

## REFLECTIONS ON THE RIGHT TO COUNSEL AFTER MORE THAN FIFTY YEARS

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### INTRODUCTION

The title of this article is likely understood as a reference to the U.S. Supreme Court's decision in *Gideon v. Wainwright*,<sup>1</sup> decided more than fifty years ago, in 1963. While "Fifty Years" does refer in part to *Gideon*, my title has a double meaning. Six months after *Gideon* was decided, I accepted my first criminal court appointments to represent defendants unable to afford counsel.<sup>2</sup> Since 1963, I have worked in various capacities studying criminal and juvenile public defense systems. These efforts have included drafting American Bar Association standards for providing defense services and preparing national reports and other publications dealing with the defense of accused persons unable to hire a lawyer.<sup>3</sup>

One of my favorite John Lennon songs is "Imagine," which includes the well-known lyric, "you may say I'm a dreamer." Well, I have dreamed a lot about what state court public defense systems in the United States would look like if we could start over based on what we know now about providing

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1. 372 U.S. 335 (1963).

2. At the time, I was two years out of law school and a member of the E. Barrett Prettyman Program in Trial Advocacy at the Georgetown University Law Center. A major component of the program was providing defense services in the District of Columbia for persons in criminal and juvenile cases financially unable to afford a lawyer.

3. See, e.g., NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011) [hereinafter LEFSTEIN, SECURING REASONABLE CASELOADS]; NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009) [hereinafter JUSTICE DENIED] (I served as co-reporter and principal author); ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009) (I served as reporter); ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2005) [hereinafter ABA GIDEON'S BROKEN PROMISE] (I served as co-author); *The Defense Function*, in THE ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) (I served as reporter); *Providing Defense Services*, in THE ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) (I served as reporter).

adequate defense services for the millions of persons who cannot afford their own lawyer. If this were possible, I am confident public defense would not look like it does today in most of the country. So, in this brief essay, I discuss my dreams as I imagine public defense programs as I wish they were, not as most actually are.

### I. ORGANIZATION OF STATE PUBLIC DEFENSE PROGRAMS

First and foremost, public defense services would be organized on a statewide basis and the program overseen by an independent, non-partisan commission that would adopt appropriate enforceable standards. At a minimum, the commission's standards would deal with attorney performance, qualifications to provide representation, supervision of public defenders and private lawyers, and would address the workloads and supervision of all lawyers providing defense services.<sup>4</sup> In addition, the funding for public defenders and private lawyers would be adequate,<sup>5</sup> and sufficient support staffs of "experts, investigators, social workers, paralegals, secretaries, technology, research capabilities, and training" provided.<sup>6</sup> Funding for the defense program would be substantially from the state's general revenues<sup>7</sup> rather than derived from fees paid by poor persons<sup>8</sup> or from unstable sources of funding.<sup>9</sup>

One of the commission's primary goals would be to assure that the same quality of defense representation is provided throughout the state so that there are not major differences among local jurisdictions. Absent a statewide defense program, we know from experience that there will be significant differences in the quality of representation provided throughout the state's governmental subdivisions.<sup>10</sup>

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4. These recommendations are consistent with those endorsed by the National Right to Counsel Committee organized by the Constitution Project. *See* Recommendations 2, 3, 5, and 6 in JUSTICE DENIED, *supra* note 3, at 185–94.

5. *Id.* at 194.

6. *Id.* at 196.

7. *Id.* at 189.

8. *See, e.g.*, ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 1 (2010) ("Thirteen of the fifteen states [with the highest prison populations in the United States] . . . charge poor people public defender fees simply for exercising their constitutional right to counsel.").

9. *See, e.g.*, Campbell Robertson, *In Louisiana, the Poor Lack Legal Defense*, N.Y. TIMES (Mar. 19, 2016), <https://www.nytimes.com/2016/03/20/us/in-louisiana-the-poor-lack-legal-defense.html> [http://perma.cc/52MG-LNKF] ("While the [statewide public defender] board distributes a central fund to the various districts, that state money is simply meant to supplement what for nearly all the districts is the main source of revenue: traffic tickets and local court fees.").

10. In Indiana, for example, counties receive partial reimbursements of forty percent for indigent defense felony expenses if the county elects to participate in the state's reimbursement program, which requires compliance with various standards and is administered by the Indiana

More than fifty years since the *Gideon* decision, still less than half the states have independent commissions with complete oversight of the state's public defense services. According to a chart prepared by the Sixth Amendment Center, the exact count appears to be nineteen states, most of which provide, as in Missouri, 100% of the funding from the state's general revenues.<sup>11</sup> However, in Missouri, as in many of the nineteen states, the funding is insufficient to mount a strong public defense program that ensures quality representation for accused persons throughout the state.<sup>12</sup>

## II. FEDERAL FUNDING FOR STATE PUBLIC DEFENSE

Now I have a second dream: federal funding to assist states in providing defense services for those who cannot afford a lawyer. By virtue of United States Supreme Court decisions,<sup>13</sup> implementation of the Sixth Amendment right to counsel is a vital, albeit politically unpopular, unfunded mandate imposed on the fifty states and the District of Columbia. The Supreme Court's decisions are now decades old, yet no significant federal funding to assure their implementation has ever been provided. In 1979, the American Bar Association (ABA) passed a resolution urging that the federal government establish a Center for Defense Services to assist the states in providing counsel.<sup>14</sup> The ABA thought this made sense since the states were charged

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Public Defender Commission (IPDC). A recent study of Indiana noted significant differences among Indiana counties in providing defense services and found that “[t]he State of Indiana has no mechanism to ensure that its constitutional obligation to provide effective counsel to the indigent accused is met in felony and juvenile delinquency cases, at both the trial level and on direct appeal, in counties and courts that do not participate in the IPDC reimbursement program.” SIXTH AMENDMENT CENTER, Executive Summary of THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL INDIGENT DEFENSE SERVICES (2016).

