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REMARKS

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Lessons from *Gideon*

ABSTRACT. Why has the promise of *Gideon* gone largely unfulfilled and what can be learned from this? *Gideon* was an unfunded mandate to state governments, requiring them to provide the money to ensure competent counsel for all criminal defendants facing possible prison sentences. *Gideon* failed to provide any enforcement mechanism to ensure adequate funding and no subsequent cases have done so. Nor did *Gideon* recognize that providing an attorney is not sufficient; it must be a competent lawyer. The Supreme Court has made it so difficult to demonstrate ineffective assistance of counsel that those who cannot afford an attorney often are saddled with incompetent counsel and are left with no remedy. Simply put, money matters in fulfilling *Gideon*'s promise and the Court provided no way of ensuring adequate funding.

Providing adequate funding for counsel, whether in criminal or civil or immigration cases, will be problematic so long as it is a welfare program for the poor. The right to counsel will be meaningful only if there are enforcement mechanisms to ensure adequate funding and the provision of competent counsel.

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ESSAY CONTENTS

The fiftieth anniversary of *Gideon v. Wainwright*[1] deserves celebration. *Gideon*'s assurance of counsel to all facing a prison sentence undoubtedly has meant that many who otherwise would have been convicted and imprisoned, some wrongly, were able to be free. In fact, there have likely been countless instances of prosecutors not even going forward simply because of the presence of defense counsel. In a criminal justice system where almost all convictions are gained by guilty pleas—ninety-seven percent in federal court and ninety-four percent in state court[2]—the presence of defense attorneys surely often makes an enormous difference in the nature of the plea deal and the length of the sentence.

None of these effects can be measured. It is not possible to know the number of people who were acquitted who would have been convicted, or the number of cases not brought, or the length of the sentences not imposed. But nor can these benefits be denied by anyone with even a passing familiarity with the criminal justice system.

The importance of *Gideon* as a symbol also cannot be overstated. An adversary system of justice requires some semblance of equality between the two sides. *Gideon* is a crucial attempt to make that a reality. It holds that all facing the power of the state to take away their liberty, however poor, are entitled to representation. Under a Constitution that often is described as being a charter of negative liberties, restrictions on government power, and not affirmative rights,[3] *Gideon* holds that there is something the government must pay for and provide: an attorney to those who cannot afford one and face the loss of their liberty by imprisonment. As the Court powerfully declared in *Gideon*:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided

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1. 372 U.S. 336 (1963) (holding that the Sixth Amendment right to counsel requires that state governments provide an attorney to all indigent defendants facing a possible prison sentence).

2. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

3. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (holding that the government has no duty to protect individuals from privately inflicted harms); *see also* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (describing and criticizing the view that the Constitution is about negative liberties).

> for him. This seems to us to be an obvious truth. . . . 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 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.[4]

Yet while *Gideon* is celebrated, the reality of its implementation must be lamented, too. A decade ago, on the fortieth anniversary of *Gideon*, an American Bar Association study concluded: "Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of wrongful conviction. . . . Funding for indigent defense services is shamefully inadequate."[5] Over the last decade, the problem undoubtedly has gotten much worse as the severe recession has caused budget crises in states across the country and cuts in funding for courts and all the services they provide.[6]

As someone who handles criminal appeals, I have represented clients whom I believe to be innocent who were convicted because of ineffective assistance of counsel.[7] I have also represented clients whom I am convinced received death sentences because their trial lawyers were ineffective.[8] In instances like these, I wonder whether these individuals really were better off because of *Gideon*. Perhaps if they had been left to represent themselves they would have done better, or perhaps the courts would have looked more closely at their cases. *Gideon* creates such a strong presumption that the presence of counsel has insured adequate representation when the reality is so very different. As

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4. 372 U.S. at 344.

5. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 38 (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter BROKEN PROMISE].

6. *See* Erwin Chemerinsky, *Symposium on State Court Funding: Keynote Address*, 100 KY. L.J. 743, 744 (2012) (describing budget cuts in court funding across the country).

7. *E.g.*, Haskell v. Berghuis, No. 10-1432, 2013 WL 163965 (6th Cir. Jan. 16, 2013) (rejecting a claim of ineffective assistance of counsel).

