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Introduction

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Many of the articles in the *Seattle Journal for Social Justice* (*SJSJ)* Spring 2013 issue were inspired by the Third Annual Conference on Public Defense (Conference) held at Seattle University School of Law on March 8, 2013. The conference is sponsored by the law school's Defender Initiative, a project dedicated to elevating the quality of indigent representation and improving the overall fairness of our criminal justice system through research, advocacy, and education. As in years past, experts from practice and academia convened at the law school to examine and reflect upon the current state of public defense across the country. However, the 2013 gathering took place at a time of historic significance. Fifty years earlier, on March 19, 1963, the Supreme Court issued the landmark decision of *Gideon v. Wainwright.*[1] In *Gideon*, the Court held that defendants charged with felonies in state court who are too poor to hire a lawyer are entitled to appointed counsel.

An accused person's fundamental right to an attorney, despite the ability to pay, is now engrained in our national fabric.[2] The routine advice given to an arrested suspect about that right is portrayed on television, film, and depicted in novels and works of non-fiction. The man behind the case guaranteeing an indigent's right to counsel— Clarence Earl Gideon—was

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1 372 U.S. 335 (1965).

2 *See* Robert C. Boruchowitz, *Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their* Own, 11 SEATTLE J. FOR SOC. JUST. 891 (2013).

memorialized in Anthony Lewis's engaging book *Gideon's Trumpet*.[3] Gideon, charged by the state of Florida with the felony offense of breaking into a poolroom with the intent to commit a crime, asked the trial judge to provide him with a lawyer.[4] Gideon's request was refused since existing Florida law only allowed counsel to be appointed for defendants charged with capital offenses.[5] Consequently, Gideon went to trial without a lawyer. He defended himself "about as well as could be expected by a layman," and was eventually convicted by a jury and sentenced to five years in prison.[6]

Gideon's handwritten petition to the United States Supreme Court for a writ of certiorari, penciled in on lined paper, was granted.[7] Because he was indigent, the Court appointed counsel to represent him and move the case forward through briefing and argument.[8] The resulting decision, less than ten pages in its entirety, was breathtaking in its reach. It unanimously held that the federal Sixth Amendment right to counsel was made obligatory on the states by the Due Process clause of the Fourteenth Amendment. In so ruling, the Court overturned the twenty-year precedent of *Betts v. Brady* holding to the contrary.[9] The *Gideon* Court proclaimed that lawyers in criminal proceedings are "necessities, not luxuries" and held that the right to counsel was "fundamental and essential to fair trials."[10] In other words, the Court recognized that the right to counsel is important not only to the accused person, but also indispensable to the broader societal interest of ensuring that our system of justice is fair.

Gideon's judgment was reversed, and his case was remanded to the Supreme Court of Florida.[11] On re-trial, his attorney Fred Turner brought

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3 ANTHONY LEWIS, GIDEON'S TRUMPET (1964).
4 *Gideon*, 372 U.S. at 337.
5 *Id*.
6 *Id.*
7 LEWIS, *supra* note 3.
8 *Gideon*, 372 U.S. at 338.
9 *Id.* at 339-42.
10 *Id.* at 344.
11 *Id.* at 345.

with him what his client lacked—expertise, skill, and knowledge of the law.[12] Turner researched legal issues and argued a series of pre-trial motions; he reviewed the jury list in advance and knew which individuals to excuse without comment; and he possessed an understanding of the courtroom and community culture.[13] Perhaps most importantly, Turner spent three days interviewing witnesses and investigating the background of the State's star witness, something his imprisoned client was not able to do before his first trial.[14] Information gathered during the investigation yielded fodder for Turner's withering cross-examination of the State's key witness and uncovered exculpatory information not proffered at the first trial.[15] Presented with this new evidence, the jury took only an hour and five minutes to acquit.[16] After spending almost two years in prison, Gideon struggled to contain his emotions upon obtaining his freedom.[17] When asked by a reporter whether he accomplished anything, Gideon replied: "Well, I did."[18]

