REFLECTIONS ON THE RIGHT TO COUNSEL AFTER MORE THAN FIFTY YEARS

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INTRODUCTION

The title of this article is likely understood as a reference to the U.S. Supreme Court's decision in *Gideon v. Wainwright*,[1] decided more than fifty years ago, in 1963. While "Fifty Years" does refer in part to *Gideon*, my title has a double meaning. Six months after *Gideon* was decided, I accepted my first criminal court appointments to represent defendants unable to afford counsel.[2] Since 1963, I have worked in various capacities studying criminal and juvenile public defense systems. These efforts have included drafting American Bar Association standards for providing defense services and preparing national reports and other publications dealing with the defense of accused persons unable to hire a lawyer.[3]

One of my favorite John Lennon songs is "Imagine," which includes the well-known lyric, "you may say I'm a dreamer." Well, I have dreamed a lot about what state court public defense systems in the United States would look like if we could start over based on what we know now about providing

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1. 372 U.S. 335 (1963).

2. At the time, I was two years out of law school and a member of the E. Barrett Prettyman Program in Trial Advocacy at the Georgetown University Law Center. A major component of the program was providing defense services in the District of Columbia for persons in criminal and juvenile cases financially unable to afford a lawyer.

3. *See, e.g.*, NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011) [hereinafter LEFSTEIN, SECURING REASONABLE CASELOADS]; NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009) [hereinafter JUSTICE DENIED] (I served as co-reporter and principal author); ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009) (I served as reporter); ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (2005) [hereinafter ABA GIDEON'S BROKEN PROMISE] (I served as co-author); *The Defense Function*, in THE ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) (I served as reporter); *Providing Defense Services*, in THE ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980) (I served as reporter).

adequate defense services for the millions of persons who cannot afford their own lawyer. If this were possible, I am confident public defense would not look like it does today in most of the country. So, in this brief essay, I discuss my dreams as I imagine public defense programs as I wish they were, not as most actually are.

I. ORGANIZATION OF STATE PUBLIC DEFENSE PROGRAMS

First and foremost, public defense services would be organized on a statewide basis and the program overseen by an independent, non-partisan commission that would adopt appropriate enforceable standards. At a minimum, the commission's standards would deal with attorney performance, qualifications to provide representation, supervision of public defenders and private lawyers, and would address the workloads and supervision of all lawyers providing defense services.[4] In addition, the funding for public defenders and private lawyers would be adequate,[5] and sufficient support staffs of "experts, investigators, social workers, paralegals, secretaries, technology, research capabilities, and training" provided.[6] Funding for the defense program would be substantially from the state's general revenues[7] rather than derived from fees paid by poor persons[8]

More than fifty years since the Gideon decision, still less than half the

with implementing a federal constitutional guarantee without any meaningful federal assistance. In fact, the ABA concluded that its proposal was so sensible that for a second time, in 2013, the organization again approved a resolution urging federal funding for defense services in state courts.[15]

Ironically, although there is not a broad based civil right to counsel guarantee, many years ago the federal government established the Legal Services Corporation (LSC), which in FY 2016 had a budget of $385 million.[16] While I applaud the establishment of the LSC, I simply observe that nothing of this sort has ever been enacted by the federal government to assist states in implementing the Sixth Amendment's constitutional right to counsel in criminal and juvenile cases.

III. SUBSTANTIAL PRIVATE BAR INVOLVEMENT IN PUBLIC DEFENSE

Another of my dreams is substantial private bar representation in public defense in all states. This is not because I oppose having full-time public defenders. To the contrary, I am a former public defender and believe strongly in having well-funded, full-time, trained public defenders throughout the country. Moreover, I believe that the vast majority of public defenders are knowledgeable, dedicated, and make important contributions in defending their clients despite usually having far too many cases and inadequate support

Center for Defense Services for the purpose of assisting and strengthening state and local governments in carrying out their constitutional obligations to provide effective assistance of counsel for the defense of poor persons in state and local criminal proceedings."). For further discussion of this proposal, see Norman Lefstein & Sheldon Portman, Implementing the Right to Counsel in State Criminal Cases, 66 A.B.A. 1084, 1084 (1980). A similar proposal was recommended by the National Right to Counsel Committee. See JUSTICE DENIED, supra note 3, at 200: "Recommendation 12—The federal government should establish an independent,

qualifications.[24] The principle that lawyers who represent death penalty cases should be certified to defend capital cases is well accepted.[25] This approach should be extended to private lawyers and public defenders when representing persons in all types of cases, especially serious felonies.[26]

IV. PUBLIC DEFENDER REFERRALS TO QUALIFIED PRIVATE LAWYERS

Undoubtedly, one of the most vexing problems in public defense is the incredibly large numbers of persons that public defenders represent.[27] Although ethical rules require that lawyers resist work that they can neither competently nor diligently handle,[28] defenders nevertheless frequently do so as requested by their defense programs, which then becomes the prevailing culture of the organization.[29] This pattern has been repeated throughout much

