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## SYMPOSIUM

### WILL WE EVER SUCCEED IN FULFILLING *GIDEON*'S PROMISE?

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The Supreme Court's 1963 historic decision in *Gideon v. Wainwright*<sup>1</sup> guaranteed the right to counsel in state court felony prosecutions for persons unable to afford a lawyer. *Gideon* was followed by a number of other landmark decisions in which the right to a lawyer was recognized, including delinquency cases involving juveniles<sup>2</sup> and misdemeanor prosecutions of adults.<sup>3</sup> The U.S. Supreme Court's decisions, however, based upon the federal Constitution's Sixth Amendment's right to counsel clause,<sup>4</sup> always have been a significant unfunded mandate with which states have struggled for more than fifty years.

This Article's title asks if the so-called "promise of the *Gideon* decision" will ever be achieved. Before attempting to answer this ultimate question, we should define several terms and consider a few preliminary ones. Most importantly, what is meant by "*Gideon*'s promise"? Also, why does the title of these remarks assume that "*Gideon*'s promise" has not been achieved? And, finally, even if "*Gideon*'s promise" is unfulfilled, how, if at all, can it ever be realized?

#### I. THE MEANING OF *GIDEON*'S PROMISE

Consider the first of these questions: the meaning of "*Gideon*'s promise." The phrase is frequently used, but it is rarely defined. Some years ago, on behalf of the American Bar Association (ABA) committee that deals with public defense issues, I co-authored a report in which the first three words of the title were "*Gideon*'s Broken Promise," but we never defined in the report what "*Gideon*'s

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1. See generally 372 U.S. 335 (1963).

2. See generally *In re Gault*, 387 U.S. 1 (1967).

3. See generally *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

4. See U.S. CONST. amend. VI. (The Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

Promise” meant.<sup>5</sup> In contrast, a definition has been suggested by a nationally acclaimed program headquartered in Atlanta, in which young lawyers are trained to work in public defender offices.<sup>6</sup> The program is “*Gideon’s Promise*,”<sup>7</sup> and its goal is to promote equal justice for all persons charged with criminal and juvenile misconduct.<sup>8</sup>

So what does “*Gideon’s promise*” mean? At a minimum, I suggest the phrase “*Gideon’s promise*” means that a poor person unable to afford a reasonable attorney’s fee is treated substantially the same in our criminal and juvenile justice systems as a person of financial means. In the *Gideon* decision, the Supreme Court wrote that “every defendant [should] stand[] equal before the law . . . [but] [t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer.”<sup>9</sup>

But obviously *Gideon’s* promise means more than a poor person having access to a lawyer—it means more than simply having a warm body with a law license standing next to you when you go to court. Mere access to a lawyer is not enough, just as access to water means more than simply being able to turn on a faucet. Just ask the people in Flint, Michigan!

In fact, the Supreme Court emphasized in 1984 that the right to counsel guaranteed in the Constitution’s Sixth Amendment requires “reasonableness under prevailing professional norms.”<sup>10</sup> Twenty-six years later, the Supreme

5. The committee is the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, which has jurisdiction of civil legal aid and indigent defense matters. I am a former committee member, consultant, and now serve as a Special Advisor to the committee. AM. BAR ASS’N STANDING COMM. LEGAL AID & INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE*, REP. ON THE AM. BAR ASS’N’S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS, at i-62 (2004), available at [http://texaswel.tamu.edu/reports/2004\\_ABA\\_Gideon%27s\\_Broken\\_Promise.pdf](http://texaswel.tamu.edu/reports/2004_ABA_Gideon%27s_Broken_Promise.pdf) [<https://perma.cc/XT9X-BFEN>] [hereinafter ABA *GIDEON’S BROKEN PROMISE*].

6. See generally *GIDEON’S PROMISE*, <http://www.gideonspromise.org/> [<https://perma.cc/673F-7JRE>] (last visited May 9, 2017).

7. *Id.*

8. See, e.g., *1 Promise, 1 Vision, 1 Movement*, DEFENDER CONNECTIONS (*Gideon’s Promise*, Atlanta, Ga.), Feb. 10, 2017, at 1, available at <http://www.gideonspromise.org/sites/default/files/FINAL%20Winter%20Newsletter%202017%20WEB%2C%20EMAIL.pdf> [<https://perma.cc/SF59-Q6EA>] (“In continuous solidarity with the spirit of the 1960’s Civil Rights Movement and the movements taking place today, *Gideon’s Promise* champions the promise of equal justice made to all Americans in 1963—*Gideon’s* promise.”). The organization’s “mission is to transform the criminal justice system by building a movement of public defenders who provide equal justice for marginalized communities[;]” therefore, “[p]ublic defenders are necessary if we are to realize equal justice in America. We are the voice for the voiceless.” *Our Mission, Our Movement*, *GIDEON’S PROMISE*, <http://www.gideonspromise.org/about> [<https://perma.cc/766U-6EP7>] (last visited May 9, 2017).

9. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

10. The complete sentence reads as follows: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Strickland v. Washington*,

Court reiterated that “[w]e long have recognized that ‘[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable.’”<sup>11</sup>

In the fourth edition of the ABA Defense Function Standards, approved in 2015, the Association repeated what it has long maintained, namely, that in every criminal case, a defense lawyer “should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been completed.”<sup>12</sup> This requirement is similar to performance standards adopted by the Indiana Public Defender Council, which also emphasizes the importance of investigations.<sup>13</sup> Both Indiana’s recommendations and the ABA’s Defense Function Standards emphasize the need for discussion with the client, analysis of relevant law, the prosecution’s evidence, and the potential dispositions and possible consequences.<sup>14</sup> The ABA’s current standards also state “[d]efense counsel should advise against a guilty plea at [a defendant’s] first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client’s best interest.”<sup>15</sup>

The emphasis in the ABA’s Defense Function Standards on the need to investigate is understandable since the failure to conduct reasonable investigations is probably the most frequent reason that appellate courts reverse criminal and juvenile convictions and conclude that the defense lawyer did not provide “effective assistance of counsel” as required by the Sixth Amendment.<sup>16</sup>

*Gideon*’s promise also means that lawyers comply with state rules of professional conduct, virtually all of which are based upon the ABA Model Rules of Professional Conduct. Pursuant to the ABA’s rules, duties of counsel require competence,<sup>17</sup> diligence,<sup>18</sup> and client communication,<sup>19</sup> as well as the obligation

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466 U.S. 668, 688 (1984).

11. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

12. CRIMINAL JUSTICE STANDARDS FOR THE DEF. FUNCTION § 4-6.1(b) (AM. BAR ASS’N 2015) [hereinafter ABA DEF. FUNCTION].

13. “Counsel has a duty to conduct an independent investigation regardless of the accused’s admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible, particularly with respect to time-sensitive evidence . . . .” PERFORMANCE GUIDELINES FOR CRIMINAL DEF. REPRESENTATION § 4.1(a) (IND. PUB. DEF. COUNCIL 2014).

