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Valuing *Gideon*'s Gold: How Much Justice Can We Afford?

ABSTRACT. In this Essay, we explore *Gideon*'s impact in our community, El Paso, Texas, which has the will to try to meet *Gideon*'s challenge, but lacks the resources to deliver fully *Gideon*'s promise. We look at the origins of our community's indigent defense reform and examine our office's subsequent ability to provide effective assistance of counsel to our clients.

We recount our journey in managing two of our greatest challenges. The first challenge involves our efforts to increase our low trial rate; our slow and reluctant acceptance of a defense practice that is overwhelmingly a pretrial and plea one; and our examination of various measures, case outcomes, and lawyering skills as indicators that the client's best interest is driving our strategies and that we are not operating a plea mill. The second challenge is helping our clients who suffer from mental illness or intellectual disability. We struggle to secure due process and fundamental fairness for these individuals in the face of meager defense resources and the almost complete lack of mental health and social services.

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INTRODUCTION

In the fifty years since sounding *Gideon's* trumpet,¹ the Supreme Court has extended *Gideon's* reach to other contexts and classes of defendants. State and local governments have heeded this call, creating and reforming indigent defense systems. Why then do equal justice and fundamental fairness continue to elude us? Can they ever be anything more than ideals? Are they, like maturity, a road but never a destination? Of what value are *Gideon* and its progeny if individuals and communities today receive only as much justice as they can afford?

To deliver effective assistance of counsel, public defenders and other assigned counsel must meet certain performance criteria, carry reasonable caseloads, count on obtaining the necessary money and resources, and have ready access to a team of experts, investigators, social workers, and support staff. National defense standards addressing these crucial factors are readily available to help communities comply with *Gideon's* call.² Sadly, however, these standards rarely come with the necessary funding. The price of fundamental justice, equal access to competent counsel, and due process is steep in our deeply criminalized, widely institutionalized nation. Communities struggling to squeeze justice into their budgets dismiss these standards as unaffordable or unrealistic. Rarely do communities consider funding this mandate by reducing arrests and incarceration for petty crime, or by reducing prison sentences.

Gideon's fiftieth anniversary compels reflection and evaluation of our own community's and office's efforts to mine *Gideon's* gold for each of our clients. Painful and demoralizing, valuable and encouraging, this journey reveals more questions than answers and causes more concern than celebration. Still, we remain unapologetic in our hope that one day fundamental fairness and justice will mean the same thing and we will not need to place the word "equal" before the word "justice."

We begin this Essay by exploring briefly Clarence Gideon's personal story, one which parallels that of so many public defenders' clients. We then discuss the seed of indigent defense reform in our community, El Paso, Texas,

1. For this reference, see ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

2. See, e.g., Standing Comm. on Legal Aid & Indigent Defendants, *Ten Principles of a Public Defense Delivery System*, A.B.A. (Feb. 2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf; *Compendium of Indigent Defense Standards*, NAT'L LEGAL AID & DEFENDER ASS'N (May 2001), http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp; *Indigent Defense Systems*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=28> (last updated Oct. 14, 2011).

including the creation and growth of our office, the El Paso County Public Defender's Office. In the final two Parts, we discuss our struggle to provide effective representation in a pretrial and plea practice, particularly to our mentally ill clients.

I. WHO WAS GIDEON?

As we consider Clarence Earl Gideon's story, we see many men whom we have defended. Gideon was born in Missouri in 1910, lost his dad at the age of three, and quit school and ran away from home before entering high school.³ Thus began his cycle of aimlessness, poverty, property crimes, incarcerations, and imprisonment.⁴ He drifted through several states, married four times, and fathered three children who were taken away by child welfare authorities.⁵ In 1961, Gideon was charged in Florida with the felony offense of breaking and entering with the intent to commit a misdemeanor.⁶ He was forced to try his own case before a jury because he could not afford a lawyer.⁷ The Supreme Court already had recognized the right to counsel, but left the states to decide how far to extend this right beyond capital cases.⁸ The jury found Gideon guilty and sentenced him to five years in prison.⁹ Gideon wrote a petition to the Supreme Court, arguing that Florida's failure to appoint a defense lawyer violated his Sixth Amendment right to counsel.¹⁰ In answering his petition, the Court transformed our criminal justice system:

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national

3. See Letter from Clarence Earl Gideon to Abe Fortas (Nov. 1962), in LEWIS, *supra* note 1, at 65, 65-66.

4. See *id.* at 66-71.

5. See *id.*

6. *Gideon v. Wainwright*, 372 U.S. 335, 336-37 (1963).

7. *Id.* at 337.

8. See *Powell v. Alabama*, 287 U.S. 45 (1932), *narrowed by Betts v. Brady*, 316 U.S. 455 (1942) (holding that the defendant must be involved in a complicated case or have a mental deficiency to be entitled to appointed counsel).

9. *Gideon*, 372 U.S. at 337.

