

A LOOK BACK AT *GIDEON V. WAINWRIGHT*  
AFTER FORTY YEARS: AN EXAMINATION OF  
THE ILLUSORY SIXTH AMENDMENT RIGHT  
TO ASSISTANCE OF COUNSEL

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## I. INTRODUCTION

The Fourth, Fifth, and Sixth Amendments,<sup>1</sup> taken together, constitute the bulk of constitutional criminal procedure law.<sup>2</sup> Yet the Sixth Amendment right to counsel is different from the Fourth and Fifth Amendments in an important way: it is the only criminal procedure constitutional guarantee that costs money in the purest sense. The Fourth Amendment's prohibition against unreasonable searches and seizures only costs overly zealous government officers the "price" of restraining their conduct. The Fifth Amendment guarantee against self-incrimination, which was firmly established in *Miranda v. Arizona*,<sup>3</sup> could conceivably cost money if interrogating officers provided counsel upon request, rather than merely ceasing questioning.<sup>4</sup> In contrast, because the Sixth Amendment right to counsel requires states to staff offices with public defenders, pay hourly rates to appointed private attorneys, or both, the burden placed upon localities quickly becomes expensive.<sup>5</sup>

This Article argues that the cost of maintaining a successful and adequate indigent defense system is almost insurmountable for many localities, making the Sixth Amendment's guarantee to assistance of counsel illusory. Part I of this Article will discuss the landmark decision of *Gideon v. Wainwright*,<sup>6</sup> which required states to provide indigent

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1. U.S. CONST. amends. IV-VI.

2. See Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 398 (1999) (defining criminal procedure as "essentially a subcategory of constitutional law").

3. *Miranda v. Arizona*, 384 U.S. 436 (1966).

4. But since *Miranda* gives government officers the choice of either retrieving counsel for a suspect or ceasing questioning after his or her request, *see id.* at 473-74, government officers almost always choose the latter option, which is substantially cheaper.

5. See, e.g., Jane Fritsch & David Rohde, *Lawyers Often Fail New York's Poor*, N.Y. TIMES, Apr. 8, 2001, at 1 (describing the financial and resource burden on New York defense attorneys).

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

defendants with assistance of counsel.<sup>7</sup> Part II will discuss the current indigent defense system forty years after the Warren Court's decision in *Gideon*. Part III of this Article will discuss possible reforms that could improve the current system. Part IV will discuss how to improve the current system so that *Gideon's* guarantee of assistance of counsel can become a reality.

## II. AN INTRODUCTION TO *GIDEON V. WAINWRIGHT* AND HOW THE SIXTH AMENDMENT RIGHT TO COUNSEL AROSE

### A. *Indigent Public Defense Prior to Gideon*

The Sixth Amendment right to counsel<sup>8</sup> gave indigents in federal court the right to the assistance of counsel long before *Gideon* was decided.<sup>9</sup> In *Barron v. Baltimore*,<sup>10</sup> the Supreme Court soundly held that the Bill of Rights only applied to the federal government and not to the states.<sup>11</sup> Later, when the Fourteenth Amendment was enacted, the Court used a fundamental fairness analysis to examine whether a defendant's due process rights had been violated.<sup>12</sup>

*Powell v. Alabama*<sup>13</sup> was the pioneering case in establishing that fundamental fairness under the Fourteenth Amendment required at least the appointment of counsel in capital cases. While this is the holding that *Powell* has come to represent, it is somewhat misleading to state that this is the only holding from *Powell* because the Court actually dictated six grounds independent of the Sixth Amendment in its opinion.<sup>14</sup>

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7. *Id.* at 344.

8. *See* U.S. CONST. amend. VI ("In all criminal prosecutions the accused shall enjoy . . . the Assistance of Counsel for his defense.").

9. *Gideon v. Wainwright*, 372 U.S. at 339-40 (finding that the Sixth Amendment has been interpreted as requiring counsel to be provided for defendants) (citing *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938)).

10. *Barron v. Baltimore*, 32 U.S. 243 (1833).

11. *Id.* at 247.

12. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 71 (1932) (holding that the Fourteenth Amendment at least required the appointment of counsel in capital cases).

13. *Powell v. Alabama*, 287 U.S. 45 (1932).

14. The six holdings of *Powell* regarding the right to counsel are:

First, the right to counsel constitutes part of the larger due process right to be heard. The presence of counsel assures an adequate hearing, because "[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law." Second, the constitutional guarantee to the right of counsel

In *Johnson v. Zerbst*,<sup>15</sup> decided a mere six years after *Powell*, the Court finally stated that the Sixth Amendment itself guaranteed the right of indigents to have appointed defense counsel in all federal criminal cases.<sup>16</sup> Writing for the Court, Justice Black reasoned that the right to counsel is just as constitutionally crucial at trial as the other rights the Sixth Amendment provides.<sup>17</sup> This holding, however, was in a federal case, and its application was not mandated upon the states until over twenty years later in *Gideon*.<sup>18</sup>

During the twenty-year period before the Court's decision in *Gideon*, the notable case of *Betts v. Brady*<sup>19</sup> was decided. In *Betts*, the Court construed *Powell* as creating a "special circumstances" test that examined the specific facts of a case to determine if there was a violation of a defendant's Fourteenth Amendment rights by the state.<sup>20</sup> The standard to determine if the defendant's due process rights were violated was whether the state trial was "offensive to the common and fundamental ideas of fairness and right."<sup>21</sup> Accordingly, the *Betts* Court held that its holding in *Powell*—that counsel must be appointed in capital cases—was only an example of "special circumstances" where a state trial violated the fundamental fairness doctrine of the Due Process Clause of the Fourteenth Amendment.<sup>22</sup> Startlingly, the Court further found that the failure to

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includes the opportunity to have a lawyer of one's choosing. Third, the right to counsel is not just a trial right, but includes the right to counsel "from the time of . . . arraignment until the beginning of [the] trial, when consultation, thoroughgoing investigation, and preparation [are] vitally important." Fourth, a defendant must be afforded enough time to communicate with counsel to prepare a defense. Fifth, the court must assign counsel in capital cases if the defendant appears unable to argue his own defense. Finally, a defendant is guaranteed *effective* aid of counsel.

Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 151-52 (2001) (quoting *Powell v. Alabama*, 287 U.S. at 57, 69.).

15. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

16. *See id.* at 467-68 (stating the Sixth Amendment entitles one charged with a crime to counsel and the court's jurisdiction may be lost by a failure to provide counsel).

17. *Id.* at 462-63.

18. Michael E. Lubowitz, *The Right to Counsel of Choice After Wheat v. United States: Whose Choice Is It?*, 39 AM. U. L. REV. 437, 442 (1990) (citing *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963)).

19. *Betts v. Brady*, 316 U.S. 455 (1942).

20. *Id.* at 463-64.

21. *Id.* at 473.

22. *Id.* at 463-64. However, the Court did hold that even though the Sixth

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appoint counsel for a defendant charged with a felony is not a per se violation of the Due Process Clause of the Fourteenth Amendment.<sup>23</sup> The *Betts* Court viewed due process as “a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights.”<sup>24</sup>

Throughout the years that preceded *Gideon*, the Court applied the “special circumstances” test.<sup>25</sup> However, in the years *immediately* preceding *Gideon*, special circumstances were found in almost every case, making the test a mere formality in order to have counsel appointed.<sup>26</sup> This led the Court to believe it would be better to adopt a standard rule for the appointment of counsel, rather than encouraging the states to apply a meaningless, confusing test on a case-by-case basis.<sup>27</sup>

B. *The Circumstances Under Which Gideon Was Decided and the Immediate Implementation of Its Holding*

Robert F. Kennedy, a preeminent figure in America during the 1960s, and Attorney General at the time *Gideon* was decided, is quoted as stating that “[i]t is time to recognize that lawyers have a very special role to play in dealing with this helplessness felt by the poor. And it is time we filled it.”<sup>28</sup> At the time of that statement, *Gideon* was the only criminal procedure holding by the Warren Court that was immensely popular with the general public.<sup>29</sup> Society reveled in Gideon’s plight and was so intrigued by and

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Amendment itself laid down “no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment.” *Id.* at 465.

23. *Id.* at 462. In explaining its decision, the Court stated:

Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.

*Id.*

24. *Id.*

25. *Gideon v. Wainwright*, 372 U.S. 335, 350-51 (1963).

26. *See id.* at 351 (determining that “[t]he Court has come to recognize . . . that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial”).

27. *See* WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 11.1 (3d ed. 2000).

28. William J. Dean, *Equal Access to Justice*, N.Y.L.J., Mar. 4, 2002, at 3.

29. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 379

supportive of him that the book, *Gideon's Trumpet*, was written, and a movie starring Henry Fonda was later created based upon the story.<sup>30</sup>

This decision was not only popular with the public, but also within the Warren Court itself, which was searching for a case like *Gideon*.<sup>31</sup> It yearned for a sympathetic, indigent defendant and the proper set of circumstances that would provide it with the vehicle to dictate the protection of the Sixth Amendment to the few remaining states that did not provide it.<sup>32</sup> *Gideon*, in overruling *Betts*, gave indigent defendants in state courts the right to counsel in felony trials.<sup>33</sup>

As the voice of the Court in the *Gideon* opinion, Justice Black remarked "reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."<sup>34</sup> Justice Black, who dissented in *Betts*, emphatically stated that the fundamental fairness analysis in *Betts* was flawed because it assumed that assistance to counsel was not rigidly essential for a fair trial.<sup>35</sup> Justice Black looked further back than his dissent in *Betts* to the Court's holding in *Powell*, where it was first held that a state must provide an indigent defendant with the assistance of counsel.<sup>36</sup>

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(2000).

30. *See id.*

31. *See id.* at 381 (discussing the Court's reversal of *Gideon*'s conviction and ordering of a new trial).

32. *Id.* at 380-81.

33. *Gideon v. Wainwright*, 372 U.S. 335, 342-44 (1963) (holding that *Betts* was incorrect in concluding that the Sixth Amendment right to counsel is not fundamental to a fair trial).

34. *Id.* at 344.

35. *Id.* at 342.

36. *Id.* at 342-43. In *Powell v. Alabama*, Justice Sutherland emphasized the importance of effective counsel:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the

The Court attempted to establish standards for implementing the right to counsel in *McMann v. Richardson*<sup>37</sup> by vesting control of ineffective counsel claims with trial judges.<sup>38</sup> Furthermore, in *Argersinger v. Hamlin*,<sup>39</sup> the Court held that a state violated an indigent defendant's Sixth Amendment rights when it refused to appoint counsel to represent him in a charge with a possible jail sentence.<sup>40</sup> Additionally, it has been held that an indigent defendant has the right to counsel in state courts throughout the sentencing phase<sup>41</sup> and for the initial appeal from the trial court's decision.<sup>42</sup>

C. *Delineating the Right of Gideon with the Two-pronged Test in Strickland v. Washington*<sup>43</sup>

Even though *Gideon* decided the ultimate issue of the right to counsel, the Court declined to clarify many questions, such as exactly when the right to counsel attaches or if the right attaches to certain minor offenses.<sup>44</sup> Although *Powell* recognized that the right to assistance of counsel meant the right to "effective" assistance to counsel,<sup>45</sup> *Gideon* failed

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proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

*Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

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

38. *Id.* at 771. The justification was that:

The matter . . . should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

*Id.*

39. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

40. *Id.* at 37.

41. *See Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (determining that counsel must be afforded regardless of whether the proceeding is for "revocation of probation" or a "deferred sentencing").

42. *See Douglas v. California*, 372 U.S. 353, 356-58 (1963) (holding that indigent criminal defendants have a right to counsel of first appeal).

