

SPRING 2013 INDIGENT DEFENSE PROGRAM GUIDE

Clarence Earl Gideon, having been charged with felony breaking and entering in a Florida state court, requested a court appointed attorney because he could not afford one. The court denied that request, stating that court appointed indigent defense was required only in capital cases. Mr. Gideon, representing himself, was found guilty by a jury and sentenced to five years imprisonment, but appealed that verdict to the Supreme Court. On March 18, 1963, in *Gideon v. Wainwright*, the Court held that “any person ha[u]led into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”¹ This victory for Mr. Gideon and other indigent defendants gave proper interpretation and true meaning to the Sixth Amendment right to counsel. However, fast forward fifty years, this country has fallen short of what is required of it by the Constitution.

The 50th anniversary of the Supreme Court’s decision in *Gideon* provides an ideal opportunity to reflect on the progress made and explore needed reforms in order to ensure that all Americans have access to effective counsel when accused of a crime that could land them in prison. According to the Department of Justice, three-quarters of the public defender’s offices in the country have caseloads which exceed minimum caseload standards. In some jurisdictions, indigent defenders have so many cases that they may have as little as one hour per client.² In some instances, defendants meet their attorneys in the courtroom hallway shortly before arraignment. This leaves indigent defense attorneys largely in the position of negotiating plea bargains without adequate time or resources to devote to even the most cursory investigation as to the guilt or innocence of the accused.³ And with one legal aid attorney available for every 6,415 low-income people,⁴ a Civil Gideon movement is being led by those who argue that the right to counsel must extend beyond indigent criminal defense to indigent civil representation.

Statistics alone, however, cannot do justice to the individual horror stories that the crisis in indigent defense has caused. In Detroit, Michigan, Edward George Carter was wrongfully convicted and

¹ 372 U.S. 335, 343 (1963).

² See DONALD J. FAROLE, JR. & LYNN LANGTON, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: CENSUS OF PUBLIC DEFENDER OFFICES 2007, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 (2010), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf>; ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION AND PROSECUTION FUNCTION 126, Defense Function Standards 4-1.3(e) (3d ed. 1993) *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html#1.3.

³ “To a large extent . . . horse trading determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system.” Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992) (emphasis in original); GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (stating that in 2001 94% of cases in the federal system “plead out.”).

⁴ LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA (2009), *available at* http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf.

incarcerated for over 35 years because of inadequate public representation. Mr. Carter's public defense attorney was not prepared to handle his complex case, as evidenced by the failure to investigate case facts, interview alibi witnesses, and introduce forensic evidence at trial that would have exonerated Mr. Carter.⁵ In New Orleans, Willie Cheneau found himself in the middle of a fight between the Orleans Parish public defender's office and the state when the office lost funding and had to fire many of its attorneys, leaving over 500 people without legal representation. The squabble left Mr. Cheneau, charged with marijuana possession, in jail for over two months while missed trial dates, hearings, and postponements mounted. When finally appointed an attorney, Mr. Cheneau plead guilty and was released within two days.⁶ And in New York, Kimberly Hurrell-Harring, whose boyfriend convinced her to sneak marijuana into a prison, was arrested and jailed for three weeks. When Ms. Hurrell-Harring did get a court-appointed attorney, they met for 15 minutes before the pre-trial hearing, where she was advised to plead guilty and receive six months in prison and five months of probation. Ms. Hurrell-Harring took the plea and quickly ran into the collateral consequences of a felony plea deal; she lost her nursing license, her job, and her home. Had her attorney been able to spend more than 15 minutes with her before the sentencing hearing, perhaps the outcome for Ms. Hurrell-Harring would have been different.⁷