11. For the Sixth Amendment Center's chart of the fifty states plus the District of Columbia, see *Know Your State*, SIXTH AMENDMENT CENTER (2013), <http://sixthamendment.org/know-your-state/> [<http://perma.cc/SWN4-Z5NZ>].

12. See, e.g., Camila Domonoske, *Overworked and Underfunded, Mo. Public Defender Office Assigns Case — To The Governor*, NAT'L PUB. RADIO (Aug. 4, 2016, 12:34 PM), <http://www.npr.org/sections/thetwo-way/2016/08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-governor> [<http://perma.cc/T5PM-G8CL>].

13. In addition to *Gideon*, other key Supreme Court decisions extending the Sixth Amendment's guarantee of legal representation for those unable to afford a lawyer include: *In re Gault*, 387 U.S. 1, 41 (1967) (right to counsel applies in cases in which juveniles are charged with delinquency); *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972) (right to counsel extends to misdemeanor cases resulting in a defendant's loss of liberty); and *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (defendants may not be imprisoned for probation violations if not extended the right to counsel when found guilty of the underlying offense for which sentence was suspended).

14. See A.B.A., STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, REPORT TO THE HOUSE OF DELEGATES (1979), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/downloads/20110325\\_aba\\_121.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/20110325_aba_121.authcheckdam.pdf) [<http://perma.cc/PC24-HSS7>] (resolution for “establishment of an independent federally funded

with implementing a *federal* constitutional guarantee without any meaningful federal assistance. In fact, the ABA concluded that its proposal was so sensible that for a second time, in 2013, the organization again approved a resolution urging federal funding for defense services in state courts.<sup>15</sup>

Ironically, although there is not a broad based civil right to counsel guarantee, many years ago the federal government established the Legal Services Corporation (LSC), which in FY 2016 had a budget of \$385 million.<sup>16</sup> While I applaud the establishment of the LSC, I simply observe that nothing of this sort has ever been enacted by the federal government to assist states in implementing the Sixth Amendment's constitutional right to counsel in criminal and juvenile cases.

### III. SUBSTANTIAL PRIVATE BAR INVOLVEMENT IN PUBLIC DEFENSE

Another of my dreams is substantial private bar representation in public defense in all states. This is not because I oppose having full-time public defenders. To the contrary, I am a former public defender and believe strongly in having well-funded, full-time, trained public defenders throughout the country. Moreover, I believe that the vast majority of public defenders are knowledgeable, dedicated, and make important contributions in defending their clients despite usually having far too many cases and inadequate support

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Center for Defense Services for the purpose of assisting and strengthening state and local governments in carrying out their constitutional obligations to provide effective assistance of counsel for the defense of poor persons in state and local criminal proceedings.”). For further discussion of this proposal, see Norman Lefstein & Sheldon Portman, *Implementing the Right to Counsel in State Criminal Cases*, 66 A.B.A. 1084, 1084 (1980). A similar proposal was recommended by the National Right to Counsel Committee. See JUSTICE DENIED, *supra* note 3, at 200: “Recommendation 12—The federal government should establish an independent, adequately funded National Center for Defense Services to assist and strengthen the ability of state governments to provide quality legal representation for persons unable to afford counsel in criminal cases and juvenile delinquency proceedings.”

15. See A.B.A., RESOLUTION 104A (2013), [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2013\\_hod\\_midyear\\_meeting\\_104a.docx](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2013_hod_midyear_meeting_104a.docx) [http://perma.cc/6ZFF-T3LX] (resolution of the American Bar Association urging that “Congress . . . establish an independent federally funded Center for Indigent Defense Services for the purpose of assisting state, local, tribal and territorial governments in carrying out their Constitutional obligation to provide effective assistance of counsel for the defense of the indigent accused in criminal, juvenile, and civil commitment proceedings, and to appropriate sufficient funds for the Center to successfully carry out its mission.”).

16. See *FY 17 Budget Request*, LEGAL SERVICES CORP., <http://www.lsc.gov/media-center/publications/fy-2017-budget-request#bftoc-fy-2017-budget-request> [http://perma.cc/Z8RL-ZMZR] (“Congress appropriated \$385 million to LSC for FY 2016, \$10 million more than the previous year. Compared to its largest appropriation of \$420 million in FY 2010, however, LSC’s funding has decreased by 8%, or \$35 million.”).

services.<sup>17</sup> But I also believe that ample private bar defense representation is essential. Unless private lawyers are involved in public defense, the likelihood is overwhelming that caseloads of public defenders will expand beyond their capacity, and there will be no alternative except to fall back on overworked public defenders to handle the caseload.<sup>18</sup> This has often been the history of public defense in state courts, as caseloads have outstripped the capacity of public defender programs and the private bar's involvement has been marginalized.

