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Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel

Cara H. Drinan

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Getting Real About *Gideon*: The Next Fifty Years of Enforcing the Right to Counsel

Cara H. Drinan*

Table of Contents

I. Introduction	1310
II. Fifty Years of “Crisis”	1312
III. What We Should Celebrate and Sustain	1315
A. The Development of Professional Standards.....	1316
B. The Development of the Collateral Consequences Doctrine	1319
C. The Trend Toward Data-Driven Analysis and Advocacy	1322
IV. The Next Fifty Years of Enforcing the Right to Counsel	1325
A. Diversion and Decriminalization Should Be Pursued . . . and Might Even Be Achievable	1326
B. Surgical Litigation Is Better than Systemic Litigation	1330
C. The Defense Community Needs to Embrace Nonlawyers as Guardians of the Right to Counsel	1335
V. Conclusion.....	1344

* Associate Professor of Law, Columbus School of Law, The Catholic University of America. I am grateful to Professor J.D. King for organizing the Washington & Lee Law Review Symposium on the topic of *Gideon* at 50 and to the other participants for their insightful comments and contributions.

I. Introduction

In the last five decades, the Supreme Court has consistently expanded the scope of the Sixth Amendment right to counsel.¹ Not only must states provide counsel to poor criminal defendants in serious cases,² but states also must provide counsel to any defendant facing potential jail time,³ to minors in delinquency proceedings,⁴ and to defendants who appeal their state court convictions on direct appeal.⁵ Moreover, and perhaps most significant, the Court has held that state-funded lawyers must be effective in all of these contexts and during the plea-negotiation process.⁶ In recent years, the Court has added new dimensions to this latter requirement.⁷ For example, in death penalty cases, lawyers must meet a heightened standard of practice,⁸ and at

1. See cases cited *infra* notes 2–6 (explaining some of the developments and expansions that have been made to the right to counsel in the past fifty years).

2. See *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (finding a “fundamental right of the accused to the aid of counsel in a criminal prosecution” guaranteed by the Sixth Amendment).

3. See *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that absent a knowing waiver, an individual cannot be imprisoned unless he or she has been represented by counsel at trial).

4. See *In re Gault*, 387 U.S. 1, 41 (1967) (finding that when a minor is facing delinquency charges, “the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child”).

5. See *Douglas v. California*, 372 U.S. 353, 356–57 (1963) (finding that an indigent individual has the right to counsel on the first level of appeal).

6. See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (“This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (“Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.”); *Strickland v. Washington*, 466 U.S. 668, 669 (1984) (“The Sixth Amendment right to counsel is the right to the effective assistance of counsel . . .”); *United States v. Cronin*, 466 U.S. 648, 656 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.”).

7. See cases cited *infra* notes 8–9 (discussing the extension of the right to effective counsel to additional stages of representation).

8. See, e.g., *Porter v. McCollum*, 558 U.S. 30, 130 S. Ct. 447, 453 (2009) (applying *Wiggins* and finding counsel ineffective); *Wiggins v. Smith*, 539 U.S.

least in some instances, lawyers for the poor must understand the collateral consequences that flow from a criminal conviction and advise clients accordingly.⁹ While the Court has continued to expand the contours of the right to counsel since its landmark decision in *Gideon v. Wainwright*,¹⁰ even the most basic understanding of the right to counsel has never been fully implemented on the ground. From the start, states have failed to fund the indigent defense function adequately, and as the volume of criminal cases has grown over the years, too few lawyers have faced ever-increasing workloads.¹¹ The result has been what many have called “assembly-line justice”—in other words, egregious and persistent violations of the right to counsel.¹² These violations have not gone unnoticed by academics and defenders. In the last fifty years, there have been significant efforts to document the indigent defense crisis and to correct it.¹³ Yet—despite countless reports and articles detailing the crisis, state and federal court litigation, and attempts at legislative reform—

510, 521 (2003) (relying upon established ABA guidelines for performance of counsel in death penalty cases and finding counsel ineffective).

9. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) (finding counsel’s assistance ineffective because counsel failed to notify the client that his guilty plea made him subject to deportation).

10. See *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963) (finding a “fundamental right of the accused to the aid of counsel in a criminal prosecution” guaranteed by the Sixth Amendment).

11. See *infra* Part II.

12. See, e.g., NAACP LEGAL DEF. & EDUC. FUND, INC., ASSEMBLY LINE JUSTICE: MISSISSIPPI’S INDIGENT DEFENSE CRISIS 6–7 (2003) (providing an overview of the state’s broken indigent defense system).

13. See generally, e.g., ROBERT C. BORUCHOWITZ ET AL., NAT’L ASS’N CRIM. DEF. LAW., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS (2009), [http://www.nacdl.org/public.nsf/defense_updates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defense_updates/misdemeanor/$FILE/Report.pdf) (explaining the growing lack of adequate counsel for misdemeanor crimes); NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED 49–99 (2009), <http://www.constitutionproject.org/pdf/139.pdf> [hereinafter JUSTICE DENIED] (highlighting the areas of indigent counsel requiring reform); STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 7–21 (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lisclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [hereinafter BROKEN PROMISE] (documenting some of the current problems in indigent defense and suggesting some improvements that can be made).

the right to counsel remains illusory for most poor criminal defendants.

As we mark the fiftieth anniversary of *Gideon*, in this Article I argue that we can and should be more realistic in our efforts to enforce the right to counsel. Assuming, as many now do, that five decades of resource-starved indigent defense will likely continue in the future, where are our efforts most effectively deployed in the years to come? I address that question in three parts. Part II briefly acknowledges the entrenched crisis in indigent defense that is as old as the *Gideon* decision itself. Part III examines the most salient reform efforts of the last fifty years, highlighting those that have made a lasting impact on the provision of indigent defense services. Part IV suggests that some efforts of the last five decades need to be de-emphasized to make room for efforts that are achievable and imperative in the near term. In particular, I suggest that defenders need to seize upon this political and economic climate and pursue diversion and decriminalization; that systemic litigation should be rare and only a measure of last resort; and that the defense community needs to explore the role that nonlawyers can play in protecting the rights of criminal defendants.

II. Fifty Years of “Crisis”

Scholars and practitioners have documented extensively the ongoing crisis in indigent defense services over the last five decades.¹⁴ As I have discussed in prior works, there are as many factors contributing to the indigent defense crisis as there are symptoms of it.¹⁵ At bottom, though, defenders nationwide suffer

14. See *supra* note 13 and accompanying text; see also Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006) (“[M]ore than half the lawyers entered pleas for their clients without spending any significant time on the cases, without interviewing witnesses or filing motions. Sometimes they barely spoke with their clients.”); Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 802–07 (2004) (examining the role that inadequate funding plays in defective counsel).

15. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation’s Indigent Defense Crisis*, 47 HARV. J. LEGIS. 487, 491–94 (2010) (analyzing some of the reasons that the indigent

from a lack of resources.¹⁶ Without adequate financial support, public defenders cannot hire adequate staff, they cannot train or retain lawyers, and they cannot sufficiently represent their clients.¹⁷ Even at the time of the *Gideon* decision, there was great concern over how taxpayers could afford a widely applicable right to counsel.¹⁸ That concern was legitimate, even if it did not undermine the constitutional argument in *Gideon*, and it has only proven more accurate over time.¹⁹ In 1986, Professor Stephen Gillers wrote a piece for the *New York Times* in which he discussed how little money states were allocating to indigent defense and the tragic consequences for poor defendants.²⁰ Referring to the language of the *Gideon* Court's decision, Gillers wrote: "Lofty ideas. They aren't working."²¹

Fast forward several decades, and Professor Gillers's words still resonate. The American Bar Association (ABA) released a report on the state of indigent defense services nationwide in 2004 and aptly entitled the report "*Gideon's Broken Promise*."²² One of the report's key findings was that: "Forty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis, resulting in a system that lacks fundamental fairness and places poor persons at constant risk of

defense crisis has continued); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 429–30 (2009) [hereinafter Drinan, *Third Generation*] ("There are other salient attributes to the indigent defense crisis . . . , but chronic underfunding is the common thread.").

16. See Drinan, *Third Generation*, *supra* note 15, at 430 ("Inadequate funding is the root cause of the indigent defense crisis.").

17. See *id.* (providing some of the necessary elements to maintain "an effective, efficient, high-quality, and ethical public defense system").

18. See William Pincus, *Programs to Supplement Law Offices for the Poor*, 41 NOTRE DAME L. REV. 887, 897 (1965) ("Is the American public ready to pay the price in tax dollars for more legal services and greater justice? There will be a struggle of major proportions.").

19. See JUSTICE DENIED, *supra* note 13, at 49–99 (examining the continued lack of resources and staffing problems that indigent counsel faces).

20. Stephen Gillers, *Poor Man, Poor Lawyer*, N.Y. TIMES, Feb. 28, 1986, at A31.

21. *Id.*

22. See BROKEN PROMISE, *supra* note 13, at v, 38 (assessing the progress America's justice system has made towards meeting the goals of indigent defense representation).

wrongful conviction.”²³ In 2009, The Constitution Project released a report on indigent defense services nationwide, finding that public defense remains underfunded and defense counsel are consistently overworked.²⁴

Recent national headlines demonstrate the breadth and scope of the indigent defense crisis. For example, in Utah, one of only two states that do not provide funding for public defender services, the county-based system is failing its clients in every way possible.²⁵ Public defense contracts are awarded to the lowest bidders, and some contracts result in defense counsel earning less than \$400 per felony case.²⁶ The prosecutor in one county not only plays a role in selecting defense counsel, but also controls the budget of the county’s indigent defense system.²⁷ In Pennsylvania, the American Civil Liberties Union filed suit challenging systemic deficiencies in representation more than fifteen years ago.²⁸ Despite some initial improvements as a result of that suit,²⁹ in 2011 the Joint State Government Commission reported that the system is still failing poor criminal defendants.³⁰ The Tennessee Supreme Court recently proposed a

23. *Id.* at 38.

