

**FIFTY YEARS OF DEFIANCE AND  
RESISTANCE AFTER *GIDEON* v. *WAINWRIGHT***

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Forthcoming, to be published by the Yale Law  
Journal Company, Inc. in 122 *Yale Law Journal* \_\_ (2013).

Every day in thousands of courtrooms across the nation, from top-tier trial courts that handle felony cases to municipal courts that serve as cash cows for their communities, the right to counsel is violated. Judges conduct hearings in which poor people accused of crimes and poor children charged with acts of delinquency appear without lawyers. Many plead guilty without lawyers. Others plead guilty and are sentenced after learning about plea offers from lawyers they met moments before and will never see again. Innocent people plead guilty to get out of jail. Virtually all cases are resolved in this manner in many courts, particularly municipal and misdemeanor courts, which handle an enormous volume of cases. But it is also how many felony cases are resolved.

Even when representation lasts for more than a few minutes, it is often provided by lawyers struggling with enormous caseloads, who practice triage as they attempt to represent more people than is humanly—and ethically—possible without the resources to investigate their many clients’ cases, retain expert witnesses, and pay other necessary expenses. As a result, they are unable to give their clients informed, professional advice during plea negotiations, which resolve almost all cases in “a system of pleas, not a system of trials.”<sup>3</sup> In the rare case that goes to trial, defense counsel often cannot seriously contest the prosecution’s arguments, raise and preserve legal issues for appeal, or provide information about the defendant that is essential for individualized sentencing. For the poor person accused of a crime, there may be no adversarial system. Prosecutors may determine outcomes in cases with little or no input from defense counsel.

There are exceptions. Some jurisdictions have provided the resources, independence, structure, and supervision that enable capable, caring, and dedicated lawyers to zealously

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<sup>3</sup>*Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012). Ninety-four percent of convictions in state courts are the result of guilty pleas. *Id.* In the federal courts, ninety-seven percent of convictions are the result of guilty pleas. *Id.*

represent their clients. Some public defenders and assigned counsel do heroic work despite overwhelming caseloads and lack of resources. But in many jurisdictions, perfunctory representation and “meet ’em and plead ’em” processing of human beings through the courts remains the dominant culture. Many courts are plea mills: courts of profit that impose fines without any inquiry into the ability of defendants to pay, thus setting them up for failure and return to jail.

The representation received by most poor people accused of crimes—if they receive any at all—is a far cry from the constitutional requirement of the “the guiding hand of counsel at every step in the proceedings,” which was established by *Gideon v. Wainwright*<sup>4</sup> and its progeny.<sup>5</sup> *Gideon* held that “fair trials before impartial tribunals in which every defendant stands equal before the law” “cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”<sup>6</sup> The Court also discussed equality before the law in another case decided on the same day as *Gideon*, reiterating its previous statement that “there can be no equal justice” where the kind of justice a person gets “depends on the amount of money he has.”<sup>7</sup>

Nevertheless, most states, counties, and municipalities—responsible for over ninety-five

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<sup>4</sup>372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

<sup>5</sup>*Gideon* applied to felony cases. The Court later held that children facing commitment to an institution were entitled to counsel as a matter of due process in delinquency proceedings, *In re Gault*, 387 U.S. 1, 34-42 (1967), and that “no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel,” *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972). An accused is entitled to counsel “within a reasonable time” after “the initiation of adversary judicial proceedings,” *see Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008), and at any “critical stage” of a criminal proceeding, such as a preliminary hearing, *Coleman v. Alabama*, 399 U.S. 1, 7-10 (1970), or arraignment, *White v. Maryland*, 373 U.S. 59, 60 (1963). The Court also held that an indigent defendant is entitled to expert assistance when necessary to a fair trial in *Ake v. Oklahoma*, 470 U.S. 68, 77-83 (1985), although its decision was based on due process and not the Sixth Amendment. The American Bar Association, among other organizations, has developed standards for effective representation, *see, e.g.*, AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3d ed. 1992), [http://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/providing\\_defense\\_services.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf), and the effective delivery of public defense services, *see* ABA Standing Comm. on Legal Aid & Indigent Defendants, *Ten Principles of a Public Defense Delivery System*, A.B.A. (Feb. 2002), [www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) [hereinafter *Ten Principles*] (summarizing and citing principles from previous reports, studies and guidelines).

<sup>6</sup>*Gideon*, 372 U.S. at 344.

<sup>7</sup> *Douglas v. California*, 372 U.S. 353, 355 (1963) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)) (holding that a poor person had a right to counsel on appeal).

percent of all criminal prosecutions<sup>8</sup>—have refused to provide funding necessary for counsel and equal justice, despite repeated reports of deficient representation and gross miscarriages of justice. There is no public support for such funding, and governments have no incentive to provide competent representation that could frustrate their efforts to convict, fine, imprison and execute poor defendants. Many governments have a long history of disregarding or resisting unpopular United States Supreme Court decisions—whether they require desegregation of the schools or the right to counsel—unless they are enforced. The right to counsel is not enforced. Many judges tolerate or welcome inadequate representation because it allows them to process cases quickly. The Supreme Court has refused to require competent representation, instead adopting a standard of “effective counsel” that hides and perpetuates deficient representation.

The cost of this one-sided system is enormous. Innocent people are convicted and sent to prison while the perpetrators remain at large. Important issues, such as the system’s pervasive racism—from stops by law enforcement officers to disparate sentencing—are ignored. People are sentenced without consideration of their individual characteristics, allowing race, politics, and other improper factors to influence sentences. Over 2.2 million people—a grossly disproportionate number of them African Americans and Latinos<sup>9</sup>—are in prisons and jails<sup>10</sup> at a cost of \$75 billion a year.<sup>11</sup> Nearly an additional five million people are on probation, parole, or supervised release.<sup>12</sup> Over seventy thousand children are held in juvenile facilities.<sup>13</sup> Even those

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<sup>8</sup>See NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 13 (Brian J. Ostrom, Neal B. Kauder & Robert C. LaFountain eds., 2003), <http://bjs.ojp.usdoj.gov/content/pub/pdf/ewsc02-npcsp.pdf>.

<sup>9</sup>One in 15 African American men over 18 and 1 in 36 Latino men over 18 are imprisoned, while only 1 in 106 white men over 18 is behind bars. *One in 100: Behind Bars in America 2008*, PEW CENTER ON THE STATES 6 (2008), [www.pewstates.org/uploadedFiles/PCS\\_Assets/2008/one%20in%20100.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2008/one%20in%20100.pdf). One in 9 African American men between the ages of 20 and 34 is behind bars. *Id.*

<sup>10</sup>Lauren E. Glaze, *Correctional Population in the United States, 2010*, BUREAU OF JUST. STAT. 7 (2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf>.

<sup>11</sup>John Schmitt, Kris Warner & Sarika Gupta, *The High Budgetary Cost of Incarceration*, CENTER FOR ECON. & POL’Y RES. 2 (2010), [www.cepr.net/documents/publications/incarceration-2010-06.pdf](http://www.cepr.net/documents/publications/incarceration-2010-06.pdf).

