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Cover Page Footnote

Visiting Professor and Interim Director of Clinical Education, Stanford Law School; Professor of Law, Northwestern University School of Law; Legal Director, Northwestern University Center on Wrongful Convictions. Many thanks to Gabriel Soledad (Stanford Law School '05) for his help in the preparation of this Essay.

GIDEON'S PARADOX

*Lawrence C. Marshall**

America's most dominant images of justice and law focus on equality. The United States Supreme Court beckons all to come forth and partake of "equal justice under law."¹ Lady justice is made to wear a blindfold, so she is not influenced by whether prince or pauper stands before her.² Although other professions, such as education and medicine, also value the principle, no other field is as dominated by the image of equality.

The reason for this focus on equality lies in the essence of what justice and the rule of law mean. Before there was the rule of law, there was the rule of power. The strongest man ruled the tribe. The man with the biggest club was always right. Justice mattered not. The aspiration of any modern legal system is to move away from this rule of power and to resolve disputes in accordance with principles of justice and morality. This goal can only be achieved by a system that is committed fundamentally to equality before the bench. If legal disputes are still being resolved in accordance with who is more powerful—who can buy the better lawyer, who can yield the most influence—then we have not really moved beyond the rule of power after all. Law without equality is lawlessness.

It follows, then, that when we talk about equality within the framework of justice we are not simply talking about how to distribute the commodity of justice and distribute it more broadly. Unlike medicine, where there can be great advances, even if we fail to make those breakthroughs widely available, there can be no justice when the wealthy enjoy advantages in the courts that are wildly disparate from the tools available to the poor. Without some degree of equality, there simply is no justice. There is only the rule of power—the antithesis of the rule of law.

With the publication of *Access to Justice*, Deborah Rhode has documented the extent to which the goal of equality—and hence the

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1. Robert Shnayerson, *The Illustrated History of the Supreme Court of the United States* 6 (1986).

2. See generally Judith N. Shklar, *The Faces of Injustice* (1990).

promise of justice—remains unfulfilled in the United States.³ Beyond cursing that darkness, Rhode lights a candelabra by focusing on ways in which we can enhance access to justice in a broad array of settings. Rhode's book has the potential to open America's eyes to the desperate need for reform.

I. THE MAGNITUDE OF THE PROBLEM

The need for rousing the public and policy makers is particularly acute in the arena of indigent criminal defense. In theory, the promise of meaningful indigent defense is already in place. Forty years ago the Supreme Court's landmark decision in *Gideon v. Wainwright* recognized that the right to counsel is the great equalizer in the courtroom.⁴ There can be no fair trial, the court declared, when a criminal defendant is denied counsel.⁵ As Justice Black explained, "[t]hat government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries."⁶ Yet, two score after that broad declaration, the evidence is clear—as Rhode demonstrates—that many indigent defendants are still forced to defend themselves without access to any meaningful assistance of counsel.⁷

This problem is far from universal. In some jurisdictions, bar leaders, legislators, and judges have made extraordinary commitments to creating high-quality indigent defense systems. There are some public defender offices in this country providing defense services that rival the best available in the private market.⁸ The same is true for many lawyers who take on court appointments. In both settings there are many experienced and dedicated lawyers who are committed public servants. So long as they continue to receive appropriate levels of funding, and are provided sufficient independence, they will continue to ethically represent their clients in precisely the manner that *Gideon* envisioned.

In far too many jurisdictions, however, the quality of lawyering that a poor defendant gets is disgraceful, as Rhode documents.⁹ These instances are far more widespread than any of us want to believe. Yet, they generally are not apt to attract attention. A man who is

3. Deborah L. Rhode, *Access to Justice* (2004).

4. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

5. *Id.* at 343-44.

6. *Id.* at 344.

7. See Rhode, *supra* note 3, at 123-30.

8. See generally Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 *Law & Contemp. Probs.* 81 (1995); Inga L. Parsons, "Making it a Federal Case": *A Model for Indigent Representation*, 1997 *Ann. Surv. Am. L.* 837, 839 n.7 (1999).