Even though recent Supreme Court decisions have protected and expanded Sixth Amendment rights, if the indigent defense status quo remains, public defenders will continue to find themselves vastly overworked and unable to provide zealous representation for their clients. With this reality in mind, and upon the 50th anniversary of *Gideon*, ACS encourages all chapters to host spring events that can highlight issues surrounding our right to counsel in criminal and civil proceedings. Some events can be simple educational discussions; for example, inviting a local public defender to speak about the indigent defense system in the local jurisdiction. Others can examine whether the right to counsel will eventually morph into a "Civil Gideon," where people will be constitutionally afforded counsel in civil matters if they cannot afford one. Several of these issues are outlined below, and ACS believes indigent defense programs provide an excellent opportunity to engage with national, state, and local officials, advocates, practitioners, and policymakers. This brief guide, along with its associated speaker list, has been designed to assist chapters in planning indigent defense programs in the spring.

Indigent Defense Program Ideas

Interpreting the Sixth Amendment

According to the text of the Sixth Amendment, "[T]he accused shall enjoy the right ... to have the assistance of counsel for his defen[s]e." At first glance, this right appears limited to the English common

⁵ AMERICAN CIVIL LIBERTIES UNION, *FACES OF FAILING PUBLIC DEFENSE SYSTEMS PORTRAITS OF MICHIGAN'S CONSTITUTIONAL CRISIS* (2011), available at http://www.aclu.org/files/assets/MI_failedjustice_bookletsm.pdf.

⁶ Karen Houppert, *Locked Up Without a Key in New Orleans*, THE NATION, Aug. 22, 2012, <http://www.thenation.com/article/169516/locked-without-key-new-orleans>.

⁷ Deborah Hastings, *Nationwide, Public Defender Offices are in Crisis*, ASSOCIATED PRESS, Jun. 7, 2009, http://www.realclearpolitics.com/news/ap/us_news/2009/Jun/03/nationwide__public_defender_offices_are_in_crisis.html.

law rule it was written to counteract, which denied anyone charged with a felony the right to retain counsel. The original importance of the right was to guarantee the accused the right to retain private counsel in their defense.⁸ With this history, how did the right to counsel grow to require a lawyer for those who could not afford one in all criminal proceedings where the loss of liberty is at stake?

In interpreting the right to counsel, the watershed Warren Court⁹ decision in *Gideon*, as well as *In re Gault*¹⁰ and *Argersinger v. Hamlin*,¹¹ was demonstrative of a judicial approach that faithfully interpreted the Constitution. These decisions gave real effect to Sixth Amendment principles, and respected state law precedent going back to the 19th century recognizing that, “[t]he defense of the poor in [felony] cases is a duty which will at once be conceded as essential to the accused, to the court and to the public.”¹² The Warren Court right to counsel cases illustrate an approach to constitutional interpretation founded upon an understanding of constitutional principles, principles that make the Constitution a document that remains as salient today as it was in 1787. **Program questions to consider include: Can the Constitution be faithfully interpreted as providing a right to counsel in the civil context? In the time since the Warren Court decisions, has the Court faithfully interpreted the Sixth Amendment in other right to counsel cases?**

The Indigent Defense Crisis

There is a long list of what has led to the indigent defense crisis: inadequate funding; large caseloads; untimely case appointments; poor representation; insufficient training and supervision; unqualified experts, investigators, and interpreters; over-criminalization; and disparate systems at state and local levels.¹³ According to the National Legal Aid & Defender Association, felony caseloads of “500, 600, 800 or more are common.”¹⁴ The American Bar Association advises that a full-time attorney should be assigned to no more than 150 non-capital felony defendants per year, or 400 non-traffic misdemeanor defendants, or 200 juvenile clients.¹⁵ Local public defenders can provide firsthand accounts of their systems, responding to questions that include: **What is a typical public defender caseload? How much**

⁸ CONG. RESEARCH SERV., ANNOTATED CONSTITUTION ONLINE, CORNELL U. LEGAL INFORMATION INSTITUTE (2000), *available at* http://www.law.cornell.edu/anncon/html/amdt6frag7_user.html.

⁹ Refers to the Supreme Court between 1953 and 1969, when Chief Justice Earl Warren was at the Court’s helm.

