

Valuing *Gideon*'s Gold: How Much Justice Can We Afford?<sup>1</sup>

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**Introduction**

In the fifty years since sounding *Gideon*'s trumpet,<sup>3</sup> the Court has extended *Gideon*'s reach to other contexts and classes of defendants. State and local governments have heeded this call, creating and reforming indigent defense systems. Why, then, do equal justice and fundamental fairness continue to elude us? Can they ever be any more than ideals? Are they, like maturity, a road and never a destination? Of what value are *Gideon* and its progeny if today individuals and communities still get as much justice as they can afford?

To deliver effective assistance of counsel, public defenders and other assigned counsel must meet certain performance criteria, carry reasonable caseloads, count on the necessary money and resources, and have ready access to a team of experts, investigators, social workers, and support staff. National defense standards addressing these crucial factors are readily available to help communities comply with *Gideon*'s call.<sup>4</sup> Sadly, these standards rarely come

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<sup>3</sup> Cf. ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

<sup>4</sup> See, e.g., Am. Bar Ass'n Standing Comm. on Legal Aid & Indigent Defendants, *Ten Principles of a Public Defense Delivery System*, A.B.A. (Feb. 2002),

with necessary funding. The price of fundamental justice, equal access to competent counsel, and due process is steep in our deeply criminalized, widely institutionalized nation. Communities struggling to squeeze justice into their budgets dismiss these standards as unaffordable or unrealistic. Rarely do they consider funding this mandate by reducing arrests and incarceration for petty crime, or reducing prison sentences.

*Gideon's* fiftieth compels reflection and evaluation of my own community's and office's efforts to mine *Gideon's* gold for each of our clients. Painful and demoralizing, valuable and encouraging, this journey reveals more questions than answers, and causes more concern than celebration. Still, I remain unapologetic in the hope that one day fundamental fairness and justice will mean the same thing and we will have no need to place the word "equal" before the word "justice."

I begin this Essay by briefly exploring Clarence Gideon's personal story, which parallels that of so many public defender clients. I then discuss the seed of indigent defense reform in my community, El Paso, including the creation and growth of my Office, the El Paso County Public

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[http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf); *Compendium of Indigent Defense Standards*; NAT'L LEGAL AID & DEFENDER ASS'N (May 2001), [http://www.nlada.org/Defender/Defender\\_Standards/Defender\\_Standards\\_Comp](http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp); *Indigent Defense Systems*, BUREAU OF JUST. STAT., <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=28> (last updated Oct. 14, 2011).

Defender's Office. The last two Parts discuss our struggle to provide effective representation in a pretrial and plea practice, particularly to our mentally ill clients.

## I. Who Was Gideon?

As I consider Clarence Earl Gideon's story, I see many men whom I have defended.

Gideon was born in Missouri in 1910, lost his dad at the age of three, and quit school and ran away from home before entering high school.<sup>5</sup> Thus began his cycle, like that of so many of our clients, of aimlessness, poverty, property crimes, incarcerations, and imprisonment.<sup>6</sup> He drifted through several states, married four times, and fathered three children who were taken away by child welfare authorities.<sup>7</sup> In 1951, Gideon was charged with felony theft in Florida.<sup>8</sup> He was forced to try his own case before a jury because he could not afford a lawyer.<sup>9</sup> The Court already recognized the right to counsel, but left the states to decide how far to extend this right beyond capital cases.<sup>10</sup> The jury found Gideon guilty and sentenced him to five years in prison.<sup>11</sup> He

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<sup>5</sup> *Clarence Earl Gideon*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Clarence\\_Earl\\_Gideon](http://en.wikipedia.org/wiki/Clarence_Earl_Gideon) (last visited Feb. 17, 2013) [**OP: We should consult *Gideon's Trumpet* to see if we can replace these Wikipedia citations.**].

<sup>6</sup> *See id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Gideon v. Wainwright*, 372 U.S. 335, 336-37 (1963).

<sup>9</sup> *Id.* at 337.

<sup>10</sup> *See Powell v. Alabama*, 287 U.S. 45 (1932), *narrowed by Betts v. Brady*, 316 U.S. 455 (1942) (holding the defendant must be caught up in a complicated case or have a mental deficiency).

wrote a petition to the Supreme Court, arguing that Florida's failure to appoint a defense lawyer violated his Sixth Amendment right to counsel.<sup>12</sup> A simple question by a simple but profoundly wise man—how can you say justice was served by forcing me to trial and sending me to prison without a lawyer?—compelled the Court to transform our criminal justice system:

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.<sup>13</sup>

*Gideon* rocked the criminal justice system, giving poor defendants a chance at a fair trial with a competent lawyer, and charging the states with delivering its promise. Sadly, it left huge

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<sup>11</sup> *Gideon*, 372 U.S. at 337.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 377.

untreated gaps where the bacterium of rationed and unequal justice flourished and engendered disease, challenge, and reform. *Gideon*'s progeny substantially plugged these gaps, extending the right to counsel to include misdemeanors<sup>14</sup> and juveniles,<sup>15</sup> and defining minimum trial standards.<sup>16</sup> Yet, states doggedly refuse to either pay the full price or to lower the cost by reducing prosecutions.