24. See JUSTICE DENIED, *supra* note 13, at 49–99 (examining the burdens placed on indigent defense counsel including insufficient funding and the heavy workload).

25. See generally AM. CIVIL LIB. UNION, FAILING *GIDEON*: UTAH’S FLAWED COUNTY-BY-COUNTY PUBLIC DEFENDER SYSTEM 7–11 (2011), http://www.acluutah.org/Failing_Gideon.pdf (finding that the county funding system used in Utah does not meet the standards of *Gideon*).

26. *Id.* at 7.

27. See Patsy Stoddard, *Commission Makes Decision For Public Defenders*, EMERY CNTY. PROGRESS (Nov. 15, 2011), http://www.ecprogress.com/index.php?tier=1&article_id=11730 (last visited Apr. 2, 2013) (detailing the county attorney’s request for law firms to lower their bids to meet the county’s budget) (on file with the Washington and Lee Law Review).

28. See Vidhya K. Reddy, *Indigent Defense Reform: The Role of Systemic Litigation in Operationalizing the Gideon Right to Counsel* 24–30 (Wash. Univ. Sch. of Law, Working Paper No. 1279185, 2007), available at <http://ssrn.com/abstract=1279185> (describing a 1996 lawsuit in Allegheny County).

29. See *id.* at 28–29 (describing the court’s decision to extend the jurisdiction of the cases that required additional time to provide the defendant with counsel).

30. See JOINT STATE GOV’T COMM’N, A CONSTITUTIONAL DEFAULT: SERVICES TO INDIGENT CRIMINAL DEFENDANTS IN PENNSYLVANIA 2 (2011),

rule change that would allow for flat-fee defender contracts—a model widely recognized as creating a conflict-of-interest and unacceptable for purposes of the Sixth Amendment.³¹ Recent Department of Justice data confirms that this is an ongoing, national crisis: “[Seventy-nine percent] of reporting state public defender systems . . . exceeded nationally-recognized workload standards.”³²

In short, half a century has passed since the *Gideon* decision, and the right to counsel at the state level has yet to be realized.

III. What We Should Celebrate and Sustain

Despite my contention that *Gideon*'s mandate has never been fully implemented, the picture is not entirely gloomy. Academics, practitioners, and advocates of poor criminal defendants have worked tirelessly over the last five decades to enforce the right to counsel, and their efforts have not been in vain—even if much remains to be done, and even if a new approach to reform is warranted today. In this Part of the Article, I identify three achievements within the defense community during the last fifty years that are particularly worthy of celebration: (1) the development of professional standards and the dissemination of these standards through training and litigation;³³ (2) the

http://www.nlada.net/sites/default/files/pa_indigentdefensetaskforce_report_12062011.pdf (“The lack of state financial support and oversight has led to a service deficiency syndrome . . .”).

31. See David Carroll, *Gideon Alert: Tennessee Supreme Court Proposes Rule Change Allowing Flat-Fee Contracting*, JSERI (Aug. 23, 2011, 4:11 PM), <http://www.nlada.net/jseri/blog/gideon-alert-tennessee-supreme-court-proposes-rule-change-allowing-flat-fee-contracting> (last visited Apr. 2, 2013) (“The Tennessee Supreme Court proposed a new rule change that attempts to find an easy answer to controlling indigent defense costs by allowing flat-fee contracting for right to counsel services, but the Court has neglected to provide institutional safeguards that would protect the adequacy of representation.”) (on file with the Washington and Lee Law Review).

32. David Carroll, *Gideon Alert: DOJ Data Confirms Existence of Right to Counsel Workload Crisis In The United States*, JSERI (Sep. 17, 2010, 10:56 AM), <http://www.nlada.net/jseri/blog/gideon-alert-doj-data-confirms-existence-right-counsel-workload-crisis-united-states> (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

33. See discussion *infra* Part III.A (looking specifically at the American Bar

development of the collateral consequences doctrine and the constitutionalization of its significance to effective representation;³⁴ and (3) the burgeoning trend toward data-driven analysis and advocacy within the public defense community.³⁵

A. *The Development of Professional Standards*

First, the defense community has made a lasting contribution to the representation of criminal defendants through the development of professional standards. In particular, the ABA is currently working on the third version of its Criminal Justice Standards (Standards).³⁶ When the Standards were first released in 1968, Chief Justice Warren described them as “the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history.”³⁷ Not only do the Standards define the contours of the prosecution and defense function, but they also provide particular guidance on issues such as capital litigation, mental health, and post-conviction remedies.³⁸ More recently, the ABA’s *Ten Principles of a Public Defense Delivery System*³⁹ (*Ten Principles*) and *Eight Guidelines*

Association’s Criminal Justice Standards as a model of professional standards).

34. See discussion *infra* Part III.B (examining the impact of *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)).

35. See discussion *infra* Part III.C (emphasizing the progress made in compiling empirical assessments of public defenders’ work).

36. *About Criminal Justice Standards*, A.B.A., http://www.americanbar.org/groups/criminal_justice/policy/standards.html (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

37. *Id.*

38. See *id.* (providing the individual standards that are covered by the Criminal Justice Standards).

39. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1–3 (2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/l_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [hereinafter TEN PRINCIPLES] (“The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”).

of *Public Defense Related to Excessive Workloads*⁴⁰ (*Eight Guidelines*) have made an equally significant contribution to the field. With these standards, the ABA has taken an official position, one respected by courts and legislatures, on what constitutes the necessary elements of constitutional representation.⁴¹

In addition to the research and drafting of these standards—a significant achievement in its own right—the ABA’s development of professional standards has had several critical downstream benefits. With established and recognized standards, individual defenders and public defender offices have been able to challenge inadequacies by reference to these standards.⁴² For example, the *Ten Principles* make clear what elements are threshold requirements for an effective public defense system, and when systems fail to comply with the *Ten Principles*, parties have relied upon them in lawsuits seeking systemic reform.⁴³ Similarly, the *Eight Guidelines* articulate a clear roadmap for defenders who are managing excessive workloads; the *Guidelines* address each step, from advising one’s supervisor to seeking redress in court if necessary.⁴⁴ Recently, the *Eight Guidelines* were crucial to the Missouri Public Defender Office’s successful

40. See STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS’N, EIGHT GUIDELINES OF PUBLIC DEFENSE 2–15 (2009), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf [hereinafter EIGHT GUIDELINES] (“These Guidelines are intended for the use of public defense programs and for lawyers who provide the representation, when they are confronted with too many persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules.”).

41. See *supra* notes 39–40 (referencing practice guidelines created to assist public defenders in providing effective representation for their clients).

42. See, e.g., Amended Class Action Complaint at 68, *Hurrell-Harring v. State*, 866 N.Y.S.2d 92 (N.Y. Sup. Ct. 2008) (No. 8866–07), <http://www.nyclu.org/files/Amended%20Class%20Action%20Complaint.pdf> (using the *Ten Principles* of the Public Defense Delivery System as a standard that New York’s indigent defense system has not met).

43. See *id.* (“New York’s indigent defense system does not even conform to the American Bar Association’s *Ten Principles* of Public Defense Delivery System.”).

44. See EIGHT GUIDELINES, *supra* note 40, at 1 (providing a “detailed action plan . . . to which those providing public defense should adhere as they seek to comply with their professional responsibilities”).

challenge of excessive workloads before its state supreme court.⁴⁵ Thus, well-developed professional standards have provided leverage to defenders challenging unconstitutional features of a defense function, as well as entire defense systems.

Moreover, the establishment and recognition of these professional standards has led to a body of case law that defines the contours of effective representation. In *Strickland v. Washington*,⁴⁶ the Supreme Court established the two-pronged test for whether defense counsel's performance was effective, and its opinion relied upon the ABA *Standards for Criminal Justice* regarding the defense function as a proxy for "prevailing norms of practice."⁴⁷ While scholars have uniformly and roundly criticized the toothless nature of the *Strickland* test for effective representation,⁴⁸ it is nonetheless the test upon which defendants must rely, and sometimes defendants do prevail in making ineffective assistance claims.⁴⁹ The fact that the Court has continued to invoke the ABA's professional standards in its *Strickland* case law is a testament to the import of the standards.

Formal training of public defenders has also flowed naturally from the establishment of professional standards. The Public Defender Service (PDS) in the District of Columbia has long been recognized as a model for the provision of defense services, and it offers training each summer for practitioners outside of PDS.⁵⁰

45. See *State ex rel. Mo. Public Defender Comm'n v. Waters*, 370 S.W.3d 592, 608 (Mo. 2012) ("No exception exists to the ethics rules for lawyers who represent indigent persons [T]here is an 'implicit premise that governments . . . never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules.'" (citing EIGHT GUIDELINES)).

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

47. *Id.* at 668.

48. See generally Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 86–100 (2007) (describing criticism of the doctrine but expressing reasons for optimism in recent applications).

49. See *id.* at 88–90 (illustrating a case in which an ineffective assistance claim prevailed under the *Strickland* standard).

50. See *Criminal Defender Training Program*, PUB. DEFENDER SERV., <http://www.pdsdc.org/LegalCommunity/TrainingSummerSeries.aspx> (last visited Apr. 2, 2013) (providing a general description of training offered) (on file with the Washington and Lee Law Review).

