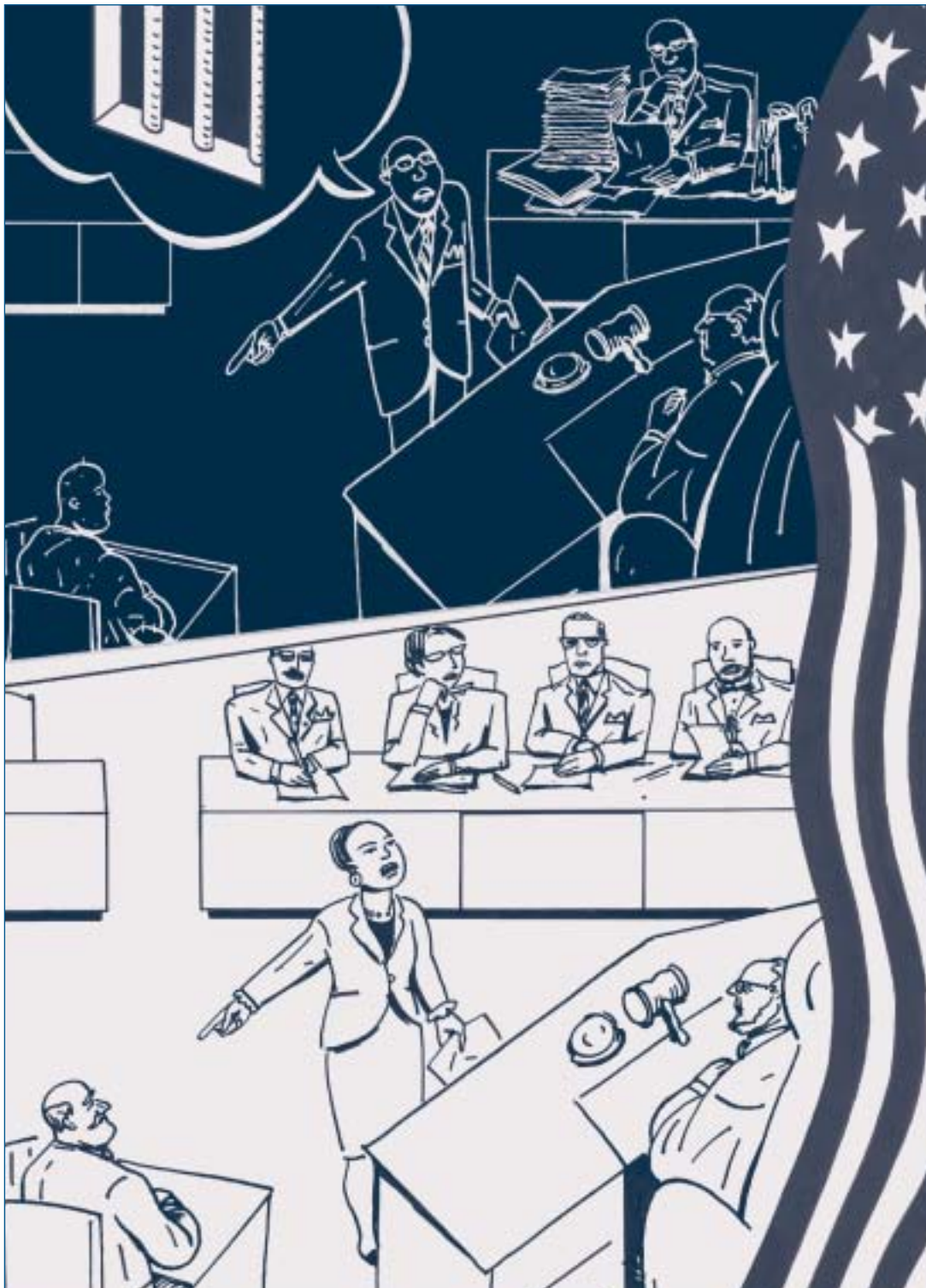


IDEAS

FOR AN OPEN SOCIETY



THE PROMISE OF EQUAL JUSTICE

Forty years after Gideon v. Wainwright, our country still has no comprehensive system for indigent defense. Such a fragmented approach cannot deliver quality legal representation.