Many of the articles in this current issue of the *SJSJ* question what our society has accomplished in the fifty years since *Gideon* was decided. The authors examine instances of *Gideon's* unfulfilled promise through the outright denial of counsel,[19] or the constructive denial of counsel through crushing caseloads and a "meet, greet, and plead" mentality.[20] They call for the expansion of Gideon's promise, in part by relying on its foundational principle of ensuring a fair system of justice.[21] A collective call for reform

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[12] LEWIS, *supra* note 3, at 249-50.
[13] *Id.* at 239, 241 & 249.
[14] *Id.* at 250.
[15] *Id.* at 242-48.
[16] *Id.* at 249.
[17] *Id.* at 250.
[18] *Id.*
[19] Boruchowitz, *supra* note 2, at 891.
[20] Steven Zeidman, *Gideon: Looking Backward, Looking Forward, Looking in the Mirror*, 11 SEATTLE J. FOR SOC. JUST. 933 (2013).
[21] Nancy P. Collins, *Does the Right to Counsel on Appeal End as You Exit the Court of Appeals*, 11 SEATTLE J. FOR SOC. JUST. 987 (2013); Travis Stearns, *Legal Financial*

is sounded throughout this issue, with every author acknowledging that *Gideon's* promise remains unfulfilled. The authors discuss innovative solutions such as court rules,[22] collaborative networking,[23] and the framework of interdisciplinary research[24] as potential avenues of reform.

It is fitting that this issue, with reflections on *Gideon's* fiftieth anniversary, is published in Washington State. Long before *Gideon*, in 1854, the territory of Washington provided counsel to defendants who could not afford a lawyer.[25] Continuing the protection of an accused person's right, Washington was the first state in the nation to guarantee the right to appeal to individuals convicted of crimes.[26] More recently, the Washington Supreme Court adopted a rule of professional responsibility prohibiting attorneys from entering into indigent defense service contracts─which require them to bear the cost of providing conflict counsel, investigation, or expert services, unless a fair and reasonable amount for the costs is specifically designated in the contract, in a manner that does not adversely affect the income or compensation allocated to the attorney.[27] Washington is also the first state in the country to adopt a rule establishing qualification standards, and caseload limits, for public defenders.[28]

Obligations: Fulfilling the Promise of Gideon by Reducing the Burden, 11 SEATTLE J. FOR SOC. JUST. 963 (2013).

[22] *The Undersigned Attorney Hereby Certifies – The Washington Supreme Court Rule on Standards and Its Implications*, 11 SEATTLE J. FOR SOC. JUST. 1005 (2013) [hereinafter *Undersigned Attorney*].

[23] Kim Taylor-Thompson, *Gideon at Fifty – Golden Anniversary or Mid-Life Crisis*, 11 SEATTLE J. FOR SOC. JUST. 867 (2013).

[24] Janet Moore, *G Forces: Gideon v. Wainwright and Matthew Adler's Move Beyond Cost-Benefit Analysis*, 11 SEATTLE J. FOR SOC. JUST. 1025 (2013).

[25] *Undersigned Attorney*, *supra* note 22, at 1011.

[26] Collins, *supra* note 21, at 987.

[27] WASHINGTON RULES OF PROF'L CONDUCT R. 1.8(m); *see also* Jacqueline McMurtrie, *Unconscionable Contracting for Indigent Defense: Using Contract Theory to Invalidate Conflict of Interest Clauses in Fixed-Fee Contracts*, 39 U. MICH. J.L. REFORM 773 (2006).

[28] Gene Johnson, *State High Court Limits Public-Defender Caseloads*, SEATTLE TIMES, June 15, 2012, http://seattletimes.com/html/localnews/2018446807_caseload16m.html.