9. See Rhode, *supra* note 3, at 123-30.

released after spending months in jail without access to a lawyer will be taking no appeal; he is pleased that charges against him are eventually dropped—even if his time spent in detention exceeds the sentence that would have been imposed had he been convicted. The defendant who waives counsel and pleads guilty after her hurried conversation with the prosecutor will also be unlikely to appeal—she believes that her plea was a bargain (they call them “plea bargains,” don’t they?), and knows that she was not giving up much by waiving her right to counsel, given the kind of counsel she would have been afforded had she demanded one. Even in its most basic form—the naked right to counsel—there are locations in which *Gideon* is not being satisfied and very few in power are noticing.

The far more pervasive problem that affects the implementation of *Gideon*, however, relates not to whether some “lawyer” will be available, but to whether that lawyer will have the competency, independence, and resources to provide a meaningful defense. The right to counsel is not simply the right to some living, breathing being who happens to have secured and retained a law license. Rather, the right to appointed counsel is an entitlement to a reasonably competent, reasonably independent counsel with reasonably adequate resources. As the Court explained in *Strickland v. Washington*:

That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.¹⁰

This is not to say that indigent defendants are entitled to the same defense that the multi-millionaire could secure. There are baseline levels of competence, independence, and resources that are critical, however. When we fall below these baselines, the right to counsel is not being respected.

As Rhode explains, our legal system often reneges on its promise to provide such counsel.¹¹ We have counties in which the contract to represent the county’s indigent defendants is offered to the lowest bidder, without regard to experience, qualification, or the ability to spend a reasonable amount of time on given cases.¹² Obviously, the lowest bidder may well be the attorney who is most willing to shirk responsibilities to the clients by spending insufficient time

10. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

11. See Rhode, *supra* note 3, at 123-30.

12. See *id.* at 126; see also Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 *Law & Contemp. Probs.* 31 (1995); *Low-Bid Criminal Defense Contracting: Justice in Retreat*, *Champion*, Nov. 1997, at 22.

investigating cases, meeting with clients, and undertaking the other tasks essential to mounting a competent defense.

In other situations, local judges appoint counsel in individual cases.¹³ In far too many cases, these appointments are a form of patronage, having everything to do with connections, and nothing to do with qualifications. Indeed, there are many instances in which it appears obvious that judges are choosing lawyers whom the judges trust will not put up much of a fight and will keep the assembly line moving.¹⁴

Even in states or counties with public defender systems which are generally considered the best way to provide indigent defense services,¹⁵ there are many instances in which those offices are so underfunded and understaffed that it is simply impossible for the lawyers—no matter how well intentioned—to provide adequate representation to all of the indigent defendants whom they are appointed to defend.¹⁶ Through no fault of the lawyers, a system that forces them to represent so many clients in so little time generates assembly-line justice of the crudest form. Surely *Gideon* never envisioned lawyers and clients meeting just minutes before guilty pleas are entered or cases proceed to trial. The right to counsel cannot be satisfied where the entirety of the lawyer-client relationship is a hushed and hurried conversation in the bullpen behind the courtroom, in the hallway, or in the courtroom itself.

As the Supreme Court recognized in *Powell v. Alabama*, the “Scottsboro Boys” case, “perhaps the most critical period of the proceedings” is the period during which counsel has the opportunity for pre-trial consultation, preparation, and investigation.¹⁷ Yet, like the Scottsboro defendants, so many defendants today do not “have the aid of counsel in any real sense,” during the pre-trial phase, “although they were as much entitled to such aid during that period as at the trial itself.”¹⁸

Indeed, the problem of inadequate counsel and inadequate resources exists even in the one area in which most would tend to assume that the right to competent counsel is being the most respected: capital cases. Before dismissing the stories of the sleeping

13. See Rhode, *supra* note 3, at 127-28; see also Spangenberg & Beeman, *supra* note 12.

14. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1855-57 (1994).

15. See S. Ctr. for Human Rights, “If You Cannot Afford a Lawyer . . .”: A Report on Georgia’s Failed Indigent Defense System 16 (Jan. 2003) (noting that “[i]f funded adequately, a public defender is the most efficient and cost-effective system to provide competent counsel to poor defendants”), available at <http://www.schr.org/reports/docs/jan.%202003.%20report.pdf>.

