

## How *Gideon v. Wainwright* Became Goldilocks

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Oceans of ink have been spilled on forests of trees arguing the merits of *Mapp v. Ohio*<sup>1</sup> and *Miranda v. Arizona*.<sup>2</sup> As Tracey Maclin has recently shown, opposition to *Mapp*'s Fourth Amendment exclusionary rule surfaced in Supreme Court conferences surprisingly soon after the 5-4 case was decided.<sup>3</sup> And in light of *Herring v. United States*,<sup>4</sup> the robust exclusionary rule that *Mapp* favored appears to be hanging by a thread.<sup>5</sup>

Controversy over *Miranda*'s warnings and waiver requirement was there for all to see in the three vigorous dissents. Most notable was Justice White's biting claim that *Miranda* would cause innocent victims to die but that, for the majority, there is "a saving factor: the next victims are uncertain, unnamed and unrepresented in this case."<sup>6</sup> A series of cases over the next forty-five years limited *Miranda*'s effect on police interrogation; the most recent retrenchment, *Berghuis v. Thompkins*,<sup>7</sup> held that a properly warned suspect who makes no explicit waiver and says almost nothing in response to three hours of interrogation nonetheless waives his *Miranda* rights if he then answers a question.

But *Gideon v. Wainwright*<sup>8</sup> was "the good war," a unanimous judgment that no indigent defendant should face felony charges without a lawyer. *Betts v. Brady*<sup>9</sup> had held in 1942 that non-capital felony defendants were not necessarily entitled to counsel at state expense. By 1963, the idea of an indigent felony defendant without counsel facing a trained district attorney was so unappealing that the Court

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<sup>1</sup> 367 U.S. 643 (1961).

<sup>2</sup> 384 U.S. 436 (1966).

<sup>3</sup> TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE* (2013). For my review of Maclin's book, see George C. Thomas III, *Mapp v. Ohio: Doomed from the Beginning?*, 12 OHIO ST. J. CRIM. L. 289 (2014).

<sup>4</sup> 555 U.S. 135 (2009).

<sup>5</sup> See Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463 (2009); Wayne R. LaFave, *The Smell of Herring: A Critique of the Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757 (2009).

<sup>6</sup> *Miranda*, 384 U.S. at 543 (White, J., dissenting).

<sup>7</sup> 560 U.S. 370 (2010).

<sup>8</sup> 372 U.S. 335 (1963).

<sup>9</sup> 316 U.S. 455 (1942).

relied on little more than innate fairness to justify overruling *Betts*.<sup>10</sup> *Gideon* not only seems eminently fair but also self-executing in ways that neither *Mapp* nor *Miranda* could be. To make *Mapp* and *Miranda* work, courts have to suppress evidence taken in violation of the relevant constitutional right. The loss of (almost always) reliable evidence of guilt is the principal reason that *Mapp* and *Miranda* were controversial from the start and suffered at the hands of later, more hostile Courts. But *Gideon* is satisfied once the defendant is provided a lawyer—the ungainly problem of ineffective assistance off to one side for the moment.

And yet there has been for years a slow dawning of awareness that *Gideon* has fallen far short of the Court's initial vision. All six of the essays in this symposium express, in varying degrees, sadness and frustration at the state of *Gideon* in 2014. The crux of the criticism is that public defense is significantly under-funded and plagued with perverse incentives, leading to huge caseloads for defenders and worse outcomes for defendants.

We should pause to examine the meaning of “worse outcomes.” At one level, a worse outcome is when the defendant does not feel that his case has been adequately defended. More defenders who could spend more time on each case would ameliorate this bad outcome. But at an instrumental level, better defense suggests more acquittals, more dismissals, and better plea deals with shorter average sentences. We will shortly see a study concluding that if all murder defendants in Philadelphia from 1994 to 2005 had received adequate representation, there would have been roughly 10% more acquittals and a total of 6,400 years in shorter sentences.<sup>11</sup>

Ironically enough, therefore, critics have turned on *Gideon* not because it frees the guilty but because it does not free the guilty often enough or reduce their sentences sufficiently!! To be sure, I exaggerate for effect. We know that a non-trivial number of defendants are innocent. But there is no evidence that increasing the percentage of acquittals, or decreasing the average sentence, disproportionately benefits innocent defendants. Thus, the net effect of improving outcomes for indigent defendants will be to benefit (mostly) guilty defendants. Do legislatures actually want better outcomes if the benefit flows to (mostly) guilty defendants? I will return to this idea later, but for now, let's assume that better outcomes are the goal of actors who provide indigent defense.

Has *Gideon* fallen short of its promise to provide better outcomes to indigent defendants? Yes, it has failed, at least when judged by the Warren Court's rhetoric. Justice Black, the populist from Alabama, first struck a blow in

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<sup>10</sup> The *Gideon* Court made a lame attempt to characterize *Powell v. Alabama*, 287 U.S. 45 (1932), the 1932 Scottsboro case, as settled law from which *Betts* departed. But the effort was unavailing. In his concurrence, Justice Harlan said, “I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded . . .” *Gideon*, 372 U.S. at 344. Harlan is right.

