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New York Breaks Gideon's Promise

By Rebecca King

I. Introduction

In 1963, the Supreme Court of the United States held that criminal defendants have the constitutional right to counsel, regardless of whether they can afford one, in the famous case of *Gideon v. Wainwright*.¹ However, statistics, as well as public defense attorneys, reveal that the Supreme Court's decision has yet to be fulfilled. Part of the problem is due to the system of mass incarceration in the United States. In 2013, the Brennan Center for Justice reported that the prison population reached 2.3 million individuals, compared to the 217,000 inmates imprisoned when *Gideon* was decided.² The American Bar Association estimates that between 60 to 90 percent of criminal defendants cannot afford a lawyer, and must rely on public criminal defense services.³

Even though there has been an exceptional rate of criminalization and growth in the prison system population, funding for public defenders remains inadequate and meager compared to prosecution offices. In 2007, the U.S. Bureau of Justice Statistics (BJS), determined that state and local public defender offices' budgets were merely \$2.3 billion, compared to prosecutor offices' budgets that were approximately \$5.8 billion.⁴

1. *Gideon v. Wainwright*, 372 U.S. 335, 336 (1963).

2. THOMAS GIOVANNI & ROOPAL PATEL, *GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL*, BRENNAN CTR. FOR JUST. 3 (2013) (citing E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 and TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2011 (2012)).

3. MAREA BEEMAN, USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 2 (2012), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_sustaining_and_improving_public_defense.authcheckdam.pdf. See also ROBERT L. SPANGENBERG ET AL., CONTRACTING FOR INDIGENT DEFENSE SERVICES, U.S. DEP'T OF JUST. BUREAU OF JUST. ASSISTANCE 3 n.1 (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

4. GIOVANNI & PATEL, *supra* note 2 at 4 (citing STEVEN W. PERRY & DUREN BANKS, PROSECUTORS IN STATE COURTS, 2007 - STATISTICAL TABLES, U.S. DEP'T

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BJS further concluded that only 27 percent of county-based public defender offices have an adequate number of attorneys to effectively manage their caseloads.⁵

This has real consequences for defendants. “Numerous studies that stretch from the 1980s to recent years show that public defenders meet with clients less quickly, file fewer motions, plea-bargain more often, and get charges dismissed less often than private attorneys.”⁶ However, since politicians receive little incentive from voters to reform the public defense system and increase public defender offices’ funding, these deficits continue to persist in jurisdictions.⁷ The absence of a political upside for lawmakers to increase funding may be the reason why Governor Cuomo of New York vetoed Bill S.8114/A.10706, a criminal justice reform bill that would have required New York State, rather than the individual counties, to provide funding for public defender office.⁸

II. Background

A. Before Gideon

a. English Common Law

Until 1836, English common law held that although defendants in civil and misdemeanor criminal cases were entitled to counsel, those accused of treason or a felony were not.⁹ Proponents of the old rule argued that there was no need

OF JUST. BUREAU OF JUST. STAT., <https://www.bjs.gov/content/pub/pdf/pso07st.pdf>; LYNN LANGTON & DONALD J. FAROLE, JR., U.S. BUREAU OF JUSTICE STATISTICS, PUBLIC DEFENDER OFFICES, 2007- STATISTICAL TABLES, Table 1 (Jun. 27, 2010), <http://bjs.gov/content/pub/pdf/pdo07st.pdf>.

5. LANGTON & FAROLE, *supra* note 4.

6. Lorelei Laird, *Starved of Money for Too Long, Public Defender Offices are Suing—and Starting to Win*, ABA J. (Jan. 2017), http://www.abajournal.com/magazine/article/the_gideon_revolution.

7. *Id.*

8. Jimmy Vielkind, *Citing Cost, Cuomo Vetoes Indigent Legal Defense Bill*, POLITICO (Dec. 31, 2016, 11:21 PM), <http://www.politico.com/states/new-york/albany/story/2016/12/citing-cost-cuomo-vetoes-indigent-legal-defense-bill-108386>.

9. *Powell v. Alabama*, 287 U.S. 45, 60 (1932).

for counsel, because the judge would ensure fairness and justice was served.¹⁰ The belief was that “the judge was impartial and looked with equal suspicion on both sides in a criminal action”¹¹ However, many did not believe this was equitable, and sought change.

Many legal scholars vehemently believed this common law rule defied principles of justice. Opponents of the rule, including Blackstone in 1758, argued that it was illogical to deny those accused of a felony the assistance of counsel, but assure those accused of petty crimes the right to retain counsel.¹² The colonies opposed the rule as well.¹³ At least twelve of the thirteen colonies rejected the English common law rule and maintained that the right to counsel was generally recognized in all criminal cases.¹⁴

b. Initial Supreme Court Interpretations

In 1932, the Supreme Court considered its first major criminal defense representation case in *Powell v. Alabama*.¹⁵ In *Powell*, a group of black men were charged with raping two white women.¹⁶ At the arraignments, the judge “appointed all members of the bar” for the defendants, apparently assuming that the counsel who represented them during arraignment would continue to do so during their trial.¹⁷ Each defendant was arraigned and pled not guilty.¹⁸ However, on the morning of the trial, the judge realized that none of the defendants had a lawyer to represent them.¹⁹ The judge asked if anyone would volunteer to represent the defendants, and a real estate attorney from

10. *Id.* at 61.

11. WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 11 (1955).

12. *Powell*, 287 U.S. at 61.

13. *Powell*, 287 U.S. at 58.

14. *Id.* at 64-65 (noting that there were a few instances where the right to counsel was limited to capital punishment cases).

15. Bruce R. Jacob, *Memories of and Reflections about Gideon v. Wainwright*, 33 *STETSON L. REV.* 181, 188 (2003).

16. *Powell v. Alabama*, 287 U.S. 45, 49 (1932).

17. *Id.* at 49.

18. *Id.* at 49-50.

19. *Id.* at 57.

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Tennessee offered to do so.²⁰ A local attorney who had not tried a case in years offered to assist the Tennessee attorney.²¹ Neither of the attorneys had knowledge of the facts of the case, or even their clients.²² Yet, the defense attorneys did not move to postpone the trial.²³ The court then granted the prosecution's request to sever the defendants into three different groups.²⁴ Each of the three groups of defendants had a jury trial that lasted one day.²⁵ All of the defendants were found guilty of rape and sentenced to death.²⁶

The defendants appealed, arguing that their Fourteenth Amendment rights were violated, because "(1) They were not given a fair, impartial, and deliberate trial; (2) they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial; and (3) they were tried before juries from which qualified members of their own race were systematically excluded."²⁷ The Supreme Court of Alabama affirmed the convictions.²⁸

The Supreme Court of the United States then granted a writ of certiorari.²⁹ The Court decided that when a defendant in a capital case is not able to afford an attorney and is incapable of making his own defense, "it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law[.]"³⁰ The Court noted that the right to counsel is essential for even intelligent laymen.³¹ Justice Sutherland noted that a defendant needs "the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his

20. *Powell v. Alabama*, NAT'L LEGAL AID & DEF. ASS'N (2010), http://www.nlada.net/library/article/na_powellvalabama [hereinafter NLADA].