16. See Rhode, *supra* note 3, at 128-29.

17. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

18. *Id.*

and drunk lawyers in capital cases as freak occurrences,¹⁹ consider that in Illinois, thirty-three defendants who were sentenced to death were represented at trial by an attorney who had once been, or was later, disbarred or suspended.²⁰ One of these lawyers had been the subject of seventy-eight disciplinary complaints.²¹ Another had been disbarred but was later reinstated despite serious issues regarding his emotional stability and drinking. He soon proceeded to represent four men who landed on death row. Shortly thereafter he was disbarred again.²² Among the other attorneys who have been appointed in Illinois to represent indigent defendants in capital cases are “a tax lawyer who had never before tried a case, an attorney just two years out of law school” who was juggling his capital case with one hundred other criminal cases, and “another attorney just ten days off a suspension for incompetence and dishonesty” exhibited in six separate cases.²³ One defendant, Jeffrey Rissley, was represented by an appointed lawyer who specialized in probate and real estate. When this lawyer was later asked if he had ever handled a criminal jury trial by himself, he responded, “Well, is paternity criminal?”²⁴ It is no wonder that Illinois Governor George Ryan declared that he had no confidence in the results of a system that allowed lawyers like these to handle capital cases.²⁵

II. THE ROADS NOT YET TAKEN

The American Bar Association's Standing Committee on Legal Aid and Indigent Defendants has issued a blueprint for confronting this crisis. The Committee's Ten Principles of a Public Defense Delivery

19. See Rhode, *supra* note 3, at 136-37 (discussing *Burdine v. Johnson*, 362 F.3d 386 (5th Cir. 2001) (en banc) and other cases); see also Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of Cronin's Call to Presume Prejudice from Representational Absence*, 76 Temp. L. Rev. 827 (2003).

20. Ken Armstrong & Steve Mills, *Death Row Justice Derailed: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harsheset Punishment into Its Least Credible*, Chi. Trib., Nov. 14, 1999, at 1.

21. Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdicts: With their Lives at Stake, Defendants in Illinois Capital Trials Need the Best Attorneys Available. But they Often Get Some of the Worst.*, Chi. Trib., Nov. 15, 1999, at 10.

22. *Id.*

23. *Id.*

24. This colloquy is cited in the dissenting opinion of Chief Justice Harrison in *People v. Rissley*, No. 82536, at *1 (Ill. Mar. 15, 2001) (dissent subsequently stricken) available at <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=il&vol=/sc/2001/82536&invol=>. The Illinois Supreme Court later vacated that opinion upon granting rehearing. See *People v. Rissley*, 795 N.E.2d 174 (Ill. 2003).

25. Governor George H. Ryan, Address at Northwestern University School of Law (Jan. 11, 2003), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/RyanSpeech.htm>; see also Comm'n on Capital Punishment, Report 105, at ch. 7 (Apr. 15, 2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/chapter_07.pdf.

stress the need for independence in the selection and funding of defense counsel and the need to control the workload of defense counsel to permit the rendering of quality representation.²⁶ Of special significance to capital cases and other complex matters, these principles establish that defense counsel's ability, training, and experience must match the complexity of the case.²⁷ The principles set forth general guidelines that speak directly to the value of equality that goes to the heart of *Gideon*: that there be parity between defense counsel and the prosecution with respect to resources, and that defense counsel be included as an equal partner in the justice system. The American Bar Association similarly has promulgated extensive guidelines for representation in capital cases.²⁸

Yet, despite these obvious solutions, the promise of *Gideon* remains unfulfilled in many jurisdictions. Stephen Bright, the visionary director of the Southern Center for Human Rights, put it so well when he wrote that “[n]o constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.”²⁹

This is *Gideon*'s paradox. On the one hand, of all the major criminal justice decisions of the Warren Court, *Gideon* is the one that no one seeks to overrule. The exclusionary rule³⁰ is the subject of constant attack,³¹ and *Miranda*³² remains unpopular in many circles.³³ By contrast, the validity of *Gideon*—at least as an abstract matter—is universally accepted.³⁴ Yet, as Rhode describes, despite the widespread acceptance of *Gideon*, there remains a systemic failure in many areas of the country to actually follow the essence of the ruling in *Gideon*.

