Post-Gideon Developments in Law and Lawyering

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The title of the Connecticut Public Interest Law Journal's symposium celebrating the fortieth anniversary of the United States Supreme Court's decision in *Gideon v. Wainwright*[1] suggests that it is important to assess whether "we" are "keeping the promise." To discern a "promise" in the Court's decision forty years ago, one must begin with the mandate of the *Gideon* Court itself and then review the later counsel cases in which the Supreme Court has defined the nature, scope, and purpose of the Sixth Amendment counsel guarantee.

In this paper based on my oral presentation at the symposium held in November of 2003, I review summarily some of the important decisions of the United States Supreme Court in which the Court has elaborated on the meaning of the Sixth Amendment counsel guarantee.[2] I note briefly some of the issues and tensions relating to the counsel guarantee that have not yet been settled definitively by the Supreme Court. In the forty years since *Gideon*, the Supreme Court has only gradually mapped out the scope[3] and meaning[4] of the Sixth Amendment

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

[2] It was an honor to appear on the panel assembled for this symposium: Connecticut Supreme Court Justice David Borden, Connecticut Superior Court Judge Michael R. Sheldon, Attorney Jacob Zeldes, and Assistant Chief Public Defender Susan O. Storey. Each brought a distinct experiential and philosophical perspective to a discussion of the criticality of the counsel guarantee in the criminal justice system. How any given commentator assesses the meaning and importance of the *Gideon* decision depends in part on the geographic location and vocational identity of the commentator. All of us on the panel have legal vocations that have exposed us primarily to the criminal justice system as it functions in the state and federal courts of Connecticut.

[3] For example, the Court decided in 1972 that an indigent defendant is entitled to appointed counsel even in a minor criminal case if the defendant faces loss of liberty upon his conviction. Argersinger v. Hamlin, 407 U.S. 25 (1972) (court struck down Florida rule denying counsel in petty misdemeanor cases where jail exposure was six months or less). In 1979, a closely divided Court fashioned a clearer rule, holding that the Sixth Amendment does not require appointment of counsel for an indigent criminal defendant who is merely *exposed* to imprisonment by his prosecution so long as a sentence of *actual* imprisonment is not imposed. Scott v. Illinois, 440 U.S. 367 (1979) (5-4 decision). Not until 2002 did the Court reconcile the *Scott* "actual incarceration" rule with the looming anomaly presented by cases in which a sentence of imprisonment is initially "suspended," placing the defendant on probation with no immediate loss of

counsel guarantee. After reviewing some seminal post-*Gideon* decisions, I will comment briefly on some aspects of criminal defense lawyering in the 21st Century that did not exist when the Supreme Court decided *Gideon* in 1963.

A sweeping view of the right to counsel in a short paper comes at a price. The paper presents some small sketches and big perspectives, not the nicely delineated treatment of counsel law that would be needed to frame a truly scholarly argument. At an anniversary event celebrating a seminal Supreme Court decision, the focus on the big picture is, I trust, appropriate. Looking backward at the Supreme Court's 1963 decision on the right to counsel is more than a ceremonial exercise. The longitudinal view provides a framework for viewing how our adversarial system of criminal justice currently functions. In the process, one may discern some of the new issues in criminal practice that are exerting pressure on and challenging the legitimacy of the criminal justice system in the present day.

I. THE ROLE OF COUNSEL IN ENSURING THE FUNCTIONALITY AND LEGITIMACY OF THE ADVERSARIAL PROCESS: THE ROAD LEADING TO *GIDEON*

Well before the Supreme Court in *Gideon* declared that the right to counsel was a "necessity" not merely a "luxury" in a criminal case, the Court had recognized that the presence of prepared and competent defense counsel was sometimes, but not always, the *sine qua non* of the fair trial guarantee in the due process clause of the Fourteenth Amendment.

In *Powell v. Alabama*,[5] the Supreme Court employed "fair trial analysis" to the exceptional circumstances of a capital case tried in Alabama in which the defendants claimed a functional violation of their

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liberty, only to be incarcerated later for violation of that probation. Alabama v. Shelton, 535 U.S. 654 (2002) (5-4 decision). *Shelton* held that the "Sixth Amendment does not countenance" incarceration of a probationer who was deprived of counsel when originally convicted and sentenced because the underlying conviction "has never been subjected to 'the crucible of meaningful adversarial testing.'" *Id*. at 667 (quoting United States v. Cronic, 466 U.S. 648, 656 (1984)).

[4] Twenty-one years after *Gideon* the Court announced the federal constitutional standard by which to determine whether counsel in a given case has violated the Sixth Amendment by providing "ineffective assistance of counsel" in representing his client. Strickland v. Washington, 466 U.S. 668 (1984).

[5] 287 U.S. 45 (1932).

right to counsel, which was guaranteed under state law.[6] In *Powell*, the formal existence of the right to counsel was a "conceded" issue because the Alabama Constitution and an Alabama statute required appointment of counsel for capital defendants unable to employ counsel.[7] The Supreme Court found the appointment process in *Powell* to have been "little more than an expansive gesture" because the trial judge appointed "'all the members of the local bar'" to represent the defendants at arraignment but did not settle until moments before trial began whether anyone in particular from the local bar would actually represent any of the defendants at trial.[8]

The *Powell* Court saw the constitutional case before it not as a right to counsel case, but as a fair trial case under the Fourteenth Amendment due process clause.[9] The issue was whether the defendants had been deprived of a fair trial because their court-appointed lawyers had not functioned as informed advocates in defending them, given that the lawyers had not conducted any investigation and had not consulted with the defendants before trying the case.[10] The *Powell* Court did not find an unwavering correlation between the right to a fair hearing and the right to counsel: "The right to be heard would be, *in many cases*, of little avail if it did not comprehend the right to be heard by counsel."[11] The *Powell* Court held that due process of law mandated the functional

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[6] *Id.* at 53, 59-60.

[7] *Id.* at 59-60.

[8] *Id.* at 53-56.

[9] *Id.* at 59-60.

[10] In *Powell*, the deficiencies of counsel collectively were patent because no one in particular was appointed to represent the defendants until moments before trial commenced. Presaging modern "critical stages" analysis, the *Powell* Court drew a correlation between counsel's ability to defend at trial and pretrial stages of a criminal prosecution, during which time a defendant's need for competent counsel is equally critical: "[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself." *Id.* at 57. *See* United States v. Wade, 388 U.S. 218, 227 (1967) (right to counsel at certain pretrial confrontations such as police lineup correlated with right to fair trial: "In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself").

