Assessing the First Half-Century of Gideon:
Reconciling Courtroom Reality with Constitutional Mandate

William J. Leahy
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In 1964, the very first year following the *Gideon* decision, Anthony Lewis stated the national challenge precisely and prophetically in chapter 13 of *Gideon's Trumpet*:

> "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."

As every comprehensive national report concerning the right to counsel has declared, the evidence is overwhelming that we have failed as a nation to realize the dream of *Gideon*, at least in our state and local courts where 95% or more of criminal cases arise. We must face the fact that most poor people charged with crime in America are <u>not</u> capably defended; and that most lawyers who provide their representation are <u>not</u> "sure of the support needed to make an adequate defense." We must acknowledge that today, 50 years later, the Supreme Court's proud declaration that "[t]he right to counsel…may not be deemed fundamental and essential to fair trials in some countries, but it is in ours" bespeaks more irony than truth. Today, while the U.S. homicide rate is almost exactly the same as it was in 1963, and while the violent crime rate, albeit double that of 1963 is in continuous decline, we incarcerate almost seven times the number of people relative to population than we did in 1963. Indeed, we are the undisputed world leader in the frequency of incarceration. If the right to counsel was intended to protect and vindicate the rights of the poor, it is hard to find evidence that *Gideon* has been a success.

If we are to rededicate ourselves to achieving the ideals established in the *Gideon* decision, as we must, our starting point must be to squarely acknowledge this national failure; then to identify its causes, and finally to propose constructive remedies; all with the goal that the chasm between the law as declared and the law in actual operation be bridged, and the dream of *Gideon* be realized at last.

Why have we failed? How can we correct those failures? I suggest three areas of examination: 1) failures by the Federal government; 2) failures by State and local governments; 3) missed opportunities by all participants in our criminal justice systems.

1. **The Federal Government:** The federal failures are by far the most significant cause of our national failure. First and foremost is the long-recognized and as long neglected <u>unfunded federal mandate</u> imposed upon the States to implement the federal constitutional right to counsel. As the *right* to counsel has been expanded by the Supreme Court in decision after decision, those decisions have come to "constitute an enormous unfunded mandate imposed

upon the states." Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 Hastings Law Journal 835, 843 (2004). A constitutional right that is proclaimed by our courts as a national treasure, yet is ignored in the annual executive and congressional appropriations, is a right that is stillborn. For over thirty years, the American Bar Association has called for the creation of a national Center for Indigent Defense Services, in order to assess and provide support for persistently overburdened and underfunded state and local counsel assignment programs. The beginning of realizing *Gideon's* dream would be for that Center, so long overdue, to be created and funded in 2013.

But the federal mistake has not been merely one of neglect. In addition, the federal government has acted consistently to magnify the states' fiscal burden of complying with the right to counsel. Compounding the unfunded federal mandate has been the relentless, four-decade long federal emphasis upon broader criminalization and harsher punishments. This is the reason why it was accurate for the March 10, 2013 *New York Times* assessment of the right to counsel to bear the title "The Right to Counsel: Badly Battered at 50", rather than simply "Neglected at 50". Year upon year, law upon law has been enacted, always in the direction of being "tough on crime", and rarely being smart about crime. The War on Drugs, the war on drunk driving, and the war on accused and former sex offenders, among other actions, have not only produced an explosion of new federal crimes and extended punishments; but they have required that federal "anti-crime" aid to the states be contingent upon the imposition of more punitive state laws and punishments. These enactments have driven up the cost to the states of providing counsel by a significant amount. In recent years, federal anti-crime grants administered by the Department of Justice to state law enforcement agencies have almost equaled the total amount of state and local spending in all fifty states for enforcing the constitutional right to counsel. One remedy for this grievous imbalance would be to require that all federal grants to state and local law enforcement be accompanied by an assessment of the increased costs of providing effective counsel for indigent persons whose arrests or punishments are supported by the federal law enforcement grant, and funding in an amount sufficient to fully support that representation. A second remedy would be to set aside a significant percentage of all such federal funding for the purpose of supporting the right to counsel, in order to balance the scales of justice. When I became a public defender, in 1974, the federal Law Enforcement Assistance Administration distributed funds to state public defender programs to create neighborhood offices that served indigent clients and the criminal justice system very well. It is past time to begin a comprehensive evaluation of the role that the federal government plays in the cost to the states of providing counsel, with the aim of providing support to states and localities rather than increasing their fiscal burden.

