

# Equal Before the Law: Toward a Restoration of *Gideon*'s Promise

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Among the most significant cases in the history of constitutional criminal procedure is *Gideon v. Wainwright*,<sup>1</sup> the Supreme Court's landmark decision establishing that indigent defendants facing serious criminal charges have the right to a lawyer paid for by the state. Clarence Earl Gideon's story was made famous by Anthony Lewis's acclaimed book, *Gideon's Trumpet*, which reached a broader audience in the form of a Hollywood film starring Henry Fonda.<sup>2</sup>

In 1961, Clarence Gideon, an unemployed, poor, poorly educated Floridian, was convicted of breaking and entering the Bay Harbor pool hall in Panama City and attempting to steal money from a vending machine. As he could not afford to hire an attorney to represent him at trial, and neither the federal government nor Florida provided him with counsel, Gideon was forced to defend himself. He was convicted of burglary and sentenced to five years in prison. While incarcerated, Gideon scribbled and mailed a letter to the Supreme Court raising objections about how he was denied a lawyer at trial. Each year the Supreme Court chooses to hear eighty cases from among the more than one thousand appeal requests, which usually are drafted by teams of attorneys at the most reputable law firms in the country. Yet the Court agreed to hear Gideon's case, considering his handwritten note a "petition for certiorari." Subsequently, the Court ruled that the Sixth Amendment guarantees all indigent criminal defendants the right to a lawyer at the state's expense. The Court ultimately ordered a retrial at which Gideon was acquitted.<sup>3</sup>

The task of implementing *Gideon*'s promise is not without its challenges, and there is no dearth of articles documenting failures to carry out its constitutional vision.<sup>4</sup> In some important respects, the Court has read *Gideon*

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<sup>1</sup> 372 U.S. 335 (1963).

<sup>2</sup> *GIDEON'S TRUMPET* (Acorn Media 1980).

<sup>3</sup> David Cole, *Gideon v. Wainwright and Strickland v. Washington: Broken Promises*, in *CRIMINAL PROCEDURE STORIES* 101, 102 (Carol Steiker & Pamela S. Karlan eds., 2006).

<sup>4</sup> See, e.g., NORMAN LEFSTEIN, *ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PRO-*

narrowly. Specifically, the Court imposed certain limits on the right to counsel by granting trial judges broad discretion over the appointment of counsel pre-charge,<sup>5</sup> during optional appeals,<sup>6</sup> and in cases involving petty offenses where the defendant is not facing a possible prison sentence.<sup>7</sup> The impact of *Gideon* has been undeniably far-reaching, especially with respect to its retroactive application, extension beyond the trial,<sup>8</sup> and sweeping protection of the majority of criminal defendants.<sup>9</sup> Still, for many criminal defendants throughout the United States, the promise of adequate representation remains unfulfilled.<sup>10</sup> Astute observers of the practical realities underpinning the protection of the right to counsel<sup>11</sup> describe contemporary indigent defense in the United States as being in a chronic state of disarray,<sup>12</sup> citing a

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VIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING (1982) (“[M]illions of persons in the United States who have a constitutional right to counsel are denied effective legal representation.”); Note, *Gideon’s Promise Unfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2064-65 (2000) (providing citations and statistics describing the failed promise of counsel); see also DEBORAH L. RHODE, ACCESS TO JUSTICE 122-33 (2004) (depicting the problem of inadequate representation); Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1515 (2005) (describing the failure of *Gideon*).

<sup>5</sup> Kirby v. Illinois, 406 U.S. 682 (1972).

<sup>6</sup> Ross v. Moffitt, 417 U.S. 600 (1974).

<sup>7</sup> Scott v. Illinois, 440 U.S. 367 (1979).

<sup>8</sup> See Massiah v. United States, 377 U.S. 201 (1964). The rule requiring access to counsel also applies in some identification procedures that take place prior to trial, United States v. Wade, 388 U.S. 218 (1967), various pretrial proceedings, such as arraignments and preliminary examinations, Coleman v. Alabama, 399 U.S. 1 (1970), sentencing hearings, Alabama v. Shelton, 535 U.S. 654 (2002), and in automatic appeals, Douglas v. California, 372 U.S. 353 (1963).