The issue opens with Kim Taylor-Thompson's article *Gideon at Fifty – Golden Anniversary or Mid-Life Crisis.*[29] Taylor-Thompson begins by referencing the wealth of symposia and ceremonies across the country honoring *Gideon v. Wainwright's* fiftieth anniversary. It is a bittersweet anniversary because, as she notes, the individual right championed by *Gideon's* birth is under current attack by a system that values efficiency over effectiveness in the pursuit of justice.[30] Artfully framing her article as a journey through *Gideon's* life stages, Taylor-Thompson points out that *Gideon* spent its young adult life under attack and underfunded. She argues: "States were less intent on building systems that guaranteed effective assistance of counsel as a bedrock principle, and more drawn toward systems that guaranteed rock bottom prices."[31] Still, there were moments of vitality. For instance, defenders mobilized to bring public attention to practices preventing the poor from receiving *Gideon's* guarantee, and the American Bar Association issued the Ten Principles of a Public Defense Delivery System.[32]

Now that we are in *Gideon's* mid-life stage, Taylor-Thompson urges defenders to advocate in multiple forums and broaden their constituencies to change the public dialogue about social and racial justice. She discusses the successful example of Florida public defender Carlos Martinez, who brought the problem of transporting juveniles to court in shackles to the attention of the Florida Bar Association and worked to shine light on the shameful practice through the media. These actions led to a 2010 Florida Supreme Court ruling barring the indiscriminate shackling of juveniles.[33] Building on the collaborative theme, Taylor-Thompson calls upon legislators to protect the right to counsel against attack; defenders to think beyond excellence in the courtroom and work with client's communities to

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[29] Taylor-Thompson, *supra* note 23, at 867.
[30] *Id.* at 871.
[31] *Id.* at 874.
[32] *Id.*
[33] *Id.* at 877-79.

uncover issues of social and racial injustice and bring those stories to the media; prosecutors to recognize and champion for strong advocates on both sides; and students to "fearlessly push boundaries in a way that actually creates change and force others around them to think differently."[34] In this way, Taylor-Thompson concludes, our era will not be *Gideon's* mid-life crisis, but its golden anniversary.[35]

Robert C. Boruchowitz's article, *It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, addresses the routine violation of *Gideon's* mandate in misdemeanor courts.[36] Boruchowitz's research and anecdotal evidence document the widespread denial of counsel to indigent defendants in misdemeanor courts across our country. In many instances, the only attorney that the defendant is encouraged to speak with is the prosecutor.[37] Failure to protect the right of counsel, as Boruchowitz argues, has significant consequences for the accused, the integrity of the court and society's respect for its role, and for individual judges who do not honor the right to counsel.[38] As he notes, the majority of people who come into contact with the criminal justice system do so through misdemeanor courts.[39] Moreover, the consequences of misdemeanor convictions can be severe, and misdemeanor prosecutions have a disparate impact on poor people and people of color.[40] Boruchowitz advocates for full protection of the right to counsel in misdemeanor court and offers concrete alternatives, such as diversion and reclassification of misdemeanor offenses, to fund the cost of fulfilling *Gideon's* promise.[41]

Boruchowitz recounts his efforts working with the Department of Public Advocacy to effect change in Kentucky's misdemeanor courts. In 2011,

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[34] *Id.* at 882-83.
[35] *Id.* at 884.
[36] Boruchowitz, *supra* note 2.
[37] *Id.* at 894.
[38] *Id.*
[39] *Id.* at 893.
[40] *Id.* at 892.
[41] *Id.* at 895.

when he began his work, only 29.3 percent of misdemeanor defendants were appointed counsel.[42] After Boruchowitz spent about sixteen months observing proceedings and meeting with defenders and judges, the appointment rate went up dramatically (an average of 32 percent) in the five counties where he focused his efforts.[43] Examples from other states support Boruchowitz's argument that change can occur through education, advocacy, and litigation. He persuasively argues that jurisdictions embracing *Gideon* can reap cost savings by implementing innovative reform. Boruchowitz puts forward data establishing that jurisdictions can save resources through diversion programs, decriminalization, and social service intervention.[44] Boruchowitz concludes that providing attorneys to indigent defendants in misdemeanor courts, as mandated by the Constitution, will enhance society's respect for the law.[45]