<sup>12</sup>Glaze, *supra* note 10, at 2-3. When those under supervision in the community are combined with those in prison and jail, one in every thirty-three adults, or 3.1% of the population, is under some form of correctional control. *Id.* at 2. The rates are drastically elevated for African Americans. One in every eleven African Americans was under correctional control at the end of 2007. *One in 31: The Long Reach of American Corrections*, PEW CENTER FOR THE STATES 5 (2009), [www.pewstates.org/uploadedFiles/PCS\\_Assets/2009/PSPP\\_1in31\\_report\\_FINAL\\_WEB\\_3-26-09.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2009/PSPP_1in31_report_FINAL_WEB_3-26-09.pdf); *see also* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 179-80 (2010) (discussing the effects of mass incarceration on the African

who have completed their sentences may be deported, denied the right to vote, dishonorably discharged from the Armed Forces, denied public benefits, and denied business or professional licenses.<sup>14</sup> Reentry into society is extremely difficult,<sup>15</sup> extending the costs to the families and communities of those who have been imprisoned.<sup>16</sup>

There are expressive costs as well. A system in which all of the key actors routinely ignore one of its most fundamental constitutional requirements is not a system based on the rule of law, no matter what it claims to be. When those actors shirk their constitutional obligations and bring the immense power of the state down most heavily on African Americans and Latinos, people cease to have confidence in the courts. The system lacks legitimacy and credibility and is undeserving of respect. For this to change, courts, legislatures, executives, and members of the legal profession will need to respond with a sense of urgency and commitment to justice that has been missing in most places during the last fifty years.

## I. PROSECUTORS DETERMINE OUTCOMES IN MANY CASES WITH LITTLE OR NO INPUT FROM THE DEFENSE

The United States supposedly has an adversary system of justice as opposed to an inquisitorial system, employed in much of the rest of the world.<sup>17</sup> In the latter, a judge or

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American community).

<sup>13</sup>CHILDREN'S DEF. FUND, THE STATE OF AMERICA'S CHILDREN: HANDBOOK 2012, at 48 (2012). Since 1997, African American children have been at least three-and-a-half times as likely and Latino children at least one-and-a-half times as likely as white children to be in residential placement. *Id.*

<sup>14</sup>*Padilla v. Kentucky*, 130 S. Ct. 1473, 1488 (2010) (Alito, J., concurring) (citing Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705-06 (2002)).

<sup>15</sup>See PEW CTR. ON THE STATES, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 9-18 (2010), [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2010/Collateral\\_Costs%281%29.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2010/Collateral_Costs%281%29.pdf), (reporting that incarceration reduces former inmates' earnings by forty percent and limits their future economic mobility).

<sup>16</sup>See *id.* at 4-5, 18-21 (reporting that 2.7 million children have a parent behind bars—1 in 9 African American children, 1 in 28 Latino children, and 1 in 57 white children—and that a parent's incarceration hurts children educationally and financially); see also ALEXANDER, *supra* note 12, at 171-75; TODD CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007).

<sup>17</sup>The "lawyer-conducted" Anglo-American adversary system is practiced in the United States, England, and other countries founded on English common law, as opposed to the judge-driven "European and European-derived" system found elsewhere. See JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 1 (2005); see also Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989) (explaining that the

magistrate is primarily responsible for directing the investigation and sifting through the evidence and establishing the true facts.<sup>18</sup> America's adversary system relies on the prosecution and defense each to conduct investigations, analyze evidence, select witnesses, argue law, and present "partisan advocacy"<sup>19</sup> to a neutral fact-finder. The system is premised on "the principle that truth—as well as fairness—is best discovered by powerful statements on both sides of the question."<sup>20</sup> For this system to work, there cannot be significant disparities between the skills and resources of the prosecution and defense. Both must be able to investigate the case and present their evidence and arguments fully and forcefully.

However, for the most part, only very wealthy individuals and corporations can afford to pay for hundreds—often thousands—of hours of representation by experienced trial lawyers and the cost of investigation, expert witnesses, and other expenses of defending a criminal case within the adversary system. On the other hand, the lawyer assigned to defend a poor person usually has little or no time and few resources to investigate the charges and mount a defense. For those who are indigent and cannot afford costly representation by experienced attorneys, the system is inquisitorial, but the prosecutor, not a neutral judicial officer, serves as inquisitor.

Prosecutors have vast resources and immense power in conducting their inquests and dictating outcomes in the plea bargaining that resolves the overwhelming majority of cases. Governments maintain well-staffed offices specializing in the prosecution of cases. Prosecutors regularly appear in court, and many judges rely on their recommendations on issues ranging from pretrial release to sentencing. Some judges even rely on prosecutors to write their orders.<sup>21</sup> Prosecutors have access to law enforcement agencies to investigate cases and laboratories to conduct scientific tests and present expert testimony.<sup>22</sup> They can subpoena witnesses to testify

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majority of the world uses some version of the inquisitorial system that evolved primarily in continental Europe).

<sup>18</sup>LANGBEIN, *supra* note 17, at 1 ("The striking peculiarity of the Anglo-American trial is that we remit to the lawyer-partisans the responsibility for gathering, selecting, presenting, and probing the evidence. . . . In the European systems, by contrast, evidence is gathered by judges or judge-like investigators, public officers who operate under a duty to seek the truth.").

<sup>19</sup>Herring v. New York, 422 U.S. 853, 862 (1975).

<sup>20</sup>Penson v. Ohio, 488 U.S. 75, 84 (1988) (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569, 569 (1975)) (internal quotation marks omitted).

<sup>21</sup>*See, e.g.*, CLIVE STAFFORD SMITH, *THE INJUSTICE SYSTEM* 210-11 (2012) (describing a Florida judge allowing prosecutors to prepare sentencing orders in capital cases); *see also* Stephen B. Bright & Patrick Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 803-811 (1995) (describing numerous instances in which state attorneys wrote orders signed by judges without any changes).

<sup>22</sup>*See* David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1731-36 (1993) (describing the resources available to the prosecution).

before grand juries and produce all documents and records relevant to a case.<sup>23</sup> They have a power that no other litigant has: the ability to reward witnesses for providing information or testimony by granting immunity from prosecution, dismissing or reducing criminal charges, or informing sentencing judges of cooperation.<sup>24</sup> They can place informants in the cells of defendants.<sup>25</sup> On the other hand, in the overwhelming majority of criminal cases against poor defendants, the defense conducts no investigations whatsoever.

In most jurisdictions, prosecutors are not required to reveal much of what they know about the case to defense counsel. “[T]he prosecutor’s institutional role in controlling access to information relevant to a defendant’s guilt, and the prosecutor’s ability to withhold evidence that might prove a defendant’s innocence . . . dramatically distorts the ability of the adversary system to function fairly and properly.”<sup>26</sup> Most jurisdictions allow prosecutors to withhold almost everything about their case and conduct “trial by ambush.”<sup>27</sup> Some prosecutors make plea offers conditioned upon the defendant’s not filing any motions or seeking discovery.<sup>28</sup> The Supreme Court has held that prosecutors are not required to disclose exculpatory evidence to a grand jury before it decides whether to issue formal charges<sup>29</sup> or to defense counsel before the entry of a guilty plea.<sup>30</sup> Prosecutors may even demand that a defendant release officials from civil liability

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<sup>23</sup>Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 400-01 (1992).

<sup>24</sup>*Id.* at 416-17.

<sup>25</sup>*See, e.g.*, *Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (holding that an accused’s statements to a jailhouse informant placed in his cell by police are admissible so long as the informant does not ask questions or take coercive steps to elicit information).

<sup>26</sup>Gershman, *supra* note 23, at 449; *see also id.* at 449-54 (describing the prosecutor’s control of information); Luban, *supra* note 22, at 1737 (“[C]riminal defendants have virtually no discovery rights against the prosecution in most jurisdictions.”).

<sup>27</sup>*See* Norman L. Reimer, *Discovery Reform: The Time for Action Is at Hand*, CHAMPION, Mar. 2012, at 7, 7 (providing illustrative examples and arguing that “[t]rial by ambush practices that leave the defense clueless as to the identity, background and reliability of key witnesses until the eve of trial, or later, must end,” for “[t]hese practices not only ambush individual defendants, they ambush justice”); *see also* Paul C. Giannellia & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 FORDHAM L. REV. 1493 (2007) (discussing “trial by ambush” in the use of expert witnesses).

<sup>28</sup>*See, e.g.*, R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1431 & n.8 (2011) (describing plea agreements with explicit discovery-waiver provisions).

