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## *Gideon's* Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?

**ABSTRACT.** In *Gideon v. Wainwright*, twenty-three state attorneys general, led by Walter F. Mondale and Edward McCormack, joined an amicus brief on the side of the criminal accused, urging the Supreme Court to recognize indigent defendants' Sixth Amendment right to appointed counsel in felony cases. This was a unique occurrence. Although amicus filings by public entities have increased significantly since then, including in criminal cases, government lawyers rarely submit amicus briefs in the Supreme Court supporting criminal defendants' procedural rights, and never en masse as in *Gideon*. The states' public support for *Gideon's* position points up the special nature of the right to a defense lawyer—a right that is fundamental to a fair trial and to avoiding wrongful convictions and which most states had already recognized as a matter of state law by the time *Gideon* was argued. Although *Gideon* was special, there have been recent Supreme Court criminal cases in which progressive government lawyers might similarly have supported recognition of the procedural right in issue. This Essay identifies philosophical, practical, and political reasons that might explain government lawyers' unwillingness to take the defense side on questions before the Court, but argues that these rationales are not entirely convincing. The Essay concludes that, consistent with their duty to seek justice, government lawyers should play a stronger role in promoting criminal procedural fairness by occasionally serving as Supreme Court amici on the defense side.

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**INTRODUCTION**

*Gideon v. Wainwright*<sup>1</sup> makes a compelling story.<sup>2</sup> Charged with breaking into a poolroom to steal coins and cigarettes, Clarence Gideon has to defend himself at trial after the judge denies his request for a lawyer. The jury finds Gideon guilty, and while serving his sentence, he handwrites a petition to the Supreme Court.<sup>3</sup> His timing is propitious because the Court is poised to reconsider its earlier ruling in *Betts v. Brady*,<sup>4</sup> which held that states ordinarily have no obligation to provide lawyers to criminal defendants who cannot afford them.<sup>5</sup> The Court designates prominent Washington, D.C., litigator (and later Justice) Abe Fortas to argue for Gideon, leading to a momentous decision recognizing indigent felony defendants' Sixth Amendment right to counsel at the state's expense.<sup>6</sup> *Gideon* leads to a right to assigned counsel for misdemeanor defendants facing imprisonment,<sup>7</sup> and eventually to lawsuits challenging the adequacy of state funding for indigent criminal defense.<sup>8</sup> The decision becomes the foundation for the right to competent and conflict-free

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

2. ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

3. *Id.* at 4-5, 34-35.

4. 316 U.S. 455 (1942). A few months before Gideon's case was accepted for review, several Justices urged overruling *Betts v. Brady*, on the grounds that its standard was vague and courts applied it ficklely, that justice should be equal between the rich and poor, and that no layman can be expected to understand and navigate the law's complexities. See *Carnley v. Cochran*, 369 U.S. 506, 518 (1962) (Black, J., concurring) ("Twenty years' experience in the state and federal courts with the *Betts v. Brady* rule has demonstrated its basic failure as a constitutional guide."); *id.* at 520-24 (Douglas, J., concurring) (elaborating on reasons for overruling *Betts v. Brady*, as previously put forth in *McNeal v. Culver*, 365 U.S. 109, 117-19 (1961)); see also LEWIS, *supra* note 2, at 27-28 (discussing the Court's prior likelihood of overturning *Betts*).

5. *Betts*, 316 U.S. at 473 ("[W]hile want of counsel in a particular case may result in a conviction lacking in . . . fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial . . . can be fairly conducted and justice accorded a defendant who is not represented by counsel."). Decisions following *Betts* required the appointment of counsel in capital cases and others involving special circumstances. See Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1, 5 n.23 (1962) (discussing case law following *Betts*).

6. *Gideon*, 372 U.S. at 339, 343-45.

7. See *Scott v. Illinois*, 440 U.S. 367 (1979); *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

8. See, e.g., *State v. Peart*, 621 So. 2d 780 (La. 1993); *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010).

counsel;<sup>9</sup> protection from state and judicial interference with the lawyer-client relationship and with one's choice of counsel;<sup>10</sup> and limits on police interrogations after formal charges are initiated.<sup>11</sup> At least indirectly, *Gideon* opens the door to other procedural protections, both within and outside the criminal context, including a right to appointed counsel in some civil cases.<sup>12</sup>

One chapter in this story involves the position taken by state attorneys general.<sup>13</sup> After the Court agrees to hear Gideon's case, the Florida Attorney General writes to his counterparts, soliciting advice and inviting them to submit amicus briefs.<sup>14</sup> Although most states then afford counsel to indigent felony defendants as a matter of state law, that does not mean states will welcome a federal constitutional right to appointed counsel, and several attorneys general respond sympathetically, expressing concern that a constitutional mandate will interfere with states' rights or will later be expanded to encompass misdemeanor defendants.<sup>15</sup>

Minnesota's Attorney General, Walter F. Mondale, answers differently, however, explaining why he would welcome a federal constitutional requirement:

Nobody knows better than an attorney general or prosecuting attorney that in this day and age furnishing an attorney to those felony defendants who can't afford to hire one is "fair and feasible." Nobody knows better than we do that rules of criminal law and procedure which baffle trained professionals can only overwhelm the uninitiated.

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9. *Strickland v. Washington*, 466 U.S. 668 (1984) (competent counsel); *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (conflict-free counsel).
  10. *See, e.g., United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); *United States v. Morrison*, 449 U.S. 361 (1981); *Weatherford v. Bursey*, 429 U.S. 545 (1977); *Geders v. United States*, 425 U.S. 80 (1976); *Herring v. New York*, 422 U.S. 853 (1975).
  11. *See, e.g., Brewer v. Williams*, 430 U.S. 387 (1977); *Massiah v. United States*, 377 U.S. 201 (1964).
  12. *See, e.g., Turner v. Rogers*, 131 S. Ct. 2507 (2011).
  13. As Yale Kamisar observed upon the occasion of *Gideon's* fortieth anniversary, "No celebration of the *Gideon* case would be complete without mention of the *amicus* brief filed by twenty-two state attorneys general on behalf of Mr. Gideon." Panel Discussion, *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 135, 144-45 (2004) (remarks of Yale Kamisar).
  14. LEWIS, *supra* note 2, at 141-42.
  15. *Id.* at 144-45 (noting that Indiana's Attorney General expressed concern that the Supreme Court was "infringing on state criminal procedure," Kansas's Attorney General expressed support based on the "philosophical issue" of states' rights, and Pennsylvania's Attorney General expressed concern that a constitutional right to appointed counsel would expand beyond felony cases).

