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## Gideon at Fifty – Golden Anniversary or Mid Life Crisis

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## ***Gideon* at Fifty—Golden Anniversary or Mid-Life Crisis**

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Kim Taylor-Thompson\*

As I prepared to write this speech, I noticed the large number of symposia and ceremonies that will take place across the country to commemorate the fiftieth anniversary of *Gideon v. Wainwright*.<sup>1</sup> Such widespread attention to the anniversary signals, quite powerfully, the vitality of *Gideon* in shaping the country's view of justice. But, I must admit, what drew my attention was that so many of the conference and speech titles struck such a hopeful note, "Redeeming Gideon," "Gideon's Legacy," and "A Tribute to Gideon," to name a few. All of these stood in stark contrast to the tone of my decidedly less optimistic title, "Gideon at 50—Golden Anniversary or Mid-Life Crisis." Now, it is probably not a coincidence that I would gravitate towards the mid-life crisis theme. As my hair continues to turn gray with mind-numbing speed, I certainly can relate to the need to come to grips with one's identity at the middle of the life span. And, yes, like Michelle Obama, I have recently opted for bangs.<sup>2</sup>

Perhaps the mid-life crisis theme resonates for me because I once represented Clarence Gideon . . . . The lack of laughter in the room disturbs me greatly since I am really not that old. I am, though, old enough to have celebrated the twenty-fifth anniversary of the *Gideon* decision, when the American Bar Association (ABA) opted to stage a mock trial of *State of*

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<sup>1</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>2</sup> See Ellie Krupnick, *Michelle Obama's Mid-Life Crisis is the Reason for Her Bangs!*, HUFFINGTON POST (Feb. 19, 2013, 9:23 AM), [http://www.huffingtonpost.com/2013/02/19/michelle-obama-mid-life-crisis\\_n\\_2715773.html](http://www.huffingtonpost.com/2013/02/19/michelle-obama-mid-life-crisis_n_2715773.html).

*Florida v. Gideon* and asked Albert Krieger and I to serve as co-counsel for Mr. Gideon. Animating the ABA's choice to mark the *Gideon* anniversary with a trial was the desire to demonstrate that counsel is *so* critical. Talk about pressure! Clarence Gideon finally had received what the law required: defense lawyers. But what would happen if the two of us let Mr. Gideon down and actually lost his case?

Some of you may be too young to know Al Krieger. He has built a distinguished career as a criminal defense lawyer, having zealously represented both the famous and infamous, and he has been honored more times than one can count for his skill as a defense lawyer. Still, despite the many years of experience between us, Al and I were panicked. We were nervous in no small part due to the fact that the chance to represent Mr. Gideon—even in a mock trial—meant so much to both of us. We understood that the Court's ruling had promised Mr. Gideon a lawyer who would be committed to *him*. We knew that promise meant more than having just a warm body next to him during trial; it meant that he had a right to expect counsel to fight to give him voice in a system intent on treating him as little more than a personification of his charge. So, if the government wanted to get to Clarence Gideon, they had to get through us. And they would not pass! We tried the hell out of that case in front of an audience of about one hundred lawyers. I am proud to report that the audience found Mr. Gideon “not guilty.”

Lawyers in criminal cases are not luxuries; they are, in fact, necessities.<sup>3</sup> The Supreme Court deemed this “the obvious truth.”<sup>4</sup> So, *Gideon* promised individuals in criminal cases a lawyer in order that the indigent accused would never face the power of the state alone and unprotected.<sup>5</sup> Sadly, what we have seen over the course of the last fifty years is a promise too often honored in its breach—a promise not sufficiently understood by anyone

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<sup>3</sup> *Id.*

<sup>4</sup> *Gideon*, 372 U.S. at 344.

<sup>5</sup> *Id.* at 344–45.

other than the individuals who know all too well what it means to place their lives and liberty in the hands of a lawyer they have not chosen. We have seen the promise of *Gideon* too often contracted by courts and policymakers more concerned with being tough on crime than smart on crime.

Fifty years ago, *Gideon* laid an important foundation, but that foundational principle requires new responses to new challenges. There is much work to do to prevent this fiftieth anniversary from collapsing into a mid-life crisis and, instead, enabling this half-century mark to be the golden anniversary it ought to be. Part one of this essay examines the ways in which the states have veered from the path set by *Gideon*. To breathe life into the *Gideon* mandate, and to make the sort of course correction that honors the decision's principles rather than weaken them to caricatures, we, and all who care about social justice, must rigorously defend the right to counsel and the voice of the accused. Part two explores the untapped potential of collective efforts to galvanize opinion and actions in support of social and racial justice. This part addresses ways that defenders can strengthen and amplify their voices by engaging broader networks to construct a more inclusive vision of justice for all. Part three discusses the roles that those who care about justice must play in reclaiming and reinvigorating the right to counsel. This part urges defenders and others committed to social change to come to terms with the life-altering challenges facing an ever-expanding population of "have-nots" in this country, and then to work with them and on their behalf to advance the promise of *Gideon*.

#### I. PROTECTING THE RIGHT TO COUNSEL

As a country, we find ourselves at an inflection point. The 2008 global financial crisis left the country reeling economically, politically, and

socially.<sup>6</sup> At the same time, the crisis forced a long-overdue re-examination of the nation's domestic and global priorities and approaches. Not surprisingly, our domestic introspection has largely degenerated into political finger-pointing and brinkmanship, exemplified most recently by the “sequester” debacle.<sup>7</sup> Similarly, we have allowed partisan politics to distill the analysis of our weakened global position into a narrow critique of our economic missteps.<sup>8</sup> But what our political leaders so frequently fail to recognize, and we must have the courage to make clear, is that a re-examination of our national priorities must be rooted in what makes us unique in the world—our commitment to individual liberty.