14. *Id.* § 4.1; ABA DEF. FUNCTION, *supra* note 12, § 4-6.1(b) (The standard states that “[s]uch study should include discussion with the client and an analysis of relevant law, the prosecution’s evidence, and potential dispositions and relevant collateral consequences.”).

15. ABA DEF. FUNCTION, *supra* note 12, § 4-6.1(b).

16. For example, a California study found that nearly half the cases in the state reversed on grounds of ineffective assistance of counsel were due to the failure of defense lawyers to adequately investigate their cases. Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 327 (2009).

17. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the

to avoid conflicts of interest, which arise when defense lawyers have too many cases and every client's case competes for a lawyer's time and attention with every other client's case.<sup>20</sup> Finally, when lawyers cannot provide defense services consistent with professional conduct rules, they are required to seek withdrawal from representation.<sup>21</sup>

So what does it mean to fulfill *Gideon*'s promise? It means that accused persons unable to afford counsel receive the same kind of competent, well-supported, conscientious lawyer every person of financial means seeks to retain when charged with criminal conduct and faced with a loss of liberty.

## II. HOW DO WE KNOW THAT *GIDEON*'S PROMISE REMAINS UNFULFILLED?

The title of this essay assumes that *Gideon*'s promise has not been achieved. Yet there has been enormous progress in providing public defense representation in state courts since *Gideon* was decided more than five decades ago.<sup>22</sup> The public defense landscape in 2017 is completely different than it was in 1963, which was the first year in which I was assigned by judges to represent defendants who could not afford their own lawyers.<sup>23</sup>

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representation." MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2016) [hereinafter ABA MODEL RULES].

18. "A lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* r. 1.3.

19. *Id.* r. 1.4 ("(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

20. *Id.* r. 1.7(a)(2) ("[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

21. *Id.* r. 1.16(a)(1) ("Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law[.]" ).

22. See ABA *GIDEON*'S BROKEN PROMISE, *supra* note 5, at 29-35 (The report documents Strategies for Reform in Part III.).

23. In 1963, two years after graduating law school, I began my involvement in criminal justice matters as a member of the E. Barrett Prettyman Fellowship Program of the Georgetown University Law Center. During the program, we received expert training in criminal defense and were assigned cases to defend in the criminal and juvenile courts of Washington, D.C.

Today, there are thousands of lawyers across the country serving as full or part-time public defenders.<sup>24</sup> In fact, in every state except Maine there are at least some full-time or part-time public defenders, the vast majority of whom are dedicated to doing the best they can for their clients.<sup>25</sup> There also are thousands of private lawyers who participate in providing defense services as either assigned counsel or as contract lawyers.<sup>26</sup> In addition, there are thousands of investigators, social workers, paralegals, and secretaries who support the work of these defense lawyers, as well as various types of experts available to assist lawyers in defending their clients.<sup>27</sup>

In a majority of states, there are statewide defense programs, either completely funded and administered at the state level, or financed by a mix of state and local monies.<sup>28</sup> In a number of these states and in some local jurisdictions, the defense function is largely independent due to a board or commission with oversight functions.<sup>29</sup> In the fifty states and the District of Columbia, the total amount spent on public defense is far greater now than when

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24. Lynn Langton & Donald J. Farole, Jr., *Public Defender Offices, 2007—Statistical Tables*, U.S. DEP'T OF JUST. 1 (June 17, 2010), <https://www.bjs.gov/content/pub/pdf/pdo07st.pdf> [<https://perma.cc/P8UQ-3KA8>] (“In 2007, a total of 957 public defender offices in 49 states and the District of Columbia provided defense services for indigent clients. (Indigent defense services were provided by private attorneys in Maine.) The public defender offices received more than 5.5 million cases in 2007, employed more than 15,000 full-time equivalent litigating attorneys, and reported operating expenditures of more than \$2.3 billion.”).

25. *Id.* at 3.

26. See generally HOLLY R. STEVENS ET AL., STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008, at 1-69 (Ctr. for Justice, Law & Soc’y at Geo. Mason U. 2010), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_expenditures\\_fy08.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf) [<https://perma.cc/MCU8-NWKZ>] (last visited Aug. 7, 2017) [hereinafter STATE, COUNTY, LOCAL 2008 INDIGENT DEFENSE EXPENDITURES].

27. *Id.*; *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985) (“[W]hen a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist’s assistance on this issue if the defendant cannot otherwise afford one.”); see also *McWilliams v. Dunn*, 137 S. Ct. 1790, 1799 (2017) (“*Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively ‘assist in evaluation, preparation, and presentation of the defense.’”).

28. STATE, COUNTY, LOCAL 2008 INDIGENT DEFENSE EXPENDITURES, *supra* note 26.

29. See THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 147-80 (Nat’l Right to Counsel Comm. 2009), available at <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/79BN-GYFY>] [hereinafter JUSTICE DENIED]; see also *Know Your State*, SIXTH AMENDMENT CTR., <http://sixthamendment.org/know-your-state/> [<https://perma.cc/DTX2-TSHZ>] (last visited July 5, 2017).

*Gideon* was decided more than fifty years ago.<sup>30</sup>

Despite these important developments, the vast majority of state courts fail to deliver on *Gideon*'s promise.<sup>31</sup> Consider, for example, the findings of national studies conducted about public defense in state courts.<sup>32</sup> During 2003, commemorating the 40th anniversary of the *Gideon* decision, the ABA Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID) held public hearings in four sites across the country and invited public defense experts to offer their assessments of state public defense representation in criminal and juvenile courts.<sup>33</sup> The witnesses were drawn from diverse geographic regions representing twenty-two states.<sup>34</sup> Their testimony resulted in hundreds of transcript pages detailing the problems of public defense across America.<sup>35</sup>

Based upon the witnesses' testimony, ABA SCLAID, in 2004, published its findings and recommendations:<sup>36</sup>

[O]ur hearings support the disturbing conclusion that thousands of persons are processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring . . . . The fundamental right to a lawyer that Americans assume apply to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.<sup>37</sup>

A 2009 report by the National Association of Criminal Defense Lawyers contained a similar critique of indigent defense representation of persons charged with misdemeanor offenses in state courts.<sup>38</sup> Moreover, there are numerous other

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30. STATE, COUNTY, LOCAL 2008 INDIGENT DEFENSE EXPENDITURES, *supra* note 26, at 6-7 ("In 1986, the first time expenditure data for all fifty states was compiled, it was estimated that just under \$1 billion, or \$991,047,250, was spent on indigent defense services in the U.S. In 1986, indigent defense systems across the nation were in crisis and woefully underfunded. While spending increased to \$3.3 billion in FY02, \$4.1 billion in FY05, to nearly \$5.3 billion in FY08, many systems remain in crisis.").