Steven Zeidman begins his article, *Gideon, Looking Backward, Looking Forward, Looking in the Mirror*, with the observation that "the undeniable truth is that Gideon's original request for a lawyer to be appointed to represent him at trial has devolved into lawyers appointed to simply negotiate plea bargains."[46] He urges public defenders to look "in the mirror" and reflect upon how their contributions have led to *Gideon's* failed promise. Zeidman posits that until the plea mentality is changed, adding lawyers and reducing caseloads will "still not achieve the 'promise of *Gideon*,' as envisioned by Gideon himself—a lawyer to represent the accused at trial."[47] He then discusses a recent trilogy of Supreme Court cases: *Padilla*,[48] *Lafler*,[49] and *Frye*,[50] which evidence the Court's new-

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[42] *Id.* at 900.
[43] *Id.* at 901.
[44] *Id.* at 913-19.
[45] *Id.* at 913.
[46] Zeidman, *supra* note 20, at 937-38.
[47] *Id.* at 941-42.
[48] Padilla v. Kentucky, 559 U.S. 356 (2010) (defense counsel's failure to provide client with adequate immigration-impact advice regarding a plea offer is ineffective assistance).

found willingness to delve into the attorney-client relationship in order to evaluate the quality of a defense attorney's advice about a plea offer. Zeidman's thorough analysis of the cases leads him to surmise that their true potential lies in the Court's consideration of ethical standards, and its incorporation of those standards into its effective assistance of counsel analysis to answer the question of what constitutes ethical and constitutional advice regarding whether to accept or reject a plea.[51]

Zeidman calls upon public defenders to arm themselves with the lessons from the trilogy of cases to better serve their clients, especially when faced with judges urging them to move faster or handle more cases. He advises defense attorneys to "eschew[] any pleas until they are in a position to give constitutionally adequate advice on a range of issues confronting their clients."[52] Zeidman makes a compelling case that the Court's heightened attention to defense attorney counseling, in all facets of criminal defense representation, should yield tangible benefits in the quality of representation, in addition to the demise of "meet, greet, and plead" lawyering.[53] Zeidman concludes:

Just maybe then, this trilogy of cases will nudge the Criminal Court toward the adversarial system it theoretically is supposed to be, and *Gideon's* original plea for lawyers to represent the indigent at trial will move a little closer to realization. The transformative potential is there, if lawyers for the poor are willing to look in the mirror and find it.[54]

Travis Stearns, in *Legal Financial Obligations: Fulfilling the Promise of Gideon by Reducing the Burden*, grounds his argument for reform of Washington State's Legal Financial Obligation (LFO) structure in *Gideon's*

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[49] Lafler v. Cooper, 132 S.Ct. 1376 (2012) (defense counsel renders ineffective assistance by providing inaccurate legal advice to a client about plea offer).
[50] Missouri v. Frye, 132 S. Ct. 1399 (2012) (client's right to effective assistance of counsel was violated when defense attorney failed to timely communicate plea offer).
[51] Zeidman, *supra* note 20, at 958-60.
[52] *Id.* at 952.
[53] *Id.* at 961.
[54] *Id.* at 962.

promise that our criminal justice system treat persons fairly.[55] Stearns writes of the crushing LFOs imposed as part of a criminal defendant's sentence, and documents the difficulty in obtaining relief based upon an inability to pay.[56] These financial burdens have a disproportionate impact on indigent defendants, who often struggle with other issues upon reentry such as housing, mental health treatment needs, unemployment, child support, and drug and alcohol treatment.[57] The accrual of interest, at a 12 percent rate, creates a criminal justice debt that indigent defendants can never resolve, resulting in a lifetime of disenfranchisement. Stearns discusses research showing the significant disparity across Washington State in the imposition of LFOs. The charges, county of adjudication, and the decision to exercise the right to trial contribute to higher fines and fees.[58] Latinos and male defendants are assessed higher fees than other demographic groups, and nonviolent drug charges are associated with higher median fines and fee amounts than violent felonies.[59]