21. *Id.*

22. *Id.*

23. *Id.*

24. *Powell v. Alabama*, 287 U.S. 45, 49 (1932).

25. *Id.* at 50.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Powell v. Alabama*, 286 U.S. 540, 540 (1932).

30. *Powell*, 287 U.S. at 71.

31. *Id.* at 69.

innocence.”³² With this decision, the Court established a criminal defendant’s right to counsel in a capital case.

In *Johnson v. Zerbst*, the Supreme Court expanded the holding in *Powell*.³³ In *Johnson*, the petitioner and another criminal defendant were “charged with feloniously uttering and passing four counterfeit twenty-dollar Federal Reserve notes and possessing twenty-one such notes” in Charleston, South Carolina.³⁴ The defendants did not have an attorney to represent them and were unable obtain counsel.³⁵ Throughout the course of one day, January 23, 1935, the defendants were notified of their indictment, arraigned, tried, convicted, and sentenced.³⁶ During the arraignment, the defendants pled not guilty, and informed the Court that they did not have a lawyer, but that they were ready for trial.³⁷ The two defendants had minimal education, lived in “distant cities of other states[,]” and had no family, friends, or acquaintances in Charleston.³⁸ During the trial, the petitioner spoke with the District Attorney, not the Judge, and requested for the Judge to appoint counsel.³⁹ The District Attorney explained to the petitioner that South Carolina trial courts do not appoint counsel unless the trial is for a capital crime.⁴⁰

After the defendants were sentenced, the petitioner petitioned for a writ of habeas corpus.⁴¹ The United States District Court denied the petitioner habeas corpus, finding that even though the petitioner’s Sixth Amendment right to counsel was violated during his criminal trial, the petitioner was still not entitled to habeas corpus because the trial errors were insufficient to void the trial.⁴²

32. *Id.*

33. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

34. *Id.* at 459- 60.

35. *Id.* at 460.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Johnson*, 304 U.S. at 460-61.

40. *Id.* at 461.

41. *Bridwell v. Aderhold*, 13 F. Supp. 253, 253 (N.D. Ga. 1935), *aff’d sub nom.* *Johnson v. Zerbst*, 92 F.2d 748 (5th Cir. 1937), *rev’d*, 304 U.S. 458 (1938).

42. *Id.* at 256.

The petitioner appealed the District Court's denial of his writ of habeas corpus, and the Fifth Circuit affirmed the decision.⁴³ The petitioner then petitioned for a writ of certiorari and the Supreme Court granted the petition.⁴⁴ The Court held that the Sixth Amendment not only provided defendants in criminal cases with the right to counsel, but also required the federal courts to appoint counsel to indigent defendants in federal criminal court.⁴⁵ Since the Court recognized the right to counsel under the Sixth Amendment, the Court's holding did not apply to state courts.⁴⁶

However, in *Betts v. Brady* the Court considered whether state courts should be required to provide indigent defendants with counsel in non-capital cases.⁴⁷ The Court concluded that the Fourteenth Amendment did not incorporate the Sixth Amendment right to counsel, and the defendant's constitutional guarantee to counsel only applied in federal courts.⁴⁸ In reaching its holding, the Supreme Court noted that in the majority of states, citizens and their legislators have decided to forego requiring the courts to appoint counsel to defendants.⁴⁹ The Court held, "the appointment to counsel is not a fundamental right, essential to a fair trial[.]" but rather a matter of "legislative policy" for the states.⁵⁰ The Court felt that because the states apply a wide range of policies regarding public criminal defense, the states should make the ultimate decision.⁵¹

In the years between the Supreme Court's decision in *Betts v. Brady*, and the decision in *Gideon v. Wainwright*, the Supreme Court heard numerous cases where a defendant was convicted in a non-capital criminal state court without counsel.⁵² The Supreme Court recognized "*special circumstances*" in which the

43. *Johnson v. Zerbst*, 92 F.2d 748 (5th Cir. 1937), *rev'd*, 304 U.S. 458 (1938).

44. *Johnson v. Zerbst*, 303 U.S. 629 (1938).

45. *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

46. *Jacob*, *supra* note 15, at 191-92.

47. *Betts v. Brady*, 316 U.S. 455 (1942).

48. *Id.* at 461-62.

49. *Id.* at 471.

50. *Id.* at 471.

51. *Id.* at 471-72.

52. *Jacob*, *supra* note 15 at 194.

trial court was required to appoint counsel for a defendant.⁵³ The Supreme Court held that even “the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.”⁵⁴ Trial courts were required to consider the defendant’s “age, his educational background, his mental history, his prior experience in court, the complexity of the case, and the severity of the charges . . . before reaching a decision about the defendant’s request for a lawyer.”⁵⁵ However, the Supreme Court still did not hold that a criminal defendant in state court had a constitutional right to counsel.⁵⁶

III. Gideon

On June 3, 1961, the Bay Harbor Pool Room was broken into around 5:30 a.m.⁵⁷ The intruder entered the Pool Room after breaking a window, and stole beer, wine, and coins from the jukebox and cigarette machines.⁵⁸ Later that morning, Clarence Gideon was arrested and charged with breaking and entering with the intent to commit a misdemeanor.⁵⁹ Under Florida state law, the crime was considered a felony.⁶⁰

Clarence Gideon resided in a rooming house across the street from the Pool Room, and had spent the most of his adult life in prison or jail on various robbery and larceny convictions.⁶¹ Gideon could not afford a lawyer, was arraigned, and pled not guilty without assistance of counsel.⁶² When he requested an attorney from the Court, the trial judge stated that Florida law

53. *Id.* (emphasis added).

54. *Id.* at 194, n. 59 (quoting *Gideon*, 372 U.S. at 351).

55. Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After 'Gideon'*, ATLANTIC (Mar. 13, 2013), <http://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/>.

56. *Id.*

57. Jacob, *supra* note 15, at 200.

58. Bruce R. Jacob, *The Gideon Trials*, 99 IOWA L. REV. 2059, 2060- 61 (2014).

59. *Id.*

60. *Gideon v. Wainwright*, 372 U.S. 335, 336 (1963).

61. Jacob, *supra* note 15, at 185; Jacob, *supra* note 60, at 2061-63.

62. Jacob, *supra* note 60, at 2061.

did not require courts to assign a defendant an attorney, unless the defendant was charged with a capital offense.⁶³ Gideon, however, argued that the “United States Supreme Court sa[id he was] entitled to be represented by Counsel.”⁶⁴ The Court did not find Gideon’s argument to be convincing and refused to appoint him an attorney.⁶⁵ This forced Gideon to take matters into his own hands.