—Stephen B. Bright

Volume 3 Number 1

MARCH 2003

OPEN SOCIETY INSTITUTE



EQUAL JUSTICE UNDER LAW

A landmark Supreme Court decision 40 years later

Forty years ago, Clarence Earl Gideon was charged with breaking into a pool-room. Unable to afford an attorney, Gideon asked that a lawyer be appointed to represent him at the state's expense. The judge denied his request. Forced to defend himself, Gideon was convicted. Following his trial, he sent a handwritten petition to the United States Supreme Court asking for a review of his case. His request was granted.

In its landmark decision in *Gideon v. Wainwright*, the United States Supreme Court recognized the “guiding hand of counsel at every step in the proceedings” as the fundamental requirement for equal justice and reliable results in criminal cases and held that a lawyer must be provided for people who cannot afford to hire one. The court appointed Abe Fortas, who later joined the court as a justice, as Gideon's attorney. At this new trial, Gideon was acquitted.

But 40 years later, the promise of competent counsel and equal justice remains unfulfilled for many poor people. Some enter guilty pleas and are sentenced to imprisonment without any legal representation. Some languish in jail for weeks or months, often for longer than any sentence they would receive, before being appointed a lawyer. Some obtain perfunctory

representation only — nothing more than a hurried conversation with a court-appointed attorney outside or even inside the courtroom — before entering a guilty plea or going to trial.

In the Superior Court of Coweta County, Georgia, many people charged with felonies — crimes punished by a year or more of imprisonment — are not informed of their right to counsel. Instead, Chief Judge William Lee directs them to speak with the prosecutor. In a whispered conversation, the prosecutor proposes a plea bargain — a reduction in charges or a shorter sentence if the defendant pleads guilty. Because defendants have no ability to assess their legal situation, many agree. The defendants only learn of their right to counsel after they plead guilty and the judge, as required by the United States Supreme Court, lists the constitutional

BY STEPHEN B. BRIGHT

rights that they are giving up. Though Judge Lee's refusal to inform people of their right to counsel is unconstitutional, the practice occurs in other courts, particularly those dealing with misdemeanor and municipal offenses.

In most courts, the accused are assigned counsel, but often the court-appointed lawyers lack the experience, skills, or resources necessary to provide competent representation. Courts have upheld death sentences in cases where lawyers failed to present evidence regarding the defendant's guilt or to argue for a sentence less than death, did not know the governing law, or were intoxicated or under the influence of drugs.

In Houston, Texas, a trial judge said that although the United States Constitution guarantees the accused a lawyer, it "doesn't say the lawyer has to be awake." The Texas Court of Criminal Appeals — the state's highest criminal court — upheld convictions in three capital cases in which the defense lawyer slept during trial. In one case, the United States Court of Appeals for the Fifth Circuit granted the defendant a new trial. But another defendant was not so fortunate; he was executed even though the same attorney slept through portions of his trial. The courts are still reviewing the third case. Though most lawyers don't fall asleep during trial, the execution of even one person who was represented by a sleeping lawyer is one too many.

Investigative reporting in Illinois, Kentucky, Tennessee, and Texas found that nearly one-third of those sentenced to death were represented by



lawyers who were later disbarred, suspended from the practice of law, or found guilty of crimes. Dennis Williams, convicted twice for the 1978 murders of a couple from Chicago, was represented at his first trial by an attorney who was later disbarred and at his second by one who was later suspended. Fortunately, DNA evidence later exonerated Williams. In Illinois, a convicted felon — and the only lawyer in the state to be disbarred twice — represented four men who were sentenced to death. He handled those cases after being reinstated despite concerns about his emotional stability and drinking habits. In Tennessee, the list of lawyers eligible to handle capi-

tal cases includes a lawyer convicted of bank fraud, another found guilty of perjury, and another whose failure to demand a blood test let an innocent man linger in jail for four years.

Forty years after the Supreme Court guaranteed poor people the right to counsel, many state and local governments have failed to sufficiently fund indigent defense programs, leaving legal representation for the poor dreadfully inadequate. Thirty-two states cover at least 50 percent of the cost of indigent defense, leaving the remaining financial responsibility to individual counties. Eighteen states leave representation primarily up to localities.