<sup>9</sup> See CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf> (last visited Mar. 6, 2008); see also CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP’T OF JUSTICE, INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf> (last visited Mar. 14, 2008); NEB. MINORITY & JUSTICE TASK FORCE, INDIGENT DEFENSE SYSTEM IN NEBRASKA: AN UPDATE (2004), available at <http://ppc.unl.edu/publications/documents/IndigentFINALCOPY-PDF.pdf> (Mar. 6, 2008) (Nebraska); PA. SUPREME COURT COMM. ON GENDER & RACIAL BIAS IN THE JUSTICE SYS., FINAL REPORT 164-93, available at [www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.ch5.pdf](http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.ch5.pdf) (Mar. 6, 2008) (Pennsylvania); Bill Rankin, *Indigent Defense Rates F*, ATLANTA J.-CONST., Dec. 12, 2002, at 1A (Georgia); Hon. Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana, Address to the Joint Session of the Louisiana Legislature (May 3, 2005) (Louisiana). See generally DEBORAH L. RHODE, ACCESS TO JUSTICE 122 (2004).

<sup>10</sup> Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1037 (2006).

<sup>11</sup> Approximately eighty percent of criminal defendants are indigent. See HARLOW, *supra* note 9.

<sup>12</sup> See, e.g., Barbara Allen Babcock, *The Duty to Defend*, 114 YALE L.J. 1489, 1515 (2005); Sylvia R. Cooks & Karen Karre Fontenot, *The Messiah is Not Coming: It’s Time for Louisiana to Change its Method of Funding Indigent Defense*, 31 S.U. L. REV. 197, 208 (2004); Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911, 912 (2005); Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 838 (2004); Lawrence C. Marshall, *Gideon’s Paradox*, 73 FORDHAM L. REV. 955, 956 (2004); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 NW. U. L. REV. 1635, 1636 (2003); George C. Thomas III, *History’s Lesson for the Right to Counsel*, 2004 U. ILL. L. REV.

lack of funds as the “most fundamental reason” for the abysmal quality of indigent defense today.<sup>13</sup>

The aim of this essay is to examine the problem of financing *Gideon*'s imperative at the state and local levels. Part I situates the indigent criminal defendants' constitutional right to counsel in its historical context by tracing the historical and doctrinal developments that lead to *Gideon*. Part II examines the challenges associated with implementing *Gideon* by comparing two representative structural approaches to the provision of indigent defense: Minnesota's statewide system and Mississippi's county-based system. Finally, Part III of this essay contends that the statewide model of indigent defense is a superior system that preserves the adversarial process and ensures the equitable administration of justice for all criminal defendants, regardless of their ability to pay. Part III also critically assesses the legal and policy arguments that localities responsible for financing and administering indigent defense programs may use to advocate for a statewide system; it provides broad conceptual prescriptions of how these localities could go about making their case.

This Essay examines the public defender systems of only two states—Minnesota and Mississippi. It focuses on these states for three reasons. First, the programs in these states are exceptional illustrations of the types of financial challenges facing statewide and county-based public defender systems. Second, in considering the constitutional merits of any administrative structure, it is especially helpful to use examples that have been the subject of controversial litigation. Finally, focusing on these two examples helps to highlight the critical role of institutional design in determining the efficacy of public defender systems in fulfilling *Gideon*'s constitutional command. This Essay does not contend that these states are necessarily representative of states with similar systems and does not attempt to generalize about other state and local programs.

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543, 544 (2004); Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 149 (2001).

<sup>13</sup> Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 816; see also 1996 FINAL REPORT OF THE NATIONAL ADVISORY COMMITTEE ON INDIGENT DEFENSE SERVICES (1996) (citing RICHARD KLEIN & ROBERT SPANGENBERG, THE INDIGENT DEFENSE CRISIS 25 (1993)), available at <http://www.nlada.org/DMS/Documents/998936147.738/Blue%20Ribbon%20Committee.doc> (last visited Mar. 14, 2008) (“This failure to fairly fund the indigent defense component of the criminal justice ‘eco-system’ has resulted in ‘overburdened public defenders, the incarceration of the innocent, court docket delays, prison overcrowding, and the release of violent offenders into the community.’”); see also Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615, 1620 (2002).

I. *GIDEON* IN HISTORICAL CONTEXTA. *Judicial Foundations*

Born out of a patchwork of precedents empowering indigent defendants in the criminal justice system, *Gideon* represented the culmination of a decades-long struggle to strip away the economic barriers to realizing the principle of equality before the law. Yet the Supreme Court neglected to specify which level of government—federal, state, or local—must serve as the guarantor of this principle. The right to counsel is grounded in the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."<sup>14</sup> The Sixth Amendment was designed to prevent federal courts from adopting the English common law practice of precluding defendants facing felony charges from retaining legal counsel, even if they were willing to pay for it.<sup>15</sup> Although the original scope of the Sixth Amendment was extremely narrow, Justice Black construed it more broadly in *Gideon* by invoking the powerful rationale underpinning a criminal defendant's right to a lawyer:

[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 for him. . . . Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.<sup>16</sup>

In the first part of the twentieth century, concerns over the right to counsel received little attention from the Court. It was not until 1932 that the Supreme Court decided, in *Powell v. Alabama*, that the Due Process Clause of the Fourteenth Amendment requires the provision of counsel in capital

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<sup>14</sup> U.S. CONST. amend. VI.