Gideon represented himself at trial.⁶⁶ The Supreme Court characterized his performance as “about as well as could be expected from a layman.”⁶⁷ Gideon was convicted by a jury and sentenced to five years of state imprisonment.⁶⁸ Gideon filed a petition for a writ of habeas corpus with the Florida Supreme Court, arguing his conviction violated his constitutional rights.⁶⁹ The Florida Supreme Court denied Gideon’s petition for habeas corpus.⁷⁰ However, this did not deter Gideon. He sent a handwritten letter to the Supreme Court, claiming that his conviction was unconstitutional.⁷¹ The Supreme Court granted Gideon certiorari.⁷²

On March 18, 1963, Gideon’s persistence and faith in the United States Constitution proved to be successful. The Supreme Court unanimously held that the Sixth Amendment right to counsel is a fundamental right incorporated by the Fourteenth Amendment in all criminal proceedings, including those in state court.⁷³ In reaching its holding, the Supreme Court expressly overturned *Betts v. Brady*, finding that the Supreme Court in *Betts* erred in holding that the Sixth Amendment right to counsel was not a fundamental right.⁷⁴ The

63. *Gideon*, 372 U.S. at 337.

64. *Id.*

65. *Id.*

66. *See generally Gideon*, 372 U.S. 335.

67. *Id.* at 337.

68. Jacob, *supra* note 58, at 2080.

69. *Gideon*, 372 U.S. at 337.

70. *Id.*

71. *Gideon v. Wainwright - Case Providing Defendants an Attorney - Turns 50*, CBS NEWS (Mar. 16, 2013, 1:32 PM), <http://www.cbsnews.com/news/gideon-v-wainwright-case-providing-defendants-an-attorney-turns-50/>.

72. *Gideon v. Cochran*, 370 U.S. 908 (1962).

73. *Gideon*, 372 U.S. at 340.

74. *Id.* at 342.

majority opinion, written by Justice Hugo Black, expressed the belief that there was extensive precedent to support the holding that the right to counsel is a fundamental right protected under the Fourteenth Amendment Due Process Clause.⁷⁵ Justice Black wrote, “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.”⁷⁶

IV. Downfall of Gideon

A. Inadequate Defense

Unfortunately, the Supreme Court’s promise in *Gideon* has not been properly upheld in America’s courtrooms. Today, “[i]ndigent defense continues to be the proverbial neglected child in the justice system.”⁷⁷ Even though the unanimous Supreme Court expressed the belief that justice required effective counsel for both sides of the case, the burden of implementing this constitutional guarantee was placed on the states’ shoulders.⁷⁸ Many courts today fail to appoint attorneys to indigent defendants, even though they are constitutionally required to do so.⁷⁹ On the fiftieth anniversary of *Gideon*’s landmark decision, the Assistant Attorney General of Florida, Bruce Jacob, who argued against *Gideon* in front of the Supreme Court, noted, “[o]ur system hasn’t performed as well as it should in fulfilling the promise of *Gideon* . . . [and] court legislatures have not gone as far as they should in implementing the provisions of the *Gideon* ruling.”⁸⁰ The United States Attorney General Eric Holder stated in recent years that the American indigent

75. *Id.* at 341.

76. *Id.* at 344.

77. Anthony C. Thompson, *The Promise of Gideon: Providing High-Quality Public Defense in America*, 31 QUINNIPIAC L. REV. 713, 713 (2013).

78. *Id.*

79. David Carroll, *Gideon’s Despair*, MARSHALL PROJECT, (Jan. 2, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/01/02/four-things-the-next-attorney-general-needs-to-know-about-america-s-indigent-defense-crisis#.YdNtzfcvB>.

80. *Gideon v. Wainwright- Case Providing Defendants an Attorney- Turns 50*, *supra* note 71.

criminal defense services “exist in a state of crisis.”⁸¹

The dismal state of indigent criminal defense creates a ripple effect of negative consequences throughout the entire criminal justice system.⁸² In the immediate sense, insufficient criminal defense counsel can cause one of two consequences: (1) excessive delays within the courts, causing defendants to wait in jail for months at a time, or (2) “courts become assembly lines to process poor people into jail or prison without adequately sorting the guilty from the innocent.”⁸³ According to Tanya Greene, an attorney for the American Civil Liberties Union (ACLU), the insufficient number of public defenders is a main reason why ninety to ninety-five percent of indigent criminal defendants plead guilty.⁸⁴

B. Inadequate Funding

The reasons for the crippling indigent defense system across the country are numerous, including the “crippling case overload, inadequate funding, and a pervasive, but false belief that efficiency and effectiveness are functional equivalents.”⁸⁵ Public defense offices nationwide have greater than 5,000 cases per year, and merely twelve percent of these cases had enough attorneys to handle the national caseload standard.⁸⁶ This national standard recommends that public defenders should not represent more than “150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appeals per year.”⁸⁷ Moreover, approximately sixty percent of state-based public defender offices do not implement limits on the public defenders’

81. Carroll, *supra* note 79.

82. *Id.*

83. *Id.*

84. Jaeah Lee et al., *Charts: Why You're in Deep Trouble if You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013, 10:00 AM), <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts>.

85. Thompson, *supra* note 77, at 713-14.

86. Zerline Hughes & Jason Fenster, *Overloaded Public Defense Systems Result in More Prison Time, Less Justice*, JUST. POL'Y INST. (July 27, 2011), <http://www.justicepolicy.org/news/2757>.

87. Hughes & Fenster, *supra* note 86.

caseloads.⁸⁸ Tanya Greene of the ACLU explained that there are “so many cases, limited resources, and there’s no relief . . . You go to work, you get more cases. You have to triage.”⁸⁹ According to the Justice Department, United States public defender offices handled more than 5.5 million cases in 2007.⁹⁰

Public defender offices are “often lacking the political clout, independence, and legislative expertise to effectively navigate the appropriations process[.]”⁹¹ Public defenders have frequently remained quiet in public budget negotiations.⁹² “Chief public defenders have chosen to fly under the radar in a presumed effort to protect their offices from public scrutiny that could induce governments to further reduce funding for the ‘undeserving poor’ whom defender offices represent.”⁹³ However, the public defenders’ silence has done little to aid to their funding deficit.⁹⁴

Indigent defense offices encounter a great amount of difficulty in obtaining funding, especially since law enforcement and corrections agencies are considered by the public to be more essential to the state’s criminal justice role.⁹⁵ In fact, the United States “spends less on public defense as a percentage per capita than every single European nation.”⁹⁶ Moreover, in 2012, the federal government provided states with \$287 million in grants, giving the states the discretion to choose how to allocate these monies to different criminal justice programs.⁹⁷ However, the Department of Justice (DOJ) reported that law enforcement receives more than sixty percent of Edward Byrne Memorial

88. Lee et al., *supra* note 84.

89. *Id.*

90. Tina Peng, *I’m a Public Defender. It’s Impossible for Me to do a Good Job Representing my Clients*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-9812-92d5948a40f8_story.html?utm_term=.7fb12b180243.