Courts operate on the fiction that anyone licensed to practice law can handle criminal cases, as if every doctor is competent to perform brain surgery.

IDEAS for an Open Society

But public defender programs — which employ full-time lawyers, investigators, and support staff — and assigned counsel programs, which allocate cases to lawyers who are on a list of those qualified to try criminal cases, strive to provide competent representation. In 25 states, public defender programs represent over half of indigent defendants. Inadequate funding, however, leaves

nal law or contract with lawyers to represent all of the country's poor defendants for a fixed amount. Often these contracts are awarded to the lowest bidder. In Georgia, a contract attorney was scheduled to represent 94 people on the same day; another handled cases at an average cost of less than \$50. Such a fragmented approach cannot deliver quality legal representation.

afraid to zealously represent their clients for fear of losing future business.

Unfortunately, the United States Supreme Court has adopted a low standard for representation. In reluctantly upholding a death sentence, one federal judge observed that, as interpreted by the court, the United States Constitution “does not require that the accused, even in capital cases, be represented by able or effective counsel.” Even if a defendant receives inadequate counsel, a court can uphold the conviction as long as it finds that the lawyer's ineptitude did not affect the verdict.

Courts operate on the fiction that anyone licensed to practice law can handle criminal cases, as if every doctor is competent to do brain surgery. In Alabama, Gary Drinkard was appointed one lawyer who handled collections and another who dealt with foreclosures and bankruptcy cases. Drinkard was sentenced to death and spent seven years behind bars, five of them on death row, before his case was reversed on appeal. Competent criminal defense attorneys defended him at his new trial and established that on the night of the murders, Drinkard was housebound with a severe back injury. He was acquitted and released.

People accused of crimes depend upon their lawyers to protect their rights, but poor people, who are assigned incompetent attorneys, have no means to enforce their right to counsel. Gregory Wilson, who faced the death penalty in Covington, Kentucky, was assigned one lawyer with no experience trying serious cases, and another — described by

“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.”

—Justice Hugo Black

for the majority in *Gideon v. Wainwright*

public defenders with crushing case-loads, making individual attention to clients impossible. And in many jurisdictions, inadequate compensation for assigned counsel cases deters qualified lawyers or prevents them from devoting sufficient time to indigent clients.

Many states, however, have yet to create and fund such programs, so the quality of representation varies greatly from one locality to another. Alabama, Georgia, Mississippi, New York, Pennsylvania, and Texas do not have statewide public defender systems, and others — including Texas and Georgia — leave primary responsibility for providing lawyers for those who cannot afford them to each county. Some jurisdictions conscript unwilling lawyers who have no interest in crimi-

In many jurisdictions, judges appoint lawyers to defend the poor, but ensuring competent counsel is not always their highest priority. In a 1999 survey for the State Bar of Texas Committee on Services to the Poor in Criminal Matters, almost half of the Texas trial judges who responded admitted that an attorney's reputation for moving cases quickly, regardless of the quality of the defense, influenced their appointment decisions. According to a June 1999 *Austin American Statesman* article, another survey of Texas judges found that appointments were often based on whether an attorney had supported or contributed to a judge's political campaign. As a result, many judge-appointed lawyers, who depend upon judges for their livelihoods, may be

the first as a “burned-out alcoholic” who was “disoriented” and “incapable of having any meaningful discussion about the case” — with no office or support staff. The second attorney practiced out of his home, which showcased a large, illuminated Budweiser sign. When Wilson called the telephone number that this lawyer had given him, a voice answered, “Kelly’s Keg” — the bar across the street from the courthouse.

Unlike many defendants who feel powerless to protest poor representation, Wilson repeatedly objected to his lawyers and asked for new counsel. But the judge refused. Wilson was convicted and sentenced to death. The Kentucky courts upheld his conviction and sentence, attributing his poor representation to Wilson’s “lack of cooperation.”