Stearns argues that Washington State's LFO structure has not proven effective in generating revenue for the state.[60] He advocates for systemic reform on many levels to end the incarceration and jailing of individuals for failure to pay a criminal justice debt. Stearns provides guidance to defenders on how to best advocate for clients at sentencing and post-sentencing hearings. He urges jurisdictions to undertake alternative solutions similar to the City of Spokane's relicensing program. Additionally, he calls for the Washington State Legislature to follow the example of Massachusetts, which will require a cost-benefits analysis before fines are imposed.[61] Stearns concludes that these reforms will reduce

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[55] Stearns, *supra* note 21.
[56] *Id.* at 972-73.
[57] *Id.* at 969-70.
[58] *Id.* at 968.
[59] *Id.* at 967-68.
[60] *Id.* at 969-70.
[61] *Id.* at 968-77.

disparity and disproportionality in our criminal justice system, and ensure that only people who willfully fail to pay are punished.[62] This in turn, Stearns predicts, will create a fairer system of justice, resulting in an increased respect for the courts.[63]

Nancy Collin's article, *Does the Right to Counsel on Appeal End as You Exit the Court of Appeals?*, examines the common scenario of appointed counsel withdrawing immediately after a court of appeals issues its decision.[64] This leaves the indigent appellant unrepresented when seeking review from the Washington Supreme Court. The only way to make the right to appeal meaningful, Collins contends, is to protect a client's rights during all stages of the appellate process. Collins discusses the many benefits that can result from seeking review of an appellate decision. Most obviously, the client may prevail and have a conviction reversed, in which case the cost of the appeal is borne by the prosecution.[65] Additionally, review extends the life of the appeal, so a change of law occurring during that time will apply to the client.[66]

Finally, the process of seeking review is critical to preserving an appellant's rights in federal court through exhaustion.[67] Collins asserts that appointed counsel should only withdraw after direct and explicit conversations with the client, which explain the matter to the client so that he or she can make an informed decision about whether to seek review.[68] Although Collins agrees that appointed counsel should not file frivolous petitions, she maintains that "the decision as to the frivolousness of an issue should be made with a thumb on the scale that favors vindicating the client's issues and rights."[69] Collins concludes that Washington's strongly

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[62] *Id.* at 977-79.
[63] *Id.*
[64] Collins, *supra* note 21.
[65] *Id.* at 997-98.
[66] *Id.* at 1000.
[67] *Id.* at 997.
[68] *Id.* at 1000.
[69] *Id.* at 1001-03.

protected, and constitutionally guaranteed, right to appeal should expressly require appointed counsel to file a petition for review to the Washington Supreme Court, when it would serve the client to do so.[70]

Marc Boman moderates a discussion between Washington Supreme Court Justices Susan Owens and Sheryl Gordon McCloud and Office of Public Defense (OPD) Director Joanne Moore in *The Undersigned Attorney Hereby Certifies—The Washington Supreme Court Rule on Standards and Its Implications*.[71] In 2012, the Washington Supreme Court adopted new Standards for Indigent Defense Services, which include guidelines for caseload limits and types of cases, administrative costs, limitations on private practice and qualifications of attorneys, appellate representation, and use of legal interns.[72] Upon the standards adoption, Chief Justice Barbara Madsen stated, "We understand the delicate balance in providing a constitutional right to an attorney and the monetary impact on local governments. By delaying implementation of the caseload limits until 2013, our goal is to move towards the promise of the landmark US Supreme Court case of *Gideon v. Wainwright."* [73]

Boman begins the panel discussion by providing a brief history of the promulgation and adoption of the Indigent Defense Standards.[74] Justice Owens and Justice Gordon McCloud candidly discuss their experiences prior to taking a seat on the Washington Supreme Court. Justice Owens served as a trial court judge in Clallam County, which has a tradition of strong public defense. Prior to serving as a trial court judge, Justice Owens maintained a private criminal defense practice. For a short period of time, she handled the district court contract and never thought to treat her