91. Roger A. Fairfax, Jr., *Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda*, 122 YALE L.J. 2316, 2322 (2013).

92. Thompson, *supra* note 77, at 720.

93. *Id.*

94. *Id.*

95. Fairfax, *supra*, note 91, at 2322.

96. Lee et al., *supra* note 84.

97. GIOVANNI & PATEL, *supra* note 2, at 4.

Justice Assistance Grant (JAG), the main source of federal justice funding for state and local jurisdictions.⁹⁸ Of the small amount that is allocated to defenders and prosecutors, prosecutors receive seven times that of defenders.⁹⁹ In fact, in 2010, less than one percent of Byrne-JAG funds, merely \$1.9 million, were distributed to public defenders.¹⁰⁰

Furthermore, even though the costs associated with inadequate defense counsel, such as those concerning “incarceration, probation, and parole should now be apparent,” state legislators continuously neglect to use their political power to ensure ample funding is provided for the state’s criminal defense role.¹⁰¹ The executive director of the Justice Policy Institute (JPI) stated that: “For every \$1 we spend on public defense, we are currently spending nearly \$14 on corrections. We need to make smarter investments that will keep us safe and not empty our wallets.”¹⁰² Unfortunately, state legislators do not have any political pressure motivating them to increase funding for indigent criminal defense.¹⁰³ The populations that are most affected by these legislators’ choices are those with little political power, the poor, and those accused of committing crimes.¹⁰⁴

a. Reasons for Inadequate Funding

i. Fear of Those Accused of Crime

Throughout history, United States citizens have consistently permitted individual rights to be encroached upon in the face of fear.¹⁰⁵ Stringent anti-crime legislation and the media have helped create the societal view that those who commit crimes are dangerous and do not deserve to have their

98. *Id.* See also *Edward Byrne Memorial Justice Assistance Grant Program*, OFF. OF JUST. PROGRAMS, <https://www.bja.gov/jag/index.html> (last visited Mar. 11, 2018).

99. GIOVANNI & PATEL, *supra* note 2, at 4.

100. *Id.*

101. Thompson, *supra* note 77, at 717.

102. Hughes & Fenster, *supra* note 86.

103. Thompson, *supra* note 77, at 717.

104. *Id.*

105. *Id.* at 714.

rights protected.¹⁰⁶ Jonathan Rapping, public defense attorney and founder of Gideon's Promise, notes:

There is a view that public defenders represent people who commit the most heinous crimes. There's a sense of, 'Why would I fund a lawyer to help get a rapist or a murderer out of prison?' . . . "Maybe they did something wrong. But it's something relatively minor. And now they're sitting in jail on a bond they can't make, they've lost their housing, their job. For these mistakes, families are torn apart and communities are ruined."¹⁰⁷

ii. Mass Incarceration

The United States has "about 5% of the world's population but almost 25% of its prisoners, with the world's largest number of inmates and highest per capita rate of incarceration."¹⁰⁸ As of 2017, the United States had 2.2 million individuals incarcerated in jails or prisons.¹⁰⁹ Almost sixty percent of incarcerated individuals are people of color, with black men being nearly six times more likely than white men to be incarcerated.¹¹⁰ In fact, one out of ten black men in their thirties is in jail or prison every day,¹¹¹ and even more disturbing, one in every three black men will be in prison at some point in their lifetime.¹¹² "[T]he reality is that today there are more African Americans under correctional control in prison or jail, on probation or parole, than

106. *Id.* at 714-15.

107. Lee et al., *supra* note 84.

108. *California's Overcrowded Prisons, The Challenges of "Realignment,"* ECONOMIST (May 19, 2012), <http://www.economist.com/node/21555611>.

109. *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT 2, <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (last updated June 2017).

110. *Id.* at 5.

111. *Id.*

112. *Id.*; See also Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 592 (2016).

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were enslaved in 1850, a decade before the civil war began.”¹¹³

The so-called War on Drugs has been deemed one of the main sources of the United States' mass incarceration issues. Since the War on Drugs was first implemented in the 1980s, the number of people incarcerated for drug offenses has increased from approximately 41,000 in 1980 to almost 500,000 in 2014.¹¹⁴ Moreover, the mandatory minimums imposed on drug crime sentences keep drug offenders in prison for greater periods of time.¹¹⁵ For example, in 1986, federal drug offense sentences had an average of twenty-two months in prison; however, federal drug offenders are now sentenced to prison for a period three times longer, with an average of sixty-two months in prison.¹¹⁶ Additionally, the number of prisoners serving sentences of life without parole rose by more than 300 percent between 1992 and 2009.¹¹⁷ Even more distressing is the number of incarcerated individuals serving life sentences, at one in every nine prisoners in 2013.¹¹⁸

The increase in criminalization and criminal justice enforcement policies have contributed to the overcrowding of jails and prisons.¹¹⁹ The causes and effects of mass incarceration have created obstacles in fulfilling the Supreme Court's promise in *Gideon*.¹²⁰

[T]hink of the process that leads to mass incarceration as a swift conveyor belt, whisking people from arrest to sentencing. First, increasing numbers of people, mostly poor, are dumped onto the conveyor belt. With no friction to slow it down, the conveyor belt whisks those people to the other

113. Sarah Childress, *Michelle Alexander: "A System of Racial and Social Control"*, FRONTLINE (Apr. 29, 2014), <http://www.pbs.org/wgbh/frontline/article/michelle-alexander-a-system-of-racial-and-social-control/>.

114. *Fact Sheet: Trends in U.S. Corrections*, SENTENCING PROJECT 3, <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> (last updated June 2017).