<sup>29</sup>*United States v. Williams*, 504 U.S. 36, 45-55 (1992) (holding that a district court may not dismiss an otherwise valid indictment on the ground that the government failed to disclose “substantial exculpatory evidence” to the grand jury).

<sup>30</sup>*United States v. Ruiz*, 536 U.S. 622, 632-33 (2002) (holding that the Constitution does not require the government to disclose material impeachment information prior to entering a plea agreement with a criminal defendant).

in exchange for dismissal of charges.<sup>31</sup>

The exclusive access to information and complete, unbridled discretion in charging and plea bargaining enables prosecutors to dictate the resolution of many cases and often to determine sentences. Prosecutors decide whether to charge, what to charge, whether to charge in state or federal court or both,<sup>32</sup> whether to allow defendants to enter diversion programs, whether to agree to pretrial release as part of a plea bargain, and whether to grant immunity.<sup>33</sup> They can overcharge defendants in order to increase their bargaining power. They may seek the death penalty or other enhanced penalties and mandatory minimum sentences. In jurisdictions with sentencing guidelines, prosecutors influence and often control the length of sentences by what they charge and, in the federal courts, whether they agree to notify the sentencing judge that the defendant has rendered “substantial assistance.”<sup>34</sup> In all types of cases, prosecutors may agree to reduce the charges, withdraw their notice to seek enhanced sentences, agree to a specific sentence, or make some other concession in exchange for the defendant’s entry of a guilty plea and waiver of a trial by jury and any appeals.<sup>35</sup> Judges are often left with little or no sentencing discretion,<sup>36</sup> and defense counsel may be relegated to the role of messenger.

These vast prosecutorial powers and the ruthless use of them in plea bargaining and

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<sup>31</sup>Town of Newton v. Rumery, 480 U.S. 386 (1987).

<sup>32</sup> The decision to bring charges in state or federal court may be based upon which jurisdiction has the more severe punishment. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 479 (1996) (Stevens, J., dissenting) (noting that sentences for drug offenses tend to be substantially more severe in the federal system than in the state systems and that, in the case before the Court, the federal sentence might be as long as a mandatory life term, but in state court it could have been as short as twelve years, less work-time credits of half that amount).

<sup>33</sup>*See* Gershman, *supra* note 23, at 405-08 (describing discretionary decisions of prosecutors with regard to charging and resolving cases); *see generally* ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* (2007) (arguing that unchecked prosecutorial discretion leads to unjust results in the criminal system).

<sup>34</sup>*See* 18 U.S.C. § 3553(e) (2006); 28 U.S.C. § 994(n) (2006); U. S. SENTENCING COMM’N, *GUIDELINES MANUAL* § 5K1.1 (2011). As one scholar has noted, “Congress created a sentencing system that provides prosecutors tremendous leverage in the plea bargaining process, forced criminal defense attorneys to adopt the role of transactional attorneys rather than zealous advocates, and virtually eliminated the criminal jury as a viable check on government overreaching.” Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 373 (2005) (footnotes omitted).

<sup>35</sup>*See* McCleskey v. Kemp, 481 U.S. 279, 312 (1987) (“A prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case.”).

<sup>36</sup>*See, e.g.*, 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> (describing how sentencing laws give prosecutors power to determine sentences).

determining sentences were upheld by the Supreme Court in *Bordenkircher v. Hayes*.<sup>37</sup> There, a prosecutor offered Paul Hayes a sentence of five years in prison for forging a check for \$88.30 and warned Hayes that if he rejected the offer the prosecutor would file repeat offender papers requiring a mandatory sentence of life imprisonment. Hayes declined the offer, and the prosecutor carried out his threat, obtaining the mandatory life sentence. The Supreme Court upheld the prosecutor's actions, calling them part of the "'give-and-take' of plea bargaining."<sup>38</sup>

Prosecutors exercise this power with virtually no oversight or accountability. They have absolute immunity for their work in prosecuting cases<sup>39</sup> and may not be held liable even when their failure to train their assistants results in suppression of exculpatory evidence and conviction of innocent people.<sup>40</sup> The Supreme Court has made it impossible for a defendant to prevail on a claim of selective prosecution,<sup>41</sup> and has refused to require prosecutors to reveal the basis for their charging decisions, even when these decisions produce racial disparities.<sup>42</sup> Although prosecutors are, in theory, bound by the ethics rules promulgated by each state, the reality is that disciplinary measures are almost never imposed on prosecutors.<sup>43</sup> As is often the case in various contexts, unchecked power sometimes leads to abuse.<sup>44</sup>

An inquisitorial system masquerading as an adversary system with all power concentrated in the prosecution is not fair or just. Prosecutors evaluate cases not as objective inquisitors, but as adversaries and politicians.<sup>45</sup> Many are elected on tough-on-crime platforms,

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<sup>37</sup>434 U.S. 357 (1978).

<sup>38</sup>*Id.* at 363. The Court relied on the "relatively equal bargaining power" between the prosecution and the defense. *Id.* at 362 (quoting *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting)). However, Hayes had no power—only a choice between accepting the plea offer for a sentence of five years or rejecting it and spending the rest of his life in prison.

<sup>39</sup>*Burns v. Reed*, 500 U.S. 478 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

<sup>40</sup>*Connick v. Thompson*, 131 S. Ct. 1350 (2011).

<sup>41</sup>*See McCleskey v. Kemp*, 481 U.S. 279, 292-97 (1987); *Wayte v. United States*, 470 U.S. 598, 607 (1985).

<sup>42</sup>*See United States v. Bass*, 536 U.S. 862 (2002) (per curiam); *McCleskey*, 481 U.S. at 296-97 & n.18; *In re United States*, 397 F.3d 274 (5th Cir. 2005) (per curiam).

<sup>43</sup>*See David Keenan et al., The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011), <http://yalelawjournal.org/2011/10/25/keenan.html>; Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997–2009*, VERITAS INITIATIVE, [http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct\\_Exec\\_Sum.pdf](http://www.veritasinitiative.org/downloads/ProsecutorialMisconduct_Exec_Sum.pdf) (showing that prosecutors are not penalized for misconduct).

<sup>44</sup>*See Gershman, supra* note 23, at 408 (decrying the regular overcharging, discrimination, vindictiveness, plea bargaining abuses, and other misconduct that occurs "without meaningful judicial review or correction").

<sup>45</sup>All but four states (Connecticut, Delaware, New Jersey, and Rhode Island) elect their

promising convictions and severe sentences. Moreover, even the most conscientious prosecutor committed to a just outcome lacks critical information about the accused—his or her version of events as well as personal characteristics relevant to culpability and punishment—necessary to make fully informed decisions. Justice in America supposedly requires a working adversary system, as the attorneys general of twenty-three states and territories recognized in 1963 by filing an amicus curiae brief in the Supreme Court in support of Clarence Earl Gideon’s argument that the Sixth Amendment required counsel for defendants in the state courts.<sup>46</sup> Today, however, denying the poor adequate representation is a strategy for winning cases, used by some prosecutors.<sup>47</sup>

## II. GOVERNMENTS HAVE DISREGARDED THEIR CONSTITUTIONAL OBLIGATION TO PROVIDE COUNSEL

Fifty years after *Gideon*, the right to counsel and equal justice are as much a fiction as the adversary system. The kind of justice people receive depends very much on the amount of money they have, which determines whether they have counsel, when they obtain counsel, whether they have access to investigators and expert witnesses, and whether the representation provided is zealous or perfunctory. This is apparent from the moment someone is arrested and jailed. A person who can afford a lawyer usually retains one at once. The lawyer will attempt to secure the person’s immediate release from jail, often successfully, so that the client can maintain employment, take care of family, and prepare for trial. A team of lawyers, investigators, paralegals, and support staff will begin an investigation while the evidence is available and the memories of witnesses are fresh. If it appears that the charges lack merit, the lawyers will attempt to secure dismissal of the case and, if unsuccessful, prepare for and represent the client trial, asserting and protecting all of the client’s rights at trial and for appeal. If the client appears to be guilty of the crime charged or a lesser offense, the lawyer will engage in plea bargaining based upon a detailed knowledge of the facts of the crime and the background of the client. If the client is convicted at trial or by entering a guilty plea, the lawyer will provide individualized,

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chief prosecutors. Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 n.3 (2012). The United States is the only country in the world where citizens elect prosecutors. *Id.*

<sup>46</sup>See Brief for State Governments as Amici Curiae Supporting Petitioner, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155), 1962 WL 75209; ANTHONY LEWIS, *GIDEON’S TRUMPET* 147-52 (1964).