<sup>11</sup> James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make: The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 212 (2013).

favor of empowering indigent criminal defendants in *Griffin v. Illinois*.<sup>12</sup> The issue in *Griffin* was whether indigent defendants had a right to a transcript at state expense when filing appeals. The Court held yes. A plurality said, “Providing equal justice for poor and rich, weak and powerful alike is an age-old problem.”<sup>13</sup> The most often quoted line from *Griffin* is: “There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”<sup>14</sup> Eight members of the Court in *Gideon* signed onto the following: “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*.”<sup>15</sup>

Taken literally, this rhetoric promised an equality that today appears almost absurd. But the Court could not have meant bringing all defendants up to the level of the wealthiest, who hire teams of the best lawyers money can buy. It must have meant making indigent defendants equal to the average criminal defendant who could afford counsel. That would have seemed possible at the time. President Lyndon Johnson made an aggressive call for a War on Poverty in his first State of the Union address, not even a year after *Gideon*: “‘We shall not rest until that war is won,’ Johnson said. ‘The richest nation on Earth can afford to win it. We cannot afford to lose it.’”<sup>16</sup> In the heady days of a War on Poverty, courts interpreting *Gideon* might have imagined—if not Perry Mason—at least an A-rated lawyer with time to investigate defenses and provide zealous representation.

And how close has *Gideon* come to achieving the goal of making the indigent defendant the equal of the defendant who can afford to pay counsel? We do not know how frequently *Gideon* is ignored. The American Bar Association (ABA) in its 2004 report claimed that judges and prosecutors sometimes find ways around the appointment of counsel for indigent defendants.<sup>17</sup> The report cites no empirical evidence. I know of a judge who routinely sentenced unrepresented indigent DUI defendants to a few days in jail without getting a waiver of counsel; I assume he thought almost all would serve the few days without knowing that their right to counsel had been violated (or without caring, I suppose).

But even if these practices are outliers, even if almost all indigent defendants receive the benefit of a lawyer, two questions remain for *Gideon*. First, to what extent are the outcomes over the universe of cases instrumentally better now than they were before *Gideon*? In *Gideon*’s case, counsel did produce an

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<sup>12</sup> 351 U.S. 12 (1956).

<sup>13</sup> *Id.* at 16 (plurality opinion).

<sup>14</sup> *Id.* at 19 (plurality opinion).

<sup>15</sup> *Gideon*, 372 U.S. at 344 (emphasis added).

<sup>16</sup> See NPR Staff, *For LBJ, The War On Poverty Was Personal*, NPR (Jan. 8, 2014, 3:31 AM), <http://www.npr.org/2014/01/08/260572389/for-lbj-the-war-on-poverty-was-personal>.

<sup>17</sup> AMERICAN BAR ASSOCIATION, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE* 23–26 (2004).

instrumentally better outcome. When he represented himself, he was convicted, but appointed counsel secured an acquittal upon retrial.<sup>18</sup>

To answer the instrumental question, the most appropriate measure would be to focus on a set of cases with counsel and a set of similar cases without counsel and compare the outcomes. Fortunately, or unfortunately, that metric is unavailable in criminal cases because *Gideon* mandates counsel in the absence of waiver,<sup>19</sup> and waiver cases are far too idiosyncratic to serve as a control group.

At least three randomized studies of the value of counsel in civil cases have been done. One study involved appeals of unemployment insurance claims, and two studies dealt with tenants facing eviction.<sup>20</sup> Two of the three studies found no statistically significant improvement in outcomes when a lawyer represented the claimant or the tenant.<sup>21</sup> This finding is not as surprising as it might seem. In administrative hearings, the judge typically does most, if not all, of the questioning, thus diminishing the value of a lawyer, perhaps to the vanishing point. I once represented claimants who appealed the denial of their claim for Social Security disability.<sup>22</sup> The administrative law judges had reviewed the written record and did such a good job questioning the claimants that I was often forced to repeat a line of questioning just so the client would think he was getting a benefit from my appearance. This is obviously not the case in felony criminal trials, and I would be shocked if a randomized study of indigent criminal cases showed no benefit from counsel.

Assuming a non-trivial instrumental benefit from having counsel, the second, and harder, question for *Gideon* is whether defenders deliver adequate representation. This is obviously a subjective determination. But when thoughtful policy makers study the operation of the *Gideon* right to counsel, they almost universally conclude that indigent defenders, in general, have too many cases to be able to provide effective representation. A Bureau of Justice Statistics report shows that, in 2007, public defenders in Colorado were assigned, on average, 229 felony cases and 111 misdemeanor cases; Wisconsin public defenders were assigned 122 felony cases and 245 misdemeanor cases.<sup>23</sup>

Mary Sue Backus and Paul Marcus were reporters for the National Committee on the Right to Counsel that in 2009 found that a national crisis existed

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<sup>18</sup> See ANTHONY LEWIS, *GIDEON'S TRUMPET* 238 (1964).

<sup>19</sup> *Gideon*, 372 U.S. at 340.

<sup>20</sup> See Jeanne Cham, *Celebrating the "Null" Finding: Evidence-Based Strategies for Improving Access to Legal Services*, 122 *YALE L.J.* 2206, 2220–22 (2013).

<sup>21</sup> *Id.* at 2221.

<sup>22</sup> This was a service provided free of charge by Congressman Ed Jones, 8th District Tennessee, to his constituents. My father worked part-time for Congressman Jones, and I was sometimes dispatched to attend the hearings in my father's stead.