Our nation has been adrift regarding the fundamental rights and liberties of the individual. The loss of our bearings threatens to undermine this country's national identity and global luster as surely as would any economic misjudgments. On a daily basis, we witness a casual contempt for the rights of individuals who are entangled in the criminal justice system.<sup>9</sup> Actors in the system too often elevate goals of efficiency over effectiveness in the pursuit of justice, and policy makers remain unwilling to fund

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<sup>6</sup> See, e.g., John Irons, *Economic Scarring—The Long-Term Impacts of the Recession*, ECON. POLICY INST. (Sept. 30, 2009), <http://www.epi.org/publication/bp243>; Haya El Nasser et al., *Recession Affecting Every Aspect of American Life*, USA TODAY, Sept. 28, 2010, [http://usatoday30.usatoday.com/news/nation/census/2010-09-28-census-american-community-survey\\_N.htm](http://usatoday30.usatoday.com/news/nation/census/2010-09-28-census-american-community-survey_N.htm).

<sup>7</sup> See, e.g., Richard S. Dunham, *Sequester Debate Turns into Blame Game*, S.F. CHRON., Feb. 27, 2013, <http://www.sfgate.com/politics/article/Sequester-debate-turns-into-blame-game-4311351.php>.

<sup>8</sup> See, e.g., REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 2012, available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf>.

<sup>9</sup> See, e.g., ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 14–22 (2009), available at [www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17129](http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17129) (a national study finding that judges encouraged pleas of guilty from defendants in misdemeanor cases, defendants were discouraged from requesting the appointment of counsel and prosecutors spoke directly with defendants to secure guilty pleas).

adequately the protection of individual rights.<sup>10</sup> That disdain puts at risk the democratic freedoms for which this country stands. Quite frankly, depriving an individual of effective representation when her life or liberty hangs in the balance is nothing less than a frontal assault on the democratic principles we cherish.

Fifty years ago, the Supreme Court deciding *Gideon* understood that. The Court fully grasped the significance and centrality of individual liberties. At the core of the *Gideon* decision sat the Court's full-throated rejection of the pretense that an individual can defend herself against the power of the state without legal protection.<sup>11</sup> The decision at once recognized and championed the right to counsel as a bedrock principle. The Court underscored that individuals cannot stand equal before the law if the "poor man charged with crime has to face his accusers without a lawyer to assist him."<sup>12</sup> Some might be tempted to dismiss the *Gideon* decision as anachronistic. Times were much simpler and less perilous then, they might argue. Yet they would be wrong.

It took courage for the Court to articulate the right to counsel in criminal cases when it did. The country faced domestic turmoil in the 1960s. This period was particularly challenging due to the combustible combination of high crime rates, rising public fear, and a certain level of brutality that commonly accompanied police interactions with individuals accused of crime.<sup>13</sup> That climate made the Court's ruling all the more necessary. So, even as the turbulence of the 1960s unfolded, the Court stubbornly and painstakingly identified critical individual rights in the criminal justice system. The Court set guidelines, sought to educate actors in the system,

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<sup>10</sup> See NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://www.constitutionproject.org/manage/file/139.pdf>.

<sup>11</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

<sup>12</sup> *Id.* at 344.

<sup>13</sup> See Kim Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. OF L. & SOC. CHANGE 153, 163 (2004).

and promulgated remedies designed to create a framework of protections for the accused.<sup>14</sup>

Central to that safety network of guidelines was the right to counsel. Despite the Court's good intentions, the clarity of hindsight reveals that the Court's articulation of the right to counsel fell short. The Court may have intended to define and advance a vision of social justice; however, it failed to provide the states with sufficient guidance regarding the development of a coherent system of public defense to enable that vision.<sup>15</sup> Rather, the Court left open pivotal questions of how to create and fund a system of public defense that satisfied the constitutional mandate.<sup>16</sup> Perhaps the Court intuited that states would not require a detailed elaboration of what the Court's newly announced right to counsel entailed. After all, forty-five states, in one form or another, already appointed counsel in serious cases prior to the ruling.<sup>17</sup> But the states' perfunctory compliance with the Court's mandate since 1963 contradicts the Court's intuition that they did not require guidance. Without much time or direction, states scrambled to create systems for the mass delivery of legal services to indigent defendants.<sup>18</sup> Some states chose to maintain their assigned counsel systems, while others

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<sup>14</sup> The Supreme Court's framework of protections signaled its expectations of the defense lawyer; it expected that defense lawyers would uncover and litigate constitutional violations. *See, e.g.,* *McMann v. Richardson*, 397 U.S. 759, 768 (1970) (noting that for a defendant "who considers his confession involuntary and hence unusable against him at a trial, . . . [t]he sensible course would be to contest his guilt, prevail on his confession claim at trial, on appeal, or, if necessary, in a collateral proceeding, and win acquittal, however guilty he might be"); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (requiring warnings prior to custodial interrogation); *Wong Sun v. United States*, 371 U.S. 471, 485 (1963) (barring the use of the "fruit" of the government's illegal actions); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending the exclusionary rule to the states).

<sup>15</sup> *See* Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 *FORDHAM L. REV.* 1461 (2003).