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[70] *Id.* at 1004.
[71] *Undersigned Attorney*, *supra* note 22.
[72] Supreme Court Adopts Standards for Indigent Defense; Case Limit Guidelines Effective in 2013, *available at* http://www.courts.wa.gov/newsinfo/?fa=newsinfo.internetdetail&newsid=2135.
[73] *Id.*
[74] *Undersigned Attorney*, *supra* note 22, at 1005-06.

appointed clients any differently than her private clients. Thus, it was a surprise for her to learn about the practice in other counties, where indigent defenders did not argue suppression hearings and never went to trial.[75] Justice McCloud worked as a public defender before she began to do appellate work. She tells of seeing examples of attorneys who fell down on the job, and places the blame on overworked, underpaid lawyers with inadequate standards.[76] Joanne Moore discusses OPD's role in securing funding for criminal public defense, parent termination cases, and appellate representation. She contends that the standards are unique because they bring instant accountability.[77] Moore reports that although attorneys and courts were anxious about standard implementation, an OPD survey showed that the certification process is working well and is relatively problem-free.[78] The panel discussion concludes by taking questions and answers from the audience about the impact and potential of reduced caseloads for indigent defenders.

Janet Moore, in G Forces, Gideon v. Wainwright and Matthew Adler's Move Beyond Cost-Benefit Analysis, explores criminal justice reform through the interdisciplinary lens of Matthew Adler's book, Well-Being and Fair Distribution: Beyond Cost Benefit Analysis.[79] Moore first summarizes Adler's book, published in 2012, and his economic theory, which emphasizes priority being given to improving the lot of less well-off individuals, while still acknowledging the role of personal responsibility, or free will in the economic calculus. The nuances of Adler's theory, and its contrast with other economic theories, cannot be done justice within this introduction. Suffice it to say that Moore discusses these in an engaging and adroit manner, taking the reader through the complexities and nuances of Adler's methodology.

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[75] *Id.* at 1006-10.
[76] *Id.* at 1010-12.
[77] *Id.* at 1012.
[78] *Id.* at 1014.
[79] Moore, *supra* note 24.

Moore achieves her articulated goals to "sketch key aspects of [Adler's] argument for a continuous prioritarian decision-making model, to note areas for future refinement and development of the argument, and to take some initial steps towards testing the argument's application in the real-world context of the struggle for improved public defense services."[80] Her article explains how Adler's methodologies, his framework for ranking outcomes to favor the enhancement of individual human well-being, and his methodology of giving preference to choices that improve the lot of the less well-off resonate with core commitments of public defense reformers to secure liberty and equal, fair treatment, particularly in confrontations between an individual and concentrated government power.[81] She thoughtfully explores the development of the right-to-counsel doctrine as a real-world application of Adler's theory.[82] Moore offers Adler's approach as an intriguing resource for academics and activists to address ongoing struggles over fairness.[83] Moore concludes that this could help "shift 'grasstop reform'—that is, efforts driven by elites on behalf of the less well-off—toward grassroots change," thereby empowering low income people and people of color to "participate more directly in the formation, implementation, and oversight of the criminal justice policies in which indigent defense services play such a critical role."[84]

The need for change resounds throughout the series of *SJSJ* articles dedicated to commemorating *Gideon's* anniversary. The authors also express hope that our justice system can achieve *Gideon's* promise of fundamental fairness for indigent defendants. These excellent additions to the scholarly discourse are a significant contribution to ensuring what *Gideon's Trumpet* heralded: "In the future, the name 'Gideon' will stand for

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[80] *Id.* at 1052.
[81] *Id.* at 1036, 1047.
[82] *Id.* at 1052-60.
[83] *Id.* at 1066.
[84] *Id.*

the great principle that the poor are entitled to the same type of justice as those who are able to afford counsel."[85]

[85] LEWIS, *supra* note 3, at 239.