

Gideon's Problematic Promises

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Abstract: The landmark case of “Gideon v. Wainwright” (1963) ensured the right of criminal defendants across the country to the effective assistance of counsel, but the overwhelming consensus is that the promise of “Gideon” has not been kept. Although there are significant differences in the delivery of indigent defense services across the country, there are four general reasons for the failure of “Gideon” that obtain across every jurisdiction and collectively cover much of the explanatory terrain: 1) its mandate is inadequately and precariously funded; 2) institutional impediments have impinged on the independence, training and oversight, and advocacy culture of indigent defense counsel; 3) legal remedies for ineffective assistance of counsel are often inadequate, inaccessible, or both; and 4) the ubiquitous practice of plea bargaining shields inadequate representation from view or remedy. Vindicating the right of poor people to effective representation in criminal cases remains a daunting but enormously important task.

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What is at stake in a criminal trial? The special procedural protections that the Constitution provides in criminal cases protect a defendant’s reputation, liberty, and sometimes even life. In addition, a criminal conviction can carry serious collateral (that is, putatively non-punitive) consequences, such as deportation, disenfranchisement, and required registration and community notification (as in the case of convicted sex offenders). Beyond these individual interests, considerable though they are, lie less tangible but no less important collective interests. In the United States, constitutional adjudication establishes minimum national standards regulating police investigative practices, the vast majority of which takes place in the litigation of individual criminal cases. Thus, criminal trials play a crucial role in establishing constitutional limits on the entire range of law enforcement investigative techniques, including police intrusions into private homes, street encounters, border searches, interrogations, identification procedures such as lineups, and the use of technology such as GPS tracking and DNA sampling.¹

Because the U.S. incarceration rate has undergone a massive and unprecedented increase over the past

several decades (as documented in the Summer 2010 issue of *Dædalus*) even more is now at stake in the criminal process.² The United States has become the leading incarcerator in the world, with some 2.3 million people behind bars and an incarceration rate of around 750 per 100,000 of the population, which is far above our own past (and Europe's current) rate of around 100 per 100,000.³ This exponential rise of our prison and jail populations since the 1970s has had enormous consequences not only for individuals, but also for their families and communities – consequences with a highly disproportionate impact on racial minorities and the poor. The study of the society-wide effects of what has come to be called “mass incarceration” has demonstrated that the operation of the criminal justice process is directly linked to the substantial racial and socioeconomic divides in contemporary American society.⁴

With so much at stake in our criminal justice system, it is obvious that serious attention must be paid to its proper functioning. Anyone familiar with the operation of the criminal justice process – any judge, litigator, or informed policy-maker – will attest that one of the best ways to promote the proper functioning of the criminal justice system is to ensure that it is staffed with qualified lawyers working under conditions that permit them to practice effectively. Indeed, this rather obvious conclusion was reached by the Supreme Court fifty years ago in its landmark decision in *Gideon v. Wainwright* (1963),⁵ which held that the Sixth Amendment's guarantee of court-appointed counsel for indigent defendants in serious criminal cases applied as matter of “due process of law” to the states in addition to the federal government. The *Gideon* decision is often hailed as a triumphant story of progress: it was the subject of the bestselling book by the journalist Anthony Lewis, *Gideon's Trumpet*, which was adapted into a film of the

same name starring Henry Fonda; it is also the only decision recognized by the Supreme Court itself as establishing a “watershed” right of criminal procedure for the purposes of retroactive application.⁶

Anthony Lewis passed away in 2013, the year of *Gideon's* fiftieth birthday, but the triumphal version of the *Gideon* story died much longer ago, as Lewis himself recognized. On each significant anniversary of the decision, commentators have wrung their hands over the failure of the reality of indigent defense representation to live up to the promises implicit in the recognition of the right. Horror stories abound of the failure of indigent defense systems in infamously low-performing jurisdictions. For example, in the wake of Hurricane Katrina, the New Orleans public defender office was unable to produce a list of the 6,500 to 8,000 prisoners whom they were supposed to be representing.⁸ And in some Mississippi counties, defendants may wait up to a year to speak to a court-appointed lawyer about their case, and many lawyers do not meet their clients until the day of trial.⁹