115. *Id.*

116. *Id.*

117. Capers, *supra* note 112, at 591.

118. *Id.*

119. Fairfax, *supra* note 91, at 2319.

120. *Id.*

end. Once there, those people are dumped into prison cells, where they are held for increasingly longer periods of time.¹²¹

As more and more indigent defendants are dragged into the increasingly harsh criminal justice system, effective public defenders have become more essential than ever.¹²² The situation becomes even worse when prosecutors charge defendants with crimes that are “far higher than warranted by the facts of the case, and defenders often do not have time or resources to assertively negotiate with prosecutors in plea discussions”.¹²³ Thus, many defendants accept unjust plea deals instead of risking going to trial.¹²⁴ In 2013, more than ninety-seven percent of criminal charges were resolved through plea bargains, with less than three percent going to trial.¹²⁵ In fact, twenty percent of the 2.2 million incarcerated individuals in the United States “have yet to be found guilty of a crime.”¹²⁶ Accordingly, “addressing pretrial detention is significant to any effort to address the mass-incarceration problem, and providing poor people effective lawyers has a significant impact on these detention rates.”¹²⁷

C. Issues Concerning Indigent Defense Nationally

Although the severity of the indigent defense crisis varies from state to state, public defenders are generally overworked and underfunded nationwide.¹²⁸ A report generated by the Justice Policy Institute concluded that “73 percent of county-based public defender offices lacked the requisite number of

121. Jonathan A. Rapping, *Retuning Gideon's Trumpet: Telling the Story in the Context of Today's Criminal-Justice Crisis*, 92 TEX. L. REV. 1225, 1227 (2014).

122. *Id.* at 1228.

123. GIOVANNI & PATEL, *supra* note 2, at 1.

124. *Id.*

125. Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/>.

126. Rapping, *supra* note 121, at 1236.

127. *Id.* at 1237.

128. Sara Mayeux, *What Gideon Did*, 116 COLUM. L. REV. 15, 19 (2016).

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attorneys to meet caseload standards; 23 percent of these offices had less than half of the necessary attorneys to meet caseload standards[.]”¹²⁹ The combination of the draconian sentencing requirements and plea deals have resulted in “even relatively well-funded public defenders hav[ing] little leverage in advocating for their clients.”¹³⁰

V. Indigent Defense in New York

In 1965, the New York State Legislature adopted New York County Law Article 18-B.¹³¹ This law requires the individual sixty-two counties in New York to create their own funding plan for public defense services.¹³² Counties could choose between three options: (1) creating public defender offices; (2) contracting with a private legal aid society; or (3) creating a panel of private assigned counsel.¹³³ The statute did not provide any means for oversight, or create a representation quality standard.¹³⁴ In fact, in 1967, the New York State Bar Association (NYSBA) conducted a seminar to address the lack of standards to ensure quality representation, and “the lack of guidelines for determining an accused person’s eligibility for assigned counsel and for ancillary services, such as investigators and experts, the scope of representation, and the representation of minors.”¹³⁵

The county funding system in New York State has failed to become more effective over the years. New York’s former Chief Judge Kaye referred to New York’s indigent defense system as “severely dysfunctional.”¹³⁶ Believing that the New York’s system needed “[a] top-to-bottom reexamination[.]” Chief Judge Kaye formed the Commission on the Future of Indigent Defense

129. Hughes & Fenster, *supra* note 86.

130. Mayeux, *supra* note 128, at 19-20.

131. N.Y. CTY. LAW § 722-b (McKinney 2012).

132. *Id.*

133. N.Y. CTY. LAW § 722 (McKinney 2012).

134. *A History of Public Defense in New York State*, N.Y. CIV. LIBERTIES UNION, <https://www.nyclu.org/en/history-public-defense-new-york-state> (last visited Mar. 11, 2018) [hereinafter NYCLU].

135. *Id.*

136. The Editorial Board, *A Big Victory for Public Defense in New York*, N.Y. TIMES (June 24, 2016), <https://www.nytimes.com/2016/06/24/opinion/a-big-victory-for-public-defense-in-new-york.html>.

Services.¹³⁷ The Spangenberg Group contracts with the American Bar Association to conduct criminal justice research, and specializes in research concerning indigent defense services.¹³⁸ The Spangenberg Group was hired by the Kaye Commission on the Future of Indigent Services to “examine the effectiveness of indigent criminal defense services across [New York] State.”¹³⁹ The study conducted was, and still remains, “the most comprehensive study of indigent defense representation ever undertaken in New York State.”¹⁴⁰ The study required the Spangenberg Group to travel to courtrooms in twenty-two counties, and meet with judges and lawyers.¹⁴¹ The final report indicated that New York’s indigent criminal defense system is “broken” and “is in a serious state of crisis.”¹⁴² Further, the final report indicated that New York’s funding system that allows the sixty-two counties to each create their own system, has numerous negative effects, including an absence of uniformity and oversight, as well as an “acute and chronic lack of funding.”¹⁴³ Additionally, the final report stated that in many instances, defendants in minor misdemeanor and violations cases are not provided with assistance of counsel, in violation of their rights under the state and federal constitutions.¹⁴⁴ Finally, the report concluded that it was the Commission’s opinion that “New York State is currently failing to provide a substantial number of indigent defendants with adequate and meaningful representation as required by the state and federal constitutions

137. Geoff Burkhart, *Public Defense The New York Story*, 30 CRIM. JUST., no. 3, 2015, at 25, http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_nystory.authcheckdam.pdf

138. Marc Sackin, Note, *Applying United States v. Stein to New York’s Indigent Defense Crisis Show the Poor Some Love Too*, 73 BROOK. L. REV. 299, 301 fn. 14 (2007).

139. *Id.* at 301.

140. Burkhart, *supra* note 137, at 25 (internal quotation marks omitted).

141. *Id.*

142. THE SPANGENBERG GROUP ET AL., STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE’S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES FINAL REPORT ii (2006), https://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

143. *Id.*

144. *Id.* at iv.

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and the laws of New York State.”¹⁴⁵

Moreover, the final report made several recommendations to address the ongoing issues present in New York's insufficient indigent defense system. The Commission first recommended for New York to create a statewide defender office in order to “insure accountability, enforceability of standards, and quality representation.”¹⁴⁶ The Commission urged New York to address the disproportionate funding between prosecution offices and public defense offices.¹⁴⁷ Further, the Commission recommended that the county funding system be “phased out,” and to instead have the “State's General Fund” provide sufficient funding for indigent criminal defense.¹⁴⁸ Finally, the Commission recommended that New York replace its county funding system with that of a state funded system within three years.¹⁴⁹

VI. New York Public Defense Reform Bill

A. *Hurrell-Harring* Litigation

In 2014, the New York Civil Liberties Union (NYCLU) published the report, *State of Injustice: How New York State Turns its Back on the Right to Counsel for the Poor*.¹⁵⁰ The report evaluated the great disparity in funding between public defense offices and district attorney offices, including that in Onondaga County, which spent more than thirty-five times more money on prosecutors' investigators, than public defenders'

145. *Id.* at vi.