[11] *Powell,* 287 U.S. at 68-69 (emphasis added).

appointment of counsel before trial and the presence of prepared counsel at trial under the special circumstances evinced by the record, including the fact that Alabama law guaranteed the defendants a right to appointed counsel.[12]

Following its decision in *Powell,* the Court employed the fair trial test in later cases when deciding whether due process of law required the provision of counsel to an indigent accused in any particular state criminal prosecution. In *Betts v. Brady*,[13] Justice Roberts for the majority rejected a broad claim that the Sixth Amendment counsel clause should apply to all state criminal prosecutions without regard to the specific circumstances of each case: "[W]hile want of counsel in a particular case may result in a conviction lacking such fundamental fairness, we cannot say that the [Fourteenth] Amendment embodies an inexorable command that no trial for any offense, or in any court can be fairly conducted and justice accorded a defendant who is not represented by counsel."[14] Justice Black, joined by Justices Douglas and Murphy,

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[12] The Court found that due process of law had been violated both by failure to accord the defendants reasonable time and opportunity to obtain counsel and by appointment of counsel in form but not substance. The Court's holdings were specifically predicated on the facts of the case which undermined the opportunity to receive a fair trial: "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives . . . ." *Id.* at 71. The Court specifically avoided announcing a broad right to counsel as a due process guarantee in all state criminal cases: "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Id.* at 71.

[13] 316 U.S. 455 (1942).

[14] *Id.* at 473. The majority opinion in *Betts* characterized the petitioner's argument as follows: "He says the rule to be deduced from our former decisions is that, *in every case, whatever the circumstances*, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State." *Id.* at 462 (emphasis added.). Petitioner Betts did not claim special circumstances as in Powell. The majority characterized Betts' bench trial as unexceptional, stating that "there was no question of the commission of a robbery, " that Betts was "not helpless," that he was "a man forty-three years old, of ordinary intelligence," and that his previous larceny conviction showed that he "was not wholly unfamiliar with criminal procedure." *Id.* at 472. The majority concluded that it was "quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious

dissented in *Betts*.[15]

Thus, until the *Gideon* Court overruled *Betts* in 1963, an indigent criminal defendant facing a state prosecution was entitled to appointed counsel only if the circumstances of the case were such that a fair hearing at trial required representation by counsel. The due process guarantee controlled. The Sixth Amendment did not apply. Absent specific features in a case that jeopardized the right to a fair trial and thus necessitated appointment of counsel, an indigent criminal defendant was not entitled under the federal constitution to appointed counsel.[16]

By way of contrast, it should be noted that the Supreme Court had long made clear that the Sixth Amendment's counsel guarantee, applicable in federal prosecutions, is an integral part of a federal criminal defendant's right to fair criminal trial. In *Johnson v. Zerbst*,[17] Justice Black wrote for the Court:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, *justice will not 'still be done.'* It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.[18]

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disadvantage by reason of the lack of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction." *Id.* at 472-73.

[15] Justice Black based his dissent on two independent constitutional premises, the first only tersely presented and the second somewhat more discursively. First, he declared his own belief "that the Fourteenth Amendment made the Sixth applicable to the states." *Id.* at 474. Quickly conceding "this view, although often urged in dissents, has never been accepted by a majority of this Court," Justice Black put it aside, remarking "[a] statement of the grounds supporting it is, therefore, unnecessary at this time." *Id*. (Of course, Justice Black's reserve was but temporary luffing, as evidenced by his dissent under full sail detailing his argument for total incorporation in *Adamson v. California*, 332 U.S. 46, 68-123 (1947)). The lengthier basis for Justice Black's dissent in *Betts* was that even under the "prevailing view of due process" the right to counsel should be recognized as "'implicit in the concept of ordered liberty.'" *Id.* at 475-76.

[16] *Id.* at 461-62.

[17] 304 U.S. 458 (1938).

[18] *Id.* at 462-63 (emphasis added).

The *Johnson* Court held that an indigent federal criminal defendant is constitutionally guaranteed the assistance of appointed counsel unless the defendant expressly waives his right to counsel and chooses to proceed *pro se*: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[19]

II. THE SUPREME COURT TREATS THE RIGHT TO COUNSEL AS A CONSTITUTIONAL NECESSITY FOR INDIVIDUAL CRIMINAL DEFENDANTS THAT SIMULTANEOUSLY CONFERS A PRESUMPTION OF LEGITIMACY UPON THE CRIMINAL ADVERSARIAL PROCESS AND CRIMINAL PUNISHMENTS

The Supreme Court in *Johnson v. Zerbst* recognized the Sixth Amendment right to counsel to be an essential feature of the right to a fair trial in *federal* criminal prosecutions, declaring that absence of defense counsel means *"justice will not 'still be done.'"*[20] Until 1963, the Supreme Court did not recognize the right to counsel to be an essential feature in the right to a fair trial in *state* criminal prosecutions. Instead the Court reviewed state criminal cases to determine *whether* the defendant had been accorded a fair trial even in the absence of defense counsel. Clarence Gideon's lawyer in the Supreme Court, Abe Fortas, featured the disparity between the paradigms for federal fair trial analysis and state fair trial analysis at the very beginning of his argument in the United States Supreme Court:

> Mr. Chief Justice, may it please the Court.
> If you will look at this transcript of the record, perhaps you will share my feeling, which is a feeling of despondency. This record does not indicate that Clarence Earl Gideon is a man of inferior natural talents. This record does not indicate that Clarence

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[19] *Id.* at 463. The Court wrote: "The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused's ignorant failure to claim his rights removes the protection of the Constitution." *Id.* at 465. The Court called on the federal trial bench to protect unrepresented defendants: "The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused -- whose life or liberty is at stake -- is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Id.*

[20] *Id.* at 462 (emphasis added).

> Earl Gideon is a moron or a person of low intelligence. This record does not indicate that the judge of the trial court in the state of Florida, or that the prosecuting attorney in the state of Florida, was derelict in his duty. On the contrary, it indicates that they tried to help Gideon. But to me, if the court please, this record indicates the basic difficulty with *Betts* against *Brady*. And the basic difficulty with *Betts* against *Brady* is that no man, certainly no layman, can conduct a trial in his own defense so that the trial is a fair trial.[21]

In *Gideon, v. Wainwright*,[22] the Supreme Court declared that the Sixth Amendment right to the assistance of counsel applies to the states categorically, not merely to those state prosecutions where a defendant's right to a fair trial would be violated if he were not represented by and heard through a lawyer at trial. Justice Black, writing for the Court, put to rest the due process approach to counsel claims employed by the Court in *Betts v. Brady*.[23] The *Gideon* Court explained that the adversary system of justice relies on the ability of both parties, i.e., the government and the defendant, to engage meaningfully in the adversarial process:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, *any person*

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[21] MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS MADE BEFORE THE SUPREME COURT SINCE 1955 187 (Peter Irons & Stephanie Guitton eds., 1993).

[22] 372 U.S. 335 (1963).