¹⁰ 387 U.S. 1 (1967). This case gave juveniles in delinquency proceedings the same due process rights as adults, including the right to counsel.

¹¹ 407 U.S. 25 (1972). This case afforded indigent defendants the right to counsel in any case that involved actual imprisonment, even misdemeanors.

¹² *Webb v. Baird*, 6 Ind. 13, 16 (1854).

¹³ THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* <http://www.constitutionproject.org/pdf/139.pdf>.

¹⁴ National Legal Aid & Defender Association, Five Problems Facing Public Defense on the 40th Anniversary of *Gideon v. Wainwright*, http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_5_Problems (last visited Nov. 29, 2012).

¹⁵ ABA STANDING COMM’N ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

funding and resources are available per case? How many cases in the jurisdiction result in plea bargains?

Film screenings are another way to bring attention to the indigent defense crisis, with films like *Gideon's Trumpet* and *Gideon's Army* offering an in depth look at the weaknesses in the criminal justice system. *Gideon's Trumpet* is a 1980 film starring Henry Fonda as Clarence Earl Gideon and depicts the events surrounding *Gideon v. Wainwright*. [Gideon's Army](#), featuring public defenders working in the Deep South, will air on HBO in the spring of 2013. Post-film group discussions can consider several questions: **Is the need for indigent defense representation more or less prescient than it was when *Gideon* was decided? Are there simply too many crimes, e.g., drug offenses, today for which one could potentially go to prison? What are viable indigent defense reforms?**

For more information, see the Oyez Project's [opinion and oral argument audio](#) for *Gideon v. Wainwright*; Inimai M. Chettiar's ACS Blog post, [It's Not Just Prosecutorial Leverage That's Eroding our Justice System](#); Laurence A. Benner's ACS Issue Brief, [When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice](#); and Robert Boruchowitz's ACS Issue Brief, [Diverting and Reclassifying Misdemeanors Could Save \\$1 Billion per Year: Reducing the Need For and the Cost of Appointed Counsel](#).

Right to Effective Counsel SCOTUS Review

During the 2011-2012 Term, the Supreme Court considered a number of cases relating to indigent defense. Significantly, the Court looked at the right to counsel at the plea-bargaining stage in *Missouri v. Frye*¹⁶ and *Lafler v. Cooper*.¹⁷ In *Frye*, a prosecutor made a plea offer to the defendant's court appointed lawyer, who failed to communicate the offer to his client. The defendant was sentenced to three years in state prison. In *Cooper*, the prosecutor's plea deal was communicated to the defendant, but the court appointed attorney recommended that the defendant reject the deal based on a faulty legal theory. The defendant followed this advice and lost at trial, receiving a sentence nearly four times longer than if he had taken the plea deal. With counsel being deemed ineffective in both *Frye* and *Cooper*, the Court recognized that "[b]ecause ours 'is for the most part a system of pleas, not a system of trials,'"¹⁸ it was critical to have effective assistance of counsel at this stage of criminal proceedings.

The Court also considered right-to-counsel cases in the context of post-conviction proceedings. In *Maples v. Thomas*,¹⁹ an Alabama death row inmate was abandoned by his attorneys during the appeals process, causing the inmate to miss an appeals deadline. The Court agreed that the attorneys abandoned their client, thereby causing an extraordinary circumstance, and created an exception to the usual rule that a counsel's mistakes in post-conviction proceedings are imputed to the client. In *Martinez v. Ryan*,²⁰ the defendant wanted to raise an ineffective assistance of counsel claim in a collateral *state*

¹⁶ 132 S. Ct. 1399 (2012).

¹⁷ 132 S. Ct. 1376 (2012).

¹⁸ *Id.* at 1388.

¹⁹ 132 S. Ct. 912 (2012).