Less obvious culprits, too, have left *Gideon's* promises unmet. For example, the state of New York – a relatively wealthy state in the relatively progressive Northeast – has failed to establish a well-functioning statewide system of indigent defense services; rather, services are supplied through a patchwork of inadequately funded county-based systems, without any statewide attorney training, supervision, or monitoring.¹⁰ And even the federal defender system, often promoted as a model for the states, was thrown into crisis as a consequence of the fiscal sequester in 2013, which forced substantial and unprecedented cuts in staffing and resources.¹¹ Even the nation's chief prosecutor recognizes the grave deficiencies that indigent defense providers face across the country. As Attorney General Eric Holder has forcefully

acknowledged, “Too often, when legal representation is available to the poor, it’s rendered less effective by insufficient resources, overwhelming caseloads, and inadequate oversight. . . . [T]he basic rights guaranteed under *Gideon* have yet to be fully realized.”¹²

Why has it proven so difficult to meet *Gideon*’s promise of minimally adequate indigent defense representation for the poor in serious criminal cases? Unlike the fairly simple story of *Gideon*’s triumph, the story of *Gideon*’s failure is complicated and murky, especially in light of the many differences among the various jurisdictions (local, state, and federal) that are charged with the task of providing indigent defense services. However, there are four general reasons for *Gideon*’s failure that obtain across every jurisdiction and collectively cover much of the explanatory terrain.

Gideon’s most obvious deficit is that its command took the form of an unfunded mandate. Unlike most other constitutional guarantees in the Bill of Rights, the right to assistance of counsel in criminal cases is an affirmative rather than a negative right. The government cannot ensure the right merely by abstaining from impermissible intrusions (such as unwarranted searches and seizures or violation of First Amendment free speech rights), but only by directly channeling resources for that particular purpose. However, no court – not even the United States Supreme Court – has control over the power of the purse. Courts may elucidate the contours of constitutional rights, but they cannot compel the appropriation of state or federal monies. What this separation between affirmative rights and fiscal appropriations has meant for *Gideon* is that each jurisdiction (federal, state, or local) has been left to its own devices in deciding how to structure and fund its obligatory services for indigent criminal defendants, who comprise approximately

80 percent of all criminal defendants. Since the 1980s, when the number of prosecutions soared, funding challenges have been enormous. Close to half of the states have established statewide public defender offices of salaried lawyers who handle most of the state’s indigent defense caseload. The other states generally fully or partially delegate the responsibility for providing indigent defense services to counties or judicial districts, which provide for court-appointed counsel through a variety of means, including hourly compensation (often with mandated “caps”) and contracts (often of the “low-bid” variety). Although there are some decently funded and well functioning indigent defense systems, they are clearly the exception rather than the rule: most systems – whether public-defender, court-appointed, or contract-based – are characterized by chronic lack of adequate funding.¹³

The chronic underfunding of indigent defense is the source of many of the most obvious problems that plague such systems. First, there are the astronomically high caseloads that salaried public defenders (and some court-appointed and contract attorneys as well) carry in underfunded locales. For example, by one recent count, Florida public defenders in Miami-Dade County were carrying average caseloads of close to 500 felonies or 2,225 misdemeanors at a time.¹⁴ Crushing caseloads require attorneys to perform a kind of ER “triage” with their cases, moving from emergency to emergency rather than performing the kind of methodical investigation, legal research, client consultation, informed negotiation, and courtroom advocacy that the adversary system presumes. Second, chronically underresourced working conditions make it impossible to recruit enough well-qualified lawyers to take on the job of indigent defense, or to retain experienced lawyers. As a result, too many ill-qualified or inexperienced lawyers are

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providing indigent defense services, and they are the least able to deal with the constraints of inadequate resources. Third, lack of resources precludes the investment in training and supervision that might ameliorate problems caused by under-qualified and inexperienced counsel. Fourth, even if the lawyers could perform adequately, underfunding deprives them of the kind of investigative and expert services that many cases require.