The ABA has long recommended that there be "substantial participation" by private lawyers in providing public defense representation.<sup>19</sup> That goal has been fulfilled in the federal courts, in which, pursuant to the Criminal Justice Act, private lawyers are substantially involved in defense representation and thus serve as a vital safety valve in assuring that federal public defenders are not overloaded with too many cases.<sup>20</sup> The same situation should prevail in state criminal courts as well.

But it is not sufficient to have substantial numbers of private lawyers involved in public defense. The lawyers need to be adequately compensated, trained, supervised, and their level of experience matched with the seriousness of the charges against the accused. Unless the public defender agency oversees the private bar's involvement in public defense, as in Massachusetts,<sup>21</sup> the sort of program that makes the most sense is to provide for an assigned counsel program in which there is full time staff not only to operate the program, but also to train, mentor, and supervise, as necessary, the private defense lawyers.

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17. Lack of funding, high caseloads, and other problems are effectively summarized in the most recent and extensive national report on public defense. See *JUSTICE DENIED*, *supra* note 3, at 2. Excessive caseloads also are discussed in *id.* at 65–70.

18. The importance of private bar involvement in indigent defense representation was illustrated several years ago in a Missouri case, in which the trial court acknowledged that the public defender was overworked, but since there were no private lawyers to appoint the judge told the public defender that he would have to handle the defendant's case despite his caseload. See LEFSTEIN, *SECURING REASONABLE CASELOADS*, *supra* note 3, at 236–37.

19. The first edition of standards relating to defense services approved by the ABA recommended the following:

Assignments [of cases] should be distributed as widely as possible among the qualified members of the bar. Every lawyer licensed to practice law in the jurisdiction, experienced and active in trial practice, and familiar with the practice and procedure of the criminal courts should be included in the roster of attorneys from which assignments are made.

Std. 2.2 in A.B.A., *STANDARDS RELATING TO PROVIDING DEFENSE SERVICES* 26 (1968) [hereinafter *ABA PROVIDING DEFENSE SERVICES* (1968)]. Current ABA-approved standards contain the following recommendation: "The plan for legal representation should include substantial participation by assigned counsel." Std. 5-2.1 in A.B.A., *ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES* 29 (3d ed. 1992) [hereinafter *ABA PROVIDING DEFENSE SERVICES*].

20. See LEFSTEIN, *SECURING REASONABLE CASELOADS*, *supra* note 3, at 238–39 nn.43–45.

21. *Id.* at 202–05.

The leadership of the program must also be staunch advocates for reasonable compensation for private defense lawyers, as well as assuring that investigators and experts are made available. Several years ago the Texas legislature authorized counties to establish “managed assigned counsel” programs, which are capable of implementing programs with these attributes.<sup>22</sup>

The model for the Texas statute has been the successful Private Defender Program developed by the San Mateo County Bar Association in San Mateo, California, which is an assigned counsel program featuring training, mentoring, supervision, and staff to operate the program and monitor lawyer performance. In fact, there is even a chief investigator who assists lawyers in identifying and training private investigators.<sup>23</sup> This program is quite different from the vast majority of assigned counsel programs in state courts, in which there is no meaningful oversight of the private lawyers and no real assessment of whether defense performance standards are achieved.

It is also necessary to certify the lawyers who provide representation to ensure that they are genuinely qualified for the seriousness of the cases to which they are assigned. No public defender program worth its name asks its lawyers to defend cases for which they lack the requisite training and experience. Similarly, assigned counsel and contract defense programs ought never to permit private lawyers to defend persons when they lack the necessary qualifications. The solution to making sure that all defense counsel, whether public defenders or private lawyers, are adequately prepared to represent accused persons in various types of cases is to assess carefully their

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When a person charged with a crime cannot afford to hire a lawyer, judges in most Texas counties appoint a private attorney from a list maintained by the courts. While this type of system, known as an assigned counsel system, can provide an effective means for some jurisdictions to meet Constitutional requirements, it can present several challenges for judges to effectively provide the oversight and quality control required given their primary duties and given that their visibility of attorney performance is limited to courtroom interaction.

In order to enhance the independence and quality of indigent defense in Texas, the legislature has authorized a new option, called a Managed Assigned Counsel system. In 2011, the 82nd Texas State Legislature enacted HB 1754, establishing procedures for counties to create managed assigned counsel (MAC) programs, which were defined as ‘a program operated with public funds by a governmental entity, nonprofit corporation, or bar association under a written agreement with a governmental entity other than an individual judge or court; and for the purpose of appointing counsel under Article 26.04 of the Texas Code of Criminal procedure or Section 51.10 of the Family Code.’

*Managed Assigned Counsel Program Overview/Implementation Steps*, CENTER FOR COURT INNOVATION, <http://www.courtinnovation.org/sites/default/files/documents/ManagedAssignedCounselProgram.pdf> [http://perma.cc/PB7B-X96B].

23. The Private Defender Program has been providing defense services in San Mateo County, California, for many years. For a discussion of the program, see LEFSTEIN, *SECURING REASONABLE CASELOADS*, *supra* note 3, at 217–28.

qualifications.<sup>24</sup> The principle that lawyers who represent death penalty cases should be certified to defend capital cases is well accepted.<sup>25</sup> This approach should be extended to private lawyers and public defenders when representing persons in all types of cases, especially serious felonies.<sup>26</sup>

#### IV. PUBLIC DEFENDER REFERRALS TO QUALIFIED PRIVATE LAWYERS

Undoubtedly, one of the most vexing problems in public defense is the incredibly large numbers of persons that public defenders represent.<sup>27</sup> Although ethical rules require that lawyers resist work that they can neither competently nor diligently handle,<sup>28</sup> defenders nevertheless frequently do so as requested by their defense programs, which then becomes the prevailing culture of the organization.<sup>29</sup> This pattern has been repeated throughout much

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24. For example, the Massachusetts Committee on Public Counsel Services oversees the private lawyers who provide defense services and screens the lawyers to determine their qualifications for representing defendants based upon the seriousness of the cases. See LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 3, at 196.