<sup>15</sup> Cole, *supra* note 3, at 105.

<sup>16</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

cases.<sup>17</sup> In *Gideon*, Justice Black included the *Powell* Court's commanding and oft-cited language characterizing the right to counsel as the lynchpin of the adversarial system:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>18</sup>

*Powell*, however, left unresolved the question of whether the right to counsel extended to non-capital cases. Six years after *Powell*, in *Johnson v. Zerbst*, the Court broadened the right to appointed counsel, holding that in all *federal* criminal trials, the Sixth Amendment required the government to pay for an attorney where the defendant could not afford one.<sup>19</sup>

Recoiling from the relatively robust protections of the 1930s, in *Betts v. Brady*, the Court held that the right of indigent defendants to counsel was not a "fundamental right," and that the mandate of appointed counsel did not extend to trial proceedings in *state* courts.<sup>20</sup> While the Court's case-by-case application of the right to counsel in criminal proceedings eventually proved as impracticable as it was arbitrary, *Betts* remained the rule for over twenty years.

Considering an equal protection challenge to the denial of assistance of counsel, in *Griffin v. Illinois*, the Court declared "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has" and held that barring a defendant from appealing simply because he could not afford to pay the trial transcript fee constituted a violation of equal protection.<sup>21</sup>

When Clarence Gideon's case reached the Supreme Court in 1963, the stage was set for a dramatic enhancement in the protection of indigent defendants' rights. Having already contemplated the problem of legal assis-

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<sup>17</sup> *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (stating that "the duty of the trial court to appoint counsel under such circumstances is clear" after six men were sentenced to death with little assistance of counsel).

<sup>18</sup> 372 U.S. at 344-45 (quoting *Powell*, 287 U.S. at 68-69).

<sup>19</sup> 304 U.S. 458, 463 (1938).

<sup>20</sup> 316 U.S. 455, 461-62 (1942).

<sup>21</sup> 351 U.S. 12, 19 (1956).

tance for the poor in criminal cases under the Sixth Amendment, the Equal Protection Clause, and the Due Process Clause, the Court was poised to render a revolutionary decision. Overruling *Betts*, the *Gideon* Court held that the Fourteenth Amendment incorporated the Sixth Amendment and that poor criminal defendants have a “fundamental right” to a lawyer in both state and federal criminal trials.<sup>22</sup> In his concurring opinion, Justice Harlan noted that *Powell*—which found that criminal trials lacking appointed counsel constituted a fundamental unfairness in violation of due process—was the first instance in which the Court reversed a state conviction on the grounds that it violated the right to counsel.<sup>23</sup> In doing so, the Court recognized “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 for him.”<sup>24</sup>

## II. STATE AND LOCAL APPROACHES TO FUNDING INDIGENT DEFENSE

Inadequate funding is the primary source of the systemic failure in indigent defense programs nationwide. Of the more than \$146.5 billion spent annually on criminal justice, over half is allocated to support the police officers and prosecutors who investigate and prosecute cases, while only about two to three percent goes towards indigent defense.<sup>25</sup> One observer stated that, on balance, poor defendants “receive only an eighth of the resources per case available to prosecutors. The disparity is still greater when adjusted for the amounts available to other law enforcement officials for assistance in investigation and trial preparation.”<sup>26</sup> “While prosecutors also face budgetary constraints, they are not of the same magnitude.”<sup>27</sup> Nevertheless, the numbers presented here tell the story of indigent defense programs in desperate need of funding.<sup>28</sup>

As neither *Gideon* nor its progeny prescribe a method by which states should administer their public defender programs, different states shoulder

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<sup>22</sup> 372 U.S. at 341-42.

<sup>23</sup> *Gideon*, 372 U.S. at 349-52.

<sup>24</sup> *Id.* at 344.

<sup>25</sup> See HARLOW, *supra* note 9.

<sup>26</sup> See BACKUS & MARCUS, *supra* note 10, at n.60 (quoting DEBORAH L. RHODE, ACCESS TO JUSTICE 123 (2004)); see also DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 64, 84 (1999); Editorial, *State Should Pay for Indigent Defense*, ATLANTA J.-CONST., Dec. 31, 2001, at A-11 (noting an eight-to-one disparity); Douglas McCollam, *The Ghost of Gideon*, AM. LAW, Mar. 2003, at 63, 67.