## II. The El Paso Plan: A 10-Karat Gold Nugget<sup>17</sup>

If Gideon were arrested in Texas today,<sup>18</sup> he would be entitled to a court-appointed lawyer, but “the devil is in the details.” How soon would he see this lawyer? Would she be a public defender?<sup>19</sup> How competent would she be? What resources would she have? Would

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<sup>14</sup> See *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>15</sup> See *In re Gault*, 387 U.S. 1 (1967).

<sup>16</sup> See *Strickland v. Washington*, 466 U.S. 668 (1984). What value, after all, is counsel if she fails to perform at a minimum of competence at trial?

<sup>17</sup> 10-karat is “[t]he lowest common gold alloy” and “not considered gold in some places, as the content is less than [fifty percent] gold. It’s hard, but it can tarnish a bit.” *Gold Rings – Understand Gold and Its Properties*, PRICESCOPE, <http://www.pricesscope.com/wiki/engagement-rings/gold-rings> (last visited Feb. 18, 2013).

<sup>18</sup> Interestingly, Gideon and his family did live a few years in Orange, Texas, a tiny town bordering Louisiana, in the mid-1950s. He also served time in a Texas prison. See *Clarence Earl Gideon*, *supra* note 5.

<sup>19</sup> Texas does not have a statewide public defender system. Most counties rely exclusively on assigned private counsel for noncapital cases, with a few counties enjoying a hybrid system of assigned counsel and public defenders. A few noncapital public defender offices in South Texas

Gideon get a fair plea offer? How soon could he get his day in court? The answers would depend on the particular county that arrests him, the particular court that adjudicates the matter, and the particular prosecutor who is assigned to the case. We do not have a state public defender system, or any other statewide system that ensures access to appointed counsel. Gideon would fare better in El Paso than in most counties, but he would still find justice rationed.

Indigent defense reform took root in El Paso in the mid-1980s. Inmates charged with felonies in the El Paso County Jail filed federal suit under 42 U.S.C. § 1983<sup>20</sup> to enforce their right to appointed counsel.<sup>21</sup> Private lawyers were appointed upon indictment, an average of one

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are regional. The West Texas Regional Capital Public Defender Office covers a major part of the state. *See Expansion Effort*, REG'L CAPITAL PUB. DEFENDER OFFICE (Spring 2011), [http://www.txcourts.gov/tidc/pdf/RCPDOPanningDocument93\(April2011\).pdf](http://www.txcourts.gov/tidc/pdf/RCPDOPanningDocument93(April2011).pdf). The first public defender (PD) offices representing adults were established in the 1980s. The Dallas County PD office was created in 1983. *A Review of Dallas County's Indigent Defense System*, SPANGENBERG GRP. 4 (Aug. 2004), <http://www.courts.state.tx.us/tidc/pdf/DallasPDStudy.pdf>. The El Paso County PD office was created in 1986. The Webb County PD was created in 1988. *Office of the Webb County Public Defender*, WEBBCOUNTYTX.GOV, <http://webbcounty.com/PublicDefender> (last visited Feb. 14, 2013). The very first, and for many years the only, public defender office in Texas was the Travis County Juvenile Public Defender Office, established in 1971. *Juvenile Public Defender*, TRAVISCOUNTYTX.GOV, [http://www.co.travis.tx.us/juvenile\\_public\\_defender/default.asp](http://www.co.travis.tx.us/juvenile_public_defender/default.asp) (last modified Aug. 6, 2012).

<sup>20</sup> 42 U.S.C. § 1983 (2006).

<sup>21</sup> *See Maldonado v. Schild*, No. EP-86-CA-402 (W.D. Tex. 1987), <http://tidc.tamu.edu/IDPlanDocuments/El%20Paso%5CEl%20Paso%20District%20and%20County%20Court%20Federal%20Order.pdf>.

hundred days after the arrest.<sup>22</sup> The district attorney's office routinely failed to indict or reject a case within the required ninety days, and inmates were not being released as proscribed by statute.<sup>23</sup> By law, defendants were entitled to release if the indictment was not filed within ninety days from the date they were booked.<sup>24</sup> Unable to bond out or to hire a lawyer, poor inmates charged with felonies languished in jail. At the time of the filing, El Paso County had no formal or written indigent defense plan and no public defender office.

El Paso settled the lawsuit<sup>25</sup> with a consent decree and Memorandum of Understanding known as "The El Paso Plan" (the "Plan"). The Plan created our office and a jail magistrate responsible for the early appointment of counsel. It established a hybrid system of representation that exists to this day, where fifty percent of all felony appointments would be ours, while the other fifty percent and all misdemeanors would still be handled by assigned private counsel. Today, we handle approximately sixty percent of the felony appointments, fifty percent of the capital appointments, twenty-five percent of the misdemeanor appointments, and fifty percent of the juvenile appointments. We also staff several problem-solving and drug courts; and represent

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<sup>22</sup> Commission on Criminal Justice of El Paso County, *Report: Managing Inmate Population in the El Paso County Detention Facility*. July 1985 [OP: needs to be SC]

<sup>23</sup> Texas Code of Criminal Procedure, Art. 17.151. [OP: needs to be SC]

<sup>24</sup> TEX. CODE OF CRIMINAL PROC. ANN. art. 17.151 (West 2005).