146. COMM'N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK iii (2006), https://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

147. *Id.*

148. *Id.*

149. *Id.*

150. *NYCLU Report Exposes NY's Failure to Provide Public Defense to Poor in Violation of Constitution*, N.Y. CIV. LIBERTIES UNION (Sept. 17, 2014), <https://www.nyclu.org/en/press-releases/nyclu-report-exposes-nys-failure-provide-public-defense-poor-violation-constitution> [hereinafter *NYCLU Report*].

investigators.¹⁵¹ The report also revealed the lack of adequate representation by public defense offices, including that in Onondaga County, where “public defense attorneys consulted expert witnesses in only 22 of 14,000 cases and used investigators in only 50 cases.”¹⁵²

The information included in the NYCLU’s report was gathered from summary judgment filings in the *Hurrell-Harring v. New York* class action lawsuit brought by the NYCLU and law firm of Schulte, Roth & Zabel LLP in 2007.¹⁵³ The suit challenged the inadequacy and constitutionality of New York’s indigent defense system, which placed the \$262 million cost for public defense on the counties’ shoulders, and only provided counties with \$62 million in support.¹⁵⁴ The twenty plaintiffs in the class action were criminal defendants in Onondaga, Ontario, Schuyler, Suffolk, and Washington Counties who have experienced the lack of quality in their criminal defense representation.¹⁵⁵ The lawsuit chose to focus on these five New York counties, not because they represented the worst indigent criminal defense in the state, but rather because they exemplified the three different funding methods available to counties under article 18-B, including “public defender (Schuyler and Washington Counties), assigned counsel (Onondaga and Ontario Counties), and contract counsel (Suffolk County).”¹⁵⁶ With regards to the lawsuit, Executive Director of the NYCLU, Donna Lieberman, stated, “Every day, in courtrooms throughout the state, New Yorkers are denied justice simply because they are poor. Justice should not depend on your ZIP code or the size

151. *Id.*

152. Christopher Dunn, *Op-Ed*, N.Y. CIV. LIBERTIES UNION (Feb. 1, 2017, 12:30 PM), <https://www.nyclu.org/en/taxonomy/term/108?page=4>.

153. *Settlement Begins Historic Reformation of Public Defense in New York State*, N.Y. CIV. LIBERTIES UNION (Oct. 21, 2014), <https://www.nyclu.org/en/press-releases/settlement-begins-historic-reformation-public-defense-new-york-state>.

154. *New York State Failing Its Constitutional Duty on Public Defense, NYCLU Lawsuit Charges*, N.Y. CIV. LIBERTIES UNION (Nov. 8, 2007), <https://www.nyclu.org/en/press-releases/new-york-state-failing-its-constitutional-duty-public-defense-nyclu-lawsuit-charges> [hereinafter *NYCLU Files Suit*].

155. *Id.* See also, Burkhart, *supra* note 137, at 26-27.

156. Burkhart, *supra* note 137, at 27.

of your wallet.”¹⁵⁷

In 2009, the New York Appellate Division dismissed the case, finding that any relief, if justified, should come from the legislature and not the courts, since none of the plaintiffs were seeking relief for their convictions.¹⁵⁸ In 2010, the New York Court of Appeals reversed the decision, finding that the complaint correctly stated a claim for relief for constitutional violations of the guarantees established in *Gideon*.¹⁵⁹ In 2014, the DOJ filed a Statement of Interest, comparable to an amicus brief.¹⁶⁰ In their Statement of Interest, the DOJ did not reveal its position on the merits of the case, but instead aimed to “assist the Court in assessing whether the State of New York has ‘constructively’ denied counsel to indigent defendants during criminal proceedings.”¹⁶¹ The DOJ’s Statement of Interest was groundbreaking because it marked the first time that the DOJ expressed support for public defense in a state court case.¹⁶²

On October 21, 2014, after seven years of litigation and less than one month after the DOJ filed their statement of interest, the parties agreed to settle.¹⁶³ The 2014 settlement agreement required New York to reform, “focusing on the five New York counties—Ontario, Onondaga [], Schuyler, Suffolk and Washington[.]”¹⁶⁴ The agreement will last seven and one-half years, subject to court approval.¹⁶⁵ Associate Legal Director of the NYCLU, Christopher Dunn, stated “[t]his settlement marks what we hope and expect to be the beginning of sweeping reforms of New York’s broken public defense system.”¹⁶⁶ Among several other provisions, New York is required to hire enough

157. *NYCLU Files Suit*, *supra* note 154.

158. *See* Hurrell-Harring v. New York, 883 N.Y.S.2d 349 (App. Div. 2009).

159. *See* Hurrell-Harring v. New York, 904 N.Y.S.2d 296 (2010).

160. Burkhart, *supra* note 137, at 27.

161. Statement of Interest of the United States at 1, Hurrell-Harring v. New York, 866 N.Y.S.2d 92 (Sup. Ct. 2008) (No. 8866-07), www.justice.gov/file/65011/download. *See also*, Burkhart, *supra* note 137, at 27.

162. Burkhart, *supra* note 137, at 27.

163. *Id.*

164. *Settlement Begins Historic Reformation of Public Defense in New York State*, N.Y. CIV. LIBERTIES UNION (Oct. 21, 2014), <https://www.nyclu.org/en/press-releases/settlement-begins-historic-reformation-public-defense-new-york-state> [hereinafter *NYCLU Settlement*].

165. *Id.*

166. *Id.*

lawyers, investigators, and support staff to guarantee that “all poor criminal defendants have lawyers with the time and support necessary to vigorously represent the defendant.”¹⁶⁷ The state is also required to increase the Office of Indigent Legal Service’s ability to conduct state-level oversight to ensure that the constitutional requirement of quality indigent public defense is fulfilled.¹⁶⁸ Finally, the settlement established a new threshold for determining whether a defendant qualifies for public defense services.¹⁶⁹ This new threshold is set at “250 percent of the federal poverty limit[,]” rather than permit counties to set their own thresholds.¹⁷⁰ William J. Leahy, head of the Office of Indigent Legal Service, stated that this settlement “marks the very first time that the state has stood up and acknowledged that it is a state’s responsibility to comply with the *Gideon* mandate. It is a state responsibility, not a county responsibility.”¹⁷¹

B. Proposed Public Defender Reform Bill

Despite the *Hurrell-Harring* settlement and the Kaye-Commission report, the New York State Legislature has failed to create a statewide funding system. The closest the state has come to implementing a statewide funding system was Bill S.8114/A.10706, which was passed unanimously by each chamber of the state legislature in June of 2016.¹⁷² This public defender reform bill was sponsored by Senator John DeFrancisco and Assembly Member Patricia Fahy,¹⁷³ and had

167. *Id.*

168. *Id.*

169. Jimmy Vielkind, *Groups Urge Cuomo to Sign Indigent Defense Bill Amid Worries Over Cost*, POLITICO (Dec. 14, 2016, 5:26 AM), <http://www.politico.com/states/new-york/albany/story/2016/12/groups-urge-cuomo-to-sign-indigent-defense-bill-amid-cost-worries-108067>.