31. ABA GIDEON'S BROKEN PROMISE, *supra* note 5, at iv.

32. *Id.* at 38-44 (Main Findings in Part V. from ABA hearings analysis).

33. *Id.* at iv.

34. *Id.*

35. *Id.*

36. *Id.* at 38-45.

37. *Id.* at iv.

38. See generally ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 7 (Nat'l Ass'n of Criminal Def. Lawyers 2009), available at [http://texaswcl.tamu.edu/reports/2009\\_Misdemeanor\\_Appointment-Minor\\_Crimes\\_Massive\\_Waste.pdf](http://texaswcl.tamu.edu/reports/2009_Misdemeanor_Appointment-Minor_Crimes_Massive_Waste.pdf) [<https://perma.cc/MN6E-RA2J>] ("Legal representation for misdemeanants is absent in many cases. When an attorney is provided, crushing workloads often make it impossible for the defender to effectively represent her clients. Counsel is unable to spend

reports of state and local public defense systems that expose the vexing deficiencies that are all too common.<sup>39</sup> Sadly, there is no shortage of reports complaining about the state of public defense in America's criminal and juvenile courts.<sup>40</sup> In fact, just as I was writing this Article, a brand new report about the state of public defense in juvenile courts was issued by the National Juvenile Defender Center.<sup>41</sup>

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adequate time on each of her cases, and often lacks necessary resources, such as access to investigators, experts, and online research tools. These deficiencies force even the most competent and dedicated attorneys to engage in breaches of professional duties. Too often, judges and prosecutors are complicit in these breaches, pushing defenders and defendants to take action with limited time and knowledge of their cases. This leads to guilty pleas by the innocent, inappropriate sentences, and wrongful incarceration, all at taxpayer expense.”).

39. See, e.g., SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES (2016), available at [http://sixthamendment.org/6ac/6AC\\_indianareport.pdf](http://sixthamendment.org/6ac/6AC_indianareport.pdf) [https://perma.cc/VF78-LHAM] [hereinafter SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN INDIANA]; SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN UTAH: AN ASSESSMENT OF TRIAL-LEVEL INDIGENT DEFENSE SERVICES (2015), available at [http://sixthamendment.org/6ac/6AC\\_utahreport.pdf](http://sixthamendment.org/6ac/6AC_utahreport.pdf) [https://perma.cc/E8SQ-H9CW] [hereinafter SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN UTAH]; OFFICE OF STATE PUB. DEFENDER MISS., THE STATE OF THE RIGHT TO COUNSEL IN MISSISSIPPI, REP. & RECOMMENDATIONS (2014), available at [http://sixthamendment.org/6ac/6AC\\_mississippireport\\_%20updated092014.pdf](http://sixthamendment.org/6ac/6AC_mississippireport_%20updated092014.pdf) [https://perma.cc/2ZT4-9CKP]; SIXTH AMENDMENT CTR., THE CRUCIBLE OF ADVERSARIAL TESTING ACCESS TO COUNSEL IN DELAWARE'S CRIMINAL COURTS (2014), available at [http://sixthamendment.org/6ac/6AC\\_delawarereport.pdf](http://sixthamendment.org/6ac/6AC_delawarereport.pdf) [https://perma.cc/8TWC-S4NZ] [hereinafter SIXTH AMENDMENT CTR., THE CRUCIBLE].

40. SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN INDIANA, *supra* note 39; SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN UTAH, *supra* note 39; OFFICE OF STATE PUB. DEFENDER MISS., *supra* note 39; SIXTH AMENDMENT CTR., THE CRUCIBLE, *supra* note 39.

41. See generally NAT'L JUVENILE DEF. CTR., ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL (2017), available at [http://njdc.info/wp-content/uploads/2017/05/Snapshot-Final\\_single-4.pdf](http://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf) [https://perma.cc/YFB7-7XWV] (last visited Aug. 7, 2017). The Internet website of the National Juvenile Defender Center summarizes its report as follows:

[N]early every state falls short of its constitutional obligation to provide effective lawyers for youth. Based on statutory analysis and interviews with juvenile defenders in every state, the *Snapshot* exposes gaps in procedural protections for children—gaps that perpetuate the over-criminalization of youth, racial and economic disparities, and the fracturing of families and communities. The *Snapshot* explores five fundamental barriers to access to counsel for children: Eligibility procedures that prevent appointment of a publicly funded attorney; fees charged to children for what should be a free public defender; appointment that happens too late in the process for children to receive strong representation; permissive waiver of counsel; and the stripping of young people's right to an attorney after sentencing.

*Access Denied: A National Snapshot of States' Failure to Protect Children's Right to Counsel,*

The most recent comprehensive national report on public defense was published in 2009 by the National Right to Counsel Committee, organized by the Constitution Project of Washington, D.C.<sup>42</sup> The committee's membership was bipartisan and included persons with defense backgrounds, judges, prosecutors, police representatives, victim rights advocates, and academics.<sup>43</sup> The committee's several hundred-page report is titled *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*.<sup>44</sup>

Much like the other reports quoted above, the executive summary of *Justice Denied* indicted the way in which public defense is provided in America's criminal and juvenile courts:

[T]oday, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the *Gideon* decision and the Supreme Court's soaring rhetoric. Throughout the United States, indigent defense systems are struggling. Due to funding shortfalls, excessive caseloads, and a host of other problems, many are truly failing . . . [T]he call for reform has never been more urgent.<sup>45</sup>

*Justice Denied* discussed the reasons why it is so difficult for defense programs to provide effective and competent services.<sup>46</sup> Among the most vexing deficiencies documented in the report are the following: a lack of the defense function's independence; insufficient funding; resource inequities between prosecution and defense; very low fees paid to private lawyers; excessive public defender caseloads; criminalization of minor offenses; lack of private bar participation in defense representation; a failure of courts to provide defense counsel or doing so late; the willingness of courts to accept invalid waivers of counsel in misdemeanor cases; prosecutors who negotiate plea arrangements with defendants in misdemeanor cases in violation of professional conduct rules;<sup>47</sup> a

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NAT'L JUVENILE DEF. CTR., <http://njdc.info/snapshot/> [<https://perma.cc/CNU2-ABJ3>] (last visited Oct. 16, 2017).

42. See JUSTICE DENIED, *supra* note 29.

43. *Id.*

44. *Id.*

45. *Id.* at 2; see also NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING (Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants 1982) (referencing obstacles limiting defense services to low income populations).