One might wonder why, given all of these serious problems, underfunding persists in so many jurisdictions around the country. The answer is relatively simple: caseloads grow ever larger, and budgets are failing to keep pace and sometimes even shrinking. *Gideon's* mandate is essentially a welfare program, because indigent defense services by definition directly benefit only the poor.¹⁵ Welfare programs are always politically unpopular and fare poorly in comparison to government programs that support things that more apparently benefit all citizens, such as infrastructure and education. But criminal defendants are even less politically powerful than the poor. First, many current and past defendants are politically disenfranchised as a collateral consequence of prior convictions. Second, state officials are not merely insufficiently motivated to remedy the plight of criminal defendants (as is often the case with the poor); rather, they often have some affirmative interest in keeping criminal defendants at a comparative disadvantage in the criminal justice process, in order to produce more certain convictions at a lower cost. In explaining the persistent “defiance and resistance” of state governments to *Gideon's* mandate, some commentators have noted that adequate funding for criminal defense lawyers “could frustrate [governmental] efforts to convict, fine, imprison and execute poor defendants.”¹⁶ Moreover, when individual judges control some or all of the funding of

indigent defense, they may “tolerate or welcome inadequate representation because it allows them to process cases quickly.”¹⁷ The fact that most state judges must stand for some sort of election may also increase their wariness of the possibility of acquittals in high-profile cases.

Moreover, improvements in funding for indigent criminal defense programs are often short-lived. Even in jurisdictions where episodic increases in funding or resources for indigent defense services have been approved by the political branches, the battle for adequate funding is ongoing, due to the yearly nature of budget appropriations and other competing demands for funds. For example, in Massachusetts (a progressive state whose indigent defense system is considered a high-functioning one), the current Democratic governor has promoted a major reorganization of the structure of the statewide indigent defense program in an attempt to reduce costs by raising public defender caseloads.¹⁸ A recent proposal from the state's House Committee on Ways and Means suggested that Massachusetts experiment with a “low-bid” contracting system for indigent defense (the proposal was rejected in the House budget after a firestorm of criticism).¹⁹ The fragility of indigent defense funding, even in a relatively progressive and wealthy state like Massachusetts, demonstrates how precarious indigent defense funding is around the country and how difficult it is to achieve lasting reform.

Current indigent defense systems are plagued by institutional impediments that go beyond a lack of resources. While adequate funding is clearly necessary, it is also insufficient by itself for the proper functioning of an indigent defense system. In addition to adequate funds, indigent defense systems require institutional structures that 1) ensure their independence from improper political interference; 2)

provide adequate training, supervision, and oversight; and 3) more generally promote a culture of zealous advocacy. In too many jurisdictions around the country, these basic structural components are lacking, which severely undermines the ability of indigent defense counsel to provide minimally adequate representation.

The defense function's independence from improper political interference is of such importance that it commands the first principle of the American Bar Association's *Ten Principles of a Public Defense Delivery System* ("The public defense function, including the selection, funding, and payment of defense counsel, is independent").²⁰ Yet many states do not insulate their indigent defense counsel from direct or indirect political influence. In a small number of jurisdictions, chief public defenders must stand for election – a requirement that pits the public's interest in quick, cheap, and certain criminal convictions against public defenders' obligation to zealously defend their indigent clients. In many more jurisdictions, defense counsel (either chief public defenders or court-appointed counsel) are appointed by the judiciary, which has an interest in processing cases quickly and avoiding politically antagonizing prosecutors and police, whose support judges may need when they themselves stand for election, as is common throughout the United States. Similarly, in contract-based systems, state and local officials who enter into contracts with indigent defense service providers have obvious incentives to seek the lowest price and may demand certain hiring, cost-cutting, or case-processing practices in order for contracts to be renewed – demands that may be antithetical to the norms of zealous representation. Hence, even adequately funded indigent defense lawyers would be severely limited in the quality of representation they could realistically offer in the absence of an independent governing body distinct from the

electorate, the judiciary, and the legislative branch.

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Moreover, adequate training, supervision, and quality oversight of indigent defense counsel are also necessary to ensure the adequacy of indigent defense representation. In the substantial number of states that provide for indigent defense services on a local rather than a state basis, the availability of training and supervision is often spotty, and top-down enforcement of consistent norms of practice through attorney oversight may be nonexistent. The complexity of indigent defense practice and the ever-changing nature of both constitutional rules and technological advances (such as DNA testing) make ongoing training and supervision of criminal defense counsel a necessity rather than a luxury. Yet adequate initial training and continuing education remain unavailable or geographically inaccessible in many jurisdictions. It is similarly essential to require that attorneys have certain kinds of training and/or experience before they become eligible to take on the most serious cases. Yet in many jurisdictions, there are no such clear or generally enforced rules. For example, observers have reported that in Alabama, attorneys fresh out of law school are as likely as experienced attorneys to be assigned to serious cases, even to homicide prosecutions.²¹