<sup>25</sup> *Maldonado*, No. EP-86-CA-402. Thus, while other PD offices in the state are authorized, ours is the only one that is legally mandated.

noncustodial parents facing criminal contempt for failure to pay child support, unknown fathers in child abuse and neglect proceedings, and county officials facing ethics complaints. This federal consent decree has secured our existence despite economic downturns and political battles with the judiciary and the private bar, but has not guaranteed necessary resources.

El Paso is located at the western tip of Texas. It shares an international border with Juarez, Mexico, an interstate border with New Mexico, and is home to Fort Bliss, a major army base. A significant number of residents do not speak English. El Paso County had an estimated 2011 population of 820,790: 81.4% Hispanic, 13.7% non-Hispanic white, and 3.6% African-American.<sup>26</sup> Our median income and percentage of residents living below the poverty level compares unfavorably with the national figures as well.<sup>27</sup> Nearly thirty percent of El Pasoans are high-school dropouts,<sup>28</sup> and our unemployment rate was 9.2% in 2011.<sup>29</sup> Last year, for the

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<sup>26</sup> *State & County Quickfacts: El Paso County, Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48/48141.html> (last revised Jan. 10, 2013).

<sup>27</sup> *See id.* (measuring El Paso's median household income, 2007-2011, at \$38,259 per year, and persons below poverty level, percent, 2007-2011, at 25% of El Paso County residents); *State & County Quickfacts: USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last revised Jan. 10, 2013) (measuring the national median income, 2007-2011, at \$52,762 per year, and persons across the nation below the poverty level, percent, 2007-2001, at 14.3%).

<sup>28</sup> *State & County Quickfacts: El Paso County, Texas*, *supra*, note 26.

<sup>29</sup> *Labor Force Data by County: 2011 Annual Averages*, BUREAU OF LAB. STAT. (Apr. 20, 2012), <ftp://ftp.bls.gov/pub/special.requests/la/laucnty11.txt>. The statewide annual average rate for 2011



second consecutive year, El Paso was the large city with the lowest crime rate in the country, and it has been one of the three safest in the country every year since 1997.<sup>30</sup>

### III. No Jury, No Foul: *Gideon's* Plea

Our trial rate the past two years was 1% for felonies, and less than 0.5% for misdemeanors.<sup>31</sup>

Our trial rate for juvenile cases (felony and misdemeanor combined) jumped from 2.5 to 9% from one year to the next.<sup>32</sup> The uncomfortable fact of criminal practice is that most criminal cases never go to trial. A recent article noted that “the percentage of felonies taken to trial in nine

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was 7.9%. *Local Area Unemployment Statistics: Unemployment Rates for States*, BUREAU OF LAB. STAT., <http://www.bls.gov/lau/lastrk11.htm> (last modified Feb. 29, 2012).

<sup>30</sup> Aaron Bracamontes, *El Paso Repeats As US City with Lowest Crime Rate Ranking*, EL PASO TIMES (Dec. 8, 2011, 10:27 AM), [http://www.elpasotimes.com/ci\\_19496681](http://www.elpasotimes.com/ci_19496681). (over 500,000 population).

<sup>31</sup> Manually sorted internal office data revealed trial rates of 0.9% and 0.8% for fiscal years 2011 and 2012, respectively, *See* El Paso County Public Defender, Office Data (on file with author) [hereinafter EPPD Data]

<sup>32</sup> See p. 18 for explanation of the higher juvenile trial rate, and the 2012 jump.

states fell to 2.3 percent in 2009, from 8 percent in 1976.”<sup>33</sup> Similarly, 97% of all federal criminal cases plead out.<sup>34</sup>

Clearly, ensuring that a competent—even brilliant—lawyer is standing up for the accused at trial does virtually nothing for the vast majority of poor people accused of crimes. Yet, criminal defense training doggedly continues to focus on trial technique, to the exclusion of pretrial and plea practice; and we, criminal defense lawyers, doggedly continue to focus on trial performance as the ultimate measure of our lawyering skills. We need to understand our ethical and professional duty to clients who will never stand trial; and every other player in the system (prosecutors, judges, magistrates, detention personnel, probation officers, and communities) must acknowledge their own duty to provide fundamental fairness and due process to individuals who waive their right to trial. The Supreme Court has addressed this institutional blindness through a series of opinions over the last forty years.<sup>35</sup>

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<sup>33</sup> Richard A. Opper, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25, 2011, <http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html> (citing data from the National Center for State Courts).

<sup>34</sup> Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar As Bargains Trump Trials*, WALL ST. J., Sept. 23, 2012, <http://online.wsj.com/article/SB10000872396390443589304577637610097206808.html>.