46. See generally JUSTICE DENIED, *supra* note 29.

47. *Id.* at 49-101; ABA MODEL RULES, *supra* note 17, at r. 3.8 (b) and (c), which most states have adopted verbatim in their professional conduct rules, provides as follows:

The prosecutor in a criminal case shall . . . (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing[.]



lack of defense performance standards, inadequate training, and insufficient oversight; a lack of experts, investigators, and interpreters; infrequent and brief client contact; a lack of technology and data; the erosion of conflict of interest rules; and case delays.<sup>48</sup>

The first deficiency listed above—a lack of defense function independence—is illustrated by stories told by chief public defenders when they appeared before county appropriation committees. In one instance, the public defender was challenged about her office's policy in seeking to discourage clients from pleading guilty at arraignments, making discovery requests of the prosecutor, and filing pretrial motions.<sup>49</sup>

Of all the problems in public defense, none is more vexing than the excessive caseloads of public defenders. Nor does any other deficiency better illustrate the dismal state of public defense in much of this country. In 2011, the ABA published a book that I wrote dealing with the excessive caseload problem.<sup>50</sup> My Introduction to the book told the story of a lawyer from a large northeastern city who emailed me about his exceedingly high caseload and his concern that clients were going to jail because he did not have sufficient time to represent them adequately.<sup>51</sup> At the time, the lawyer said his pending caseload was more than 300, consisting mainly of misdemeanor cases and some felonies.<sup>52</sup> The lawyer asked me if I could send him a sample copy of a motion to withdraw that he could file with the judges before whom he appeared.<sup>53</sup>

The lawyer's email led to a lengthy exchange between us in which I urged that before filing a motion to withdraw, he needed to speak with his supervisor and, if that was unsuccessful, with the chief public defender.<sup>54</sup> Although he followed my advice, the conversations did not go well, as both the lawyer's supervisor and chief defender threatened to fire him if he filed motions to

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*Id.*

48. JUSTICE DENIED, *supra* note 29, at 52-101.

49. *Id.* at 80-81. Independence is enormously important in structuring public defense programs. For this reason, independence is emphasized in ABA policy statements about public defense. *See, e.g.*, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEF. SERV. § 5-1.3 (AM. BAR ASS'N 1992) [hereinafter ABA PROVIDING DEF. SERV.]; TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, §1 (AM. BAR ASS'N 2002) [hereinafter ABA TEN PRINCIPLES].

50. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants 2011), available at [https://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf) [<https://perma.cc/AWV3-KX27>] (last visited Aug. 7, 2017) [hereinafter LEFSTEIN, SECURING REASONABLE CASELOADS].

51. *Id.* at 2-8.

52. *Id.* at 2.

53. *Id.* at 2-8.

54. *Id.* at 2. My advice was consistent with the ethics rules of the public defender's state, which were substantially the same as ABA MODEL RULES, *supra* note 17, r. 5.1-5.2; *see also* LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 50, at 2 n.3.

withdraw from any of his cases.<sup>55</sup> Faced with his unmanageable caseload and the threat of being fired, he resigned his public defender position.<sup>56</sup>

### III. INDIANA AND THE NEED FOR MAJOR REFORM

The public defense problems nationwide naturally lead to the question of how Indiana compares to the rest of the country. Does Indiana's defense system have the same types of deficiencies encountered in other states? The answer is that defense problems in Indiana are pervasive throughout much of this state. In fact, a major impetus for the *Indiana Law Review's* Symposium in April 2017 was the release of a detailed report in 2016 about Indiana's public defense system prepared by the Sixth Amendment Center of Boston, Massachusetts.<sup>57</sup>

This lengthy study makes abundantly clear that the kinds of defense difficulties that I have been discussing are present in this state as well. The report concludes that Indiana's public defense system is "deeply flawed," a proposition with which I fully agree.<sup>58</sup>

In the report's final chapter containing recommendations, the report states, "[t]here is no uniform cookie-cutter indigent defense services model that can or should be applied to each and every state."<sup>59</sup> I regard this statement as incorrect as applied to most states and clearly wrong as applied to Indiana. During the past several decades, states increasingly have adopted statewide defense programs headed by commissions or boards, many of which are either substantially or entirely independent and have authority over all facets of defense services for persons charged in criminal and juvenile delinquency cases who cannot afford counsel.<sup>60</sup> In the majority of these states, funding for public defense is provided from the state's general revenues.<sup>61</sup>

The virtues of a statewide program are many, including: the development of enforceable uniform statewide performance, caseload, and other standards; the opportunity for statewide lawyer training for those who provide public defense

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55. LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 50, at 3.

56. *Id.*

57. SIXTH AMENDMENT CTR., THE RIGHT TO COUNSEL IN INDIANA EVALUATION OF THE TRIAL LEVEL INDIGENT DEFENSE SERVICES (2016), available at [http://sixthamendment.org/6ac/6AC\\_indianareport.pdf](http://sixthamendment.org/6ac/6AC_indianareport.pdf) [<https://perma.cc/VF78-LHAM>].

58. "The Indiana Model for providing Sixth Amendment right to counsel services is inherently flawed. It both institutionalizes and legitimizes the choice of counties to not fulfill the minimum parameters of effective representation." *Id.* at 200. The Indiana Public Defender Commission has partial jurisdiction over trial level public defense representation in the state. I served as the Commission's first chairman from 1990 to 2007.

59. *Id.*

60. See *Systematic accountability through an independent commission—ABA Principle 1*, SIXTH AMENDMENT CTR., <http://sixthamendment.org/the-right-to-counsel/national-standards-for-providing-the-right-to-counsel/systemic-accountability-through-an-independent-commission-aba-principle-1/> [<https://perma.cc/A4EN-KFU4>] (last visited May 21, 2017).

61. *Id.*; see also JUSTICE DENIED, *supra* note 29, at 149-51.

representation; and a statewide structure that can serve as a strong voice for the funding needs of public defense, criminal and juvenile justice reforms, and concerns of the client community.<sup>62</sup> These kinds of changes would be an altogether appropriate response to the system that we have had in Indiana for more than twenty-five years, and one that has failed to stand the test of time, as the Sixth Amendment Center's report makes clear.

#### IV. PUBLIC DEFENSE AND THE CRIMINAL JUSTICE SYSTEM

Before attempting to answer whether we ever will be able to achieve *Gideon's* promise, I want to comment about the importance of public defense in advancing the fair administration of criminal and juvenile justice.

There can be no serious question that the quality of defense services in state courts is enormously important in achieving just results for persons unable to afford private counsel. But there also are significant and seemingly intractable systemic problems that plague criminal and juvenile justice systems in every state. These are problems, however, that vigorous and adequately funded public defense programs can bring to the public's attention, seek to alter through legislation, and perhaps challenge in court proceedings.

Consider the mass incarceration problem that has developed in this country. It is primarily the result of persons in state courts who are convicted of crimes and sentenced to prisons or locked up in jails awaiting a plea bargain or trial.<sup>63</sup> Today in the United States, more than two million people are incarcerated in prisons and jails at any one time.<sup>64</sup> In fact, there are more people behind bars in this country than in any other.<sup>65</sup> In contrast to the United States, China has more than four times our population, yet the number of people behind bars for crimes in China is smaller than in America.<sup>66</sup> An important factor that contributes to our country's mass incarceration is the length of our prison sentences, which are among the

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62. See, e.g., JUSTICE DENIED, *supra* note 29, at 185-99 (citing specifically recommendations 2, 8 and 11).