<sup>16</sup> *Id.*; *see also* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 *GEO. L.J.* 2419 (1996) [hereinafter Taylor-Thompson, *Alternating Visions*].

<sup>17</sup> Brief for Petitioner at 29–30, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155).

<sup>18</sup> *See* Taylor-Thompson, *Alternating Visions*, *supra* note 16, at 2426.

expanded existing defender offices and developed new ones.<sup>19</sup> In the end, the mid-1960s and early 1970s may have witnessed an explosion in the number of defender offices across the country, but these offices lacked consistency in funding and operations.<sup>20</sup> All things considered, defender offices operated and expanded in the midst of a relatively supportive environment largely because states—albeit begrudgingly—appreciated that the Court held their feet to the fire.

And, then the Court doused the fire. As the Warren Court era concluded in 1969, the climate in which defenders operated shifted. The decisions of the Burger and Rehnquist courts in the 1970s and 1980s signaled a dramatic movement away from the rights of criminal defendants and toward a concern for the victims of crime.<sup>21</sup> These more conservative courts sought to undue much of what had been accomplished by the Warren court—knocking the teeth out of the exclusionary rule<sup>22</sup> and creating such a low bar

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<sup>19</sup> See NAT'L LEGAL AID & DEFENDER ASS'N, *THE OTHER FACE OF JUSTICE* 13 (1973).

In 1961, two years prior to *Gideon*, defender systems existed in only 3% of the counties serving approximately a quarter of the country's population. Only 32 states compensated assigned counsel in non-capital cases and in 1182 counties indigent defendants were either unrepresented by counsel or were provided with lawyers who were obliged to serve without either fee or expense money. Today 650 defender systems provide indigent defense services in 883 (28%) counties throughout the United States. These defenders serve almost two-thirds of the nation's population.

*Id.* (citations omitted). See also SHELDON KRANTZ ET AL., *RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN* 202 (1976) (discussing rapid expansion of public defender systems after *Gideon*).

<sup>20</sup> See Taylor-Thompson, *Alternating Visions*, *supra* note 16.

<sup>21</sup> See generally Yale Kamisar, *The 'Police Practice' Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969–1986*, at 143–68 (Herman Schwartz ed., 1987) (tracing three phases of the Burger Court, during which the Court first adopted a strong pro-police attitude, then retreated somewhat as it “reinvigorated *Miranda* in some respects[,]” but finally “picked up where the first [Burger Court] had left off in the mid-1970s”).

<sup>22</sup> See *United States v. Leon*, 468 U.S. 897, 913 (1984) (establishing good-faith exception to Fourth Amendment exclusionary rule).

for effective assistance as to amount to no bar at all.<sup>23</sup> What had been boldly built was now brazenly dismantled.

Politicians, perhaps emboldened by the Court, capitalized on this shift. Motivated, in part, by rising crime rates and spurred on by a relentless parade of violent crime stories in the media, legislators had license to impose stiffer controls in the fight against crime.<sup>24</sup> They exploited the public's fear of unpredictable violence and waged wars on crime and wars on drugs,<sup>25</sup> all the while presupposing the virtues of those campaigns. Politicians deployed law enforcement resources to police and wage these wars within low-income communities and communities of color. More often than not, politicians failed to invite to the policy-making table members of the very communities in whose names and on whose streets these wars were waged. Under the guise of addressing "quality of life crimes," policy makers criminalized poverty and mental illness.<sup>26</sup> What occurred was top-down decision-making where the most powerful—the wealthy, the privileged, and the politically well-connected—defined justice priorities and initiatives to the exclusion of the vast majority in our society.

While these politicians held both the floor and the purse strings, they dealt their most crippling blows. Although money flowed freely to the enforcement side of the equation, political leaders across the nation slashed

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<sup>23</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>24</sup> See Taylor-Thompson, *Alternating Visions*, *supra* note 16, at 2430.

<sup>25</sup> See, e.g., STEVEN WITSOTSKY, *BEYOND THE WAR ON DRUGS: OVERCOMING A FAILED PUBLIC POLICY* 182 (1990) (discussing Nelson Rockefeller's New York gubernatorial reelection campaign in 1966 during which he launched a war on drugs in New York and, upon reelection, successfully capitalized on public fear and pressed the state legislature into enacting some of the nation's toughest drug laws).

<sup>26</sup> In 1982, James Q. Wilson and George L. Kelling advanced the "broken windows" theory suggesting that neighborhoods with more concentrated physical and environmental disorder increased acceptance—and incidences—of unlawful behavior and recommended policing strategies that would focus on low level, quality of life crimes as a way of reducing overall criminal conduct. James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, *ATLANTIC MONTHLY*, Mar. 1982, at 29–38. See generally Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457 (2000).

funding to indigent defense systems.<sup>27</sup> Fiscal constraints will, of course, force hard choices. But for political leaders more focused on short-term electoral gains than long-term reasoned policy, the choice was far too easy. The individuals and communities that defenders represent by definition are indigent, and they are often disenfranchised by law.<sup>28</sup> Without the power of either wealth or the vote to pose a political threat, defenders and their clients lacked the traditional methods of influence to move politicians in different directions. So, riding the tide of a certain type of anti-crime sentiment that demonized individuals charged with crime as well as their lawyers, politicians correctly perceived no immediate consequence to the decision to cut funds to the group that lacked voice.<sup>29</sup> Instead, they comfortably created false dichotomies, by pitting the “deserving poor” against the “undeserving poor.” Caseloads grew at alarming rates, funding for indigent defense systems could not keep pace, and systems operated largely at the political whim of whoever was in power.<sup>30</sup>