43. *Strickland v. Washington*, 466 U.S. 668 (1984).

44. *See Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (discussing precedent, particularly *Betts* and *Powell*).

45. *See Powell v. Alabama*, 287 U.S. 45, 71 (1932) (finding that under the circumstances of this case "the necessity of counsel was so vital and imperative that the

to define exactly what the modifier “effective” meant.<sup>46</sup> In *Strickland v. Washington*, the Court finally answered the all important question of the proper standard for “effective” counsel.<sup>47</sup>

In *Strickland*, the Court stated valiantly in the crusade for the right to counsel: “[T]hat a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command.”<sup>48</sup> But, what medals the Court awarded to the cause of indigent defense were soon stripped by the two-pronged test it handed down.<sup>49</sup> With one answer, the Court shattered the hope of defendants throughout the nation by setting an astoundingly high hurdle to prove ineffectiveness.<sup>50</sup> In *Strickland*, the Court remarked that the benchmark for judging a claim of ineffectiveness is “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>51</sup> The requirement of the defendant who desires a reversal of his conviction is to show first, “that counsel’s performance was deficient,” and second, “that the deficient performance prejudiced the defense. . . . so serious[ly] as to deprive the defendant of a fair trial.”<sup>52</sup> These requirements are the substance of what has become known as the *Strickland* two-pronged test.<sup>53</sup>

When examining the two-pronged test, there is a presumption that counsel performed within the scope of reasonable professional assistance.<sup>54</sup> The standard for judging the performance of an attorney is whether he or

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failure of the trial court to make an *effective* appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment”) (emphasis added). The modifier “effective” was originally included by the Court in *Powell* because in that case the defendants did have counsel, but the Court wanted to make a more formal guarantee. *Id.*

46. See *Gideon v. Wainwright*, 372 U.S. at 344 (finding a right to counsel but not defining the requirements of the right to counsel).

47. See *Strickland v. Washington*, 466 U.S. at 688-89 (determining generally that the “inquiry must be whether counsel’s conduct was reasonable considering all the circumstances”).

48. *Id.* at 685.

49. See *id.* (defining what constitutes the deficient performance of counsel and the degree to which the defendant must be prejudiced by such a deficiency).

50. *Id.* at 686.

51. *Id.*

52. *Id.* at 687.

53. See, e.g., *Bell v. Cone*, 535 U.S. 685, 694 (2002) (examining whether respondent could obtain relief under the *Strickland* test); *Edwards v. Carpenter*, 529 U.S. 446, 450 (2000) (discussing the *Strickland* test and applying it to facts at hand).

54. *Strickland v. Washington*, 466 U.S. at 689 (citation omitted).



she provided reasonably effective service.<sup>55</sup> The hurdle that the defendant must overcome to prove that prejudice has occurred is to show a reasonable probability that, but for defense counsel's errors, there would have been a different result from the lower judicial proceeding.<sup>56</sup> This ultimately results in the prejudice prong of the *Strickland* test resembling a custom-made harmless error doctrine for indigent defense.<sup>57</sup>

#### D. *The Implications of Strickland*

The opinions in *Strickland* and *United States v. Cronin*<sup>58</sup> were handed down by the Supreme Court on the same day. *Cronin* established a “per se” approach, holding that counsel could be automatically ineffective when certain factors are present.<sup>59</sup> Under *Cronin*, the question to be asked is whether the performance of counsel was so lacking that the process “lost its character as a confrontation between adversaries,” producing an “actual breakdown of the adversary process.”<sup>60</sup> In *Cronin*, the Court held that there are only two circumstances where the assistance of counsel was ineffective “per se”:<sup>61</sup> (1) where “counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding,”<sup>62</sup> or (2) “if counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.”<sup>63</sup> If either of these instances occur, then the defendant is not subjected to the *Strickland* two-pronged test, and

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55. *Id.* at 687 (citation omitted).

56. *Id.* at 694 (citation omitted).

57. *See* Levinson, *supra* note 14, at 171.

58. *United States v. Cronin*, 466 U.S. 648 (1984).

59. *Id.* at 656 (“The right to effective assistance is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversary testing. When a true adversarial criminal trial has been conducted—even if defense may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred.”); *see also* LAFAYETTE, ET AL., *supra* note 27, § 11.7.

60. *United States v. Cronin*, 466 U.S. at 657-58. Justice Stevens initially stressed that the judiciary must evaluate ineffective assistance of counsel claims by beginning with a recognition “that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” *Id.* at 658; *see also* LAFAYETTE, ET AL., *supra* note 27, § 11.7.

61. *United States v. Cronin*, 466 U.S. at 658 (citations omitted).

62. *Id.* at 659 n.25 (citations omitted).

63. *Id.* at 659 (determining that if the prosecution’s case is not subjected to “meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable”).

prejudice is presumed.<sup>64</sup> It initially appears that *Cronic* mitigates the harshness of *Strickland*; however, the two instances that are provided occur very rarely in criminal cases.<sup>65</sup> In most cases, even the worst attorney will overcome the minimum requirements listed in *Cronic* by meeting with defendants in the critical stages of the trial and presenting some type of a mediocre defense.<sup>66</sup>

In a later case, *Lockhart v. Fretwell*,<sup>67</sup> the Court elaborated on the prejudice prong of the *Strickland* two-pronged test.<sup>68</sup> The Court enlarged a defendant's rights, stating that when courts analyze the prejudice a defendant suffered they should not "focus[] solely on mere outcome determination," but rather, they should consider the overall fairness.<sup>69</sup> However, what the Court gave in *Lockhart*, it partially took away in *Williams v. Taylor*,<sup>70</sup> where it clarified that the "fundamental fairness" analysis should only be applied to substantive and procedural rights of the defendant.<sup>71</sup> Therefore, when combining these holdings, the Court is saying that the facts of a case rarely allow a court to presume an ineffective assistance of counsel claim; rather, the defendant usually has the burden of proving the claim through his or her own efforts.