. . . As chief law enforcement officer of one of the thirty-five states which provide for the appointment of counsel for indigent defendants in *all* felony cases, I am convinced that it is cheap—very cheap—at the price.<sup>16</sup>

Mondale shares his letter with Edward McCormack, the progressive Attorney General of Massachusetts, who agrees to help produce an amicus brief on Gideon's side. Later to be lauded for their leadership,<sup>17</sup> Mondale and McCormack enlist others' support,<sup>18</sup> with the result that twenty-three states as amicus curiae endorse Gideon's position.<sup>19</sup> Although amici generally coordinate with counsel for the party they support,<sup>20</sup> the states' brief surprises both Fortas and the Florida Attorney General.<sup>21</sup>

The states make four arguments against *Betts v. Brady*: that its ad hoc approach is contrary to the historical development of the right to counsel and offends the contemporary notion of due process,<sup>22</sup> as demonstrated by thirty-

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16. *Id.* at 145-46 (alteration in original).

17. See Stephen B. Bright, *Is Fairness Irrelevant? The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts To Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 28 (1997) ("Attorney General Walter Mondale of Minnesota, along with attorneys general of twenty-one other states, filed as amici on Gideon's side, supporting the right to counsel. Today, we do not have this kind of leadership. Even the most minimal efforts to improve the quality of representation for the poor are opposed by the associations of state attorneys general and district attorneys." (footnote omitted)).

18. Yale Kamisar, *Miranda: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1082 (1984) (reviewing LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* (1983)) (noting that Mondale and McCormack "approached virtually every one of their counterparts and urged them to support Gideon's claim"). Mondale later identified "[t]he *Gideon* brief [as] probably the most important single case that [he] pursued in four years as attorney general." WALTER MONDALE, *THE GOOD FIGHT: A LIFE IN LIBERAL POLITICS* 7 (2010).

19. LEWIS, *supra* note 2, at 146-48. See Brief for the State Government Amici Curiae, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 62-155) [hereinafter *States' Brief in Gideon*]. The brief listed only twenty-two states because a twenty-third, New Jersey, had inadvertently been omitted. Its participation was included, however, in the reported decision. LEWIS, *supra* note 2, at 148. Oregon, one of the signatories, also filed a separate amicus brief describing its experience under state law. *Id.* at 150. Alabama, joined by North Carolina, filed an amicus brief in support of the State of Florida. Brief for State of Alabama as Amicus Curiae, *Gideon*, 372 U.S. 335 (No. 62-155).

20. See, e.g., J. Joseph Curran, Jr., *For the Petitioner*, 28 U. BALT. L.F. 12, 14 (1998); Clement E. Vose, *NAACP Strategy in the Covenant Cases*, 6 CASE W. RES. L. REV. 101, 105-12 (1955).

21. LEWIS, *supra* note 2, at 148, 150.

22. *States' Brief in Gideon*, *supra* note 19, at 4-12.

five states' requirement of appointed counsel in all felony cases;<sup>23</sup> that the decision makes the quality of criminal justice dependent on the accused's ability to pay for it;<sup>24</sup> that its ad hoc test is unworkable and incapable of consistent judicial application;<sup>25</sup> and that the burden of providing counsel in all felony cases can adequately be managed by the bench and bar.<sup>26</sup> Although the states are not uniquely situated to make these arguments, they can speak from experience about both the litigation burdens under the existing constitutional standard and their ability to cope with the financial and administrative costs of a categorical rule. Most significant, however, is not the brief's content, but simply that so many states have filed on the side of the procedural rights of the accused.<sup>27</sup> The Court takes notice. Endorsing the states' observation that *Betts v. Brady* was "already an anachronism when handed down,"<sup>28</sup> the Court concludes that "any person haled into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him."<sup>29</sup>

#### 1. WHY IS GIDEON SO SPECIAL?

The intervening half-century has placed in bold relief the extraordinary nature of the states' participation on Gideon's side. Supreme Court amicus practice has increased substantially since *Gideon*,<sup>30</sup> and government entities participate frequently<sup>31</sup>: in the second half of the twentieth century, one or

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23. *Id.* at 10 ("Such a solid majority of the states, in endorsement of the non-capital assigned counsel principle, indicates that the principle is indeed a fundamental part of the concept of due process of law.").
  24. *Id.* at 12-13.
  25. *Id.* at 13-21.
  26. *Id.* at 21-24.
  27. LEWIS, *supra* note 2, at 148 ("The mere fact that twenty-three states would urge the Supreme Court to impose a new standard of fairness on state criminal procedure was the most startling of all.").
  28. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) ("Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree." (quoting States' Brief in *Gideon*, *supra* note 19, at 24)).
  29. *Id.* at 344 (emphasis added).
  30. See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 749 (2000) (finding that, during the fifty years studied from the 1946 Term to the 1995 Term, "the number of amicus filings has increased by more than 800%").
  31. See PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 60-61, 73 (2008); Cornell W. Clayton, *Law, Politics and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 544-48 (1994). Notably, the federal and state governments are the only parties that do not require

more states filed amicus briefs in more than fourteen percent of all cases,<sup>32</sup> and sometimes virtually every state joined.<sup>33</sup> State amici often *oppose* the expansion of criminal defendants' rights.<sup>34</sup> But chief law enforcement officials rarely take defendants' side,<sup>35</sup> and never do so en masse as in *Gideon*.<sup>36</sup>

Why is *Gideon* so special? The answer may be that few if any cases call for recognition of such a fundamental right. The arguments are compellingly

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permission of a party or the Court to file an amicus brief. Michael E. Solimine, *State Amici, Collective Action, and the Development of Federalism Doctrine*, 46 GA. L. REV. 355, 363-65 (2012).