<sup>27</sup> BACKUS & MARCUS, *supra* note 10; see also Marcia Coyle & Marianne Lavelle, *Legal Safeguards Don't Hamper Crime-Fighting*, NAT'L L.J., Dec. 12, 1988, at 5; Ronald George, Chief Justice, California Supreme Court, State of the Judiciary Address by Chief Justice Ronald George to a Joint Session of the California Legislature (Mar. 23, 2004); Ronald Goldstock et al., *Justice That Makes Sense: Prosecution & Defense Find Common Ground*, THE CHAMPION, 2001, available at <http://www.criminaljustice.org/public.nsfChampionArticles/97dec01?OpenDocument> (last visited Mar. 6, 2008).

<sup>28</sup> See, e.g., BACKUS & MARCUS, *supra* note 10; Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004).

the expense and the burden of providing counsel to indigent defendants differently. Whether the state has a duty to pay for indigent defense or whether the county must bear the cost has been the subject of much litigation.<sup>29</sup> In comparing the programmatic scope and financing schemes of the indigent defense systems in Minnesota and Mississippi, I am primarily interested in contrasting the merits of the statewide approach of the former with the county-based approach of the latter.

#### A. *Minnesota Indigent Defense: State Counsel*

Notably for this case study, a small cadre of concerned Minnesotans played key roles in urging the *Gideon* court to reconsider its decision in *Betts*. In 1962, Minnesota Attorney General Walter Mondale, who would later go on to become a U.S. Senator and the 42nd Vice President of the United States, received a routine letter from Richard Ervin, the Attorney General of the state in which *Gideon* was incarcerated (Florida) asking him to join in opposing *Gideon*. Not only did Mondale refuse to do so, but he also expressed his hope that the Supreme Court would mandate appointed counsel in all state felony cases without delay.<sup>30</sup>

Shortly thereafter, Mondale was contacted by Yale Kamisar, a professor of criminal law at the University of Minnesota Law School from 1957 to 1964, who informed him that Massachusetts Attorney General Eddie McCormack was working with the faculty of Harvard Law School on an amicus brief supporting *Gideon*'s right to counsel.<sup>31</sup> Rather than fashion a separate amicus brief, Mondale joined McCormack's effort and spearheaded a successful campaign to garner support among state attorneys-general for the brief, which was ultimately signed by twenty-two state governments.<sup>32</sup> Through effective legal advocacy and coalition building, Minnesota played

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<sup>29</sup> See, e.g., Lefstein, *supra* note 12, at n.69; see also *State v. Quitman County*, 807 So. 2d 401, 405 (Miss. 2001) (finding the county has standing to challenge statute requiring it to fund representation of indigent defendants); *State v. Crittenden County*, 896 S.W.2d 881 (Ark. 1995) (finding under Arkansas law the state is responsible for indigent defense fees); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1138 (Fla. 1990) (finding the court has duty to appoint other counsel where public defender has excessive case backlog, with the county bearing the cost of appointed private counsel); *In re D.B.*, 385 So. 2d 83, 87 (Fla. 1980) (“[W]hen counsel is constitutionally required, the county, rather than the state, must compensate appointed counsel.”); *Reist v. Bay County Circuit Judge*, 241 N.W.2d 55, 66 (Mich. 1976) (finding the cost of appointed counsel allocated to the county).

<sup>30</sup> See Letter from Walter F. Mondale to Richard W. Ervin (August 15, 1962) (on file with author).

<sup>31</sup> See ANTHONY LEWIS, *GIDEON'S TRUMPET* 144-48 (1964). Twenty-two states and commonwealths signed the amicus brief, including: Alaska, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, Nevada, Ohio, North Dakota, Oregon, Rhode Island, South Dakota, Washington, and West Virginia.

<sup>32</sup> See *id.*

an important role in pioneering the establishment of the right to counsel for all indigent defendants.<sup>33</sup>

Even before *Gideon*, Minnesota defendants facing felony or gross misdemeanor charges were afforded an attorney at the expense of the state.<sup>34</sup> In response to *Gideon*, Minnesota's legislature passed laws in 1965 requiring the creation of full-time public defender offices.<sup>35</sup> In 1994, Minnesota courts extended the right to counsel to misdemeanor defendants more than four years before the Supreme Court did.<sup>36</sup>

Two years later, however, the Minnesota Supreme Court tempered *Gideon's* idealistic mandate with a dose of fiscal discipline. In *Kennedy v. Carlson*,<sup>37</sup> William Kennedy, the chief public defender of Minnesota's Fourth Judicial District, sued the governor as part of a challenge to the constitutionality of statutory limits on indigent defense funding.<sup>38</sup> A "nationally recognized expert"<sup>39</sup> hired by the legislature to study the efficacy of the existing public defender system recommended, among other things, that full-time public defenders handle fewer than three homicide cases or 100 to 120 other felonies per year.<sup>40</sup> The recently created state board rejected the homicide and felony caseload limits.<sup>41</sup> In his argument to the court, Kennedy stressed that the statutory limits caused his office to be "significantly underfunded, understaffed, and therefore unable to adequately and completely fulfill the scope of their representation to their clients as defined by law."<sup>42</sup> The Minnesota Supreme Court held that the public defender failed to demonstrate that the statutory limits undermined the ability of attorneys to provide adequate assistance to their clients,<sup>43</sup> caused harm to the clients,<sup>44</sup> or constituted

<sup>33</sup> See Peter Erlinder, *Muting Gideon's Trumpet: Pricing the 'Right to Counsel' in Minnesota Courts*, BENCH AND BAR OF MINNESOTA (Dec. 2003).