The remaining part of the institutional structure necessary for a well-functioning criminal defense system is less concrete, but no less important: the maintenance of a culture of zealous representation. In many jurisdictions, indigent defense lawyers are so overwhelmed that they do not even attempt to advocate for their clients in the way that the adversary system of justice presupposes. They do not even try to investigate the facts underlying the allegations, do legal research, negotiate in an informed way, or file motions and litigate legal issues, much less actually try crimi-

nal cases. Rather, in many jurisdictions, the adversary process has devolved into a “meet ’em and plead ’em” form of perfunctory mass processing for large swaths of cases.²² Even if the funding issues that primarily drove the emergence of “meet ’em and plead ’em” practices were satisfactorily resolved, it would take a massive cultural reorientation to change the perspective of many currently operating indigent defense lawyers about the nature and requirements of their role. The promotion of such abstract institutional reform (the reform of “lawyer culture”) may be the hardest to accomplish or to measure.

One might wonder why, if the problems plaguing indigent defense systems are as dire as described, the lawyers practicing under such circumstances don’t sue to fix them – after all, they *are* lawyers. The answer is that the available legal remedies are often inadequate, inaccessible, or both.

On the one hand, the Supreme Court has maintained that the Sixth Amendment right to “assistance of counsel” for indigent defendants extended in *Gideon* entails the right to *effective* assistance of counsel, thus theoretically enabling defendants to assert their constitutional right to adequate representation in either state or federal court. On the other hand, the Court has defined the contours of “ineffective assistance of counsel” in such a way as to make it very difficult to establish. In the landmark case of *Strickland v. Washington*,²³ the Court mandated that judges evaluating claims of ineffective assistance of counsel must start with a thumb on the scale against such a finding: “[A] court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”²⁴ Moreover, the *Strickland* Court essentially created a safe harbor for “strategic” decisions of counsel, warning that courts must “apply a heavy measure of deference to counsel’s judg-

ments.”²⁵ Because lawyers, of course, do not wish to be found constitutionally ineffective, they have strong incentives to cover up their mistakes by claiming “legal strategy.” Moreover, in a companion case to *Strickland*, the Court further held that defendants seeking to challenge the quality of the representation afforded them must identify particular acts or omissions of their counsel, rather than general circumstances that might negatively affect counsel’s performance (such as insufficient time or resources, or lack of experience).²⁶ Thus, systemic problems are essentially immunized from constitutional review in individual cases.

Furthermore, *Strickland* also established that even if defendants can prove that their lawyers’ performance was constitutionally deficient, they still cannot undermine the validity of their convictions unless they can also demonstrate that they suffered “prejudice” from their lawyers’ mistakes: they must establish a reasonable probability that the outcome of the proceeding would have been different had their counsel performed adequately. Courts are often reluctant to find criminal defense lawyers who appear regularly before them to be constitutionally ineffective even when their performance is highly questionable. As a result, courts often dispose of cases on the grounds that they lack outcome-determinative “prejudice” so as not to be forced to decide the deficiency issue, thus giving even flagrantly deficient lawyers a free pass while failing to set (or uphold) basic norms of practice for future cases.

Even putting aside the substantive standard for ineffectiveness, the procedural setting in which claims of ineffective assistance of counsel are generally litigated makes them extremely unlikely to succeed. Claims of ineffective assistance usually require the development of some new facts (about evidence, arguments, or theories) that should have been developed at trial

but were not, and thus such claims cannot be litigated on direct review of criminal convictions, which is always conducted on the cold trial record. Rather, ineffectiveness claims are generally litigated in the post-conviction civil process afforded by state *habeas corpus* review, at which new evidence may be presented. However, criminal defendants are generally not represented by counsel on state *habeas* review (their constitutional right to representation in criminal cases runs out after their first appeal); thus, most indigent criminal defendants are on their own in seeking to establish the ineffectiveness of their trial (or appellate) counsel. Without the advice and assistance of a lawyer, it is very difficult for most criminal defendants to identify, investigate, and present claims of ineffective assistance of counsel, even when meritorious grounds for such claims exist. Moreover, even in the rare instances when criminal defendants are represented by counsel on state *habeas corpus* review, the state courts reviewing their claims are generally the same courts that oversaw their initial trials and appeals and thus are often resistant to overturning their earlier work.