32. Kearney & Merrill, *supra* note 30, at 753 n.25 (studying Supreme Court Terms from 1946 to 1995).
33. Solimine, *supra* note 31, at 358 ("On occasion, up to forty-nine or fifty states join in a single amicus brief.").
34. For example, states filed amicus briefs in two-thirds of the fifteen criminal cases heard by the Supreme Court in October through December 2011. States filed amicus briefs in: *Williams v. Illinois*, 132 S. Ct. 2221 (2012); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Martel v. Clair*, 132 S. Ct. 1276 (2012); *Messerschmidt v. Millender*, 132 S. Ct. 1235 (2012); *Howes v. Fields*, 132 S. Ct. 1181 (2012); *Maples v. Thomas*, 132 S. Ct. 912 (2012); and *Perry v. New Hampshire*, 132 S. Ct. 716 (2012). No state filed an amicus brief in *Setser v. United States*, 132 S. Ct. 1463 (2012); *United States v. Jones*, 132 S. Ct. 945 (2012); *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012); *Smith v. Cain*, 132 S. Ct. 627 (2012); or *Greene v. Fisher*, 132 S. Ct. 38 (2011).
35. See Panel Discussion, *supra* note 13, at 145. This Essay draws on the research of Jacob Sayward, the Fordham Law Library's head of electronic services, who attempted to identify every case in which a then-current prosecutor filed a defense-side amicus brief on the merits in a case decided by the Supreme Court in the past twenty years. This Essay cites every example he found. (Prosecutors may also file amicus briefs on criminal defendants' side at the certiorari stage, *see, e.g.*, Brief of Dallas County District Attorney as Amicus Curiae in Support of Petitioner, *Jiménez v. Texas* (2012) (No. 12-117), <http://sblog.s3.amazonaws.com/wp-content/uploads/2012/12/12-117-Jimenez-2012-10-17-Br-of-Dallas-County-District-Atty-as-Amicus-ISO-P....pdf>, but no systematic effort was made to gather examples.)
36. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner, *Hudson v. McMillian*, 503 U.S. 1 (1992) (No. 90-6531), 1994 U.S. S. Ct. Briefs LEXIS 347 (asserting that a beating by prison guards that inflicts unnecessary and wanton pain violates the Eighth Amendment even absent medical injury); Brief of the Attorney General of the State of New York, as Amicus Curiae in Support of Petitioner, *Johnson v. Mississippi*, 486 U.S. 578 (1988) (No. 87-5468), 1987 WL 881030 (arguing that in deciding whether to impose the death penalty, a Mississippi court should not be allowed to rely on a vacated New York conviction); Brief for Elizabeth Holtzman, District Attorney, Kings County, New York as Amicus Curiae, *Batson v. Kentucky*, 476 U.S. 79 (1986) (No. 84-6263), 1985 WL 669923 [hereinafter Kings County *Batson* Brief]; *see also* Brief for the United States as Amicus Curiae Supporting Affirmance, *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (No. 08-651) (endorsing criminal a defendant's legal argument that the right to effective assistance of counsel is denied when a defendant pleads guilty as a result of inadequate advice about the immigration consequences of a guilty plea, although supporting affirmance of defendant's conviction on the ground that this defendant was not prejudiced by his lawyer's inadequate advice).

simple: a criminal accused needs a lawyer to get a fair trial; the poor should not receive lower quality justice; individuals risking their freedom should not have to face the government unaided. Counsel's role is basic to our adversarial process and there is no legitimate law enforcement interest on the other side of the equation. Assigning counsel to represent the accused does not make it harder for law enforcement authorities to gather evidence or to prove their case or place any demands or restrictions on them. Prosecutors benefit too because of the difficulties of dealing with unrepresented defendants and because defense lawyers help prevent wrongful convictions, the prosecutor's *bête noire*. The countervailing interests are surmountable administrative and financial ones. And yet, as compelling as Gideon's case may have been, fewer than half of the attorneys general joined the amicus brief supporting a federal constitutional right to assigned counsel. Had Mondale and McCormack not taken the lead, the brief might never have been written.

Still, there are reasons why *Gideon*, although truly a special case, should not be an anomaly. Publicly expressing honest, balanced views about how the law should develop is a legitimate role for state attorneys general and district attorneys.<sup>37</sup> While government lawyers undoubtedly see their litigating role as paramount, they also have a responsibility to promote the sound development of the law<sup>38</sup>—a responsibility that grows out of their status as public officials, as government lawyers, and as lawyers generally.<sup>39</sup> Legislators and regulators

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37. I use the term “district attorneys” to include others such as “county attorneys” and “commonwealth attorneys” who head local prosecutors’ offices and have the authority to file an amicus brief in Supreme Court cases on behalf of their jurisdiction or office or themselves as public officials.

38. See ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2 (3d ed. 1993), [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/prosecution\\_defense\\_function.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf) (“It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.”); *id.* § 3-1.2 cmt. (“[T]he prosecutor ‘affects the development of legal rules by his arguments in court. He can help bring about needed reform by pressing for changes in bail practices, for example, or in procedures for the appointment of counsel.’” (quoting PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 147 (1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>)); see also Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1192-93 (2003) (noting prosecutors’ obligation to seek legislation supporting adequate defense representation).

39. See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”); Elizabeth Chambliss & Bruce A. Green, *Some Realism About Bar Associations*, 57 DEPAUL L. REV. 425, 425 (2008) (observing that the legal profession “encourages all lawyers to participate in activities ‘for improving the law, the legal system [and] the legal profession’ . . . as part of lawyers’ professional



naturally look to state and local prosecutors to contribute based on their expertise and experience in criminal law enforcement, promoting law reform that gives fair weight to procedural fairness to the accused, rather than reflexively taking positions that exaggerate law enforcement interests. Although government lawyers often speak on behalf of their offices against proposed procedural restrictions, they do not always derogate defendants' interests,<sup>40</sup> and they would have little credibility if they did.<sup>41</sup>

Constitutional litigation in the Supreme Court provides a comparable opportunity for prosecutors to contribute to the sound development of the law. Attorneys general and, less frequently, district attorneys, take advantage of the opportunity by filing or joining amicus briefs when they believe that fairness dictates denying the defendant's claim. Given their role, prosecutors can also contribute to the Supreme Court's deliberations when they think it is fair and just to recognize the procedural right in question, even if there are countervailing law enforcement interests.<sup>42</sup> Government lawyers have a

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obligation as 'public citizens,' as well as lawyers' obligation to work 'pro bono publico.'" (citations omitted)).

40. For example, prosecutors have advocated tempering the harshness of sentencing laws. See, e.g., Tracey Kaplan, *Group Seeks Initiative To Reform California's Three Strikes Law*, SAN JOSE MERCURY NEWS, June 14, 2011, [http://www.mercurynews.com/breaking-news/ci\\_18273887](http://www.mercurynews.com/breaking-news/ci_18273887) (noting that San Francisco's district attorney had long sought reform of the state's three-strikes law); Julie Preston, *Prosecutor Urges Change to Drug Law*, N.Y. TIMES, Dec. 7, 2004, <http://query.nytimes.com/gst/fullpage.html?res=9B01EEDB1531F934A35751C1A9629C8B63> (describing then-Manhattan District Attorney Robert Morgenthau's call for abolishing mandatory jail sentences for less serious drug crimes).
41. See, e.g., Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 890-91 (2012) (discussing Tennessee and Wisconsin state prosecutors' endorsement of new ethics rules regulating prosecutors' postconviction conduct).
42. A former county attorney from Minnesota recently cited prosecutors' "ethical obligations to pursue justice and to promote the wellbeing of 'society as a whole,'" to explain why some current and former prosecutors recently submitted an amicus brief on the defense side in *Chaidez v. United States*, 133 S. Ct. 1103 (2013). Robert Johnson, Op-Ed., *Equal Justice for Immigrants*, NAT'L L.J., Nov. 26, 2012, [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202579120730&Equal\\_justice\\_for\\_immigrants](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202579120730&Equal_justice_for_immigrants). The issue in *Chaidez* was whether to apply *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), retroactively. *Padilla* held that a defense lawyer's failure to advise a noncitizen defendant accurately about the potential immigration consequences of a conviction may comprise ineffective assistance of counsel requiring a court to vacate the defendant's guilty plea. Two district attorneys, Craig Watkins of Dallas County, Texas, and Jeffrey Rosen of Santa Clara County, California, joined a brief arguing that nonretroactivity will compromise prosecutors' discretion to negotiate guilty pleas designed to minimize the risk of deportation. Brief for Active and Former State and Federal Prosecutors as Amici Curiae in Support of Petitioner, *Chaidez*, 133 S. Ct. 1103 (No. 11-820). Twenty-eight states filed an amicus brief arguing that retroactivity "would undermine the states' interest in the finality of their convictions to the detriment of public safety." Brief for New Jersey et al. as Amici Curiae in Support of the

potentially useful role—and can perhaps be even more helpful to the Court as amici—when the defendant's claim is less obviously meritorious than in *Gideon*.