²⁰ 132 S. Ct. 1309 (2012).

post-conviction proceeding, but without his knowledge, defendant's state-assigned appellate counsel failed to do so; the defendant then sought to raise the ineffective assistance of counsel claim in a *federal* habeas petition. The Court ruled that a defendant will not be barred from seeking relief for an ineffective trial counsel for the first time in a *federal* post-conviction proceeding when certain conditions are met. One, state law must bar a defendant from raising an ineffective trial counsel claim until the initial-review collateral proceeding and two, a defendant's lack of counsel or ineffective assistance of counsel in regard to that proceeding results in a failure to raise that claim. And in *Martel v. Clair*,²¹ the Court strengthened a capital defendant's ability to replace his counsel when it serves the "interests of justice." The Court's ruling will make it easier for prisoners to bring deficiencies in their appellate representation to the attention of the judges overseeing their cases and provide for more effective counsel in post-conviction relief.

There are several cases with indigent defense implications to watch this 2012-2013 Term as well. These cases include *Ryan v. Gonzales* and *Tibbals v. Carter*, in which the Court will consider questions around habeas rights for indigent death row inmates who lack the competency to assist counsel. *Boyer v. Louisiana* is another case where the Court will consider if Louisiana's failure to provide counsel to an indigent capital defendant for five years, due to Louisiana's funding crisis, denied the defendant the right to a speedy trial. Public defenders are also arguing some of the Court's more high profile criminal cases this term, like *Florida v. Jardines* and *Florida v. Harris*, where the Court is considering Fourth Amendment rights in the context of drug-sniffing police dogs.

Program questions to consider include: **Should the criminal justice system be a system of pleas rather than trials? How has plea bargaining changed post-Lafler and Frye? Have Lafler and Frye impacted professional standards for defense counsel? Is the defendant's burden to prove ineffective assistance of counsel during the plea bargaining stage too great? Post-Maples v. Thomas, what qualifies as an extraordinary circumstance in order for an inmate to get a second chance at the appeals process? In Martinez v. Ryan, the Court stopped short of declaring a constitutional right to counsel post-conviction; should it have?**

For more information, see Mary Schmid Mergler and Christopher Durocher's ACS Issue Brief, [The "Right-to-Counsel" Term](#); Mary Schmid Mergler's ACS Blog post, [Supreme Court Sets Critical New Precedents on Right to Counsel](#); Brandon L. Garrett's ACS Blog post, [State Habeas at Center Stage](#); Nicole Flatow's ACS Blog post, [In Rejecting Plea Deal, Federal Judge Laments 'Pandemic' Waiver of Rights](#); and J. Amy Dillard's ACS Blog post, [Justices Weigh Privacy in Police Dog Search Cases](#).

Intersection of Indigent Defense and Immigration

In *Padilla v. Kentucky*,²² the Supreme Court found that public defenders have a responsibility to advise clients on how a guilty plea will affect their immigration status. In *Padilla*, a permanent lawful resident was advised by his lawyer that he did not have to worry about deportation because he had been in the

²¹ 132 S. Ct. 1276 (2012).

²² 130 S.Ct. 1473 (2010).

country for 40 years; the client then plead guilty to a deportable offense and faced virtually mandatory deportation. The Supreme Court ruled that “when the deportation consequence is truly clear... the duty to give correct advice is equally clear.”²³ And even where immigration law is complex, the Court ruled that, at the very least, a competent attorney has the duty to warn their client that a guilty plea could have adverse immigration consequences.

The first case to make its way through the appellate system applying the rule set forth in *Padilla* is *Chaidez v. U.S.*,²⁴ where a permanent lawful resident unknowingly plead guilty to a crime with deportation implications. Ms. Roselva Chaidez pled guilty to insurance fraud in 2003. Six years later, Ms. Chaidez was not only unsuccessful in her petition for citizenship because she disclosed the plea, but was placed in deportation proceedings. Ms. Chaidez sought to have her conviction vacated on grounds that her lawyer advised her to plead guilty without mentioning the immigration consequences of doing so. The Seventh Circuit held that, because *Padilla* announced a new constitutional rule, it could not be applied retroactively. The Supreme Court granted cert and oral argument took place on October 30, 2012. Program questions to consider include: **Should there be a role for the federal government to assist lawyers in providing sound advice to their clients about immigration consequences? Should all defense attorneys now be competent in immigration issues post-*Padilla*? Should *Padilla* be applied retroactively, particularly for individuals who committed minor offenses and have lived in the U.S. for decades?**