The answer to this puzzle lies in a cruel combination of economics and politics. On the economic front, the right recognized in *Gideon* is a very expensive one to implement.³⁵ More than any other decision in

26. ABA, *The Ten Principles of a Public Defense Delivery System* (Feb. 5, 2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/resolution107.pdf>.

27. *Id.*

28. ABA, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003).

29. Stephen B. Bright, *Turning Celebrated Principles into Reality*, Champion, Jan./Feb. 2003, at 6.

30. *Mapp v. Ohio*, 367 U.S. 643 (1961).

31. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 785-800 (1994).

32. *Miranda v. Arizona*, 384 U.S. 436 (1966).

33. *See, e.g.*, Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 Nw. U. L. Rev. 1084 (1996); William J. Stuntz, *Miranda's Mistake*, 99 Mich. L. Rev. 975 (2001).

34. Indeed, the Supreme Court continues to expand the breadth of the right to counsel, if not the depth. *See, e.g.*, *Alabama v. Shelton*, 535 U.S. 654 (2002) (suspended sentences may not be imposed without counsel or waiver of counsel).

35. For example,

[in] 1983, on the 20th anniversary of *Gideon*, the U.S. Department of Justice,

the criminal justice arena, *Gideon* is an "enormous unfunded mandate imposed upon the states."³⁶ The costs of fairly compensating those who represent indigent defendants, hiring enough lawyers and support staff to guard against overload, and providing funds for investigators and experts are substantial ones. The courts have no budgets to directly provide these services, so it is up to the legislative branch to include these kinds of expenditures in their budgets. This is where politics come into play.

To quote the late Robert Kennedy, "[t]he poor man charged with crime has no lobby."³⁷ There is no natural, powerful constituency whose narrow self-interest is served by ensuring that the right to competent counsel with adequate resources is implemented. Thus, the need to fund indigent defense services is often relegated to a very low place on the legislative priority list.

Indeed, the situation is often worse than the simple lack of a lobby for indigent defense services. Some policy makers are actively resistant to the idea of adequately funding indigent criminal defense. After all, some argue, these defense lawyers are simply trying to frustrate the efforts of the elected prosecutors to prosecute criminals. If we trust our prosecutors to charge the guilty people, the thinking goes, why should we spend money providing better funding to lawyers who will not only cost money on their own but also will jack up the cost of the prosecution? This thinking can be summed up in the words of a Georgia prosecutor who opposed an indigent defense-funding measure on the ground that "it was the greatest threat to the proper enforcement of the criminal laws of this state ever presented."³⁸

The challenge is to forge a strategy for breaking through this cycle of apathy and antagonism that leads to such widespread failure to make good on *Gideon's* promise. But how can this be done? How can legislators be persuaded, in an era of fiscal austerity, in which

Bureau of Justice Statistics reported that state and local government had spent approximately \$625 million or a per capita cost of \$2.76 on indigent defense representation in the state courts of this country. In 2003, we do not have a statistically valid expenditure figure for the 50 states, however, my best estimate, based upon reliable data from two-thirds of the states, is that the figure will exceed \$3 billion dollars and the estimated per capita cost will exceed \$10.

Robert L. Spangenberg, *In Appreciation of the ABA's Gideon Efforts*. Champion, Jan./Feb. 2003, at 35; see also Spangenberg & Beeman, *supra* note 12, at 31-32; The Spangenberg Group, *State and County Expenditures for Indigent Defense Services in Fiscal Year 2002*, at 1 (Sept. 2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexp end2003.pdf>.

36. Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 *Hastings L.J.* 835, 843 (2004) (internal citations omitted).

37. Anthony Lewis, *Gideon's Trumpet* 211 (1966).

38. Bright, *supra* note 29, at 7.

even politically popular programs are being slashed, that resources for indigent defense should be enhanced?

Perhaps they cannot be so persuaded. Perhaps we are dealing with a classic example of a right enjoyed by a “discrete and insular minorit[y],” which the political process itself cannot be entrusted to protect.³⁹ Despite our rhetorical commitment to the presumption of innocence, the class of whom we are speaking here—indigent people charged with criminal offenses—is as powerless a class as one could imagine.

If this is true—and to some extent, it surely is—the courts must adopt a more aggressive role in implementing *Gideon*. To leave the implementation of *Gideon* in the hands of the political branches is, in some sense, to deconstitutionalize *Gideon*.