## II. WHY DO PROSECUTORS SO RARELY FILE AMICUS BRIEFS ON THE DEFENDANT'S SIDE?

Why are there so few government amicus briefs on the defense side? One possibility is that from the states' perspective, the Court has already expanded defendants' protections to the limit. Nowadays, some criminal cases in the Supreme Court are fact-intensive or deal with narrow procedural questions on which, understandably, prosecutors would not bother to weigh in as amici.<sup>43</sup> When criminal cases do raise questions of basic principle, the defendants may assert positions that government lawyers genuinely consider to be extreme. Perhaps there have been no cases in the past fifty years involving basic questions of procedural fairness that defendants deserve to win.

This seems like an unlikely explanation, however. New criminal procedure questions arise periodically, implicating public concerns about wrongful convictions, overcriminalization, excessive punishment, technological invasions of privacy, and racial disparities.<sup>44</sup> The Court continues to review cases in which progressive attorneys general and district attorneys might usefully support the accused, including when, as in *Gideon*, their own state laws or practices are consistent with the procedural protection being sought and experience shows that additional burdens on the state will not be unduly onerous. It is not unusual for *former* prosecutors to join amicus briefs on the defense side,<sup>45</sup> and their views cannot always be attributable to a change in

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United States of America, *Chaidez*, 133 S. Ct. 1103 (No. 11-820). The Court ultimately held that *Padilla* did not apply retroactively. *Chaidez*, 133 S. Ct. at 1113 (No. 11-820).

43. See, e.g., Transcript of Oral Argument at 20, 44, *Boyer v. Louisiana*, No. 11-9953 (U.S. argued Jan. 14, 2013), [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-9953.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-9953.pdf) (Justices Scalia and Alito observing that the speedy-trial question presented in the case is “fact-bound”). *But see supra* text accompanying note 34 (noting that states often file amicus briefs on the prosecution's side).

44. See, e.g., *Maryland v. King*, 133 S. Ct. 594 (2012) (granting certiorari on the question whether the Fourth Amendment limits states' power to collect DNA samples from individuals arrested and charged with serious crimes); *Smith v. United States*, 132 S. Ct. 2772 (2012) (granting certiorari on the question whether a defendant can be convicted as a conspirator without the prosecution proving beyond a reasonable doubt that he participated in the conspiracy within the relevant statute-of-limitations period); Petition for Writ of Certiorari, *Jimenez v. Texas*, No. 12-117 (U.S. cert. denied Jan 7. 2013) (raising the question whether a defendant who proves her innocence by a preponderance of the evidence in a postconviction proceeding is entitled to a new trial).

45. See *infra* notes 52, 54 & 57.

perspective after entering private life. Surely sometimes, as their amicus briefs imply, they are expressing views that they held while in government service and that some current government lawyers privately share.<sup>46</sup>

Strange though it might seem for attorneys general to file amicus briefs like the one in *Gideon*, it is not surprising outside the criminal context to see them take positions as amici favoring individuals' interests at the expense of states' financial and sovereignty interests. On a number of occasions, progressive states have supported civil rights claims that were opposed by more conservative states.<sup>47</sup> For example, state amici have argued that Congress validly abrogated the states' Eleventh Amendment sovereign immunity in enacting the Americans with Disabilities Act<sup>48</sup> and the Family Medical Leave Act.<sup>49</sup>

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46. In some cases, prosecutors may change their views after they enter private life. Having left an office in which views are relatively uniform, former prosecutors' perspectives on criminal justice issues may evolve. It is also conceivable that views expressed by former prosecutors as amici sometimes are insincere. But it seems more likely that current attorneys general and district attorneys feel constrained by their role and that there is actually a broader spectrum of views on close questions of criminal justice than are reflected in their positions as amici.
  47. For example, several states took the position that individual claimants may sue parties (including states) with whom they are not in contractual privity under a provision of 42 U.S.C. § 1981 (2006), protecting one's right to "make and enforce contracts" without regard to race. Brief of New York et al. as Amici Curiae in Support of Respondent, *Domino's Pizza, Inc. v. MacDonald*, 546 U.S. 470 (2006) (No. 04-593). Ten other states opposed the claimant's position, noting that it "is of great concern to the States, which routinely contract with private sector companies." Brief of the States of Alabama et al. as Amici Curiae in Support of Petitioners at 1, *MacDonald*, 546 U.S. 470 (No. 04-593).
  48. Brief of States of Minnesota et al. as Amici Curiae in Support of Respondents, *Tennessee v. Lane*, 541 U.S. 509 (2004) (No. 02-1667); Brief of the States of Kansas and Delaware as Amici Curiae in Support of Respondents, *Lane*, 541 U.S. 509 (No. 02-1667); Brief of the States of Minnesota et al. as Amici Curiae in Support of Respondents, *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (No. 99-1240). In both of these cases, seven states took the opposite side, in one case citing their "strong interest in preserving the principles of dual sovereignty that are 'a defining feature of our Nation's constitutional blueprint,'" Brief for Amici Curiae Alabama et al. in Support of Petitioner at 1, *Lane*, 541 U.S. 509 (No. 02-1667) (quoting *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002)), and in the other case arguing that "[t]he constitutional rights of the States are being violated by the ADA." Brief of Amici Curiae States of Hawaii et al. in Support of Petitioners, *Garrett*, 531 U.S. 356 (No. 99-1240).
  49. Brief of the States of New York et al. as Amici Curiae in Support of Respondents, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368). Thirteen states filed an amicus brief on the other side, in light of their "significant practical interest in federal employment laws and policies . . . that may expose state governments to liability for civil damages." Brief for the States of Alabama et al. as Amici Curiae in Support of Petitioners at 1, *Hibbs*, 538 U.S. 721 (No. 01-1368).