<sup>35</sup> *Hill v. Lockhart*, 474 U.S. 52 (1985), invalidated a plea of guilty based on erroneous advice of counsel regarding parole eligibility. Pre-plea advice must be both correct and sufficient. It is not enough to tell a client that he could suffer collateral consequences as a result of a plea or finding

Convincing even an innocent client to fight, and risk harsh punishment, can be difficult.<sup>36</sup> Pleading guilty is the client's decision, whether or not he is actually guilty.<sup>37</sup> We cannot intrude upon this sacred right, but must ensure that the client makes this decision upon competent advice, with complete knowledge of the consequences and the strength of the evidence against him, and a knowing and intelligent waiver of the right to trial and to have the case fully investigated. No criminal defense lawyer or public defender office should operate a cut rate "plea mill" where defendants are quickly, and without the necessary preparation, advised and even pressed to plead guilty. Plea mills are an abhorrent practice, but guilty pleas are not evil, ineffective, or unjust per se. On the contrary, effective and just pretrial and plea practice requires investigation, research, and preparation. Often, meticulous trial preparation is what

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of guilt. We must advise the client of the particular consequences before entering a guilty plea. *See Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). We are also ineffective if we fail to communicate to a client a plea offer by the prosecutor, the offer expires, and the client later pleads to harsher punishment, *see Missouri v. Frye*, 132 S. Ct. 1399 (2012); or if we give erroneous advice that causes the defendant to reject the plea offer and receive a more severe sentence at trial, *see Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

<sup>36</sup> *See* Lucian E. Dervan & Vanessa Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, J. CRIM. L. & CRIMINOLOGY (forthcoming [OP: Year]), available at: SSRN: <http://ssrn.com/abstract=2071397>. [OP: Not sure whether this merged form of SSRN and forthcoming in journal works, but to be able to check content for the sourcecite, I included the SSRN link]

<sup>37</sup> *See* *North Carolina v. Alford*, 400 U.S. 25 (1970).

enables our lawyers to work out advantageous pleas. The stronger the defensive theory, the stronger is the prosecutor's incentive to bargain. Successful plea practice also requires imagination, resourcefulness, and acute negotiation skills. These skills, which are so prized in civil practice, are often overlooked in criminal practice, and are rarely the subject of criminal defense education and training. Criminal defense lawyers are compelled to fight to make the pretrial and plea process a fair and just one, to work on collateral issues, and to structure better pretrial outcomes to fit the individual needs of clients.

In conjunction with the decline in jury trials, we must confront the difficult fact that the United States is now the most imprisoned nation in the world,<sup>38</sup> even in the face of declining crime rates over the past two decades.<sup>39</sup> State spending on prisons and prisoners tripled

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<sup>38</sup> See *Entire World—Prison Population Rates per 100,000 of the National Population*, INT'L CENTER FOR PRISON STUD. (last visited Feb, 18, 2013) (listing the United States first in incarceration rate); *Entire World—Prison Population Totals*, INT'L CENTER FOR PRISON STUD. (last visited Feb. 18, 2013) (listing the United States first in total inmate population).

<sup>39</sup> Violent crime began declining in the early 1990s—from a rate of 757.7 per 100,000 inhabitants in 1992, to a rate of 403.6 per 100,000 inhabitants in 2010. *Crime in the United States, Table 1*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls> (last visited Feb. 17, 2013); see also Daniel B. Wood, *U.S. Crime Rate at Lowest Point in Decades. Why America Is Safer Now*, CHRISTIAN SCI. MONITOR, Jan. 9, 2012, <http://www.csmonitor.com/USA/Justice/2012/0109/US-crime-rate-at-lowest-point-in-decades.-Why-America-is-safer-now> (discussing factors that may account for the trend).

nationwide between 1990 and 2010.<sup>40</sup> So this is not only a challenge to the parties in court—our entire society bears a massive burden in terms of fiscal and social costs. This burden was never contemplated fifty years ago, and is still uncounted.<sup>41</sup>

This fundamental failure of the entire criminal justice system—defense lawyers, prosecutors, judges, and legislatures—has an insidious impact. The system is weighted in favor of conviction and confinement. Sentencing risks often outweigh considerations of guilt. A client's fear-driven decision to plead guilty can spell moral hazard for the defender forced to negotiate the best bad outcome, or push for trial at great risk to the client. How do we counsel a client who wants to accept a reasonable plea deal when guilt may be in doubt? Each criminal defense lawyer, each public defender office, and each individual defender must be armed with an ethical and professional moral compass that always points us to the client's best interests, no matter what the limitations, the circumstances of the client, the facts of the case, the biases of a particular court or prosecutor—never to the best interests of the prosecutors, the courts, the funders, or the taxpayers.

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<sup>40</sup>*Time Served: The High Cost, Low Return of Longer Prison Terms*, PEW CENTER ON THE STS.7 (June 2012),

[http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Prison\\_Time\\_Served.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Prison_Time_Served.pdf).

<sup>41</sup> Complete economic impact statements should accompany every law enforcement grant proposal, and every criminal justice legislative proposal to include the cost of: defense, judicial process, prosecution, incarceration, supervision, and collateral services—not just the usual enforcement cost-benefit analysis.

In 1995, I was appointed to my current position. After a few years, I became concerned that we were not trying enough cases, and focused on training and recruitment of experienced trial lawyers. In 2005, I was dismayed and embarrassed to discover that we were still not trying enough cases. I saw this as an indictment of our performance, a failure on our part. More disturbing, I feared we were failing our clients. We had many discussions on the subject. Trial lawyers insisted that they were trying the cases that should be tried, and that trial quotas were anathema. We adopted a soft approach, appealing to lawyers' competitiveness: recognizing lawyers who tried the most cases and encouraging or shaming those who rarely tried cases. We set up a "trial dawg" chart with every trial lawyer's name on it on a very prominent wall, and we tallied every trial. We sent out office-wide e-mails congratulating lawyers on trials, acquittals, and other favorable verdicts. We gave lawyers compensatory time or administrative leave at the conclusion of a trial. We included trial/plea considerations in supervisory file reviews. These tactics produced complaints and no significant results.