The courts have a variety of tools at their disposal to ensure adherence to *Gideon*. The Supreme Court should reduce the burdens it erected in *Strickland v. Washington* for defendants asserting that they received ineffective assistance of counsel at trial. For example, once a defendant satisfies his burden of proving that his lawyer provided incompetent representation at trial, the burden could shift to the prosecution to prove that the lack of competent counsel was harmless in the context of the case.⁴⁰

Moreover, the Court should recognize that the only way to guarantee a right to effective assistance of counsel at trial is to guarantee counsel for post-conviction challenges to the adequacy of the counsel who represented the defendant at trial.⁴¹ Otherwise, even the shallow right now recognized in *Strickland* becomes a right without a remedy for many of those who could clearly secure relief if they only had post-conviction counsel to make their case.⁴² Either of these approaches, if applied with rigor, would generate systemic reform by forcing counties or states to fund indigent defense at levels that enable counsel to satisfy the courts’ scrutiny.⁴³

On a more general level, courts have an opportunity to address the systemic failing of some indigent defense delivery systems through civil suits that are increasingly being filed challenging these practices

39. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

40. At present, the burden is on the defendant to show “that the decision reached would reasonably likely have been different absent the errors.” *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

41. The current Supreme Court position is that there is no federal constitutional right to counsel in post-conviction proceedings. See *Murray v. Giarratano*, 492 U.S. 1 (1989).

42. See Clive A. Stafford Smith & Rémy Voisin Starns, *Folly by Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 *Loy. L. Rev.* 55, 56 (1999).

43. See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale L.J.* 1, 70 (1997).

on a county-wide or state-wide basis.⁴⁴ For example, the New York County Lawyers' Association brought suit against the State of New York and the City of New York in 2001 claiming that the caps on compensation for appointed lawyers were unconstitutional.⁴⁵ Those caps were set at twenty-five dollars per hour for out-of-court time and forty dollars per hour for time spent in court.⁴⁶ After a state trial court judge invalidated the rates as unconstitutional,⁴⁷ the State settled the case by agreeing to pay seventy-five dollars per hour for all work on felony cases and sixty dollars per hour for representation on misdemeanors.⁴⁸ Gone was the differential between in-court and out-of-court work, a differential that generates natural incentives to shirk pre-trial investigation and consultation to the great detriment of the client.⁴⁹ Similar litigation has succeeded in a number of other jurisdictions.⁵⁰

Describing some of the ways in which courts could put bite into *Gideon* begs the question, though, of how the courts can be persuaded to expend their limited judicial capital on this endeavor. Appeals to constitutional theory alone are unlikely to suffice. Mapping the doctrinal framework provides a way, but for the courts to choose that way, they must first have the will. Thus, whether the focus is on legislators or judges, the question remains the same: How can those in power be persuaded to use that power to confront the continuing crisis in indigent representation?

III. STIMULATING ACTION

There is no one answer to this quandary, but it is clear that the campaign to enhance public support for indigent defense services

44. See Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. Pitt. L. Rev. 293 (2002); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev. 2062 (2000).

45. N.Y. County Lawyers' Ass'n v. State of N.Y., 763 N.Y.S.2d 397 (Sup. Ct. 2003).

46. *Id.* at 400.

47. *Id.* at 397.

48. See Susan Saulny, *Lawyers' Fees to Defend Poor Will Increase: Settlement in Lawsuit over Rates Paid by City*, N.Y. Times, Nov. 13, 2003, at B1.

49. After hearing extensive testimony on the point, Justice Lucindo Suarez found that "[a]ssigned counsel maximize their in-court time at the higher rate in order to financially survive. . . . The lower rate operates as a disincentive to perform necessary out-of-court work." N.Y. County Lawyers' Ass'n, 763 N.Y.S.2d at 409 (internal citations omitted).