2. State Government Failures:

All states share the enormous, federally-imposed burden of providing effective representation to clients who are entitled to the assistance of counsel but who cannot afford to hire a lawyer. Some states have done a much better job than others in providing the state funding necessary to provide high quality representation within their borders, and the oversight necessary to assure

uniform quality of services within different geographical regions or political subdivisions. At last count, twenty-eight states provided 100% or very close to it of the cost of providing counsel within their jurisdiction, and twenty-two states did not. (New York provides about 17% of the cost, a very low contribution). Similarly, twenty-eight states have created a statewide entity which is responsible for and has the tools to enforce a uniform quality of representation throughout the state, and twenty-two have instituted either partial or no such authority. (New York took a beginning step in this direction in 2010 when it created the Office of Indigent Legal Services, but it has yet to enact the scope of enforcement authority that the majority of states have provided).

In recent years, there has been slow but steady progress toward a greater exercise of state responsibility for funding and quality control. This progress must accelerate, if the goal of uniformly effective representation for all eligible clients within the state is to be achieved.

A second area of state failure has been the decades-long tendency of state legislatures, just as their congressional counterparts, to enact broader criminal enactments and harsher punishments. Here, New York has recently done a good job of beginning to reduce its reliance on incarceration. And last month, South Dakota passed legislation intended to avoid previously planned prison capacity, and divert the funding into recidivism reduction strategies, and substance abuse and mental health assistance.

3. Participants in the Criminal Justice System Must Re-Evaluate Its Fairness, Efficiency and Cost

Sometimes I reflect on my long career promoting equal justice for poor persons charged with crime, and feel that I have been involved, too often unsuccessfully, in a futile fiscal arms race in which costs constantly rise in every part of the criminal justice system, yet the goal of equal justice suffers. U. S. Attorney General Eric Holder has identified the indigent defense crisis as requiring the involvement not only of the federal, state and local governments, but also of service providers, bar associations and judges. Holder has also stated that additional funding may not always be the answer; that finding smarter and cheaper ways than incarceration to respond to crime should be a priority as well. I would add that streamlining the criminal discovery process and diverting many more cases away from the criminal justice system entirely would increase justice and decrease costs as well.

I support the proposal by the Sixth Amendment Center for a national Commission on the Fair Administration of Justice to address all components of our criminal justice systems. Increasingly, the unchecked growth of prosecutable crimes, the injustices of mandatory sentencing schemes and excessive prosecutorial sentencing discretion, and our over-reliance upon incarceration have drawn fire from informed observers across the political spectrum. For too long, our political process has catered to slogans such as “you can’t put a price on public safety”, rather than applying intelligence and restraint in the exercise of governmental power at public expense. It is my hope that such a Commission, under the leadership of the Attorney General *and* the director of the new national Center for Indigent Defense Services, and with broad participation from

participants in and students of the criminal justice system could find ways to examine how those systems can become fairer, more equal, and more efficient. The Commission might even set as a goal the forfeiture by the United States of its title as the undisputed world leader of incarceration. Now *that* would be cause for celebration.

Global Postscript:

With the adoption by the United Nations General Assembly in December, 2012 of the *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,* and the convening of the first International Conference on Criminal Legal Aid Systems in Beijing, China, also in December, it becomes ever more apparent that the governments of virtually all developed or developing countries are seeking to expand the rule of law and the protection of individuals against unlawful government intrusion. The United States is no longer a pioneer, but a partner in this effort. Every country can learn from the experience of others, just as American states learn from each other's experiences. That the United States was constructively involved in each of the watershed events described above is a good beginning for our active and appropriately humble involvement in the continued development of international rule of law and right to counsel standards.

Defender Postscript:

In laying out my critical assessment of the right to counsel at 50, I could fairly be accused of ignoring many signs of progress, and much organizational activity at local, state and national levels. Many dedicated and highly capable public servants are making progress in their local or state jurisdictions, as I have had the pleasure of witnessing at first hand during my two years in New York. National organizations of serious purpose and keen determination such as the American Council of Chief Defenders, the ABA Standing Committee on Legal Aid and Indigent Defendants, the American Civil Liberties Union, the Constitution Project, the Sixth Amendment Center, the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers, among others, are active and purposeful. Gideon's Army is marching, with purpose and resolve. In Massachusetts, where the Committee for Public Counsel Services has this month been shaken by the death of its legendary chief appellate attorney Browny Speer, the watchword has been passed instantly along the web: "We all carry the Speer."

But political support for a meaningful right to counsel has been starkly lacking. Our goal must be to insist that every client who is represented by a public defender or assigned private counsel receives the same quality of representation that Fred Turner provided to Clarence Earl Gideon at his retrial. Turner had experience, he had local knowledge, he had confidence, he had the time to conduct a meaningful investigation, and he knew how to formulate a defense strategy that turned the tables on the prosecution and its lead witness, and led to his client's acquittal. Until

we can say, in each of our programs, that every client can and does receive this level of representation, our clients will not have been served, and our job will remain unfinished.