### III. EXAMINATION OF THE CURRENT STATE PUBLIC INDIGENT DEFENSE SYSTEM

Today, rather than indigent defense being the exception, it is the accepted practice. Roughly 80% of all defendants are represented by appointed defense counsel.<sup>72</sup> An American Bar Association (ABA) report concluded that "long-term neglect and underfunding of indigent defense ha[ve] created a crisis of extraordinary proportions in many states throughout the country."<sup>73</sup> Currently the national and state standards, on

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64. *Id.* at n.26 (citations omitted).

65. LAFAVE, ET AL., *supra* note 27, § 11.7.

66. *Id.*

67. *Lockhart v. Fretwell*, 506 U.S. 364 (1993).

68. *Id.* at 368-72.

69. *Id.* at 369; *see also* Levinson, *supra* note 14, at 156-57.

70. *Williams v. Taylor*, 529 U.S. 362 (2000).

71. *Id.* at 363-64.

72. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 32 (1997).

73. Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 785 (quoting RICHARD KLEIN & ROBERT SPANGENBERG, THE INDIGENT DEFENSE CRISIS 25 (1993) (prepared for the American Bar Association Section of

average, recommend that one public defender handle a maximum of 400 misdemeanors, 150 felonies, or 25 appeals in one year.<sup>74</sup> The expectation is that the public defender will spend approximately 1700 hours on one, or a combination, of the above caseloads.<sup>75</sup> Alarming, some studies have shown public defenders to have handled as many as 400 felony defendants in eight months, while others handled as many as 1,000 misdemeanor cases in one year.<sup>76</sup> Though these figures are higher than average, these studies illustrate exactly how overburdened some public defenders are.<sup>77</sup>

#### A. *Restraints and Hindrances the Current System Faces*

##### 1. *The Discretion That Allows for Large Variances in the Systems Among States*

States can choose their own indigent defense system, but it is up to the localities themselves to choose how to implement the system.<sup>78</sup> In Virginia, some localities use only court-appointed attorneys, while others have a public defender system that they sometimes supplement with court-appointed attorneys.<sup>79</sup> For example, forty-seven of Virginia's 136 jurisdictions maintain public defender offices to represent indigent defendants.<sup>80</sup> In the remainder of those jurisdictions, the trial court solely appoints private attorneys.<sup>81</sup> In those jurisdictions where the trial court appoints private attorneys, the Commonwealth has imposed fee caps, which the trial judge does not have authority to waive, despite the immense resources the attorney may need to spend on a defense.<sup>82</sup> Shockingly, a study by the State Crime Commission in Virginia found that the caps imposed upon court-appointed attorneys do not save the Commonwealth money.<sup>83</sup> On average, public defenders cost \$118, while their court-

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Criminal Justice Ad Hoc Committee on the Indigent Defense Crisis)).

74. John Gibeaut, *Defense Warnings*, A.B.A. J., Dec. 2001, at 35, 36.

75. *Id.*

76. *Id.*

77. Stuntz, *supra* note 72, at 11.

78. *Too Poor to Be Defended*, ECONOMIST, Apr. 11, 1998, at 21, 22 (discussing various states' methods of appointing and paying court-appointed defense attorneys and examining fee cap structures in various states).

79. Brooke A. Masters, *Appointed Counsel, Prison Time Linked in Va.*, WASH. POST, Dec. 18, 2001, at B3.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

appointed counterparts cost \$223-\$326 per charge.<sup>84</sup> The study additionally found that there was not a huge difference between the sentences received by defendants represented by privately retained counsel and those represented by public defenders.<sup>85</sup> However, indigent defendants who were given court-appointed attorneys received on average sentences approximately 2.5 years longer than those represented by public defenders or privately retained counsel.<sup>86</sup>

New York uses the court-appointed attorney system.<sup>87</sup> The trial court appoints attorneys from a list of volunteers who have met screening requirements for experience levels.<sup>88</sup> Once selected, these attorneys are paid \$40 an hour for courtroom work and \$25 an hour for out-of-court work.<sup>89</sup> Many states that have lower costs of living than New York pay higher rates.<sup>90</sup> For example, Arkansas pays \$80-\$85 an hour—twice the New York rate.<sup>91</sup> New York's rate is the second-lowest rate in the nation,<sup>92</sup> which is despicable. Only New Jersey pays its court-appointed attorneys less—\$30 an hour in court and \$25 an hour out of court.<sup>93</sup> However, most of New Jersey's indigent defendants are represented by public defenders and not court-appointed attorneys who receive those rates.<sup>94</sup>

A *New York Times* study found that in 137 homicide cases during the year 2000, the court-appointed attorneys in forty-two (approximately one third) of those cases spent less than one week preparing their defense.<sup>95</sup> In only twelve of those cases did the court-appointed attorneys spend more than 200 hours, the accepted equivalent of five weeks, preparing and investigating their defenses.<sup>96</sup> The average was actually seventy-two hours, which is approximately two weeks' work.<sup>97</sup> In only 37% of the cases did the court-appointed attorney arrange for a court-appointed investigator, only 36% visited their client in jail, only 31% visited the scene of the crime,

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84. *Id.*  
85. *Id.*  
86. *Id.*  
87. Fritsch & Rohde, *supra* note 5, at 1.  
88. *Id.*  
89. *Id.*  
90. *Id.*  
91. *Id.*  
92. *Id.*  
93. *Id.* at 38.  
94. *Id.*  
95. *Id.* at 1.  
96. *Id.*  
97. *Id.*

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and only 24% arranged for the appointment of an expert.<sup>98</sup>

## 2. *The Financial Restraints on the Current System*

Currently, estimated spending for indigent defense is less than 2% of all national law enforcement spending and less than 10% of total spending on legal and judicial services.<sup>99</sup> This lack of spending can be attributed to many parties, including trial judges, legislators, and the general public.<sup>100</sup>