For more information, see Sejal Zota & John Ruben’s ACS Issue Brief, [Immigration Assistance for Indigent Defenders](#); L. Song Richardson’s ACS Blog post, [The Argument in Padilla v. Kentucky](#); Rebecca Sharpless’ ACS Blog post, [What Counts as a Teague ‘New Rule’? Supreme Court Hears Argument About Pre-*Padilla* Criminal Plea Involving Defense Counsel’s Failure to Warn of Deportation](#); and Elizabeth Wydra’s ACS Blog post, [Supreme Court Considers Important Case for Immigrants’ Constitutional Rights in Rare Hearing](#).

Indigent Defense, Death Penalty, and Wrongful Convictions

While the benefits of having a private lawyer in criminal cases are obvious, research suggests that having one can save a defendant’s life if they are facing the death penalty. Scott Phillips studied capital cases in the Houston, Texas area and found that hiring a private attorney *totally* eliminated the risk of being sentenced to death and increased one’s chances of being acquitted. In fact, if you had a private attorney, your chances of the prosecutor even seeking the death penalty were just 3%.²⁵ Furthermore, the desirability of private counsel in capital cases is great given the many problems with indigent defense in such cases. The National Coalition to Abolish the Death Penalty (NADCP) finds that “bad lawyers are a persistent problem” in capital cases.²⁶ NADCP reports that the appointed attorneys are

²³ *Id.* at 1483.

²⁴ 655 F.3d 684 (2011).

²⁵ Scott Phillips, ACS Issue Brief, *Hire A Lawyer, Escape the Death Penalty?* (2010), https://www.acslaw.org/sites/default/files/Phillips_Hire_Lawyer_Death_Penalty.pdf.

²⁶ National Coalition to Abolish the Death Penalty, *Death Penalty Overview: Ten Reasons Why Capital Punishment is Flawed Public Policy*, <http://www.ncadp.org/index.cfm?content=5> (last visited Nov. 14, 2012).

overworked, underpaid, and inexperienced, and in some instances, have slept through parts of the trial or have been under the influence of alcohol at trial.²⁷

Some capital defendants are disadvantaged not only because of the failures of our current indigent defense system, but also because of the system's treatment of mentally impaired defendants. Though the Supreme Court ruled in *Atkins v. Virginia*²⁸ that executing the mentally disabled violates the Eighth Amendment, the Court's ruling left it to the states to determine who is mentally disabled. This is how, despite the Court's decision in *Atkins*, a Virginia jury decided that Mr. Daryl Atkins's contact with his lawyers had intellectually stimulated him enough to be competent to stand trial and Mr. Atkins found himself on death row again. Fortunately, Mr. Atkins' death sentence was commuted to a life sentence in 2008.²⁹ Mentally ill death row inmates in Texas, Yokamon Hearn and Marvin Wilson, were not as fortunate. Mr. Hearn suffered from brain damage, in addition to poor representation at trial, and Mr. Wilson was below the first percentile of human intelligence; both were executed in 2012. Since *Atkins* entrusted the states with establishing appropriate competency standards, Texas was able to impose a trial competency standard that is not recognized by the American Association on Intellectual and Developmental Disabilities.³⁰

The most unjust consequence of a defendant relying on inexperienced and overworked indigent defenders is a wrongful conviction. Professor Brandon Garrett illuminates this type of grave injustice with the case of Earl Washington, Jr., a Virginia man who was exonerated based on DNA evidence after spending nine years on death row. It is likely this ordeal could have been avoided had Mr. Washington been competently represented at trial; his trial counsel had never tried a death penalty case and at the trial, never made claims as to Mr. Washington's actual innocence or challenged Mr. Washington's confession on the basis of mental impairment.³¹ Going beyond Mr. Washington's case, and recognizing the many factors that contribute to wrongful convictions – eyewitness misidentification, improper forensic science, false confessions, and informants³² – it is, however, zealous and diligent indigent defense that can bring these issues to light and prevent wrongful convictions.