25. See Guidelines 3.1(E)(1), 3.1(E)(3), and 3.1(E)(6) in A.B.A., GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 4 (2003), [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/death\\_penalty\\_representation/2003guidelines.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf) [<https://perma.cc/32UG-XQKV>].

26. Of course, it is important that the certification of lawyers to handle serious felony cases be a searching and careful inquiry. In the well-known Netflix documentary, *Making a Murderer*, attorney Len Kachinsky represented juvenile Brendan Dassey. The documentary showed how Kachinsky used his investigator to obtain a videotaped confession from Dassey, which was then made available to the police. At the time, Kachinsky had been certified to handle serious felony cases by the Wisconsin State Public Defender, which coordinates the state's private lawyer assigned counsel program. But after Kachinsky's handling of the case was exposed, his certification for representing cases of such seriousness was withdrawn. See Bruce Vielmetti, *Attorney in 'Making a Murderer' Crosshairs Admits Errors But Defends Work*, MILWAUKEE JOURNAL SENTINEL (Jan. 6, 2016), <http://archive.jsonline.com/news/wisconsin/attorney-in-making-a-murderer-crosshairs-admits-errors-but-defends-work-b99646945z1-364401181.html> [<http://perma.cc/W9TD-3XMS>] ("The State Public Defender decertified Kachinsky from taking homicide cases after it learned of the O'Kelly interview and filed a complaint with the Office of Lawyer Regulation. He said he agreed to take additional training and meet other conditions for a year as part of an alternative to discipline.").

27. The problem of high caseloads was discussed earlier in conjunction with the need for private lawyers to be involved in public defense representation. See *supra* text accompanying note 17.

28. See MODEL RULES OF PROF'L CONDUCT r. 1.1 and r. 1.3 (A.B.A. 2014). Also, r. 1.16 (a) requires a lawyer to decline representation, or to seek to withdraw from continued representation, if continued involvement on the client's behalf will result in the violation of a disciplinary rule. MODEL RULES OF PROF'L CONDUCT r. 1.16 (A.B.A. 2014).

29. Culture in public defense has been discussed in various sources. See, e.g., *Understanding Lawyer Behavior: Why Leadership Matters*, in LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 3, at 95–111; Jonathan A. Rapping, *Directing the Winds of Change: Using Organizational Culture to Reform Indigent Defense*, 9 LOY. J. PUB. INT. L. 177, 177–220 (2008).

of the country in state criminal and juvenile courts, since those in charge of defender programs often lack the independence to challenge defense systems in which their lawyers practice. But this means that the public defenders are violating their ethical duties and Sixth Amendment obligations to render effective assistance of counsel.<sup>30</sup> To justify their inaction, defense programs and public defenders often rationalize that the private lawyers who would take the cases in lieu of public defenders would do a very poor job for their clients and cannot be trusted to provide even minimally adequate defense representation.<sup>31</sup> And, finally, if the public defender program or its lawyers seek relief from the trial courts, protracted litigation may well ensue in which judges are sometimes quite unreceptive to the defense program's position.<sup>32</sup>

But there is a way in which the pattern of defense programs accepting far too much work can be broken, which brings me to another of my dreams about public defense. To avoid caseload litigation and to pave the way for defender programs to control the caseloads of their lawyers, I suggest that all such programs be authorized to refer cases directly to alternative defense service providers rather than asking judges that the defense program and its lawyers not be appointed to new cases until their caseloads are brought under control.

The successful implementation of this recommendation is dependent on several factors. First, either state laws, rules of court, or tacit approval of the judiciary must authorize defense programs to make direct referrals to private lawyers. And, of course, there must also be alternative defense providers who not only are available, but also well trained, supervised, adequately resourced, and fully capable of accepting direct case referrals from defense programs. This is why I earlier stressed the importance of there being effective defense

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30. For examples of the kinds of problems that defense programs encounter when independence is absent, see *JUSTICE DENIED*, *supra* note 3, at 80–84.

31. I have been told this on many occasions when I have discussed the subject with overworked public defenders around the country. While I fully appreciate their point of view and recognize that they may be correct in their assessments, their excessive caseload problem is obviously not resolved when defenders accept even more clients than they can competently and diligently represent. Moreover, the public defenders' viewpoint ignores the principle that they owe their primary allegiance to current clients and accepting more work than they can effectively represent further jeopardizes their ability to deliver competent and diligent representation to their current clients. The issue is addressed in the ABA's ethics opinion dealing with excessive public defense caseloads. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441, 4-5 (2006) ("A lawyer's primary ethical duty is owed to existing clients. Therefore, a lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive.").