<sup>34</sup> See MINN. STAT. ANN. § 611.07, 12, 13 (1945) (Hennepin and Ramsey Counties had public defender offices instead of an assigned counsel program).

<sup>35</sup> Act of May 26, 1965, ch. 869, 1-20, 1965 Minn. Laws 1631 (codified as amended at MINN. STAT. § 611.14-35 (1994)); MINN. STAT. § 611.26 (1965) (mandating the appointment and financing of public defense services in all of Minnesota's judicial districts). District offices funded each public defender office with revenues drawn from county property taxes. MINN. STAT. § 611.27 (1965).

<sup>36</sup> See Fred Morrison, *An Introduction to the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 287 (1994). Compare *State v. Borst*, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967) (holding that indigents charged with misdemeanors and facing possible imprisonment have a right to counsel), with *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that the Sixth Amendment requires that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").

<sup>37</sup> 544 N.W.2d 1 (Minn. 1996).

<sup>38</sup> See *id.* at 3.

<sup>39</sup> See *id.* at 4; see also Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31 (1995).

<sup>40</sup> See *Kennedy*, 544 N.W.2d at 4.

<sup>41</sup> See *id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *Portman v. County of Santa Clara*, 995 F.2d 898, 903 (9th Cir. 1993) (holding the attorney who argued county's at-will employment policy interfered with his criminal clients' Sixth Amendment rights did not present justiciable claim due to his reliance on "hypothetical situations and hypothetical clients"); see also *Gardner v. Luckey*, 500 F.2d 712, 714-15 (5th

a justiciable issue, reasoning that his claims were “too speculative and hypothetical to support jurisdiction in this court.”<sup>45</sup> Significantly, the *Kennedy* court’s actions in scaling back the efficiency of Minnesota’s public defender services in the mid-1990s set the stage for progressive reforms designed to ensure adequate funding for programs around the state.

On the fortieth anniversary of *Gideon*, the Minnesota legislature instituted a fee of up to \$200 for indigent defendants, regardless of an individual’s ability to pay.<sup>46</sup> Under this “co-pay” scheme, if a defendant fails to pay the fee within a thirty-day period, the state may seek a civil judgment by withholding tax refunds or other state payments.<sup>47</sup> In *State v. Tennin*, the legislature’s plan to increase funding by charging indigent defendants through a co-pay system was declared unconstitutional by the Minnesota Supreme Court,<sup>48</sup> at a cost of \$7.6 million in expected public defense funds.<sup>49</sup> In September 2003, Shawnatee Tennin was charged with misdemeanor prostitution in Hennepin County, Minnesota. While she qualified for representation by a public defender, after being informed that she would have to pay a fee of fifty dollars, she initially declined the appointment of counsel due to her inability to pay.<sup>50</sup> Eventually, however, Tennin decided that the burden of paying the fee was outweighed by the potential consequences of ineffectively representing herself at trial.<sup>51</sup> The district court judge declared the co-payment statute unconstitutional in 2004.<sup>52</sup> On appeal, the Minnesota Supreme Court invalidated the new law, reasoning that it would “impose manifest hardship on the defendant and [her] immediate family.”<sup>53</sup>

Currently, Minnesota’s indigent defense program is fully funded by the state. The system is divided into four component parts: (1) the State Board of Public Defense; (2) the Office of the State Public Defender; (3) two district

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Cir. 1974) (holding the threat of future injuries to criminal defendants, who claim their public defenders failed to provide effective legal assistance, was “too speculative” to provide a basis for judicial relief); *Dash v. Mitchell*, 356 F. Supp. 1292, 1295 (D.D.C. 1972) (finding legal defense organizations alleged no direct or consequential detriment to their interests as a result of preventative detention program; thus there was no injury in fact as required by Article III of the Constitution).

<sup>44</sup> See *Coleman v. State*, 703 N.E.2d 1022, 1040 (Ind. 1998) (holding that a failure to show that deficiencies in the public defender system specifically affected defendant’s lawyers is dispositive); see also *United States v. Cronin*, 466 U.S. 646 (1984) (holding that an inexperienced counsel given twenty-five days to prepare for a trial involving complex and grave issues with difficult to access witnesses did not violate the defendant’s right to effective assistance of counsel).