Legislators are reluctant to allocate funds for indigent defense when areas more popular with constituents, such as education, parks, and transportation, are lobbying for the same scarce funds.<sup>101</sup> The lobbying efforts in favor of indigent defense are minimal at best. In addition, the Sixth Amendment's goal of providing a criminal defense for indigent murderers and drug dealers is likely at the opposite end of the popularity spectrum from the cause of protecting the First Amendment rights to free speech or freedom of religion. Furthermore, when the Georgia legislature actually introduced a bill that would create statewide funding for the indigent defense system, the District Attorney's Association vehemently told the legislature that the bill generated "the greatest threat to the proper enforcement of the criminal laws of this state ever presented."<sup>102</sup>

Often judges who are elected have an incentive not to appoint defense counsel that will zealously advocate a defendant's rights, because they do not want to appear as a crime sympathizer during election time.<sup>103</sup> Further, when appointing counsel to represent indigent defendants, judges will often select their friends and others they seek to favor, even though they may not be the best candidates.<sup>104</sup> This is because they know that their friends will not fervently advocate their clients' cases to the point that it may question or threaten the judge's authority or reputation. Therefore, attorneys who desire court appointments are encouraged to go along with the judge's whims so that they will remain popular on the list of attorneys available for court appointments.<sup>105</sup>

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98. *Id.*

99. *Too Poor to Be Defended, supra* note 77, at 27.

100. *Id.*

101. *Id.*

102. Bright, *supra* note 73, at 787.

103. *Id.*

104. *Id.* at 825.

105. *Id.*

### B. *How Costs Affect Attorney Incentives*

Representing indigent defendants is one of the lowest, if not the lowest, paid form of legal work.<sup>106</sup> Many qualified attorneys cannot afford to work at such low rates, even though they may have a desire to champion the causes of the less fortunate. This eliminates many attorneys initially; however, more attorneys are alienated from the position once they experience the insurmountable burdens that accompany it.<sup>107</sup> This occurs in part because of the low rates paid to court-appointed attorneys. In order to maintain their standard of living, these attorneys are forced to take on a soaring case load until it is almost impossible to manage.<sup>108</sup> However, this aspect only deals with the personal financial implications of indigent defense work. There are many more financial implications the attorneys have to endure professionally.

Often, in order to conduct a satisfactory fact investigation or discovery, attorneys have to sacrifice some of their own earnings through working more hours than they will be paid for or through paying costs out of their own pockets.<sup>109</sup> However, attorneys who do not endure such costs often endure a much larger one—the cost of their reputation.<sup>110</sup> This is because the structure of the current legal defense system promotes “underlitigation” of a defendant’s claims.<sup>111</sup> The tools of promotion include a lack of resources, which restricts defense counsel from being as aggressive as they should be.<sup>112</sup> Further, the overworked public defenders are also restricted by the plethora of additional cases that they are handling at one time.<sup>113</sup> They have to budget their time in order to focus on all of their cases within the appropriate time frame.<sup>114</sup> This scarcity of time supports the argument that defense counsel have the propensity to encourage their clients to plead guilty rather than go to trial.<sup>115</sup> Then, the public defenders can focus more on their stronger cases and take them to trial, rather than waste time on more dispensable ones.

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106. *Id.* at 787.

107. *Id.* at 816.

108. *Id.*

109. *See id.* at 790, 807 (stating that handling a capital postconviction case requires between 400 and 900 hours, while limiting fees to 150 hours).

110. *Id.* at 790.

111. Stuntz, *supra* note 72, at 32.

112. *Id.*

113. *Id.*

114. *Id.* at 33.

115. *Id.*

This is what has become known as the “meet ‘em and plead ‘em”<sup>116</sup> phenomenon, which is very similar to what happened to the defendants in *Powell*, where the attorneys were appointed at the last minute.<sup>117</sup> If, upon meeting their clients for the first time at trial, public defenders cannot convince the client to plead guilty, they will then struggle through a short trial that they are not fully prepared to conduct.<sup>118</sup>

When *Gideon* was initially decided, the thought in New York City was that as a form of charity, most private attorneys would take a break from their successful practice and lend their experience to a few indigent criminal defendants a year, thereby providing indigent defendants with services as good as those they could pay for at prominent law firms.<sup>119</sup> Also, because it was a charity, they would not mind the low pay rate.<sup>120</sup>

The current reality in our modern capitalist society is that most private attorneys do not have the time or desire to represent indigent criminal defendants.<sup>121</sup> Most court-appointed attorneys are basically unofficial public defenders.<sup>122</sup> They make court appointments their main source of income and hustle to take on a huge caseload, possibly even a thousand cases a year, so that they can make a decent living upon the amazingly low rates they are paid for their services.<sup>123</sup>

In a court-appointed system, local bar members are appointed by judges to represent indigent defendants.<sup>124</sup> However, a relatively new phenomenon in the court-appointed attorney system is to outsource all court-appointed work to one firm.<sup>125</sup> Usually the municipality will take bids from interested firms and then hire the firm with the best offer.<sup>126</sup> This is a unique phenomenon in that it encourages competition, which keeps prices low. However, one must ask if these lower prices come at the

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116. *Too Poor to Be Defended*, *supra* note 77, at 21.

117. *Powell v. Alabama*, 287 U.S. 45, 45 (1932).

118. *Too Poor to Be Defended*, *supra* note 77, at 21.

119. Fritsch & Rohde, *supra* note 5, at 1.

120. *Id.*

121. Brenda Sapino Jeffreys, *A Lonely Crusade Against El Paso's Mandatory Pro Bono Plan*, TEX. LAW., Apr. 7, 1997, at 28.

122. Fritsch & Rohde, *supra* note 5, at 1.

123. *Id.*

124. *See id.* (stating “private lawyers are assigned by the court from a pool of volunteers after they meet screening requirements to show they have some experience”).

125. *See, e.g., Bright*, *supra* note 73, at 788-89.