More recently, the Southern Public Defender Training Center (SPDTC) was established to address the particularly acute indigent defense crisis in the southeastern region of the country.⁵¹ Public defenders apply to be members of a class that trains with the nonprofit organization over the course of three years.⁵² Training efforts like these rely upon well-recognized professional standards of practice for defenders.⁵³ Thus, the defense community should celebrate the development and dissemination of clear professional standards, for these standards have had and will continue to have a lasting impact on the quality of defense representation.

B. The Development of the Collateral Consequences Doctrine

Second, practitioners and academics have changed the discourse of criminal defense entirely by explaining and constitutionalizing the significance of collateral consequences. Long before the Court's decision in *Padilla v. Kentucky*,⁵⁴ members of the defense community understood that effective representation entailed an obligation to consider all consequences of a conviction—not just those deemed criminal in nature.⁵⁵ And

51. See generally *Why We Are Needed*, S. PUB. DEFENDER TRAINING CTR., <http://thespdtc.org/about/why-we-are-needed/> (last visited Apr. 2, 2013) (“SPDTC was formed to inspire, mobilize and train legal professionals to provide the highest quality defense representation to people unable to afford an attorney.”) (on file with the Washington and Lee Law Review).

52. See *Core Training 101*, THE S. PUB. DEFENDER TRAINING CTR., <http://thespdtc.org/training/core-training-101/> (last visited Apr. 2, 2013) (“Over a three year timespan, participants learn from some of the best current and former public defenders in the country while engaging in interactive workshops.”) (on file with the Washington and Lee Law Review).

53. See generally PUB. DEFENDER SERV., CRIMINAL DEFENDER TRAINING PROGRAM (2012), <http://www.pdsdc.org/resources/summerseries/2012RegistrationMaterials.pdf> (providing an idea of some of the content covered by the summer training for practitioners).

54. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) (holding that counsel must inform their client of the risk of deportation to meet the requirements of the Sixth Amendment).

55. See Josh Bowers, *Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas*, 2 CAL. L. REV. CIRCUIT 52, 53 (2011) (“No doubt, [the *Padilla* decision] came as nothing new to some lawyers in the

yet it was only in the 2010 *Padilla* decision that the Court made explicit the fact that at least some collateral consequences, including the risk of deportation, fall within the purview of the Sixth Amendment right to counsel and are governed by the *Strickland* test for ineffective assistance.⁵⁶ Specifically, the *Padilla* Court held that “[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”⁵⁷ The *Padilla* decision was a tremendous triumph for poor criminal defendants, but it was not an innovation; the defense community had been developing the doctrine of collateral consequences and articulating its importance for years.⁵⁸

And yet it appears that achieving redress for Jose Padilla was just the beginning.⁵⁹ In the wake of the Supreme Court’s decision in 2010, members of the defense community have worked diligently to understand the implications of the *Padilla* decision for practitioners and to enable defenders to meet the mandate of *Padilla*.⁶⁰ Not only has there been a wealth of scholarship on the topic,⁶¹ but most importantly, in just the last two years, the ABA

defense bar who have long understood that they have a professional obligation to attend to all significant consequences of conviction, not just traditional criminal consequences.”).

56. See *Padilla*, 130 S. Ct. at 1482 (applying the *Strickland* test to determine whether the actions of the defense attorney met her professional obligation of effective representation).

57. *Id.*

58. See, e.g., Gabriel J. Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 712–23 (2002) (explaining why the collateral–direct consequences distinction was inconsistent with the Court’s own Sixth Amendment analysis and with prevailing practice norms). The Court’s opinion in *Padilla* made reference to well-developed professional standards, all of which suggested that advising one’s client regarding deportation, among other collateral consequences, was central to effective representation. See *Padilla*, 130 S. Ct. at 1482–83 (“[T]hese standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.”).

59. See *Padilla*, 130 S. Ct. at 1486–87 (finding sufficient reason for Padilla’s counsel to be deemed constitutionally deficient).

60. See *infra* notes 62–66 and accompanying text (highlighting some of the of the defense community’s accomplishments in meeting the *Padilla* standard).

61. See, e.g., Symposium, *Padilla and the Future of the Defense Function*, 39

has created a national, searchable database that allows defenders and policymakers to identify relevant collateral consequences by jurisdiction.⁶² This “National Inventory of Collateral Consequences” is still a work-in-progress, but to date, it reflects the data for nine states and the federal system.⁶³ Users can search the database by categories and keywords.⁶⁴ This interactive resource will help defenders research issues for clients, while enabling policymakers to identify redundant and unnecessary collateral consequences.⁶⁵

The importance of the development of the collateral consequences doctrine cannot be overstated. Not only did the legal academy and defense community succeed in making consideration of such consequences a constitutional imperative,⁶⁶ but also, growing awareness of these consequences may change criminal justice policy in broader ways. Knowledge of the sheer breadth of these collateral consequences is changing and will continue to change how defenders practice, how legislators decide when and whether to increase consequences of a conviction, and what society thinks of as a “minor” crime. In sum, the Court’s decision in *Padilla* was an enormous victory for the defense community, and scholars and defenders are only beginning to

FORDHAM URB. L.J. 1 (2011) (symposium issue dedicated to *Padilla*’s implementation).

62. *National Inventory of the Collateral Consequences of Conviction*, A.B.A., <http://www.abacollateralconsequences.org/> (follow the link to enter the site; then click to agree to the terms and conditions and enter the site) (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

63. *Id.*

64. *Id.*

65. *See National Inventory Of The Collateral Consequences Of Conviction: Project Description*, A.B.A. 3, <http://www.abacollateralconsequences.org/CollateralConsequences/docs/ProjectDescription.gp.ml.pdf> (“The website will make it possible for criminal and civil lawyers to determine which collateral consequences are triggered by particular categories of offenses, for affected individuals to understand the limits on their rights and opportunities, and for lawmakers . . . to understand the full measure of . . . sanctions and disqualifications.”).

66. *See supra* note 58 and accompanying text (detailing the efforts of the defense community in developing an emphasis on the collateral consequences of defense counsel’s actions).

understand the ways in which it will change our criminal justice system.

C. The Trend Toward Data-Driven Analysis and Advocacy

Historically, in many pockets of the country, defenders operated below the “data radar.”⁶⁷ There was no independent statewide agency overseeing the defense function; there was no way to track caseloads; and relatedly, there was no way for defenders to challenge excessive caseloads as a violation of their ethical duties.⁶⁸ In some parts of the country, this is still true today.⁶⁹ One of the more recent and most promising accomplishments within the defense community, however, is its movement toward data-driven analysis and advocacy.⁷⁰

Across the country, there is great variety when it comes to the question of whether and how defenders measure caseloads.⁷¹ Some offices, like PDS in D.C., not only have statutorily-set caseloads, but they have a refined system for managing the assignment of new cases and distributing the office’s workload.⁷²

67. See *infra* notes 68–69 (providing a look at some of the inadequacies of data collection in areas of the United States).

68. See, e.g., FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 184, <http://www.pacourts.us/NR/rdonlyres/EC162941-F233-4FC6-9247-54BFE3D2840D/0/FinalReport.pdf> (“Many of the smaller counties could not even estimate their caseloads; other counties collected certain data, but could not break down the data into types of cases. Even Philadelphia, the largest county in the Commonwealth, uses a strictly manual case tracking system.”).

69. See MAREA BEEMAN, USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 10 (2012), <http://www.txcourts.gov/tidc/pdf/SustainingandImprovingPublicDefenseWithData082912.pdf> (providing guidance on how to develop the definition of a case to those public defender offices that have not yet established a method for collecting that type of data).

70. See EIGHT GUIDELINES, *supra* note 40, at 2 (listing one of guidelines for public defense as considering the time and tasks dedicated to each case, which can be monitored through keeping accurate data).

71. See *infra* notes 72–73 and accompanying text (providing examples of some of the different procedures set in place for data collection).

72. See NORM LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 205–13 (2011), http://www.americanbar.org/content/dam/aba/publications/books/lis_sclaid_def_securing_reasonable_caseload_s.authcheckdam.pdf (describing PDS’s governing statute and caseload

In other, typically smaller and more rural offices, there is no system in place for measuring workloads, and there is no clear definition of what constitutes a case.⁷³ National defender organizations and statewide defender offices are trying to change these patchwork methods of data collection and analysis across the country.⁷⁴

The National Legal Aid & Defender Association (NLADA) has developed a committee of academics and practitioners whose charge is to identify best practices regarding defender data collection and to disseminate this information nationally.⁷⁵ The data collection and research that has occurred within the North Carolina Office of Indigent Defense Services (IDS) serves as a model of what jurisdictions can ultimately do with good data, and its work has served as the starting point for the NLADA committee.⁷⁶ Created in 2000 through legislation, IDS has studied several important aspects of the North Carolina system, including

comparative resources available to prosecution and indigent defense; the time required to resolve criminal cases by type of attorney (public defender, private assigned counsel and retained); the impact on public safety and indigent defense costs of reclassifying minor misdemeanor offenses that rarely or never result in jail sentences, and an annual comparative review of public defender and private assigned counsel costs.⁷⁷

While the NLADA committee has only recently begun its work, the short-term goal is to implement similar data collection and

management).

73. See BEEMAN, *supra* note 69, at 10 (providing an explanation of why it is necessary to have a clear definition of what a case is when tracking data).

74. See *id.* at 3–15 (creating guidelines for maintaining an effective and helpful data collection system in a public defender office).

75. See NATIONAL RESEARCH & DATA ANALYSIS ADVISORY COMMITTEE MEMBERS (2012), http://www.ncids.org/Systems%20Evaluation%20Project/Projects/RDA_Members.pdf (listing the members of the National Research & Data Analysis Advisory Committee). This committee is in the early stages of its efforts, and in full disclosure, the author is a member of the committee.

76. See BEEMAN, *supra* note 69, at 16–18 (examining North Carolina's data collection program and how the state was able to use data to disprove inaccuracies provided by the Conference of District Attorneys).