Federal courts also offer federal *habeas corpus* review of federal constitutional claims after the conclusion of all state processes. It is often thought that federal courts may be more sympathetic than state courts to claims of ineffective assistance of counsel because 1) the claim is based on the federal Constitution rather than on state law; 2) federal judges are appointed rather than elected (as many state judges are); and 3) the consequences of granting *habeas* relief and ordering a new prosecution will have a greater effect on state rather than federal resources. However, accessing federal *habeas corpus* review of constitutional claims is a daunting task, because many complicated procedural hurdles must be cleared, both in the direct review process and on state *habeas corpus* review.

Moreover, even when criminal defendants actually make it through the procedural maze into federal court with their claims, Congress significantly curtailed the ability of federal courts to order relief in its 1996 overhaul of *habeas corpus* procedures, which now require federal courts to use a highly deferential standard in reviewing the decisions of state courts. Because the *Strickland* standard of constitutional ineffectiveness is already deferential to counsel, the overlay of federal deference to state courts yields what the Supreme Court has deemed a “doubly” deferential form of oversight.²⁷ As a result, the federal judiciary has not been able to serve as a robust champion of Sixth Amendment *Gideon* rights through its power of federal *habeas corpus* review of state court convictions.

The difficulties of enforcing *Gideon* through state and federal review of the constitutionality of individual criminal convictions have led some public defense and civil rights advocates to bring civil class action lawsuits in an attempt to directly address the systemic problems (including underfunding, crushing caseloads, and inexperienced counsel) that plague the delivery of indigent defense services. Structural litigation of this type has yielded some judicial rulings and legislative responses promoting indigent defense reform in several jurisdictions. For example, a recent federal court decision found that two cities in Washington State had constitutionally inadequate public defense systems and ordered extensive injunctive relief requiring new resources and monitoring for defense attorneys.²⁸ Nonetheless, structural litigation to remedy systemic inadequacies has run into some of the same obstacles as individual constitutional review, as well as some new ones. Some courts have insisted that structural litigation, like individual defendant litigation, must meet the *Strickland* “prejudice” standard and prove that systemic un-

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derfunding and excessive caseloads caused specific outcome errors – an often difficult task that requires throwing individual lawyers under the bus in order to make the systemic case. In addition, some state courts have dismissed structural claims by insisting that such claims must be addressed to the legislature rather than the courts. And federal courts – generally the more sought-after venue for constitutional litigation – have dismissed structural claims under the *Younger* abstention doctrine, named after the Supreme Court case that held that federal courts may not issue rulings that would interfere with ongoing state criminal prosecutions.²⁹ In short, there is a chasm between the proclaimed existence of the constitutional right to effective indigent defense representation and accessible legal remedies in state or federal courts for violations of that right.

Last but not least, *Gideon*'s promise has proven so hard to vindicate because the vast majority of cases of ineffective assistance of indigent defense counsel are essentially invisible: they are not detectable in the public records kept by the criminal justice system, and they are never raised in any court. The reason for this cloak of invisibility is the extraordinary dominance of the practice of plea bargaining across the country, which accounts for all but a tiny percentage of criminal convictions (more than 95 percent). The possible penalties are often so high as to make plea offers irresistible; the government offers such substantial concessions in the plea process that defendants are unwilling to risk the much higher penalties that might result if they were convicted after trial. Because the government's case is never put to the test, the adequacy of a defense lawyer's preparation, knowledge, and skills is never revealed (to defendants or to anyone else). Moreover, when defendants do have strong reasons to believe that their lawyers are inad-

equat in some significant respect, their incentive to accept a plea bargain becomes stronger, not weaker – by pleading, they at least get a sentencing concession, whereas by going to trial, the chance of acquittal with a subpar lawyer becomes even more remote. Moreover, because misdemeanor courts often fail to inform defendants of their right to counsel and some misdemeanor prosecutors offer plea deals only to those who will waive that right, *Gideon* is often more honored in the breach than in the observance in petty cases without the threat of substantial penalties after trial.³⁰

By pleading guilty, defendants are held to have waived any objections to their conviction other than infirmities in the plea process itself. Until recently, defendants could not claim ineffective assistance of counsel to undermine a conviction based on a guilty plea unless they could demonstrate that they likely would have gone to trial in the absence of their lawyers' incompetence – a difficult burden in light of the steep concessions offered in the plea bargaining process and the overwhelming percentage of defendants who plead guilty. However, the Supreme Court has very recently issued a series of decisions imposing some new duties on lawyers in the plea process that indicate possible new remedies. The Court has held that criminal defense lawyers have a duty to advise their clients about the deportation consequences of a criminal conviction prior to either a trial or a plea.³¹ Moreover, the Court has recognized that an attorney's failure to communicate a more lenient plea offer than the one accepted by a defendant,³² or to offer competent advice that might have prevented a defendant from risking a trial,³³ violates the Sixth Amendment right to effective assistance of counsel and might require reversal of the defendant's convictions. These cases have been hailed as revolutionary in the Court's more expansive re-

cognition of counsel's Sixth Amendment duties, especially in the context of plea bargaining.