Lawyers objected that the chart misled clients and family members to believe higher trial rates mean better lawyers and to ask for the lawyer with the highest trial rate; and that this recognition devalued the amount and quality of work performed pretrial—obtaining pretrial release, investigating and developing evidence, negotiating favorable outcomes, and even preparing for trial only to be reset or offered a sweet deal on the day or eve of trial. Some argued that certain lawyers try more cases because they are poor negotiators. They also felt chastised for

factors over which they had no control. Prosecutors and judges vary widely in characteristics that control trial rates.<sup>42</sup> Finally, our lawyers pointed out that we were overlooking the role that personal relationships play in this arena. The El Paso legal community, especially in criminal practice, is very small. Defense lawyers and prosecutors are friends, they worship in the same churches, live in the same neighborhoods, and bump into each other picking up their children in the same schools. Many defense lawyers are former prosecutors, and some prosecutors are former defense lawyers. In addition, when a prosecutor and a public defender are assigned to the same court for a period of time, they gain better knowledge of each other's strengths, weaknesses, pet peeves, and tendencies—facilitating pretrial negotiations.<sup>43</sup>

With increasing frustration, and some hesitation, in 2007, we tied salary increases to trial quotas. Without interference by supervisors on case by case decisions, each lawyer had to try at least two cases that year—a modest quota which most lawyers already met and several surpassed. We would increase the minimum annually, until we were satisfied with the trial rate.

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<sup>42</sup> One lawyer in one court saw his trials drop from three to zero in one year with a change of prosecutor.

<sup>43</sup> Certainly, we must be vigilant that public defenders assigned to work with the same judge and prosecutor for a while are not participating in a judicially sanctioned plea mill or facilitating bad pleas because everyone is too “chummy” or because the defender is concerned about retaliation for fighting too hard.

Every lawyer met the trial quota. However, some had to serve as second chair alongside another lawyer when their own trials fell through. A second-chair trial furthered our goals of increasing each lawyer's trial experience, but did nothing to increase our trial rate. The following year, we were in the throes of the Great Recession—county budgets were slashed, positions were cut, salaries were frozen, and every county employee was furloughed. Trial quotas were placed on hold.

Our trial rate does appear to be primarily driven by our clients' choices and prosecutorial willingness to negotiate. In FY2011 and 2012 we obtained dismissals on almost one quarter of our felonies, more than one third of our misdemeanors, and one third of our juvenile cases.<sup>44</sup>In prior years, I had only focused on trials and pleas, never on the best possible outcome, which is dismissal of charges. I was pleased. Also, while our trial rate was low, close to half resulted in

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<sup>44</sup> *Id.* Office data. In FY2012 we received a total of 10,197 appointments, and we closed 9,264. In FY2011 we received 10,184 appointments and closed 9,969. These include adult and juvenile trial cases (from capital to misdemeanors), appeals, juvenile cases, criminal contempt for nonpayment of child support, and child abuse and neglect cases; and many short appointments to handle all cases set for a particular type of hearing on a given day, such as detention or review hearings in juvenile proceedings, adult jail pleas, and problem-solving court proceedings. Data is maintained in our County's Judicial Information Management System (JIMS). Disposition rates (trials, dismissals) are only for trial-type criminal and juvenile appointments, which are less than 50% of total appointments.



acquittals. Moreover, 82% of all our adult cases were resolved favorably relative to the prosecutor's initial plea-bargain offer.<sup>45</sup>

The plea bargaining window under the Juvenile Justice Code<sup>46</sup> is small, and the juvenile prosecutors have become more and more adverse to using it, so we try more juvenile than adult cases. The prosecutor and defense lawyer cannot agree to a particular type or length of sentence, until after the child is adjudicated,<sup>47</sup> but by then, agreement is usually pointless. Punishment for a misdemeanor is not a range, it is probation up to the age of eighteen, either at home or in an institution. For a felony, the range is only two options: probation up to the age of eighteen, or commitment to the Texas Juvenile Justice Division until the age of nineteen. Penal commitment through adulthood and certification for trial as an adult are additional option for serious felonies.<sup>48</sup> Once the child pleads true, the appropriate type (not length) of probation is largely determined by the probation officer's recommendation to the court. Our juvenile defenders try to negotiate dismissals, deferred prosecution, or reductions of felonies to misdemeanors; but prosecutors increasingly refuse to bargain. Usually, and more so in the last year, prosecutors

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<sup>45</sup> *Id.* Whether the outcome was dismissal, acquittal or a guilty verdict by plea or trial—the outcome was better than the original plea recommendation offered by the prosecutor.

<sup>46</sup> Title 3, Texas Family Code, O'Connor's Family Code Plus (2012-13)

<sup>47</sup> *Id.* Sec. 54.03, 54.04. Juvenile adjudication is the equivalent of the guilt phase, the juvenile's plea is "true" or "not true," and the disposition is the sentencing phase.

