IS THIS JUSTICE?
A Look at the Representation Afforded Poor Defendants in America

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I.

INTRODUCTION

In this country, you are better off being rich and guilty than poor and innocent.

— Steve Bright, Southern Center for Human Rights

Robert Wayne Holsey was charged with capital murder after allegedly shooting a police officer in 1997.[1] Because Holsey was unable to afford an attorney he was assigned court appointed counsel. After the trial, Holsey's attorney admitted to drinking a quart of vodka every night before trial. Additionally, he said that he was preoccupied with his own legal problems – he was being investigated for embezzling client funds – and he was unable to adequately represent

[1] Andrew Rosenthal, *Ineffective Counsel in Georgia,* THE N.Y. TIMES (Sept. 19, 2012).

anyone.[2] If Holsey were affluent he would be able to work within the private system and hire a new attorney but, because he was assigned counsel, he was stuck. After his conviction Holsey appealed on an ineffective assistance of counsel claim. Unfortunately for Holsey, the court was not convinced that his lawyer's behavior in fact prejudiced the case and therefore his claim did not fulfill a critical requirement of an ineffective claim.[3]

Although no state has made it a crime to be poor, the fact is that in our criminal system poverty heightens the likelihood of prosecution and a more severe punishment.[4] In 1963, Justice Black penned the majority opinion in *Gideon v. Wainwright* - arguably the Supreme Court of the United States' most important criminal law holding. *Gideon* held that under the Sixth and Fourteenth Amendments, all Americans charged with a felony must be offered legal representation at trial no matter their ability to pay.[5] Later, the holding of *Gideon* was extended to misdemeanors that may result in incarceration.[6] The Court has also recognized the importance of attorney assistance at "critical stages" of adjudication, including pre-trial police line-ups,[7] plea negotiations,[8] and the entry of guilty pleas.[9] In *Gideon,* the Court said "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided

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[2] *Id.*
[3] *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1273 (11th Cir. 2012).
[4] Robert B. McKay, *Poverty and the Administration of Criminal Justice,* 35 U. COLO. L. REV. 323, 323 (1962).
[5] *Gideon v. Wainright*, 372 U.S. 335 (1963).
[6] *Argersinger v. Hamlin*, 407 U.S. 25 (1972). *Scott v. Illinois*, 440 U.S. 367 (1979) (The Court held that the requirement for representation could only be extended to those where "actual imprisonment" is enforced.) *Alabama v. Shelton*, 535 U.S. 654 (2002) (The Court ruled that attorneys must be provided for indigent defendants whose probationary sentences may result in imprisonment.)
[7] *United States v. Wade*, 388 U.S. 218, 224 (1967).
[8] *White v. Maryland*, 373 U.S. 59, 60 (1961).
[9] *Missouri v. Frye*, 132 S.Ct. 1399, 1404 (2011).

for him."[10] The Court labeled this requirement an "obvious truth" that must be extended to all persons brought into a U.S. court.

Unfortunately, *Gideon* has resulted in a half-hearted promise as our justice system has strayed from the spirit of the law. In our system, wealthy individuals with the ability to hire attorneys with firm resources often succeed; individuals who are assigned counsel fail. This paper will articulate the clear nexus between economic stratification and criminal representation. Part II will demonstrate the disparate effects of our system of punishment on the economically disadvantaged and the cyclical nature of the poverty to prison channel. It will show how incarceration and other collateral consequences leave many previously convicted individuals teetering on the edge of recidivism, unable to re-assimilate into their communities. Part III will describe the current collection of legal services offered to the poor. This Part will describe a minority of organizations that have become the gold standard for indigent criminal defense. More importantly, it will also emphasize a more common broken system of representation, highlighted by ineffective counsel. Finally, Part IV will propose the use of Court Room Advocates ("CRA") and increasing pro-bono hours among practitioners and students to better our justice system. These proposals are intended to adhere to the promise of *Gideon* and, hopefully, begin to lessen disparate outcomes based on a person's socio-economic status.[11]

[10] *Gideon* at 344.