77. *Id.* at 16.

analysis models in several test-pilot jurisdictions. In the long run, the committee seeks to enable defender offices nationwide to collect and leverage good data by creating a “toolkit” that walks the office through the process from start to finish. As chief defenders know, only with good data may lawyers decline new case assignments, garner adequate financial resources in the budget process, and achieve systemic reform.⁷⁸

Recent public defense lawsuits have demonstrated the importance of high-quality data.⁷⁹ I discuss the recent lawsuit in Missouri and the pending suit in Florida in Part IV.B,⁸⁰ but it is worth mentioning here that neither suit—one of which the state defender won and the other of which is pending before the state supreme court—would have gotten off the ground without good data.⁸¹ Courts want to know exactly how many cases defenders are handling; how long they are spending on each case; what is the relative difficulty of each case; and how chief defenders are allocating office-wide resources to distribute the workload evenly. Defenders are recognizing that, if they are to seek relief in court, they must have the data to demonstrate their claims that lawyers have far too many cases and cannot provide constitutional representation to their clients.⁸²

While the shift toward empirical assessment within defender offices is relatively new and poses significant fiscal and training challenges, especially in smaller, cash-strapped jurisdictions, it does represent the future of indigent defense reform.⁸³ The

78. *See id.* at 2 (“Time-strapped, budget-minded legislators with little understanding of criminal defense practice look to clear indicators and data on which to assess indigent defense system needs.”).

79. *See infra* Part IV.B (discussing the impact that defender’s workload data has on the outcome of court decisions).

80. *See infra* Part IV.B (looking at a case in Missouri and another in Florida in which defenders used data illustrating their caseload to support their claim).

81. *See* BEEMAN, *supra* note 69, at 22 (listing some of the data that may be requested during litigation challenging the caseload of a public defender office).

82. *See id.* (“Data collected by public defender programs become essential in the event litigation is brought to challenge caseload or any other facet of a program.”).

83. *See supra* notes 73–74 and accompanying text (looking at the status of some smaller and underfunded public defender’s offices and the work that is being done to improve the offices).

defense community must sustain this shift toward data-driven analysis and advocacy.

In discussing these three developments, I do not mean to imply that these are the only accomplishments within the defense community in the post-*Gideon* era. Surely, there are many others that I have not included here, but I have focused on these three because I view them as having made a lasting and far-reaching impact on the defense function nationwide. I also think that these three accomplishments will be important to the next fifty years of enforcing *Gideon*—the subject to which I now turn.

IV. The Next Fifty Years of Enforcing the Right to Counsel

Despite thoughtful reform suggestions from the bar and the academy, the entrenched crisis in indigent defense persists today, and there is no reason to think that dramatic improvement is on the near horizon. If we accept this reality, we must ask where our efforts are most effectively deployed in the future. In this Part of the Article, I offer three suggestions as to how the defense community might re-prioritize, and, in some cases re-think altogether, its reform initiatives. In particular, I suggest that: (1) defenders should seize upon the political and economic climate to pursue diversion and decriminalization;⁸⁴ (2) not all litigation strategies are created alike, and systemic suits should be exclusively a measure of last resort;⁸⁵ and (3) the defense community needs to explore the role that nonlawyers can play in protecting the rights of criminal defendants.⁸⁶

84. See *infra* Part IV.A (looking at how the current political and economic climate creates an opportunity for the public defense community to pursue decriminalization of lesser crimes).

85. See *infra* Part IV.B (suggesting the types of claims that public defenders should be pursuing in court, and which types should be avoided).

86. See *infra* Part IV.C (examining the flaws of appointing too many lawyers to cases in which a nonlawyer could fill the same role).

*A. Diversion and Decriminalization Should Be Pursued . . . and
Might Even Be Achievable*

One way to relieve some of the pressure on the public defense function is to take cases out of the system through decriminalization and diversion. Scholars have expressed mixed sentiments about these ideas in the past; some academics think that such efforts will never happen or will have little impact on the system even if they do, while others have been more optimistic.⁸⁷ I want to suggest, though, that timing is everything, and that today's political and economic climates make these efforts more achievable than they have been in recent history.

The recession and continued sluggish economy have changed voter sentiment regarding criminal justice issues, and politicians are taking note.⁸⁸ California provides the clearest example.⁸⁹ There are a little over 230,000 people incarcerated in California's jails and prisons.⁹⁰ The explosion in the state's prison population is a relatively recent phenomenon,⁹¹ and the state's corrections budget has ballooned along with it.⁹² The state's 2000–2001

87. Compare Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 249–65 (2007) (demonstrating that decriminalization has happened and is sustainable despite conventional wisdom), with Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719–30 (2005) (explaining incentives for various actors to increase criminal sanctions).

88. See Inimai Chettiar, *Criminal Justice Reform Can Help With State Fiscal Woes*, CENTER FOR AM. PROGRESS (Jan. 11, 2012), <http://www.americanprogress.org/issues/civil-liberties/news/2012/01/11/10970/criminal-justice-reform-can-help-with-state-fiscal-woes/> (last visited Apr. 2, 2013) (looking at how the recession has encouraged legislators from both parties to make changes in criminal justice) (on file with the Washington and Lee Law Review).

89. See discussion *infra* notes 90–91 and accompanying text (illustrating the changes in the criminal justice structure in California).

90. SENTENCING PROJECT, <http://www.sentencingproject.org/map/map.cfm> (roll over the map to see the statistics for California) (last visited Apr. 2, 2013) (counting both jail and prison inmates, The Sentencing Project finds there are 231,163 people incarcerated in California) (on file with the Washington and Lee Law Review).

91. JOSEPH M. HAYES, PUB. POL'Y INST. OF CAL., CALIFORNIA'S CHANGING PRISON POPULATION (2011), http://www.ppic.org/content/pubs/jtf/JTF_Prisoners_JTF.pdf (describing a 73% prison population increase between 1990 and 2005).

92. See *infra* notes 93–94 and accompanying text (illustrating the increase in California's budget for corrections between the years 2000 and 2012).

budget allocated 5.8% of total expenditures to corrections and 11.5% to higher education.⁹³ In contrast, the 2012–2013 budget allocated roughly the same percentage of total expenditures to corrections and to higher education—approximately 7%.⁹⁴

The state is already in the process of complying with a Supreme Court order to reduce its prison population by nearly one-third,⁹⁵ and this past November, California voters weighed in on two important criminal justice issues: the state’s three-strikes law and its use of the death penalty. The referendum to repeal the state’s death penalty failed, but only by a margin of six points.⁹⁶ Fifty-three percent of voters supported the death penalty, and as the manager of the campaign to repeal the death penalty noted: “This issue is not going away [Fifty-three]] percent is not a mandate for carrying out executions. This state is clearly evenly divided on the death penalty.”⁹⁷ Also in November,

93. CAL. DEP’T OF FIN., GOVERNOR’S BUDGET HIGHLIGHTS, 2000–2001, at 83 (2000), <http://www.dof.ca.gov/budget/historical/2000-01/documents/Highlights00-01.pdf> (showing corrections expenditures as 5.8% of total expenditures and higher education as 11.5%).

94. CAL. DEP’T OF FIN., GOVERNOR’S BUDGET SUMMARY—2012–2013, at 19 (2012), <http://www.ebudget.ca.gov/pdf/BudgetSummary/SummaryCharts.pdf> (showing 7.8% of expenditures going toward corrections and 7.1% going to higher education).

95. See *Brown v. Plata*, 131 S. Ct. 1910, 1943–47 (2011) (requiring the California prison population reduction); see also CAL. DEP’T OF CORRECTIONS & REHABILITATION, CORRECTIONS: YEAR AT A GLANCE 2011, at 5 (2011), http://www.cdcr.ca.gov/News/docs/2011_Annual_Report_FINAL.pdf (discussing the state’s prison population reduction effort).

96. See Howard Mintz & Matt O’Brien, *Proposition 34: Death Penalty Repeal Fails*, SAN JOSE MERCURY NEWS (Nov. 7, 2012, 3:17 PM), http://www.mercurynews.com/elections/ci_21943752/california-proposition-34-voters-decide-whether-keep-states (last visited Apr. 2, 2013) (“Proposition 34 lost by about 6 percentage points, dimming the hopes of death penalty opponents who were trying to abolish the death penalty in California and clear the largest death row in the nation.”) (on file with the Washington and Lee Law Review).

97. *Id.* Indeed, given its costs, voters may be asked to revisit the death penalty issue in the years to come. In this past election year, some vocal proponents of the repeal were one-time capital punishment supporters who evolved to view its costs as unjustifiable. For example, former Los Angeles District Attorney, Gil Garcetti, explained: “I was a supporter and believer in the death penalty, but I’ve begun to see that the system doesn’t work and it isn’t functional It costs an obscene amount of money.” Ashby Jones & Steve Eder, *Costs Test Backing for Death Penalty*, WALL ST. J., Oct. 5, 2012, at A3.

California voters elected to amend the state's three-strikes law so that an offender's third strike must be violent in order to trigger the twenty-five-years-to-life sentence.⁹⁸ An overwhelming majority of the electorate voted to enact this reform, in large part because of the state's enormous corrections budget.⁹⁹

While California is unique in some respects,¹⁰⁰ it is not the only state where voter sentiments are evolving on criminal justice issues. The people of Washington and Colorado recently voted to legalize marijuana,¹⁰¹ while lawmakers in Utah and Montana are seeking to abolish the death penalty in large part because of its costs.¹⁰² In recent years Texas, Kansas, Mississippi, South Carolina, Kentucky, and Ohio have all passed bipartisan criminal justice reform legislation designed to reduce prison populations and costs.¹⁰³ These bills have mandated nonprison punishments

98. See Don Thompson, *Initiative Asks for Softening of Three Strikes Law*, SAN JOSE MERCURY NEWS (Oct. 7, 2012, 12:20 PM), http://www.mercurynews.com/news/ci_21720146/initiative-asks-softening-3-strikes-law (last visited Apr. 2, 2013) (explaining that California's Proposition 36 would "modify the nation's toughest three-strikes law so only a violent or serious third felony would lead to a life sentence") (on file with the Washington and Lee Law Review).