<sup>48</sup> *Id.* Sec. 54.04(d)(3), Sec. 53.035.

simply expect the child to admit to the charge as pled—which accounts for the spike in trials last year. Parental involvement and influence further affects the child’s decision to plead.

Our economic crisis presented us with an opportunity to evaluate our services. We have examined our case dispositions much more closely and strategically in our overall effort to become more client-centered in our process and client-driven in our outcomes. We have made structural changes within the office, and more changes are forthcoming. We developed a short, simple survey to find out what our clients want. In October 2012, we began asking what they most want and value from us and the system, in terms of services, communication, and outcomes.<sup>49</sup> A caseworker administers the survey before the client speaks to our lawyers. We plan an exit survey to measure the service we deliver against the clients’ expectations. While the content and the number of participants may not be sufficient to formulate statistically significant or rigorous conclusions, our clients’ responses are thought-provoking.

Only 8% of the 558 surveyed clients wanted a trial; 39% wanted to negotiate a plea; and 51% were unsure.<sup>50</sup> I had presumed most clients began the process hoping for a trial<sup>51</sup> and that over the course of time, a set of factors—inability to make bail coupled with a long wait for a trial date to be set; an understanding of the nature and amount of evidence possessed by the

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<sup>49</sup> See EPPD Data, *supra* note 49.

<sup>50</sup> *Id.*

<sup>51</sup> Which I found to be the case whenever a client retained me, or my colleagues, on a state criminal matter, while in private practice.

prosecutor; the fear of a harsher sentence; our lawyers' persuasiveness; a lack of confidence in the system, our office, or their lawyer—eventually discouraged them and convinced them to take a plea.

What began as a tool to guide us in our representation has produced more questions than answers. Why do so few clients want a trial? Is it a perception that public defenders are unwilling or unable to fight their case? Is it a perception about the system itself based on prior experience? How do race, gender, ethnicity, other characteristics factor in? A more comprehensive study may be necessary.

I have to conclude that it is absurd to punish lawyers for not going to trial, when they are negotiating so many dismissals and other favorable outcomes for their clients--especially when the clients, who have the final word, do not want to risk trial. My duty is to ensure that our clients make this decision with my lawyers' effective advice and assistance. The lawyer's advice should not be driven by the expectations of a supervisor, court, or prosecutor; but it must comply with well-defined standards to keep our pretrial and plea *practice* from becoming a "plea mill." I understand that the amount and quality of work performed by a lawyer on a case does not correlate with the number of trials;<sup>52</sup> and the number of cases our lawyers set for trial and prepare for trial far exceeds the number of actual trials. Quite often, lawyers who negotiate an

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<sup>52</sup> We are currently trying to quantify the average number of attorney and investigator hours per plea.

excellent plea for their clients experience disappointment. Prepared for trial with a good defense, they sacrifice the thrill of trial for the client's best interest. Nonetheless, unable or unwilling to reconcile our plea practice with our self-image as trial lawyers, or with the meaning that "standing up for my clients" has for me, I will keep looking for ways to increase our trials without sacrificing more favorable outcomes such as dismissals.

#### **IV. *Gideon* Through the Labyrinth of Mental Illness**

How do we deliver *Gideon's* gold to clients who are not only poor, but also lack the intellectual, behavioral, and emotional resources needed to confront the charges? We represent many individuals with a mental illness or intellectually disability. In our experience, mental illness doubles the work of representation—requiring more time with clients and their families, resolving more collateral issues, and searching for services that do not exist. We established a Mental Health Unit (MHU) in 2005, but insufficient funding has kept us from serving our mentally ill clients as effectively as fundamental fairness demands. Few standards exist to guide us in defending these clients.<sup>53</sup> Yet, standards are not what my lawyers need right now. They know what these clients need; they need more lawyers, more staff and more resources to get there. Not only are we dealing with the reality of charges being disposed of through the plea

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<sup>53</sup> National caseload standards for criminal defense do not define reasonable numbers for clients with mental illness. Where defined, they speak to representation for civil commitment proceedings, not criminal defense.

process rather than through trial, but also with the frightening reality that this population can only hope to see the best possible disposition of their criminal charges if we, their defense lawyers, do much more than prepare their cases for trial. How do we accomplish this?

Our first priority is pretrial release, because freedom is always a priority and because incarceration aggravates mental illness. Every once in a while, insanity provides a defense at trial; but, more often than not, mental illness simply prevents the client from having his day in court. The emotional stress of incarceration, court proceedings, and long delays in the process are frequently unmanageable for these vulnerable clients. It becomes imperative to seek *extralegal* remedies to address our clients' underlying mental illness and collateral needs. For them, access to pretrial release depends on access to medication, treatment, and a stable environment. We have also learned that pretrial release is only the beginning. We obtain their release on personal recognizance (PR) bonds, but there is no safety net to catch them once they get out. Some 42% of our MHU clients released on PR bonds in 2010 were ultimately returned to jail on arrests for new offenses, or upon revocation of their bonds for failing to report or appear in court.<sup>54</sup>

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<sup>54</sup> See EPPD Data, *supra* note 49.