[23] Justice Black for the Court agreed with the amicus argument that "*Betts* was 'an anachronism when handed down' and that it should now be overruled." *Id.* at 345. Justice Black's opinion characterizes the *Gideon* holding as a return to "old precedents, sounder . . . than the new." *Id.* at 344. He writes: "[T]he Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents." *Id*. Justice Black argued that pre-*Betts* precedent need not be read narrowly despite case language appearing to limit constitutional expansiveness: "While the Court at the close of its *Powell* opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable." *Id.* at 343. Black's opinion elicited a quietly plaintive concurrence from Justice Harlan that began: "I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided." *Id.* at 349. Only Justices Black and Douglas sat on both *Betts* and *Gideon*; both, along with Justice Murphy, had dissented in *Betts*.

> *haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him*. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that *lawyers in criminal courts are necessities, not luxuries*. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[24]

The *Gideon* Court's declaration that state criminal defendants have a Sixth Amendment right to the assistance of counsel has two obvious systemic consequences: (1) states must expend their resources to provide counsel for indigent defendants; and (2) legal recognition that both indigent and non-indigent defendants alike have a *constitutional right* to the "assistance of counsel." There is a third consequence, less immediately apparent when *Gideon* was decided, but just as directly attributable to the decision: when the state convicts a criminal defendant who is represented by counsel, the state enjoys a strong presumption that the criminal justice process that led to his conviction and punishment is constitutionally legitimate. Thus, the *state itself* is a beneficiary under *Gideon* and subsequent decisions of the Supreme Court regarding the

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[24] *Id.* at 344 (emphasis added).

nature and function of the Sixth Amendment's counsel guarantee.

As noted, the first and most obvious consequence of the *Gideon* decision was to place the individual states under a constitutional mandate to close the gap in the quality of criminal justice for the rich and the poor. By recognizing the right of indigent defendants to appointed counsel, *Gideon* met the concern voiced by Justice Black in his *Betts* dissent:

> A practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented.[25]

The degree to which the individual states have met their systemic obligation under *Gideon* to provide counsel to indigent defendants is beyond the scope of this paper. The service systems used in the different states vary greatly in structure, commitment of expenditures, and the extent of their success and failure in meeting the "promise" of *Gideon* to the poor.[26]

Gideon is built on the premise that the right to counsel is an *individual* right to be accorded individuals facing criminal prosecution. A correlative premise is that the government itself has an interest in ensuring fair trials. This latter interest is independent of the individual's interest in obtaining the assistance of counsel to defend against a

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[25] Betts v. Brady, 316 U.S. at 476.

[26] For a 2003 overview of the delivery systems for indigent defense services in the country, *see* "State and County Expenditures for Indigent Defense Services in Fiscal Year 2002" (prepared for the American Bar Association by The Spangenberg Group), *available at*

http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf. For a 1982 perspective on funding support for counsel for the indigent, *see* Gideon Undone: The Crisis in Indigent Defense Funding (Transcript of Hearing on the Crisis in Indigent Defense Funding held during the Annual Conference of the National Legal Aid and Defender Association in cooperation with the American Bar Association), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/gideonundone.pdf.

criminal prosecution. An adversarial system that is actually adversarial provides the government and society generally with a legitimate basis for concluding that justice has been done once a trial and post-conviction review have occurred. Thus there are two beneficiaries: the individual under prosecution because he needs counsel in order to defend effectively in an adversarial setting; and the government which may claim the criminal trial to have been properly adversarial because of the presence of a professional lawyer to advocate for the accused's interests. Normally, there is at least an apparent confluence of interests on the part of the two beneficiaries, that is, both the individual defendant and the government prefer to proceed with counsel representing the defendant.

III. CONFLUENCE AND TENSION: *GIDEON*'S PROMISES TO THE INDIVIDUAL DEFENDANT, DIVIDENDS FOR THE ADVERSARIAL SYSTEM OF CRIMINAL JUSTICE, AND THE PROBLEM OF THE PRO SE DEFENDANT

While *Gideon* is rightly understood as the seminal modern era case on the right to counsel, it has taken the last four decades to define the scope and meaning of the Sixth Amendment right to the assistance of counsel for the defense. The development of counsel doctrine in the case law after *Gideon* reflects attention to the various beneficiaries of the decision: indigent criminal defendants unable to retain counsel; criminal defendants, rich and poor alike, whose ability to procure a fair trial depends on representation by a competent professional; and the criminal justice system itself whose legitimacy depends on the presumption that the process leading to punishment was truly adversarial because the accused was represented by counsel. It is impossible to answer neatly whether the "promise" of *Gideon* has been kept over the last four decades. This is so for many reasons, primary among which is the fact that the right to counsel in our system of criminal justice serves the interests of the individual and the state differently. There is an inherent tension between the individual's interest in having counsel to assist in his defense and the state's interest in ensuring that an individual has counsel so as to legitimate the trial and punishment of that individual.

The Sixth Amendment counsel clause implies a number of correlative constitutional guarantees: a right to appointed counsel for indigents in nearly all criminal cases,[27] a right to competent counsel who is conflict-free,[28] a right to counsel of choice for those who can afford to

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[27] *See supra* note 3, discussing Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979); Alabama v. Shelton, 535 U.S. 654 (2002).

[28] The Supreme Court includes counsel's duties to represent the interests of a criminal

retain private counsel,[29] and a right to be free from government interference in the attorney/client relationship.[30]

Certainly the provision of legal services to indigent criminal defendants is a central promise in *Gideon*. The rationale is that failure to provide counsel for an accused who cannot afford a lawyer effectively deprives the accused of the benefits of our adversarial system of criminal justice. An accused without counsel presumptively cannot hold his own against a professional prosecutor pressing the government's case.

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client loyally and competently as "basic" to the Sixth Amendment counsel guarantee: "Representation of a criminal defendant entails *certain basic duties*. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. *See* Cuyler v. Sullivan, [446 U.S. 335, 346 (1980)]. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. *Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process*. *See* Powell v. Alabama, 287 U.S. at 68-69." Strickland v. Washington, 466 U.S. 668, 688 (1984) (emphasis added).

[29] The Sixth Amendment right to counsel carries with it a right to retain counsel of choice but the right to counsel of choice is not absolute. Wheat v. United States, 486 U.S. 153, 159 (1988). Recognizing a "Sixth Amendment presumption in favor of counsel of choice," the *Wheat* Court also recognized the legitimacy of Federal trial courts' "independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Id*. at 160. Thus the Court held that trial courts "must recognize a presumption in favor of [a defendant's] counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Id*. at 164. An indigent who cannot afford private counsel does not have the right to require a court to appoint his counsel of choice. *Id*. at 159. *See* Morris v. Slappy, 461 U.S. 1, 13-14 (1983) (rejected claim that denial of continuance and proceeding with trial violated Sixth Amendment where newly substituted counsel lacked rapport with defendant enjoyed by first appointed counsel who was unavailable due to hospitalization).