<sup>47</sup>For example, after a trial judge permitted a public defender in Miami to decline representation in one complex case carrying a sentence of life imprisonment because the public defender could not competently and ethically handle it due to obligations to 164 clients in pending felony cases, the prosecutor appealed and obtained a reversal of the order. *Bowens v. State*, 39 So.3d 479, 480-82 (Fla. App. 2010). It is hard to imagine the State having any interest in seeking reversal of a judge’s decision allowing a public defender to decline a single complex case except to take advantage of the public defender’s excessive workload.

client-specific advocacy with regard to sentencing.

In contrast, poor people accused of crimes, although entitled to counsel “within a reasonable time” after “the initiation of adversary judicial proceedings,”<sup>48</sup> may languish in jail for days, weeks, or months after arrest without a lawyer.<sup>49</sup> They do not receive the “consultation, thoroughgoing investigation and preparation” that are “vitally important” from the outset in a case.<sup>50</sup> As a result, they may lose their jobs, homes, and means of transportation, even though the charges may later be dismissed. Jacqueline Winbrone even lost her husband. She was detained after arrest in New York because she could not make \$10,000 bail. With no lawyer to seek a reduction, she remained in jail and was unable to take her husband to dialysis and, as a result, he died.<sup>51</sup> She was later released on her personal promise to return to court and ultimately the charge was dismissed.<sup>52</sup> Diego Moran, facing the death penalty in Del Rio, Texas, asked for a lawyer the day after his arrest, but did not receive one for over eight months.<sup>53</sup> A woman in Mississippi charged with shoplifting spent eleven months in jail before a lawyer was appointed to her case, and three additional months before entering a guilty plea.<sup>54</sup> Many poor people spend more time in jail waiting for the appointment of a lawyer and a hearing than they would spend if found guilty and sentenced.<sup>55</sup> Some jurisdictions have “jail clearing days” when people who have spent more time in jail than any sentence they might receive can plead guilty for time served. Innocent people plead guilty to get out of jail.<sup>56</sup>

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<sup>48</sup>*Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008) (quoting *Michigan v. Jackson*, 475 U.S. 625, 630 n.3 (1986)). Defendants are entitled to counsel at preliminary hearings, *Coleman v. Alabama*, 399 U.S. 1 (1970), which are scheduled in most jurisdictions within ten to twenty days of arrest and provide an opportunity for dismissal of the charges or a reduction of bond, but defendants without counsel may not receive preliminary hearings because there is no counsel to ask for them.

<sup>49</sup>See NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 85-87 (2009), <http://www.constitutionproject.org/manage/file/139.pdf> [hereinafter JUSTICE DENIED].

<sup>50</sup>*Powell v. Alabama*, 287 U.S. 45, 57 (1932).

<sup>51</sup>*Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 360 n.3 (N.Y. App. Div. 2009) (Peters, J., dissenting), *aff’d as modified*, 930 N.E.2d 217 (N.Y. 2010).

<sup>52</sup>*Id.*

<sup>53</sup>Brian Chasnoff, *Indigent Often Are Left in a Legal Limbo*, SAN ANTONIO EXPRESS-NEWS, Oct. 10, 2010, at A1.

<sup>54</sup>*Assembly Line Justice: Mississippi’s Indigent Defense Crisis*, NAACP LEGAL DEF. & EDUC. FUND, INC. 3 (2003).

<sup>55</sup>JUSTICE DENIED, *supra* note 49, at 86-87; Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. LAW. 18-19 (2009), <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808>.

<sup>56</sup>See John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty* 16-17 (Cornell Legal Studies Research Paper 2012), <http://ssrn.com/abstract=2103787> (“[I]nnocent persons charged with relatively minor offenses often plead guilty in order to get out of jail, to avoid the hassle of having criminal charges hanging over their heads, or to avoid being punished for exercising their right to trial.”); see also *When the Innocent Plead Guilty*, INNOCENCE PROJECT (last visited Jan. 28, 2013),

An ABA report in 2004 reached “the disturbing conclusion that thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation.”<sup>57</sup> A national study in 2009 found that in misdemeanor cases—which far outnumber felonies and which affect millions of people<sup>58</sup>—judges were encouraging defendants to plead guilty without counsel, prosecutors were talking directly with defendants and convincing them to plead guilty without counsel, defendants were discouraged from asking for counsel because of application fees for a public defender as high as \$200, and defense lawyers usually had too many cases to provide competent representation.<sup>59</sup>

Other studies confirm that judges and prosecutors are routinely ignoring the right to counsel established by *Gideon* and its progeny. For example, one report found seventy percent of defendants in misdemeanor cases in twenty-one Florida counties entered pleas of guilty or no contest at arraignments that lasted an average of 2.93 minutes in 2011.<sup>60</sup> One-third were not represented by counsel.<sup>61</sup> Some defendants were not advised of their right to counsel and others were handed forms encouraging them to waive counsel.<sup>62</sup> Poor defendants in Florida must pay a minimum fifty dollar fee for representation, which cannot be waived or reduced by trial judges no matter how destitute the defendant.<sup>63</sup> Unrepresented defendants were more likely to plead guilty or no contest than defendants represented by counsel.<sup>64</sup> In Kentucky, even fewer people accused of misdemeanor offenses—about thirty percent—were represented by counsel.<sup>65</sup> Less than ten percent of the accused were provided counsel in two populous counties near Cincinnati,

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[http://www.innocenceproject.org/Content/When\\_the\\_Innocent\\_Plead\\_Guilty.php](http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php).

<sup>57</sup>Standing Comm. on Legal Aid & Indigent Def., *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice*, AM. BAR ASS’N (2004), [http://www.americanbar.org/groups/legal\\_aid\\_indigent\\_defendants/initiatives/indigent\\_defense\\_systems\\_improvement/gideons\\_broken\\_promise.html](http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html).

<sup>58</sup>*See* Boruchowitz et al., *supra* note 55, at 11 (estimating that at least ten million misdemeanor cases are filed each year); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280-82, 297-303 (2011) (discussing the number of misdemeanor cases and the significant consequences of convictions in those cases).

<sup>59</sup>Boruchowitz et al., *supra* note 55, at 14-22.

<sup>60</sup>Alisa Smith & Sean Maddan, *Three-Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. LAW. 23 tbl.9 (July 2011), <http://www.nacdl.org/reports/threeminutejustice>.

<sup>61</sup>*Id.*

<sup>62</sup>*Id.* at 15, 23.

<sup>63</sup>*Id.* at 18.

<sup>64</sup>*Id.* at 15.

<sup>65</sup>David Carroll, *Underrepresentation in Kentucky Misdemeanor Courts*, NAT’L LEGAL AID & DEFENDER ASS’N (Nov. 16, 2011), <http://nlada.net/jseri/blog/underrepresentation-kentucky-misdemeanor-courts>; *see also* Dave Malaska, *Trampling over the Sixth Amendment: NKY Courts Play Fast and Loose with Rules*, CITYBEAT (Cincinnati) (Nov. 9, 2011), [http://www.citybeat.com/cincinnati/article-24355-trampling\\_over\\_the\\_sixth\\_amendment.html](http://www.citybeat.com/cincinnati/article-24355-trampling_over_the_sixth_amendment.html); *DPA Misdemeanor Appointments*, KY. DEP’T OF PUB. ADVOCACY, <http://dpa.ky.gov> (follow hyperlink on bottom right) (last visited Feb. 8, 2013).