10. *Id.*

constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.¹¹

Gideon rocked the criminal justice system, giving poor defendants a chance at a fair trial with a competent lawyer and charging the states with delivering its promise. Unfortunately, *Gideon* left huge untreated gaps where the disease of rationed and unequal justice flourished and engendered challenge and reform. *Gideon*'s progeny have tried to substantially plug these gaps, extending the right to counsel to include misdemeanors¹² and juvenile cases,¹³ and defining minimum trial standards.¹⁴ Yet, states have doggedly refused to either pay the full price of justice or to lower its cost by reducing prosecutions.

II. THE EL PASO PLAN: A TEN-KARAT GOLD NUGGET¹⁵

If Gideon were arrested in Texas today,¹⁶ he would be entitled to a court-appointed lawyer, but the devil would be in the details. How soon would he see his lawyer? Would she be a public defender? How competent would she be? What resources would she have? Would Gideon receive a fair plea offer? How soon could he get his day in court? The answers would depend on the particular county that arrests him, the particular court that adjudicates the matter, and the particular prosecutor who is assigned to the case. We have neither a state public defender system nor any other statewide system that ensures access to appointed counsel.¹⁷ Gideon would fare better in El Paso than

11. *Id.* at 377.

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

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

14. See *Strickland v. Washington*, 466 U.S. 668 (1984).

15. Ten-karat is “[t]he lowest common gold alloy” and “not considered gold in some places, as the content is less than [fifty percent] gold. It’s hard, but it can tarnish a bit.” *Gold Rings – Understand Gold and Its Properties*, PRICESCOPE, <http://www.pricerscope.com/wiki/engagement-rings/gold-rings> (last visited Apr. 3, 2013).

16. Gideon and his family did live for a few years in Orange, Texas, a tiny town bordering Louisiana, in the mid-1950s. He also served time in a Texas prison. See Letter from Clarence Earl Gideon to Abe Fortas, *supra* note 3, at 68-69.

17. Most counties rely exclusively on assigned private counsel for noncapital cases, while a few counties enjoy a hybrid system of assigned counsel and public defenders. A few noncapital public defender (PD) offices in South Texas are regional. The West Texas Regional Capital Public Defender Office covers a major part of the state. See *Expansion Effort*, REGIONAL

in most Texas counties, but he would still find justice rationed.

Indigent defense reform took root in El Paso in the mid-1980s. Inmates charged with felonies in the El Paso County Jail filed federal suit under 42 U.S.C. § 1983 to enforce their rights to appointed counsel.¹⁸ Private lawyers were appointed upon indictment, an average of over one hundred days after the arrest.¹⁹ The district attorney's office routinely failed to indict or reject a case within the required ninety days, and inmates were not being released as required by law.²⁰ Unable to bond out or to hire a lawyer, poor inmates charged with felonies languished in jail. At the time of the suit's filing, El Paso County had no formal or written indigent defense plan and no public defender office.

El Paso settled the lawsuit with a consent decree and memorandum of understanding known as "The El Paso Plan" (the Plan).²¹ The Plan created our office and a jail magistrate responsible for the early appointment of counsel. It established a hybrid system of representation which still exists today, where 50% of all felony appointments would be ours, while the other 50% and all misdemeanors would still be handled by assigned private counsel. Today, we handle approximately 60% of the felony appointments, 50% of the capital appointments, 25% of the misdemeanor appointments, and 50% of the juvenile

CAP. PUB. DEFENDER OFF. (Spring 2011), [http://www.txcourts.gov/tidc/pdf/RCPDOPlanningDocument93\(April2011\).pdf](http://www.txcourts.gov/tidc/pdf/RCPDOPlanningDocument93(April2011).pdf). The first PD offices representing adults were established in the 1980s. The Dallas County Public Defender's Office was created in 1983. *A Review of Dallas County's Indigent Defense System*, SPANGENBERG GROUP 4 (Aug. 2004), <http://www.courts.state.tx.us/tidc/pdf/DallasPDStudy.pdf>. The Office of the Webb County Public Defender was created in 1988. *Office of the Webb County Public Defender*, WEBBCOUNTYTX.GOV, <http://webbcounty.com/PublicDefender> (last visited Apr. 3, 2013). The very first, and for many years the only, PD office in Texas was the Travis County Juvenile Public Defender, which was established in 1971. *Juvenile Public Defender*, TRAVISCOUNTYTX.GOV, http://www.co.travis.tx.us/juvenile_public_defender/default.asp (last modified Aug. 6, 2012).