Program questions to consider include: **Should there be a national public defender system for capital cases? Should states be required to have statewide defender systems for capital cases? Are prosecutors less willing to take capital cases to trial if they know they will be litigating against**

²⁷ *Id.*

²⁸ 536 U.S. 304 (2002).

²⁹ Adam Liptak, *Lawyer Reveals Secret, Toppling Death Sentence*, N.Y. TIMES, Jan. 19, 2008, http://www.nytimes.com/2008/01/19/us/19death.html?_r=2&oref=slogin&.

³⁰ Jeremy Leaming, *Texas Messes with Court Precedent, Prepares to Execute Another Mentally Disabled Person*, ACS BLOG, Aug. 2, 2012, <http://www.acslaw.org/acsblog/texas-messes-with-court-precedent-prepares-to-execute-another-mentally-disabled-person>.

³¹ Brandon L. Garrett, *Why We Convict the Innocent*, ACS BLOG, Mar. 31, 2011, <http://www.acslaw.org/acsblog/why-we-convict-the-innocent>.

³² Innocence Project, *Facts on Post-Conviction DNA Exonerations*, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Nov. 14, 2012).

experienced private attorneys? How do wrongful convictions demonstrate flawed indigent defense systems, particularly in capital cases? What can be done to ensure that criminal justice system errors are revealed at the trial stage rather than when a defendant has spent years in prison? Should the Supreme Court impose a national standard to determine who is mentally competent to stand trial in capital cases?

For more information, see Scott Phillips' ACS Issue Brief, [Hire A Lawyer, Escape the Death Penalty?](#); Jeremy Leaming's ACS Blog post, [Texas Messes with Court Precedent, Prepares to Execute Another Mentally Disabled Person](#); Jeremy Leaming's ACS Blog post, [Human Rights Law Review Reveals Troubling Picture of Wrongful Execution](#); Brandon L. Garrett's ACS Blog post, [Why We Convict the Innocent](#); and ACS program video, [A Long Road to Innocence: A Screening and Dialogue Around Mississippi Innocence](#).

Indigent Defense Reform

Responses to the indigent defense crisis within the last couple of years have taken many forms; some efforts are an attempt to comprehensively reform the system, while others are necessary just to keep the system from imploding. The New Orleans Parish Defenders Office responded to a lack of funding by appointing private attorneys, but many were not paid for their services and others had to withdraw from their appointed cases because of inexperience. With this response to the lack of indigent defense funding proving disastrous, and many criminal defendants languishing in prison, the Louisiana legislature voted to increase the traffic ticket penalties that the Parish Defenders Office relies on for funding.³³ Even though there are now fewer defendants sitting in jail waiting for a public defender, the office is still critically dependent on people paying their traffic tickets to get funding. And in Maryland, to avoid a \$23 million dollar price tag, the legislature there reduced the number of crimes that carry incarceration sentences and therefore require the appointment of counsel. The Maryland Supreme Court had recently held that indigent defendants have the right to an attorney before having their bail set by the court, which had the Maryland legislature not acted, was sure to burden the state's indigent defense system.³⁴

Some states are pursuing more drastic indigent defense reforms. Last year, Alabama created a state-wide indigent defense system. In addition to centralizing right to counsel services, standards will be promulgated and staffing in public defender offices will be increased.³⁵ And recently, the Michigan House of Representatives approved a bill to create the Michigan Indigent Defense Commission, also moving Michigan closer to the state-wide system used by most states. As was the case in Alabama,

³³ John Simerman, *New Orleans Public Defender's Office to Restore Services*, TIMES-PICAYUNE, June 26, 2012, http://www.nola.com/crime/index.ssf/2012/06/new_orleans_public_defenders_o_1.html.

