An Assessment of the Right to Counsel in the United States

William J. Leahy

Director, New York State Office of Indigent Legal Services

International Conference on Criminal Legal Aid Systems

Beijing, China December 15-16, 2012

"The right…to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963).

" 'A journey of a thousand miles must begin with a single step.' Lao Tzu, Chinese Taoist Philosopher, 6th century B.C.", from the Conclusion of *Gideon's Broken Promise: America's Continuing Quest for Equal Justice,* American Bar Association Standing Committee on Legal Aid and Indigent Defendants (ABA SCLAID) at 46 (2004).

Since March 18, 1963, when the United States Supreme Court declared with evident national pride that the right to counsel under the Sixth Amendment to the United States Constitution would be honored in state court criminal cases throughout the United States, this nation has seen a proliferation of lawyers who represent poor persons charged with crime, and a "due process revolution" under which the criminal process has gradually become more fair and even-handed as between the prosecution and the defense. Some progress has undoubtedly been made. Yet we have also witnessed a two-track history that has resulted in an ever-wider chasm between ideal and reality; between the law as declared and the law in operation. On the one hand, *Gideon's* robust declaration of a right to counsel in felony cases has been consistently extended to include the right to appointed counsel for direct appeal, *Douglas v. California,* 372 U.S. 353 (1963); for juvenile delinquency cases, *In re Gault,* 387 U.S. 1 (1967); for misdemeanor cases that carry a possibility of incarceration, *Argersinger v. Hamlin,* 407 U.S. 25 (1972); for cases in which a suspended sentence that may later result in incarceration is imposed, *Alabama v. Shelton,* 535 U.S. 654 (2002); for appeals following a plea of guilty, *Halbert v. Michigan,* 545 U.S. 605 (2005); and for the attachment of the right to counsel at arraignment, *Rothgery v. Texas,* 554 U.S. 191 (2008). In addition, expectations of high quality performance have been reinforced by the publication of national, state and local Performance Standards, by the widespread distribution of the American Bar Association's *Ten Principles of a Public Defense Delivery System,* and by the 2006 ABA Ethics Opinion that an attorney's basic ethical obligation to provide competent and diligent representation to every client admits of no exception or qualification with regard to an indigent client charged with crime.

On the other hand, every informed analysis that has been published since the *Gideon* decision has criticized, and very severely, the quality of the representation that is in practice provided to poor people in state and local courts throughout the United States. The titles of these reports accurately

summarize their highly critical contents: *Gideon Undone: The Crisis in Indigent Defense Funding* (American Bar Association, 1982); *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (ABA, 2004); *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (National Right to Counsel Committee, 2009); *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* (National Association of Criminal Defense Lawyers, 2009). These detailed and well-informed critiques identify insufficient funding, excessive caseloads, and the absence of adequate support resources (including, for example, such essential needs as fact investigation, time to consult with client in a private and unhurried setting, office help, exploration of alternatives to incarceration, and forensic resources including expert witnesses).

Here is how *Justice Denied* summarizes its bleak national assessment:

"The right to counsel is now accepted as a fundamental precept of American justice. It helps to define who we are as a free people and distinguishes this country from totalitarian regimes, where lawyers are not always independent of the state and individuals can be imprisoned by an all powerful and repressive state.

Yet today, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it is often 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. In the country's current fiscal crisis, indigent defense funding may be further curtailed, and the risk of convicting innocent persons will be greater than ever. Although troubles in indigent defense have long existed, the call for reform has never been more urgent."

Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel (2009) at 2 (italics in original).

I suggest three fundamental reasons for the existence of this unintended but undeniable chasm between constitutional ideal and courtroom reality. My suggestions draw upon Dean Norman Lefstein's insights, in his law review article *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help,* 55 Hastings Law Journal 835 (2004) and his book *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011).