8. *E.g.*, Wilkinson v. Polk, 227 F. App'x 210 (4th Cir. 2007) (rejecting a claim of ineffective assistance of counsel).

Senator Patrick Leahy has remarked, "Too often individuals facing the ultimate punishment are represented by lawyers who are drunk, sleeping, soon-to-be disbarred or just plain ineffective. Even the best lawyers in these systems are hampered by inadequate compensation and insufficient resources to investigate and develop a meaningful defense."[9]

In these remarks, I want to focus on what explains *Gideon*'s failure. I focus specifically on the failure to adequately fund the right to counsel that *Gideon* promised. Part I describes the crucial importance of funding to fulfilling the promise of *Gideon v. Wainwright*. Part II explains why the right to counsel has been inadequately funded and points to two interrelated phenomena: The Court imposed an unfunded mandate on state governments without any enforcement mechanism, and the Court then undermined the one remedy available to the judiciary, the ability to find ineffective assistance of counsel. Part III concludes by drawing lessons from *Gideon* for other areas, including the attempt to extend it to the civil arena. Funding inherently will be inadequate when reliance is on state and local governments to provide services for the poorest in society.

To be clear, I join the celebration of *Gideon* and its importance. It is a "watershed" rule of criminal procedure.[10] I realize, as stated above, that so many of its benefits never can be quantified and can be so easily taken for granted. But I also lament its unfulfilled promise, and that is the focus of my discussion.

I. LAWYERS MATTER, MONEY MATTERS

My premise is a simple one: the quality of representation often matters in criminal cases, and money often is crucial in determining that quality of representation. Of course, there are instances where the outcome is the same no matter how good or bad the defense lawyer. Of course, there are instances where the best-paid lawyer does a poor job or the inadequately compensated attorney is terrific. But, that said, any one of us facing criminal charges would want the best lawyer we could get, and being able to pay for him or her matters.

The most powerful evidence of this comes from studies that have compared the outcomes of cases depending on how the lawyer is compensated. The Bureau of Justice Statistics found that those with publicly funded counsel are

9. 150 CONG. REC. S11,613 (daily ed. Nov. 19, 2004) (Statement of Sen. Leahy).

10. *See* Whorton v. Bockting, 549 U.S. 406, 418-19 (2007) (referring to *Gideon* as a watershed rule of criminal procedure).

more likely to be incarcerated for longer than those with privately paid attorneys.[11] It concluded: "Of defendants found guilty in Federal district courts, 88% with publicly financed counsel and 77% with private counsel received jail or prison sentences; in large state courts, 71% with public counsel and 54% with private attorneys were sentenced to incarceration."[12]

Moreover, among those cases involving publicly paid attorneys, the sentencing outcome varies depending on whether there is a public defender or appointed counsel. Similarly, in federal court, outcomes depend on whether there is a federal defender or an attorney appointed under the Criminal Justice Act.[13] Professor Radha Iyengar has concluded that "[d]efendants with CJA panel attorneys are on average more likely to be found guilty and on average to receive longer sentences. Overall, the expected sentence for defendants with CJA panel attorneys is nearly 8 months longer."[14]

The same difference has been found in state courts. James M. Anderson and Paul Heaton compared the outcomes in murder cases in Philadelphia courts depending on whether the defendant was represented by a public defender or an appointed lawyer from a list.[15] They found that, compared to appointed counsel, public defenders reduce their clients' murder conviction rate by 19% and lower the probability that their client will receive a life sentence by 62%.[16] Public defenders, as compared to appointed counsel, reduce overall expected time served in prison by 24%.[17] To say the obvious, these are dramatic differences.

Many studies have been done in capital cases and they are remarkably consistent in documenting that a conviction and death sentence in a capital case is least likely with a privately paid lawyer, and that those with government-paid attorneys are much better off with public defenders than with appointed

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11. Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, BUREAU OF JUST. STAT. (Nov. 2000), http://bjs.ojp.gov/content/pub/pdf/dccc.pdf.

12. *Id.* at 1.

13. Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* (Nat'l Bureau of Econ. Res., Working Paper No. 13187, 2007).