99. See Tracey Kaplan, *California Proposition 36: Voters Overwhelmingly Ease Three Strikes Law*, SAN JOSE MERCURY NEWS (Nov. 7, 2012, 3:02 AM), http://www.mercurynews.com/elections/ci_21943951/prop-36-huge-lead-early-returns?IADID=Search-www.mercurynews.com-www.mercurynews.com (last visited Apr. 2, 2013) (explaining that the California measure was passed by more than a 20% point margin) (on file with the Washington and Lee Law Review).

100. For example, California has the largest death row population in the nation, and its population is nearly twice the size of the next largest death row in Florida. See *Death Row Inmates by State*, DEATH PENALTY INFO. CTR. (Oct. 1, 2012), <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year> (last visited Apr. 2, 2013) (showing the figures for inmates on death row in each state as of October 1, 2012, with California having 724 on its death row and Florida having 411 on its death row) (on file with the Washington and Lee Law Review).

101. See Emily Bazelon, *Don't Touch Their Stash!: Why Eric Holder Should Let Colorado and Washington Experiment with Drugs*, SLATE (Nov. 7, 2012, 4:25 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/colorado_and_washington_legalize_marijuana_will_the_obama_administration.html (last visited Apr. 2, 2013) (discussing the interaction of these state laws with federal drug policy) (on file with the Washington and Lee Law Review).

102. See generally Jones & Eder, *supra* note 97.

103. See generally AM. CIV. LIBERTIES UNION, SMART REFORM IS POSSIBLE:

for certain offenses and expanded the terms of parole eligibility.¹⁰⁴ Thus, today more than ever in recent history, voters may be amenable to criminal justice reforms that divert offenders away from the system in order to free up tax dollars.

At the same time, the political pressure to be “tough on crime” may be abating. In recent years, a number of conservative politicians have taken progressive positions on criminal justice matters, and in the process they have created the space for bipartisan reform. For example, while in office, Maryland’s Governor Ehrlich instituted an innovative approach to executive clemency and standardized the process.¹⁰⁵ “From 2003–2007, the Republican Governor reviewed 444 applications and granted 228 pardons[]; t]o date, 99% of those pardoned have not re-offended”¹⁰⁶ In fact, in the last year, two of three Governors who have received significant attention regarding executive clemency grants have been Republicans.¹⁰⁷

STATES REDUCING INCARCERATION RATES AND COSTS WHILE PROTECTING COMMUNITIES (2011), www.aclu.org/files/assets/smartreformispossible.pdf.

104. See *id.* at 11–14 (providing an overview of the reforms).

105. See Press Release, Maryland Governor Robert L. Ehrlich, Jr., Governor Ehrlich Clarifies Executive Clemency Process (Aug. 29, 2003), <http://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/001000/001015/unrest/20051987e.html> (last visited Apr. 2, 2013) (detailing the new clemency process) (on file with the Washington and Lee Law Review).

106. Proposal for the Ehrlich Center for Criminal Justice Policy 1 (on file with the Washington and Lee Law Review); see also Robert L. Ehrlich Jr., *Obama’s Unpardonable Neglect of Clemency: Robert Ehrlich, Who Knows Something About the Pardon Process, Questions President Obama’s Commitment to Fairness*, BALT. SUN (Jan. 13, 2013), http://articles.baltimoresun.com/2013-01-13/news/bs-ed-ehlich-pardons-20130113_1_clemency-petitions-unpardonable-neglect-activism (last visited Apr. 2, 2013) (providing Governor Ehrlich’s pardon statistics) (on file with the Washington and Lee Law Review).

107. The three Governors who have received significant coverage in the last year are Oregon’s Governor Kitzhaber, who is a Democrat, and Haley Barbour of Mississippi and Ohio’s John Kasich, both of whom are Republicans. See Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1147–50 (2012) (discussing the governors’ clemency actions). Recently, however, Governor Barbour has received criticism surrounding a deadly shooting allegedly committed by a man Barbour pardoned during his last week in office. See Kari Huus, *Man Pardoned by Gov. Haley Barbour Linked to Deadly Barbeque Shootout*, ABCNEWS.COM (Jan. 12, 2013, 1:21 AM), http://usnews.nbcnews.com/_news/2013/01/12/16471961-man-pardoned-by-gov-haley-barbour-linked-to-deadly-barbeque-shootout (last visited Apr. 2, 2013) (discussing the shooting) (on file with the Washington and Lee Law Review).

These individual actions are consistent with the proposals of the Right on Crime organization. Led by prominent Republicans, including Newt Gingrich, Jeb Bush, and Ed Meese,¹⁰⁸ the organization seeks to promote criminal justice reform that is consistent with small government, personal responsibility, and a results-oriented approach to public policy.¹⁰⁹ Finally, voters today seem entirely uninterested in criminal justice policy,¹¹⁰ and that reality may provide some room for maneuvering in contrast to times when politicians have felt scrutinized in this arena.¹¹¹ Criminal justice reform may be emerging as a truly bipartisan issue.¹¹²

In sum, there are a number of variables that make today's climate ripe for criminal justice reform. Defenders should seize upon this moment and pursue reform measures that would permanently take some pressure off of the defense function going forward.

B. Surgical Litigation Is Better than Systemic Litigation

Defenders also need to recognize that the era of structural public defense litigation—that is, suits that argue entire public

108. See *id.* at 1–2 (listing the Statement of Principles's signatories).

109. See generally *Statement of Principles*, RIGHT ON CRIME (Oct. 22, 2012), <http://www.rightoncrime.com/wp-content/uploads/2012/11/RightOnCrime-Statement-of-Principles.pdf>.

110. For example, crime and sentencing policy does not even make the top list of voter priorities. See Jeffrey M. Jones, *Americans Want Next President to Prioritize Jobs, Corruption*, GALLUP POL. (July 30, 2012), <http://www.gallup.com/poll/156347/americans-next-president-prioritize-jobs-corruption.aspx> (last visited Apr. 2, 2013) (discussing voter priorities for the 2012 presidential election) (on file with the Washington and Lee Law Review).

111. See Doug Berman, *Obama Hasn't Reformed Criminal Justice—Could Romney Do Better?*, DAILY BEAST (Apr. 13, 2012, 12:00 AM), <http://www.thedailybeast.com/articles/2012/04/13/obama-hasn-t-reformed-criminal-justice-could-romney-do-better.html> (last visited Apr. 2, 2013) (discussing the historical reality that Democrats especially felt constrained in this arena) (on file with the Washington and Lee Law Review).

112. See, e.g., Catholic University Law Review, *Bipartisan Criminal Justice Reform*, <http://lawreview.law.edu/symposium.cfm> (last visited Apr. 2, 2013) (explaining its 2013 symposium) (on file with the Washington and Lee Law Review).

defense systems regularly violate the constitutional rights of their clients—is waning.¹¹³ Future litigation efforts to improve public defense systems need to be much more surgical in nature. In prior works I have discussed and promoted the efforts of litigants who bring systemic suits challenging entire public defense functions,¹¹⁴ and there have been some recent successes in systemic public defense litigation¹¹⁵—so one may query why I am suggesting a shift away from these suits. The answer lies in resource constraints and the obligation to choose wisely how resources are deployed in the years to come.

Why are system-wide challenges perhaps not the best use of resources? To begin, these suits are incredibly time-consuming and expensive. In New York, lawyers recently spent three years litigating the justiciability of a class-action challenge to New York’s county-based defense system.¹¹⁶ In addition, even those few systemic suits that have been “successful”—and by that I mean suits that have been resolved either through a consent decree or a favorable court opinion—require perpetual enforcement.¹¹⁷ Pennsylvania provides a good case in point.

113. A discussion of suits of this type is outside the scope of this brief Article. For an overview of this type of litigation, see generally Drinan, *Third Generation*, *supra* note 15, at 4 28–78 (providing an in-depth look at the historical transition of structural public defense litigation); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Quality of Criminal Justice Services*, 63 U. PITT. L. REV. 293, 310–46 (2002) (discussing the various legal challenges used in this type of litigation); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1736–53 (2005) (discussing the effects of three significant suits in structural public defense litigation).

114. See Drinan, *Third Generation*, *supra* note 15, at 478 (“[R]ecent [systemic] suits designed to improve indigent defense systems have enjoyed greater success than their predecessors, and there is good reason to think that future litigants bringing the third generation of these suits can capitalize—and even improve—upon these recent suits.”).

115. See *id.* at 458–62 (discussing those suits that have been successful and what attributes they share); see also *Hurrell-Harring v. State*, 930 N.E.2d 217, 220–21 (N.Y. 2010) (finding cognizable a class-action claim that a county-based public defense system was unconstitutional).

116. See *Hurrell-Harring*, 930 N.E.2d at 220–21 (rendering the court’s decision on justiciability three years after the complaint was filed).