The first reason has to do with the United States' system of government, which is federal rather than national. Under this system, each of the fifty states, and not the federal government, has primary responsibility for the delivery of services affecting its citizenry; including the operation of its law enforcement, criminal justice and judicial systems. While this primacy is not total, and is subject to federal constitutional provisions that are binding upon the states, it is distinctively different from the power exercised by a national government whose laws and funding decisions have immediate nationwide impact unconstrained by local government.

In the United States, each of the American states operates its own system of criminal justice. These state systems and their local courts process the vast majority of all criminal prosecutions in the country. It is in state and local courts, not in federal courts, where justice is primarily dispensed. Yet there exists a tremendous funding disparity between the two political entities. Together, the fifty states and their county subdivisions spent about $3.5 billion for indigent defense representation in 2005. *Justice Denied,* at p. 52. When I attended a national conference on public defense hosted by the U.S. Department of Justice in 2009, it was estimated that the then-current state and local annual expenditure of approximately $4 billion would have to be increased *by a factor of ten, or forty billion dollars,* if the quality of service delivered by state and local indigent defense programs were to be raised to the level already being provided - not to the affluent, but to the comparatively small numbers of indigent persons who face criminal charges in federal court.

Thus it can be seen that while most critiques of the right to counsel in the United States refer to two separate and unequal systems, one for the rich and one for the poor, the reality is that there exist three distinct fiscal realities. One group, composed of affluent persons charged with a crime, may hire an attorney or attorneys of their choosing. The second group, composed of persons charged with crime in a federal court, is likely to be represented either by a federal public defender whose caseload is controlled and whose salary is relatively ample, or by an assigned private lawyer who has met professional qualifications and who is paid at a reasonable hourly rate. Members of these first two client groups may reasonably be assured that their lawyer will be adequately trained and well prepared to represent them with professional competence and zeal. It is the members of the third group, the overwhelming number of persons charged with criminal offenses in state and local courts, who fall into the chasm between professed national ideal and grim fiscal reality. It is the federal Constitution that requires the states to appoint and to compensate counsel; but it is the relatively impecunious states that must absorb the cost. As Lefstein has observed, the United States Supreme Court decisions, based upon the federal Constitution and affirming the necessity of providing the effective assistance of counsel, "constitute an enormous unfunded mandate imposed upon the states." *In Search of Gideon's Promise,* at 843.

Dean Lefstein's description of the distinction between England and the United States concerning funding for indigent defense is instructive:

"One of the ways in which England and the United States differ relates to the source of the funding, in that all financing of defense services in England is provided by the central government. In the United States, the change that could have the greatest positive impact on indigent defense would be for the federal government to provide financial support to assist state and local governments in fulfilling their duty to implement the right to counsel. Almost twenty-five years ago the ABA endorsed the creation of an independent, federally funded program to help state and local governments discharge their obligation to provide counsel for indigent defendants. The arguments in support of such a program are just as persuasive today[.]" *In Search of Gideon's Promise,* at 841 (footnotes omitted, emphasis added).

In 2004, the ABA report *Gideon's Broken Promise* stated starkly its finding that "[f]unding for indigent defense services is shamefully inadequate." (Finding # 2, p. 38). After exhorting the states to provide

funding equal to that with which they support the prosecution function, the Report recommended that **"To fulfill the constitutional guarantee of effective assistance of counsel, the federal government should provide substantial financial support for the provision of indigent defense services in state criminal and juvenile delinquency proceedings."** (Recommendation #2, p. 41, emphasis in original).

In 2009, the Report of the National Right to Counsel Committee, *Justice Denied,* likewise issued a strong recommendation that "[t]he 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."