170. *Id.*

171. Burkhart, *supra* note 137, at 28 (quoting *Indigent Legal Services: A Discussion with William Leahy*, AMICI (2015), www.nycourts.gov/admin/amici/).

172. S. 8114, 114th Cong. (2016) (enacted). *See also* John Stashenko, *Long-Sought Indigent Defense Bill Goes to Governor’s Desk*, N.Y.L.J. (Dec. 21, 2016, 6:02 PM), <https://www.law.com/newyorklawjournal/almID/1202775338558/>.

173. *Id.*

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support from numerous groups, including veteran organizations, the National Association for the Advancement of Colored People (NAACP), and county government leaders.¹⁷⁴ In an effort to meet the constitutional mandate under *Gideon*, the bill would place the responsibility of funding public defense on New York State, and would be completely implemented by 2023.¹⁷⁵ Under the public defender reform bill, the Office of Indigent Legal Services would be authorized to establish and uphold standards of effective legal representation for indigent defendants.¹⁷⁶ The bill would extend the public defense reform that has been initiated for the five counties in the *Hurrell-Harring* settlement agreement to all of the counties in New York.

Unfortunately, Governor Cuomo vetoed the bi-partisan bill at the last minute on New Year's Eve 2016.¹⁷⁷ In his veto message, Governor Cuomo stated, "This bill would do little more than transfer to the taxpayers of this state an entirely new obligation to pay for any and all existing expenses related to general defense legal work, far beyond legal representation of indigent criminal defendants."¹⁷⁸ Governor Cuomo believed that the legislators included over \$800 million in legal aid costs that were not related to criminal defense, and instead involved family court and other courtrooms.¹⁷⁹ Governor Cuomo asserted that this bill was not truly an indigent defense bill, but instead was merely an "attempt to shift costs from the counties to the state taxpayers under the guise of indigent defense."¹⁸⁰ However, Governor Cuomo pledged to introduce his own proposal on how

174. Vielkind, *supra* note 169.

175. *News Release Assembly Speaker Carl E. Heastie State Legislature Passes Measure to Address Disparities in New York's Justice System*, N.Y. ST. ASSEMBLY (June 17, 2016), <http://nyassembly.gov/Press/20160617a/>.

176. *Id.*

177. The Editorial Board, *New York's Unequal Justice for the Poor*, N.Y. TIMES (Jan. 5, 2017), <https://www.nytimes.com/2017/01/05/opinion/new-yorks-unequal-justice-for-the-poor.html>.

178. Jimmy Vielkind, *Citing Cost, Cuomo Vetoes Indigent Legal Defense Bill*, POLITICO (Dec. 31, 2016, 11:21 PM), <https://www.politico.com/states/new-york/albany/story/2016/12/citing-cost-cuomo-vetoes-indigent-legal-defense-bill-108386>.

179. *Id.*

180. Matthew Hamilton, *Gov. Cuomo Vetoes Legal Services Bill*, TIMES UNION (Jan. 1, 2017), <http://www.timesunion.com/local/article/Gov-Cuomo-vetoes-legal-services-bill-10829111.php>.

to handle New York's indigent defense system and the *Hurrell-Harring* settlement.¹⁸¹

Not surprisingly, the proponents of the public defender reform bill were disappointed in Governor Cuomo's decision. Many of the proponents could not understand why Governor Cuomo would agree to the *Hurrell-Harring* settlement for only five counties and refuse to extend the agreement to the remaining fifty-eight counties with this bill. The Senate Deputy Majority Leader, John DeFransisco, a Republican, asserted that Governor Cuomo should not have been surprised by the cost, especially since "[t]his bill passe[d] six months ago . . . It made no sense in the [*Hurrell-Harring*] settlement to make more people eligible . . . and then say it's too costly."¹⁸² Senator DeFransisco further argued "What about the other counties – are they chump change or do they have to go ahead and bring a lawsuit and settle with the governor for the same amount?"¹⁸³ Donna Lieberman, the NYCLU Executive Director, noted, "We are deeply disappointed that the governor has vetoed the most important criminal justice reform legislation in memory."¹⁸⁴ Additionally, the New York State Bar Association expressed their disappointment in Governor Cuomo's veto of the public defense reform bill.¹⁸⁵ The New York State Bar Association further criticized Governor Cuomo's proposal to fund the 2017 increase in county expenditures for public defense services, by increasing the Biennial Attorney Registration Fee by fifty dollars, rather than using the state's General Fund to satisfy the

181. Vielkind, *supra* note 8.

182. Jimmy Vielkind, *Legal Defense Bill Remains in Limbo After Failed Special Session Plan*, POLITICO (Dec. 20, 2016, 5:14 AM), <https://www.politico.com/states/new-york/albany/story/2016/12/after-consideration-in-special-talks-legal-defense-bill-still-in-limbo-108371>.

183. Jimmy Vielkind, *Group Urges Cuomo to Sign Indigent Defense Bill Amid Worries Over Cost*, POLITICO (Dec. 14, 2016, 5:26 AM), <https://www.politico.com/states/new-york/albany/story/2016/12/groups-urge-cuomo-to-sign-indigent-defense-bill-amid-cost-worries-108067>.

184. Kenneth Lovett, *Cuomo Vetoes Bill Requiring N.Y. to Fund Legal Services for Poor*, N.Y. DAILY NEWS (Jan. 1, 2017, 12:42 PM), <http://www.nydailynews.com/news/politics/cuomo-vetoes-bill-requiring-n-y-fund-legal-services-poor-article-1.2930833>.

185. Claire P. Gutekunst, *The Imperative to Protect Human Rights and the Rule of Law*, N.Y. ST. BAR ASS'N J., Feb. 2017 at 5.

constitutional mandate under *Gideon*.¹⁸⁶ Overall, Governor Cuomo's 2017 budget provisions regarding New York's criminal justice system were not well received by many.

C. What Should the New Reform Legislation Look Like?

As previously stated, although Governor Cuomo vetoed the public defender reform bill, he pledged to pass a new bill that would ensure the constitutional mandates of *Gideon* are upheld. There is an abundant amount of research to guide New York State's lawmakers to enact a statute that would ensure every criminal defendant receives a quality legal representation, regardless of their ability to pay. Scholars have provided various methods that could be implemented to address the problems plaguing public defender offices. Three different reform proposals include, "(1) public defender programs that employ full- or part-time counsel; (2) a contract system, where individuals or firms engage in a contract to provide representation for a number of indigent defendants; and (3) an assigned counsel system, where courts appoint attorneys to handle individual cases."¹⁸⁷

Not only is there a large amount of scholarship on the subject, but New York can learn from reform efforts in other states as well. Recent phenomena and public discourse have led to many reform efforts throughout the nation. The increased attention to mass incarceration has acted as a catalyst for indigent defense reform efforts.¹⁸⁸ In 2013, the Office for Access to Justice, which works with federal, state, and local officials to permit indigent citizens greater access to effective counsel, "issued \$6.7 million in federal grants designed to improve indigent criminal defense services."¹⁸⁹ Additionally, Utah passed a bill in March of 2016, which created a commission to oversee indigent defense, and will include state funding for the first time, leaving Pennsylvania as the only state not providing

186. *Id.*

187. Margaret A. Costello, *Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1958 (2000).

188. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1804 (2016).