50. See, e.g., *State v. Smith*, 681 P.2d 1374 (Ariz. 1984) (invalidating bid system for indigent defense counsel as inadequate assistance); *State v. Peart*, 621 So. 2d 780 (La. 1993) (holding that the provision of indigent services was so inadequate that the court would apply a rebuttable presumption that all defendants were not receiving effective assistance of counsel); Bill Rankin, *Coweta Settles Suit on Indigent Defense*, Atlanta J.-Const., Mar. 9, 2003, at C2 (describing Georgia case brought by the Southern Center for Human Rights).

must be framed in a manner that resonates with groups broader than the traditional progressive communities that have long championed the rights of criminal defendants. In *Gideon*, the Court advanced two types of justifications for affording adequate counsel. First, from a Kantian values-based perspective, the Court stressed the critical role of the lawyer in ensuring a fair trial and equality.⁵¹ Second, from an instrumentalist perspective, the Court observed that without the right to counsel, a defendant “though he be not guilty, . . . faces the danger of conviction because he does not know how to establish his innocence.”⁵²

These two arguments carry very different potentials to expand the pool of those willing to invest in building an adequate indigent defense system. When the value of indigent defense is cast in terms of due process, equality, or intrinsic human rights, the audience willing to divert precious resources to the endeavor will remain, unfortunately, a narrow one. There is strong reason to believe, though, that a focus on the more utilitarian values of providing adequate resources for indigent defense services will significantly enhance public concern and concomitant willingness to expend resources on defending the poor.

In this sense, the campaign to reform indigent defense has many similarities to the campaign to reform (or abolish) capital punishment. In the death penalty arena, the recent focus on wrongful convictions has yielded real fruits in reopening the debate over capital punishment.

When the debate over capital punishment focused on the propriety of executing a defendant who committed various heinous acts, the majority of Americans were unmoved by evidence of arbitrariness and racism, much less by general philosophical or religious claims about the morality of capital punishment. When the debate shifted to the plight of innocent men and women who were sentenced to death, however, the audience that was receptive grew dramatically.⁵³

During the late 1990s, a series of exonerations throughout the country, particularly in capital cases, spawned national attention to flaws in the capital punishment system.⁵⁴ The shift in momentum

51. *Gideon v. Wainright*, 372 U.S. 335, 344-45 (1963).

52. *Id.* at 345 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

53. See Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 Ohio St. J. Crim. L. 573, 576 (2004).

54. See Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* 67-69 (2000); Death Penalty Info. Ctr., *Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Oct. 25, 2004); Northwestern Univ. Ctr. on Wrongful Convictions, *The Exonerated: Exonerations in All States*, at <http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/States.htm> (last visited Oct. 29, 2004).

prompted by this new focus on innocence is unmistakable.⁵⁵ In a number of states, serious movements toward moratoria on executions have begun.⁵⁶ In Illinois, a Republican Governor commuted all 167 death sentences in the state.⁵⁷ Throughout the country, juries have been imposing the death penalty less frequently.⁵⁸ Although it is hardly the case that the majority of Americans have become abolitionists, no one can dispute that there is a new focus on problems with capital punishment, and the focus on innocence has spawned a more generalized concern with the fairness of the ways in which the death penalty is applied.

There is reason for optimism that this same shift in focus can yield significant benefits in broadening the class of those who are committed to the provision of high-quality indigent defense.⁵⁹ In the current social and political climate, a campaign for resources on behalf of unsympathetic defendants who have received harsh sentences because of the lack of adequate counsel is unlikely to garner much support. By contrast, a campaign that emphasizes the extent to which the lack of resources for indigent defense has resulted in the conviction of innocent defendants has far more potential for success.⁶⁰ This is not only because the average person on the street is likely to have a strong visceral reaction to the conviction of the innocent; it is also because the conviction of the innocent poses a direct threat to law and order. When the innocent have been put in prison for crimes they did not commit, the guilty remain at large—free to commit further acts of violence—despite the crimes they did commit.

Framed this way, the call for more resources for indigent defense becomes a call for accuracy—a call for tough enforcement of the criminal law against the truly guilty. Both the courts and legislators now can, through the prism of wrongful convictions, be made to see that the levels of funding committed to indigent defense—levels that they once considered adequate to minimize the possibilities of error—have proven inadequate to the task.

55. See Death Penalty Info. Ctr., *Innocence and the Crisis in the American Death Penalty* (2004), available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=1150>.