14. *Id.* at 3.

15. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012).

16. *Id.* at 159.

17. *Id.*

counsel.[18]

The advice to a person facing prosecution, especially for a serious crime, would be clear: if you can, hire your own attorney. Failing that, do all you can to get representation by a public defender rather than by a court-appointed attorney. Why? Anderson and Heaton offer a compelling explanation:

> We find that, in general, appointed counsel have comparatively few resources, face more difficult incentives, and are more isolated than public defenders. The extremely low compensation for appointed counsel reduces the pool of attorneys willing to take the appointments and makes extensive preparation economically undesirable. Moreover, the judges selecting counsel may be doing so for reasons partly unrelated to counsel's efficacy. In contrast, the public defenders' steady salaries, financial and institutional independence from judges, and team approach to indigent defense avoid many of these problems. These longer-term institutional differences lead to the more immediate cause of the difference in outcomes: less preparation by appointed counsel.[19]

Simply put, the identity of the lawyer matters, and the method of compensating the lawyer is often crucial in determining who will provide representation. It is in this context that the many studies done of the inadequacy of representation in criminal cases can be understood. The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants concluded:

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18. *See, e.g.*, James C. Beck & Robert Shumsky, *A Comparison of Retained and Appointed Counsel in Cases of Capital Murder*, 21 LAW & HUM. BEHAV. 525 (1997) (finding that a death sentence was more likely to result when the defendant was represented by appointed counsel than by privately retained counsel); Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253 (1989) (finding that defendants represented by privately retained counsel obtained better outcomes than defendants represented by public defenders). Not every study has found such differences. *See* Roger A. Hanson & Brian J. Ostrom, *Indigent Defenders Get the Job Done and Done Well*, *in* THE CRIMINAL JUSTICE SYSTEM: POLITICS AND POLICIES 254 (George F. Cole, Marc G. Gertz & Amy Burger eds., 8th ed. 2002) (finding small differences in performance between public defenders and appointed private counsel); Richard D. Hartley, Holly Ventura Miller & Cassia Spohn, *Do You Get What You Pay For? Type of Counsel and Its Effect on Criminal Court Outcomes*, 38 J. CRIM. JUST. 1063 (2010) (finding generally that public defenders and private attorneys have no direct effect on incarceration or sentence length); Pauline Houlden & Steven Balkin, *Costs and Quality of Indigent Defense: Ad Hoc vs. Coordinated Assignment of the Private Bar Within a Mixed System*, 10 JUST. SYS. J. 159, 170 (1985) (finding that the method of assigning attorneys to cases did not affect outcomes in a statistically significant way).

19. Anderson & Heaton, *supra* note 15, at 188.

> Quality legal representation cannot be rendered unless indigent defense systems are adequately funded. Attorneys who do not receive sufficient compensation have a disincentive to devote the necessary time and effort to provide meaningful representation or even participate in the system at all. With fewer attorneys available to accept cases, the lawyers who provide services are often saddled with excessive caseloads, further hampering their ability to represent their clients effectively.[20]

The ABA Committee concluded "that inadequate compensation for indigent defense attorneys is a national problem, which makes the recruitment and retention of experienced lawyers extraordinarily difficult."[21]

The National Right to Counsel Committee similarly concluded: "[I]nadequate financial support continues to be the single greatest obstacle to delivering 'competent' and 'diligent' defense representation."[22] It noted that "the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads. Frequently, public defenders are asked to represent far too many clients."[23] Appointed counsel are often paid so little that only those who cannot find other work are available, and their compensation is so inadequate as to provide insufficient incentives for the needed work.[24]

This simple notion that one gets what one can pay for in representation is reflected in studies done of the quality of representation in capital cases. Professor Douglas Vick explains:

> Several observers have noted that poor compensation will not attract the best attorneys to represent indigents in death penalty cases. . . . For example, as of January 1990, the Alabama attorneys who represented defendants sentenced to death had been subject to disciplinary action, including disbarment, at a rate twenty times that of the Alabama bar as a whole. For those attorneys whose clients were executed, the rate of disciplinary sanctions was almost forty times that of the bar as a whole. One-quarter of the inmates on Kentucky's death row were represented at trial by attorneys who subsequently were disbarred or resigned

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20. BROKEN PROMISE, *supra* note 5, at 7.