Meeting the constitutional requirement of *Gideon v. Wainwright* is not impossible. Some states have established and funded public defender and assigned counsel programs, in which attorneys receive the training, supervision, and resources needed to represent their clients. And many dedicated lawyers work long hours to make the promise of *Gideon* a reality.

But public scrutiny and lawsuits are necessary for change in the many states that have yet to meet their responsibility to provide competent counsel for the poor. In December 2002, a commission on indigent defense appointed by the Chief Justice of Georgia reported that there should be a statewide public defender system, fully funded by the state and operated independently of the state’s judges and prosecutors. But extensive

investigations by the *Atlanta Journal-Constitution* and other media — and reports and lawsuits filed by the Southern Center for Human Rights — preceded this report. Eventually such lawsuits resulted in the creation of public defender offices and a reduction in the maximum time between arrest and the assignment of counsel. In Mississippi, which leaves indigent representation up to each county, a bill to create a statewide defender system passed the state Senate in 1997 but was blocked by the House. Several counties are suing the state, demanding that it fund indigent defense. And in Connecticut and other states, litigation has led to improvements in indigent defense programs.

The realization of *Gideon v. Wainwright* requires statewide indigent defense systems, so that representation is not left to — and does not vary by — locality, court, or judge. States must provide sufficient funding, so that defenders carry reasonable caseloads and have the expert and investigative assistance they need to effectively

represent clients. Responsibility for indigent defense must be independent of the executive branch and judiciary, so that a lawyer’s business interests are not entangled with his legal practice. Attorneys who represent the poor must be subject to regular performance reviews by an independent agency, so that the quality of representation becomes standardized. And courts, upon determining that a person has received incompetent representation, should require a new trial instead of speculating on whether the deficient representation altered the verdict.

Only by acknowledging the deficiencies in the system and providing the structure, standards, resources, independence, and accountability to insure fair and adequate representation will *Gideon*’s promise of equal justice be realized.

Stephen B. Bright, the director of the Southern Center for Human Rights in Atlanta since 1982, teaches courses on criminal issues at Harvard, Yale, and other law schools. He received the American Bar Association’s Thurgood Marshall Award in 1998.

Southern Center for Human Rights Mission Statement

The Southern Center for Human Rights was created in 1976 to respond to the deplorable conditions in prisons and jails in the South and the United States Supreme Court’s decision that year allowing the resumption of capital punishment. The center’s mission is to protect the civil and human rights of poor people charged with crimes — particularly those facing the death penalty — and incarcerated in prisons and jails by ensuring that they have adequate legal representation, that they receive due process and equal protection before independent judges, that they have access to the courts to challenge any unlawful convictions or unconstitutional conditions or practices, and that their dignity as human beings is recognized and preserved.

INDIGENT DEFENSE LEGAL AND ADVOCACY GROUPS

The Gideon Project awarded grants to the following organizations working around indigent defense issues:

American Bar Association Standing Committee on Legal Aid and Indigent Defendants

American Bar Association Division for Legal Services
541 North Fairbanks Court, 15th Floor
Chicago, IL 60611
www.abanet.org/legalservices/sclaid

To support task forces studying the lack of indigent defense in Louisiana, Michigan, Arizona, Mississippi, Washington, and Virginia.

American Bar Association Death Penalty Representation Project

American Bar Association Death Penalty Representation Project
727 15th Street NW, 9th Floor
Washington, DC 20005
www.abanet.org/deathpenalty

To fund a resource counsel position to assist volunteer lawyers from the private bar who represent death row inmates.

Brennan Center

Brennan Center for Justice
New York University School of Law
161 Avenue of the Americas, 12th Floor
New York, NY 10013
www.brennancenter.org

To support a two-year pilot project to seed, encourage, and strengthen holistic and community-oriented advocacy by defender agencies.

The Defender Association

The Defender Association
810 Third Avenue, 8th Floor
Seattle, WA 98104
www.defender.org

To support the association's Racial Disparity Project, a specially staffed project within the public defender's office that works to reduce racial disparity in criminal law enforcement.

Equal Justice Initiative of Alabama

Equal Justice Initiative of Alabama
643 South Perry Street
Montgomery, AL 36104
www.eji.org

To support indigent defense and capital punishment reform in Alabama.