63. Grace Wyler, *The Mass Incarceration Problem in America*, VICE NEWS (Jul. 26, 2014, 9:05 AM), <https://news.vice.com/article/the-mass-incarceration-problem-in-america> [<https://perma.cc/5D8H-8364>] (state incarceration data).

64. *Criminal Justice Fact Sheet*, NAT'L ASSOC. FOR THE ADVANCEMENT OF COLORED PEOPLE, <http://www.naacp.org/criminal-justice-fact-sheet/> [<https://perma.cc/SU8F-U3R4>] (last visited May 21, 2017).

65. See generally JUSTICE POLICY INST., FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICES OF OTHER NATIONS (2011), available at <http://www.justicepolicy.org/uploads/justicepolicy/documents/sentencing.pdf> [<https://perma.cc/BW22-5SDC>].

66. "Between 1980 and 2015, the number of people incarcerated in America [quadrupled] from roughly 500,000 to < over 2.2 million." *Criminal Justice Fact Sheet*, *supra* note 64; *World Prison Brief data: China*, PRISONSTUDIES.ORG, <http://www.prisonstudies.org/country/china> [<https://perma.cc/J43L-WQAC>] (last visited May 21, 2017) (stating as of mid-2015, 1,649,804 individuals were imprisoned in China).

longest in the world.<sup>67</sup>

In recent years, states increasingly have relied upon the use of court fees and fines to help pay for our justice systems.<sup>68</sup> As a result, poor persons, who are least able to pay the expenses, are charged for all kinds of services, including user fees for receiving a defense lawyer, fees for probation or parole services, ankle bracelets for home detention, and fines for low level traffic and other offenses.<sup>69</sup> Even worse, too often poor people, disproportionately minorities and people of color, who cannot pay the charges, wind up jailed for non-payment despite U.S. Supreme Court cases that prohibit the practice.<sup>70</sup>

Effective defense lawyers also are needed to challenge the enormous problem of pretrial incarceration due to courts imposing extremely high, unrealistic, and unnecessary money bonds. Unfortunately, most states still do not require lawyers to represent defendants at their first court appearance, so in many states no lawyer is present to advocate for defendants' releases at first appearances, and defendants are detained on bonds they cannot afford.<sup>71</sup> Recently, there have been some important court victories challenging the use of bail bonds, and these provide hope that eventually significant changes may be achieved in state courts.<sup>72</sup> In

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67. For example, the U.S. average custodial sentence length is 63 months, compared to Australia (36 months), Canada (4 months), Finland (10.1 months), Germany (6-12 months), and England and Wales (13 months). JUSTICE POLICY INST., *supra* note 65, at 4.

68. See COUNCIL OF ECON. ADVISORS, FINES, FEES, AND BAIL: PAYMENTS IN THE CRIMINAL JUSTICE SYSTEM THAT DISPROPORTIONATELY IMPACT THE POOR 2 (2015), available at [https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215\\_cea\\_fine\\_fee\\_bail\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf) [<https://perma.cc/8EJF-NWNH>].

69. *Id.* at 3.

70. In *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983), the Court prohibited the incarceration of indigent probationers for failing to pay a fine because "[t]o do otherwise would deprive the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine. Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." See also *Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that the state cannot convert defendant's unpaid fine for a fine-only offense to incarceration because that would subject him "to imprisonment solely because of his indigency"); see also *Williams v. Illinois*, 399 U.S. 235, 241-42 (1970) (stating that an indigent defendant cannot be imprisoned longer than the statutory maximum for failing to pay his fine); see generally Walter Kurtz, *Pay or Stay: Incarceration of Minor Criminal Offenders for Nonpayment of Fines and Fees*, 51 TENN. B. J. 16 (2015); see generally Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486 (2016).

71. See generally THE CONSTITUTION PROJECT, DON'T I NEED A LAWYER? PRETRIAL JUSTICE AND THE RIGHT TO COUNSEL AT FIRST JUDICIAL BAIL HEARING (Nat'l Right to Counsel Comm. 2015), available at [https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL\\_3.18.15.pdf](https://constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf) [<https://perma.cc/JK2N-HQXU>]. This report notes that there still are only fourteen states that require indigent defendants to be represented by counsel prior to their first court hearing at which bail is determined. *Id.* at 16 n.70.

72. The Civil Rights Corps of Washington, D.C. has successfully challenged the use of money bail in a number of state courts and achieved notable results. The organization's webpage

Indiana, for example, the state's Supreme Court has addressed the excessive use of money bail and scheduled reforms that should eventually reduce the rate at which defendants are detained pretrial on bonds they cannot afford.<sup>73</sup>

But aside from the systemic problems of criminal and juvenile justice systems, an intensely practical reason exists for why everyone should care about having strong public defense programs. I refer to the indisputable risk of innocent persons being convicted in juvenile and criminal courts. Ever since the first DNA exoneration case in 1989, it has been painfully obvious that our criminal justice systems sometimes make terrible mistakes.<sup>74</sup> The website of the National Registry of Exonerations now lists more than 2000 cases in which convicted persons have been freed.<sup>75</sup> Regrettably, in many of these cases, defendants pled guilty and passed up the opportunity for trial on the merits of the case, whether due to poor legal advice or the fear that in the event of conviction after trial they would receive a much harsher sentence. But it is extremely naïve to believe that now all inmates remaining in prison are actually guilty, because every year new persons are convicted and sentenced to prison, and innocent persons continue to be exonerated.<sup>76</sup>

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lists some of their representative cases. *Ending Wealth-based Pretrial Detention*, CIVIL RIGHTS CORPS, [http://www.civilrightscorps.org/ending-wealth-based-pretrial-detention/\[http://perma.cc/6GY5-Q645\]](http://www.civilrightscorps.org/ending-wealth-based-pretrial-detention/[http://perma.cc/6GY5-Q645]) (last visited Aug. 7, 2017); see also Gabrielle Banks, *Federal judge: Harris Co. bail system unfair to poor, low-level defendants*, HOUS. CHRON. (Apr. 29, 2017, 3:04 PM), <http://www.chron.com/news/houston-texas/article/Federal-judge-Harris-Ccash-bail-fundamentally-11107643.php> [https://perma.cc/22X8-76M2].

73. Indiana's new rule on pretrial release states that an arrestee should be released "without money bail or surety subject to such restrictions and conditions . . ." if the person does not pose a "substantial risk of flight or danger to themselves or other[s]." IND. R. CRIM. P. 26. Exceptions to the rule are provided for arrestees "charged with murder or treason," those currently on "probation, parole or other community supervision," and arrestees who are "on pre-trial release not related to the incident that is the basis for the present arrest." *Id.*

74. Bluhm Legal Clinic, *First DNA Exoneration*, CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/gary-dotson.html> [https://perma.cc/U8PP-CW6P] (last visited May 23, 2017); Gary Dotson, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/gary-dotson/> [https://perma.cc/N3HY-C9KP] (last visited May 23, 2017).