21. *Id.* at 9.

22. NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 6-7 (2009), http://www.constitutionproject.org/pdf/139.pdf [hereinafter JUSTICE DENIED].

23. *Id.* at 7.

24. Anderson & Heaton, *supra* note 15, at 188-96.

> rather than face disbarment. As of January 1990, nearly 13% of the defendants executed in Louisiana had been represented by lawyers who had been disciplined, while the disciplinary rate for the Louisiana bar as a whole was 0.19%. In Texas, the attorneys who represented defendants sentenced to death have been disciplined at a rate nine times that of the Texas bar as a whole; similar disparities exist in Georgia, Mississippi, and Florida.[25]

All of this has been exacerbated by the fiscal crisis facing state governments and thus state courts across the country. The Report of the National Right to Counsel Committee concluded: "[T]he country's current fiscal crisis, which afflicts state and local governments everywhere, is having severe adverse consequences for the funding of indigent defense services, which already receives substantially less financial support compared to prosecution and law enforcement."[26] For example, California, which has one of the nation's largest state court systems, reduced appropriations for courts by more than half in 2012, from $1.7 billion to $700 million, then "discovered" a budget surplus it used to increase funding for education and health care in 2014, without alleviating the prior court budget reductions.[27] Funding for defense lawyers and all of the support they need has been cut from its previously inadequate levels.

By every measure, then, there are gross inadequacies in the provision of counsel to indigent defendants. The constitutional assurance of the right to counsel is rendered illusory and innocent people are convicted as a result.[28]

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25. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 398 (1995) (footnotes omitted).

26. JUSTICE DENIED, *supra* note 22, at 7.

27. *See COSCA Budget Survey 2012*, NAT'L CENTER FOR ST. CTS. 9 (2012), http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/~/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/COSCA_Budget_Survey_all_states_2012.ashx (listing these figures); *see also* EDMUND G. BROWN, JR., 2013-14 GOVERNOR'S BUDGET SUMMARY 1 (2013), http://www.dof.ca.gov/documents/FullBudgetSummary_web2013.pdf. Many states, though, had small or moderate increases in 2012, which followed significant cuts in the prior years. The most recent budget data shows that many states increased court funding last year. *See Budgets & Funding*, NAT'L CENTER FOR ST. CTS., http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/Budget_Funding.aspx (last visited May 21, 2013).

28. JUSTICE DENIED, *supra* note 22, at 6 ("Wrongful convictions also have occurred as a result of inadequate representation by defense lawyers.").

II. WHY?

Why has the promise of *Gideon* been so poorly realized? I believe two interrelated phenomena best explain this. First, the Supreme Court imposed an unfunded mandate on state and local governments with the only realistic enforcement mechanism being the finding of ineffective assistance of counsel in individual cases. Second, the Court created a test for ineffective assistance of counsel that makes it very difficult for a convicted individual to get relief, even when counsel's performance is quite deficient.

As to the former, *Gideon* is atypical in American constitutional law because it involves the Court finding an affirmative constitutional right to the government providing a "service" to individuals. The rights in the Constitution are generally thought to be negative liberties, prohibitions on what the government may do.[29] The Constitution forbids the government from abridging freedom of speech or denying equal protection of the laws or depriving a person of life, liberty, or property. There are exceptions where affirmative duties are imposed by the Constitution, but these are regarded as aberrations. As Professor Bandes notes:

> Some constitutional provisions clearly mandate affirmative governmental conduct. For example, the sixth amendment requires government to provide an accused a speedy public trial, compulsory process, assistance of counsel, and the opportunity to be informed of the nature of the accusation and confronted with the witnesses against him. The equal protection clause requires that government sometimes take affirmative steps to ensure that certain groups are not treated unequally; and has been held to mandate government provision of goods and services which individuals would otherwise be denied because of their poverty. The conventional wisdom views these guarantees as aberrations; exceptions which prove the rule.[30]

Gideon, though, creates an affirmative constitutional duty for the government to provide something to individuals: counsel in criminal cases where there is a possible prison sentence, if necessary at the government's expense. The Court, however, imposed this duty without providing a funding source. It was left to each state, and in many instances each county, to provide

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29. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 873 (1986).