[30] Government interference with the effective assistance of counsel requires relief in the absence of proof of prejudice: "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. *See, e. g*., Geders v. United States, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); Herring v. New York, 422 U.S. 853 (1975) (bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant)." *Strickland*, 466 U.S. at 686. The Court has since held that barring the defendant and his attorney from consulting during a 15 minute break in the prosecution's cross-examination of the defendant did not require reversal. Perry v. Leeke, 488 U.S. 272 (1989).

Counsel is seen as a necessary tool in defending the accused against unfair deprivations of life or liberty. *Gideon* promises that this particular tool be provided by the state to an indigent accused, thus removing any formal distinction between the Sixth Amendment right to counsel for the rich and the poor.[31] As noted before, it is beyond the purview of this paper to describe, much less evaluate, the degree to which the service systems in this nation have succeeded and failed to satisfy the core mandate of *Gideon* that indigents be provided with counsel.[32]

Certain Supreme Court decisions since *Gideon* have been particularly instructive in defining the meaning of the Sixth Amendment counsel guarantee, i.e., the accused's right "to have the assistance of counsel for his defense." In *Faretta v. California*,[33] the Supreme Court held that the text and structure of the Sixth Amendment necessitated recognition that a criminal defendant cannot be forced to accept representation by counsel in lieu of representing himself personally.

The *Faretta* Court stated that "the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it."[34] The Court found the text of the Amendment supports the conclusion that the defendant, not his lawyer, is guaranteed the tools for making the defense.[35] The *Faretta* majority read the

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[31] However, the state's federal constitutional obligation to equip a defendant with the necessary tools for his defense, other than legal representation itself, does not include a broad obligation to pay for all the resources that may be helpful to case development and the preparation of a defense. The Supreme Court has been somewhat sparing in its use of the counsel clause, the due process clause and the equal protection clause to require that a criminal defendant be equipped at state expense with the tools needed to develop and present a defense. *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (due process requires indigent be provided with "'basic tools of an adequate defense'") (citation omitted); *Cf.* State v. Clemons, 168 Conn. 395, 401-04, *cert. denied* 423 U.S. 855 (1975) (recognized state's obligation to pay for independent experts for indigent defendants upon showing that "such expert testimony is material and necessary to provide an adequate defense").

[32] One panelist, Susan O. Storey, Deputy Chief Public Defender for the State of Connecticut, is especially well-positioned to recount Connecticut's track record in meeting its obligation to provide indigent defendants with counsel and, perhaps, to comment upon other the service systems of other states.

[33] 422 U.S. 806 (1975).

[34] *Id.* at 818.

[35] The Sixth Amendment sets forth guarantees to the accused directly, employing the personal pronouns "his" and "him" in guaranteeing the rights to compulsory process, confrontation, and the assistance of counsel for the accused's defense. *Faretta*, 422 U.S. at 819-20. The Sixth Amendment provides: "In all criminal prosecutions, *the accused* shall enjoy the right . . . to be informed of the nature and cause of the

meaning of the counsel guarantee to be consistent with the personal nature of the specifically enumerated rights in the Amendment's clauses: "The counsel provision supplements this design. It speaks of the *'assistance' of counsel, and an assistant, however expert, is still an assistant*."[36] The Court declared: "To force a lawyer on a defendant can only lead him to believe that the law contrives against him."[37] The *Faretta* Court understood that its recognition of a constitutional right to represent oneself at trial is difficult to reconcile with the *Gideon* Court's rationale for declaring the right to counsel necessary to a fair criminal trial under the Fourteenth Amendment due process guarantee:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted imprisoned unless he has been accorded the right to the assistance of counsel. . . . For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial. And a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may constitutionally impose a lawyer upon even an unwilling defendant.[38]

The *Faretta* Court's recognition of the right to self-representation reflects the Court's conclusion that the personal rights of a criminal defendant are superior even to the interests of the sovereign in assuring that criminal trials are truly adversarial in nature. The Court recognized that an untutored lay defendant might well fail to conduct the defense adequately to ensure a truly adversarial trial. The Court recognized that the justice system and the accused's interests might both be disserved where the individual foregoes his right to counsel. Nonetheless, the Court hewed to an individualistic interpretation of the Sixth Amendment:

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accusation; to be confronted with the witnesses against *him*; to have compulsory process for obtaining witnesses in *his* favor, and to have the assistance of counsel for *his* defense." U.S. CONST. amend. VI (emphasis added).

[36] *Faretta,* 422 U.S. at 820 (emphasis added).

[37] *Id.* at 834.

[38] *Id.* at 832-33.

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'That respect for the individual which is the lifeblood of the law.'[39]

In *Faretta*, the Supreme Court made clear that an accused who foregoes his right to the assistance of counsel not only jeopardizes his opportunity to receive a fair trial but also loses his right later to challenge the adequacy of his trial on grounds of ineffective assistance of counsel: "whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"[40] Interestingly, the Supreme Court had not yet defined the constitutional standard for reviewing ineffective assistance of counsel claims when it decided *Faretta* in 1975. Thus, at least then, the constitutional benefit of accepting the assistance of counsel included retention of the right later to challenge the adequacy of counsel's assistance, albeit subject to a standard that was left indeterminate.

Almost a decade after *Faretta*, and some two decades after *Gideon*, the Supreme Court in *Strickland v. Washington*,[41] announced the test for determining whether a criminal defendant's Sixth Amendment right to the effective assistance of counsel has been violated by his attorney's failure to perform competently.[42] The Court in *Strickland* adopted a standard that reflected its view of the role that counsel plays in

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[39] *Id.* at 834 (quoting, Illinois v. Allen, 397 U.S. 337, 350-51 (Brennan, J., concurring)).

[40] *Id.* at 834 n.46.

[41] 466 U.S. 668 (1983).

[42] The Supreme Court had recognized that the right to counsel included the right to the effective assistance of counsel, but it had not set forth the test for assessing the competence of counsel. McMann v. Richardson, 397 U.S. 759, 771n.14 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel. *See* Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 69-70 (1942); Avery v. Alabama, 308 U.S. 444, 446 (1940); Powell v. Alabama, 287 U.S. 45, 57 (1932)"). Lower federal and state courts had, of course, developed constitutional tests and decided Sixth Amendment claims of ineffective assistance of counsel in the years before the Supreme Court settled on the competence test set forth in *Strickland*. *See, e.g.*, United States v. DeCoster (III), 624 F.2d 196 (D.C. Cir. 1976); Siemon v. Stoughton, 184 Conn. 547, 440 A.2d 210 (1981).

the adversarial system on behalf of the individual client *in relation to* the system itself: that is, the Court defined the Sixth Amendment counsel guarantee to be an aspect of the right to a fair trial in an adversarial setting. The *Strickland* test requires that a defendant show both that his counsel was deficient and that the deficiency correlates with a breakdown in the adversarial process so as to undermine confidence in the outcome of his trial:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. *First*, the defendant must show that counsel's performance was deficient. This requires showing that *counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment*. *Second*, the defendant must show that the deficient performance prejudiced the defense. *This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable*. Unless a defendant makes *both showings*, it cannot be said that the conviction or death sentence resulted from *a breakdown in the adversary process that renders the result unreliable*.[43]

What stands out about the *Strickland* test for ineffective assistance of counsel is that prong one is a Sixth Amendment test and prong two is a due process/fair trial test. Prong one asks whether the defendant's lawyer "was not functioning as the 'counsel' guaranteed by the Sixth Amendment."[44] Even if the defendant has been deprived of his Sixth Amendment right to reasonably competent counsel, there is no remedy for that deprivation unless the defendant can also show that the incompetence of his counsel resulted "a breakdown in the adversary process that renders the result unreliable."[45]

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[43] *Strickland*, 466 U.S. at 687 (emphasis added).