126. *See, e.g., id.*

expense of those who are represented. The lower prices allow the locality to save money, which may be of greater concern than ensuring fair trials. For example, in 1993, McDuffie County, Georgia, decided that \$46,000 per year was too much to spend on indigent defense.<sup>127</sup> That county decided to accept bids from local bar members to take over the county's indigent defense.<sup>128</sup> The county did not specify any qualifications or implement any system of background checks for those who entered bids.<sup>129</sup> The county awarded the indigent defense contract to a gentleman who bid \$25,000.<sup>130</sup> That contract allowed the gentleman to maintain a separate private practice at the same time as his service to the county.<sup>131</sup> His bid was almost \$20,000 less than the two other bids the county received.<sup>132</sup>

Firms face the same challenges as court-appointed attorneys.<sup>133</sup> If their sole source of income is court appointments, they must take on an atrociously high case load in order to remain profitable. On the other hand, if the firm combines court appointments with privately paying clients, there is an incentive to spend more time and effort on the latter, who presumably pay higher rates than the former.

Many courts have used a combination of the aforementioned methods to satisfy their indigent defense demands.<sup>134</sup> However, a combination of both systems could lead to inefficiencies and poor utilization of resources unless there is good communication and organization.

#### 1. *How the Present Criminal Law System Hinders the Indigent Defense System*

*Gideon* was decided in the 1960s, before the explosion of the drug culture, which resulted in a growth of cases before the judicial system.<sup>135</sup> By 1990, drug arrests accounted for one third of all state felony

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127. *Id.* at 788.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. See David Allan Felice, *Justice Rationed: A Look at Alabama's Present Indigent Defense System with a Vision Towards Change*, 52 ALA. L. REV. 975, 981 (2001) (discussing the various methods employed by courts to provide defense to the indigent).

135. Stuntz, *supra* note 72, at 8-9.



convictions.<sup>136</sup> This explosion of drug arrests has seriously burdened the indigent defense system because, in addition to their sheer proportion, in most cases the government requests that the assets of the defendant be frozen.<sup>137</sup>

By freezing the assets of defendants, those who could otherwise afford counsel are left in a position of indigence.<sup>138</sup> This accomplishes the goal of impoverishing wealthy defendants; however, at the same time, it also costs the taxpayers money to both prosecute and defend someone who is more than capable of providing his or her own defense. It would be a much better alternative to allow wealthy defendants access to their funds to pay for their legal defenses, while freezing the remainder of their assets. With proper monitoring, the utilization of preventive measures would prohibit any type of money laundering.<sup>139</sup>

Additionally, there are more laws on record today than when *Gideon* was decided. One example is the introduction of the Internet and all the corresponding legislation that followed.<sup>140</sup> More possible crimes means more possible charges, which ultimately means a larger burden upon the indigent defense attorney.<sup>141</sup>

### C. *The Effects Upon the Public Whom this System Is Designed to Serve*

Not only does the increase in crimes burden indigent defense attorneys, but it also affects the public at large. In Quitman County, Tennessee, the population of 10,000 was forced to borrow money and increase taxes over three years in order to pay the defense costs of two men

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136. *Id.*

137. See Stephen Labaton, *Cash-Poor Defendants May Soon Lack Lawyers*, N.Y. TIMES, Aug. 9, 1992, at 4:18 (noting that many judges and lawyers feel that the system has been taxed most heavily by laws that permit the government to seize assets of defendants before they are tried).

138. See, e.g., *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (discussing defendant who retained private counsel, but forfeited specified assets, including retainer); see also Labaton, *supra* note 136, at 4:18 (discussing defendants whose assets are seized before trial who then must rely on court-appointed counsel).

139. See Stuntz, *supra* note 72, at 31 (discussing higher costs in prosecuting which stem in part from the defendant's access to money—in particular, a “large wealth advantage enjoyed by a subset of drug defendants”).

140. See, e.g., 15 U.S.C. § 6501 et seq. (1998) (preventing online service operators from collecting personal information from children).

141. Stuntz, *supra* note 72, at 31.

who were subsequently convicted in a quadruple murder.<sup>142</sup> Additionally, the 61,000 residents of Twin Falls County, Idaho, were faced with an enormous burden when nine residents faced first-degree murder charges in the slaying of five people.<sup>143</sup> The Idaho Supreme Court has held that all indigent defendants charged with a capital crime have the right to two defense attorneys, with at least one of those having tried a death penalty case, and that in any trial involving multiple defendants the public defender is only allowed to represent one defendant. Therefore, Twin Falls County's one public defender could represent only one of the defendants charged in the slayings.<sup>144</sup> While the entire county budget was a mere nineteen million dollars, it was left facing indigent defense bills totaling one million dollars, because of its responsibility to provide private lawyers for the eight other defendants.<sup>145</sup> In order to raise money to pay that bill, the county considered raising property taxes by three percent.<sup>146</sup> This left the Twin Falls County residents considering the price of justice for these nine defendants.<sup>147</sup> One imagines the Warren Court never envisioned such potential burdens would be placed upon the public to enforce its holding.

#### IV. POSSIBLE REFORMS THAT COULD IMPROVE THE CURRENT SYSTEM AND MAKE THE SIXTH AMENDMENT RIGHT TO COUNSEL A REALITY

There have been many proposals and reformations to the current system, which have had relatively inexpensive financial costs.<sup>148</sup> For example, commentators have suggested that the burden of proof should be shifted from the defendant to defense counsel when an ineffective assistance of counsel claim arises.<sup>149</sup> However, this logic is flawed. It may be argued that this would give a defendant more power in asserting his or

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142. See Gibeaut, *supra* note 74, at 38.

143. Flynn McRoberts, *Idahoans Debate Price of Justice*, CHI. TRIB., Sept. 14, 1998, at 6.

144. *Id.*

145. *Id.*

146. See *id.* (discussing the commissioning of a telephone survey to gauge public sentiment on raising property taxes).

147. *Id.*

148. See Rodger Citron, Note, *(Un) Luckey v. Miller: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 498 (1991) (describing structural reforms to indigent defense systems).