30. Bandes, *supra* note 3, at 2276-77 (footnotes omitted).

funds for attorneys for indigent criminal defendants.[31]

In the decades following *Gideon*, this burden increased tremendously as a result of an enormous increase in criminalization, prosecution, and incarceration. Nationally, five times more prisoners are incarcerated today than just a few decades ago.[32] "Between 1991 and 1999, the number of children with a parent in a Federal or State correctional facility increased by more than 100 percent, from approximately 900,000 to approximately 2,000,000."[33] The nation's incarceration rate is among the world's highest, and five to ten times higher than the rates in other industrialized nations.[34] In other words, whatever burden on state treasuries was envisioned by the *Gideon* Court, the dramatic growth in criminal laws and criminal prosecutions made it vastly greater than expected.

Among the many competing for scarce government resources, indigent criminal defendants are hardly a powerful political constituency. Professor Vick notes that in the context of inadequate representation for those facing death sentences "[t]he individuals adversely affected by this crisis—those accused of aggravated murder – are the most hated and the least politically powerful in the country, and political actors, including judges, are not highly motivated to make unpopular decisions that would benefit them."[35] It is not surprising, then, that the result is the inadequacy in funding of defense counsel described above. The Supreme Court left it to the states to provide defense lawyers and states often will choose the most inexpensive way to meet this obligation.

Actually, the problem is more subtle and more difficult. *Gideon* must mean

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31. For example, Judith Kaye, then the Chief Judge of the New York Court of Appeals, formed a commission that found that "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused." Comm'n on the Future of Indigent Def. Servs. *Final Report to the Chief Judge of the State of New York*, N.Y. ST. UNIFIED CT. SYS. 15 (June 18, 2006), http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf; *see also In Defense of Public Access to Justice: An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years After Gideon*, NAT'L LEGAL AID & DEFENDER ASS'N 10-18 (2004), http://www.nasams.org/Defender_Evaluation/la_eval.pdf (describing the method of funding lawyers for indigents in Louisiana).

32. Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272 (2004).

33. 42 U.S.C. § 17501(b)(6) (2006 & Supp. 2010).

34. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (describing incarceration rates, especially among African Americans).

35. Vick, *supra* note 25, at 459.

more than just a right to a lawyer: to have any meaning, it must be that there is a right to competent counsel. The Supreme Court has recognized that the Sixth Amendment of the United States Constitution guarantees a criminal defendant *effective* assistance of counsel.[36] This means that no criminal defendant is to be left to the "mercies of incompetent counsel."[37] But whereas the existence of an attorney for a criminal defendant is easily achieved, ensuring competent counsel is far more difficult and elusive.

In theory, the right to competent counsel can be defined and ensured in a systemic way. But in practice, the attempt to enforce a right to competent counsel on a system-wide basis has proven futile. There have been many challenges to the inadequacy of the system of providing criminal representation within a jurisdiction. Challenges in federal court to the inadequacy of criminal representation in state courts have been dismissed on abstention grounds, as federal courts cannot interfere with ongoing state cases.[38] Actually, those seeking to bring a systemic federal court challenge to the underfunding of defense counsel would face a procedural dilemma. If the suit were brought on behalf of those in the midst of a state prosecution, the federal court would have to abstain under *Younger v. Harris*.[39] But if a suit were brought by those who are not being prosecuted, there would be a serious issue concerning standing and ripeness. This explains the failure of efforts in federal court to challenge the inadequacies in the funding of defense counsel in state courts.

Nor are such systemwide suits in state court likely to succeed. For example, in *Florida v. Public Defender*, the public defender office argued that inadequate funding led to excessive caseloads that prevented it from carrying out its legal and ethical obligations to indigent defendants.[40] The court, though, ruled that the public defender was required to prove prejudice or the existence of a conflict on an individual basis, separate from an excessive caseload in general, to be relieved of its duty to represent indigent criminal defendants. Similarly, in *Kennedy v. Carlson*, the court dismissed on standing grounds a challenge to

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36. Strickland v. Washington, 466 U.S. 668, 689 (1984).