[44] *Id*.

[45] *Id*. Both prongs of Strickland must be proved: (1) that defense counsel's performance was not reasonably competent or within the range of competence expected of attorneys with ordinary training and skill in criminal law; *Id.* at 687-88; and (2) that there is a *reasonable probability* that the result of the proceeding would have been different but for counsel's substandard performance. *Id.* at 694. A defendant does *not* have to show that his counsel's deficient performance "more likely than not altered the outcome of the case." *Id.* at 693. Under *Strickland*, "[a] reasonable probability is a probability

The *Strickland* Court envisions defense counsel's presence as a constitutional guarantor that the adversarial process has been sufficiently functional to support a presumption that its product is dependable, i.e., that the process has led to a just result:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. *The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results.* An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[46]

The testing gauge for "just results" is whether the trial was sufficiently adversarial: "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[47]

In contrast to the competence standard, the standard for challenging the adequacy of a conflicted counsel does not require a showing of actual prejudice to the defense because a disloyal defense counsel cannot be presumed to have played the role necessary to ensure that the process itself was functionally adversarial. Where counsel violates his duty of loyalty to his client, the test for ineffective assistance of counsel is different from the test for lack of competence: "Where there is an actual conflict of interest, prejudice is presumed because 'counsel [has] breach[ed] the duty of loyalty, perhaps the most basic of counsel's duties . . . [I]n order to establish a violation of the sixth amendment the defendant has a two-pronged task. He must establish (1) 'that counsel "actively represented conflicting interests"' and (2) that "'an actual conflict of interest adversely affected his lawyer's performance.'"'"[48]

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sufficient to undermine confidence in the outcome." *Id.* at 694.

[46] *Id.* at 685 (emphasis added).

[47] *Id.* at 686.

[48] Phillips v. Warden, 220 Conn. 112, 132-33 (1991) (quoting *Strickland*, 466 U.S. at 692; Cuyler v. Sullivan, 446 U.S. at 350). Three of the symposium panelists had a role in *Phillips*: Justice Borden was author of the majority opinion in the Connecticut Supreme Court finding for the petitioner, Judge Sheldon at the time was Director of the University of Connecticut Criminal Clinic and appeared on the brief, and this author

Since *Gideon* was decided in 1963, the essential ingredients in the Sixth Amendment counsel guarantee have been recognized, if not fully defined. It is now basic that an attorney representing a defendant in a criminal case, whether retained privately or appointed, has a constitutional duty to the client to advocate for the client competently and loyally. Defense counsel's role is to "assist" in the defense. At the same time, counsel's presence in a case representing a criminal defendant serves the interests of the justice system itself, not just the interests of the defendant individually. While in the abstract it would appear that an individual defendant and the adversary criminal justice system have a confluence of interests in having defense counsel for the accused, that is not always the case. Defense counsel will sometimes have to decide which role takes precedence professionally–allegiance to the client or allegiance to professional and systemic values that may be at odds with the client's interests or goals. A defendant who accepts the assistance of counsel does not necessarily retain authority to set the goals of the defense or even to define his own personal stake in the case.

Cases in which a criminal defendant cries foul at his lawyer's allegiance to the system over his allegiance to the client present a glimpse into the dual nature of the defense attorney's role in the adversarial system. For example, in *Nix v. Whiteside*,[49] the defendant claimed that his attorney had denied him effective assistance of counsel by refusing to support the defendant's plan to give testimony that the attorney believed would be perjurious.[50]

Even more problematic is the strange case of the "Unabomber," Theodore Kaczynski. Kaczynski's attorneys alienated their client by allowing him to think that they were honoring his choice not to pursue a mental status defense when they actually were developing the defense.[51] On the eve of trial, Kaczynski tried to change lawyers, but was denied permission to do so because it would delay trial.[52] He then chose to

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appeared as the petitioner's lead attorney. The facts of *Phillips v. Warden* are extraordinary. The petitioner's counsel had himself been convicted of murdering his wife in a case that received extensive publicity. Nonetheless, he was permitted to continue to practice law until he had exhausted the appeals process. During that time counsel represented the petitioner in the same courthouse in which he had been tried and convicted. *Phillips,* 220 Conn. at 116-27.

[49] 475 U.S. 157 (1986).

[50] *Id.* at 174-76 (facts did not support either the performance or the prejudice prongs of the *Strickland* test).

[51] United States v. Kaczynski, 239 F.3d 1108, 1110 (9th Cir. 2001).

[52] *Id.* at 1112.

represent himself, but was not permitted to so by the trial court[53] despite the Supreme Court's holding in *Faretta v. California*,[54] recognizing that the Sixth Amendment guarantees the right to the "assistance" of counsel and that a criminal defendant ought to be able to discharge his "assistant."[55] In the end, Kaczynski pled guilty, only to later challenge the sequence of events prior to his plea as violative of his right to dispense with the "assistance of counsel" under *Faretta*.[56]

Kaczynski is a case in which the "professional players" in the criminal justice system--the trial judge and the lawyers for the prosecution and the defense--may have had greater, i.e., more rational, concern for the defendant's interests than he did himself. Their concern was that the defendant be spared the death penalty and his was not. In order to be effective in attaining their goal, however, the professional players had to ignore both the defendant and the law. In his dissent from the Ninth Circuit's affirmance of the conviction, Judge Reinhardt wrote:

> His attorneys had achieved their principal and worthy objective by preventing his execution. The government had been spared the awkwardness of pitting three experienced prosecutors against an untrained, and mentally unsound, defendant, and conducting an execution following a trial that lacked the fundamental elements of due process at best, and was farcical at worst . . . The problem with this "happy" solution, of course, is that it violates the core principle of *Faretta v. California* – that a defendant who objects to his counsel's strategic choices has the option of going to trial alone. Personally, I believe that the right of self-representation should in some instances yield to the more fundamental constitutional guarantee of a fair trial. Here, the district court understood that giving effect to *Faretta*'s guarantee would likely result in a proceeding that was fundamentally unfair. However, *Faretta* does not permit the courts to take account of such considerations. Under the law as it now stands, there was no legitimate basis for denying Kaczynski the right to be his own lawyer

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[53] *Id*. at 1112-13.