<sup>23</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT, STATE PUBLIC DEFENDER PROGRAMS, 2007, 12 tbl.9 (2010) [hereinafter BJS SPECIAL REPORT], available at <http://www.bjs.gov/content/pub/pdf/spdp07.pdf>.

in the provision of indigent defense. Their conclusion, published separately from the committee report, is typical:

By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced. This lack of money is reflected in a wide range of problems, including poor people's limited access to attorneys and the resulting ineffective assistance of counsel [as well as] excessive public defender caseloads and insufficient salaries and compensation for defense lawyers.<sup>24</sup>

The committee report, entitled *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*, details systemic and endemic failures of indigent defense in this country.<sup>25</sup> It found “overwhelming” evidence that, in most of the country, “quality defense work is simply impossible because of inadequate funding, excessive caseloads, a lack of genuine independence, and insufficient availability of other essential resources.”<sup>26</sup> The report calls for “fair compensation” for defenders as well as “parity between defense counsel and the prosecution in resources.”<sup>27</sup> Cynics like me make fun of these exhortations on the ground that states do not have enough money to fix roads and bridges and to provide quality K-12 education.<sup>28</sup> As long as those ventures are underfunded, indigent defense will just have to get by on the crumbs that are left.

But a question that is rarely, if ever, addressed is whether better funding would make an instrumental difference. It seems intuitively right that defenders with more time to spend on each case would deliver better representation and thus achieve a lower conviction rate and shorter sentences via better plea bargaining. But is it right? Maybe not. Prosecutors have all the cards. They can dismiss weak cases or bargain them for time served or another outcome too attractive for the defendant to refuse; the prosecutor's incentive to dismiss or bargain down weak cases is presumably roughly the same regardless of the defender's work load. Strong cases are strong cases whether the defender has 200 files on her desk or only 20. So weak cases are not likely affected by the work load of the defender;

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<sup>24</sup> Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045–46 (2006).

<sup>25</sup> NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 195 (quoting AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1 (2002), available at [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)).

<sup>28</sup> See GEORGE C. THOMAS III, THE SUPREME COURT ON TRIAL: HOW THE AMERICAN JUSTICE SYSTEM SACRIFICES INNOCENT DEFENDANTS 187 (2008) (referring to “pie-in-the-sky” hopes for better funding for indigent defense).

strong cases are not likely affected at all. Are cases “in the middle” affected? Perhaps. One imagines that if a defender files a lot of motions, the prosecutor might be more likely to cut an attractive deal. On the other hand, it might work the other way. If a defender had a reputation for filing motions that are borderline frivolous, the prosecutor’s position might harden. She might refuse to entertain any deal and insist on a trial. There is much here we do not know.

We can gain a bit of insight by looking at studies that compare outcomes produced by public defenders, by private counsel, and by appointed counsel.<sup>29</sup> While the results are to some degree inconsistent, it is fair to say that public defenders generally compare favorably with appointed counsel and less favorably with privately retained counsel. This makes sense. Private counsel are probably, on the whole, putting in more time on each case than public defenders because private lawyers bill for their time. But public defenders are probably putting in more time, on the whole, than appointed counsel. This would be true because of the incentives Professor Stephen Schulhofer outlines in his essay in this symposium: appointed counsel in systems that provide very low compensation rates have a strong incentive to put in as little time as possible on each case.<sup>30</sup>

Anderson and Heaton studied indigent murder defense in Philadelphia, concluding that public defenders obtained significantly better outcomes than appointed counsel.<sup>31</sup> To put numbers on the better outcomes, the researchers conducted a thought experiment:

Suppose the 2,459 defendants in our sample represented by appointed counsel had been represented instead by Defender Association counsel. Based on the results in Table 2, we would expect 270 defendants who were convicted of murder to have been acquitted of this charge with Defender Association representation. Three hundred ninety-six individuals who received life sentences without the possibility of parole would have been received shorter sentences with an expectation of eventual release. In the aggregate, we would expect the time served by the 2,459 defendants for the crimes observed in our data to decrease by 6,400 years.<sup>32</sup>

Was time spent on cases a factor in the better outcomes produced by public defenders? Like many jurisdictions, Philadelphia pays appointed counsel very little, which has the perverse incentive pointed out above. Anderson and Heaton concluded that if appointed counsel provided the time necessary to adequately represent a Philadelphia murder defendant, the authorized fee would work out to

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<sup>29</sup> See authorities cited in Anderson & Heaton, *supra* note 11, at 157 n.6.

<sup>30</sup> See Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 515 (2015).

<sup>31</sup> *Id.* at 195.

<sup>32</sup> Anderson & Heaton, *supra* note 11, at 212.

\$2 an hour! The incentive to put in the necessary hours must be dramatically compromised if the average pay is \$2 per hour. Moreover, the Philadelphia fee structure created little incentive to prepare for trial, because it paid much more for trial time than for preparation; some of those interviewed for the Philadelphia study suggested “that appointed counsel do relatively little preparation.”<sup>33</sup> The salaried public defender does not need to consider whether she is wasting time on a case that could be billed at a higher rate to other clients.