This is how *Gideon* spent its young adult life—under attack and underfunded. The first half-century of *Gideon*’s implementation was marred by a stunning but steady retreat from the Court’s original vision and

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<sup>27</sup> See, e.g., Marianne Lavelle & Cris Carmody, *Are Inspectors General Doing the Wrong Job?*, NAT’L. L.J., Feb. 15, 1993, at 9 (ABA Criminal Justice Chair Neal Sonnett noting that the “Reagan-Bush years devoted 70 percent of spending in the criminal justice area to interdiction and law enforcement, at the expense in most cases of providing funding for prevention, treatment and rehabilitation[.]”); Taylor-Thompson, *Alternating Visions*, *supra* note 16, at 2430.

<sup>28</sup> Nationally, approximately 5.85 million Americans cannot vote because laws prohibit voting by individuals with felony convictions. *Felony Disenfranchisement*, THE SENT’G PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=133> (last visited Apr. 18, 2013). Racial disparities exacerbate the effects of felony disenfranchisement in that one of every thirteen African Americans is barred from voting. See *id.*

<sup>29</sup> See Alison Frankel, *Keeping the Faith*, AM. LAW, Dec. 1989, at 58 (quoting Kim Taylor-Thompson commenting that the government’s policies showed zero tolerance for indigent defendants and their lawyers); Robert L. Spangenberg & Tessa J. Schwartz, *The Indigent Defense Crisis is Chronic*, CRIM. JUST., Summer 1994 at 13 (noting that limited criminal justice resources have been placed in law enforcement and correction rather than in public defense).

<sup>30</sup> See Taylor-Thompson, *Alternating Visions*, *supra* note 16, at 2431.

continuing mandate.<sup>31</sup> Instead of creating strong indigent defense systems, states rushed to the bottom. 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.<sup>32</sup> In the process, this country cheapened the social justice vision the Warren Court had sought to embed and shape.

Still, even that weakened vision held some vitality. One by-product of being constantly under siege is that sometimes the beleaguered stands up in recognition that what does not kill you makes you stronger. The persistent attacks on indigent defense across the nation heightened the realization that defenders, and those who care about justice, needed to act to bring substance to the *Gideon* mandate. So, while defenders and the organized bar had once simply watched and waited—hoping that political leaders or the judiciary would act on their own to correct this problem—they finally recognized the need to mobilize and to shine a light on practices that prevented indigent clients from receiving what *Gideon* had guaranteed.

Indigent defense systems across the country underwent massive transformations.<sup>33</sup> The ABA recognized the need to step into the fray and, in

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<sup>31</sup> See generally Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. (forthcoming 2013).

<sup>32</sup> See NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://www.constitutionproject.org/manage/file/139.pdf>.

<sup>33</sup> One prominent example of such a transformation is the Office of the Orleans Public Defenders (OPD) office in New Orleans, Louisiana. See ERNIE LEWIS & DAN GOYETTE, REPORT ON THE EVALUATION OF THE OFFICE OF THE ORLEANS PUBLIC DEFENDERS (July 2012), available at <http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/Report%20on%20the%20Evaluation%20of%20the%20Office%20of%20the%20Orleans%20Public%20Defenders.pdf>. *Id.* at 2. Pre-Katrina, the Office of Indigent Defense (OIDP) had drawn criticism for its failings. *Id.* at 2–7. In 2006, the Southern Center for Human Rights conducted a study of the OIDP noting severe underfunding that led to lawyers rarely conducting investigation, rarely meeting with clients, and ultimately providing poor representation. *Id.* at 3–4. The Department of Justice Bureau of Justice Assistance then provided both financial and technical assistance. *Id.* at 4. Additional studies showed that the program was still lacking until the National Legal Aid and Defender Association helped draft *A Strategic Plan to Ensure Accountability and Protect*

2002, issued its Ten Principles of a Public Defense Delivery System setting out the criteria for indigent defense systems.<sup>34</sup> Defenders themselves had also begun taking a more active role in shaping who they were and what their systems would do. They began to do battle to defend this right to counsel and to protect the voice of their clients.<sup>35</sup> And those collaborative efforts have had some success in fighting cuts and insisting on better-funded, independent indigent defense systems.<sup>36</sup> They have done this not just because those systems fulfill the constitutional obligation. Rather, well-funded, independent systems enable criminal justice systems to function well and enable the development of good criminal justice policy as strong defenders bring issues to the table to inform the policy debate.

That past continues to offer lessons today. We must learn from our history and guard against forces seeking now to diminish *Gideon's* promise because, quite simply, all our battles have not yet been won. Nor have our battles been relegated safely to the past. We are reminded today, right here in King County, Washington, that this right can come—and is coming—under attack. The King County executive has proposed an amendment to

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*Fairness in Louisiana's Criminal Courts* (2006). *Id.* at 5. The recommendations included in the report enabled the re-building of the office into the Office of Public Defenders with a new board, new staff, and policies and protocols. *Id.* at 5–6. This led to a dramatic change in representation. *Id.* at 7.

<sup>34</sup> See ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002) [hereinafter ABA STANDING COMM.], [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

<sup>35</sup> In 2000, the National Legal Aid and Defender Association (NLADA) brought collaborative partners together to expand assistance and support for local indigent defense providers focused on improving indigent defense and increasing funding. See NAT'L INFRASTRUCTURE PROJECT, STANDING TOGETHER FOR QUALITY PUBLIC DEFENSE MEETING REPORT (2000), available at [http://www.nlada.org/Defender/Defender\\_NIDC/Defender\\_NIDC\\_Reports](http://www.nlada.org/Defender/Defender_NIDC/Defender_NIDC_Reports).