[54] 422 U.S. 806 (1975).

[55] *Id.* at 820-21.

[56] *Kaczynski*, 239 F.3d at 1110.

in his capital murder trial.[57]

It may be tempting to classify the *Kaczynski* case as an aberrant case from which legal observers ought draw few, or no, lessons. Understood in light of the tension between *Gideon* and *Faretta*, however, *Kaczynski* is not an anomaly. To the contrary, it is expectable that an autonomous defendant such as *Kaczynski*--at odds with the professional players in the criminal justice process-- will bring to the fore the tensions in Sixth Amendment doctrine. The *Gideon* paradigm for the Sixth Amendment is that the assistance of counsel for the defendant is a near absolute component of his right to a fair trial and that, without counsel, criminal punishment involving loss of life or liberty is not legitimate. By contrast, the *Faretta* paradigm is that the individual criminal defendant has an autonomous right to define his interests and to conduct his own trial even if that deprives him of the very feature--representation by counsel--necessary to assure him a fair trial and to assure that any criminal punishment imposed is legitimate. Where an accused accepts the assistance of counsel, there is at least an apparent formal confluence of interests between the individual and the state. By contrast, when an accused refuses the benefits of counsel, or tries to as in *Kaczynski*, the schism in Sixth Amendment values becomes manifest.

IV. GRADING THE PROMISE OF GIDEON AT AGE 40

The constitutional standards that define the right to counsel guarantee are not designed to be a constitutional primer on how to be a criminal defense lawyer.[58] The rules for constitutional adequacy are

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[57] *Id.* at 1128.

[58] The American Bar Association's (ABA) "ABA Standards for Criminal Justice Prosecution Function and Defense Function" (3d ed. 1993) articulate standards for criminal defense practice that are sometimes influential in determining whether an attorney has performed unreasonably under the first prong of the *Strickland* competence test. However, a practitioner's violation of an ABA Standard for defense lawyering does not necessarily suffice to prove unreasonable performance under the Sixth Amendment because it requires only minimally competent performance, not good performance. The ABA Standards, by contrast, represent "an attempt to ascertain a consensus view of all segments of the criminal justice community about what good, professional practice is and should be." *Id*. at xiv. The American Law Institute-American Bar Association Committee on Continuing Professional Education publishes an invaluable resource on good defense lawyering, Amsterdam's Trial Manual 5 for the Defense of Criminal Cases (5th ed. 1988). The Amsterdam Manual is a densely packed three volume "how-to-do-it handbook of basic criminal procedure for the practitioner." *Id*. at 1.

stated in the negative: the constitutional test is not for "effective assistance of counsel" but for "ineffective assistance of counsel." The Sixth Amendment guarantees minimally competent counsel, not superior representation by counsel. A criminal defendant is not guaranteed the assistance of counsel who is in fact effective, but only counsel who is not demonstrably ineffective.

It is left to the Bar and to the individual states to develop and enforce standards of professional conduct for defense lawyering and the provision of appointed counsel for indigent defendants that will give body to the "promise of *Gideon*."[59] The promise of adequate resources for the defense of indigents has not been fulfilled for several reasons. First, *Strickland's* constitutional standard for evaluating the "assistance of counsel" is a *post hoc* standard that provides a remedy to an aggrieved criminal client only in those extraordinary cases where there is proof that counsel performed so deficiently as to support the subjunctive conclusion that a reasonable probability exists that *the outcome of the trial would have been different if counsel had not performed deficiently*.[60]

Second, the Supreme Court has never come to grips with the systemic challenge that must be met if *Gideon*'s promise is to be fulfilled for indigents as a group. The enormity of the challenge was probably not understood by the Court in the early years after *Gideon* was decided. In a 1972 decision holding that the Sixth Amendment counsel guarantee does not admit of a petty crime exception,[61] the Court rejected any

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[59] Standards have been adopted by the ABA, but systemic reform of defense services for indigent criminal defendants has occurred in only a few states. *See,* ABA Standards for Criminal Justice Providing Defense Services (3rd ed. 1992); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense,* 113 HARV. L. REV. 2062, 2069 (2000) ("[T]he high courts of Arizona, Louisiana, and Oklahoma have all found their state indigent defense systems constitutionally deficient. Additionally, two recent lawsuits in Pennsylvania and Connecticut have achieved substantial reform through pre-trial settlements.").

[60] It ought not be assumed that enforcement of a standard for a constitutionally adequate performance has to be limited to *post hoc*, i.e., post-trial, review of performance and prejudice. Those familiar with state criminal courts know that it is not uncommon for indigent clients to complain about the inadequacies of counsel before trial and even to assert that they have decided to "fire" their counsel. The appointing authority at that juncture could adopt and follow guidelines for deciding whether to appoint replacement counsel. While courts typically have the authority to substitute new counsel, the decision whether to do so is not governed by a clear legal standard.

[61] *Argersinger*, 407 U.S. at 37 (The "rule" announced in *Argersinger* is that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial").

concern that the "[n]ation's legal resources" might not be "sufficient to implement the rule we announce today."[62] The Court confidently pointed to the large population of lawyers in the country, burgeoning law school enrollment, and the expectation that the lawyer population would double by 1985.[63] Concurring that the resources existed to provide counsel for all indigent defendants, Justice Brennan added:

> Law students as well as practicing attorneys may provide an important source of legal representation for the indigent . . . more than 125 of the country's 147 accredited law schools have established clinical programs in which faculty-supervised students aid clients in a variety of civil and criminal matters. . . . These programs supplement practice rules enacted in 38 States authorizing students to practice law under prescribed conditions. Like the American Bar Association's Model Student Practice Rule (1969), most of these regulations permit students to make supervised court appearances as defense counsel in criminal cases . . . Given the huge increase in law school enrollments over the past few years, I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision.[64]

It is now plain that the *Argersinger* Court was wrong to assume that the ever-increasing size of the bar nationally would resolve the increased need for appointed counsel for indigent criminal defendants. Justice Brennan's hopeful prediction that law clinics and law students would make a significant *quantitative* contribution to representation of indigent criminal defendants was also wrong.[65] Further, the *qualitative*

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[62] *Id.* at n.7. Concurring in the judgment, Justice Powell voiced the resources concern: "It is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel." *Id.* at 55.

[63] *Id*.

[64] *Id*. at 40-41 (Brennan, J., concurring) (emphasis added; citations omitted).

[65] Having taught in a law school criminal clinic since 1987, I would not belittle the contributions of legal clinics and law students in vindicating the rights of indigent individuals over the last third of the twentieth century, a period of great growth in clinical legal education. However, criminal clinics and law students engaged in specially supervised law practice cannot carry the weight in delivering upon the

performance of an attorney in a criminal case was not addressed in the *Argersinger* Court's assessment of potential resources for defense counsel for the indigent. Quality representation is not assured by dint of an appointed counsel's having earned a law degree and passed a bar exam.