So here’s a simple question that I do not believe has been answered. *Holding other factors constant to the extent possible, do outcomes achieved by public defenders vary with caseloads?* A Bureau of Justice Statistics study surveyed the average 2007 caseloads in twenty-two states—caseloads being cases received in calendar year 2007, which of course is not the same as the average caseload at any given moment; the caseload at any moment could be more (cases pending from the year before) or less (cases that are dismissed or resolved quickly) than the number of cases received.<sup>34</sup> These twenty-two states “had a state public defender program that oversaw the operations, policies, and practices of the 427 public defender offices located in these states.”<sup>35</sup> Comparing states that have statewide public defender programs is the best way to hold constant other factors that might influence outcomes because defenders are hired and paid on a statewide basis. If we compare outcomes in similar states that have substantially different caseloads, we might find evidence of the value of counsel in criminal cases.

When I first had the idea to compare caseloads to outcomes, I thought the difficult piece would be finding reliable evidence of caseloads. But the excellent Bureau of Justice Statistics study solved that problem for the twenty-two states that have statewide public defender programs. The easy part, I thought, would be finding the conviction/acquittal/dismissal rates in the various states. I assumed that states, like the federal government, would routinely keep those statistics. Twenty-first century computers would make gathering these data a simple task. But Susan Lyons, government documents librarian at Rutgers, Newark Law School, told me that cutbacks in state budgets and the disappearance of federal funding for data gathering have reduced state criminal justice data collections.<sup>36</sup>

And that was indeed my experience. I identified four state cohorts from the BJS study: (1) Minnesota and Wisconsin; (2) Colorado, Montana, and North Dakota; (3) New Jersey and Delaware; and (4) Vermont and New Hampshire. The latter two states did not have sufficiently different caseloads to make for a good test, but I left Vermont in the study because I was able to get its felony conviction rates. Colorado, Delaware, and Vermont make their conviction rates available

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<sup>33</sup> *Id.* at 196.

<sup>34</sup> BJS SPECIAL REPORT, *supra* note 23, at 12.

<sup>35</sup> *Id.* at 1.

<sup>36</sup> Email from Susan Lyons, Government Documents Librarian at Rutgers, Newark Law School, to George Thomas, July 14, 2014 (on file with author).

online.<sup>37</sup> The New Jersey Office of the Courts was kind enough to supply me with data from 2007.<sup>38</sup> So far, my inquiries to Minnesota, Wisconsin, Montana, and North Dakota have been ignored.

I should point out how messy the data are. My goal was to compare felony caseloads with felony conviction rates. But I discovered that defenders in some jurisdictions had relatively low felony caseloads and very high misdemeanor caseloads. Even if misdemeanor cases take much less time than felony cases, it must be true that very high misdemeanor caseloads take time away from representing felony clients. Thus, I had to consider both felony and misdemeanor caseloads when comparing states.

In Wisconsin, for example, the average felony caseload in 2007 was 122 and the average misdemeanor caseload was 245<sup>39</sup>, while in Minnesota, the averages were 75 and 53.<sup>40</sup> Though Wisconsin and Minnesota are far from perfect matches—culturally they are quite different—a difference in caseloads as stark as the one we see might suggest “better” outcomes in Minnesota compared to Wisconsin if caseloads matter. The state with the highest average felony caseload in the study was Colorado, at 229 along with 111 misdemeanor cases.<sup>41</sup> Though no state in the study is truly similar to Colorado, one might look at North Dakota, average felony caseload of 80 and misdemeanor caseload of 65<sup>42</sup>, and Montana, average felony caseload of 45 and misdemeanor caseload of 96.<sup>43</sup> Even though a state with Denver, Boulder, and Colorado Springs is quite different from North Dakota and Montana, the vast difference in caseloads might make a difference. Delaware, felony caseload of 83, is a reasonably similar state to New Jersey, felony caseload of 142; the problem here is that Delaware has a high misdemeanor caseload, 296, and New Jersey did not report its misdemeanor caseload.<sup>44</sup> Here are the caseload data in tabular form:

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<sup>37</sup> See OFFICE OF RESEARCH & STATISTICS, CRIME AND JUSTICE IN COLORADO 2006 (2007) [hereinafter CRIME AND JUSTICE IN COLORADO], available at [https://cdpsdocs.state.co.us/ors/docs/reports/2007\\_CJ06.pdf](https://cdpsdocs.state.co.us/ors/docs/reports/2007_CJ06.pdf); 2007 ANNUAL STATISTICAL REPORT OF THE DELAWARE JUDICIARY, [hereinafter DELAWARE STATISTICAL REPORT], available at <http://courts.delaware.gov/aoc/AnnualReports/FY07/2007AnnualReport.pdf>; VERMONT JUDICIARY, 2007 CRIMINAL DIVISION STATISTICS [hereinafter VERMONT JUDICIARY STATISTICS], available at <https://www.vermontjudiciary.org/JC/Shared%20Documents/2007-District.pdf> (last visited Feb. 16, 2015). The Colorado data are somewhat suspect as it is never explicitly stated that the conviction rate is for felonies only, though the N in the data strongly suggest that they are felony data.

<sup>38</sup> Letter and attachment from Glenn A. Grant, Acting Administrative Director of the New Jersey Office of the Courts to George Thomas, dated Aug. 12, 2014 [hereinafter Letter and attachment from Glenn A. Grant] (on file with author).