75. "Currently 2,109 exonerations . . . [m]ore than 18,250 years lost." *National Registry of Exonerations*, U. OF MICH., <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> [https://perma.cc/HA9D-W3R7] (last visited Oct. 16, 2017).

76. In Indiana, seven convicted defendants were later exonerated and released due to DNA evidence. See *Featured Cases*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases-categories/indiana/#indiana,exonerated-by-dna> [https://perma.cc/UNF9-4UCK] (last visited June 27, 2017). In fact, three of Indiana's wrongful conviction cases were developed by the school's Wrongful Conviction Clinic. See *IU McKinney Wrongful Conviction Clinic Client Darryl Pinkins Wins Release from Prison*, IND. UNIV. ROBERT H. MCKINNEY SCH. OF LAW (Apr. 25, 2016), <https://mckinneylaw.iu.edu/news/releases/2016/04/iu-mckinney-wrongful-conviction-clinic-client->

The phenomena of wrongful convictions relates directly to the quality of defense representation provided to the accused. Although I do not suggest that excellent lawyers with access to support services, including experts and investigators, can prevent all erroneous convictions, I do maintain that if innocent defendants lack excellent lawyers with adequate support services, they stand virtually no chance of avoiding conviction. Like other wrongfully convicted defendants, defendants without adequate counsel will either plead guilty or be convicted after a trial.<sup>77</sup>

But even if the defendant is guilty, remember that ours is an adversary justice system. In such a system, the likelihood of a more just resolution of criminal and juvenile cases is enhanced when representation is provided by an excellent lawyer who knows the defendant's personal history and has investigated the case. Furthermore, the lawyer can persuade the prosecutor to permit a plea to a lesser charge, recommend a more lenient sentence, or perhaps agree that pretrial diversion is appropriate.

For all of these reasons, I reject the following assessment of Judge Richard Posner:

I can confirm from my own experience as a judge that criminal defendants are generally poorly represented, but if we are to be hardheaded we must recognize that this may be not an entirely bad thing. The lawyers who represent indigent criminal defendants seem to be good enough to reduce the probability of convicting an innocent person to a very low level. If they were much better, either many guilty people would be acquitted or society would have to devote much greater resources to the prosecution of criminal cases. A bare-bones system of indigent criminal defense may be optimal.<sup>78</sup>

Judge Posner offered this assessment in 1999, ten years after the nation's first DNA exoneration case. Although I do not know whether his opinion is the same today as it was nearly twenty years ago, I would like to think that Judge Posner may have changed his mind about a "bare bones system of indigent defense . . . [being] optimal"<sup>79</sup> in light of the many wrongful convictions in state courts

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darryl-pinkins-wins-release-from-prison.html [https://perma.cc/E3PB-BE55]. For the clinic's most recent successful case, see Innocence Staff, *Indiana Man Exonerated After Serving More Than 25 Years for a Rape DNA Testing Proves He Didn't Commit*, INNOCENCE PROJECT (May 10, 2017), <https://www.innocenceproject.org/indiana-man-exonerated-after-serving-more-than-25-years-for-a-rape-dna-testing-proves-he-didnt-commit/> [https://perma.cc/MTU8-DWXH].

77. Consider, for example, the case of *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001) ("[T]he repeated unconsciousness of Burdine's counsel through not insubstantial portions of the critical guilt-innocence phase of Burdine's capital murder trial warrants a presumption of prejudice . . ."). This is the case in which defendant's lawyer slept through evidence presented during the penalty phase of the trial. *Id.*

78. RICHARD A. POSNER, *THE PROBLEMATIC OF MORAL AND LEGAL THEORY* 163-64 (Harvard U. Press 1999).

79. *Id.*

confirmed during the past two decades. Perhaps he now agrees that both prosecution and defense in state courts should be adequately funded so that both are on an equal footing.

A wrongful conviction case from Montana illustrates the importance of effective defense representation and says much about the difficulties encountered in states where public defense reforms are implemented.<sup>80</sup> In 2002, Jimmy Ray Bromgard was released from a Montana prison after spending fifteen years behind bars.<sup>81</sup> Bromgard had been convicted of a brutal rape of an eight year old girl that occurred in 1987.<sup>82</sup> Based upon the victim's description of her assailant, a composite sketch was drawn and a policeman, who knew Bromgard, thought that Bromgard resembled the picture in the sketch, so Bromgard was taken into custody.<sup>83</sup> The girl was asked if she could identify Bromgard, and "she said she was 60 or 65 percent sure [he was her attacker]."<sup>84</sup> At trial, when asked to rate her confidence in her identification, she said, "I am not too sure."<sup>85</sup> Bromgard's lawyer, under contract with the county to provide defense representation for a flat fee, did not challenge the girl's in-court identification.<sup>86</sup> The lawyer also did not investigate the case, made no opening statement, did not prepare a closing argument, and did not even file an appeal in the case.<sup>87</sup> Even worse, at trial the lawyer did not challenge hairs found at the crime scene, which were said by the state's expert witness, without any scientific basis, that the chance was only "one in one hundred thousand" that the hairs were not Bromgard's.<sup>88</sup> Later, Bromgard's conviction and forty year prison sentence were upheld by the Montana Supreme Court.<sup>89</sup> But for DNA evidence, Bromgard would still be in prison today.

In 2005, in the wake of Bromgard's case and all sorts of other problems with public defense in Montana, the Montana Public Defender Act established a statewide public defense system with funding provided by the state's government.<sup>90</sup> Prior to this law, every county or city in Montana provided its own

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80. State v. Bromgard, 948 P.2d 182 (Mont. 1997); see also Norman Lefstein, *In Search Of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L. J., 835, 860 (2004).

81. Lefstein, *supra* note 80, at 860.

82. Bromgard, 948 P.2d at 183.

83. Lefstein, *supra* note 80, at 860.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*; State v. Bromgard, 948 P.2d 182 (Mont. 1997) (ineffective assistance of counsel claim); State v. Bromgard, 862 P.2d 1140, 1142 (Mont. 1993) (hair comparison testimony issue is raised); see also *Jimmy Ray Bromgard*, INNOCENCE PROJECT, <https://www.innocenceproject.org/cases/jimmy-ray-bromgard/> [<https://perma.cc/367A-VSQH>] (last visited June 28, 2017).

89. Bromgard, 862 P.2d at 1142.

90. MONT. CODE ANN. § 47-1-104 (West 2017).

system of public defense, except for appeals. The new program established an eleven member commission, with all members appointed by the governor.<sup>91</sup>

Although it is reasonable to assume that the new Montana statewide defense system is a significant improvement over the prior city or county-based system for defense representation, there is considerable evidence that the current statewide defense program, like so many other statewide systems, is seriously underfunded. An Internet search reveals that Montana's public defenders have had serious caseload problems, which jeopardizes the effectiveness of the representation they provide.<sup>92</sup>

#### V. WHAT ARE THE CHANCES OF FULFILLING *GIDEON*'S PROMISE?

Finally, I return to the question posed at the start of this essay—will we ever succeed in fulfilling *Gideon*'s promise? The short answer is a tentative “maybe.” My longer answer follows.