56. See ABA Death Penalty Moratorium Implementation Project, *Building Momentum: The American Bar Association Call for a Moratorium on Executions Takes Hold* (Aug. 2003), available at <http://www.abanet.org/moratorium/4thReport/4thAnnualReport.doc>.

57. See Maurice Possley & Steve Mills, *Clemency for All: Ryan Commutes 164 Death Sentences to Life in Prison Without Parole*, Chi. Trib., Jan. 12, 2003, at 1; see also Ryan, *supra* note 25.

58. See Adam Liptak, *Fewer Death Sentences Being Imposed in U.S.*, N.Y. Times, Sept. 15, 2004, at A16.

59. See Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel*, Crim. Just., Fall 2003, at 37.

60. *Id.*

In 1999, Judge Richard Posner observed that although lawyers who represent indigent defendants often provide poor representation, they “seem to be good enough to reduce the probability of convicting an innocent person to a very low level.”⁶¹ It would be reckless to make such a claim today, given what we now know about rates of wrongful convictions—only a small percentage of which are actually uncovered.⁶²

This relationship between adequacy of counsel and accuracy of conviction has not been lost on policy makers. In Illinois, the epicenter of the debate due to a staggering seventeen death row exonerations, the Illinois Supreme Court reacted with a set of new standards for counsel in capital cases.⁶³ The new rules create a specialized capital bar and require, with some exceptions, that only certified members of the capital bar may act as defense lawyers or prosecutors in capital cases.⁶⁴ Certification requires specified levels of criminal trial experience and specialized training.⁶⁵ Although there is cause for concern about the level of scrutiny with which admission to the capital bar has been regulated,⁶⁶ the promulgation of these standards is a testament to the power of the innocence issue to trigger action with respect to adequacy of representation.

It is no accident, then, that Congress’s measure to improve the quality of defense counsel for the indigent is called the “Innocence Protection Act.”⁶⁷ One section of that Act establishes thirty million dollars per year in grants to states to promote quality representation in capital cases and requires states accepting such grants to adopt minimum standards for counsel in such cases.⁶⁸ The Act is hardly a panacea: Among its other shortcomings, it does nothing for those facing lengthy prison sentences without effective counsel. But it is an important step in the right direction and drives home the power of the innocence issue to stimulate funding for indigent defense.

Given the obvious concern with the expenses of providing indigent defense, it is imperative to make sure that policy makers appropriately

61. Richard A. Posner, *The Problematics of Moral and Legal Theory* 164 (1999).

62. See Lawrence C. Marshall, *Do Exonerations Prove that “The System Works?”*, 86 *Judicature* 83 (2003) (discussing the fortuities through which wrongful convictions are uncovered and the reasons to believe that only a small fraction are ever uncovered).

63. Ill. Sup. Ct. R. 714.

64. *Id.*

65. *Id.* § 714(b).

66. See Ken Armstrong & Steve Mills, *Inept Lawyers Still on List for Capital Cases: Reforms Fail to Weed out Problems*, Chi. Trib., Mar. 10, 2002, §4, at 1; Steve Mills & Ken Armstrong, *Death-Penalty Lawyers Panel Too Lax Former Member Says*, Chi. Trib., Mar. 12, 2002 at 4.

67. The Innocence Protection Act of 2004 is Title IV of the Justice for All Act of 2004. Justice for All Act of 2004, Pub. L. No. 108-405, §§ 401-432 (to be codified in scattered sections of the U.S.C.). It received overwhelming bipartisan support.

68. *Id.* § 413.