<sup>39</sup> BJS SPECIAL REPORT, *supra* note 23, at 12 tbl.9.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*



	Felony caseload	Misdemeanor caseload
Wisconsin	122	245
Minnesota	75	53
Delaware	83	291
New Jersey	142	N/R
Colorado	229	111
Montana	45	96
North Dakota	80	65
Vermont	75	225

Of course, to compare caseloads is not to foreclose other factors that might affect outcomes. One obvious factor is salary. If salaries are markedly higher in Wisconsin, say, than in Minnesota, perhaps a better quality defender is hired in Wisconsin; this makes the somewhat dubious assumption that public defenders are significantly motivated by money. A recent study shows that increasing the salary of federal circuit judges would not improve the quality of their opinions; perhaps increasing the salary of public defenders would not increase the quality of representation.<sup>45</sup> But even if the assumption that higher salaries produce better defenders holds, salaries are relatively similar in each cohort of states.<sup>46</sup>

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<sup>45</sup> Scott Baker, *Should We Pay Federal Circuit Judges More?*, 88 B.U. L. REV. 63, 112 (2008).

<sup>46</sup> BJS SPECIAL REPORT, *supra* note 23, at 18 tbl.15 (all salaries rounded to nearest thousand).

State	Entry <sup>47</sup>	5 yrs. or less exp.		6 yrs. or more exp.	
		Min.	Max.	Min.	Max.
Wis.	47,000	49,000	49,000	49,000	113,000
Minn.	49,000	n/a	92,000	n/a	92,000
Delaware	53,000	57,000	76,000	79,000	98,000
New Jersey	54,000	69,000	98,000	79,000	113,000
Colorado	46,000	n/a	59,000	n/a	59,000
Montana	40,000	58,000	70,000	60,000	70,000
North Dakota	46,000	46,000	60,000	50,000	62,000
Vermont	37,000	44,000	56,000	53,000	67,000

Thus, while there is a significant salary differential between the East Coast and upper Midwest states, on the one hand, and the New England and Western states on the other hand, there is not a lot of difference within the cohorts.

The only cohort for which I have caseload data is New Jersey and Delaware, and that comparison is incomplete because I do not have misdemeanor data for New Jersey. But just for fun, here are the data that I have. The felony conviction rate in Colorado in 2006 was 70%.<sup>48</sup> In Vermont, for fiscal year ending June 30, 2007, the conviction rate was 79%.<sup>49</sup> In Delaware, over the same time period, the conviction rate was 65%.<sup>50</sup> In New Jersey for 2007, it was 71.5%.<sup>51</sup> In tabular form here are the data:

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<sup>47</sup> I used the minimum entry level on the assumption that the maximum was reserved for the experienced criminal defense lawyer who wanted to join public defense and that these hires are relatively rare.

<sup>48</sup> CRIME AND JUSTICE IN COLORADO, *supra* note 37, at 58.

<sup>49</sup> VERMONT JUDICIARY STATISTICS, *supra* note 37, at 9.

<sup>50</sup> DELAWARE STATISTICAL REPORT, *supra* note 37, at 28–29.

<sup>51</sup> Letter and attachment from Glenn A. Grant, *supra* note 38.

State	Fel./Misd. Caseload	Conviction Rate
DE	83/291	65%
CO	229/111	70%
NJ	142/?	71.5%
VT	75/225	79%

So the state with the lowest felony caseload, Vermont, has by far the highest felony conviction rate. This, of course, is the opposite from our hypothesis that smaller caseloads should produce lower conviction rates. But since Vermont is quite different from the other three states, there is not much we can infer from that finding. I suspect the Vermont data tell us that New England attitudes toward crime are more important than caseloads. Comparing felony caseloads in Delaware and New Jersey looks promising. The two states are quite similar. New Jersey and Delaware share a small border, are coastal states, are heavily Democratic, and as of 2010 had tax rates substantially higher than the norm in the United States.<sup>52</sup> Plus, they are both small in area and densely populated; New Jersey is the most densely populated state and Delaware the sixth most densely populated.<sup>53</sup> That Delaware has a significantly lower conviction rate than New Jersey with a felony caseload 58% that of New Jersey is consistent with our hypothesis that smaller caseloads tend to produce lower conviction rates. But we do not know the misdemeanor caseload in New Jersey so even a tentative finding must be rejected. Evidence of a potential link between caseloads and outcomes must await a discovery of sources that I missed or the laborious work of collecting the data in the cohort states by hand.

Notice, however, the Catch-22 inherent in my caseload project. If it turns out that a smaller caseload makes no measurable difference in instrumental outcomes, then what would be the rationale for the legislature to increase funding for public defenders? On the other hand, if it turns out that a smaller caseload leads to more acquittals and shorter sentences, why would that make a legislature *want* to increase funding? Imagine trying to sell the legislature on the idea that increased funding for public defense would, over time, produce 270 more acquittals of murder defendants! Although the innocence movement has made us aware that a non-trivial number of innocent defendants are convicted of murder,

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<sup>52</sup> New Jersey has the 2nd highest combined tax burden and Delaware the 17th highest. TAX FOUNDATION, FACTS AND FIGURES: HOW DOES YOUR STATE COMPARE? tbl.2 (2013), available at <http://taxfoundation.org/sites/taxfoundation.org/files/docs/ff2013.pdf>.

<sup>53</sup> U.S. Population Density State Rank, USA.COM, available at <http://www.usa.com/rank/us--population-density--state-rank.htm> (last visited Feb. 16, 2015).

the vast majority of defendants are guilty. As a wag once said, no legislator has ever been defeated for being tough on crime.