<sup>45</sup> *Kennedy*, 544 N.W.2d at 8.

<sup>46</sup> MINN. STAT. § 611.17, subd. 1(c) (2007).

<sup>47</sup> *Id.*

<sup>48</sup> 674 N.W.2d 403, 410 (Minn. 2004).

<sup>49</sup> See Tim W. Budig, *Budget Cuts: Lack of Funding Puts Public Defender Effectiveness in Jeopardy*, ECM CAPITOL ROUNDUP (June 22, 2004), available at <http://www.hometownsource.com/capitol/2004/june/22publicdefense.html> (last visited Mar. 14, 2008).

<sup>50</sup> 674 N.W.2d at 405.

<sup>51</sup> *Id.*

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

<sup>53</sup> *Id.* at 408 (quoting *Fuller v. Oregon*, 417 U.S. 40, 45-46 (1974)).

public defender offices; and (4) five public defense corporations. Each year, the State Board reviews budgetary requests submitted by the chief public defender of each district. The legislature appropriates funds it deems sufficient to the State Board, which in turn administers the funds to the respective public defender program offices.<sup>54</sup>

In the last four years, however, budgetary pressures have dealt a serious blow to public defender services. Despite requests by the Minnesota Board of Public Defense that the legislature add 100 new attorney positions, in 2003 and 2004, public defense funds were cut, and twenty attorney positions were eliminated.<sup>55</sup> In 2004, Minnesota's public defense system operated on a budget of \$53 million that supported 380 full-time attorneys, each of whom handles over 900 cases a year.<sup>56</sup>

In some of Minnesota's rural judicial districts, the overwhelming case burden has led some public defenders to find other work. In 2002, Rocky Wells, a public defender in Crow Wing County, Minnesota, handled as many cases as two full-time attorneys (based on state caseload guidelines): 135 felony cases, 53 gross misdemeanors, 343 misdemeanors, 136 probation violations, and 60 miscellaneous cases.<sup>57</sup> According to Wells, the "anxiety, stress and depression brought on by [the] caseload eventually convinced [him] that [his] job was killing [him]."<sup>58</sup> While resource scarcity is certainly an important issue for statewide public defender programs, local districts lacking funding may appeal to the state agency for relief. Fortunately, Minnesota's statewide system of indigent defense is structured to provide the chief public defender for Crow Wing County with the option of appealing to the Minnesota Board of Public Defense. Such administrative oversight by the state Board plays an important role in holding accountable underperforming county offices and ensuring the offices have the funding necessary to provide fair and adequate representation to indigent criminal defendants.

### B. *Mississippi Indigent Defense: Local Counsel*

In Mississippi, counties are responsible for funding their own public defender programs, and funds are in short supply. Interestingly, in 1998, the Mississippi state legislature passed a law instituting a statewide indigent de-

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<sup>54</sup> See MINN. STAT. § 611.27, subd. 1(b) (2005).

<sup>55</sup> Tom Robertson, *Minnesota Lawyers Frustrated Over Shortage of Public Defenders* (Minnesota Public Radio Broadcast, Sept. 30, 2003) available at [http://news.minnesota.publicradio.org/features/2003/09/30\\_robertson\\_pdshortage/](http://news.minnesota.publicradio.org/features/2003/09/30_robertson_pdshortage/) (last visited Mar. 14, 2008).

<sup>56</sup> *Id.*

<sup>57</sup> Conrad DeFiebre, *Public Defenders Seek Lighter Load*, STAR TRIBUNE, Aug. 30, 2003, at 1B.

<sup>58</sup> *Id.* After Wells' resignation, the Board of Public Defense requested that the Minnesota Supreme Court permit delays in criminal proceedings when defenders are overbooked and defendants are not in custody. *Id.*

fense system<sup>59</sup> that languished for two years as an unfunded mandate until the legislation was rescinded in 2000. According to the Spangenberg Group's study of Mississippi's system:

Funding for indigent defense is totally inadequate. . . . [T]he lack of adequate resources for indigent defense services results in poor quality services and representation, . . . there is no state-wide oversight of indigent defense, which leads to a hodgepodge, county-by-county approach to providing services, . . . and every aspect of defense representation is compromised.<sup>60</sup>

For example, the only way a county public defender could hire an investigator in a non-capital case is if she were to pay for it herself.<sup>61</sup> Despite being charged with a minor shoplifting offense, one defendant spent a year in jail before her trial or meeting her appointed counsel.<sup>62</sup> Accordingly, the Mississippi Public Defenders Task Force report determined that "indigent defense remained a vexing problem for the counties."<sup>63</sup>