18. See Notice of Pendency of Class Action, of Rights of Class Members, and of Proposed Settlement, *Maldonado v. Schild*, No. EP-86-CA-402 (W.D. Tex. 1987), <http://tidc.tamu.edu/IDPlanDocuments/El%20Paso%5CEl%20Paso%20District%20and%20County%20Court%20Federal%20Order.pdf>.
19. CRIMINAL LAW COMM., EL PASO BAR ASS'N, PUBLIC DEFENDER SYSTEM STUDY AND EARLIER APPOINTMENT OF COUNSEL 3 (1986) (on file with authors).
20. TEX. CODE OF CRIM. PROC. ANN. art. 17.151 (West 2005).
21. See Order Approving Settlement, *Maldonado v. Schild*, No. EP-86-CA-402 (W.D. Tex., Dec. 2, 1987) (on file with authors). Thus, while other PD offices in the state are authorized, ours is the only one that is legally mandated.

appointments.²² We also staff several problem-solving and drug courts, and we represent noncustodial parents facing criminal contempt for failure to pay child support, unknown fathers in child abuse and neglect proceedings, and county officials facing ethics complaints. The federal consent decree has secured our existence despite economic downturns and political battles with the judiciary and the private bar, but it has not guaranteed necessary resources.

El Paso is located at the westernmost tip of Texas. It shares an international border with Juarez, Mexico, an interstate border with New Mexico, and is home to Fort Bliss, a major army base. A significant number of residents do not speak English. El Paso had an estimated 2011 population of 820,790: 81.4% Hispanic, 13.7% non-Hispanic white, and 3.6% African American.²³ Our median income and percentage of residents living below the poverty level compares unfavorably with national figures.²⁴ Nearly 30% of El Pasoans are high-school dropouts,²⁵ and our unemployment rate was 10.3% in 2011.²⁶ In 2011, for the second consecutive year, El Paso had the lowest crime rate of any U.S. city with a population greater than 500,000, and it has been one of the three safest in the country every year since 1997.²⁷

III. NO JURY, NO FOUL: *GIDEON'S PLEA*

Our trial rate the past two years has been 1.1% for felonies, and less than 0.5% for misdemeanors.²⁸ Although our trial rate for juvenile cases (felony and

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22. El Paso Cnty. Pub. Defender, Office Data (on file with authors) [hereinafter EPPD Data]. Case information is maintained in our county's Justice Information Management System (JIMS).
 23. *State & County Quickfacts: El Paso County, Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48141.html> (last updated Mar. 11, 2013).
 24. *See id.* (measuring El Paso's median household income, 2007-2011, at \$38,259 per year, and persons below the poverty level, 2007-2011, at 25%); *State & County Quickfacts: USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last revised Jan. 10, 2013) (measuring the national median income, 2007-2011, at \$52,762 per year, and persons across the nation below the poverty level, 2007-2011, at 14.3%).
 25. *State & County Quickfacts: El Paso County, Texas*, *supra* note 23.
 26. *Labor Force Data by County: 2011 Annual Averages*, BUREAU OF LAB. STAT. (Mar. 1, 2013), <ftp://ftp.bls.gov/pub/special.requests/la/laucnty11.txt>. The statewide annual average rate for 2011 was 7.9%. *Local Area Unemployment Statistics: Unemployment Rates for States*, BUREAU OF LAB. STAT., <http://www.bls.gov/lau/lastrk11.htm> (last updated Mar. 1, 2013).
 27. Aaron Bracamontes, *El Paso Repeats as US City with Lowest Crime Rate Ranking*, EL PASO TIMES, Dec. 8, 2011, http://www.elpasotimes.com/ci_19496681.
 28. Internal office data revealed trial rates of 0.9% and 0.8% for fiscal years 2011 and 2012, respectively. EPPD Data, *supra* note 22.

misdemeanor combined) jumped from 2.5% to 9% from 2011 to 2012,²⁹ the uncomfortable fact of criminal practice is that most criminal cases never go to trial. A recent article noted that the percentage of felonies that proceed to trial in nine states fell to 2.3% in 2009, from 8% in 1976.”³⁰ Similarly, 97% of all federal criminal cases plead out.³¹

Clearly, ensuring that a competent—even brilliant—lawyer is standing up for the accused at trial does virtually nothing for the vast majority of poor people who are accused of crimes. Yet, criminal defense training doggedly continues to focus on trial technique, to the exclusion of pretrial and plea practice. We, as criminal defense lawyers, doggedly continue to focus on trial performance as the ultimate measure of our lawyering skills. However, we need to understand our ethical and professional duty to our clients who will never stand trial. All other players in the system (prosecutors, judges, magistrates, detention personnel, probation officers, and communities) must also acknowledge their own duty to provide fundamental fairness and due process to individuals who waive their right to trial. The Supreme Court, to a degree, has addressed this blindness over the last forty years,³² but much remains to be done.