32. For example, despite an uncontroverted trial court record, in which the public defender in Knoxville, Tennessee established that his lawyers had excessive misdemeanor caseloads, the court's five misdemeanor trial court judges rejected the defender's position. See discussion of the litigation in *LEFSTEIN, SECURING REASONABLE CASELOADS*, *supra* note 3, at 168–72.

systems in which private lawyers participate substantially in a state's public defense representation program.<sup>33</sup>

Implementation of this proposed recommendation has another important advantage, i.e., it removes judges from the business of appointing lawyers to provide defense services, a practice that has long been opposed by national organizations.<sup>34</sup> In its current standards, the American Bar Association forcefully explains its opposition to judicial appointments of defense counsel:

Retained lawyers are neither chosen nor approved by the courts, and there are no compelling reasons for defenders and private assigned counsel to be treated differently. Moreover, if a lawyer desires continuous appointments from the court or elected officials, there may be a strong temptation to compromise clients' interest in ways that will maximize the number of future case assignments. The assignment of cases by the defender or assigned-counsel program also should help to alleviate the fear of clients that the defense lawyer is working for the judge or court official in charge of appointments.<sup>35</sup>

In fact, there are several states in which legislatures have enacted statutes that enable public defender programs to do exactly what is suggested here—the referral of cases by defender programs directly to private defense lawyers.<sup>36</sup> However, the statutes have not been especially helpful to public defender programs with too many cases either because a strong private bar defense program is absent in the jurisdiction and/or there are insufficient funds to compensate the private lawyers.<sup>37</sup> This, of course, does not undermine the

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33. See *supra* text accompanying notes 17–26.

34. For example, during 1974–1976 the National Legal Aid and Defender Association, with support from the federal government, organized a national study commission on defense services and undertook a massive study of how best to deliver public defense services in the United States. The result was a 500-page report with twenty pages of black-letter recommendations. The commission recommended, *inter alia*, that appointments of defense attorneys should be undertaken by administrators of public defender and assigned counsel programs. See NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 1, 15 (1976), [http://www.nlada.net/sites/default/files/nsc\\_guidelinesforlegaldefensesystems\\_1976.pdf](http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf) [<http://perma.cc/ML34-YFL6>] [hereinafter NLADA GUIDELINES FOR LEGAL DEFENSE (1976)] (“The initial assignment of attorneys in defender and assigned counsel programs should be an internal administrative function.”).

35. ABA PROVIDING DEFENSE SERVICES, *supra* note 19, at 17. The black-letter standard to which this commentary pertains reads as follows: “The selection of lawyers for specific cases should not be made by the judiciary or elected officials, but should be arranged for by the administrators of the defender, assigned-counsel programs and contract-for-service programs.” *Id.* at 13. See also Principle 1 in A.B.A., ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 2 (2002).

36. Statutes in Maryland and Wisconsin, for example, provide that statewide defender programs may refer cases directly to private attorneys. See LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 3, at 240 n.48 and accompanying text.

37. *Id.* A well-publicized effort by Missouri's State Public Defender to assign the state's governor to defend the criminal case of a person who could not afford counsel was rejected.

recommendation; it simply reflects the pervasive problem of underfunding public defense almost everywhere in state courts.

#### V. USE OF “CLIENT CHOICE” IN PUBLIC DEFENSE

My final dream pertains to the United States adopting a policy that is well-accepted in British Commonwealth countries. I refer to the use of free market principles applied to public defense, enabling defendants unable to afford counsel to select their own lawyers from among those wanting to provide defense services who have been screened and deemed qualified to do so. Only if a defendant declines to choose their own lawyer should an alternative selection system be used. In that event, the choice of counsel should be made by administrators of a public defender, assigned counsel program, or officials from another non-judicial entity. As discussed in the preceding section, for the reasons previously cited and consistent with recommended standards, judges should not to be involved in appointing lawyers.<sup>38</sup>

During the early 1990s, I studied the public defense systems of England and Scotland in order to compare them with defense services in this country. In doing so, I acquired an appreciation of client selection of counsel and the extent to which the practice is highly valued by English and Scottish solicitors.<sup>39</sup> For that reason, I was not surprised to learn that when the British government proposed to eliminate client choice in 2013, there was an angry

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See Celeste Bott, *Court Rules Public Defender Can't Appoint Missouri Governor as a Defense Attorney*, ST. LOUIS POST-DISPATCH (Aug. 25, 2016), [http://www.stltoday.com/news/local/govt-and-politics/court-rules-public-defender-can-t-appoint-missouri-governor-as/article\\_c59059f8-98c8-50fe-9068-12a9b092b7f3.html](http://www.stltoday.com/news/local/govt-and-politics/court-rules-public-defender-can-t-appoint-missouri-governor-as/article_c59059f8-98c8-50fe-9068-12a9b092b7f3.html) [<http://perma.cc/FT72-2VNH>].

38. See *supra* text accompanying notes 34 and 35.

39. I discussed my research on client choice in England and Scotland in Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L. J. 835, 915–20 (2004) and in LEFSTEIN, SECURING REASONABLE CASELOADS, *supra* note 3, at 241–49. Numerous law review articles and other publications support permitting defendants to select their own defense lawyer. See, e.g., Janet Moore, *The Antidemocratic Sixth Amendment*, 91 WASH. L. REV. 1705 (2016); Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505 (2015); Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help To Fix a Broken System*, CATO INSTITUTE (Sept. 1, 2010), <http://www.cato.org/publications/policy-analysis/reforming-indigent-defense-how-free-market-principles-can-help-fix-broken-system> [<http://perma.cc/H6B9-ZSLY>]; Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525 (2007); Kenneth P. Troccoli, “I Want a Black Lawyer to Represent Me”: Addressing a Black Defendant's Concerns with Being Assigned a White Court-Appointed Lawyer, 20 LAW & INEQ. 1 (2002); Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181 (1998).

outcry from British solicitors, so much so that the government abandoned its plan to abolish client selection of counsel.<sup>40</sup>

Solicitors in both England and Scotland believe strongly that client choice fosters much stronger attorney/client relationships. Moreover, my interviews with British solicitors convinced me that the practice incentivizes lawyers to do the best possible work for their clients in order to receive repeat business from clients and be recommended for defense representation to future clients. In other words, client selection of counsel functions in exactly the same way that free enterprise operates in all other areas of commerce, whether the assistance provided is by doctors, dentists, plumbers, or others who provide services to the public.