37. McMann v. Richardson, 397 U.S. 759, 771 (1970).

38. *See, e.g.*, Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992) (rejecting a class action challenging the Georgia public defense system); Foster v. Kassulke, 898 F.2d 1144 (6th Cir. 1990) (rejecting an inmate's challenge to the Kentucky public defense system); Gardner v. Luckey, 500 F.2d 712 (5th Cir. 1974) (rejecting a class action challenging the Florida public defense system); Wallace v. Kern, 499 F.2d 1345 (2d Cir. 1974) (rejecting a class action by inmates to enforce their right to a speedy trial).

39. 401 U.S. 37 (1971) (holding that federal courts may not interfere with pending state court criminal proceedings except under extraordinary circumstances).

40. 12 So.3d 798 (Fla. Dist. Ct. App. 2009).

the inadequacy of the funding of public defenders in Minnesota. The court explained that the chief public defender failed to show that indigent clients of the public defenders' office had received ineffective assistance of counsel due to insufficient funding. The court thus concluded that there was not a sufficient showing of injury for standing purposes.[41] As Professor Cara Drinan notes,

> Historically, structural litigation—which has been defined as "a sustained pattern of cases against large power structures invoking the power of the courts to oversee detailed injunctive relief"—has been sparingly used in the indigent defense context. It is estimated that no more than ten of these suits were filed between 1980 and 2000. Moreover, early suits seeking to improve indigent defense failed to generate lasting reform.[42]

State courts have not been receptive to such claims and "to date, a federal forum has not been available to indigent defendants seeking to vindicate their Sixth Amendment right to counsel on a systemic basis."[43]

The primary mechanism then for enforcing *Gideon*'s promise has been an individual criminal defendant's ability to argue that he or she received ineffective assistance of counsel. But the Supreme Court in *Strickland v. Washington*[44] made it very difficult for courts to find ineffective assistance of counsel, even when representation is very deficient. Justice O'Connor, writing for the conservative majority, set a standard that only rarely allows a conviction to be overturned for inadequacy of representation. The Court said that a finding of ineffective assistance of counsel requires demonstrating first that the attorney's performance was so deficient "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[45] But even serious errors by defense counsel are often not sufficient to overturn a conviction or a sentence for ineffective assistance of counsel. Second, the defendant must show prejudice; that is, he or she has to demonstrate a reasonable probability that the outcome would have been different without counsel's deficient performance.[46] In other words, relief for ineffective

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41. 544 N.W.2d 1 (Minn. 1996).

42. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 468 (2009) (footnotes omitted) (quoting Michael Waterstone, *A New Vision of Public Enforcement*, 92 MINN. L. REV. 434, 437 (2007)).

43. *Id.* at 468.

44. 466 U.S. 668 (1984).

45. *Id.* at 687.

46. *Id.* at 693.

assistance of counsel requires that a convicted defendant show that the result of the trial a reasonable probability would have been different if only the attorney had acted competently.

This is usually an insurmountable burden. It is so easy for later judges to say that they think the earlier judge or jury would have come to the same conclusion anyway. Justice Marshall explained exactly this problem in his dissent in *Strickland*: "[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel."[47]

My former colleague, Professor Dennis Curtis, has said that under *Strickland* an attorney will be found to be adequate so long as a mirror put in front of him or her at trial would have shown a breath. Professor Curtis overstates, but not by much. I can identify only two cases in the 25 years since *Strickland* in which the Supreme Court has found the prejudice required for ineffective assistance of counsel.[48] The latter of these, in 2005, was a five-to-four decision, with Justice O'Connor concurring with the majority, reversing an opinion written by then-federal court of appeals judge Samuel Alito.[49]

Moreover, these two cases that found ineffective assistance of counsel—*Wiggins v. Smith* and *Rompilla v. Beard*—both involved inadequate investigation by a defense counsel in a capital case. The Court's more recent decision in *Cullen v. Pinholster* calls into question even these rulings in favor of criminal defendants.[50]

Scott Lynn Pinholster was convicted of murder.[51] His defense lawyers had not been notified in advance that the prosecutor planned to present aggravating circumstances in a penalty phase and therefore did not prepare to present mitigating evidence.[52] Nonetheless, the judge allowed the penalty phase to go forward and the defense lawyers presented only one witness, Pinholster's mother.[53]

After Pinholster was sentenced to death and exhausted his appeals in California state court, his new lawyers filed a writ of habeas corpus in federal

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47. *Id.* at 710 (Marshall, J., dissenting).

48. Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003).

49. *Rompilla*, 545 U.S. 374, *rev'g* Rompilla v. Horn, 355 F.3d 233 (3d Cir. 2004).

50. 131 S.Ct. 1388 (2011).

51. *Id.* at 1395.

52. *Id.*

53. *Id.* at 1396.

court. The lawyers provided declarations showing substantial new evidence that supported the claim of ineffective assistance of counsel. The federal court granted a hearing and the new evidence documented that the defense counsel at trial had undertaken no investigation of mitigating circumstances and had they done so they would have learned that Pinholster suffered from a brain injury, a seizure disorder, and personality disorders. The evidence also included testimony from family members and school officials about Pinholster's abuse as a child.[54] All of this is powerful mitigating evidence that might have caused the jury to have refrained from imposing the death penalty.

The federal district court granted the writ of habeas corpus and ultimately the Ninth Circuit affirmed in an en banc decision. The Supreme Court, though, reversed in an opinion by Justice Thomas. The Court held that the federal district court should not have held the hearing on ineffective assistance of counsel. The Court ruled that the federal court on habeas corpus is limited to considering the evidence that was before the state court and cannot hold an evidentiary hearing. The Court stated: "We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."[55]

The crucial flaw in this conclusion is that the habeas corpus statute expressly allows federal courts to hold an evidentiary hearing. § 2254(e)(2) specifies situations in which federal courts can hold an evidentiary hearing on habeas corpus, including if "[a] factual predicate . . . could not have been previously discovered through the exercise of due diligence." The Supreme Court essentially read this provision out of the statute in holding that federal courts may not hold evidentiary hearings and must decide entirely based on the record that was before the state courts.

The result is that individuals who have substantial evidence of ineffective assistance of counsel, or of a prosecutor's failure to disclose exculpatory evidence, or even of actual innocence, will be unable to present this material on habeas corpus. In theory, the criminal defendants can go to state court, but often state courts are unwilling to hear the evidence or simply deny claims without a hearing and with no more than a postcard.

Moreover, the Court concluded, five-to-four, that the inadequacy of Pinholster's defense lawyers was not sufficient to show ineffective assistance of counsel. The Court stressed the need for great deference to the state courts and concluded that Pinholster could not prove that he was prejudiced by the

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54. *Id.* at 1396-97.

55. *Id.* at 1398.

failings of counsel.[56] But if this total failure of defense counsel to investigate can be rationalized as a strategic choice of counsel and not prejudicial, there will be few instances in which ineffective assistance of counsel can be demonstrated.

Taken together, then, it is possible to explain the failure to implement *Gideon*: The Supreme Court created a mandate without ensuring adequate funding, state and local governments lacked political or legal incentives to provide sufficient resources, and systemic litigation was unsuccessful, leaving the determination of ineffective assistance of counsel in individual cases as the only remedy. But the Court adopted a standard for this form of litigation in *Strickland v. Washington* that makes it exceedingly difficult for a defendant to establish ineffective assistance of counsel. The result is, as death penalty lawyer Stephen Bright has declared, that "[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel."[57]

III. THE LESSONS

A decade ago, on the fortieth anniversary of *Gideon*, an American Bar Association Task Force recommended:

> To fulfill the constitutional guarantee of effective assistance of counsel, state governments should provide increased funding for the delivery of indigent defense services in criminal and juvenile delinquency proceedings at a level that ensures the provision of uniform, quality legal representation. The funding for indigent defense should be in parity with funding for the prosecution function, assuming that prosecutors are funded and supported adequately in all respects.[58]

The same recommendation is sure to be made again on this the fiftieth anniversary of *Gideon*—and I predict it will be uttered in a decade on the sixtieth as well.