Convincing even an innocent client to fight, and risk harsh punishment, can be difficult.³³ Pleading guilty is the client’s decision, whether or not he is actually guilty.³⁴ We cannot intrude upon this sacred right, but must ensure

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29. See *infra* notes 41-43 and accompanying text for an explanation of the relative rates.
 30. Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, <http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html> (citing data from the National Center for State Courts).
 31. Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL ST. J., Sept. 23, 2012, <http://online.wsj.com/article/SB10000872396390443589304577637610097206808.html>.
 32. See *Hill v. Lockhart*, 474 U.S. 52 (1985) (invalidating a plea of guilty based on the erroneous advice of counsel regarding parole eligibility). Pre-plea advice must be both correct and sufficient. It is not enough to tell a client that he could suffer collateral consequences as a result of a plea or finding of guilt. We must advise the client of any particular clear consequences before entering a guilty plea. See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). We are ineffective if we fail to communicate to a client a plea offer by the prosecutor, the offer expires, and the client later pleads to harsher punishment. See *Missouri v. Frye*, 132 S. Ct. 1399 (2012). We are also ineffective if we give erroneous advice that causes the defendant to reject the plea offer and receive a more severe sentence at trial. See *Lafleur v. Cooper*, 132 S. Ct. 1376 (2012).
 33. See Lucian E. Dervan & Vanessa Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).
 34. See *North Carolina v. Alford*, 400 U.S. 25 (1970).

that the client makes this decision based upon competent advice, with complete knowledge of the consequences and the strength of the evidence against him, and with a knowing and intelligent waiver of the right to trial and the ability to have the case fully investigated. No criminal defense lawyer or public defender office should operate a cut-rate “plea mill” where defendants are quickly, and without the necessary preparation, advised and even pressed to plead guilty. Plea mills are an abhorrent practice, but guilty pleas are not evil, ineffective, or unjust per se. On the contrary, effective and just pretrial and plea practice requires investigation, research, and preparation. Meticulous trial preparation is often what enables our lawyers to work out advantageous pleas. The stronger the defense’s theory, the stronger the prosecutor’s incentive to bargain. Successful plea practice also requires imagination, resourcefulness, and acute negotiation skills. These skills, which are so prized in civil practice, are often overlooked in criminal practice and are rarely the subject of criminal defense education and training. Criminal defense lawyers are compelled to fight to make the pretrial and plea process a fair and just one, to work on collateral issues, and to structure better pretrial outcomes to fit the individual needs of clients.

In conjunction with the low rate of jury trials, we must confront the difficult fact that the United States is now the most imprisoned nation in the world,³⁵ even in the face of declining crime rates over the past two decades.³⁶ State spending on prisons and prisoners tripled nationwide between 1990 and 2010.³⁷ This is not only a challenge to the parties in court—our entire society bears this massive burden in terms of fiscal and social costs. This burden was

35. See *Entire World—Prison Population Rates per 100,000 of the National Population*, INT’L CENTRE FOR PRISON STUD., http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate (last visited Apr. 2, 2013) (listing the United States first in incarceration rate); *Entire World—Prison Population Totals*, INT’L CENTRE FOR PRISON STUD., http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited Apr. 3, 2013) (listing the United States first in total inmate population).

36. Violent crime began declining in the early 1990s: from a rate of 757.7 per 100,000 inhabitants in 1992, to a rate of 403.6 per 100,000 inhabitants in 2010. *Crime in the United States, Table 1*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbtb01.xls> (last visited Apr. 3, 2013); see also Daniel B. Wood, *U.S. Crime Rate at Lowest Point in Decades. Why America Is Safer Now*, CHRISTIAN SCI. MONITOR, Jan. 9, 2012, <http://www.csmonitor.com/USA/Justice/2012/0109/US-crime-rate-at-lowest-point-in-decades.-Why-America-is-safer-now> (discussing factors that may account for the trend).

37. *Time Served: The High Cost, Low Return of Longer Prison Terms*, PEW CENTER ON THE STATES 7 (June 2012), http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Time_Served_report.pdf.

never contemplated fifty years ago, and is still uncounted.

This fundamental failure of the entire criminal justice system—including defense lawyers, prosecutors, judges, and legislatures—has an insidious impact. The system is weighted in favor of conviction and confinement. Sentencing risks often outweigh considerations of guilt. A client's fear-driven decision to plead guilty can spell moral hazard for the public defender forced to negotiate the best bad outcome, or to push for trial at great risk to the client. How do we counsel a client who wants to accept a reasonable plea deal when guilt may be in doubt? Each criminal defense lawyer, each public defender office, and each individual public defender must be armed with an ethical and professional moral compass that always points to the client's best interests, whatever the circumstances of the client, the facts of the case, or the biases of a particular court or prosecutor.

In 1995, I, Clara Hernandez, was appointed to my current position as Public Defender. After a few years, I became concerned that we were not trying enough cases, and so I focused on recruiting and training experienced trial lawyers. In 2005, I was too dismayed and embarrassed to discover that we were still trying too few cases. I saw this as an indictment of our performance, a failure on our part. More disturbing, I feared we were failing our clients. Our office had many discussions on the subject. Trial lawyers insisted that they were trying the cases that should be tried, and that trial quotas were anathema. We adopted a soft approach, appealing to lawyers' competitiveness: recognizing lawyers who tried the most cases and encouraging or shaming those who rarely tried cases. We set up a "trial dawg" chart with every trial lawyer's name on it, displayed on a very prominent wall, and we tallied every trial. We sent out office-wide e-mails congratulating lawyers on trials, acquittals, and other favorable verdicts. We gave lawyers compensatory time or administrative leave at the conclusion of a trial. We included trial/plea considerations in supervisory file reviews. These tactics produced complaints and no significant results.