Most observers of public defense in the United States agree that in the federal courts *Gideon*'s promise is being substantially fulfilled by the representation provided by skilled and well-trained full-time public defenders and private attorneys appointed pursuant to the Criminal Justice Act (CJA).<sup>93</sup> The federal defense program is also far better funded than state defense programs and CJA lawyers are usually better screened and always better compensated than in state courts, i.e., at \$129 per hour for felony cases and at an even higher rate in capital cases.<sup>94</sup> As a result, the best defense lawyers in a community will sometimes

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91. *Id.* § 47-1-104 (2). The Montana system for appointing commission members is not ideal. This is because different appointing authorities are needed so that not all commission members are beholden to a single person. Chapter 4 of JUSTICE DENIED recommends diverse appointing authorities: “One of the most important mechanisms for ensuring independence is to have appointments to the oversight board originate from a variety of sources. At a minimum, the authority to appoint members to the commission should be allocated to all three branches of government and relevant bar associations.” JUSTICE DENIED, *supra* note 29, at 158.

92. David Carroll, *Montana caseload challenge results in a significant increase in resources*, SIXTH AMENDMENT CTR. (Apr. 17, 2014), <http://sixthamendment.org/montana-caseload-challenge-results-in-a-significant-increase-in-resources/> [https://perma.cc/GJB3-8KZ4]. In fiscal year 2016, it appears that the case weights for public defender offices in Montana were significantly higher than the targeted caseloads. See MONT. PUB. DEF. COMM'N, FISCAL YEAR 2016 REPORT TO THE GOVERNOR, SUPREME COURT AND LEGISLATURE, at Caseload & Workload 8-11 (2016), available at <http://leg.mt.gov/content/Publications/services/2016-agency-reports/Public-Defender-Report-2016.pdf> [https://perma.cc/KR2W-TE8J].

93. See 18 U.S.C. § 3006A (2010); see also *Criminal Justice Act: At 50 Years, a Landmark in the Right to Counsel*, U.S. COURTS (Aug. 20, 2014), <http://www.uscourts.gov/news/2014/08/20/criminal-justice-act-50-years-landmark-right-counsel> [https://perma.cc/NL9R-P6AE].

94. As of May 5, 2017, “panel attorneys are paid an hourly rate of \$132 in non-capital cases, and, in capital cases, a maximum hourly rate of \$185 . . . [t]he rates include both attorney compensation and office overhead.” *Defender Services*, U.S. COURTS, <http://www.uscourts.gov/services-forms/defender-services> [https://perma.cc/3DW6-TEZF] (last visited July 3, 2017).



accept appointments pursuant to the CJA but resist appointments in state criminal cases.<sup>95</sup> Additionally, full-time federal defenders are not burdened with the sorts of massive caseloads frequently assigned to public defenders in state public defense systems.<sup>96</sup>

But it is difficult to believe that the achievements in federal public defense will be realized anytime soon, if at all, in the vast majority of state and local defense programs. Admittedly, state and local public defense programs have expanded significantly since *Gideon*, as discussed earlier.<sup>97</sup> But what basis is there to believe that the majority of state and local governments will soon provide the requisite funding for public defense programs when they have failed to do so for more than five decades?

State and local budgets are invariably tight and, unlike the federal government's budget, at the state and local level budgets must be balanced.<sup>98</sup> Moreover, public defense does not have a strong lobby. A public defender friend of mine once told me a story that illustrates the point. My friend met with a local politician who was the county's party chairman. When my friend asked the chairman about supporting an increased appropriation for public defense, the chairman's response was blunt and discouraging: "there is just not a damn vote

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There are case maximums, which limit the total amount of compensation paid to a panel attorney "for categories of representation (for example, \$10,000 for felonies, \$2,900 for misdemeanors, and \$7,200 for appeals)." *Id.* However, "maximums may be exceeded when higher amounts are certified by the district judge, or circuit judge if the representation is at the court of appeals, as necessary to provide fair compensation and the chief judge of the circuit approves." *Id.*; see also 18 U.S.C. § 3006A(d)(3) (2012).

95. This comment is based on personal conversations that I have had with excellent private criminal defense lawyers in Indianapolis, as well as in other communities, where I have had the opportunity to interview private criminal defense lawyers who have told me that they are willing to accept federal CJA appointments largely because the compensation is so much better than in the state courts.

96. LEFSTEIN, *SECURING REASONABLE CASELOADS*, *supra* note 50, at 238 (footnote omitted) ("[T]he problem of excessive caseloads in indigent defense is in the state courts, not in the federal courts. Not only is the funding for defense services substantially more generous in federal courts for federal and community defender programs and Criminal Justice Act (CJA) panel lawyers who furnish defense representation, but in many federal districts the defender programs oversee the assignment of cases to their own staff lawyers and to private panel lawyers approved for appointments under the federal district court's CJA plan.").

97. See *supra* Part II.

98. Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS (Dec. 31, 2012), <https://www.brookings.edu/articles/state-and-local-budgets-and-the-great-recession/> [<https://perma.cc/YD2H-73R5>] ("Unlike the federal government, state and local governments are generally expected to balance their budgets. Indeed, many states are constitutionally prohibited from carrying a deficit forward into the next fiscal year. Thus, in addition to relying on enhanced federal funds, states and localities typically raise revenues, cut spending, or draw down reserves to close projected budget gaps.").

to be gained in supporting money to help criminals!” In addition, the number of lawyers in state legislatures—persons who presumably appreciate the need for strong defense representation—has decreased substantially in recent years.<sup>99</sup> Although a few jurisdictions provide the necessary financial support for strong public defense programs, they are likely notable exceptions.<sup>100</sup>

Despite this gloomy assessment respecting public defense funding, I do want to mention two strategies that conceivably could yield positive public defense improvements. One of these is conducting workload studies based upon Delphi methodology respecting public defense caseloads. During the past several years in several states, ABA SCLAID, in cooperation with public accounting firms, has conducted studies about the numbers of different types of cases that public defense lawyers can reasonably represent over a twelve-month period.<sup>101</sup> Because these studies have implemented Delphi methodology in a manner never previously used, I have referred to the studies as a “new breed” for determining appropriate defense workloads.<sup>102</sup> Moreover, in at least one jurisdiction, the 2014 workload study completed in Missouri proved persuasive to the state legislature.<sup>103</sup>

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99. “There are substantially fewer lawyers serving in state legislatures than there were 40 years ago . . . .” Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, STATE LEGISLATURES MAG. (Dec. 1, 2015), <http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx> [<https://perma.cc/W24B-L9QC>].