149. See Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. U. L. REV. 147, 171 (2001) (suggesting "that attorneys accused of ineffective assistance delineate the affirmative steps they have taken").

her Sixth Amendment right to counsel, and that defense attorneys who know they will have to defend themselves against ineffective assistance of counsel claims will strive to provide better representation. However, the flip side of that argument is that a defendant who has nothing to lose or prove will be more eager to file an ineffective assistance of counsel claim. In addition, attorneys in the process of defending themselves against multiple claims by former clients will have less time out of their already hectic schedules to dedicate to their needy clients.

Another suggestion is the extension of the list of “per se” prejudicial actions or inactions by defense counsel that was established in *Cronic*.<sup>150</sup> Examples of conduct that could be added to the list include failing to introduce mitigating evidence during the penalty phase of a trial,<sup>151</sup> failing to create an informed strategy for trial,<sup>152</sup> and failing to object to inadmissible evidence.<sup>153</sup> In addition, *Strickland* implies that a conflict of interest is “per se” prejudicial conduct that prevents the effective assistance of counsel.<sup>154</sup> Actually, this implication is one of the few hopes defendants have in the current legal climate, because they tend to succeed in raising ineffective assistance of counsel claims only when their attorney had a conflict of interest or committed fatal errors of such enormity that they constituted the equivalent of gross negligence.<sup>155</sup>

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150. United States v. Cronic, 466 U.S. 648, 658-59 (1984).

151. See *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989) (considering holding that a failure to investigate possible mitigating evidence is “per se” prejudicial to a defendant’s right to effective assistance of counsel; but instead, holding there is a presumption that the failure to investigate mitigating evidence or introduce mitigating evidence or both is prejudicial).

152. See *Bean v. Caulderon*, 163 F.3d 1073, 1078 (9th Cir. 1998) (holding that the defendant did not receive effective assistance of counsel when defense counsel failed to create a trial strategy); see also *Levinson*, *supra* note 14, at 174 (discussing conditions under which lack of informed strategy may be determined by a court).

153. See *State v. Sanders*, 648 So. 2d 1272, 1292 (La. 1994). The failure to object to inadmissible evidence was examined in *State v. Sanders*, a case in which the prosecution discussed a prior criminal incident that was inadmissible and introduced uncorroborated hearsay in the form of testimony that linked the defendant as the owner of a multitude of weapons, which would have been a violation of his probation. *Levinson*, *supra* note 14, at 175 (citing *State v. Sanders*, 648 So. 2d at 1292). The Louisiana Supreme Court held that the failure to object to the above evidence was a “textbook unprofessional error,” therefore satisfying the first prong of the *Strickland* test. *State v. Sanders*, 648 So. 2d at 1292.

154. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)).

155. See *Stuntz*, *supra* note 72, at 20 & n.74 (asserting that while the statement cannot be proven, the existence of this characterization can be found in the reported

Recent procedural changes in Illinois illustrate additional improvements that could be made in the judicial system.<sup>156</sup> Illinois, which had recently come under scrutiny for its reckless imposition of the death sentence, announced new guidelines for its courts, in addition to a moratorium on the death penalty.<sup>157</sup> These new improvements require that “[o]nly lawyers with special skills and experience will be prosecuting and defending capital cases,” that “[p]rosecutors must identify for the defense any information they have that tends to negate the guilt of the accused, thus reducing the chance of pretrial or trial error,” that “[t]he admissibility of DNA evidence will be governed by uniform guidelines to ensure that such evidence is presented competently and intelligibly,” and that “[p]rosecutors are reminded that their duty is to seek justice, not merely to convict.”<sup>158</sup>

All of these changes in Illinois are quite valiant. However, this begs the question of why the above-mentioned changes are only being implemented in death penalty cases. These standards could be reasonably and inexpensively applied to all criminal cases. This would provide a better standard of representation for all indigents in Illinois, and throughout the United States.

Another possible reformation would be to make criminal defendants reimburse the state for the costs of their attorneys if they are convicted. Even though the Warren Court did not guarantee free assistance of counsel, it did not expressly limit its holding in *Gideon* to the innocent.<sup>159</sup> Furthermore, it has been made clear that indigent defendants subjected to the current system are not receiving adequate representation, and some innocent defendants may even be convicted.<sup>160</sup> Therefore, until the system is more refined and effective, it would not be proper to impose such a burden upon those who are already at the mercy of the many imperfections of the current system.

Ultimately, there is a desperate need in the current system for uniformity. Since the ABA has suggested caseload levels for attorneys,<sup>161</sup> it

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cases).

156. Herb Franks, *Capital Cases*, CHI. TRIB., Feb. 3, 2001, at 19.

157. *Id.*

158. *Id.*

159. POWE, *supra* note 29, at 381; *see also* *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (noting that to ensure a fair trial, *any* person haled into court and too poor to afford a lawyer must have counsel provided for him) (emphasis added).

160. POWE, *supra* note 29, at 381.

161. Gibeaut, *supra* note 74, at 36.

stands to reason that the ABA could also suggest proper models for the organization of public defender offices, proper qualification standards for court-appointed attorneys, and how to efficiently orchestrate the utilization of both a public defender's office and court-appointed attorneys. With a more uniform system operating under the watchful eye of an ABA representative, evaluations of attorney performance could be more effective.

All of the above changes primarily involve the actions of defense attorneys because the current criminal appellate system is not geared toward correcting the mistakes of defense attorneys, but rather those of trial judges. By no means are the mistakes of trial judges inconsequential, but they should not be more closely scrutinized than mistakes made by counsel. In most instances trial judges are less likely to commit errors than attorneys due to a better familiarity with the rules of evidence, which can usually be attributed to more experience and education. Further, evaluating the errors of the trial court will not reveal the improper admission of evidence when defense attorneys failed to preserve objections. This reveals the fundamental concept of the adversarial process shielding the errors of the defense attorney.