Texas ranks last in the nation on spending for mental health services,<sup>55</sup> but nearly quadrupled its criminal justice spending from 1990 to 2010.<sup>56</sup> In 2010, there were nearly eight seriously mentally ill persons in Texas jails or prisons for every person in a psychiatric hospital,<sup>57</sup> making jails and prisons our largest inpatient mental health care provider—a responsibility they are ill-equipped and ill-funded for. El Paso is no exception. On any given day in 2010, an average of 2,193 men and women were locked up in our jails, and 40% (877) received medication for mental illness.<sup>58</sup> In 2010 alone, the mental health provider at the county jail saw as many as 7,531 inmates for psychiatric problems.<sup>59</sup> By comparison, El Paso only has 209 psychiatric hospital beds: 119 private,<sup>60</sup> 16 military,<sup>61</sup> and 74 other public nonprofit beds.<sup>62</sup>

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<sup>55</sup> Claire Cardona, *Study: Texas Ranks Last in Mental Health Spending*, TEX. TRIB., Nov. 11, 2012, <http://www.texastribune.org/2011/11/10/texas-ranks-50th-mental-health-spending>.

<sup>56</sup> Marc Levin, *Corrections Budget & Prison Operations*, TEX. PUB. POL'Y FOUND. (2011-12) <http://www.texaspolicy.com/sites/default/files/documents/2011-PrisonOperations-CEJ-ml.pdf>.

<sup>57</sup> Emily Ramshaw, *Mentally Ill End Up in Texas Prisons*, TEX. TRIB., May 12, 2010, <http://www.texastribune.org/2010/05/12/mentally-ill-end-up-in-texas-prisons>.

<sup>58</sup> Data provided by the El Paso County Sheriff's Office (on file with author).

<sup>59</sup> *Id.* Data provided by the El Paso County Sheriff's Office (on file with author). *See Also*, Testimony by (then County Attorney, now State Senator) José Rodríguez before the Texas Senate Health & Human Services Committee regarding Border Mental Health, March 26, 2002, <http://www.epcounty.com/ca/bordermentalhealth.htm>. (last viewed Feb.27, 2013)

<sup>60</sup> At University Behavioral Health of El Paso (UBH), <http://health.usnews.com/best-hospitals/area/tx/university-behavioral-health-of-el-paso-6740408/details> (last viewed Feb.27, 2013); not counting the 36 private beds that Peak Psychiatric Hospital has in Santa Teresa, New Mexico, a suburb of El Paso, for children and teens.

Outpatient mental health care providers are scarce and difficult to access.<sup>63</sup> Our mental health services delivery “system” is one underfunded provider, Emergence Health Network, funded primarily by the State,<sup>64</sup> poorly supported by a few private, and charitable providers. Our social workers are essential to help our clients access this limited patchwork of services, but their efforts can only go so far. The need is so great, resources are so limited, and mental health professionals are so few,<sup>65</sup> that “access” usually means “wait-listed.” These factors also translate

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[http://www.ucomparehealthcare.com/hospital/the\\_peak\\_psychiatric\\_hospital](http://www.ucomparehealthcare.com/hospital/the_peak_psychiatric_hospital). (last viewed Feb.27, 2013)

<sup>61</sup>William Beaumont Army Medical Center,

<http://www.wbamc.amedd.army.mil/Departments/MentalHealth/InpatientPsychiatryService/>

<sup>62</sup> These beds belong to the El Paso Psychiatric center. Texas Department of State Health Services, <http://www.dshs.state.tx.us/mhhospitals/ElPasoPC/default.shtm>. REDCO Quality of Life Report, El Paso, <http://www.elpasoredco.org/regional-data/el-paso/community/overview>. (last viewed Feb.27, 2013)

<sup>63</sup> See Lisa Tomaka, Mario Caire & Dennis L. Soden, *Greater El Paso Chamber of Commerce*

*Community Mental Health Survey*, INST. FOR POL’Y & ECON. DEV. 3 (Jan. 1, 2008),

[http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1079&context=iped\\_techrep](http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1079&context=iped_techrep)[http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1079&context=iped\\_techrep](http://digitalcommons.utep.edu/cgi/viewcontent.cgi?article=1079&context=iped_techrep)

(noting that “a number of factors make [mental health] service delivery difficult and overextend existing resources” in El Paso).

<sup>64</sup> Formerly known as El Paso Community Mental Health & Mental Retardation (MHMR).

<http://emergencehealthnetwork.org/wp-content/uploads/2012/01/revenue-exp.pdf>. See Also,

<http://www.window.state.tx.us/specialrpt/tif/urgrande/healthcare.php>.

<sup>65</sup> “In 2008, 36 licensed psychologists served a population of 755,157.” Texas Comptroller of Public Accounts, <http://www.window.state.tx.us/specialrpt/tif/urgrande/healthcare.php>; and we had 0.1-6.2 psychiatrists per 100,000 population,

[http://shapleigh.org/system/reporting\\_document/file/322/Crisis\\_in\\_HC.pdf](http://shapleigh.org/system/reporting_document/file/322/Crisis_in_HC.pdf).

into treatment protocols emphasizing medication over counseling. Sadly, these clients usually lack the cognitive ability and life skills to adhere to such a treatment plan.