In this country, we have not seriously considered nor sought to replicate the practice of client choice, although the idea was addressed in some of the first standards prepared for the delivery of public defense representation.<sup>41</sup> Recently, however, the Texas Indigent Defense Commission (TIDC) launched the first-ever experimental program of client choice in the United States, beginning in February 2015 in Comal County, Texas.<sup>42</sup> Comal County is

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40. See Catherine Baksi, *MoJ Unveils Tendering Plans for Criminal Defence*, THE L. SOC'Y GAZETTE (Apr. 8, 2013), <http://www.lawgazette.co.uk/news/moj-unveils-tendering-plans-for-criminal-defence/70293.fullarticle> [<http://perma.cc/YZ7V-GDDC>] (“On the removal of client choice, head of legal aid at the Law Society Richard Miller said: ‘Client choice is widely regarded as an important driver of quality in the justice system. It is very concerning, and revealing, that the government appears prepared to sacrifice this vital principle.’”); Press Release, Ministry of Just., *Law Society and MoJ Agree New Proposals for Criminal Legal Aid*, (Sept. 5, 2013), <https://www.gov.uk/government/news/law-society-and-moj-agree-new-proposals-for-criminal-legal-aid> [<http://perma.cc/F5NR-69LD>]. Justice Secretary Chris Grayling is quoted in the press release as follows: “The proposals we have agreed make sure legally-aided lawyers will always be available when needed and that people can choose the lawyer they want to help them.” *Id.*

41. In preparing this article I discovered an ABA statement respecting client selection of counsel that I previously had overlooked. In its first edition of ABA standards relating to defense services, the commentary regarding rotation of assignments to private lawyers contains this sentence: “Permitting the defendant to select the lawyer he wishes to represent him is one method for increasing his confidence that he is being provided competent counsel and of providing as nearly as possible the same conditions for the professional relation that obtain when counsel is retained by a defendant of means.” See r. 2.3 cmt. in ABA PROVIDING DEFENSE SERVICES (1968), *supra* note 19, at 29–30. But outright endorsement of client selection of counsel is not contained in the black-letter standards of the first edition. NLADA standards developed several years later went further, endorsing client selection in a black-letter recommendation: “However, to the extent administratively feasible and consistent with the overall effectiveness of the system, the client should be afforded an opportunity to choose a particular attorney.” See Sect. 5.2 in NLADA GUIDELINES FOR LEGAL DEFENSE (1976), *supra* note 34, at 15.

42. A news release on the website of the Texas Indigent Defense Commission announced the start of the program:

On February 2nd Comal County kicked off its first-in-the-nation Client Choice pilot project. Indigent defendants are now given the option to choose their attorney from the lawyers who have been qualified by the courts to handle indigent cases. The program

relatively small, with a population of approximately 120,000, situated between Austin and San Antonio. Defense services for those unable to afford counsel are provided by private lawyers serving as assigned counsel upon approval of the judiciary.<sup>43</sup>

I have been personally involved with the program since its beginning, primarily developing procedures for its implementation in Comal County while working in close cooperation with TIDC staff and others. In addition, just as this article is being completed, in December 2016, I have had involvement in the program's assessment and evaluation, which was publically released by the Justice Management Institute (JMI) of Arlington, Virginia, a few days before this article was finalized.<sup>44</sup>

The TIDC experiment with client choice, implemented in close cooperation and with the support of Comal County's judiciary, operated for twelve months, from February 2015 through the end of January 2016. However, Comal County's six misdemeanor and felony court judges have been so pleased with the perceived benefits of client choice that the program continues to function in Comal County even though the demonstration period for the project has ended. That it has continued to operate beyond its scheduled twelve-month period due to the decision of the county's judges is an important project finding in itself.

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aims to enhance the independence of indigent defense, foster more effective attorney-client relationships, and create new and stronger incentives for attorneys to provide good quality representation. Not all defendants wish to exercise the choice option, so the county reverts to the attorney rotation system when defendants decline. The project includes an impact assessment report . . . . The program has generated significant interest in the press. On December 28, 2014, the *Associated Press* published the news story *Indigent Defense Idea to Get First Test in U.S.*, which was picked up by dozens of media outlets around the country.

*Indigent Defense Newsletter: Comal County Client Choice Begins*, TEXAS INDIGENT DEFENSE COMMISSION (2015), <http://tidc.texas.gov/media/33921/1502newsletter-legalsize-.pdf> [<http://perma.cc/49TX-H6VL>].