Maybe, just maybe, legislatures ignore the many pleas for better funding for indigent defense because they have as much defense as they want—the *Goldilocks* of indigent defense, not too hot, not too cold, just right. If this is correct, then the underfunding for half a century in the face of repeated calls for additional funding is not the result of tight budgets. If this is correct, indigent defense will never be funded to the extent necessary to provide the kind of representation envisioned by *Gideon*, and this will be true *regardless of a jurisdiction's ability to fund indigent defense*. If a state were suddenly flooded with tax revenues, it would spend the money on bullet trains or solar power or tax cuts or free college education. Indigent defense would still get the crumbs.

The point to this symposium issue, however, is not to discover the secret to persuading legislators to radically increase the funding for public defenders, but to offer thoughts about how *Gideon* works today and how it might be made to work better. In that light we have a wealth of insights in six essays. To see how we got where we are today, Professor Michael Mannheimer in *Gideon, Miranda, and the Downside of Incorporation*<sup>54</sup> concludes that the failure of *Gideon*, and *Miranda*, resulted from the failure of their bright-line approach. In attempting to monitor state criminal processes, the Warren Court rejected the case-by-case analysis of the due process fundamental fairness approach favored by earlier Courts.<sup>55</sup> To solve the indeterminacy problem inherent in case-by-case balancing, the Warren Court incorporated into the Due Process Clause most of the specific criminal procedure guarantees in the Bill of Rights.<sup>56</sup> The problem, which quickly became apparent, is that the specific guarantees are also indeterminate when close cases arise.<sup>57</sup>

*Miranda* required specific warnings and waiver before police can conduct custodial interrogation, but the underlying question of voluntariness is a morass of indeterminacy. Whether the state or county provided an indigent defendant a lawyer is easy enough to determine but whether that lawyer was effective, ah, that is a morass of the first order. When faced with these indeterminate outcomes of the incorporated bright line rules, Mannheimer shows that the Court refused to go back into the briar patch of case-by-case analysis.<sup>58</sup> Instead, it adopted virtually irrebuttable presumptions that create new bright lines.<sup>59</sup> The Court has instructed that voluntariness of a confession is heavily presumed when a suspect is warned and later expressly waives his rights, or even answers question.<sup>60</sup> And the Court

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<sup>54</sup> Michael J. Zydney Mannheimer, *Gideon, Miranda, and the Downside of Incorporation*, 12 OHIO ST. J. CRIM. L. 401 (2015).

<sup>55</sup> *Id.* at 402.

<sup>56</sup> *Id.* at 418–19.

<sup>57</sup> *Id.* at 438–39.

<sup>58</sup> *Id.* at 441.

<sup>59</sup> *Id.*

<sup>60</sup> *Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010).

told us in *Strickland v. Washington* that “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment”<sup>61</sup> and that courts reviewing counsel’s strategic decisions should “apply[] a heavy measure of deference to counsel’s judgments.”<sup>62</sup> It seems unlikely that these new bright-line rules would have been favored by the Courts that decided *Gideon* and *Miranda*. But the doctrinal lines indeed are bright.

The bright lines are only doctrinal, however. On the ground, defenders are the primary enforcers of *Gideon*’s promise, and Professor Alexandra Natapoff demonstrates in *Gideon’s Servants and the Criminalization of Poverty*<sup>63</sup> that their jobs have become messier and more complex as American law has, in essence, criminalized poverty. Being poor leads to various criminal law consequences, which Natapoff describes, and once poor people are caught in the criminal justice web, their lives spiral downward.<sup>64</sup> They face fines, fees, lost work, and a heavy burden on future employment, credit, and reputation.<sup>65</sup> Because being poor is part of the problem of indigent criminal defendants, the defenders now find themselves called on to “provide a wide array of social services and legal aid that make them look less like the traditional defense attorneys contemplated by *Gideon v. Wainwright* and more like social workers.”<sup>66</sup>

But the hydraulics works the other way, too. In schools, hospitals, and welfare offices, civil servants are taking on some aspects of the role of law enforcement. Natapoff observes:

These two phenomena are the flip sides of the same coin. Public defenders and other criminal justice actors are morphing into service providers in response to the tight connection between criminalization and their clients’ poverty, the same connection that drives teachers and welfare caseworkers to treat their poor clients as presumptive criminals.<sup>67</sup>

Thus what Natapoff calls the bottom of the “penal pyramid,” is a “world of minor offenses and urban poverty in which crime, unemployment, racial segregation, and lack of social services swirl around in one large nearly inextricable mass.”<sup>68</sup> As if the life of an overburdened defender were not hard enough, now she has to be a social worker as well as a lawyer.

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<sup>61</sup> 466 U.S. 668, 690 (1984).

<sup>62</sup> *Id.* at 691.

<sup>63</sup> Alexandra Natapoff, *Gideon’s Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445 (2015).

<sup>64</sup> *Id.* at 446.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 445.

<sup>67</sup> *Id.* at 446.

<sup>68</sup> *Id.* at 447.