These recent cases do indeed represent a substantial departure from prior law in their recognition of the "simple reality" that "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process."³⁴ Moreover, these cases will undoubtedly open up new avenues of litigation on behalf of indigent criminal defendants. However, it is unlikely that these new pronouncements – even if extended by the Court to cover more cases – can substantially undo the potent "invisibility" effect that the practice of plea bargaining has on Sixth Amendment violations. The enormously powerful incentives to plead guilty – the generally huge differential between the concessions offered in the plea process and the likely sentence after trial, along with the overwhelming caseloads of most indigent defense attorneys – will continue to drive the vast majority of criminal defendants to accept plea bargains. Once such bargains are accepted (by both a defendant and the court), it is the very rare defendant who will seek to "undo" the bargain, because successful challenges generally simply place defendants back where they started. Cases in which defendants discover the kind of information about attorney misfeasance that might make it worthwhile to challenge a plea bargain – such as a better plea offer that was never communicated by defense counsel – are extremely rare, because defendants rarely have the capacity to uncover such information after their plea bargains are entered (especially without the help of a lawyer).

Hence, even with greater recognition by the Supreme Court of attorneys' Sixth Amendment responsibilities during the plea bargaining process, the prevalence of plea bargaining will continue to cloak from

view and shield from remedy the vast majority of Sixth Amendment failures.

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Major disasters are often produced by the confluence of many separate, smaller mistakes. A corollary of this is no less true: fixing major problems usually requires the simultaneous repair of many smaller problems. So it is with realizing *Gideon's* promise: ensuring the right to adequate representation for indigent criminal defendants will require changes from root to branch, from funding and organization to legal institutions and remedies, with careful attention to the current institutional pathologies that drive the problem of inadequate representation. Effecting these changes cannot be done with the stroke of a pen, the way *Gideon's* trumpet was first sounded. Rather, the problem is largely one of "political will."³⁵ The challenges are so widespread and complex that there is no silver bullet to overcome them; rather, the kinds of changes necessary will require the long, slow, and concerted effort of all possible institutional actors: not just governmental officials, but also the private bar, the nonprofit sector, the academy, and the media. The task is daunting, but so much is at stake: not just the rights and liberty of millions of criminal defendants, but the proper limits of the state power that shapes our society, for better or for worse.