Immigrant Legal Resource Center

Immigrant Legal Resource Center
1663 Mission Street, Suite 602
San Francisco, CA 94103
www.ilrc.org

To ensure that non-citizen defendants receive adequate representation in the criminal justice system by educating defenders about the immigration consequences of their criminal cases.

Innocence Project

Innocence Project
Benjamin N. Cardozo School of Law
55 Fifth Avenue, 11th Floor
New York, NY 10003

To support the Innocence Network, which investigates and represents persons with colorable claims of wrongful conviction.

National Legal Aid & Defender Association

National Legal Aid & Defender Association
1625 K Street NW, Suite 800
Washington, DC 20006
www.nlada.org

To support a national initiative for quality indigent defense that includes the development of an Internet technical assistance program, a communications campaign, and leadership training for defender managers.

New York State Defenders Association

New York State Defenders Association
194 Washington Avenue, Suite 500
Albany, NY 12210
www.nysda.org

To support a public education campaign to improve defender services that focuses on the need for state funding, statewide defense standards, and a non-partisan commission to oversee the dissemination of criminal defense findings.

ProTex: Network for a Progressive Texas

Texas Criminal Justice Reform Coalition
1506 South First Street
Austin, TX 78704
www.protex.org/criminaljustice

To support a grassroots movement for progressive criminal justice reform through a statewide coalition.

Southern Center for Human Rights

Southern Center for Human Rights
83 Poplar Street, NW
Atlanta, GA 30303
www.schr.org

To support indigent defense reform in Georgia.

Texas Defender Service

Texas Defender Service
412 Main Street, Suite 1150
Houston, TX 77002
www.texasdefender.org

To train and assist capital trial lawyers in Texas and to develop systemic reforms in capital procedures.

The Virginia Indigent Defense Coalition

The Virginia Indigent Defense Coalition
700 East Main Street, Suite 1510
Richmond, VA 23219
www.vidcoalition.org

To support indigent defense reform in Virginia.



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OSI and the Gideon Project

The Gideon Project, named for the landmark United States Supreme Court ruling in *Gideon v. Wainwright* guaranteeing the right to legal counsel for the indigent, was created to safeguard that right and to promote equal justice throughout the criminal justice system. In recent years, however, the random

application of law, wrongful convictions and incarcerations, and an overburdened criminal justice system have thwarted the exercise of this right. Such systemic flaws compromise human and constitutional rights while also undermining the foundation of a democratic society.

The Gideon Project provides funds to

promote the fair administration of justice in police precincts and courthouses through research, advocacy, and legal representation. The project has four funding priorities: improving public defense services, increasing prosecutorial accountability, combating racial profiling, and ending the death penalty.

Mission Statement

AN OPEN SOCIETY IS ONE THAT protects fundamental human rights, guarantees impartial justice, provides opportunities for people to make the most of their talents, and makes public decisions through a democratic process that is open to full participation and constant reexamination.

The mission of the Open Society Institute is to promote these values in the United States as well as in emerging democracies around the world. Although the U.S. aspires to the ideal of an open society, in many respects we fall short and in others we are losing ground.

An open society requires a public sphere shielded from the inequalities of the marketplace, but in the U.S., the dominant values have become those of market fundamentalism, which rejects a role for government and poses a threat to political equality, public services, racial justice, and the social safety net. An open society requires an unbiased system of justice that

stands apart from political pressures and social inequality, but in the U.S., the pressures of money, bias, and politics undermine the independence of the courts and the fairness of the criminal justice system. An open society is one in which individuals and communities can make the most of their talents and assets, but in the U.S., too many people face barriers posed by failed schools, a dead end criminal justice system, or the sharp inequalities in our provision of health care and economic security. And too many communities are isolated from full participation in democratic decisionmaking or the mainstream of the economy.

Through our grantmaking and our policy initiatives, the Open Society Institute's U.S. Programs seek to restore the promise of our pluralistic democracy and bring greater fairness to our political, legal, and economic systems. We seek to protect the ability of individuals to make choices about their lives and to participate fully in all the opportunities — political, economic, cultural, and personal — that life has to offer.

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