One can understand why state attorneys general might be more sympathetic to individuals' civil rights claims than to criminal defendants' procedural rights claims. State attorneys general have a role in protecting and enforcing individuals' state and federal civil rights against private parties. An attorney general's office will include civil rights lawyers who investigate civil rights violations and prosecute affirmative claims to vindicate individuals' civil rights.<sup>50</sup> These government lawyers will envision filing an amicus brief on the civil rights claimant's side as consistent with the state's enforcement role, even if inconsistent with the state's financial and sovereignty interests. In some cases, progressive attorneys general may conclude that the public interest in protecting citizens' civil rights is paramount. In criminal cases, in contrast, there will be no subdivision of the attorney general's office dedicated to defending criminal defendants' rights that will lobby to take a pro-defense stance as amicus. And yet, ensuring procedural fairness to individuals accused of crime is as important a public interest as protecting civil rights. In the criminal no less than in the civil context, public interests often collide. Sometimes, attorneys general and district attorneys should fairly conclude that procedural justice favors the defendant's side of a legal argument. Prosecutors cannot plausibly believe that criminal defendants should always lose in the Supreme Court and that, given the chance, the Court should always curtail defendants' rights.

#### A. Missed Opportunities

*Roper v. Simmons*,<sup>51</sup> which decided that the Eighth Amendment prohibits executing individuals for crimes committed when they were juveniles, illustrates both the continuing vitality of constitutional decisionmaking in criminal cases and the opportunity for progressive state attorneys general or district attorneys to contribute to the Court's interpretation of constitutional provisions governing the procedural rights of the accused. It is also a rare case in which an appreciable number of states—albeit only eight—in fact filed an amicus brief on the defendant's side.<sup>52</sup> The brief's argument, emphasizing that

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50. See, e.g., *Civil Rights*, ATT'Y GEN. ERIC T. SCHNEIDERMAN, <http://www.ag.ny.gov/bureau/civil-rights> (last visited Apr. 2, 2013) (describing the Civil Rights Bureau of the New York State Attorney General's Office); *The Civil Rights Division*, ATT'Y GEN. MARTHA COAKLEY, <http://www.mass.gov/ago/bureaus/public-protection-and-advocacy/the-civil-rights-division> (last visited Apr. 2, 2013) (describing the Civil Rights Division of the Massachusetts Attorney General's Office).

51. 543 U.S. 551 (2005).

52. Brief for New York et al. as Amici Curiae Supporting Respondent, *Roper*, 543 U.S. 551 (No. 03-633). See generally Omari Scott Simmons, *Picking Friends from the Crowd: Amicus*

more than thirty states had no death penalty for the crimes of juveniles, was potentially meaningful, because the Eighth Amendment case law relies on “the evolving standards of decency that mark the progress of a maturing society” to determine which punishments are so disproportionate as to be cruel and unusual.”<sup>53</sup>

There have been other potential candidates, including cases in which *former* public officials filed amicus briefs in their personal capacity, but in which all, or virtually all, current public officials remained on the sideline or opposed the defendant’s position.<sup>54</sup> These cases have involved such significant issues as whether juveniles could be sentenced to life imprisonment without parole for nonhomicide offenses,<sup>55</sup> the availability of postconviction relief based on actual innocence,<sup>56</sup> and prison overcrowding.<sup>57</sup>

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*Participation as Political Symbolism*, 42 CONN. L. REV. 185, 224-31 (2009) (discussing amicus briefs, and Justices’ references to them, in *Roper v. Simmons*). Six states, however, filed an amicus brief arguing that the death penalty for juvenile defendants should not be categorically barred. Brief for the States of Alabama et al. as Amici Curiae Supporting Petitioner, *Roper*, 543 U.S. 551 (No. 03-633), 2004 WL 865268.

53. *Roper*, 543 U.S. at 561 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion)).
54. See, e.g., Brief of Janet F. Reno et al. as Amici Curiae in Support of Petitioner, *Wiggins v. Corcoran*, 537 U.S. 1027 (2002) (No. 02-311), 2003 WL 122270. One current District Attorney, E. Michael McCann of Milwaukee County, Wisconsin, joined this brief. See also *supra* note 42; *infra* notes 56, 59 (providing other examples).
55. Corrections professionals filed a brief in *Graham v. Florida*, 130 S. Ct. 2011 (2010), opposing this practice, but no states or district attorneys joined them. See Brief of Council of Juvenile Correctional Administrators et al. as Amici Curiae in Support of Petitioners, *Graham*, 130 S. Ct. 2011 (No. 08-7412) and *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (No. 08-7621). More recently, in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), nineteen states joined an amicus brief opposing a ban on mandatory sentences of life without parole for juveniles committing homicides, Brief of State of Michigan et al. as Amici Curiae in Support of Respondents, *Miller*, 132 S. Ct. 2455 (No. 10-9646), while no state without this sentencing regime supported the defendants, see Docket No. 10-9646, SUP. CT. OF THE U.S., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-9646.htm> (last visited Apr. 2, 2013) (listing amicus briefs in *Miller* and including none filed by a state in support of the petitioner).
56. Two local Texas prosecutors joined a group of *former* prosecutors who argued in *Dretke v. Haley*, 541 U.S. 386 (2004), that an inmate should be able to obtain habeas corpus relief, despite a procedural default, when he was wrongly sentenced under the habitual felony offender law. Brief of Zachary W. Carter et al. as Amici Curiae in Support of Respondent, *Dretke*, 541 U.S. 386 (No. 02-1824), 2004 WL 188116. In *House v. Bell*, 547 U.S. 518 (2006), *former* prosecutors supported the defendant’s position that credible claims of actual innocence should be susceptible to habeas review, Brief for Former Prosecutors et al. as Amici Curiae Supporting Petitioner, *House*, 547 U.S. 518 (No. 04-8990), but the fifteen states that filed as amici took the opposite side, Brief of the State of California et al. as Amici Curiae in Support of Respondent, *House*, 547 U.S. 518 (No. 04-8990), 2005 WL 3226399; see also Brief of the States of California et al. as Amici Curiae in Support of Respondent, Schlup

In *District Attorney's Office v. Osborne*,<sup>58</sup> for example, only two elected district attorneys (whose offices had exonerated convicted defendants through DNA testing) joined former prosecutors in supporting a state inmate's asserted due process right to conduct DNA testing of evidence introduced against him at trial.<sup>59</sup> At the time, forty-four states and the District of Columbia had laws providing for postconviction DNA testing,<sup>60</sup> a process that does not impede prosecutors in securing evidence or convicting the guilty. Endorsing postconviction DNA testing as a constitutional right would have helped fulfill prosecutors' "obligation[] to see . . . that special precautions are taken to . . . rectify the conviction of innocent persons."<sup>61</sup> State attorneys general might have echoed what they had said in *Gideon*: "[A] solid majority of states, in endorsement of the . . . principle, indicates that the principle is indeed a fundamental part of the concept of due process of law."<sup>62</sup> But not one state attorney general took the defendant's side, and thirty-one states joined in an amicus brief arguing that states lacking postconviction DNA testing laws had no obligation to afford defendants this opportunity to exonerate themselves.<sup>63</sup> This is not unusual; almost without exception,<sup>64</sup> states as amici value the interest in the finality of criminal convictions over the interest in correcting errors, even errors that may have led to convicting the innocent.<sup>65</sup>

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v. Delo, 513 U.S. 298 (1995) (No. 93-7901), 1994 U.S. S. Ct. Briefs LEXIS 319 (opposing federal habeas review of state determinations).