Of course it should. The irony of this unfunded federal constitutional mandate clashing against the reality of the states' fiscal limitations must end. To put the matter plainly, the United States Government must put its money where its mouth is. It has a logical and a moral obligation to help finance a fundamental right which it has not only declared, but which its highest Court has trumpeted as a treasured national value. And where its failure to do so has resulted in the widespread noncompliance with that mandate made plain by these Reports, I would argue that the time has come for the Court to declare that it has a legal obligation to do so as well. As the 50th anniversary of the landmark *Gideon* decision approaches in March, 2013, I suggest that it is time for a second right to counsel challenge; one which seeks a declaration that adequate federal funding must underlie and support the fundamental federal constitutional right. This time, the challenge for the United States Supreme Court will be to issue an opinion that will make its rhetoric and its holding in *Gideon* achievable and real. For the reason stated below, it would be far preferable for the Congress and the President to act. But if they will not, the Supreme Court must.

The second reason for the divergence between constitutional ideal and courtroom reality is that the right to counsel in America, while having its origin in the federal Constitution and in many if not all of the state Constitutions, has received its dramatic late twentieth and early twenty-first century expansion via successive edicts issued by an unelected federal judiciary; a branch of government that possesses no legislative or funding authority. Here too, the United States differs from the United Kingdom, where the right to counsel has received legislative approbation. See, *In Search of Gideon's Promise* at 861. Judicial rulings, unless they concur with majority popular will, can be inherently fragile vehicles for achieving societal reform; and even when such rulings fit the times, as the *Gideon* decision undoubtedly did, the once-accepted rule of law can easily be undermined by subsequent events. This fragility can be seen by comparing the unanimous and universally applauded decision in the 1963 *Gideon* case with the much more defensive and fragmented separate opinions by the members of a divided court only nine years later in *Argersinger v. Hamlin.* By 1972, the reality that effective lawyering costs money was already becoming apparent, and rates of violent crime were showing a sharp increase. Several members of the *Argersinger* Court dismissed the rather obvious fiscal consequences of extending the right to counsel to all crimes punishable by imprisonment by proclaiming their belief in the virtues of law school clinical programs or the willingness of private lawyers to represent people for free. To be charitable, these proclamations were mere hopes. Justice Powell, concurring in the Court's decision, warned that funding was an "acute problem", and noted that "successful implementation of the majority's rule would

require state and local governments to appropriate considerable funds, something they have not been willing to do." *Argersinger v. Hamlin,* 407 U.S. at 59 and 61, n.30. As every subsequent authoritative report has established beyond doubt, some combination of the *unwillingness* described by Justice Powell, and the fiscal *inability* as seen from a state government perspective, has frustrated the vision of *Gideon* and has produced a serious tension between the law's promise and the law's performance.

It is worth noting here that some state courts have used their limited judicial power adroitly to achieve real improvements in the quality of representation in their jurisdictions. See, for example, the action by the Massachusetts Supreme Judicial Court in *Lavallee v. Justices in Hampden Superior Court,* 442 Mass. 228 (2004), in which the Court concluded that the low hourly compensation paid by the state of Massachusetts to assigned counsel in criminal cases had created a "systematic problem of constitutional dimension." Rather than ordering the Legislature to increase the rates, the Court urged cooperation among all branches of government with the aim of "fashioning a permanent remedy[.]" At the same time, the Court ordered that prosecutions could not continue against unrepresented persons. In short order, the Court's decision was followed by (1) immediate legislative approval of an increase in the hourly rate and the creation of a special Commission that (2) issued a Report recommending significant additional funding and structural changes, which (3) were passed by the Legislature and signed by the Governor. The decision in *Lavallee* is a model for the judicial galvanizing of constructive political attention to a festering lack of support for the right to counsel for poor people. In New York, the decision by the Court of Appeals in *Hurrell-Harring v. State of New York,* 15 NY3d 8 (2010) reinstating a lawsuit alleging violation of the right to counsel was soon followed by legislation creating the Office of Indigent Legal Services and the Indigent Legal Services Board; and may have provided the impetus for a similar political consensus in support of the right to counsel to emerge.