<sup>36</sup> For successful challenges to low hourly rates and caps on fees paid to court appointed counsel, see *Arnold v. Kemp*, 813 S.W. 2d 770 (Ark. 1991); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990). For successful challenges to excessive caseloads of part-time, full-time and contract defenders, see *State v. Peart*, 621 So. 2d 780 (La. 1993); *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987).

the charter that would collapse the four defender offices into a single department under the authority of the executive branch.<sup>37</sup> In a county that boasts an indigent defense system widely recognized as one of the preeminent indigent defense systems in the country, we see political leaders seeking to unravel it. We know that, in times of economic challenge, many in power will look to cut indigent defense budgets because they believe they can. We know from our past that many in power misunderstand what *Gideon* intended, so they will look to belittle and weaken the right to counsel. We know from our past that many in power believe they can make sweeping political decisions without ever including or considering the voices of those affected. But we have to stand up when others sit down. We must remind them, “if you want to get to our clients, you have to go through us and you shall not pass.”

The four non-profit providers in King County, Washington,<sup>38</sup> have provided—and continue to set the standard for—excellence in representation for the individuals and communities with whom they work. Not only can this county take pride in its indigent defense system, but also the criminal justice system as a whole in King County stands out as one of the country’s best. King County has demonstrated for the past forty-two years that it understands that a well-functioning adversarial process contemplates a battle between two strong combatants, not an ambush. So, this county has maintained a commitment to excellence by ensuring that strong players fill each of the critical roles in the system: able judges, prosecutors, and defenders.

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<sup>37</sup> See Rev. OPD Reorganization Code (Feb. 11, 2013) (on file with *Seattle Journal for Social Justice*).

<sup>38</sup> The four defender offices are Assigned Counsel for the Accused (ACA), Northwest Defenders Association (NDA), Society of Counsel Representing Accused Persons (SCRAP) and The Defender Association (TDA). *Public Defense Agencies*, KING COUNTY, <http://www.kingcounty.gov/courts/OPD/Partners/Agency.aspx> (last visited Apr. 18, 2013).

The strength of King County’s defenders results from the independence of the four providers, their insistence on excellence, and their innovation. Perhaps it is obvious, but it nonetheless must be stated: a defender office that must endure shifting political attitudes or judicial intervention cannot provide the representation mandated by the Constitution. The ABA recognized this when it adopted the Ten Principles of a Public Defense Delivery System as a practical guide to effective, efficient, and conflict-free indigent defense delivery.<sup>39</sup> Indeed, Attorney General Eric Holder has praised the ABA’s Ten Principles as “an essential guidepost for ensuring that our indigent defense systems are as effective—and as efficient—as possible.”<sup>40</sup> The first principle, which is the linchpin of the ten principles, holds that the public defense system must be independent from political influence.<sup>41</sup>

By being independent, the King County defender offices have first set an example of zealous representation, and have then helped to develop standards to raise the performance of the rest of the bar. The four defender offices have embraced quality as their mission, giving historically excluded groups and communities a chance to feel confident that their voices will be heard. These offices have engaged in innovations to meet today’s challenges, recognizing that they are uniquely positioned to identify, and to collaborate with others to address systemic problems that inhibit justice and hamper the effective administration of the system. Yet today, this model system that others emulate faces a very real threat to its continued existence. We must rigorously defend the right to counsel and the voice of the accused.

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<sup>39</sup> See ABA STANDING COMM., *supra* note 34.

<sup>40</sup> Eric Holder, Attorney General, Address at the American Bar Association’s National Summit on Indigent Defense (Feb. 4, 2012), *available at* <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>.

<sup>41</sup> See ABA STANDING COMM., *supra* note 34.

## II. TAPPING INTO NETWORKS TO BROADEN THE REACH OF THE RIGHT TO COUNSEL

Defenders, and all those who care about social justice, must develop and tap into local and national networks to amplify our voices and to galvanize both opinion and actions to change the public dialogue around social and racial justice. The work of defenders is essential to ensure and protect individual liberty. When defenders fight in court on behalf of individual clients, they are fighting critical battles for voice and dignity. That fight must continue and can never waiver. But defender voices cannot be confined to the courtroom. Nor can defenders afford to wage battles alone on behalf of their clients. While the voice of the lone warrior may ring with eloquence, it often lacks power. However, when one voice becomes many, when defenders connect, convene, and enable other voices as part of a larger network, those networked voices not only garner attention, but they gain weight and authority.