³⁴ Vanita Gupta & Steve Hanlon, *Hitting Two Birds with One Stone: Strategies for Addressing the Indigent Defense Crisis and Overincarceration*, Sept. 4, 2012, <http://www.acslaw.org/acsblog/hitting-two-birds-with-one-stone-strategies-for-addressing-the-indigent-defense-crisis-and-o>.

³⁵ David Carroll, *Gideon Alert: Alabama Creates Statewide Indigent Defense System*, National Legal Aid and Defender Association, June 9, 2011, <http://www.nlada.net/jsери/blog/gideon-alert-alabama-creates-statewide-indigent-defense-system>.

Michigan's current decentralized approach to providing counsel to those who cannot afford it has been deemed inadequate.³⁶

Program questions to consider include: **What other indigent defense reforms should be considered; e.g. requiring all members of the bar to take pro bono criminal cases? Will reforms like those in Maryland that eliminate jail time for certain offenses result in needless criminal convictions because attorneys are no longer needed? Should all states have state-wide indigent defense systems? Should all defender systems follow the best practices established by the American Bar Association in its Ten Principles of a Public Defense Delivery System?**

For more information, see Vanita Gupta and Steve Hanlon's ACS Blog post, [Hitting Two Birds with One Stone: Strategies for Addressing the Indigent Defense Crisis and Overincarceration](#); Jeremy Leaming's ACS Blog post, [With No Legal Representation Inmates Face Uphill Struggle to Challenge Conviction](#); Inimai M. Chettiar's ACS Blog post, [It's Not Just Prosecutorial Leverage that's Eroding our Justice System](#); and David Carroll's ACS Blog post, [Mich. Supreme Court Reverses Course in ACLU Class Action Indigent Defense Lawsuit](#).

Federal Role in Indigent Defense Reform

With many states failing at their constitutional duty to ensure that the poorest among us have a fair trial, there is a role for the federal government to play. The federal government gives states criminal justice grants, with most of the states pumping those dollars into law enforcement, prosecutorial, and court activities. But when it comes to indigent defense, a recent Government Accountability Office (GAO) study revealed that the dollars are noticeably absent. GAO estimated that states allocated seven-tenths of 1% of grant money to indigent defense, while 38% was allocated to prosecutors and law enforcement.³⁷

In addition to providing comparable resources to state indigent defense systems, there are various ways the federal government could shape indigent defense reforms. For example, it could design a common template for assessing errors in local systems and serve as a clearinghouse for collecting and sharing this data, thereby setting in motion a cultural shift that motivates local systems' frontline practitioners to adopt "best practices."³⁸ Another approach the federal government could take is passing legislation that would allow federal courts to hear claims alleging that a state has systemically violated the Sixth Amendment right to counsel.³⁹ Program questions to consider include: **Should there be an obligation for the federal government to fund indigent defenders to the same extent as prosecutors? Should**

³⁶ *Michigan House OK's Overhaul of Indigent Defense*, ASSOCIATED PRESS, Nov. 8, 2012, <http://www.detroitnews.com/article/20121108/METRO/211080465>.

³⁷ Robert M.A. Johnson, *Indigent Defense Given Short Shrift in Federal Justice Grants*, THE HILL, June 6, 2012, <http://thehill.com/blogs/congress-blog/judicial/231475-indigent-defense-given-short-shrift-in-federal-justice-grants>.

³⁸ James M. Doyle, ACS Issue Brief, *From Error Toward Quality: A Federal Role in Support of Criminal Process* (2010), <http://www.acslaw.org/files/ACS%20Issue%20Brief%20-%20Doyle%20>.