A third cause of the post-*Gideon* tension has been the incessantly increasing expansion and "punitization" of the criminal law throughout the United States during the past forty years. Virtually every legislative session, in every state and in the national Congress, the criminal law has been expanded to include new offenses, harsher punishments have been authorized or mandated, and additional "collateral consequences" of a conviction – additional punishments, in actuality – have been imposed. This punitive trend, with its adverse consequences for public defender caseloads, its undermining of effective lawyering for the poor, and its ratcheting up the risk of creating a permanent underclass in American society, is well and thoroughly told in *Minor Crimes, Massive Waste* (2009).

In *Gideon's Trumpet,* his famous 1964 book explaining the landmark 1963 case, Anthony Lewis posed the national challenge directly and succinctly: "It will be an enormous social task to bring to life the dream of *Gideon v. Wainwright* – the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense." (Chapter 13, page 215). Nearly a half-century later, it is as clear as it is regrettable that the United States has largely failed to realize that dream.

What is needed now is (1) for the states which have not yet taken responsibility for fully funding and ensuring the quality of their indigent defense systems to step up and fulfill their responsibility to do so,

utilizing both public defenders and well-trained and well-supported private counsel; (2) for the federal Congress to enact, and the President to sign, legislation that will mitigate the unfunded federal mandate, and appropriate to states the funding they need to comply with their obligation to provide counsel as guaranteed by the United States Constitution; (3) for the United States Supreme Court to act, if the executive and legislative branches of the federal government will not; (4) for the states and the federal government to sharply accelerate the conversion of minor criminal offenses to civil infractions that do not carry the possibility of imprisonment and do not impose debilitating collateral consequences; and to achieve a substantial reduction in the number and the length of mandatory sentences; and (5) for prosecutors, defenders and judges in every state and nationally to begin working together to devise ways of reducing both the excessive costs and the unnecessarily harmful impacts of the criminal justice system as it operates today. Indeed, this cooperative effort to accomplish justice while doing the least feasible harm should be required of state participants as a condition of receiving the federal funding for which I advocate under (2) above.

I close by quoting Dean Lefstein's own conclusion, taken directly from *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, at pages 267-268:

"Since 1963 there has been much progress in providing representation to the indigent accused. Today, across the country there are thousands of public defenders and private lawyers actively engaged in defending indigent persons in criminal and juvenile cases. Yet, in state courts, lawyers cannot provide adequate representation due to overwhelming caseloads and numerous other problems, such as a lack of sufficient support staff and access to experts."

"Not only is additional funding essential…but significant structural problems in the delivery of indigent defense services must be addressed. There need to be strong mixed systems of defense representation involving not only public defenders but also substantial numbers of private lawyers who are screened, trained, supervised, and well compensated. To avoid excessive caseloads, defense programs need to be empowered to designate private lawyers to provide representation without prior judicial approval. And judges should not be involved in appointing lawyers to cases and overseeing the operation of indigent defense systems…."

"More broadly, legislatures should focus on the intake issue….Caseloads could be reduced if serious efforts were made to reclassify offenses as infractions and remove the potential for incarceration, especially in cases where it is rarely imposed anyway."

"Because I believe that improvements in indigent defense will continue…I am optimistic about the future. But the struggle for adequate funding and fundamental, structural changes will surely continue. And success will prove elusive unless the legal profession and others who care about the quality of justice are relentless in pursuing defense service improvements."

Based upon my thirty-eight years of experience in providing indigent defense in two American states, I would highlight Dean Lefstein's emphasis on the necessity of extensive involvement by the private bar in the provision of indigent defense. Private bar *representation of clients* is essential, lest public defender caseloads become too onerous to permit effective representation of every client; and private bar

support for the provision of quality representation is also essential, lest indigent defense funding and structural needs become neglected, amidst the host of fiscal and political priorities that legislative and executive branch officials in every state must confront. Vibrant private bar participation at both the law practice and policy levels is essential to the effective operation of a system for providing high quality indigent defense.