57. In *Brown v. Plata*, 131 S. Ct. 1910 (2011), San Francisco's sheriff joined a group of amici that principally comprised former corrections and law enforcement officials who argued that the lower court had devised an adequate remedy for unconstitutional prison overcrowding. Brief of Corrections and Law Enforcement Personnel as Amici Curiae in Support of Appellees, *Plata*, 131 S. Ct. 1910 (No. 09-1233).
58. 557 U.S. 52 (2009).
59. Brief of Current and Former Prosecutors as Amici Curiae in Support of Respondent at 1-9, *Osborne*, 557 U.S. 52 (No. 08-6). Amici included Scott D. McNamara, District Attorney of Oneida County, New York, and Craig Watkins, District Attorney of Dallas County, Texas.
60. *Id.* at 10.
61. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2012).
62. States' Brief in *Gideon*, *supra* note 19, at 10.
63. Brief for the States of California et al. as Amici Curiae Supporting Petitioners, *Osborne*, 557 U.S. 52 (No. 08-6). The City of New York also filed an amicus brief opposing a constitutional right to postconviction DNA testing. Brief of Amicus Curiae City of New York, *Osborne*, 557 U.S. 52 (No. 08-6).
64. An exception occurred two decades ago when two states supported defendants' access to habeas review. Brief of the States of New York and Ohio as Amici Curiae in Support of Respondent on the Issue of De Novo Review, *Wright v. West*, 505 U.S. 277 (1992) (No. 91-542).
65. For example, states filed amicus briefs unsuccessfully opposing, on finality grounds, defendants' asserted procedural rights in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012); *Skinner v.*

Another plausible candidate for a government amicus brief on the defense side was *Dickerson v. United States*.<sup>66</sup> In *Dickerson*, the Supreme Court reviewed a federal appeals court's sua sponte determination that a long-ignored federal statute,<sup>67</sup> adopted two years after *Miranda v. Arizona*,<sup>68</sup> had effectively overruled that landmark decision. The appeals court held that custodial statements given without the familiar warnings were admissible if made voluntarily. The Court had to appoint counsel as an amicus to defend the appeals court's decision because the U.S. Department of Justice (DOJ) refused to do so. Rather, DOJ maintained that "sound application of principles of stare decisis dictates that at this point in time, thirty-four years after *Miranda* was decided and many years after it has been absorbed into police practices, judicial procedures, and the public understanding, the *Miranda* decision should not be overruled."<sup>69</sup> One might have expected that states, which investigate and prosecute more criminal cases than the federal government, would substantiate DOJ's argument that *Miranda* does not unduly impede law enforcement and is easier to administer than the alternative. But no state attorney general supported this position, while seventeen states joined as amici opposing it, arguing improbably that the Court should construe "the *Miranda* procedures . . . as provisional, prophylactic rules" and leave states free to experiment with alternatives.<sup>70</sup>

*Batson v. Kentucky*,<sup>71</sup> with various parallels to *Gideon*, likewise tests the intuition that *Gideon* is unique. *Batson* gave the Court a chance to reconsider a thirty-year-old precedent, *Swain v. Alabama*,<sup>72</sup> which several Justices had criticized the previous Term in a case arising out of Brooklyn, New York.<sup>73</sup> *Swain* acknowledged that racial discrimination in jury selection "not only violates our Constitution and the laws enacted under it but is at war with our

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*Switzer*, 131 S. Ct. 1289 (2011); *Holland v. Florida*, 130 S. Ct. 2549 (2010); *Williams v. Taylor*, 529 U.S. 362 (2000); and *Schlup v. Delo*, 513 U.S. 298 (1995).

66. 530 U.S. 428 (2000), *rev'g* 166 F.3d 667 (4th Cir. 1999).

67. 18 U.S.C. § 3501.

68. 384 U.S. 436 (1966).

69. Brief for the United States, *Dickerson*, 530 U.S. 428 (No. 99-5525), 2000 WL 141075, at \*29.

70. Brief for the States of South Carolina et al. as Amici Curiae Urging Affirmance, *Dickerson*, 530 U.S. 428 (No. 99-5525), 2000 WL 271989, at \*3.

71. 476 U.S. 79 (1986).

72. 380 U.S. 202 (1965).

73. *McCray v. New York*, 461 U.S. 961, 964 (1983) (Marshall, J., dissenting from the denial of certiorari) ("In the nearly two decades since it was decided, *Swain* has been the subject of almost universal and often scathing criticism."); *see also id.* at 961-62 (Stevens, J., respecting the denial of certiorari) (acknowledging the importance of the underlying issue but suggesting that further judicial development would be helpful).

basic concepts of a democratic society and a representative government.”<sup>74</sup> But *Swain* offered no remedy unless a defendant could prove that prosecutors were systematically striking jurors based on their race,<sup>75</sup> an insurmountable hurdle. The question implicated not only criminal defendants’ right to an unbiased jury but also prospective jurors’ civil rights. The underlying principle that racial discrimination should play no role in jury selection is foundational. Giving this principle meaning by reducing defendants’ evidentiary burden would not impede criminal investigations or prosecutors’ ability to prove guilt fairly, would cost nothing, and would only lightly inconvenience fair prosecutors who would occasionally have to justify their peremptory challenges. Reciprocal obligations on defendants could (and later did) follow, leading to fairer juries for prosecutors as well.<sup>76</sup> Several state courts had rejected *Swain* in favor of a more liberal test under state constitutional law,<sup>77</sup> and prosecutors in those states might have attested to the absence of ill effect. Yet only one prosecutor—the Brooklyn District Attorney—filed an amicus brief in support of overruling *Swain*,<sup>78</sup> while both the United States and the National District Attorneys Association filed briefs defending *Swain*,<sup>79</sup> and the states, which have a responsibility to promote citizens’ civil rights, remained on the sideline.

One might point to federalism principles to explain prosecutors’ unwillingness to support criminal defendants’ rights: even when state or local public officials see merit in the accused’s claim, they may resist federal judicial interference, believing that the question of procedural fairness should be left

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74. 380 U.S. at 205 (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940)).

75. *Id.* at 222–24.

76. *Georgia v. McCollum*, 505 U.S. 42 (1992) (extending *Batson* to peremptory strikes by criminal defendants).

77. See, e.g., *State v. Neil*, 457 So. 2d 481 (Fla. 1984) (discussing and drawing on state court decisions rejecting *Swain* in California, Massachusetts, New Mexico, and New York).

78. Kings County *Batson* Brief, *supra* note 36; see Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 745 (1992) (discussing the district attorney’s inclusion of a letter from a prospective juror complaining after all blacks were struck and an all-white jury was selected).