³⁹ Cara H. Drinan, ACS Issue Brief, *A Legislative Approach to Indigent Defense Reform* (2010), http://www.acslaw.org/files/ACS%20Issue%20Brief%20-%20Drinan%20Indigent%20Def%20Reform_0.pdf.

federal courts be more readily accessible to state defendants? Is a national standards approach necessary to be successful with indigent defense reform efforts?

For more information, see Erica J. Hashimoto's ACS Issue Brief, [Assessing the Indigent Defense System](#); Stephen B. Bright and Lauren Sudeall Lucas' ACS Issue Brief, [Overcoming Defiance of the Constitution: The Need for a Federal Role in Protecting the Right to Counsel in Georgia](#); James M. Doyle's ACS Issue Brief, [From Error Toward Quality: A Federal Role in Support of Criminal Process](#); Cara H. Drinan's ACS Issue Brief, [A Legislative Approach to Indigent Defense Reform](#); and Eve Brensike Primus' ACS Issue Brief, [Litigation Strategies for Dealing with the Indigent Defense Crisis](#).

Legal Services & Civil Gideon

Outside of the criminal context, low-income individuals need access to legal services in life changing matters such as housing evictions, financial disputes, and domestic issues. With over 46 million people living in poverty, the largest number in 52 years, access to legal services is critical.⁴⁰ And in the wake of this great need for legal services, the Legal Services Corporation – the single largest funder of civil legal aid – has been subjected to spending cuts. As a result, less than 20% of the need for legal services is currently being met. For every one person who receives legal services, one person is denied.⁴¹

Going a step beyond legal services, there is a movement calling for the right to counsel in civil matters, especially when basic human needs are at stake – Civil Gideon. Having recently considered the right to counsel in the civil context, however, the Supreme Court, in *Turner v. Rogers*,⁴² held that there is no Fourteenth Amendment due process right to counsel in a civil contempt hearing that can result in incarceration. Arguably, *Turner v. Rogers* implicates the very high stakes issues that should entitle both parties to counsel – a mother seeking delinquent child support and a father facing incarceration for failure to pay child support. However, the *Turner* decision does insist that certain procedural safeguards be in place for pro se litigants facing incarceration for civil contempt.⁴³

Program questions to consider include: **Should there be instances, e.g. the financial crisis, where funding for legal services in that specific context is increased? Is the right to counsel in a civil context rooted in our Constitution? Should states incorporate a civil right to counsel in their constitutions? Should states follow California's Civil Gideon model and provide a right to counsel in key civil cases, like eviction and domestic abuse? Should other states follow New York's example and require all aspiring attorneys to complete 50 hours of pro bono work before they are admitted to the state bar? Should states require that all attorneys participate in Interest on Lawyers Trust Accounts (IOLTA) programs, which use the interest to provide civil legal aid to the poor?**

⁴⁰ Sabrina Tavernise, *Soaring Poverty Casts Spotlight on 'Last Decade,'* N.Y. TIMES, Sept. 13, 2011, <http://www.nytimes.com/2011/09/14/us/14census.html?pagewanted=all>.

⁴¹ Alan W. Houseman, *The Crisis in Civil Legal Aid*, ACS BLOG, Sept. 25, 2012, <http://www.acslaw.org/acsblog/the-crisis-in-civil-legal-aid>.

⁴² 564 U.S. _ (2011).

⁴³ Mark Walsh, *A Sour Note from Gideon's Trumpet*, ABA JOURNAL, Sept. 1, 2011, http://www.abajournal.com/magazine/article/a_sour_note_from_gideons_trumpet/.

For more information, see Alan W. Houseman's ACS Blog post, [*The Crisis in Civil Legal Aid*](#), Rebekah Diller's ACS Blog post, [*Turner v. Rogers: What the Court Did and Didn't Say*](#); Laura Abel's ACS Blog post, [*The Fiscal Cliff Threatens Court Access*](#); and Jeremy Leaming's ACS Blog post, [*House Leaders Push Effort to Slash Funding for Poor*](#).