Campbell and Kenton.<sup>66</sup> Many courts in Michigan “simply do not offer counsel in misdemeanor cases” while others “avoid their constitutional obligation to provide counsel” by accepting “uninformed waivers,” prosecutors agreeing to release from jail and sentences of time served without counsel, and “the threat of personal financial strains” because of “unfair cost recovery measures,”<sup>67</sup> and accept guilty pleas in misdemeanor cases on “McJustice Days.”<sup>68</sup> A Colorado statute requires defendants in misdemeanor cases to be informed of plea offers by a prosecutor before applying for a public defender.<sup>69</sup>

Fees for counsel may be waived in most states that have them, but defendants are often not told that the fee can be waived or that they have a right to a lawyer if they cannot afford one. A typical example is the case of Hills McGee, who was told only that he had to pay \$50 to apply for a public defender when he appeared in court in Augusta, Georgia on charges of public drunkenness and obstruction of the law enforcement officer who arrested him. Mr. McGee, a 53-year old man whose sole source of income was a Veterans Administration disability payment of \$243 per month, was unable to pay the \$50 fee and pleaded guilty without a lawyer. Without any inquiry into his income or ability to pay, a judge fined him \$200 plus \$70 in fees and surcharges. Because Mr. McGee did not have \$270 that day, the judge told him he could pay the fine in installments to a private probation company. The probation company charged an “enrollment fee” of \$15 and \$39 a month for accepting Mr. McGee’s monthly payments. After struggling to make monthly payments for over a year, Mr. McGee had paid \$552 on his \$270 fine. He was jailed because he still owed but was unable to pay the last \$186.<sup>70</sup>

Many poor people do not see a lawyer until moments before the court proceeding in which their cases are resolved. They have a few minutes of conversation with harried lawyers with little knowledge of their clients and cases and few resources to hire investigators and experts. Some do not even talk to a lawyer. Reontay Miller, a seventeen-year-old African American child charged in adult court with stealing a go-cart (a felony) with his brother, asked for a lawyer the first time he appeared before Superior Court in Cordele, Georgia in March 2012. An investigator from the public defender office had a brief conversation with him. He did not speak to an attorney. Later that morning he was in one of seven groups of defendants who pleaded guilty. While accepting the plea, the judge asked Reontay if he was satisfied with his attorney’s services. The teen looked around, confused, and said, “I don’t have one.” A public defender standing near the group of defendants entering pleas volunteered that he represented him, but said nothing on behalf of Reontay. The court sentenced Reontay to five years probation, a \$300 fine, and \$500 restitution, and imposed the \$50 public defender fee.<sup>71</sup> One of the three

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<sup>66</sup> Malaska, *supra* note 65.

<sup>67</sup> NAT’L LEGAL AID & DEFENDER ASS’N, A RACE TO THE BOTTOM: SPEED AND SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS, at ii-iii (2008), [http://www.mynlada.org/michigan/michigan\\_report.pdf](http://www.mynlada.org/michigan/michigan_report.pdf); *see id.* at 29, 34, 36, 46.

<sup>68</sup> *See id.* at 15, 20, 22, 32.

<sup>69</sup> COLO. REV. STAT. § 16-7-301(4) (West 2006). The statute has been challenged in *Colo. Criminal Def. Bar v. Suthers*, No.10-CV-02930 (D. Colo. filed Jan. 20, 2012), [www.nacdl.org/WorkArea/DownloadAsset.aspx?id=23584&I:6ID:23554](http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=23584&I:6ID:23554).

<sup>70</sup> Petition for Writ of Habeas Corpus, McGee v. Companaro, No. 2018-RCHM-1 (S.D. Ga. Jan. 22, 2010)

<sup>71</sup> Memorandum from Abigail Leinsdorf and Atteeyah Hollie Regarding Proceedings in Cordele Superior Court (Mar. 13, 2012) (on file with authors).

public defenders in the office for that circuit wrote a client in jail: “[E]xplain to me why you are requesting a preliminary hearing. I would like to know why you feel like a preliminary hearing is needed in your case.”<sup>72</sup> The public defender also advised the client that she would not file a motion to reduce bond for ninety days.<sup>73</sup>

Those in custody may have their only conversation with a lawyer while handcuffed to other defendants on either side of them.<sup>74</sup> Despite the complete inability of the lawyers to meet even the most minimal professional responsibilities—such as having confidential communications and being sufficiently informed about the charges and their clients to give advice—these discussions are very often followed a few minutes later by the entry of a guilty plea and sentencing. A California lawyer explained that he was able to handle a high volume of cases because seventy percent of his clients entered guilty pleas at the first court appearance after he spent thirty seconds explaining the prosecutor’s plea offer to them.<sup>75</sup> The lawyer processed cases in one of the twenty-four California counties that contract with lawyers to handle the cases of people unable to afford lawyers.<sup>76</sup> Contracts are often awarded to the lowest bidder, creating an incentive for lawyers to handle a high volume of cases and spend as little time as possible on each case in order to make a profit. One contract defender repeatedly fought off low bidders by reducing his budget, which had been forty-one percent of the prosecutor’s budget in 2000, to only twenty-seven percent of the prosecutor’s budget in 2005. Yet in 2006, he was undercut by a bid that was almost fifty percent less than his by a firm employing even fewer lawyers spending even less time on each case.<sup>77</sup>

Such unconscionable low-bid contracts are the most egregious example of how inadequate funding “continues to be the single greatest obstacle to delivering ‘competent’ and

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<sup>72</sup>Letter from Rashawn Clark, Assistant Pub. Defender, to Client (Dec. 28, 2011) (on file with authors).

<sup>73</sup>*Id.*; Letter from Rashawn Clark, Assistant Pub. Defender, to Client (Jan. 19, 2012) (on file with authors).

<sup>74</sup>Both authors have observed this in various courtrooms in the South.

<sup>75</sup>Laurence A. Benner, *The Presumption of Guilt: Systemic Factors That Contribute to Ineffective Assistance of Counsel in California*, 45 CAL. W. L. REV. 263, 305 (2009).

<sup>76</sup>*See id.* at 300. In California, twenty-four of fifty-eight counties use contract defenders. One county relies primarily on an assigned counsel program and the rest have public defender offices as the primary provider of representation. *Id.* at 284, 307. California and Pennsylvania are the only states that require counties to provide all funding for indigent defense. Several states, including Colorado, Connecticut, Delaware, Florida, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Vermont, Virginia, West Virginia, and Wisconsin provide all funding for representation of indigent defendants. Alabama, Alaska, Iowa, Kentucky, and Wyoming provide primary funding (51% or more), supplemented by their counties. Counties provide primary funding in Arizona, Arkansas, Georgia, Idaho, Illinois, Indiana, Louisiana, Michigan, Mississippi, Nebraska, Nevada, Ohio, South Carolina, Texas, Utah, and Washington, with supplemental funding by the state. *See* Kathleen E. Mollison, *50-State Survey of Indigent Defense Systems* (2012) (unpublished manuscript) (on file with authors).

<sup>77</sup>CAL. COMM’N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS ON FUNDING OF DEFENSE SERVICES IN CALIFORNIA 10-12 (2008).