189. *Id.* at 1802-03.

any funding for indigent defense.¹⁹⁰

Even though the majority of states currently fund at least ninety percent or more of their public defense system,¹⁹¹ the manner in which each state provides this funding varies greatly.¹⁹² “There is a disturbing lack of consistency in the amounts allocated to indigent defense and the services or cases to which that funding is linked.”¹⁹³ In the ABA’s 1992 Standards for Criminal Justice, the ABA noted that “it [is] preferable to create a statewide system of defense,” emphasizing that state programs “have shown their ability to grow and change with the times while maintaining financial stability.”¹⁹⁴ Efforts to reform funding for indigent defense systems should make sure that there is “meaningful oversight of defense counsel.”¹⁹⁵ This “meaningful oversight” must concentrate on whether defense counsel represents the defendants zealously and through a client-centered approach.¹⁹⁶

It seems as though Governor Cuomo may have taken this scholarship into consideration when he proposed his own plan to address New York’s indigent defense system through the 2017-2018 budget, signed on April 8, 2017.¹⁹⁷ The budget includes a six-year plan to improve indigent public defense; however, it does not encompass the entire \$450 million cost necessary to provide effective counsel as required by *Gideon*.¹⁹⁸ Rather, the budget calls for the state to compensate counties for the cost of

190. David Carroll, *Utah Reforms Indigent Defense with First-Ever State Dollars for Trial Representation*, SIXTH AMEND. CTR. (Mar. 16, 2016), <http://sixthamendment.org/utah-reforms-indigent-defense-with-first-ever-state-dollars-for-trial-representation/>.

191. Thompson, *supra* note 77, at 723.

192. *Id.*

193. *Id.* at 723-24.

194. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES 3, 9-10 (3rd ed. 1992) https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.authcheckdam.pdf.

195. Primus, *supra* note 188, at 1815.

196. *Id.*

197. *News Release Assembly Speaker Carl E. Heastie SFY 2017-2018 Budget Includes Six Year Plan to Improve Public Defense Services Statewide*, N.Y. ST. ASSEMBLY (April 8, 2017), <http://assembly.state.ny.us/Press/20170408a/>.

198. Joel Stashenko, *Budget Contains Long-Sought Relief for Some Indigent Criminal Defense Costs*, N.Y.L.J., Apr. 10, 2017.

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implementing the improvements established in the *Hurrell-Harring* settlement.¹⁹⁹ These improvements include requiring the state's Office of Indigent Legal Services to create and implement standards for public defense concerning "presence of counsel at a criminal defendant's first court appearance; reasonable limits on the caseloads public defense attorneys can carry; proper training, supervision, and support staff for attorneys; and access to resources needed to mount an effective defense."²⁰⁰ By the year 2023, the state is expected to provide counties with \$250 million each year for indigent defense.²⁰¹

While many of these trends in legislation and policy seem to be heading in the direction of an improved indigent criminal defense system, not only in New York, but across the United States, there are still many obstacles in the way. To be sure, there are still many who are doubtful that real change will result.²⁰² William Leahy, director of the NYS Office of Indigent Legal Services believes "This [six year plan] is less than whole, but it is what I have been saying since the day after the *Hurrell-Harring* settlement was signed, that the state has to make sure that all counties are in compliance with the [C]onstitution."²⁰³ Further, the executive director of New York State Defenders Association, Jonathan Gradess, expressed, "I don't think it's going to be enough, but it moves us in the direction of maturely looking at the system."²⁰⁴ Those who have doubts about the effectiveness of this budget plan have reason to be skeptical. Not only does this budget plan fail to cover the entire \$450 million

199. *Id.*

200. Simon McCormack, *Long-Awaited Public Defense Reform Comes to New York State*, AM. CIV. LIBERTIES UNION, (May 9, 2017), <https://www.aclu.org/blog/mass-incarceration/smart-justice/long-awaited-public-defense-reform-comes-new-york-state>.

201. *Id.*

202. John H. Blume & Sheri Lynn Johnson, *Gideon Exceptionalism?*, 122 *YALE L.J.* 2126, 2147 (2013) (stressing that until the Supreme Court establishes a much higher bar for the quality of representation required under the Sixth Amendment, the right to effective assistance of counsel will continue to elude indigent defendants).

203. Lorelei Laird, *For the First Time, New York Will Provide Some State Funding for Indigent Defense*, ABA J. (Apr. 14, 2017, 3:45 PM), http://www.abajournal.com/news/article/for_the_first_time_new_york_will_provide_some_state_funding_for_indigent_def/.

204. *Id.*

cost of indigent defense, but some of the states who previously passed public defense reform legislation have still failed to adequately fund their systems. For example, Mississippi enacted reform legislation in 1998, “only to repeal [it] a few years later when funding had still not materialized.”²⁰⁵ Other states have cut funding for indigent defense after passing legislation meant to help increase funding. In Montana, the state’s allocation for indigent criminal defense in the budget has fallen more than \$3 million dollars behind the state’s original funding goal.²⁰⁶ While efforts have been made to address the crisis, it is far from being completely remedied.

VII. Conclusion

It has been over fifty years since the Supreme Court held in *Gideon* that criminal defendants have a constitutional right to counsel, regardless of their socioeconomic status. Yet, New York State has largely failed to satisfy this constitutional requirement. The state’s failure not only delegitimizes its legal system, but has profound detrimental effects on indigent criminal defendants and their loved ones. As Corey Stoughton, NYCLU Senior Staff and lead counsel on the *Hurrell-Harring* case, stated, “Our criminal justice system only works at producing the truth if both the prosecution and the defense are on equal footing. In much of New York State, the system is broken.”²⁰⁷ Until New York State replaces their county funded indigent criminal defense system with a state funded system and provides meaningful oversight, indigent criminal defendants will continue to have their constitutional rights violated. Governor Cuomo had the chance to ensure significant change occurred. However, he floundered this opportunity. One can only hope that New York’s legislators will hold him to his word and ensure that *Gideon*’s promise is fulfilled.

205. Andrew Rachlin, *Rights of Defense*, GOVERNING MAG., (Jan. 2007), at 42, http://apps.americanbar.org/webupload/commupload/CR209700/sitesofinterest_files/RIGHTSOFDEFENSEGoverningMagazineJanuary2007.pdf.

206. *Id.* at 42.

207. *NYCLU Report*, *supra* note 150.