24. For example, the Massachusetts Committee on Public Counsel Services oversees the private lawyers who provide defense services and screens the lawyers to determin3.7( )0.6(l)-195ensh -(m)10.4(i)-10.7(t)-10.7(

of the country in state criminal and juvenile courts, since those in charge of

outcry from British solicitors, so much so that the government abandoned its plan to abolish client selection of counsel.[40]

Solicitors in both England and Scotland believe strongly that client choice fosters much stronger attorney/client relationships. Moreover, my interviews

relatively small, with a population of approximately 120,000, situated between Austin and San Antonio. Defense services for those unable to afford counsel are provided by private lawyers serving as assigned counsel upon approval of the judiciary.[43]

I have been personally involved with the program since its beginning, primarily developing procedures for its implementation in Comal County while working in close cooperation with TIDC staff and others. In addition, just as this article is being completed, in December 2016, I have had involvement in the program's assessment and evaluation, which was publically released by the Justice Management Institute (JMI) of Arlington, Virginia, a few days before this article was finalized.[44]

The TIDC experiment with client choice, implemented in close cooperation and with the support of Comal County's judiciary, operated for twelve months, from February 2015 through the end of January 2016. However, Comal County's six misdemeanor and felony court judges have been so pleased with the perceived benefits of client choice that the program continues to function in Comal County even though the demonstration period for the project has ended. That it has continued to operate beyond its scheduled twelve-month period due to the decision of the countyeasedeS.2(i)5(t)5.3(r)3.5F[es is an important project finding in itself.

aims to enhance the independence of indigent defense, foster more effective attorney-client relationships, and create new and stronger incentives for attorneys to provide good quality representation. Not all defendants wish to exercise the choice option, ede12.4(o)0.5(t)-10.7(he)0.5(c)-13.7(ount)-24.8(y)]TJ 0

impact assessment report . . . . The program has generated significant interest in the press. On December 28, 2014, the Associated Press published the news story Indigent Defense Idea to Get First Test in U.S., which was picked up by dozens of media 6 t5y0.25.co3027 6 t(ens)-12l7(r)-12.1(ot)-1 bFir5ye (gener)(ck)-1(ck)-1-10.6(5y0v)7903 2.1(dea)d4(ed28.2-

doing the best they can for their clients, state and/or local governments provide insufficient financial help. Consequently, public defense in the United States is far too often assembly line justice involving a "meet 'em and plead 'em" kind of law practice, especially in misdemeanor and low level offense cases.[54] And that should embarrass America's state court judiciaries and the legal profession, because it is so far beneath what rules of professional conduct and constitutional principles require for defense representation.[55]

In Gideon, Justice Black stressed the goal that every person, rich and poor alike, should stand "equal before the law."[56] But in the most recent, extensive nationwide report on the right to counsel published in 2009, the National Right to Counsel Committee, a bi-partisan group of experts assembled by the Constitution Project, painted a very different picture from the one envisioned by Justice Black:

> [T]oday, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the Gideondecision and the Supreme Court's soaring rhetoric. Throughout the United States, indigent defense systems are struggling. Due to funding shortfalls, excessive caseloads, and a host of other problems, many are truly failing. Not only does this failure deny justice to the poor, it adds costs to the entire justice system. State and local governments are faced with increased jail expenses, retrials of cases, lawsuits, and a lack of public confidence in our justice systems.[57]

Since state and local governments have now had more than fifty years to "fix" public defense in this country, is it realistic to think that significant additional improvements in state court public defense systems can be achieved simply by persons of good will engaged in persuasive lobbying efforts?

54. See generallyROBERT C.

Admittedly, there have been many improvements in public defense since the Supreme Court's right to counsel decisions, but there is little basis to believe that genuinely excellent, let alone even adequate public defense systems, will emerge in most states anytime soon absent something else. And that "something else," I submit, is the intervention of appellate courts willing to recognize that the current state of public defense in state courts is simply unacceptable. In this respect, however, perhaps the recent past is prologue.

During the past several years, several state supreme courts have rendered positive decisions when confronted with systemic challenges to public defense systems. The arguments set forth in these challenges and those that may be presented in the future are beyond the scope of this article.[58] Clearly, however, state supreme courts have begun to recognize that defense lawyers representing persons unable to afford counsel must meet certain standards and that the status quo can be successfully challenged if this is not being achieved. The most prominent of these decisions are from state supreme courts in Florida,[59] Michigan,[60] Missouri,[61] New York,[62] and Pennsylvania.[63]

There has never been a United States Supreme Court decision at all similar to those in the state supreme courts mentioned. The Supreme Court has never addressed whether systemic deficiencies in public defense systems may be

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challenged prior to a criminal conviction. If a favorable ruling of this sort were rendered by the Supreme Court, regardless of the precise theory on which it was based, the decision could have profound implications for providing defense services because it would make clear that state courts may insist that state governments provide the essential resources required for genuinely effective, adversarial public defense programs. This, in turn, could do much to enhance the cause of justice in this country during the next fifty years of the post-Gideon era.