Networked voices have made a difference in Florida. Let me offer an example. A young eleven-year-old girl made her way to the front of the courtroom.<sup>42</sup> She stood three-feet seven inches and the court officers led her into court wearing shackles. The metal shackles weighed nearly as much as she did. It was not just that they had handcuffed her small hands. She was restrained by a chain that wrapped around her waist, connected to the handcuffs around her wrists, and linked to the leg irons around her feet. She posed no real danger. She had not attempted to flee the court. She was simply making her first appearance in juvenile court in Dade County, Florida. The image of children—and predominantly children of color—being herded into a room shackled together with other kids summons images of slaves on the auction block, not of children presumed to be

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<sup>42</sup> Interview with Carlos J. Martinez, Miami-Dade Public Defender, October 18, 2010.

innocent in a court of law. Yet this shameful practice constituted business as usual in Florida juvenile courts.<sup>43</sup>

The practice was all the more humiliating given the nature of the restraint.<sup>44</sup> The leg irons stretched typically only sixteen inches, which made it difficult for the children to walk normally. The shackles forced them to shuffle into the courtroom. You could hear the kids coming before you actually saw them. The principal justification for this practice seems to have been custom rather than any real concern about safety or flight risk. This was simply how kids were brought to—and appeared in—juvenile court.<sup>45</sup>

That is, until then assistant public defender Carlos Martinez, shocked by what he saw in court, made changing this policy his personal goal.<sup>46</sup> His office, the Dade County Public Defender Office had tried to amend the policy both in formal arguments made in individual cases and then through informal channels in 2006.<sup>47</sup> When the Department of Juvenile Justice's practice of shackling kids while transporting them to court from the detention facility had been extended to shackling kids at all times in court, the defender office asked the court to halt the practice, and succeeded in getting the court to agree to remove the shackles for a child's trial. But that was all the informal process yielded. That result was not good enough for Martinez. He knew that, if he had any hope of changing this court policy, he needed to bring more visibility to this practice.

So, Martinez looked for ways to shine a public light on this practice. The constituency most immediately affected by this practice—children in

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<sup>43</sup> See Bernard P. Perlmutter, "Unchain the Children": *Gault, Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1 (2007).

<sup>44</sup> See Dr. Marty Beyer, Affidavit for Motion for Child to Appear Free from Degrading and Unlawful Restraints, Miami Public Defender 2 (Aug. 23, 2006), available at <http://www.pdmiami.com/unchainthechildren/AppendixDBeyer.pdf>.

<sup>45</sup> See *Ending Indiscriminate Shackling*, JUV. JUST. CPR, [http://www.pdmiami.com/cpr/Ending\\_Indiscriminate\\_Shackling.htm](http://www.pdmiami.com/cpr/Ending_Indiscriminate_Shackling.htm) (last visited Apr. 18, 2013).

<sup>46</sup> *Id.*

<sup>47</sup> See Maya Bell Orlando, *Lawyers Want Shackles Off Teen Suspects*, SUN SENTINEL (Sept. 12, 2006), [http://articles.sun-sentinel.com/2006-09-12/news/0609110536\\_1\\_juvenile-court-detention-defender](http://articles.sun-sentinel.com/2006-09-12/news/0609110536_1_juvenile-court-detention-defender).

juvenile courts and their families—quite obviously did not wield conventional power or voting strength to bring their weight to bear in traditional ways. So Martinez needed to build an expanded community of support and influence to amplify his arguments. He began with the legal community by bringing the practice of shackling to the attention of the Florida Bar Association. He placed the policy and practice on the agenda for discussion at bar meetings as a way to raise awareness of this issue and to catalyze sentiment.<sup>48</sup>

Martinez simultaneously worked to inform the media.<sup>49</sup> Reporters soon became interested in the story, and pursued it aggressively.<sup>50</sup> As they began to investigate this practice, they began to raise its visibility by making it part of the larger public debate. Once reporters began asking questions and exposing the story in the press, almost universal condemnation of the practice followed. The Florida Bar Association issued a resolution reviling the indiscriminate use of chains in juvenile courts.<sup>51</sup> In 2010, after hearing

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<sup>48</sup> See *Shackled Juvenile Will Be Debated at General Meeting*, 33 FLA. B. NEWS § 17 at 10 (2006).

<sup>49</sup> See Carlos Martinez, *Why are Children in Florida Treated as Enemy Combatants?*, 10 CORNERSTONE 1 (2007), available at <http://www.safetyandjustice.org/files/Cornerstone.pdf>.

<sup>50</sup> See Associated Press, *Miami-Dade Public Defender Seeks End to Shackling of Juveniles in Courts*, POILICEONE.COM (Sept. 12, 2006), <http://www.policeone.com/school-violence/articles/758171-Miami-Dade-public-defender-seeks-end-to-shackling-of-juveniles-in-courts/>; Jan Pudlow, *Court: Unchain the Children*, FLORIDA BAR NEWS, Jan. 1, 2010; *Court Made Right Call in Limiting Juvenile Shackles*, MIAMI HERALD, Dec. 28, 2009; Bill Kaczor, Associated Press, *Florida Justices Horrified by Restraints on Juveniles*, THELEDGER.COM (June 4, 2009) <http://www.theledger.com/article/20090604/NEWS/906055003>.

<sup>51</sup> In September 2006, the Florida Bar's Legal Needs of Children Committee unanimously voted to oppose the blanket shackling of juveniles in response to a bevy of motions by public defenders to unshackle juveniles in court. See Perlmutter, *supra* note 43, at 16–28. In December 2006, the Board of County Commissioners in Miami-Dade County adopted a resolution urging the state legislature to ban the indiscriminate shackling of juveniles. See Miami-Dade County Comm'n, Res. 63,613, Resolution Urging the Florida Legislature to Enact Legislation Banning the Use of Indiscriminate Chains and Shackles on Detained Children in Juvenile Courtrooms; and Establishing a Presumption of No Chains or Shackles Absent a Showing of Risk to Self or Others (Dec.

arguments on both sides of this issue, the Florida Supreme Court issued a ruling amending the court rules and barring the blanket use of shackles for kids.<sup>52</sup> What had once been hidden and accepted was now exposed and condemned, at least in Florida.