79. Brief of the United States as Amicus Curiae Supporting Affirmance, *Batson*, 476 U.S. 79 (No. 84-6263); Brief of National District Attorneys Association, Inc., as Amicus Curiae in Support of Respondent, *Batson*, 476 U.S. 79. In a post-*Batson* case, the United States filed an amicus brief urging the Court to extend *Batson* by applying its evidentiary standard to criminal defendants exercising peremptory challenges. Brief for the United States as Amicus Curiae Supporting Petitioner, *McCollum*, 505 U.S. 42 (No. 91-372).



exclusively to state law.<sup>80</sup> But states' amicus practice in other contexts suggests that federalism considerations are not invariably conclusive. As discussed, progressive state attorneys general adopt positions contrary to federalism interests in noncriminal cases implicating civil rights.<sup>81</sup> More dramatically, in both *District of Columbia v. Heller*<sup>82</sup> and *McDonald v. City of Chicago*,<sup>83</sup> more than thirty states recently joined amicus briefs arguing that the Second Amendment established an individual right to bear arms that limited states' regulatory authority.<sup>84</sup> Thus, public officials support reading the Bill of Rights expansively when federalism interests are outweighed by individual interests they value more highly, as in the case of gun ownership. From a historical (if not political) perspective, however, the individual rights protected in the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments that restrain police and prosecutorial powers in the criminal context are as valuable as the individual right to own firearms recognized for the first time by the Supreme Court only a few years ago.

### B. Practical Concerns

Attorneys general and district attorneys may decline to take defendants' side in criminal cases for pragmatic, strategic, or political reasons, some of which may reflect societal, political, philosophical, and technological changes in the fifty years since *Gideon*.<sup>85</sup> For example, they may have a pragmatic concern that a new constitutional right may later expand excessively or precipitate costly litigation regarding its scope. State attorneys general may be better attuned to a case's future implications today than when *Gideon* was

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80. See generally Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965) (suggesting that close questions of criminal procedure are best determined by local authorities).

81. See *supra* notes 47-49.

82. 554 U.S. 570 (2008).

83. 130 S. Ct. 3020 (2010).

84. See Ilya Shapiro, *Friends of the Second Amendment: A Walk Through the Amicus Briefs in D.C. v. Heller*, 20 J. FIREARMS & PUB. POL'Y 15 (2008); Solimine, *supra* note 31, at 358-61.

85. The state amici's support for criminal defendants' rights in *Gideon* was unusual in its day, but that was in part because amicus briefs by states and district attorneys were far rarer and in part because understandings of prosecutors' role as "ministers of justice" were less well developed and less widely accepted. Today, the explanations may be different for prosecutors' one-sided role as amici. For example, prosecutors, particularly if they face electoral challenges, may perceive less latitude today than they might have had fifty years ago to adopt occasional "pro-defense" positions, given popular understandings of prosecutors' "tough guy" role, "tough-on-crime" public attitudes, and the increased transparency and public scrutiny of prosecutors' work afforded by electronic media.

argued,<sup>86</sup> or at least may be cautious given their limited ability to anticipate the consequences of a ruling in a particular criminal case. In this respect, seeking to influence legislation is different from seeking to influence constitutional interpretations in defendants' favor. Legislation can define the limits of the procedural rights afforded to the accused, whereas a constitutional decision may open a Pandora's box.

It seems questionable, however, whether prosecutors effectively promote the sound development of the law by strategically opposing fair rulings lest future courts expand them too broadly. This approach is both misleading toward, and fundamentally mistrustful of, the Court. Prosecutors would be more credible and helpful if they were to candidly describe how they would draw the lines.

Government lawyers might also have practical concerns, albeit pointing in opposite directions, about the importance of an amicus brief. In some cases they may doubt whether they have anything to contribute as amici that makes it worth the effort. Simply tallying state laws—for example, noting in *Gideon* how many states afford lawyers to felony defendants or in *Roper v. Simmons* how many states do not execute juveniles—may add little to the defendant's brief or the Court's own research. Conversely, government lawyers may worry, perhaps hubristically, that their impact as amici may be disproportionate. Rather than simply evaluating the amici's arguments, the Court may conceivably give undeserved significance to the mere fact that government entities or officials took a position contrary to their apparent interest in securing convictions.<sup>87</sup> Perhaps government lawyers conclude that they adequately support the defendant's position by abstaining, thereby signaling to

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86. The state attorneys general who joined the amicus brief in *Gideon* were aware of, and concerned about, some of the case's implications. According to Yale Kamisar, the attorneys general recognized that if the Court overruled *Betts v. Brady*, questions would later arise about whether the decision would be applied retrospectively, at what stage in a criminal proceeding the right to counsel would commence, and whether misdemeanor defendants also had a right to appointed counsel. Kamisar, *supra* note 18, at 1082 & n.29; *see also* LEWIS, *supra* note 2, at 146. But it is unlikely that they considered all of what might follow. *See supra* notes 7-11 and accompanying text.

87. *See* Solimine, *supra* note 31, at 359 (suggesting that the Court will give greater weight to state amicus briefs when they “seemingly oppose the pro-state position” than when they “take a predictable position . . . in favor of state prerogatives”); *cf.* Linda Sandstrom Simard, *An Empirical Study of Amici Curiae in Federal Court: A Fine Balance of Access, Efficiency, and Adversarialism*, 27 REV. LITIG. 669, 681-82 (2008) (describing the theory that the utility of amicus briefs turns on “[t]he fact that the organization saw fit to file the brief” rather than “that amicus briefs are effective . . . because they supplement the arguments of the parties by providing information not found in the parties’ briefs”).

the Court that expanding the procedural right in question will not meaningfully compromise state interests.

A host of other factors may contribute to state and local officials' evident reluctance to side with criminal defendants in the Supreme Court. Public officials may rarely be invited to file in support of defendants; they may distrust lawyers on the defense side who do solicit their support, given the ordinary adversarial relationship between them; and public officials may not think to prepare amicus briefs on their own initiative. District attorneys and other local government lawyers, with the exception of those representing several large cities, may not engage actively in amicus practice. Public entities may have limited time and resources to prepare amicus briefs. Even taken together, however, these seem like an incomplete explanation. State attorney general offices, urban district attorney offices, and their representative associations have robust appellate practices, have the resources to file amicus briefs, and often do so to oppose recognition of criminal defendants' rights. Even if public officials were reluctant to expend resources occasionally on amicus practice on the criminal defense side, they could join briefs prepared by others or enlist private lawyers to provide pro bono assistance.

Other explanations may be political. Elected attorneys general and district attorneys may see some political downside, but little upside, to publicly supporting the rights of the criminally accused. Many constituencies expect their prosecutors to be "tough on crime." The public might anyway consider it a departure from the official's proper role or a misuse of official authority for attorneys general or district attorneys to endorse a defense-oriented position.<sup>88</sup> Today, there may be fewer progressive constituencies who would be unconcerned, understanding, or supportive if their officials endorsed expanding criminal procedural rights. Or perhaps there remain no progressive state attorneys general prepared to act in the public interest regardless of popular opinion. There may simply be no more Mondales and McCormacks.