117. See Reddy, *supra* note 28, at 33 (“The ultimate success of such suits thus depends almost exclusively on the breadth of the resulting judicially ordered relief, as policy-makers will likely do little more than is necessary to

Despite the ACLU's victory in a 1996 lawsuit challenging Allegheny County's Public Defender Office, lawyers spent years attempting to enforce the consent decree in that case.¹¹⁸ And today, things are about as bad as they were when the suit was filed.¹¹⁹ Likewise, in New York, the ACLU secured a very favorable decision from the state's highest court in its challenge of the county-based public defense system.¹²⁰ Yet, it is unclear whether that suit will generate lasting reform.¹²¹ Judicial victories still require legislative funding to breathe life into the court's holding—funding that must be fought for annually and funding that, history tells us, will be inadequate. There is simply little money to be had in many jurisdictions, and legislators may rationally choose to spend it on issues other than indigent defense¹²²—whether that choice is constitutional or not.

There may still be a place for these systemic suits, but they need to be seen for what they are: a course of last resort. For example, in jurisdictions where counsel can demonstrate

meet their obligations under the terms of the court-ordered remedy.”).

118. See *id.* at 28–30 (discussing the difficulties in implementing the consent decree, which continued until 2005 when the court's jurisdiction over the case finally ceased).

119. See David Carroll, *Gideon Alert: State-Sanctioned Commission Finds Pennsylvania Defaulting on the Sixth Amendment*, NAT'L LEGAL AID & DEFENDER ASS'N (Dec. 12, 2011, 2:46 PM), <http://www.nlada.net/jseri/blog/gideon-alert-state-sanctioned-commission-finds-pennsylvania-defaulting-sixth-amendment> (last visited Apr. 2, 2013) (discussing the constitutional deficiencies of the Pennsylvania public defender system) (on file with the Washington and Lee Law Review).

120. See *Hurrell-Harring*, 930 N.E.2d at 225–27 (ruling in favor of the petitioners).

121. See David Carroll, *Gideon Alert: Budget Deal Threatens to Gut New York Indigent Defense Efforts Before They Begin*, NAT'L LEGAL AID & DEFENDER ASS'N (Mar. 30, 2011, 12:31 PM), <http://www.nlada.net/jseri/blog/gideon-alert-budget-deal-threatens-gut-new-york-indigent-defense-efforts-they-begin> (last visited Apr. 2, 2013) (describing mixed results to date) (on file with the Washington and Lee Law Review).

122. See Brown, *supra* note 14, at 809 (“Even legislators who concede indigent defense is worthy and important must still rank its priority for marginal budget dollars relative to funds for medical care for the poor, foster care services, improvement of substandard schools, or toxic clean-up of grave environmental health risks.”).

constructive denial of counsel altogether,¹²³ such a suit may be not only worthwhile but also necessary. Moreover, in jurisdictions where right to counsel violations are egregious and longstanding, the Department of Justice's recently developed Access to Justice Initiative (ATJ) may be willing to lend support and leverage.¹²⁴ If, for example, lawyers could demonstrate constructive denial of counsel with good data and ATJ is willing to file an amicus brief in the suit,¹²⁵ the resource expenditure may be justified. In many instances, though, these suits will drain the resources of the defense function and require ongoing enforcement efforts—efforts that may be fruitless.

The kind of litigation that is worthwhile—the kind that deserves priority in the next few decades—is the kind that shores up the inherent authority of the defense function in the first place. Missouri, a state with an indigent defense function that has been struggling for years because of insufficient funding and excessive caseloads,¹²⁶ provides a good case in point. In 2007, the Missouri Public Defender Commission adopted a protocol for determining the maximum number of cases that each of its offices could effectively handle.¹²⁷ In 2010, the state Public Defender tried unsuccessfully to enforce this protocol, but a trial court judge continued to appoint the Public Defender to new cases.¹²⁸ In

123. See, e.g., *Hurrell-Harring v. State*, 930 N.E.2d 217, 225 (N.Y. 2010) (finding that the complaint stated a claim for constructive denial of counsel).

124. For a general description of this office, see *The Access to Justice Initiative*, U.S. DEP'T OF JUST., <http://www.justice.gov/atj/index.html> (last visited Apr. 2, 2013) (describing ATJ's mission) (on file with the Washington and Lee Law Review).

125. See, e.g., *ATJ's Two-Year Anniversary Major Accomplishments*, U.S. DEP'T OF JUST. 1, 1–3 (June 2012), <http://www.justice.gov/atj/accomplishments-7-9-12.pdf> (describing the ways in which the ATJ provides assistance and resources for indigent defense).

126. See *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 875–77 (Mo. 2009) (en banc) (discussing the history of public defenders and the system's challenges).

127. See *id.* at 878 (“The rule authorizes the commission to ‘maintain a caseload standards protocol identifying the maximum caseload each district office can be assigned without compromising effective representation.’” (citation omitted)).

128. See *State ex rel. Mo. Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012) (en banc) (“[T]he trial court said it believed it ‘had no choice’ but to appoint a public defender, regardless of the public defender’s ability to

doing so, the trial court effectively gutted the defender office's workload protocol altogether.¹²⁹

On appeal, the Missouri Supreme Court considered whether the Public Defender, under its current regulations, could refuse new cases when its workload prevents effective representation of additional clients.¹³⁰ In a 4–3 decision, the state supreme court held that the Public Defender acted pursuant to valid regulatory authority in devising its workload protocol, and thus its refusal of additional cases was lawful.¹³¹ Moreover, the court held that the Sixth Amendment—and prevailing ethical standards—requires that indigent defendants have effective, and “not just pro forma, representation.”¹³² Thus, the Missouri Supreme Court upheld the legitimacy of the commission's rulemaking authority and its ability to determine when defender offices were at full workload capacity.¹³³

A similar suit is pending before the Florida Supreme Court.¹³⁴ There, the Miami-Dade County defender has been fighting for years to protect the right of defenders to refuse new cases, withdraw from representation when they are operating under excessive workloads, or both.¹³⁵ In the case before the

provide competent and effective representation in another case, . . . as the court could identify no other realistic mechanism by which to provide other counsel.”).

129. *See id.* at 600–01 (describing the trial court's appointment of the public defender's office despite the defender's objection that the appointment violated the workload protocol).

130. *See id.* at 605 (describing the issue).

131. *See id.* at 612 (“[B]ecause the trial court did not find the regulation invalid or inapplicable, it erred in ordering the public defender to disobey it.”).

132. *Id.* at 607.

133. *See id.* at 612 (stating that the commission's protocol “was promulgated . . . pursuant to authority vested in it by the legislature, and there has been no showing that the rule is invalid or was applied improperly”).

134. *See* Editorial, *Florida Defense Attorneys Overloaded*, TAMPA BAY TIMES (June 6, 2012, 5:22 PM), <http://www.tampabay.com/opinion/editorials/article/1233955.ece> (last visited Apr. 2, 2013) (explaining that the Florida Supreme Court will decide “whether a public defender's office may obtain relief from caseloads so excessive that attorneys are unable to meet basic professional standards of representation”) (on file with the Washington and Lee Law Review).

135. *See id.* (describing the ongoing legal battle, which started four years ago).

Florida Supreme Court, the defender at the heart of the suit handled more than 400 felony cases per year—a caseload well in excess of nationally recognized standards.¹³⁶

These claims are precisely the types of claims that defender offices should pursue in the future. When defender offices win these suits, the victory is complete. No perpetual battle for funding awaits them. Rather, if the legislature starves the defense function of resources, the defender office will have the inherent authority to refuse cases and to represent clients only when it can do so in a constitutional manner.¹³⁷

C. The Defense Community Needs to Embrace Nonlawyers as Guardians of the Right to Counsel

Finally, the defense community needs to be more expansive in its view of what nonlawyers can do to protect the rights of poor criminal defendants. For the last few decades, criminal defense advocates have consistently sought and, in many ways, have achieved an expansion of the Sixth Amendment right to counsel in criminal cases.¹³⁸ At the same time, lawyers for the poor have sought the creation of a civil *Gideon* doctrine that would provide state-funded lawyers in many civil contexts.¹³⁹ Yet, as I discussed in Part II, even the Court’s well-articulated *Gideon* principles have never been fully implemented for criminal defendants.¹⁴⁰

136. *See id.* (“National standards put maximum annual caseloads at 150. Assistant public defenders in Miami-Dade were responsible for 400 or more felony cases.”); *see also* Initial Brief on the Merits, Pub. Defender, Eleventh Jud. Cir. of Fla. v. State, No. 10-1349, 2011 WL 7099915, at *11 (Fla. Dec. 21, 2011) (noting that the trial judge’s order determined that “the caseload of the felony public defenders in the Eleventh Judicial Circuit . . . far exceeds any recognized standard for the maximum number of felony cases a criminal defense attorney should handle annually”).

137. *See, e.g., State ex rel. Mo. Pub. Defender Comm’n v. Waters*, 370 S.W.3d 592, 611–12 (Mo. 2012) (en banc) (upholding the state public defender office’s refusal of the court’s appointment of additional cases).

138. *See* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 968–69 (2012) (noting Sixth Amendment expansions over the past century).

139. *See id.* at 977–80 (discussing the civil *Gideon* movement).

140. *See supra* notes 22–32 and accompanying text (discussing the status of

Further, just recently, the Supreme Court quashed the hopes of the civil *Gideon* movement, holding that the Due Process Clause does not require a lawyer to help a civil litigant—even one facing jail time.¹⁴¹

The defense community needs to retreat from the position that “[i]f appointing some lawyers is good, then appointing more lawyers must be better.”¹⁴² Budget constraints and excessive caseloads have made triage an essential component of modern public defense.¹⁴³ Defenders may have different methods for sorting and prioritizing clients, but as a practical matter, when an attorney is representing more than 400 felony cases¹⁴⁴ or more than 1,000 misdemeanor cases per year,¹⁴⁵ there is no avoiding the practice. As one public defender in rural Minnesota explained, “[E]ffective public defense requires a triage approach: quickly identifying which cases have legal or factual issues, and which cases are more likely to go to trial, then focusing time and resources on those cases.”¹⁴⁶ Another defender says: “We’re going to prioritize legal representation for the people who are already in custody. They’ve lost their freedom. Justice for people who are not in custody will have to be delayed.”¹⁴⁷

the right to counsel doctrine at present).