‘diligent’ defense representation.”<sup>78</sup> Whether the poor are represented by public defenders, assigned counsel or contract lawyers, “the most visible sign of inadequate funding is attorneys attempting to provide defense services while carrying astonishingly large caseloads.”<sup>79</sup> Seven public defenders in one office in Georgia each completed representation or “closed” over 250 felony cases in the twelve months ending June 30, 2012, according to records of the state public defense agency.<sup>80</sup> Other jurisdictions have struggled with similar caseloads.<sup>81</sup> As a result of such caseloads, “defense lawyers are constantly forced to violate their oaths as attorneys because their caseloads make it impossible for them to practice law as they are required to do according to the profession’s rules.”<sup>82</sup> It is doubtful that a lawyer can competently handle 150 felonies in a year, a maximum established in 1973.<sup>83</sup>

The workload of Missouri’s statewide public defender program increased by more than twelve thousand cases in a six-year period ending in 2005, but the program received no additional staff during that time.<sup>84</sup> At the end of 2012, it was seventy-one lawyers and sixty investigators short of what it needed to handle its workload.<sup>85</sup> The program had one investigator for every 1,461 cases.<sup>86</sup> The director of the state public defender commission informed the governor and the state’s justices, judges, and legislators in 2011 that “[t]riage has replaced justice in Missouri’s courts,” people languish in jail “for weeks or even months with no access to counsel,” and attorneys are forced to take “shortcuts that lead to wrongful convictions.”<sup>87</sup> The number of public defenders in Minnesota fell from 423 in 2008 to 350 in 2010, prompting a judge there to comment that the courts were “fast becoming the courts of McJustice” because “[q]uality is sacrificed for efficiency.”<sup>88</sup>

Lawyers for the poor are often under financial and political pressures to ignore ethical

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<sup>78</sup>JUSTICE DENIED, *supra* note 49, at 7.

<sup>79</sup>*Id.*

<sup>80</sup>Ga. Pub. Defender Standards Council, Attorney Caseload Comparison—July 1, 2011 to June 30, 2012, at 6-8 (Dec. 14, 2012) (on file with authors).

<sup>81</sup>*See* JUSTICE DENIED, *supra* note 49, at 65-70.

<sup>82</sup>*Id.* at 7.

<sup>83</sup>*Id.* at 66. Some public defender offices have conducted weighted caseload studies to determine how much time different kinds of cases require. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 140-60 (2011), [http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf). For example, the public defender office in Lincoln, Nebraska, established a caseload standard of 127 felonies per year. *Id.* at 157.

<sup>84</sup>State ex rel. Mo. Pub. Defender Comm’n v. Pratte, 298 S.W.3d 870, 877 (2009).

<sup>85</sup>*Fiscal Year 2012 Annual Report*, MO. PUB. DEFENDER COMM’N 10-11 (2012), <http://www.publicdefender.mo.gov/about/FY2012AnnualReport2.pdf>.

<sup>86</sup>*Id.* at 11.

<sup>87</sup>Memorandum from Cathryn R. Kelly, Dir., State Pub. Defender Comm’n, to Governor Nixon, Members of the Supreme Court, Members of the Gen. Assembly, and Presiding Judges 2 (Oct. 1, 2011) (on file with authors).

<sup>88</sup>Jeff Severns Guntzel, *Minnesota’s Public Defender Shortage: “We Are Fast Becoming the Courts of McJustice”*, MINNEAPOLIS POST: THE INTELLIGENCER (Oct. 13, 2010), <http://www.minnpost.com/intelligencer/2010/10/minnesotas-public-defender-shortage-we-are-fast-becoming-courts-mcjustice>.

standards regarding conflicts, zeal, competence, and loyalty.<sup>89</sup> Some public defenders are appointed by governors,<sup>90</sup> commissions whose members are all appointed by governors,<sup>91</sup> county commissions,<sup>92</sup> judges,<sup>93</sup> or political entities that may be more interested in processing a high volume of cases at lower cost than complying with ethical rules.<sup>94</sup> Some lawyers in private practice are dependent upon appointments by judges for their livelihoods. Resistance to higher caseloads, motions for experts—or any motions for that matter—and zealous representation may cost them future appointments. It is no secret that some judges determine the outcome of cases by the attorney appointed to defend the accused. In Georgia, as a result of financial pressures, the state public defense agency and some local public defenders joined the Attorney General’s office in arguing that public defenders should be exempt from the rules of professional conduct that prevent lawyers from representing clients with conflicting interests.<sup>95</sup>

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<sup>89</sup> MODEL RULES OF PROF’L CONDUCT pmb. ¶ 2 (explaining the duty of zealous representation); *id.* R. 1.1 (requiring competent representation); *id.* R. 1.6 (requiring confidentiality); *id.* R. 1.7 (prohibiting representation of clients with conflicting interests).

<sup>90</sup>*See, e.g.*, ALASKA STAT. § 18.85.030; DEL. CODE ANN. tit. 29, §§ 4601-4608 (2003); GA. CODE ANN. § 17-12-5 (a) (2008); IOWA CODE ANN. §§ 13B.1-BB.11 (West 2011); KAN. STAT. ANN. §§ 22-4519; MAINE REV. STAT. ANN. 4 § 1803; NEV. REV. STAT. ANN. § 180.010; N.J. STAT. ANN. § 2A:158A-4; R.I. GEN. LAWS § 12-15-2; VT. STAT. ANN. tit. 13 § 5252(a); WYO. STAT. ANN. § 7-6-103.

<sup>91</sup>*See, e.g.*, ARK. CODE ANN. §§ 16-87-202-204; HAW. REV. STAT. ANN. §§ 802-11; MO. REV. STAT. § 600.015; MONT. CODE ANN. § 2-15-1028; WIS. STAT. ANN. § 977.01.

<sup>92</sup>*See, e.g.*, ARIZ. REV. STAT. ANN. § 11-581 (2012); CAL. GOV’T CODE §§ 27700 – 27704 (West 2008); IDAHO CODE ANN. § 19-859 (2004); 16 PA. CONST. STAT. ANN. § 9960.1-.13.

<sup>93</sup>*See, e.g.*, IL ST CH. 55 §§ 5/3-4004 (2005); MICH. COMP. LAWS. ANN. § 775.16. Colorado’s supreme court appoints a commission, which then appoints the state public defender. COLO. REV. STAT. § 21-1-101.

<sup>94</sup> Several states—including Connecticut, CONN. GEN. STAT. ANN. § 51-289; Kentucky, KY. REV. STAT. ANN. §§ 31.010-.250; Maryland, MD. CODE ANN., CRIM. PROC. §§ 16-101 to -403; Minnesota, MINN. STAT. ANN. § 611.215; New Hampshire, N.H. REV. STAT. ANN. §§ 604-A:2.II; North Dakota, N.D. CENT. CODE ANN. § 54-61-01 to -.03; South Carolina, S.C. CODE ANN. §17-3-310; Virginia, VA. CODE ANN. §§ 19.2-163.01 to -.04; and the District of Columbia, D.C. CODE § 2-1603 to -1603—have created public defense commissions appointed by different officials, which gives them greater independence than ones where a single official, like the governor or a judge, appoints all the members. New Mexico’s chief public defender was until recently appointed by the governor. N.M. STAT. ANN. § 31-15-4(A). In November 2012, the New Mexico electorate passed a constitutional amendment to make the public defender office separate from the state government, and the New Mexico legislature is currently drafting enabling legislation to create the Independent Public Defender Commission. *See Minutes of the Fifth Meeting of the Courts, Correction, and Justice Committee*, N.M. LEGISLATURE 6-7 (Nov. 29-30, 2012) (describing initial hearing debating the duties and composition of the Independent Public Defender Commission), <http://www.nmlegis.gov/lcs/minutes/CCJminNOV30.12.pdf>. *See 50-State Survey*, *supra* note 76; *see also* JUSTICE DENIED, *supra* note 49, at 151.

<sup>95</sup>*See* Brief of Appellant, *In re* Formal Advisory Opinion 10-1, No. S10U1679 (Ga. Feb. 28, 2011) (on file with authors). The brief was filed by the Georgia Attorney General and a local public defender who was a member of the Public Defender Standards Council.