100. In the 2011 book that I wrote about public defense caseloads, I discuss three programs that have managed to avoid excessive caseloads, i.e., the Massachusetts Committee for Public Counsel Services, the District of Columbia Public Defender Service, and the Private Defender Program of San Mateo County, California. See LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 50, at 192-228. Although I did not discuss the funding of these three programs, it is reasonable to assume that all three receive better than average funding lest they would be unable to control their caseloads in the manner that they do.

101. The studies to which I refer are the following: “The Missouri Project,” “The Louisiana Project,” and “The Texas Study.” See RUBINBROWN, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (Am. Bar Ass’n Standing Comm. on Legal Aid & Indigent Defendants 2014), *available at* [https://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/ls\\_sclaid\\_5c\\_the\\_missouri\\_project\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf) [<https://perma.cc/JKC4-T77R>]; POSTLEWAITE & NETTERVILLE, THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (Am. Bar Ass’n Standing Comm. on Legal Aid & Indigent Defendants 2017), *available at* [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_louisiana\\_project\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.authcheckdam.pdf) [<https://perma.cc/CG7T-BFX9>]; DOTTIE CARMICHAEL ET AL., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REP. TO THE TEXAS INDIGENT DEFENSE COMMISSION (Pub. Policy Research Inst. Texas A&M Univ. 2015), *available at* [http://www.tidc.texas.gov/media/31818/150122\\_weighteddc\\_final.pdf](http://www.tidc.texas.gov/media/31818/150122_weighteddc_final.pdf) [<https://perma.cc/QY93-UNFJ>].

102. See Norman Lefstein, *Preface* to CARMICHAEL ET AL., *supra* note 101, at vi.

103. See Camila Domonoske, *Overworked And Underfunded, Mo. Public Defender Office Assigns Case—To The Governor*, NAT’L PUB. RADIO (Aug. 4, 2016, 12:34 PM), <http://www.npr>.

A second way in which public defense reform may be achieved is through litigation. One approach would be to use recently completed workload studies of the kind mentioned above to challenge the numbers of cases assigned to public defense programs. The request of courts would be to restrain case assignments to defense providers that exceed the volume of work that a completed state workload study indicates is reasonable.<sup>104</sup>

In addition, during the past several years, several state supreme courts have ruled that systemic challenges to the delivery of public defense services may proceed on legal theories distinct from an analysis based upon *Strickland v. Washington*, which requires a showing that defense counsel was ineffective and the defendant was prejudiced as a result.<sup>105</sup> *Strickland*, decided in 1984, dealt with a convicted defendant's claim that he had received ineffective assistance of counsel.<sup>106</sup> The Supreme Court held that the conviction could be overturned based upon ineffective assistance only if the defense lawyer's representation was not reasonably effective and the defendant was prejudiced by counsel's conduct.<sup>107</sup> But decisions of state supreme courts have made it possible to litigate systemic violations of the Sixth Amendment without requiring defendants to be convicted before challenging the state jurisdiction's defense representation system.<sup>108</sup> These

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org/sections/thetwo-way/2016/08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-governor [https://perma.cc/8AP3-XZDZ] ("For several years in a row, the Legislature has approved multimillion-dollar budget increases for the public defender system, which the Democratic governor has rejected. The additional money would have helped hire more lawyers; a 2014 study found that Missouri needed an additional 270 public defenders in order to adequately represent the state's poorest defendants.").

104. For further discussion of the relief to be sought, see Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 ST. LOUIS L. J. 625, 657-61 (2017).

105. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

106. *Id.* at 671.

107. *Id.* at 687-701.

108. *Tucker v. State*, 394 P.3d 54 (Idaho 2017) (class action complaint alleging a constructive denial of counsel stated a cause of action and case remanded for a hearing on the merits of plaintiffs' claims); *Kuren v. Luzerne County*, 146 A.3d 715, 718 (Pa. 2016) (A "cause of action exists entitling class of indigent criminal defendants to allege prospective, systemic violations of the right to counsel due to underfunding, and to seek an injunction forcing a county to provide adequate funding to a public defender's office . . . so long as class action plaintiffs demonstrate the 'likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.'"); *Pub. Def., Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261 (Fla. 2013) (circuit public defender's office demonstrated cause for withdrawal from representing indigent defendants in their non-capital felony cases based upon claims of excessive caseloads); *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 609 (Mo. 2012) (en banc) (Prior to appointing defense counsel, "Sixth Amendment and [attorney] ethics rules require that a court consider the issue of counsel's competency [to provide representation] and that counsel consider whether accepting appointment will cause counsel to violate the Sixth Amendment and ethical rules . . ."); *Hurrell-*

decisions also furnish a way for defense lawyers to avoid violating their ethical and constitutional duties in defending their clients in criminal and juvenile cases.

#### CONCLUSION

In 1984, the U.S. Supreme Court observed that “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”<sup>109</sup> The year after the Supreme Court wrote these words, I gave the keynote address at an indigent defense conference at another law school.<sup>110</sup> In preparing for this law school’s symposium on implementing *Gideon*’s promise, I went back and reread what I wrote more than thirty years ago. I quoted Thomas Jefferson, to whom the following quotation is often attributed: “eternal vigilance is the price of liberty.”<sup>111</sup>

When it comes to public defense, I suggested then, as I do now, that no less vigilance is required to assure adequate defense services for the poor in criminal and juvenile cases. Although we have made important progress during recent decades in providing defense services in state courts for those unable to afford counsel, we are still far from achieving *Gideon*’s promise. There is still much to be done in Indiana and other states.

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Harring v. State, 930 N.E.2d 217 (N.Y. 2010) (class of individuals assigned public defenders in various criminal proceedings stated cognizable claim for constructive denial of their Sixth Amendment right to counsel); and Duncan v. State, 774 N.W.2d 89 (Mich. Ct. App. 2009) (allegations of widespread constitutional violations as a result of the court-appointed, indigent defense systems were sufficient to state a claim for declaratory and prospective injunctive relief against state and governor). This decision of the Michigan Court of Appeals was sustained by the Michigan Supreme Court and the case remanded to the trial court for further proceedings; see Duncan v. State, 780 N.W.2d 843 (Mich. 2010).

109. United States v. Cronin, 466 U.S. 648, 654 (1984) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

110. Norman Lefstein, *Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise Been Fulfilled—Keynote Address*, 14 N.Y.U. REV. L. & SOC. CHANGE 5 (1986).

111. Much as I enjoy attributing the words to Thomas Jefferson, there apparently is a question about whether he ever uttered them. See Anna Berkes, *Eternal Vigilance*, MONTICELLO (Aug. 22, 2010), <https://www.monticello.org/site/blog-and-community/posts/eternal-vigilance> [<https://perma.cc/S69M-VKUJ>] (“The venerable old quotation that happened to present itself for investigation most recently is the eternally beloved, ‘eternal vigilance is the price of liberty,’ which as of this last check was still not said by Jefferson.”).