Lack of housing is another barrier to staying out of jail. Many clients do not have a home to which they can return. Some were homeless at the time of arrest, others lost housing and benefits during incarceration, and many are estranged from their families. El Paso has few homeless shelters, and only one of them provides psychiatric visits. Finally, a significant number of mentally ill defendants have co-occurring substance abuse problems<sup>66</sup> that impede medical and social stability and increase the likelihood of bond and probation violations. These clients require specialized hybrid substance abuse treatment.

Frustration over failed collaborative community efforts to address these issues, has me exploring ways to step in. Currently, the jail releases clients with a paid prescription for a three-day supply of psychotropic medication. The jail clinic could give up to a ten-day prescription, but the county cannot pay for it. We are developing a funding proposal that would allow our office to pay for the extra seven days of medication to provide a safety net, while the necessary treatment and services are secured. Funding would also allow us to contract with doctors and

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<sup>66</sup> Male and female detainees with severe mental disorders have a 72% rate of co-occurring substance use disorders. *The Prevalence of Co-Occurring Mental Illness and Substance Use Disorders in Jails*, SUBSTANCE ABUSE & MENTAL HEALTH SERVICES ADMIN. 2 (Winter 2004), <http://gainscenter.samhsa.gov/pdfs/disorders/gainsjailprev.pdf>.



counselors for immediate services,<sup>67</sup> pending screening and waiting for services from our state provider. A dedicated mental health PR bond caseworker<sup>68</sup> would facilitate release, and our social workers would provide intensive assistance, daily if necessary, while on pretrial release. Even if we succeed, this program barely scratches the surface and is no substitute for a well-funded system of public mental health services.

The greatest hazard for the lawyer defending clients with mental illness or intellectual disability is discouragement and exhaustion. We struggle to communicate with our clients, to work with their families, to find someone willing to stand up for them. We raise competency issues with a heavy heart, knowing this will substantially lengthen our clients' time behind bars. We must always explore the insanity defense, knowing it an unlikely winning theory.<sup>69</sup> We struggle to bring local agencies to fight for better mental health care and housing. Representing these clients is like going twelve rounds with a fresh opponent each round. A connection to these clients compels us to fight for them as so many of them have been fighting all their lives. Surely, we can stand by them, considering what they have already gone through. And although standing

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<sup>67</sup> Even with the money to pay, this will be difficult given the scarcity of mental health professionals in our community.

<sup>68</sup> The state probation department has caseworkers who screen individuals for suitability for pretrial release on PR bond, and supervise them once they are granted these bonds.

<sup>69</sup> We recently won two acquittals based on insanity, but here, as in the rest of the state and the rest of the country, the insanity defense is "rarely invoked and seldom successful." Brian D. Shannon, *The Time Is Right To Revise the Texas Insanity Defense*, 39 TEX. TECH L. REV., 67, 69-70 (2007).

by them can be the most exhausting and challenging experience, the rewards—when we finally arrive at the right solution—are great.

To be sure, effective assistance of counsel means much more than preparing for trial. It means going outside the confines of statutes and police reports in order to see the client, to understand what went wrong, to develop empathy, and to communicate the client's real story. It means taking it upon ourselves to build for our clients the community net that they deserve but never had, partnering with the medical and behavioral health communities—social workers, psychologists, and psychiatrists—to share the burden of finding treatment and stabilizing our clients' lives. It means looking beyond the courtroom and visualizing communities that have a place for everyone, including those who need treatment and support. The standards of effectiveness in *Strickland*, *Padilla*, *Frye*, and *Lafler* have not addressed the needs of this population, although it is clear that we as a society should stop relying on criminal processes and incarceration for those who simply need effective mental health services from the public health sector. Our criminal justice system must mature into a system that is able to substantially return the burden of treating and housing the mentally ill and intellectually disabled to the public health sector instead of imprisoning them. Legislative action is imperative, because so long as decisions of prosecution versus diversion, jail versus mental health facility, are in the hands of the prosecutor or the police officer, we cannot expect the system to do the right thing.

Perhaps someday there will be a case such as *Gideon v Wainwright* that affirms a person's right to health--including mental health--care. Until then, we must continue to work in this intersection between two broken delivery systems: one which rations mental health care, and ours, which rations fundamental justice and due process.

**Conclusion: How Much Justice Can We Afford?**

*Gideon*'s spirit is drowning in the undertow of the criminalization tide. There is a foundational conflict between our ideals of equal justice, fundamental fairness, and due process, and our actions. Can the wealthy and the poor, the healthy and the mentally ill, ever "stand equal before the law?" Are "equal justice" and "fairness" fundamentally irreconcilable? Can "justice" ever be "equal?" Maybe "fundamental fairness" blunts the sharp edge of "justice." If justice is anything, it must be more than our rations; it must be sufficient to guarantee that the government will be held in check.

If equal justice means that my client gets exactly the same justice as the average individual who does not qualify for a court-appointed lawyer, or it means that my mentally ill client will be treated like every other accused, then I have little use for it. The average individual who pays a lawyer gets only as much justice as he can afford. For the working class, and much of the middle class, this is insufficient to guarantee fundamental fairness, let alone a well-investigated and well-litigated fair trial. Maybe this country can live with this standard, but I refuse to.