consider the enormous costs of failing to provide adequate defense services. The human costs are powerful in this regard, but it is also useful to focus on the ways in which investments in adequate defense can be recouped in dollar savings occasioned by avoiding wrongful convictions. In the “Ford Heights Four” case, four men (Kenneth Adams, Verneal Jimerson, Willie Rainge, and Dennis Williams) and one woman (Paula Adams) were convicted of a 1978 Cook County rape and double murder.⁶⁹ Williams and Jimerson had been sentenced to death; the others were sentenced to life or lengthy terms of years. By the time evidence of their innocence emerged in 1996—through DNA tests and confessions from the true killers—three of the men (Adam, Rainge, and Williams) had spent eighteen years in prison, Jimerson had spent eleven years behind bars, and Gray had been imprisoned for nine years.⁷⁰ Ultimately, Cook County paid the men thirty-six million dollars to settle their civil rights actions.⁷¹ Gray’s civil rights suit remains pending.⁷² Beyond these payouts, Cook County spent well over two million dollars in defending the civil rights lawsuits.⁷³ In addition, the State of Illinois has paid the five defendants approximately \$600,000⁷⁴ under its compensation statute for the wrongly convicted.⁷⁵ In addition to these costs, the State also incurred the needless expense of imprisoning these innocent defendants for seventy-six years collectively. At the current rate of approximately \$22,000 per year to incarcerate an inmate,⁷⁶ these seventy-six years cost Illinois taxpayers another \$1.7 million in wasted resources. Thus, without even trying to assess the costs of the multiple trials and appeals involving these innocent individuals, the tab for the errors in this one case come out to over forty million dollars in direct expenditures (with one major lawsuit still pending).

There is, of course, no way to guarantee that the wrongful convictions in the Ford Heights Four case could have been prevented had they been represented by more competent counsel. There is no doubt, though, that many wrongful convictions could be prevented by adequate counsel. Examining the costs of this one case—albeit one

69. See David Protes & Rob Warden, *A Promise of Justice* (1998).

70. *Id.*

71. See Robert Becker, *Ford Heights 4 to Get Their Settlement from County*, Chi. Trib., Mar. 16, 1999, §2, at 3. See generally Peter M. King & William H. Jones, *Crimes of the State: Obtaining Justice for the Wrongfully Imprisoned*, Litigation, Fall 2002, at 14.

72. Telephone Interview with Thomas Decker, Counsel for Paula Gray (Sept. 17, 2004).

73. Telephone Interview with Robert Warden, Executive Director, Center on Wrongful Convictions (Sept. 12, 2004).

74. *Id.*

75. See 705 Ill. Comp. Stat. Ann. 505/8(c) (West 2004).

76. See Ill. Dep’t of Corrections, *Financial Impact Statement* (2003), available at http://www.idoc.state.il.us/subsections/reports/financial_impact_statements/2003_Financial_Impact_Statement.pdf.

with an especially high price tag in government expenditures—demonstrates that at least some of the expenses of an adequate indigent defense system can be recouped through savings generated by avoiding errors. Imagine how much good could have been done had this forty million dollars been spent systemically, instead of repairing the damage caused by just one case.

Ultimately, a system that skimps on indigent defense resources does so at its peril. It is not the investment in indigent defense that is wasteful. Rather, the true waste of money and energy is to invest heavily in a criminal justice system—to spend so much on infrastructure, judges and prosecutors—but then skimp on the defense, the other element that is critical to making the criminal process a trustworthy means of ascertaining the truth. The competent defense lawyer is not the enemy of justice; she is an indispensable party to the process through which we secure justice.

To borrow from Justice Thurgood Marshall's hypothesis about the future of capital punishment, I am confident that the current state of affairs will not be able to survive once the public is made aware of the scope and nature of the problem.⁷⁷ The good people of America do not know about the horror stories that Deborah Rhode has described. They do not know that defendants are sitting in jails for thirteen months without ever meeting a lawyer, or that grossly incompetent lawyers whom none of us would trust with traffic offenses are being entrusted with the lives and liberty of indigent defendants. Once America is properly educated about these realities, the public will understand and support the need for reform, as is now beginning to occur in some jurisdictions.

CONCLUSION

It was almost a hundred years ago that President William Howard Taft told the Virginia Bar Association that “[w]e must make it so that a poor person will have as nearly as possible an equal opportunity in litigating as the rich person, and under present conditions, ashamed as we may be of it, that is not the fact.”⁷⁸ Sadly, it is still not the fact, despite the promise of *Gideon*. Deborah Rhode's important new book reminds us all that the rule of law depends on the availability of competent counsel with adequate resources. We have come too far to allow the rule of power to prevail.

77. The “Marshall hypothesis” predicts that if Americans could be educated about the realities of the ways in which capital punishment is administered, support for the death penalty would erode. See *Furman v. Georgia*, 408 U.S. 238, 351-62 (1972) (Marshall, J., concurring).

78. Bright, *supra* note 29, at 6 (internal punctuation omitted).