Many lessons can be drawn from the manner in which *Gideon* has been implemented. First, governments will not voluntarily adequately fund legal services programs for the poor. So long as a program exists solely for indigents, and especially a politically powerless group like poor criminal defendants,

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56. *Id.* at 1409 ("There is no reasonable probability that the additional evidence Pinholster presented in his state habeas proceedings would have changed the jury's verdict.").

57. Stephen B. Bright, *Turning Celebrated Principles into Reality*, CHAMPION, Jan-Feb. 2003, at 6.

58. BROKEN PROMISE, *supra* note 5, at 41.

funding always will be insufficient. Neither the poor nor their attorneys have sufficient political influence to ensure adequate resources.

Put another way, providing for criminal defendants is regarded as akin to providing welfare. By contrast, the most successful programs politically are those that benefit the nonpoor as well. For example, Social Security and Medicare are perceived as insurance programs rather than welfare and thus attract far greater support. A "civil *Gideon*" program that relies on voluntary action by state legislatures for funding is likely to be inadequate for the same reasons that the implementation of *Gideon* has been insufficient.

Second, creating an affirmative constitutional right requires a mandate to ensure that it is adequately funded. The central problem in implementing *Gideon* has been that the Court created an affirmative right and then left it to the political process to fund. Unlike negative liberties, which generally involve enforcing prohibitions, an affirmative right inherently requires attention to how it will be financed. Moreover, it was left largely to state governments to fund, and without any enforcement mechanism to ensure that funding was adequate.

Third, creating a right to counsel is inadequate unless it is accompanied by a mandate for effective counsel. But this creates an enormous problem in assessing and ensuring effectiveness. *Gideon* assumed that it would be enough for the Court to proclaim the existence of the right to counsel in criminal cases in state court where there was a possible prison sentence. But the right is meaningless without an assurance of effective counsel. Defining the standard for effective assistance of counsel is inherently much more difficult than simply requiring the presence of an attorney. The experience in the criminal context, where the standard adopted by the Court in *Strickland* governs, raises great concern about any effort to provide attorneys and the ability to assure their competence.

Fourth, voluntary actions by the bar will not be sufficient to meet legal needs. In theory, members of the bar could provide pro bono legal representation for indigent criminal defendants. In reality, though, such representation is woefully inadequate to provide for those who cannot afford an attorney. Nor is there reason to believe that such voluntary actions could be sufficient in providing for representation in civil cases under a "civil *Gideon*."

Fifth, systemic problems require systemic solutions. The inadequacy of funding of defense counsel in a state must be dealt with in a systemic way. A case-by-case assessment of adequacy does not succeed in dealing with the overall problem. Yet procedural doctrines, such as abstention and standing and ripeness, make such system-wide remedies difficult if not impossible. A person

who is being prosecuted in state court cannot, because of abstention doctrines,[59] challenge the adequacy of representation in a federal court action. But a person who is not a defendant is unlikely to be able to meet the requirements for standing and ripeness.

The result of all of this has to be a caution for efforts to expand the right to counsel: An unfunded mandate to provide attorneys for the poor without any mechanism for ensuring adequate resources is unlikely to succeed in providing competent counsel. The solution, for *Gideon* and other areas to which it is extended, is to provide enforcement mechanisms to ensure that adequate resources are provided for retaining competent lawyers.

CONCLUSION

In observance of the fiftieth anniversary of *Gideon*, many articles will be written documenting its unfulfilled promise. Once more there will be proposals to ensure adequate funding of criminal defense lawyers for the indigent. All of this is important, and hopefully, this time, the proposals really will make a difference and adequate resources will be devoted to ensuring adequate counsel for indigent criminal defendants.

But I doubt it. My goal in these remarks has been to explain why *Gideon* has not succeeded nearly as much as hoped. Unless these underlying causes are addressed, it is difficult to see much chance for improvement. Unfortunately, neither courts nor legislatures seem inclined to deal with the problem in representation for criminal defendants. The result is a system that is deeply flawed and that is likely to stay that way.

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59. *See* Younger v. Harris, 401 U.S. 37 (1971).