagree	3 = Somewhat Disagree
4 = Somewhat Agree	5 = Agree	6 = Strongly Agree

In each question, "public defender" refers to the state public defender's office. "Appointed counsel" refers to counsel appointed to represent indigent defendants in the place of the public defender's office as, for example, when a conflict of interest exists.

1. The public defender's office is adequately funded so as to allow the office to provide competent legal representation to those the office is appointed to represent.

1	2	3	4	5	6
11	**8**	**3**	**4**	**3**	**1**

2. The public defender's office has a sufficient number of assistant public defenders to provide competent legal representation to those the office is appointed to represent.

1	2	3	4	5	6
14	**9**	**0**	**1**	**4**	**1**

3. The public defender's office has a sufficient number of non-attorney staff members to assure that the office is able to provide competent legal representation to those the office is appointed to represent.

1	2	3	4	5	6
11	**10**	**4**	**2**	**2**	**1**

4. The public defender's office has adequate resources to conduct appropriate pretrial investigations in the cases in which the office is appointed.

1	2	3	4	5	6
12	**11**	**3**	**1**	**3**	**0**

5. The public defender office receives adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which the office is appointed.

1	2	3	4	5	6
11	**3**	**2**	**9**	**5**	**0**

6. Appointed counsel receive adequate compensation so as to allow counsel to provide competent legal representation to those counsel is appointed to represent.

1	2	3	4	5	6
10	**8**	**6**	**2**	**0**	**1**

7. Appointed counsel receive adequate resources to conduct appropriate pretrial investigation in the cases in which counsel is appointed.

1	2	3	4	5	6
12	**4**	**6**	**1**	**3**	**1**

8. Appointed counsel receive adequate resources to engage expert witnesses and conduct expert examination of evidence as necessary in the cases in which counsel is appointed.

1	2	3	4	5	6
10	**1**	**4**	**8**	**3**	**1**

9. As a whole, the current public defender and court-appointed counsel system provides competent legal representation to the accused.

1	2	3	4	5	6
1	**3**	**6**	**12**	**5**	**2**

10. Answer this question only if you were familiar with the indigent defense system in your judicial district prior to the adoption of the current public defender system.

    As a whole, the current public defender and appointed counsel system provides a higher quality of representation to indigent defendants than was provided prior to the adoption of the current system.

1	2	3	4	5	6
0	**0**	**0**	**2**	**10**	**16**