State and local prosecutors may also have strategic reasons to decline to take positions as amici on defendants' side. For example, they may hesitate to

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88. Some attorneys general and district attorneys may share the concern that it is beyond their authority to speak in Supreme Court litigation on behalf of the public in support of criminal defendants' rights given the sparse tradition of public officials' doing so. Relatedly, they may doubt their qualifications to do so. Although state prosecutors in criminal cases routinely make decisions on behalf of the state, they ordinarily do so against the background of accumulated understandings guiding their ordinary investigative and prosecutorial discretion. See generally Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093 (2011) (discussing the ABA standards on the prosecution function). There are no comparable understandings, however, governing the adoption of pro-defense positions in amicus briefs.

offend their counterparts in other jurisdictions. In cases like *Gideon*, taking the defendant's side means opposing another state. Attorneys general cannot avoid being on opposite sides occasionally,<sup>89</sup> but in general, they may seek to preserve good relations with each other, since they must sometimes collaborate<sup>90</sup> and may hope to benefit from reciprocity. The payoff from promoting one's own view of the sound development of the law in a criminal case may be outweighed by the utility of maintaining good relations with one's peers. On the other hand, the willingness of states to line up as amici on opposite sides in civil rights cases<sup>91</sup> suggests that solidarity is of only limited importance.

Alternatively, government lawyers may sometimes be motivated to avoid undermining their advocacy efforts in pending or anticipated cases. If the attorney general's office or district attorney's office takes a position on the law as amicus, it might be embarrassed to take the opposite position in criminal litigation, even if it is not technically estopped from doing so. The office's position as amicus can be used against it for rhetorical effect if the office later takes a contradictory position in a case, as may occur if the Supreme Court leaves the legal question unresolved. Government lawyers may see their advocacy role as paramount to their law reform role and therefore be reluctant to side with the defense on questions that may arise in their own jurisdiction, especially questions implicated in pending cases.<sup>92</sup> Of course, prosecutors have means to avoid taking legal positions with which they disagree, including by "confessing error." But in the criminal cases likely to come before the Supreme Court, the legal questions ordinarily do not involve clear error. Regardless of their legal preferences, state attorneys general and district attorneys may perceive some obligation to preserve the ability to argue the prosecution's side of legal questions effectively so that the court receives a full adversarial airing. If government lawyers fear taking positions as amici that, in theory, may come back to haunt them as advocates, the cases in which they might serve as amici will be limited to the few in which the jurisdiction has no potential stake because, as in *Gideon* or *Roper*, state law is already consistent with the defendant's asserted right.

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89. See, e.g., *California v. Nevada*, 447 U.S. 125 (1980).

90. See, e.g., Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 921-23 (2008) (noting the collaboration of state attorneys general in tobacco litigation).

91. See *supra* notes 47-49 and accompanying text.

92. The risk of taking inconsistent positions may be more theoretical than real. If the issue is not raised in a pending case handled by the prosecutor's office, the pending Supreme Court case will ordinarily resolve the issue.

Government lawyers occasionally assert positions as amici that can theoretically be thrown back at them.<sup>93</sup> Asserting a position in a law-reform role does not preclude asserting a contrary position in litigation, since it is understood that litigators are not expressing their personal beliefs about the justness of their clients' cause.<sup>94</sup> An attorney general may publicly advise the legislature or governor that a proposed law is unconstitutional and then, if the law is nevertheless enacted, make nonfrivolous arguments defending it.<sup>95</sup> Attorneys general do not limit their advisory activities out of deference to their advocacy role; nor do they need to restrict their law-reform activities.

Even so, taking inconsistent legal positions as amicus and as a party might seem hard to explain to the public, if not to other legal professionals. Prosecutors might reasonably decline to take positions as amici that they are unwilling to accept in their own prosecutions. One possible way to address the problem might be for government lawyers to avoid personal identification with a position by filing amicus briefs through professional associations. Although the National District Attorneys Association and state prosecutors' associations have no history of filing amicus briefs favoring criminal defendants' procedural rights, they could do so in theory. Alternatively, progressive prosecutors could establish their own association to advance their perspectives.<sup>96</sup>

## CONCLUSION

The dearth of Supreme Court cases since *Gideon* in which a significant number of states have stepped in as amici to support the rights of the accused is a testament to the extraordinary and undeniable importance of indigent felony defendants' right to appointed counsel. In *Gideon*, all the stars were

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93. See *supra* note 36 (citing cases).

94. See MODEL RULES OF PROF'L CONDUCT R. 1.2(b) ("A lawyer's representation of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."); *id.* R. 3.4(e) (stating that, in trial, a lawyer shall not "state a personal opinion as to the justness of a cause"); see also, e.g., *Mendoza Toro v. Gil*, 110 F. Supp. 2d 28 (D.P.R. 2000) (noting that a federal prosecutor may be required to undertake a prosecution she considers unjust).

95. See Daniel D. Domenico, *The Constitutional Feedback Loop: Why No State Institution Typically Resolves Whether a Law Is Constitutional and What, if Anything, Should Be Done About It*, 89 DENV. U. L. REV. 161, 174 (2011); see also, e.g., *Ficker v. Curran*, 119 F.3d 1150, 1151 (4th Cir. 1997) (describing an attorney general office's defense of the constitutionality of a state law restricting attorney advertising even though it had advised the governor in writing prior to the law's passage that the law was unconstitutional and should not be enforced).

96. The Association for Prosecuting Attorneys is another association that might serve this function. See *About Us*, ASS'N OF PROSECUTING ATT'YS, <http://apainc.org/default.aspx/MenuItemID/73/MenuGroup/APAOverview.htm> (last visited Apr. 2, 2013).

aligned. The Court's recognition of the right was morally just, promoted reliable outcomes, benefitted prosecutors as well as defendants, and accorded with most states' existing law. There are many possible explanations why attorneys general and district attorneys would stay on the sidelines in other Supreme Court cases in which they might sympathize with a defendant's claim.

On the fiftieth anniversary of *Gideon*, it is still worth considering whether, consistent with their duty to seek justice, government lawyers should play a stronger role as amici in promoting criminal procedural fairness. There is no principled reason to categorically refrain, and pragmatic, strategic, and political reasons are not invariably compelling. As amici, attorneys general and district attorneys are not constrained to adopt any particular position, as they might be in litigation, but rather, they serve the public interest. Those who would never support expanding criminal defendants' procedural protections view the public interest or their own role too narrowly. Prosecutors have a responsibility to engage disinterestedly in law reform; prosecutors as amici could fulfill that responsibility by telling the Supreme Court when, in their professional judgment, a legal question should be resolved in criminal defendants' favor.

In *Gideon*, two attorneys general recognized that the indigent defendant's asserted right to appointed counsel was both fair and feasible. They led their states and more than twenty others to support the defendant in order to promote the sound development of constitutional law. That should happen more often.