Mannheimer and Natapoff describe a doctrinal and a social welfare world for defenders that could not have been envisioned by the *Gideon* Court. Now let's consider the day-to-day role of defending indigents against serious criminal charges. Did the *Gideon* Court foresee that more or less accurately? While Justice Black's brief opinion for the *Gideon* Court fails to describe the intricacies of how indigent defense would work, or how it was to be funded, it quoted Justice Sutherland's soaring rhetoric from *Powell v. Alabama*, noting that "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" because defense requires "skill in the science of law."<sup>69</sup> The defendant "requires the guiding hand of counsel at every step in the proceedings against him."<sup>70</sup>

Four essays examine "skill in the science of law" and "the guiding hand of counsel at every step in the proceedings" in indigent defense 2014. Professor Jonathan Rapping, founder and president of Gideon's Promise, provides a critical overview of indigent defense in *Grooming Tomorrow's Change Agents: The Role of Law Schools in Helping to Create a Just Society*.<sup>71</sup> According to Rapping, the indigent defense system is dysfunctional as a whole because it is infused with a value system that is indifferent to justice.<sup>72</sup> The actors that shape the criminal justice system have been shaped by this system of corrupted values.<sup>73</sup> Second and third generations of lawyers, judges, and politicians largely see nothing wrong with expecting defenders to operate with caseloads in the hundreds and little money for investigators and experts.<sup>74</sup>

As Rapping notes:

There is no better gauge of the health of American democracy than the way human beings are treated in our criminal justice system. At the very core of who we are as a nation is a deep seated respect for individual liberty and an appreciation of the need to jealously guard it against the inherent abuses of government.<sup>75</sup>

He makes a powerful case that "those responsible for justice in America frequently promote unjust outcomes."<sup>76</sup> But he does not throw up his hands in defeat. He has redoubled his efforts at Gideon's Promise and on the faculty of Atlanta's John Marshall Law School to groom a generation of professionals who

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<sup>69</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

<sup>70</sup> *Id.* at 345 (quoting *Powell*, 287 U.S. at 69).

<sup>71</sup> Jonathan A. Rapping, *Grooming Tomorrow's Change Agents: The Role of Law Schools in Helping to Create a Just Society*, 12 OHIO ST. J. CRIM. L. 465 (2015).

<sup>72</sup> *Id.* at 477.

<sup>73</sup> *Id.* at 468.

<sup>74</sup> *Id.* at 477.

<sup>75</sup> *Id.* at 467.

<sup>76</sup> *Id.* at 465.

embrace the ideas that are fundamental to the American scheme of justice.<sup>77</sup> His essay describes two innovative programs designed to teach justice values to new defenders and to empower them to resist the hydraulic power of the culture of injustice.<sup>78</sup>

If you need convincing of the power of the hydraulics that drive indigent defense toward mediocrity, Professor Carrie Leonetti's essay, *Painting the Roses Red: Confessions of a Recovering Public Defender*,<sup>79</sup> is your cup of tea. Even if you believe in your heart that indigent defense is not what it should be, Leonetti's essay will cause you to sit up and take notice. It is a powerful, gut-wrenching view from the trenches of six years of being a public defender, two in a state system and four in a federal defender's office. Leonetti draws her title from *Alice in Wonderland*, where white roses have to be painted red to satisfy the Queen of Hearts. The message is that if something is not right, you can force it to *look (sort of) right*, no matter how ridiculous the effort appears. And that is an apt description indigent defense, circa 2014. We force it to look like what *Gideon* envisioned. Leonetti shatters the illusion that the roses are actually red.

She predicts that eighty percent of the public defenders who read her essay

[W]ill be pissed. Their reaction will range from perturbed ('Oh, great, one more person contributing to the stereotype about 'dump truck' public defenders. . . .') to enraged ('This ivory tower quitter thinks that after only six years of practice she knows more than people who have been doing this stuff for decades! . . .').<sup>80</sup>

But she makes clear that she didn't write the essay for the eighty percent: "They live in a world of such overwork and underpay that it is structurally impossible for them to engage in best practices for their clients."<sup>81</sup> Instead, she wrote:

[F]or the other twenty percent. Do not read into this Essay that they do not exist. Over the years, I have worked with brilliant, talented, hard-working people. I am in awe of how they stay in the game, some of them without becoming alcoholics. They are the ones reading this and thinking, "Thank god. Someone is saying it out loud."<sup>82</sup>

And, as the editor of this symposium, I can only say to Carrie Leonetti: Thank god you are saying it out loud in this issue.

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<sup>77</sup> *Id.* at 498–503.

<sup>78</sup> *Id.*

<sup>79</sup> Carrie Leonetti, *Painting the Roses Red: Confessions of a Recovering Public Defender*, 12 OHIO ST. J. CRIM. L. 371 (2015).

<sup>80</sup> *Id.* at 396.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

In *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, Professor Stephen Schulhofer details why defenders are caught in a pressure chamber beyond their control.<sup>83</sup> There are essentially three systems for providing counsel for indigents: a system where private counsel are appointed in individual cases; a public defender system; or a contract system where a lawyer or a firm agrees to represent all the indigent defendants for a global fee or a fixed fee per case.<sup>84</sup> In all three models, the indigent defendant has no choice in selecting his attorney, which is precisely the opposite from how the American legal system operates outside of the indigent defendant context.<sup>85</sup> More troubling, the incentives in all three systems operate to discourage defenders from putting in the time needed to provide a zealous defense.<sup>86</sup>