43. Three lists of lawyers are approved by the county's judges to provide defense services: an "A" list of lawyers approved for the most serious felony cases, as well as all other cases of lesser seriousness, including misdemeanors; a "B" list of lawyers approved for the lesser serious felonies, as well as all other cases of less seriousness, including misdemeanors; and a "C" list of lawyers approved for representing defendants in misdemeanor cases. See COMAL COUNTY DISTRICT COURT PLAN PREAMBLE 6 (Oct. 27, 2015), <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=551> [<http://perma.cc/CTU6-SU3P>]; CLIENT CHOICE IMPLEMENTATION PLAN IN THE COMAL COUNTY DISTRICT COURT 5 (Jan. 9, 2015), <http://tidc.tamu.edu/IDPlanDocuments/Comal/Comal%20District%20Court%20Client%20Choice%20Implementation%20Plan.pdf> [<http://perma.cc/VL6T-GAZU>].

44. M. ELANIE NUGENT-BORAKOVE, FRANKLIN CRUZ & NORMAN LEFSTEIN, *THE POWER OF CHOICE: THE IMPLICATIONS OF A SYSTEM WHERE INDIGENT DEFENDANTS CHOOSE THEIR OWN COUNSEL* (JUSTICE MGMT. INST. 2017).

JMI's final report of the Comal County client choice project demonstrates that even though the concept of client choice is new to the United States, it seems clear from the successful implementation of the program in Comal County that it can, at least in regard to assigned counsel programs, be implemented in other Texas counties and in other states. Moreover, implementation can be achieved without much difficulty and without the sorts of adverse consequences that some feared when the Comal County experiment was launched. For example, before the program began there were concerns that some of the defense lawyers in Comal County would engage in unsavory unethical advertising or solicitation practices in order to attract clients. But nothing of the sort occurred as there was not a single incident of either advertising or solicitation among assigned counsel.

The project also demonstrated that client choice could be implemented within the framework of Texas law, which was important because there was a desire at the outset to proceed with the project, if possible, without seeking an amendment of Texas statutes. Like many states, Texas provides that judges shall appoint lawyers who provide defense representation for those unable to afford counsel.<sup>45</sup> To comply with the law, the system designed permits defendants to list their first three choices of a lawyer, in order of preference, by whom they would like to be represented, with the promise that a judge will appoint the first of the available lawyers selected by the defendant. Because of a belief that some lawyers might be overwhelmed with appointments due to their positive reputations among defendants, all assigned counsel were advised that they could remove themselves from appointment lists if they believed their caseloads were too large and would interfere with their ability to provide effective and competent representation in compliance with the Constitution and rules of professional conduct.

Finally, it is important to note that from the beginning of the project a majority of defendants opted in favor of selecting their own defense lawyers. In felony cases, during the project's year of operation, defendants exercised the option of client choice in more than seventy-five percent of all eligible felony cases. In misdemeanor cases, the client choice option was exercised in just under seventy percent of all cases.

Admittedly, this brief summary of client choice in Comal County omits many of the issues and findings addressed in the project's final evaluation report. But the discussion here should be sufficient to elicit interest in reviewing JMI's final report.

Finally, it is important to mention that client choice has an important constitutional dimension, as well as pro and con policy arguments beyond the present discussion. Although courts have often declared, including the United

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45. See TEX. CODE CRIM. PROC. ANN. art. 26.04 (2015).

States Supreme Court, that a person who cannot pay for their lawyer has no right to counsel of their choice,<sup>46</sup> the Supreme Court of the United States declared in 2006 that the lawyer of one's choice is "the root meaning" of the Sixth Amendment and cannot be denied to a defendant who has adequate funds to pay for his own lawyer.<sup>47</sup> Accordingly, if a defendant with financial means is denied counsel of her choice, the conviction must be reversed without the need to show prejudice.<sup>48</sup> In view of this determination, how can defendants unable to afford representation be denied the right to select their own lawyer consistent with principles of equal protection and due process of law?

### CONCLUSION

One of my dreams for improving public defense is unlike the rest. I refer to client selection of counsel. In order to implement the practice, judges and their court personnel, as well as defense lawyers, must embrace the concept and procedures pursuant to which defendants are advised of their right to legal representation. But the implementation of client choice does not require large expenditures of public funds.

In contrast, the other proposals advanced in this article are not likely to succeed without substantial additional financing. Whether a statewide defense program,<sup>49</sup> federal funding for defense services in state courts,<sup>50</sup> substantial private bar participation in public defense,<sup>51</sup> or public defender referrals of cases to private lawyers,<sup>52</sup> additional funding—sometimes a good deal of additional funding—is essential.

We are now more than fifty years since the *Gideon* decision and the Supreme Court's other historic "right to counsel" cases.<sup>53</sup> Yet, the vast majority of public defense programs in this country are impoverished. Although public defenders and private defense lawyers are usually dedicated to

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46. See, e.g., *Wheat v. United States*, 486 U.S. 153, 159 (1988) ("[T]he essential aim of the [Sixth] Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.").

47. *United States v. Gonzales-Lopez*, 548 U.S. 140, 147–48 (2006).

48. In the words of Justice Scalia, who authored the majority's opinion:

Where the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation [of the right to counsel]. Deprivation of the right is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of representation he received.

*Id.* at 148.