141. See *Turner v. Rogers*, 131 S. Ct. 2507, 2519–20 (2011) (discussing procedural safeguards that can stand in for a lawyer).

142. Barton & Bibas, *supra* note 138, at 968.

143. The word “triage” is commonly used in medicine, and “refers to the systematic sorting, assigning of priority order, and allocation of resources to those in need.” Meehan Rasch, *A New Public-Interest Appellate Model: Public Counsel’s Court-Based Self-Help Clinic and Pro Bono “Triage” for Indigent Pro Se Civil Litigants on Appeal*, 11 J. APP. PRAC. & PROCESS 461, 465 n.13 (2010) (internal quotation marks omitted).

144. See *supra* notes 134–36 and accompanying text (discussing the Miami-Dade caseload litigation).

145. See ROBERT C. BORUCHOWITZ ET AL., NAT’L ASSOC. OF CRIM. DEF. LAW., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* 21 (2009), <http://www.nacdl.org/reports/misdemeanor/> (click on PDF link to view report) (stating jurisdictions in which public defenders handle more than 1,000 misdemeanor cases per year).

146. J.D. Schmid, *A Day in the Life of a Public Defender*, INTHEFRAY MAG. (Feb. 3, 2009), http://inthe fray.org/joomla/index2.php?option=com_content&do_pdf=1&id=3188 (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review).

147. Bob Collins, *A Day in the Life of a Minnesota Public Defender*,

At the same time, there is some evidence that certain defendants fare better—or at least as well—on their own than with public defense counsel. Professor Hashimoto finds that, in federal court, pro se misdemeanor defendants fare better in most cases than those who have counsel.¹⁴⁸ Other scholars have shown that lay advocates can be an effective alternative to legal counsel.¹⁴⁹ Rather than persisting in the pursuit of more lawyers for more defendants, the defense community should explore opportunities for nonlawyers within the indigent defense function. This is a matter of practical reality.

The recent movement to secure the right to counsel at bail hearings in Maryland provides a good case in point. Maryland's bail process has long been viewed as unconstitutional and unfair.¹⁵⁰ Historically, arrested individuals appeared before a commissioner, whose job it was to determine if there was probable cause for the arrest and to set bail, if necessary.¹⁵¹ Public defenders did not participate in the initial commissioner appearance.¹⁵² In cases in which bail was set, defendants were entitled to a bail review hearing before a judge usually on the next business day, but even then, public defenders represented

MPRNEWS (July 1, 2008, 12:45 PM), http://minnesota.publicradio.org/collections/special/columns/news_cut/archive/2008/07/a_day_in_the_life_of_a_minneso.shtml (last visited Apr. 2, 2013) (quoting John Stewart, head of the state public defender's office) (on file with the Washington and Lee Law Review).

148. See Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 489 (2007) (“[P]ro se misdemeanor defendants in federal court appear both to have lower conviction rates and to receive more favorable sentencing outcomes than represented misdemeanor defendants.”).

149. See, e.g., Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH L. REV. 113, 127–28 (2012) (discussing Herbert Kritzer's work in *Legal Advocacy: Lawyers and Nonlawyers at Work*).

150. See Douglas L. Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1728–29 (2002) (describing the inequalities and injustices in Maryland's bail process as it was over a decade ago).

151. See *What Happens When You Are Arrested for a Crime?*, MDCOURTS.GOV (Dec. 2003), <http://www.courts.state.md.us/district/forms/criminal/dccr002br.html> (last visited Apr. 2, 2013) (listing the duties of the commissioner, including to inform the defendant of the charges against them and to “determine[] whether bail should be set”) (on file with the Washington and Lee Review).

152. See *id.* (“Public defenders do not appear before the commissioner.”).

defendants in only a small sub-set of the state's jurisdictions.¹⁵³ In 2006, a class of plaintiffs who had been denied counsel at bail hearings challenged the protocol as a violation of Maryland state law and the federal Constitution.¹⁵⁴

The state's Public Defender, also a named defendant in the suit, agreed with the plaintiffs' legal claims, but asserted from the get-go that his office would not be able to provide the scope of representation that the defendants were seeking given budget constraints.¹⁵⁵ In January, 2012, the Maryland high court held that the plaintiffs "enjoy a right under [state law] to be represented at any bail hearing conducted before a Commissioner."¹⁵⁶ Immediately after the Maryland Court of Appeals's decision, the Public Defender sought a stay in the court's decision, citing again his office's inability to handle the 180,000 bail hearings that happen each year.¹⁵⁷

There is no disputing that a lawyer makes a difference in the outcome of a bail hearing.¹⁵⁸ The legal victory in Maryland,

153. *See id.* (explaining that when public defenders did attend the bail review hearings, they only attended "in several of the state's jurisdictions, including Baltimore, . . . blaming a lack of resources").

154. *See DeWolfe v. Richmond*, No. 34, Sept. Term 2011, 2012 WL 10853, at *3-7 (Md. Jan. 4, 2012) (discussing the lawsuit filed).

155. *See id.* at *4

The Public Defender argued that the Plaintiffs' claims based on the Due Process Clause and the Public Defender Act "are well taken." He argued nevertheless that the court should defer ruling on the merits of the claims, to give him the time to resolve budgetary constraints that made it impracticable for the Public Defender's Office to provide counsel at the appearance before the Commissioner, while providing "responsible representation . . . when it really matters," at trial and other critical stages of criminal proceedings.

156. *Id.* at *7.

157. *See* Tricia Bishop, *Appeals Court Ruling Requires Lawyers at Bail Hearings*, BALT. SUN (JAN 4, 2012), http://articles.baltimoresun.com/2012-01-04/news/bs-md-public-defenders-20120104_1_public-defender-appeals-court-hearings (last visited Apr. 9, 2013) (stating that the court's ruling "was deemed impossible to implement by Maryland's public defender, whose office would be charged with attending potentially 180,000 bail hearings that occur 24 hours a day each year") (on file with the Washington and Lee Law Review).

158. Douglas Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 13-21 (1998) (describing the critical role of counsel at bail hearings).

however, is “a gift of justice for poor people”¹⁵⁹ only if it can be implemented without compromising the other, perhaps more serious matters, handled by public defenders. To date there has been some legislative response to the court’s decision: lawmakers have increased the Public Defender budget by 7.4% and have directed police officers to issue citations rather than make arrests in certain instances.¹⁶⁰ Both measures will help to ease the strain that the Maryland Court of Appeals’s decision has placed on the already-overworked state public defenders. However, the Public Defender initially estimated that his office would need to hire 284 new public defenders to comply with the court’s ruling,¹⁶¹ and to date the office has only been able to hire thirty-four new lawyers.¹⁶² Thus, the question remains whether the gains of this judicial victory will outweigh the costs it imposes on a strained public defender and its clients.

The Maryland example demonstrates that suing to expand the right to counsel when the existing contours of that right have yet to be fulfilled can be risky. It also suggests that defense advocates need to think hard about the role of nonlawyers rather than more lawyers. As discussed below, the medical and private legal professions both provide examples of differentiating among skills sets, and public defense functions should consider these models. In the medical context, when patients go “to the doctor” for, say, a common cold, they may not even see a physician; in many cases, nurse practitioners serve as primary health care

159. Bishop, *supra* note 151.

160. See David Carroll, *Maryland OPD Receives 7.4% Budget Increase to Staff Bail Hearings*, SIXTH AMENDMENT CENTER (July 6, 2012), <http://sixthamendment.org/?p=389> (last visited Apr. 2, 2013) (discussing the legislative responses) (on file with the Washington and Lee Law Review).

161. See Tricia Bishop, *Maryland Public Defender Asks for Stay in High Court’s Ruling*, BALT. SUN (Feb. 2, 2012), http://articles.baltimoresun.com/2012-02-02/news/bs-md-opd-stay-20120202_1_public-defender-ruling-hearings (last visited Apr. 2, 2013) (“The state would have to hire 284 new public defenders to comply with a recent Court of Appeals ruling requiring lawyers for indigent defendants at thousands of annual bail hearings, according to an affidavit filed . . . by Maryland Public Defender Paul DeWolfe.”) (on file with the Washington and Lee Law Review).

162. See Carroll, *supra* note 160 (“The result was a 7.4% increase in the OPD budget . . . This has allowed the Office of the Public Defender to hire 34 new lawyers and 34 support staff.”).

providers.¹⁶³ Most medical practices also employ physician assistants who, like nurse practitioners, can assess symptoms, make a diagnosis, and prescribe medicine.¹⁶⁴ Finally, medical practices also employ medical assistants and unlicensed assistive personnel who are capable of asking basic intake questions and performing routine, simple tasks such as taking a patient's height, weight, blood pressure, and temperature.¹⁶⁵

Each of these various medical professionals has a different set of educational and professional credentials, and they are paid according to their skill and education level.¹⁶⁶ They work as a team, complementing each other, and the model frees up the time and resources of the physicians in an office for those services that only a physician can provide.¹⁶⁷ These different professional roles are relatively recent creations, and they are a direct response to

163. See *Forum: A Bigger Role for Nurse Practitioners*, PITT. POST-GAZETTE (Feb. 4, 2007, 12:00 AM), <http://www.post-gazette.com/stories/opinion/perspectives/forum-a-bigger-role-for-nurse-practitioners-470677/> (last visited Apr. 2, 2013) (discussing the fact that the federal and state governments recognize nurse practitioners as highly qualified primary healthcare providers) (on file with the Washington and Lee Law Review).