Our lawyers objected that the chart misled clients and family members to believe higher trial rates mean better lawyers and to ask for the lawyer with the highest trial rate. In turn, this recognition devalued the amount and quality of work performed pretrial—obtaining pretrial release, investigating and developing evidence, negotiating favorable outcomes, and even preparing for trial only to be reset or offered a sweet deal on the day or eve of trial. Some lawyers argued that certain lawyers tried more cases because they were poor negotiators. They also felt chastised for factors over which they had no control. Prosecutors and judges vary widely in characteristics that control trial rates. Finally, our lawyers pointed out that we were overlooking the role that personal relationships play in this arena. The El Paso legal community,

especially in criminal practice, is very small. Defense lawyers and prosecutors are friends. They worship in the same churches, live in the same neighborhoods, and bump into each other picking up their children from the same schools. Many defense lawyers are former prosecutors, and some prosecutors are former defense lawyers. In addition, when a prosecutor and a public defender are assigned to the same court for a period of time, they gain better knowledge of each other's strengths, weaknesses, pet peeves, and tendencies, thereby facilitating pretrial negotiations.³⁸

With increasing frustration, and some hesitation, we tied salary increases to trial quotas in 2007. Without interference by supervisors on case-by-case decisions, each lawyer had to try at least two cases that year—a modest quota that most lawyers already met and several surpassed. We would increase the minimum annually until we were satisfied with the trial rate.

Every lawyer met the trial quota. However, some had to serve as second chair alongside another lawyer when their own trials fell through. A second-chair trial furthered our goals of increasing each lawyer's trial experience, but did nothing to increase our trial rate. When we were in the throes of the Great Recession, county budgets were slashed, positions were cut, salaries were frozen, and every county employee was furloughed. Our trial quotas were placed on hold.

Our trial rate appears to be driven primarily by our clients' choices and prosecutors' willingness to negotiate. In fiscal years 2011 and 2012, we obtained dismissals on almost a quarter of our felonies, more than a third of our misdemeanors, and a third of our juvenile cases.³⁹ In prior years, I had only

38. Certainly, we must be vigilant that public defenders assigned to work for a while with the same judge and prosecutor are not participating in a judicially sanctioned plea mill or facilitating bad pleas because everyone is too "chummy" or because the defender is concerned about retaliation for fighting too hard.

39. EPPD Data, *supra* note 22. In fiscal year 2012 we received a total of 10,197 appointments and closed 9,264. In fiscal year 2011 we received 10,184 appointments and closed 9,969. These include adult and juvenile trial cases (from capital to misdemeanors), appeals, criminal contempt for nonpayment of child support, and child abuse and neglect cases. They also include many short appointments to handle all cases set for a particular type of hearing on a given day, such as detention or review hearings in juvenile proceedings, adult jail pleas, and problem-solving court proceedings. Disposition rates are only for trial cases, which are less than 50% of total appointments.

One potential issue with our methodology can be illustrated through the following example: if we have a client who is booked on three charges and we get appointed prior to an indictment, we receive three separate letters appointing us on each count. We open a case file for each appointment letter and each file is a case, so we open and later close three cases. If this same person bonds out before a lawyer is appointed, is later indicted on all three counts in one indictment, and we then get appointed by the trial court, we will only get one

focused on trials and pleas, never on the best possible outcome, which is dismissal of charges. I was pleased. Furthermore, while our trial rate was low, close to half of our trials resulted in acquittals. Moreover, 82% of all our adult cases were resolved favorably relative to the prosecutor's initial plea-bargain offer.⁴⁰

The plea bargaining window under the Juvenile Justice Code⁴¹ is small, and the juvenile prosecutors have become more and more averse to using it, which may explain why we try more juvenile cases than adult ones. Prosecutors and defense lawyers cannot agree to a particular type or length of sentence until after the child is adjudicated.⁴² However, by then, agreement is usually pointless. Punishment for a misdemeanor is not a range; instead, it is probation up to the age of eighteen, either at home or in an institution. For a felony, the range is only two options: probation up to the age of eighteen, or commitment to the Texas Juvenile Justice Division until the age of nineteen. Penal commitment through adulthood and certification for trial as an adult are additional options for serious felonies.⁴³ Once the child pleads "true," the appropriate type (not length) of probation is determined largely by the probation officer's recommendation to the court. Our juvenile defenders try to negotiate dismissals, deferred prosecutions, or reductions of felonies to misdemeanors. However, prosecutors increasingly refuse to bargain and simply expect the child to admit to the charge as pled—which accounts in part for the spike in trials last year. Parental involvement further affects the child's decision to plead.