The scandalously low fee per hour and maximum fees provided in private appointments, which we saw in the Philadelphia appointed counsel system, create a powerful incentive to spend less time on indigent clients so that there is more time to spend on clients who can pay the hourly rate needed for the lawyer to prosper.<sup>87</sup> Thus, the optimal outcome for the defender, if not for the client, is a plea bargain hurriedly obtained. A similarly powerful set of incentives operates in the contract system. The contract attorney or firm almost always has private clients, who are likely to pay much more than the contract fee.<sup>88</sup> Because the contract attorney gets paid the same regardless of how much time the lawyer puts into the case, her optimal outcome is a plea bargain arrived at on day one, again to save hours for paying clients.<sup>89</sup> Public defenders have no paying clients to favor, but they, too, get paid the same whether they write long appellate briefs or short briefs, whether they try 10% of their cases or 0%.<sup>90</sup> And even if the defenders are driven by pride and integrity to want to spend an adequate amount of time on their cases, the caseloads in many states, as we saw earlier, are staggering.

Is there a solution? Perhaps. Schulhofer makes the case for letting defendants choose a lawyer, either a public defender or a private lawyer.<sup>91</sup> If a private lawyer accepts employment, then he or she will be paid according to the compensation schedule.<sup>92</sup> Unless the compensation schedule is liberalized, that means the pool of willing private defenders will mostly include lawyers who are either idealistic or who need the low-paid work.<sup>93</sup> But notice an interesting

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<sup>83</sup> Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementations*, 12 OHIO ST. J. CRIM. L. 505 (2015).

<sup>84</sup> *Id.* at 513–24.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 512.

<sup>87</sup> *Id.* at 516.

<sup>88</sup> *Id.* at 522.

<sup>89</sup> *Id.* at 522–23.

<sup>90</sup> *Id.* at 519.

<sup>91</sup> *Id.* at 552, 555.

<sup>92</sup> *Id.* at 546.

<sup>93</sup> *Id.* at 537.



incentive for the second type of lawyer: Unlike lawyers who are conscripted into representing indigent defendants, the lawyer who accepts the case has an incentive to do a good job so that he gets more indigent defendants.<sup>94</sup> Schulhofer concludes his essay by looking at a client-choice pilot project in Texas.<sup>95</sup> The Texas Indigent Defense Commission chose Comal County for the project and was able to get enthusiastic support from virtually all the relevant actors for an innovative program that brings free-market principles to bear on the indigent defense problem.<sup>96</sup> Though the pilot program is still underway, its success in solving the mechanical problems inherent in client choice is heartening.

Texas leads us naturally to Professor Jennifer Laurin's essay. She has detected a pulse of change, faint though it might be, that is beating in some unusual places, and one of them is Texas. In *Gideon By the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*,<sup>97</sup> Laurin notes that while everyone knows the general story of how criminal defense is not up to par, "[c]ritically, though, beyond those broad-brush characterizations from ten thousand feet above, painfully little is known about the details of indigent defense in the United States."<sup>98</sup> But that is changing. The broad-brush view of indigent defense is being subject to careful, quantitative analysis in jurisdictions that are developing "evidence-based practices."<sup>99</sup> This form of empirical analysis began in medicine and is based on the common-sense notion that practitioners and policy makers should make decisions based "upon the best available data supporting a given course of action."<sup>100</sup>

Laurin details the possibilities that "evidence-based practices" hold for criminal justice reform.<sup>101</sup> She also takes us on a tour of three jurisdictions that are, in quite different ways, applying evidence based practices on a state-wide basis: North Carolina, Texas, and New York. As one would expect, empirical evidence sometimes leads to difficult decisions. For example, a Texas study

[D]emonstrated that the public defender achieved better outcomes than private assigned counsel by a number of measures, including a greater proportion of case dismissals and acquittals. But the study also found that the office did so at significantly higher per-case cost—\$944 per felony, for example, as compared to \$550 for appointed counsel.<sup>102</sup>

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<sup>94</sup> *Id.* at 539–40.

<sup>95</sup> *Id.* at III.

<sup>96</sup> *Id.* at 544.

<sup>97</sup> Jennifer E. Laurin, *Gideon by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 OHIO ST. J. CRIM. L. 325 (2015).

<sup>98</sup> *Id.* at 327.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See id.* at 327–28.

<sup>102</sup> *Id.* at 349.

One can imagine the argument in favor of spending almost twice as much per case for better quality representation. But one can imagine political actors preferring the low cost—indeed, preferring the *Goldilocks* of fewer case dismissals and acquittals. Indeed, Laurin reports, “There is evidence already that political pressure fueled by the cost data is leading judges—who still have discretion whether to appoint counsel from the public defender office or a list of private attorneys—to opt not to use the office.”<sup>103</sup> But whatever the choice, it at least will be informed by data. Texas legislators and judges will know what they are “buying” when assigning cases to the public defender office.

If Mannheimer, Natapoff, Rapping, and Leonetti leave us feeling that *Gideon* has (largely) failed so far, each writer in his or her own way gives us hope that *Gideon* can yet be saved from the political winds that have blown it off course. Schulhofer has specific reasons for optimism; he offers us a theoretical construct of client choice that suggests better outcomes, and he details the beginnings of a test of the client-choice model. Even though Laurin tempers the expectations of evidence-based practice’s advocates, she too is optimistic that the approach will yield some gains. Maybe, someday, we will not have to paint the roses red. Maybe they will actually be red.

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<sup>103</sup> *Id.* at 350.