### *Quitman County v. State*

Nowhere is the weakness of Mississippi's indigent defense system more apparent than in Quitman County. One resident, for example, paid an extra forty dollars a year in local property taxes to cover the legal fees of two men who killed his family.<sup>64</sup> Recently, this Delta community challenged the constitutionality of a state law requiring local county governments to fund indigent defense.<sup>65</sup> Alleging that it lacked the funds to support a constitutionally adequate indigent defense system, Quitman County called on the state to create and fund a statewide public defender system on par with Mississippi's prosecution system.<sup>66</sup>

Unsympathetic to the county's argument, the Mississippi Supreme Court held that the state legislature's failure to fund a statewide public defender program did not violate the Constitution.<sup>67</sup> The court reasoned that the

<sup>59</sup> NAACP LEGAL DEFENSE FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS 7 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ms-assemblylinejustice.pdf> (last visited Mar. 8, 2008) [hereinafter ASSEMBLY LINE JUSTICE].

<sup>60</sup> *Quitman County v. State*, No. 2003-SA-02658-SCT, at ¶60 (Miss. 2003) (citing THE SPANGENBERG GROUP, REPORT FOR THE AMERICAN BAR ASSOCIATION INFORMATION PROGRAM (2000)).

<sup>61</sup> See ASSEMBLY LINE JUSTICE, *supra* note 59 (highlighting the fact that, for a variety of reasons that are difficult to measure, defendants usually end up having to pay for investigators themselves).

<sup>62</sup> DEBORAH L. RHODE, ACCESS TO JUSTICE 126 (2004).

<sup>63</sup> MISSISSIPPI PUBLIC DEFENDERS TASK FORCE, REPORT TO THE MISSISSIPPI LEGISLATURE 5 (2000).

<sup>64</sup> Sid Salter, *Poor Justice?*, CLARION-LEDGER (Jackson, Miss.), June 8, 2003, at 1G.

<sup>65</sup> *Quitman County v. State*, 910 So. 2d 1032, 1034 (Miss. 2005).

<sup>66</sup> *Id.* at 1034.

<sup>67</sup> *Id.* at 1048.

county was unable to demonstrate that the current system constituted “systemic ineffective assistance of counsel in [the county] and throughout the state,”<sup>68</sup> and that if indigent defense were such a high priority for the county, it should have budgeted accordingly.<sup>69</sup> Mississippi is not the only state in which public defenders and criminal defendants have resorted to lawsuits in order to force their state government to cough up adequate funds for indigent defense.<sup>70</sup> Nonetheless, the severity of the harm to individual residents in the *Quitman County* case, most notably the victim’s immediate family members, reflects the epidemic tendency of states with county-based public defender systems to inadequately fund indigent services to the severe detriment of the citizens *Gideon* was intended to protect.

### III. THE CASE FOR STATEWIDE FUNDING SCHEMES

State and local governments have a long way to go before *Gideon*’s promise will be fulfilled. Lessons from the experiences of Minnesota and Mississippi in financing and administering indigent defense services raise questions about the merits of the respective approaches. I agree with the American Bar Association’s finding that funding indigent defense programs on a statewide basis is preferable to a local funding scheme because the state is better equipped to shoulder the costs of the system.<sup>71</sup> Nonetheless, there is no shortage of cases illustrating the absence of a direct correlation between statewide funding schemes and adequacy of funding.<sup>72</sup> In this Part, I critically assess legal and policy arguments in favor of statewide defender services.

#### A. Constitutional Challenge to Local Indigent Defense Systems

The *Gideon* Court declared that the constitutional command of ensuring the right of indigent defendants to counsel rests with the state.<sup>73</sup> Interestingly, proponents of a statewide indigent defense system could challenge the constitutionality of a statute providing for a county-based system on equal

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1041.

<sup>70</sup> In *State v. Peart*, 621 So. 2d 780, 784-85 (La. 1993), a Louisiana state trial judge ordered the legislature to appropriate funding for improved defense services. The Supreme Court reversed the finding of unconstitutionality and the ordered relief, but remanded after commenting on the deficiencies of indigent defense services. *Id.* at 785-92.

<sup>71</sup> ABA STANDARDS FOR THE ADMINISTRATION OF CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, std. 5-1.6, at 27-28 (1992); see also Robert Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. L. 1, 42 (1999).

<sup>72</sup> See, e.g., *Fletcher v. State*, 696 So. 2d 794, 796 (Fla. Dist. Ct. App. 1997); *Bennett v. State*, 605 So. 2d 552, 553 (Fla. Dist. Ct. App. 1992); *Woods v. State*, 595 So. 2d 264, 265 (Fla. Dist. Ct. App. 1992); *Young v. State*, 580 So. 2d 301, 302 (Fla. Dist. Ct. App. 1991); *Thompson v. State*, 570 So. 2d 423, 424 (Fla. Dist. Ct. App. 1990); *Hatten v. State*, 561 So. 2d 562, 565 (Fla. Dist. Ct. App. 1990); *Kiernan v. State*, 485 So. 2d 460, 461-62 (Fla. Dist. Ct. App. 1986).