Our economic crisis presented us with an opportunity to evaluate our services. We have examined our case dispositions much more closely and

appointment letter (for the one indictment) and will open only one file. When we are appointed pre-indictment on multiple charges, we do not know if the counts arise out of the same transaction, or if they will be indicted together. Our software does not allow us to go back and edit the initial appointment, but each appointed case must be accounted for and each file closed with some disposition or reason. Another problem is that every lawyer may not treat the disposition of these charges in the same manner. Some lawyers will close all but one file—if the case goes to trial, they will reflect the trial disposition on only one case. Some lawyers will keep all files open and reflect the trial outcome in each of the files, so these will be counted as three trials. In dealing with these potential methodological issues, we have verified the accuracy of each reported trial.

40. *Id.* Whether the outcome was dismissal, acquittal, or a guilty verdict by plea or by trial, the outcome was better than the original plea recommendation offered by the prosecutor.
41. TEX. FAM. CODE ANN. tit. 3 (West 2011).
42. *See id.* §§ 54.03, 54.04. Juvenile adjudication is the equivalent of the guilt phase, the juvenile's plea is "true" or "not true," and the disposition is the equivalent of the sentencing phase.
43. *Id.* §§ 53.035, 54.04(d)(3).

strategically in our overall effort to become more client-centered in our process and more client-driven in our outcomes. We have made structural changes within the office, and more changes are forthcoming. We developed a short, simple survey to find out from our clients what they want. In October 2012, we began asking what they most want and value from us and the system, in terms of services, communication, and outcomes.⁴⁴ A caseworker administers the survey before the client speaks to our lawyers. We are planning to conduct an exit survey to measure the service we deliver against the client's expectations. While the content and the number of participants may not be sufficient to formulate statistically significant or rigorous conclusions, our clients' initial responses are thought-provoking.

Only 8% of the 558 surveyed clients wanted a trial, 39% wanted to negotiate a plea, and 51% were unsure.⁴⁵ We had presumed most clients began the process hoping for a trial and that over the course of time, a set of factors— inability to make bail coupled with a long wait for a trial date to be set, understanding the nature and amount of evidence possessed by the prosecutor, fear of a harsher sentence, our lawyers' persuasiveness, or perhaps lack of confidence in the system, our office, or their lawyer—eventually discouraged and convinced them to take a plea.

What began as a tool to guide us in our representation has produced more questions than answers. Why do so few clients want a trial? Is it a perception that public defenders are unwilling or unable to fight their case? Is it a perception about the system itself based on prior experience? How do race, gender, ethnicity, other characteristics factor in? A more comprehensive study will be necessary.

We have to conclude that it is absurd to punish lawyers for not going to trial, when they are in fact negotiating so many dismissals and other favorable outcomes for their clients—especially when the clients, who have the final word, often do not want to risk trial. Our duty is to ensure that our clients make this decision with our lawyers' effective advice and assistance. The lawyers' advice should not be driven by the expectations of a supervisor, court, or prosecutor. Rather, it must comply with well-defined standards to keep our pretrial and plea practice from becoming a plea mill. We now understand that the amount and quality of work performed by lawyers on cases does not correlate with the number of trials,⁴⁶ and the number of cases our lawyers set

44. See EPPD Data, *supra* note 22.

45. *Id.*

46. We are currently trying to quantify the average number of attorney and investigator hours per plea.

and prepare for trial far exceeds the number of actual trials. Quite often, lawyers who negotiate an excellent plea for their clients experience disappointment. Prepared for trial with a good defense, they sacrifice the thrill of trial for the client's best interest. Nonetheless, unable or unwilling to reconcile our plea practice with our self-image as trial lawyers, or with the meaning that "standing up for our clients" has for us, we will keep looking for ways to increase our trials without sacrificing more favorable outcomes such as dismissals.

IV. GIDEON THROUGH THE LABYRINTH OF MENTAL ILLNESS

How do we deliver *Gideon's* gold to clients who are not only poor, but also lack the intellectual, behavioral, and emotional resources needed to confront the charges? We represent many individuals with a mental illness or an intellectual disability. In our experience, mental illness doubles the work of representation—requiring more time with clients and their families, resolving more collateral issues, and searching for services that do not exist. We established a Mental Health Unit (MHU) in 2005, but insufficient funding has kept us from serving our mentally ill clients as effectively as fundamental fairness demands. Few standards exist to guide us in defending these clients. Yet, standards are not what we most need right now. Our clients need more lawyers, more staff, and more resources. We are dealing not only with the reality of charges being disposed of through the plea process rather than through trial, but also with the frightening reality that this population can only hope to see the best possible disposition of their criminal charges if we do much more than prepare their cases for trial.