- ¹ The last two terms of the Supreme Court have yielded constitutional decisions regarding the investigative use of GPS tracking and DNA sampling – see *United States v. Jones*, 132 S. Ct. 945 (2012), and *Maryland v. King*, 133 S. Ct. 1958 (2013) – but the provisional nature of the opinions in these cases demonstrates that the Court is clearly cognizant that these two tools represent the tip of the iceberg of technological innovation yet to come.
- ² See *Dædalus* 139 (3) (Summer 2010), “On Mass Incarceration,” <http://www.mitpressjournals.org/toc/daed/139/3>.
- ³ See Carol S. Steiker, “Criminalization and the Criminal Process: Prudential Mercy as a Limit on Penal Sanctions in an Era of Mass Incarceration,” in *The Boundaries of the Criminal Law*, ed. R. A. Duff et al. (New York: Oxford University Press, 2010), 31 – 32; and Roy Walmsley, *World Prison Population List*, 9th ed. (London: International Centre for Prison Studies, 2011).
- ⁴ See, for example, Todd R. Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (New York: Oxford University Press, 2007).
- ⁵ *Gideon v. Wainwright*, 372 U.S. 335 (1963).
- ⁶ See *Teague v. Lane*, 489 U.S. 288, 311 – 312 (1989).
- ⁷ See Anthony Lewis, “Foreword” to American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* (Chicago: American Bar Association, 2004), i, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.
- ⁸ See Karen Houppert, *Chasing Gideon: The Elusive Quest for Poor People’s Justice* (New York: The New Press, 2013).
- ⁹ See NAACP Legal Defense and Educational Fund, Inc., *Assembly Line Justice: Mississippi’s Indigent Defense Crisis* (New York: National Association for the Advancement of Colored People, 2003), 6, http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/ms_assemblylinejustice.authcheckdam.pdf.
- ¹⁰ See Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* (New York: New York State Unified Court System, 2006), 15 – 19, http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report_06.pdf.
- ¹¹ Michael S. Nachmanoff, “Sequestration Threatens to Eviscerate Federal Public Defenders,” *The Hill Congress Blog*, July 23, 2013, <http://thehill.com/blogs/congress-blog/judicial/312659-sequestration-threatens-to-eviscerate-federal-public-defenders>.
- ¹² Attorney General Eric Holder, “Address to the American Bar Association National Summit on Indigent Defense,” February 2, 2012, <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>.
- ¹³ See generally National Right to Counsel Committee, Constitution Project, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* (2009), 52 – 64, <http://www.constitutionproject.org/pdf/139.pdf>.
- ¹⁴ *Ibid.*, 68 (citing Erik Eckholm, “Citing Workload, Public Lawyers Reject New Cases,” *The New York Times*, November 9, 2008).
- ¹⁵ “[P]roviding for criminal defendants is regarded as akin to providing welfare.” See Erwin Chemerinsky, “Lessons from *Gideon*,” *Yale Law Journal* 122 (8) (2013): 2676, 2692.
- ¹⁶ Stephen B. Bright and Sia M. Sanneh, “Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*,” *Yale Law Journal* 122 (8) (2013): 2150, 2153.
- ¹⁷ *Ibid.*, 2154.

- ¹⁸ See Matt Murphy, “Patrick’s Call for More Public Defenders Draws Lawyers’ Pushback,” *The Carol S. Herald News*, February 8, 2012, <http://www.heraldnews.com/news/x962219952/Patricks-call-for-more-public-defenders-draws-lawyers-push-back>. Steiker
- ¹⁹ See Kurt Wise, “Law and Public Safety in the House Budget for FY 2014,” *MassBudget*, May 7, 2013, http://massbudget.org/report_window.php?loc=law_safety_house_fy14.html.
- ²⁰ American Bar Association, *Ten Principles of a Public Defense Delivery System*, 2002, <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>.
- ²¹ See American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon’s Broken Promise*, 17.
- ²² See Bright and Sanneh, “Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*,” 2152.
- ²³ *Strickland v. Washington* 466 U.S. 668 (1984).
- ²⁴ *Ibid.*, 689.
- ²⁵ *Ibid.*, 691.
- ²⁶ See *United States v. Cronin*, 466 U.S. 648 (1984).
- ²⁷ *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011).
- ²⁸ See *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash. Dec. 4, 2013). See also *State ex rel. Missouri Public Defender Commission v. Pratte*, 298 S.W.3d 870 (Mo. 2009) (opinion of Missouri Supreme Court setting limits on caseloads of indigent defense attorneys); and *Hurrell-Harring v. New York*, 15 N.Y.3d 8 (N.Y. 2010) (opinion of highest court in New York reinstating challenge on behalf of indigent defendants to the constitutional adequacy of defense counsel services, allowing the case to proceed to trial). See generally Stephen F. Hanlon, “State Constitutional Challenges to Indigent Defense Systems,” *Missouri Law Review* 75 (2010): 1 (surveying recent successful systemic challenges); and Cara H. Drinan, “The Third Generation of Indigent Defense Litigation,” *N.Y.U. Review of Law & Social Change* 33 (2009): 427.
- ²⁹ *Younger v. Harris*, 401 U.S. 37 (1971).
- ³⁰ See National Right to Counsel Committee, *Justice Denied*, 88 – 89.
- ³¹ See *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).
- ³² See *Missouri v. Frye*, 132 S. Ct. 1399 (2012).
- ³³ See *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).
- ³⁴ *Missouri v. Frye*, 132 S. Ct. at 1407 (quoting *Lafler v. Cooper*, 132 S. Ct. 1388, for the proposition that ours “is for the most part a system of pleas, not a system of trials”).
- ³⁵ See Carol S. Steiker, “*Gideon* at Fifty: A Problem of Political Will,” *Yale Law Journal* 122 (3) (2013): 2694.