164. See U.S. Nat'l Library of Med., *Physician Assistant Profession*, MEDLINEPLUS (Aug. 12, 2011), <http://www.nlm.nih.gov/medlineplus/ency/article/001935.htm> (last visited Apr. 2, 2013) (describing the history and role of physician assistants) (on file with the Washington and Lee Law Review).

165. See *Is Medical Assisting For You?*, AM. ASS'N OF MED. EXPERTS, <http://www.aama-ntl.org/medassisting/right4you.aspx> (last visited Apr. 2, 2013) (describing the range of tasks performed by medical assistants) (on file with the Washington and Lee Law Review).

166. See *Differences Between a Physician Assistant and a Nurse Practitioner*, DEGREEDIRECTORY.ORG, http://degreedirectory.org/articles/Physician_Assistant_vs_Nurse_Practitioner_What_is_the_Difference_in_Education_Requirements_and_Pay.html (last visited Apr. 2, 2013) (discussing the differences in educational requirements and pay between a physician assistant and a nurse practitioner) (on file with the Washington and Lee Law Review); *FAQs on Medical Assisting and the CMA (AAMA)*, AM. ASS'N OF MED. EXPERTS, <http://www.aama-ntl.org/medassisting/faqs.aspx> (last visited Apr. 2, 2013) (discussing the educational requirements and pay for medical assistants) (on file with the Washington and Lee Law Review).

167. See, e.g., Audrey Dutton, *Physician Assistants, Nurse Practitioners Fill Gap on Primary Care*, IDAHO STATESMAN (Sept. 24, 2012), <http://www.idahostatesman.com/2012/09/24/2286206/physician-assistants-nurse-practitioners.html> (last visited Apr. 2, 2013) (discussing how physician assistants and nurse practitioners are helping to alleviate Idaho's doctor shortage) (on file with the Washington and Lee Law Review).

the rising cost of health care, a shortage of doctors, and the need to be more responsive to a dynamic pool of patients.¹⁶⁸

Private law practice provides another good example of professional agility. Large and small law firms recognized that it was not a good use of an attorney's time to make copies of exhibits and bind them, and clients would simply not pay for an attorney to do that. As a result, law practices have employed a range of employees with varying skill levels: attorneys, paralegals, secretaries, law clerks, reproduction staff personnel, and record keepers.¹⁶⁹ Even more recently, though, as "big law" attempts to reduce costs and meet increasing client demands for efficiency, a new position has emerged: the "discovery attorney."¹⁷⁰ Firms now explicitly recruit attorneys for the discrete task of reviewing and producing documents relevant to a lawsuit.¹⁷¹ These attorneys generally earn about half as much as traditional incoming associates.¹⁷² Further, there may be a time when computers can perform the bulk of the work that attorneys—even discovery attorneys—now provide. Several e-discovery software programs now review documents, searching for key words and alerting attorneys to the tiny percentage of relevant documents amidst the mass of material turned over by clients and opposing counsel.¹⁷³ As one lawyer explained, the

168. See Christine Larson, *Yes, the P.A. Will See You Now*, N.Y. TIMES, Aug. 10, 2008, at BU10 (discussing the demand for the professionals).

169. See ELLEN FREEDMAN, HOW MANY NON-LAWYERS DOES IT TAKE TO RUN A LAW FIRM? 2–6 (2005), http://www.pa-lawfirmconsulting.com/pdfs/hr/HOW_MANY_NON_LAWYERS_DOES_IT_TAKE_TO_RUN_A_LAW_FIRM.pdf (describing the different positions within a law firm).

170. See Elie Mystal, *Law Graduates: Welcome to Your Barely Legal Future*, ABOVE THE LAW (Jan. 28, 2011, 10:30 AM), <http://abovethelaw.com/2011/01/law-graduates-welcome-to-your-barely-legal-future/#more-55271> (last visited Apr. 2, 2013) ("Wow, \$55K-a-year, full-time positions doing document review. Does this work, which could be described as 'barely legal,' really require three years of expensive post-graduate education?") (on file with the Washington and Lee Law Review).

171. See *id.* (stating that the "discovery attorney" will be hired to handle document review primarily).

172. See *id.* (stating that the "discovery attorney" will make roughly \$55,000—a small figure compared to \$150,000 that a normal, full-time attorney will make).

173. See John Markoff, *Armies of Expensive Lawyers, Replaced by Cheaper Software*, N.Y. TIMES, Mar. 5, 2011, at A1 ("Now, thanks to advances in artificial

software holds obvious appeal for law firms: “People get bored, people get headaches. Computers don’t.”¹⁷⁴ Computers also cost a lot less than attorneys, and they can be housed in a much more remote, far less expensive location than that of most urban law practices.¹⁷⁵

One may wonder what this kind of differentiation would look like in the context of a public defense system, and the answer is neither simple nor obvious. To begin, leveraging the skills of nonlawyers in some offices may be as basic as increasing the budget for support staff. A social worker, for example, costs less than an attorney, and she can support many attorneys at once.¹⁷⁶ In doing so, she brings to bear a more appropriate skill set, and, at the same time, frees up the attorneys to do things that only attorneys can do.¹⁷⁷ On the other end of the spectrum, Professor Donald Dripps has suggested that lay advocates may have a role to play in the criminal justice system.¹⁷⁸ In particular, he posits that lay advocates may make sense for some juvenile and misdemeanor defendants:

As it stands a young man facing criminal charges can represent himself or be heard through a public defender swamped by files and very often with very little experience. The accused has no third option to be heard through a parent, a sibling, a religious leader, a probation officer, a coach, or a commanding officer. The law would trust many of these people

intelligence, ‘e-discovery’ software can analyze documents in a fraction of the time for a fraction of the cost.”).

174. *Id.*

175. *See id.* (explaining that document review by attorneys can cost millions, but a recent document review by computer software cost less than \$100,000).

176. *See* Paula Galowitz, *Collaboration Between Lawyers and Social Workers: Re-Examining the Nature and Potential of the Relationship*, 67 *FORDHAM L. REV.* 2123, 2126 (1999) (“Social workers can be useful in interviewing, evaluation, crisis intervention, short-term casework, negotiation, and referral.” (footnote omitted)).

177. *See id.* at 2128 (“Collaborative arrangements can help reduce the stress that lawyers often experience. Not only can social workers assist lawyers to represent clients more effectively (and thereby alleviate some of the burden), but they can also help lawyers deal with their feelings about their clients and their practice.”).

178. *See* Dripps, *supra* note 149, at 127–28 (recommending lay advocacy in juvenile and misdemeanor cases).

with a medical power of attorney, but not with interviewing witnesses or negotiating a plea.¹⁷⁹

In light of the challenge regarding access to counsel for bail hearings, it is also worth considering whether a trained lay person could be an effective advocate at bail proceedings, particularly for low-level offenders whose cases are not complex.¹⁸⁰ The middle of the spectrum includes leveraging the skills of lawyers in training and paralegals more than we currently do.¹⁸¹ For example, the Washington State Supreme Court recently adopted a rule that allows nonlawyers with specified levels of training to provide assistance with some civil legal matters.¹⁸² In its order, the court recognized the significant unmet legal needs in the civil system and suggested that this new rule would enhance access to justice.¹⁸³

It is simply not realistic to seek continued expansion of the right to counsel in the face of five decades of legislative refusal to adequately fund defense functions. Accordingly, the defense community needs to engage in a searching exploration of the role that nonlawyers can play in representing poor criminal

179. *Id.* at 127 (footnotes omitted).

180. *Cf.* Turner v. Rogers, 131 S. Ct. 2507, 2519–20 (2011) (discussing procedural safeguards that can stand in for a lawyer).

181. Paralegals are not lawyers and cannot do everything that lawyers can do. *See* Frances P. Kao, *No, A Paralegal Is Not A Lawyer: A Few Things to Keep in Mind*, BUS. L. TODAY, Jan./Feb. 2007, at 11, 12–13 (discussing certain things a paralegal cannot do); Wendi A. Rogers, *How Paralegals Can Enhance the Competitive Edge of the Small Firm*, 72 TEX. B.J. 404, 405 (2009) (discussing the multi-faceted role of the paralegal); Jacqueline Meile Rasmussen & Paul M. Sedlacek, *Paralegals: Changing the Practice of Law*, 44 S.D. L. REV. 319, 331–32 (1999) (suggesting range of tasks that paralegals can perform in the criminal defense function).

182. *See* WA. R. ADMIS. APR 28 Limited Practice Rule for Limited License Legal Technicians, *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.rulesPDF&ruleId=gaapr28&pdf=1 (“This rule is intended to permit trained Limited License Legal Technicians to provide limited legal assistance under carefully regulated circumstances in ways that expand the affordability of quality legal assistance which protects the public interest.”).

183. *See* Order In the Matter of the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, 2012 WA REG TEXT 298141 (NS) (2012), at *4–6, <http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1005.pdf> (discussing the need for Limited License Legal Technicians).

defendants. Of course, the details will be complex, but the biggest hurdle is the immediate one: convincing the defense bar that this is a necessary and viable step toward sustainable indigent defense reform.

V. Conclusion

In this Article, I have attempted to provide an assessment of defense reform efforts over the last five decades. While the indigent defense crisis persists, it does so despite laudable efforts within the defense community. In particular, I have emphasized the lasting impact of the development of professional standards, the articulation of the collateral consequences doctrine, and the use of empirical data to improve the defense function. In conclusion, it is important to note that these significant marks of progress since the *Gideon* decision have come from within the defense community. Courts ultimately ratified these achievements, but they emanated from the defense community and evolved within that circle. The same should be true in the next five decades. Advocates of defense reform should seek to reform our criminal justice system in a number of ongoing ways—some will be judicial, some will be political, and others may require a re-conception of criminal defense advocacy altogether.