Additionally, even though the Supreme Court has mandated that states provide an indigent defendant with transcripts and defense counsel for one appeal,<sup>162</sup> this burden is satisfied by submitting as little as a one-page appellate brief.<sup>163</sup> There is no requirement that the defense counsel appear for an oral argument.<sup>164</sup> Further, most jurisdictions do not provide defense counsel for indigents at bail hearings, thereby denying the defendant the benefit of immediate legal consultation, which could foster a more expedient fact investigation and the defendant's release pending trial.<sup>165</sup>

An additional problem under the current system is the process of assigning cases by "horizontal representation."<sup>166</sup> Under the horizontal representation system, an attorney is assigned to defend all matters in a

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162. Bright, *supra* note 73, at 786 (citing *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

163. See Steven B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1860 (1994) (referencing *Mitchell v. State*, 352 S.E.2d 647 (Ga. Ct. App. 1987)).

164. See *id.* at 1860-61 (citing *Heath v. Jones*, 941 F.2d 1126, 1131 (11th Cir. 1991), *cert. denied*, 502 U.S. 1077 (1992)).

165. Bright, *supra* note 73, at 786.

166. Felice, *supra* note 133, at 985.

specific courtroom or another comparable purview.<sup>167</sup> Under this system, the defendant is often represented by several attorneys for one crime as the case progresses through the criminal justice system.<sup>168</sup> This hinders the attorney-client relationship due to lack of communication and familiarity, which could lead to serious flaws in representation.<sup>169</sup>

“Vertical representation,” a more sound alternative, assigns an attorney to a specific defendant, rather than a specific courtroom.<sup>170</sup> The attorney is with the client through the entire criminal process at the trial level and any appeals that follow.<sup>171</sup> This promotes familiarity and a more developed relationship between attorney and client, which leads to a better defense in most cases.<sup>172</sup>

#### V. CONCLUSION: HOW TO IMPROVE THE CURRENT SYSTEM SO THAT *GIDEON*'S GUARANTEE OF ASSISTANCE OF COUNSEL CAN BECOME A REALITY

In this country, where all persons are guaranteed equal treatment, there is a great disparity in the area of legal representation. Indigents, who must have their counsel appointed due to their dire financial situation, are much less likely to succeed in their criminal defense than wealthy defendants, who have unlimited resources to dedicate to their defense. Without a political imperative, prosecutors dread undertaking wealthy defendants' cases because it costs so much more to prosecute them.<sup>173</sup>

However, a more common occurrence in the legal system is indigents who have overworked counsel appointed to their cases. Whereas wealthy defendants who can afford private defense attorneys set their own cost, indigent defendants have the cost of defending their crime set by the state.<sup>174</sup> They are not at freedom to shop among the nation's best-educated and experienced attorneys because very few of those attorneys would even consider defending them.<sup>175</sup> Forty years after *Gideon*, legal defense as a

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. See Stuntz, *supra* note 72, at 28 (determining that “the current regime seems designed to encourage . . . [the prosecutor] to substitute poor defendants for rich ones”).

174. *Id.* at 31-32.

175. *Id.* at 32.

form of charity is still not a realization.

This author is of the opinion that in today's legal climate, where malpractice suits are a reality, it is unconscionable to expect the local bar association to charitably solve the problems facing the indigent defense system. Asking a tax attorney to defend an alleged murderer is analogous to asking a dermatologist to perform an angioplasty. Further, asking criminal attorneys to shoulder the entire burden is to place them into an impoverished servitude. Attorneys should not be expected to risk their professional and/or financial status in order to help the less fortunate. The Supreme Court, not the local bar association, is the one who guaranteed the public the right to counsel.<sup>176</sup>

The court in *Kansas ex rel. Stephan v. Smith*<sup>177</sup> echoed the current philosophy on private attorneys accepting court appointments as a form of charity work. Because only a small percentage of the bar is experienced in criminal law, it places an unfair burden on those qualified attorneys if they were required to represent a large percentage of indigent defendants on a pro-bono basis. As the Kansas Supreme Court pointed out:

We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation. When attorneys' services are conscripted for the public good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good.<sup>178</sup>

There is not a clear solution to the monumental problems facing indigent defense. However, the most feasible starting point would be through a checks and balances system that would be monitored by a national agency such as the American Bar Association (ABA). As discussed earlier, the ABA already provides the indigent defense system with a recommended attorney caseload based upon hours worked on felony and/or misdemeanor cases. It would be feasible for them to expand that role and provide more guidance. Based upon the Illinois system,<sup>179</sup> the ABA could set standards for the experience levels required of attorneys appointed in various cases. Further, they could expand the idea of a per se

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176. See *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963) (holding that the Sixth Amendment of the United States Constitution provides that an accused shall enjoy the right to assistance of counsel in criminal prosecutions).

177. *Kansas ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987).

178. *Id.* at 842.

179. See *supra* notes 156-58 and accompanying text.

approach. However, in doing so they must be cautious not to solely limit review to per se instances and, ultimately, promote a case-by-case review of an individual defendant's circumstances.

Further, in order to secure much needed funding, there must be a larger agency such as the ABA lobbying on behalf of indigent defense rights. Individual public defenders picketing in front of state capitols do not have a large enough voice or wallet to be persuasive. The mammoth financial backing and respected voice of the ABA would be more influential to legislatures, which usually count a few bar members among their composition.

When the system receives funding, it will be able to hire additional attorneys with more experience and education. This will promote better representation by allowing attorneys to maintain a smaller caseload and by fostering a healthier-paced job environment. Clients can only benefit from changes such as these.

The Sixth Amendment right will remain illusory until legislatures provide the required funding needed for realistic execution. All of the above suggestions and reformations are a small step in the direction of making the right to counsel a reality. They alone, however, do not accomplish what adequate funding and resources provided by the legislature would. Only with the necessary funding will the Sixth Amendment right to counsel become a reality, thus providing persons from all classes of society an equal opportunity at trial.