49. See *supra* text and accompanying notes 4–12.

50. See *supra* text and accompanying notes 13–16.

51. See *supra* text and accompanying notes 17–26.

52. See *supra* text and accompanying notes 27–37.

53. See, e.g., cases cited *supra* note 13.

doing the best they can for their clients, state and/or local governments provide insufficient financial help. Consequently, public defense in the United States is far too often assembly line justice involving a “meet ‘em and plead ‘em” kind of law practice, especially in misdemeanor and low level offense cases.<sup>54</sup> And that should embarrass America’s state court judiciaries and the legal profession, because it is so far beneath what rules of professional conduct and constitutional principles require for defense representation.<sup>55</sup>

In *Gideon*, Justice Black stressed the goal that every person, rich and poor alike, should stand “equal before the law.”<sup>56</sup> But in the most recent, extensive nationwide report on the right to counsel published in 2009, the National Right to Counsel Committee, a bi-partisan group of experts assembled by the Constitution Project, painted a very different picture from the one envisioned by Justice Black:

[T]oday, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the *Gideon* decision and the Supreme Court’s soaring rhetoric. Throughout the United States, indigent defense systems are struggling. Due to funding shortfalls, excessive caseloads, and a host of other problems, many are truly failing. Not only does this failure deny justice to the poor, it adds costs to the entire justice system. State and local governments are faced with increased jail expenses, retrials of cases, lawsuits, and a lack of public confidence in our justice systems.<sup>57</sup>

Since state and local governments have now had more than fifty years to “fix” public defense in this country, is it realistic to think that significant additional improvements in state court public defense systems can be achieved simply by persons of good will engaged in persuasive lobbying efforts?

54. See generally ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT’L ASS’N OF CRIM. DEFENSE LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* (2009); ABA *GIDEON’S BROKEN PROMISE*, *supra* note 3.

55. In *Padilla v. Kentucky*, the Supreme Court reiterated that defense counsel’s representation must be reasonable under prevailing professional norms. 559 U.S. 356, 366 (2010). The Court added that “[w]e long have recognized that ‘[p]revailing professional norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . .’” *Id.* See also *Cronic v. United States*, 466 U.S. 648, 656, 659 (1984):

[T]he adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’ The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. . . . [I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. (citations omitted).

56. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

57. *JUSTICE DENIED*, *supra* note 3, at 2.

Admittedly, there have been many improvements in public defense since the Supreme Court's right to counsel decisions, but there is little basis to believe that genuinely excellent, let alone even adequate public defense systems, will emerge in most states anytime soon absent something else. And that "something else," I submit, is the intervention of appellate courts willing to recognize that the current state of public defense in state courts is simply unacceptable. In this respect, however, perhaps the recent past is prologue.

During the past several years, several state supreme courts have rendered positive decisions when confronted with systemic challenges to public defense systems. The arguments set forth in these challenges and those that may be presented in the future are beyond the scope of this article.<sup>58</sup> Clearly, however, state supreme courts have begun to recognize that defense lawyers representing persons unable to afford counsel must meet certain standards and that the status quo can be successfully challenged if this is not being achieved. The most prominent of these decisions are from state supreme courts in Florida,<sup>59</sup> Michigan,<sup>60</sup> Missouri,<sup>61</sup> New York,<sup>62</sup> and Pennsylvania.<sup>63</sup>

There has never been a United States Supreme Court decision at all similar to those in the state supreme courts mentioned. The Supreme Court has never addressed whether systemic deficiencies in public defense systems may be

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58. An article in this law review issue argues for systemic challenges to public defense systems based upon workload studies with the use of Delphi panels and the need for lawyers to be free of conflicts of interest. See Stephen F. Hanlon, *The Appropriate Legal Standard Required to Prevail in a Systemic Challenge to an Indigent Defense System*, 61 ST. LOUIS U. L.J. 625 (2017). As of December 2016, no litigation invoking these arguments has been presented to any court.

59. Pub. Def., 11th Jud. Cir. v. State, 115 So. 3d 261, 279 (Fla. 2013) (based upon a showing of excessive caseloads, public defender office demonstrated cause for withdrawal from representing indigent defendants in non-capital felony cases).

60. *Duncan v. State*, 774 N.W.2d 89, 145 (Mich. App. 2009) (allegations of widespread constitutional violations as a result of the court-appointed, indigent defense systems were sufficient to state a claim for declaratory and prospective injunctive relief against state and governor). This decision of the Michigan Court of Appeals was sustained by the Michigan Supreme Court and the case remanded to the trial court for further proceedings. *Duncan v. State*, 780 N.W.2d 843, 844 (Mich. 2010).

61. *State v. Waters*, 370 S.W.3d 592, 609 (Mo. 2012) (en banc) (prior to appointing defense counsel, Sixth Amendment and attorney ethics rules require that a court consider counsel's competency to provide representation and that counsel consider whether accepting appointment will require counsel to violate the Sixth Amendment and ethical rules).

62. *Hurrell-Harring v. State*, 930 N.E.2d 217, 222 (N.Y. 2010) (class of individuals assigned public defenders in various criminal proceedings stated cognizable claim for constructive denial of their Sixth Amendment right to counsel).

63. *Kuren v. Luzerne Cty.*, 146 A.3d 715, 718 (Pa. 2016) (cause of action exists entitling class of indigent criminal defendants to allege prospective, systemic violations of the right to counsel due to underfunding, and to seek an injunction forcing county to provide adequate funding to a public defender's office, so long as class action plaintiffs demonstrate the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law).

challenged prior to a criminal conviction. If a favorable ruling of this sort were rendered by the Supreme Court, regardless of the precise theory on which it was based, the decision could have profound implications for providing defense services because it would make clear that state courts may insist that state governments provide the essential resources required for genuinely effective, adversarial public defense programs. This, in turn, could do much to enhance the cause of justice in this country during the next fifty years of the post-*Gideon* era.