In 1973, the year after *Argersinger* was decided, Chief Judge Bazelon addressed the problematic quality of representation in a 1973 journal article criticizing the quality of traditional services to indigent defendants and suggesting "new approaches" including certification of criminal defense specialists.[66] Systemic provision of appointed counsel to indigents in the fifty states has remained inconsistent, various and undependable. Individual performances by counsel, both appointed and retained, vary radically, from superb to woeful. Without defined and enforced systemic standards for criminal defense lawyers, the provision of competent counsel to indigents does not occur, no matter how many lawyers graduate from law school and pass the bar.

Few, if any, would argue in this 40th anniversary year that the promise of *Gideon* has been altogether fulfilled. At the same time, *Gideon* has had an enormous impact on our society and on our legal culture. Focusing on the shortfall in delivering on the promise, it is possible to miss the power of the case and its transformative effect on the American criminal justice system and the practice of criminal law.

Perhaps the single most interesting consequence of *Gideon* is that its mandate has brought two social classes together in a common constitutional cause, i.e., defending against criminal charges. Lawyers constitute a prestigious professional class in our society. Beneficiaries of the American system of higher education and holders of a law license, lawyers constitute a class of citizens in an advantaged position to exploit economic, social and political opportunities for their clients and for themselves. Lawyers make up an altogether powerful class in American public and private life. By contrast, there is no facile way to characterize

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promise of *Gideon* for large numbers of criminal defendants. The quantitative contribution of clinics is necessarily small in relation to the numbers in need. Law school criminal clinics have at least two purposes, to educate and to represent. In the educational purpose, there is a need to be reflective. In the representational purpose, there is a need to aspire to and attain excellence. Fulfilling both purposes is time consuming and resource intensive: law faculty and law students typically devote much time to relatively few cases. Necessarily, a premium is put on maintaining a manageable docket of cases, not taking up the slack in the criminal justice system's delivery of legal services to criminal defendants.

[66] David. L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 18-19 (1973).

indigent criminal defendants as a class save to state the tautological: indigent defendants are citizens who cannot pay for their defense. This is no small cultural marker in a country that prizes the value of things purchased for money and doubts the value of things where no money exchanges hands.[67] For appointed counsel to assist an indigent defendant in his defense, it is necessary for attorney and client to become a functional team. In 1973 Judge Bazelon observed that cultural differences between lawyers and indigent clients can impede the provision of adequate defense services to indigent defendants: "'uptown' lawyers often have a serious communication problem in dealing with an indigent defendant. They are not prepared for the cultural shock of learning that their client is neither middle class nor cast in their image of the 'deserving poor.'"[68]

The pairing of a lawyer with an indigent client in a criminal case often involves bridging more than an economic divide and in so doing creates a fascinating dynamic in which other differences between the lawyer and the client become apparent. There is an opportunity for the lawyer and client alike to identify, recognize, and respect one another as they work together. There is also a great danger that the professional and the client will not develop a functional bond so as to be a defense team. It is not appropriate to develop these thoughts at greater length here. However, I firmly believe that the *Gideon* legacy has permanently improved the American legal culture by mandating the introduction of the professional class to a class of indigent fellow citizens charged with crimes. That "introduction" in the context of the constitutional

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[67] In a small study published in 1972 on the consumers' perspectives on criminal justice in New Haven, Connecticut, Casper wrote: "The lack of choice of an attorney and of a financial exchange contributes greatly to defendants; distrust of the Public Defender and even of the more sympathetic and zealous Legal Assistance lawyers." Jonathan D. Casper, Criminal Justice–The Consumer's Perspective 37 (1972). Casper reported that 39 of 49 defendants represented by a Public Defender "did not, in fact, believe that their attorneys were on their side." *Id*. at 23. By contrast, all 12 defendants represented by privately retained counsel believed that their attorneys were on their side. *Id*. In a much bigger, later study of 812 defendants in Phoenix, Detroit, and Baltimore, Casper's results again reflected markedly greater consumer satisfaction among defendants who privately retained their attorneys. Jonathan D.Casper, Criminal Courts: The Defendant's Perspective 16-18; 35-38 (1978) (also correlates greater client satisfaction with retained attorneys to their spending greater amounts of time with their clients than appointed counsel).

[68] Bazelon, *supra* note 66, at 12. Judge Bazelon also made interesting observations about the shortcomings of two other types of private lawyers typically appointed to represent indigents in Washington D.C. criminal cases in the early 1970s, the "regulars" and the "neophytes." *Id.* at 7-14.

obligation to assist in the client's defense has led to myriad successful attorney/client defense teams. It is an immeasurable improvement in American legal culture now to have had generation after generation of lawyers dedicate their careers to representation of indigent criminal defendants.

The number of criminal clients who have in fact received respectful, zealous, and technically competent assistance of counsel because of *Gideon*'s mandate is uncountable, but real. The fact that there is such a thing as effective assistance of counsel is precisely what makes it so galling to witness individual instances of ineffective assistance of counsel. At the systemic level, the state services for indigent defendants vary too greatly to generalize about *Gideon*'s fulfilled and unfulfilled promise, except to rue the lack of legal redress against states that implicitly sanction deficient defense work.

V. POSTSCRIPT: SOME THOUGHTS ON DEFENSE LAWYERING IN THE NEW CENTURY

Gideon gave the criminal defense bar a constitutional mission when it was decided in 1963. Since then the criminal defense bar itself has been reconfigured in many ways, having multiplied in size many times over and having benefited from the seismic, if incomplete, shift away from homogeneity and toward racial, ethnic, and gender diversity in bar membership in the United States.

Criminal practice has also changed radically since 1963. In the four decades since *Gideon*, criminal lawyers have had to become keen observers of the decisions of the United States Supreme Court in order to engage in their work in criminal cases. In our era we take for granted that decisions of the Supreme Court have an impact on the criminal justice process nationally, i.e., at both the federal and state level. Before *Gideon* and a raft of other decisions of the Court in the 1960s, the rules governing criminal practice were almost solely local rules, not national rules rooted in the federal Constitution.