What Martinez chose quite deliberately to do was to tackle head on the injustice that had been accepted as a matter of routine in juvenile courts. He did this by broadening his natural constituency and adding members to his cause who could more effectively move the dialogue about this practice. He used every tool of advocacy he could muster. He lobbied; he worked with media; he kept the issue visible for a year until the court felt the pressure to amend the practice. And then his office publicized the progress and success of their efforts on the defender website and used that site as a place where other defenders could turn to gain access to motions and expert reports to enable them to take similar action in their own jurisdictions.<sup>53</sup>

Our challenge is to build similar networks, locally, regionally, and nationally, to preserve the rights of individuals and communities struggling to find voice and dignity going forward. We must create networked conversations and collaborative action around criminal justice policy and operations. Our clients' stories have power. When we find ways to share those narratives with others and engage them in understanding our clients' challenges, we often discover allies. Still, collective action may not come so easily to those of us who have defined our identity in a dichotomous framework: us against them. Consciously choosing to engage in collective action demands a willingness not only to address common concerns, but also to create common ground. Collective action means surrendering some control over issues about which we care deeply, and, at times, allowing others to speak for us. But by forcing ourselves to reach beyond the typical

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19, 2006), available at <http://www.miamidade.gov/govaction/searchleg.asp> (search "063613" in file number field, follow 063613 hyperlink).

<sup>52</sup> See Bill Kaczor, *Florida Justices Ban Shackling Kids in Court*, MIAMI HERALD, Dec. 17, 2009.

<sup>53</sup> See *Ending Indiscriminate Shackling*, *supra* note 45.

constituencies that share our views, we learn to speak more persuasively to power. We amplify our voices and make it harder to dismiss our views as marginal or fringe.

New tools allow us to amplify our voices today. While Carlos Martinez successfully used more traditional methods of networking, defenders today can and must use social networks to catalyze action. Social media has proved over and over again that it is a powerful tool that can harvest a shared sense of purpose and create and mobilize a broader constituency of support to push for change. In repressive regimes, social media has opened a critical window into practices that have helped topple governments.<sup>54</sup> The world's networked population has grown from the low millions in the early 1990s to the low billions today.<sup>55</sup> The result of that increase in usage and activity means that social media offers the user a widely distributed network of connections. Messages can spread immediately, creating intersections and connections that might otherwise take much longer to generate with traditional forms of communication. Because the information typically comes from a friend who has posted the information or forwarded it, it feels more personal and may carry word of mouth validation. Once an idea or topic gains traction, that footing can help build and expand communities of interests, particularly given the fact that individuals tend to be parts of multiple networks that may or may not naturally intersect unless there is a

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<sup>54</sup> See, e.g., Colin Delany, *How Social Media Accelerated Tunisia's Revolution: An Inside View*, HUFFINGTON POST (Feb. 10, 2011, 2:09 PM), <http://www.eapolitics.com/2011/02/10/how-social-media-accelerated-tunisia-revolution-an-inside-view/>; see ARAB SOC. MEDIA REPORT, 1 CIVIL MOVEMENTS: THE IMPACT OF FACEBOOK AND TWITTER 2 (May 2011), available at <http://www.dsg.ae/portals/0/ASMR2.pdf>.

<sup>55</sup> Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, FOREIGN AFFAIRS 1 (2011), available at <http://www.bendevane.com/FRDC2011/wp-content/uploads/2011/08/The-Political-Power-of-Social-Media-Clay-Sirky.pdf>; Ingrid Lunden, *ITU: There Are Now Over 1 Billion Users of Social Media Worldwide, Most on Mobile*, TECHCRUNCH.COM (May 14, 2012), <http://techcrunch.com/2012/05/14/itu-there-are-now-over-1-billion-users-of-social-media-worldwide-most-on-mobile/>.

unifying issue of interest. Imagine the power that defenders might tap and unleash to inform, educate, and organize around issues of racial and social justice.

### III. PLAYING OUR PARTS IN RECLAIMING AND REINVIGORATING *GIDEON*

As a country we stand at a precipice. The challenges and complexities of this century are beginning to unfold. Of course, predicting the precise trajectory of those issues is likely better left to others. But all who have looked at the trends in social change expect a certain amount of upheaval occasioned by two things: the growing gap between the “haves” and the “have-nots”<sup>56</sup> and mass migration into cities.<sup>57</sup> Already, more than 50 percent of the world’s population lives in a city.<sup>58</sup> Predictions are that these numbers will swell, which will place greater demands on city services and will likely increase feelings of insecurity and fear of crime.<sup>59</sup> Change will not occur if we stand back and wait for others to step up. We must reclaim the role of counsel, a role where we are advocates for our clients, and we must insist that the voice and experiences of the individual “have-nots” figure prominently in the debate about social justice.

As *Gideon* turns fifty, we have the opportunity and the obligation to define the right to counsel it articulated in light of the new incursions on individual liberty that we are seeing and will likely continue to see. Over the years, we have seen others look to define *Gideon* as something designed to do no more than make society feel good. We place a body with a heartbeat next to the individual accused and we can comfortably tick the

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<sup>56</sup> See, e.g., WORLD ECON. FORUM, GLOBAL RISKS 2013: EIGHTH EDITION (2013), available at [http://www3.weforum.org/docs/WEF\\_GlobalRisks\\_Report\\_2013.pdf](http://www3.weforum.org/docs/WEF_GlobalRisks_Report_2013.pdf).