This underfunded, overloaded system of pleas with divided loyalties is often not up to the task of providing lawyers for trials. Shanna Shackelford, a twenty-three-year-old African-American woman charged with arson in Georgia wrote a desperate plea for help in 2012, explaining that an arson charge against her had left her jobless and homeless. Despite her protestations of innocence, her public defenders urged her take a plea offer that would result in her spending fifteen years in prison. She lost her two jobs and could not get another because of the charges. She was sleeping in her car but about to lose it because she could not make the next loan payment. Finally, she “asked to be placed in jail until this is over[] . . . because I fear I may take my own life or die from conditions of being homeless.” Even that plea was rejected, and she went days without eating. Ultimately, she was represented by pro bono counsel who responded to her plea and provided zealous representation. Her case was dismissed.<sup>96</sup>

James Fisher, Jr. spent twenty-six and a half years in the custody of Oklahoma—most of it on death row—without ever having a fair and reliable determination of his guilt. The lawyer assigned to represent Fisher tried his case and twenty-four others during September 1983, including another capital murder case.<sup>97</sup> The lawyer made no opening statement or closing argument at either the guilt or sentencing phase and uttered *only nine words* during the entire sentencing phase.<sup>98</sup> Nineteen years later, the Tenth Circuit set aside the conviction, finding that Fisher’s lawyer was “grossly inept,” had “sabotaged” Fisher’s defense by repeatedly reiterating the state’s version of events, and was disloyal by “exhibiting actual doubt and hostility toward his client’s case.”<sup>99</sup> At the retrial in 2005, Oklahoma gave Fisher a lawyer who was drinking heavily, abusing cocaine, and neglecting his cases.<sup>100</sup> The lawyer physically threatened Fisher at a pre-trial hearing and, as a result, Fisher refused to attend his own trial.<sup>101</sup> He was again convicted and sentenced to death, but again the conviction was set aside for ineffective assistance of counsel.<sup>102</sup> Prosecutors agreed to Fisher’s release in July 2010, provided that he be banished from Oklahoma forever.<sup>103</sup>

Lawyers have been asleep,<sup>104</sup> intoxicated,<sup>105</sup> under the influence of drugs, and mentally ill while supposedly defending clients. They have been unaware in death penalty cases of their client’s intellectual disabilities, brain damage, mental illnesses, childhood abuse, and other mitigating factors, and, in one case, of their client’s real name.<sup>106</sup> Convictions and death

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<sup>96</sup>Letter from Shanna Shackelford to Stephen B. Bright (May 2, 2012) (on file with authors).

<sup>97</sup>Fisher v. Gibson, 282 F.3d 1283, 1293 (10th Cir. 2002).

<sup>98</sup>*Id.* at 1289.

<sup>99</sup>*Id.* at 1289, 1300, 1308.

<sup>100</sup>Fisher v. State, 206 P.3d 607, 610-11 (Okla. Crim. App. 2009).

<sup>101</sup>*Id.* at 610.

<sup>102</sup>*Id.* at 612-13.

<sup>103</sup>See Dan Barry, *In the Rearview Mirror, Oklahoma and Death Row*, N.Y. TIMES, Aug. 10, 2010, <http://www.nytimes.com/2010/08/11/us/11land.html>.

<sup>104</sup>See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc) (vacating, by a vote of 9-6, a conviction in a capital case because defense counsel slept during trial).

<sup>105</sup>See, e.g., *Haney v. State*, 603 So. 2d 368, 377-78 (Ala. Crim. App. 1991) (stating that an intoxicated lawyer had been held in contempt and jailed during a capital trial).

<sup>106</sup>See, e.g., *Wilson v. Rees*, 624 F.3d 737, 739-40 (6th Cir. 2010) (Martin, J., dissenting from denial of rehearing en banc) (stating that the “defense was clearly a charade” because “two

sentences have been upheld despite such incompetence because twenty-one years after *Gideon*, the Supreme Court eroded the reach of *Gideon* by applying presumptions—even in the face of facts to the contrary—that lawyers are competent and make strategic decisions.<sup>107</sup> No matter how incompetent the lawyer, the Court has decreed that “counsel is *strongly* presumed to have rendered adequate assistance,” and, no matter how clueless, counsel is presumed to have “made all significant decisions in the exercise of reasonable professional judgment.”<sup>108</sup> The Court has also abandoned its previous position that “[t]he right to the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial”<sup>109</sup> and allowed judges to make crude guesses as to whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>110</sup> Of course, appellate judges cannot possibly know whether the outcome might have been different because they do not see the witnesses who testified at trial and have no idea how the jury assessed the case. Nevertheless, courts shrug off one travesty after another based on a guess that no matter how bad the representation was, it did not matter.

Justice Marshall, the sole dissenter in *Strickland*,<sup>111</sup> correctly predicted that the majority’s standard was “so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts.”<sup>112</sup> He also objected to the presumptions adopted by the Court because they imposed “upon defendants an unusually weighty burden of persuasion”<sup>113</sup> and argued that a defendant who establishes deficient performance should not be required to show prejudice.<sup>114</sup>

Moreover, the Court and Congress have added yet another layer of deference, requiring federal judges in habeas corpus proceedings to be exceptionally deferential to the decisions of elected state-court judges.<sup>115</sup> Thus, the Court of Appeals for the Eleventh Circuit upheld a death

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wholly unqualified attorneys did a deplorable job” in a case in which the death penalty was upheld); *Slaughter v. Parker*, 467 F.3d 511, 512 (6th Cir. 2006) (Cole, J., dissenting from denial of rehearing en banc) (noting that counsel was not aware of his client’s name or brain damage in a case in which the death penalty was upheld); *see also* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455-62 (1996). For more cases, see *Counsel*, SECOND CLASS JUST., [http://www.secondclassjustice.com/?page\\_id=42](http://www.secondclassjustice.com/?page_id=42) (last visited Feb. 8, 2013).

<sup>107</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>108</sup> *Id.* at 690 (emphasis added).

<sup>109</sup> *Glasser v. United States*, 315 U.S. 60, 76 (1942).

<sup>110</sup> *Strickland*, 466 U.S. at 694.

<sup>111</sup> Justice Brennan joined the Court’s opinion but dissented from its judgment based on his view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. 466 U.S. at 701-07 (Brennan, J., concurring in part and dissenting in part).

<sup>112</sup> *Id.* at 707 (Marshall, J., dissenting).

<sup>113</sup> *Id.* at 713.

<sup>114</sup> *Id.* at 712.

<sup>115</sup> *See* 28 U.S.C. § 2254(d)(1) (2006) (providing that habeas relief may not be granted unless the state court’s decision “was contrary to, or involved an unreasonable application of,

sentence by doubly deferring under *Strickland* and the habeas corpus statute to a state court's conclusion that the outcome of the case at issue would not have been different<sup>116</sup> even though the lead defense lawyer drank a quart of vodka every night of trial. The lawyer was also preparing to be sued, criminally prosecuted, and disbarred for stealing client funds, and he failed to present evidence that his intellectually limited client had been "subjected to abuse so severe, so frequent, and so notorious that his neighbors called his childhood home 'the Torture Chamber.'"<sup>117</sup>

In this system, poverty, not justice, dictates outcomes. Inexcusable injustices occur every day in the criminal courts. As former federal judge and FBI director William S. Sessions has observed, the widespread resistance to *Gideon* and its progeny "should be a source of great embarrassment" to the judiciary, the bar and public officials because it has "created one of our legal system's most shameful deficiencies, greatly exacerbated by the Court's unrealistic and damaging 1984 decision in *Strickland v. Washington*."<sup>118</sup>

### III. CONCLUSION

In the absence of a capable lawyer, a person accused of a crime is virtually defenseless against a prosecutor acting as both inquisitor and adversary, exercising unchecked power over everything from the crime charged to the disclosure of information to the sentence imposed. That so many are left defenseless so often is shameful. That the courts give so little attention to defendants as individuals that they are compared to fast-food restaurants is a disgrace to the courts and the legal system. However, the criminal courts are not a concern of most people because they deal primarily with racial minorities and the poor. As Attorney General Robert F. Kennedy observed at the time of *Gideon*, "the poor person accused of a crime has no lobby."<sup>119</sup> States, counties and municipalities have no incentive to provide those they are prosecuting with capable lawyers. Quite to the contrary, a bad or mediocre system of providing lawyers facilitates pleas, move dockets and lessens the risk that anyone accused of a crime will not be convicted.