<sup>73</sup> 372 U.S. 335 (1963).

protection grounds. In *Plyler v. Doe*,<sup>74</sup> the Supreme Court struck down a Texas statute that excluded the children of undocumented aliens from attending public schools.<sup>75</sup> In his majority opinion, Justice Brennan observed that states “have some authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal.”<sup>76</sup> Highlighting the disharmony between Texas and federal immigration law,<sup>77</sup> he reasoned that the law served no state interest while it wrongly encouraged “the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.”<sup>78</sup>

*Plyler* stands for the principled prohibition of state policies that inevitably produce a “permanent underclass” of economically and politically disenfranchised people, and for the states’ constitutional obligation to “spend public money to avert the creation of a permanent caste” of underprivileged people.<sup>79</sup> It follows that a financing scheme that distributes the *fundamental* right to counsel unequally should be subject to strict scrutiny under the Equal Protection Clause<sup>80</sup> because the right to counsel is categorically denied to indigent criminal defendants charged in under-funded counties.

### B. Policy Advantages of Statewide Public Defender Systems

Policy reasons abound for locating indigent defense funding at the state level. As noted at the outset, the suggestions below reflect a general case for a statewide system. They are presented here to incite further thought and research about the strengths and limitations of the overall proposal.

First, state systems promote a smart legislative strategy and posture because enlarging the political constituency engenders public sympathy for criminal defendants. This in turn may be transformed into the political will needed to pressure a state legislature into providing adequate funding for, and appropriate reforms of, indigent defense programs.

Second, the increased funds in a statewide system would allow the state to support a full-time public defender office. This office would draw lawyers more qualified and dedicated than the part-time attorneys—who have less

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<sup>74</sup> 457 U.S. 202 (1982).

<sup>75</sup> *Id.* at 228-30.

<sup>76</sup> *Id.* at 225.

<sup>77</sup> *Id.* at 226.

<sup>78</sup> *Id.* at 230.

<sup>79</sup> Thomas Liotti, *Does Gideon Still Make a Difference?*, 2 N.Y. CITY L. REV. 105, 130 (1998). See also *Plyler*, 457 U.S. at 234 (Blackmun, J., concurring) (“Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group—through the State’s action—will have been converted into a discrete underclass.”).

<sup>80</sup> See U.S. CONST. amend. XIV, §1, cl. 4.

training and an incentive to prioritize work for paying clients—that currently serve as court appointed attorneys in the county-based system.

Third, statewide structures promote equality by more uniformly distributing resources across counties, thereby reducing disparities among counties. Applying uniform minimum standards of eligibility for employment and caseload distribution would also ensure state control over the quality and efficiency of defense services provided.

Fourth, statewide programs cultivate greater accountability. Whereas municipal public defender systems are held in check by virtual oversight, statewide systems more effectively monitor caseload limits, train public defenders, and enforce performance standards. State agencies are able to support specialized units (e.g., appeals, post-conviction, death penalty, etc.) that municipal offices could not. Centralizing the administration of indigent representation at the state level significantly enhances oversight, which serves to protect the constitutional rights of indigent defendants, the rights of the attorneys representing those defendants, and to preserve the integrity of the judicial branch.

Finally, local funding schemes fail to assure adequate representation to indigent defendants living in communities with weaker local economies because local public defender funding systems tend to rely on local property taxes. In poorer counties, for example, unemployment rates increase demand for local government services and crime rates tend to be higher. As a result, in counties with a disproportionately greater number of indigent residents, making local funding schemes for public defender systems dependent on property tax revenues merely ensures that the demand for indigent legal services will increasingly exceed the supply, and thus, over time, a diminishing number of indigent defendants will receive adequate representation and a just verdict.

#### IV. CONCLUSION

In the forty-three years since *Gideon's* trumpet call inspired efforts to enhance protections for indigent defendants at trial have been frustrated by complex legal challenges. While the problem of inadequate funding for indigent criminal defense is not unique to Minnesota and Mississippi, one helpful remedy is a matter of institutional design. Born out of the decades-long struggle to implement the constitutional right to counsel in criminal cases is the structural lesson that statewide public defender systems, such as Minnesota's, more effectively address the economic and political barriers to the equitable administration of justice at trial. Unless states with county-based systems begin to treat the principle of justice winning out over poverty as something more than an unfunded mandate, *Gideon's* promise will remain an unrealized dream.