<sup>57</sup> See, e.g., WORLD ECON. FORUM, GLOBAL RISKS 2012: SEVENTH EDITION (2012), available at [http://www3.weforum.org/docs/WEF\\_GlobalRisks\\_Report\\_2012.pdf](http://www3.weforum.org/docs/WEF_GlobalRisks_Report_2012.pdf).

<sup>58</sup> See *Linking Population, Poverty and Development*, UNITED NATIONS POPULATION FUND, <http://www.unfpa.org/pds/urbanization.htm> (last updated May 2007).

<sup>59</sup> *Id.*

box that says we have complied with the mandate. For those who have defined the right so narrowly, *Gideon* represents nothing more than a necessary evil. But we in this room know that if we allow such a myopic definition we do an injustice to the individuals whom the right intends to protect. The right to counsel, at a minimum, requires excellence and a deep and abiding commitment to the interests of our clients. But more than that, to defend an individual well, one must understand not only the life of the case, but also the life of the client.

The individuals who end up in the grip of the criminal justice system often find themselves there because of poverty and injustice. For too long, this country has used the criminal justice system as the site where we address mental illness, addiction, and poverty after the fact. But reclaiming and reinvigorating *Gideon* means that defenders have an obligation to rethink the ways that our society uses the criminal justice system so that we can help bring a more rational approach to its operation.

The time may be ripe to introduce some degree of reason and fairness to justice operations. The fiscal constraints following the 2008 financial crisis have opened a window of opportunity in many state legislatures to re-examine policies that once were treated as sacrosanct because legislators have come to realize that many of the practices and policies utilized in our efforts to address crime cost too much, and fails to deliver the promised results.<sup>60</sup> A reinvigorated *Gideon* means coming to the table with proposals that help to undo many of the retributive excesses that have taken their toll in lives lost and dollars spent. By working with and in the communities in which our clients live, we see recurring issues of police misconduct and racial bias playing out on a daily basis. We have the obligation to expose these practices by demanding that criminal justice policy reflect and adhere to a respect for individuals and their communities. We can and must bring a

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<sup>60</sup> See, e.g., *Fiscal Constraints Spur New Corrections Policies*, VERA INST. OF JUST. (Mar. 27, 2013), <http://www.vera.org/blog/fiscal-constraints-spur-new-corrections-policies>.

more sane approach to criminal justice policy making, all the while protecting individuals and keeping communities safe.

So, *Gideon* has reached fifty. But what does that really mean? Perhaps it might help to hear the perspective of someone who has reached that milestone and is now looking at it in the rearview mirror. When you reach fifty, it likely means that you have shaken off the insecurities of your twenties and thirties, you have moved past the need to prove yourself that dominated your forties, and now, having reached the half-century mark, you are confident in what your life has meant and now you have the obligation to imagine the next stage. Against that backdrop, let's talk about what each of us needs to do now to prepare for the next step in *Gideon's* development.

To the readers of this piece who are legislators, I am asking you to have the courage to protect this right to counsel against all forms of attack. If the county faces a financial issue as it looks to provide quality indigent defense, then invite the defender offices to the table to work with you to meet the challenge. Collaborating with them will likely produce the kind of reasoned outcome that the government, the community, and the criminal justice system can embrace.

To defenders, you need to find ways to sharpen your advocacy on behalf of individuals and their communities. You can no longer satisfy the high standard of expectations simply by being excellent in the courtroom. Those are table stakes. To fulfill *Gideon's* mandate in meeting today's challenges, you will need to do more. You will need to work with your clients' communities to uncover issues of social and racial injustice that recur in those neighborhoods. You will need to remain alert to legislation to enable your clients' voices to be heard before legislation is proposed or passed. You will need to work with the media to bring balanced viewpoints to the discussion and debate about criminal justice and social justice.

To prosecutors, our system of justice depends on strong advocates on both sides. You must step up and let the County Executive know that unraveling what has worked well for forty-two years is just not how justice

is done in King County. Achieving justice means having strong advocates on both sides, and you must play a role in ensuring that defenders' ability to perform the critical role as agitators for justice is not lost in the rush to reduce costs.

To the students who will read this, you will have the task of continuing to define and reimagine this right. Your task is to infuse this right with meaning and methods that those of us who have preceded you were never able to imagine. This is no small expectation. When I speak with students, often they wonder what they can do to effect change being so new to the practice and the profession. What I have discovered in years of teaching is that some of the most creative approaches come from those who do not yet have the experience and, more importantly, do not yet have the sense of what they cannot do. They fearlessly push boundaries in ways that actually create change and force others around them to think differently.

So I ask nothing less of you. I ask that you remind those in power that our clients' lives and stories have import and impact. I ask you to remind those in power that our clients' amount to more than just the worst thing they have ever done. I ask that you remind those in power that if the government wants our clients, they will have to get through you and they shall not pass. Even as young lawyers, you can and must take on the challenge of helping our nation grapple with economic and social pressures that threaten to disable who we are as a country and who we need to be if we are committed to social justice and individual rights.

On this fiftieth anniversary, I would like to be optimistic. So, let's commit to operating in partnership to reclaim and reinvigorate the right articulated in *Gideon*. Let's commit to working collaboratively to construct a more inclusive vision of justice for all. Let's commit to working together to give voice to underrepresented groups and historically excluded communities in our justice system and in justice policymaking. In so doing, we will advance the promise of *Gideon*. Then, we will have succeeded in

making this not a mid-life crisis, but a golden anniversary that should be trumpeted and celebrated.