Our first priority is pretrial release, because freedom is always a priority and incarceration aggravates mental illness. Insanity occasionally provides a defense at trial. However, more often than not, mental illness simply prevents the client from having his day in court. The emotional stress of incarceration, court proceedings, and long delays in the process is frequently unmanageable for these vulnerable clients. It becomes imperative to seek extralegal remedies to address our clients' underlying mental illness and collateral needs. For them, access to pretrial release depends on access to medication, treatment, and a stable environment. We have also learned that pretrial release is only the beginning. We have often obtained their release on personal recognizance (PR) bonds, but there is no safety net to catch them once they get out. Over 42% of our MHU clients released on PR bonds in 2010 were ultimately returned to jail on arrests for new offenses or upon revocation of their bonds for failing to

report or appear in court.⁴⁷

Texas ranks last in the nation on spending for mental health services,⁴⁸ but nearly quadrupled its criminal justice spending from 1990 to 2010.⁴⁹ In 2010, there were nearly eight seriously mentally ill persons in Texas jails or prisons for every person in a psychiatric hospital,⁵⁰ making jails and prisons our largest inpatient mental health care provider—a responsibility for which they are ill-equipped and ill-funded. El Paso is no exception. On any given day in 2010, an average of 2,193 men and women were locked up in our jails, 40% of whom received medication for mental illness.⁵¹ In 2010 alone, the mental health provider at the county jail saw 7,531 inmates for psychiatric problems.⁵² By comparison, El Paso only has 209 psychiatric hospital beds: 119 private,⁵³ 16 military,⁵⁴ and 74 other public nonprofit beds.⁵⁵ Outpatient mental health care providers are scarce and difficult to access.⁵⁶ Our mental health services delivery “system” is one underfunded provider, Emergence Health Network, funded primarily by the state government, and poorly supported by a few

47. EPPD Data, *supra* note 22.

48. Claire Cardona, *Study: Texas Ranks Last in Mental Health Spending*, TEX. TRIB., Nov. 11, 2012, <http://www.texastribune.org/2011/11/10/texas-ranks-50th-mental-health-spending>.

49. Marc Levin, *Corrections Budget & Prison Operations*, TEX. PUB. POL'Y FOUND. (2011-2012) <http://www.texaspolicy.com/sites/default/files/documents/2011-PrisonOperations-CEJ-ml.pdf>.

50. Emily Ramshaw, *Mentally Ill End Up in Texas Prisons*, TEX. TRIB., May 12, 2010, <http://www.texastribune.org/2010/05/12/mentally-ill-end-up-in-texas-prisons>.

51. Data provided by the El Paso County Sheriff's Office (on file with authors).

52. *Id.*

53. *University Behavioral Health of El Paso Details*, U.S. NEWS & WORLD REP., <http://health.usnews.com/best-hospitals/area/tx/university-behavioral-health-of-el-paso-6740408/details> (last updated Apr. 2012). There are also additional beds that Peak Psychiatric Hospital has in Santa Teresa, New Mexico, a suburb of El Paso, for children and teens. *About Peak Behavioral*, PEAK BEHAV. HEALTH SERVICES, <http://www.peakbehavioral.com/index.shtml> (last visited Apr. 3, 2013).

54. *Inpatient Psychiatry Service (IPS)*, WILLIAM BEAUMONT ARMY MED. CENTER, <http://www.wbamc.amedd.army.mil/Departments/MentalHealth/InpatientPsychiatryService> (last updated Oct. 12, 2012).

55. *El Paso Psychiatric Center*, TEX. DEP'T OF ST. HEALTH SERVICES, <http://www.dshs.state.tx.us/mhhospitals/ElPasoPC/default.shtm> (last updated Apr. 8, 2011).

56. See Lisa Tomaka, Mario Caire & Dennis L. Soden, *Greater El Paso Chamber of Commerce Community Mental Health Survey*, INST. FOR POL'Y & ECON. DEV. 3 (Jan. 1, 2008), http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1079&context=iped_techrep (noting that “a number of factors make [mental health] service delivery difficult and overextend existing resources” in El Paso).

private and charitable providers.⁵⁷ Our social workers are essential to helping our clients access this limited patchwork of services, but their efforts can only go so far. The need is so great, resources are so limited, and mental health professionals are so few,⁵⁸ that “access” usually means “wait-listed.” These factors also translate into treatment protocols emphasizing medication over counseling. Sadly, these clients usually often lack the cognitive ability and life skills to adhere to such a treatment plan.

Lack of housing is another barrier to staying out of jail. Many of our clients do not have a home to which they can return. Some were homeless at the time of arrest, others lost housing and benefits during their incarceration, and many are estranged from their families. El Paso has few homeless shelters, and only one of them provides psychiatric visits. Finally, a significant number of mentally ill defendants have co-occurring substance abuse problems,⁵⁹ which impede medical and social stability and increase the likelihood of bond and probation violations.

Frustration over failed collaborative community efforts to address these issues has us exploring ways to step in. Currently, the jail releases clients with a paid prescription for a three-day supply of psychotropic medication. The jail clinic is willing to give up to a ten-day prescription, but the county cannot pay for it. We are developing a funding proposal that would allow our office to pay for the extra seven days of medication to provide a safety net while the necessary treatment and services are secured. Funding would also allow us to contract with doctors and counselors for immediate services,⁶⁰ pending screening and waiting for services from our state provider. A dedicated mental health PR bond caseworker⁶¹ would facilitate release, and our social workers

57. See *Revenue & Expenditures*, EMERGENCE HEALTH NETWORK, <http://emergencehealthnetwork.org/wp-content/uploads/2012/01/revenue-exp.pdf> (Jan. 2012).