But these failings matter not only because they permanently damage lives, families and communities, but also because they leave the criminal courts without credibility or legitimacy. The media, public officials, the judiciary, the legal profession, law schools and everyone in society should be concerned with a major public institution that is supposed to be about justice that is failing so badly. They must examine what is happening in the criminal courts and hold it up to public examination. The Georgia legislature created a public defender system in 2003 only after repeated criticism of deficient representation by three consecutive chief justices of the state

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clearly established Federal law, as determined by the Supreme Court of the United States"); *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004))). The *Richter* Court added: "If this standard is difficult to meet, that is because it was meant to be." *Id.*

<sup>116</sup>*Holsey v. Warden*, 694 F.3d 1230, 1273 (2012) (holding that the state court's decision was not "beyond any possibility for fairminded disagreement" (quoting *Harrington*, 131 S. Ct. at 786-87)).

<sup>117</sup>*Id.* at 1275 (Barkett, J., dissenting).

<sup>118</sup>William S. Sessions, *Foreword* to LEFSTEIN, *supra* note 83, at ix.

<sup>119</sup>LEWIS, *supra* note 46, at 211.

in addresses to the legislature and the bar, lawsuits, reports, and extensive coverage by the *Atlanta-Constitution* and other media.<sup>120</sup> After creating the system, the state has failed to fund it adequately,<sup>121</sup> but there have been significant improvements in representation provided in many parts of the state.

While there is little chance that the United States Supreme Court can be shamed into modifying its decision in *Strickland v. Washington*, some state courts have been responsive to challenges to systemic deficiencies such as the failure to provide counsel in some courts and at some stages like first appearance hearings, excessive caseloads and the ethical responsibilities of defense counsel.<sup>122</sup>

Members of the legal profession have a responsibility to lobby for poor people accused of crimes. With their government-granted oligopoly on legal services, lawyers have a responsibility to ensure that the criminal justice system has integrity and works for the poorest and most powerless as well as for the most prosperous and powerful. Lawyers should visit courts and observe how poor people are processed through the system and bring suits to obtain systemic reforms. Lawyers—no matter what their area of practice, from corporate lawyers to small firm lawyers, to prosecutors and other government lawyers—should educate legislators, civil groups, and people concerned about public policy about the importance of an effective public defense system if there is to be justice in the courts. Bar associations and lawyers should be the primary advocates in state legislatures for full funding for the public defense. Some bar associations and lawyers have provided exemplary leadership in this regard, but others have avoided indigent

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<sup>120</sup> See Bill Rankin, *'I Felt Like I Was Just Nothing': Suspected Months After Charges Dropped*, ATLANTA J.-CONST., Dec. 20, 2003, at A1 (describing the case of a man arrested on loitering charges who was “found” in jail thirteen months after arrest, having never seen a lawyer or judge, and four months after the charges had been dismissed); Bill Rankin, *Indigent Defense Bill Beats the Odds*, ATLANTA J.-CONST., Apr. 27, 2003, at C9 (describing the passage of the bill); Bill Rankin, *Busy Barristers: Caseloads Swamp Public Defenders Throughout State*, ATLANTA J.-CONST., Aug. 13, 2001, at B1 (reporting that “many indigent defendants languish in jails for months before seeing their lawyer,” that many cases are “never investigated,” and that guilty pleas “are often entered by poor defendants after meeting their lawyer for the first time in court and only a brief conversation about the case”).

<sup>121</sup> Bill Rankin, *Indigent Defense Budget in Flux: Georgia's Strapped Public Defender System May Have To Divert Funds To Cover Costs of the Next Few Months*, ATLANTA J.-CONST., Nov. 21, 2007, at B1.

<sup>122</sup> See *State v. Peart*, 621 So. 2d 780 (La. 1993) (adopting a presumption of ineffectiveness where counsel had an excessive caseload and lacked resources for investigation and other expenses); *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012) (holding that a trial court must consider whether appointing counsel to a case will cause counsel to violate the Sixth Amendment and ethical rules); *Heckman v. Williamson County*, 396 S.W.3d (Tex. 2012) (holding that people accused of crimes could maintain a class action suit seeking counsel in misdemeanor cases); *DeWolfe v. Richmond*, 2012 WL 10853 (Md. Jan. 4, 2012) (holding that people have a right to counsel at first appearance hearings); *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010) (holding that people accused of crimes could maintain a class action suit seeking counsel at arraignment and subsequent critical stages); LEFSTEIN, *supra* note 83, at 162-89; Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751 (2010).

defense as too controversial.

Professors, students, and their associations also have an important role to play. Professors should teach the reality of criminal law by requiring students to visit different courts, write down what they see, and then discuss what they have seen and how it compares to what is required. Many law schools have criminal defense clinics.<sup>123</sup> More are needed so that students see the desperate needs of poor people accused of crimes and learn to provide competent and ethical representation.

All of these efforts must be used to persuade governments to establish and fully fund public defense programs that are independent of judges and politics and provide representation through public defender programs and assigned attorneys. This has already occurred in several jurisdictions,<sup>124</sup> and the requirements for competent and ethical representation have been set out in detail in standards and guidelines.<sup>125</sup> The programs must be led by experienced, client-oriented defense lawyers and must provide training and supervision to both public defenders and private lawyers who are assigned to represent poor defendants. Lawyers must have reasonable caseloads, resources for investigation, interpreters and experts, and, of course, they should not represent clients with conflicting interests. Programs with these features can ensure that every person arrested has “the guiding hand of counsel”<sup>126</sup> from the initial bail hearing through every subsequent proceeding.

Fifty years ago, the Supreme Court began to chart a course toward the realization of the constitutional guarantees of counsel and equal justice in *Gideon v. Wainwright* and other decisions. However, most governments have treated the Supreme Court’s decision in *Gideon* not as a bright star pointing the way to justice, but as an unfunded mandate to be resisted. A sober assessment of the defiance and resistance after *Gideon* makes clear that to go from the pretense of representation to the reality of it, there must be a new commitment to counsel and equal justice with a sense of urgency to make up for so much time lost. This will occur only when courts begin enforcing the right to counsel, instead of being complicit in its denial; when the legal profession meets its responsibility to make the legal system work for everyone; and when the media, law professors and law students, and others hold the system up to public examination until governments are shamed into providing lawyers that are “fundamental and essential”<sup>127</sup> for fairness and justice.

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<sup>123</sup>The E. Barrett Prettyman Program at the Georgetown University Law Center has provided graduate and undergraduate clinical experience in criminal defense for over fifty years.

<sup>124</sup>See, e.g., LEFSTEIN, *supra* note 83, at 191-228 (describing some programs that provide high-quality representation).

<sup>125</sup>See JUSTICE DENIED, *supra* note 49, at 181-213 (setting out extensive recommendations with commentary); LEFSTEIN, *supra* note 83, at 230-68 (making recommendations to improve representation and suggesting strategies for achieving them); *Ten Principles*, *supra* note 5, at 1-3 (setting out basic principles based on numerous studies, reports, and guidelines).

<sup>126</sup>*Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

<sup>127</sup>*Id.* at 344.