The modern criminal lawyer must be a capable constitutional lawyer.[69] Before the Supreme Court decided *Gideon* and like decisions

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[69] Notwithstanding the federal constitutionalization of criminal procedure by the United States Supreme Court, state statutory and common law have remained the bread and butter of criminal practice. However, over the last quarter century, state constitutions, long a fallow source of law, have also been relied upon as an independent source for recognition and enforcement of individual rights and state rules of criminal procedure. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90

recognizing the constitutional aspects of criminal justice, most criminal cases were not understood to present a steady stream of constitutional issues. To the contrary, the criminal process in the pre-incorporation era reflected the customs and non-constitutional rules of the jurisdiction in which a given criminal case was prosecuted. To practice criminal law in the modern age, however, requires of necessity that the practitioner understand the constitutional principles that have been recognized as animating features in the modern criminal trial.[70] If a modern practitioner is not a constitutional scholar, at least she must be an avid follower of the appellate decisions at the federal and state levels that

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HARV. L. REV. 489, 498-502 (1977) ("I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions"). The momentum toward use of state constitutional analysis of individual rights, including those of criminal defendants, increased in the 1980s. *See generally*, H.C. Macgill, *Upon A Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982) ("State courts are no longer comatose, but it is still too early to tell if we are on the threshold of a Great Awakening"). In 1985, the Vermont Supreme Court declared: "To protect his or her client, it is *the duty of the advocate to raise state constitutional issues*, where appropriate, at the trial level and to diligently develop and plausibly maintain them on appeal." State v. Jewett, 146 Vt. 221, 229; 500 A.2d 233, 238 (1985) (court provided an analytic primer for practitioners raising state constitutional claims) (emphasis added). *See* Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583 (1986). *See also* Martin B. Margulies, *A Lawyer's View of the Connecticut Constitution*, 15 CONN. L. REV. 107, 120 (1982) ("The potential uses of the Connecticut Constitution are today limited only by the constraints of language and the imagination and skill of counsel"). Rules of criminal procedure in Connecticut in recent decades have sometimes been given constitutional force under the Connecticut constitution, independent of the federal constitution. *See, e.g*., State v. Marsala, 216 Conn. 150, 579 A.2d 58 (1990); State v. Geisler, 222 Conn. 672, 610 A.2d 1225 (1992).

[70] The seminal cases announcing rules of constitutional criminal procedure applicable nationally are too numerous to recite here. Scores of Supreme Court cases, past and present, set forth federal constitutional principles that every advocate, to be literate in modern criminal procedure, must know not just formally but must be able to apply functionally in his or her own case work. *E.g.,* Mapp v. Ohio, 367 U.S. 643 (1961); Pointer v. Texas, 380 U.S. 400 (1965); Miranda v. Arizona, 384 U.S. 436 (1966); Washington v. Texas, 388 U.S. 14 (1967); Terry v. Ohio, 392 U.S. 1 (1968); Benton v. Maryland, 395 U.S. 784 (1969); Kastigar v. United States, 406 U.S. 441 (1972); Chambers v. Mississippi, 410 U.S. 284 (1973); Davis v. Alaska, 415 U.S. 308 (1974); Sandstrom v. Montana, 442 U.S. 510 (1979); Missouri v. Hunter, 459 U.S. 359 (1983); United States v. Leon, 468 U.S. 897 (1984); Maryland v. Craig, 497 U.S. 836 (1990); United States v. Hubbell, 530 U.S. 27 (2000); Apprendi v. New Jersey, 530 U.S. 466 (2000); Crawford v. Washington, 124 S.Ct. 1354 (2004); Blakley v. Washington, 124 S.Ct. 2531 (2004).

have a direct impact on criminal practice.[71]

The lawyer promised to an indigent in a criminal case under the *Gideon* doctrine is confronted with a challenging, if not overwhelming, quantity of positive and decisional law that must be mastered in order to attain and maintain legal literacy and competency in criminal law and procedure. Thankfully and quite remarkably, most modern lawyers in this country now have access to technological tools that have all but eradicated practical barriers to accessing legal authority. No longer does one need to buy local law reports or keep track of law library hours to do research. No longer must one wait for another practitioner to finish with a volume that he took off the library shelf first. With no trip down the hall, much less down the road to the county law library, criminal lawyers now have near immediate access to virtually all the state, federal and international legal materials needed to attain literacy and competency in criminal law and procedure. The ubiquity of the Personal Computer and the laptop have revolutionized information retrieval, legal research, and legal drafting. The effect has been to democratize the practice of law: a much greater portion of the Criminal Bar in 2003 had access to the textual tools of criminal practice than in 1963.[72]

The new century presents many new challenges to the criminal defense bar that must be met if the Sixth Amendment right to counsel is to have vitality. To be competent a defense lawyer in this age it is not remotely enough to be a persuasive, hard-working, and literate courtroom lawyer. Case development requires a working knowledge of

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[71] *See, e.g.,* Chambers v. Mississippi, 410 U.S. 284, 302 (1973), in which the Court held that Mississippi's common law voucher rule and its disallowance of a statement against penal interests exception to the hearsay rule did not trump the defendant's constitutional right to present a defense. The Court held that the defendant should have been permitted to present evidence to the jury to show that a defense witness had made out-of-court confessions to the crime for which Chambers was on trial. In 1980 the Connecticut Supreme Court responded to the constitutional force of the *Chambers* decision when it announced a "statement against penal interests" exception to the hearsay rule under the Connecticut law of evidence. State v. DeFreitas, 179 Conn. 431, 448-54 (1980). *See generally* Colin C. Tait, TAIT 'S HANDBOOK OF CONNECTICUT EVIDENCE § 8.43.2 (3d ed. 2001). One of today's panelists, Judge Michael Sheldon, then the Director of the University of Connecticut Criminal Clinic, was appellate counsel for the defendant in *DeFreitas*.

[72] In the first two decades after *Gideon* was decided, the ability to photocopy legal authority was a significant breakthrough that greatly enhanced lawyers' access to legal text without having to purchase a private law library or lug volumes containing critical legal authority to court. But the bigger revolution has come in the last decade or so. The age of the internet, the personal computer and the laptop computer has utterly transformed the practice of law, including the criminal law.

the ever-increasing array of forensic resources available to the prosecution and to the defense that have become basic tools in criminal practice. A competent criminal defense lawyer must be part scientist, cognizant of the ever-changing bounds of forensic science that have direct impact on the prosecution and defense of criminal cases.[73] A competent criminal defense lawyer must know when to hire and how to use a medical or psychiatric expert and must follow changes in medicine and psychiatry. A social worker is a part of a competent defense lawyer's investigative team. In short, a criminal defense lawyer today cannot succeed for long, and will not succeed at all in certain cases, if he or she is a loner. To be a defense attorney in the modern age requires working with others, not as a loner; one must choreograph case development, not merely to do the best one can with one's native wits.

One of the biggest challenges in this new century will be to close the gap between the best representation that money can buy and the representation that everyone else receives. In many cases it is not enough to be able to retain an attorney privately or to obtain an attorney by court appointment. An attorney alone is not enough. An attorney needs tools, and paying for the tools, not just paying the attorney, will be necessary so that defense attorneys will have the ability to fulfill their legitimating role in our adversary system of justice.[74]

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[73] *See generally* Paul C. Giannelli & Edward J. Imwinkelreid, SCIENTIFIC EVIDENCE (3d ed. 1999) (two volume treatise including chapters on Voice Identification Analysis, Neutron Activation Analysis, Statistical Evidence, Fingerprints, The DNA Genetic Marker, Genetic Markers Other than DNA, Pathology, Toxicology, Drug Identification, Trace Evidence, Instrumental Analysis).

[74] See *supra* note 31.