58. In 2008, thirty-six licensed psychologists in El Paso County served a population of 755,157. Susan Combs, *Texas in Focus: Upper Rio Grande*, WINDOW ON ST. GOV'T, <http://www.window.state.tx.us/specialrpt/tif/urgrande/healthcare.php> (last visited Apr. 3, 2013). In 2008, we had 0.1-6.2 psychiatrists per 100,000 people. *The Crisis in El Paso: Health Care Professional Shortages*, GREATER EL PASO CHAMBER OF COM. 4 (Feb. 2009), http://shapleigh.org/system/reporting_document/file/322/Crisis_in_HC.pdf.

59. Male and female detainees with severe mental disorders have a 72% rate of co-occurring substance use disorders. *The Prevalence of Co-Occurring Mental Illness and Substance Use Disorders in Jails*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN. 2 (Winter 2004), <http://gainscenter.samhsa.gov/pdfs/disorders/gainsjailprev.pdf>.

60. Even with the money to pay, this will be difficult given the scarcity of mental health professionals in our community.

61. The state probation department has caseworkers who screen individuals for suitability for pretrial release on PR bonds, and supervise them once they are granted these bonds.

would provide intensive assistance, daily if necessary, while our clients are on pretrial release. Even if we were to succeed, however, this program barely scratches the surface and is no substitute for a well-funded system of public mental health services.

The greatest hazard for the lawyer defending clients with mental illness or intellectual disability is discouragement and exhaustion. We struggle to communicate with our clients, to work with their families, to find someone willing to stand up for them. We raise competency issues with a heavy heart, knowing this will lengthen substantially our clients' time behind bars. We must always explore the insanity defense, knowing that it is unlikely to be a winning theory.⁶² We struggle to bring local agencies together to fight for better mental health care and housing. Representing these clients is like going twelve rounds with a fresh opponent each round. A connection to these clients compels us to fight for them as so many of them have been fighting all their lives. Surely, we can stand by them, considering what they have already gone through. And although standing by them can be the most exhausting and challenging experience, the rewards—when we finally arrive at the right solution—are great.

To be sure, effective assistance of counsel means much more than preparing for trial. It means going outside the confines of statutes and police reports in order to see the client, to understand what went wrong, to develop empathy, and to communicate the client's real story. It means taking upon ourselves the responsibility to build for our clients the community net that they deserve but never had, partnering with the medical and behavioral health communities—social workers, psychologists, and psychiatrists—to share the burden of finding treatment and stabilizing our clients' lives. It means looking beyond the courtroom and visualizing communities that have a place for everyone, including those who need treatment and support. The standards of effectiveness discussed in *Strickland*, *Padilla*, *Frye*, and *Lafler* have not addressed the needs of this population, although it is clear that we as a society should stop relying on criminal processes and incarceration for those who simply need effective mental health services from the public health sector. Our criminal justice system must mature into a system that is able to substantially return the burden of treating and housing the mentally ill and intellectually

62. Here, as in the rest of the state and the rest of the country, the insanity defense is “rarely invoked and seldom successful.” Brian D. Shannon, *The Time Is Right To Revise the Texas Insanity Defense*, 39 TEX. TECH L. REV. 67, 69-70 (2007). Since 2005, our office has won only two acquittals by reason of insanity, and has had only two cases dismissed under prosecutorial discretion when doctors for us and for the state agreed on insanity. EPPD Data, *supra* note 22.

disabled to the public health sector instead of imprisoning them.

Perhaps someday there will be a case such as *Gideon v. Wainwright* that affirms a person's right to mental health care. Until then, we must continue to work in this intersection between two broken delivery systems: one that rations mental health care and one that rations fundamental justice and due process.

CONCLUSION: HOW MUCH JUSTICE CAN WE AFFORD?

Gideon's spirit is drowning in the undertow of the criminalization tide. There is a foundational conflict between our ideals of equal justice, fundamental fairness, and due process, and our actions. Can the wealthy and the poor, the healthy and the mentally ill, ever "stand equal before the law"? Are "equal justice" and "fairness" fundamentally irreconcilable? Can "justice" ever be "equal"? Maybe "fundamental fairness" blunts the sharp edge of "justice." If justice is anything, it must be more than our rations: it must be sufficient to guarantee that the government will be held in check.

If equal justice means that our client gets exactly the same justice as the average individual who does not qualify for a court-appointed lawyer, or it means that our mentally ill client will be treated like every other accused, then we have little use for it. The average individual who pays a lawyer gets only as much justice as he can afford. For the working class, and much of the middle class, this is insufficient to guarantee fundamental fairness, let alone a well-investigated and well-litigated fair trial. Maybe this country can live with this standard, but we refuse to.