[11] Because of limitations in the breadth of this paper, it has intentionally omitted a discussion of race. This, however, is not a comment on the importance of race in the discussion of the effects of ineffective counsel and mass incarceration in America. African-Americans compose roughly thirteen percent of the American population and they compose a staggering forty percent of the prison population. Clearly, a complete analysis about the challenges facing indigent criminal defendants should include an in-depth look at race.

II.

EFFECTS OF POOR-REPRESENTATION OR LACK OF REPRESENTATION

In 2006, after surveying inmates about their income level at the time of their most recent arrest, Darren Wheelock and Christopher Uggen presented data visualizing the trends in inmates' economic status.[12] Even though the report relies on self-reported income information, it is helpful in depicting trends. Figure 1 below shows the dramatic increase in poverty among incarcerated populations.

Figure 1. Poverty Status of State Prison Inmates 1974 - 2004[13]

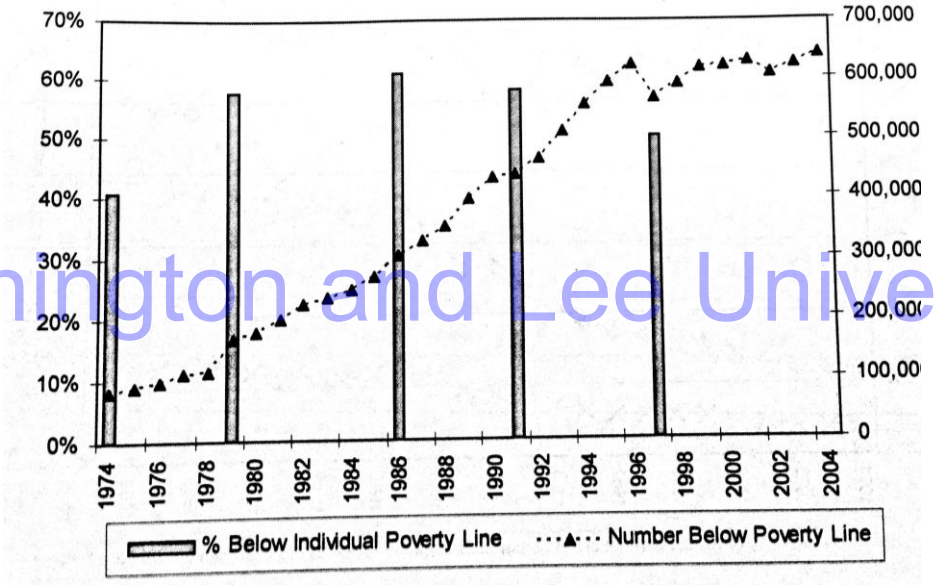


Figure 1 shows that the percentage of inmates that report being in poverty varies from forty to sixty percent. The telling statistic here is the drastic increase in the number of prisoners who report living in poverty prior to their most recent arrest. This information supports a hypothesis that although inmates have always been poor, today the poor are much more likely to be

[12] Darren Wheelock and Christopher Uggen, *Race, Poverty, and Punishment: The Impact of Criminal Sanctions on Racial, Ethnic, and Socioeconomic Inequality,* National Poverty Center Working Paper Series, #06-15, 13 (2006) *available at* http://www.npc.umich.edu/publications/working_papers/ (last visited Mar. 14, 2013).
[13] *Id.* (Table found in the appendix).

imprisoned. As seen in the next subpart, this increased incarceration has grave economic and social consequences for the individual, their neighborhood, and the greater community.

The growing low-income prison population is particularly troubling for two reasons. First, low-income defendants are not afforded the same level of protection under the law – the promise of *Gideon* is not being fulfilled. Second, the effects of contact with the justice system are far more detrimental for low-income people. "Regardless of whether or not charges could result in jail time, defendants often come away with mountains of harsh fines and fees. For people who live paycheck to paycheck, it may be nearly impossible to pay them."[14] This section will delve into the effects of poor representation, primarily through incarceration and the collateral consequences of a criminal record. Subpart A will investigate the frightening proposition that, in this environment of increased incarceration, ending up behind bars is much more likely without effective representation.

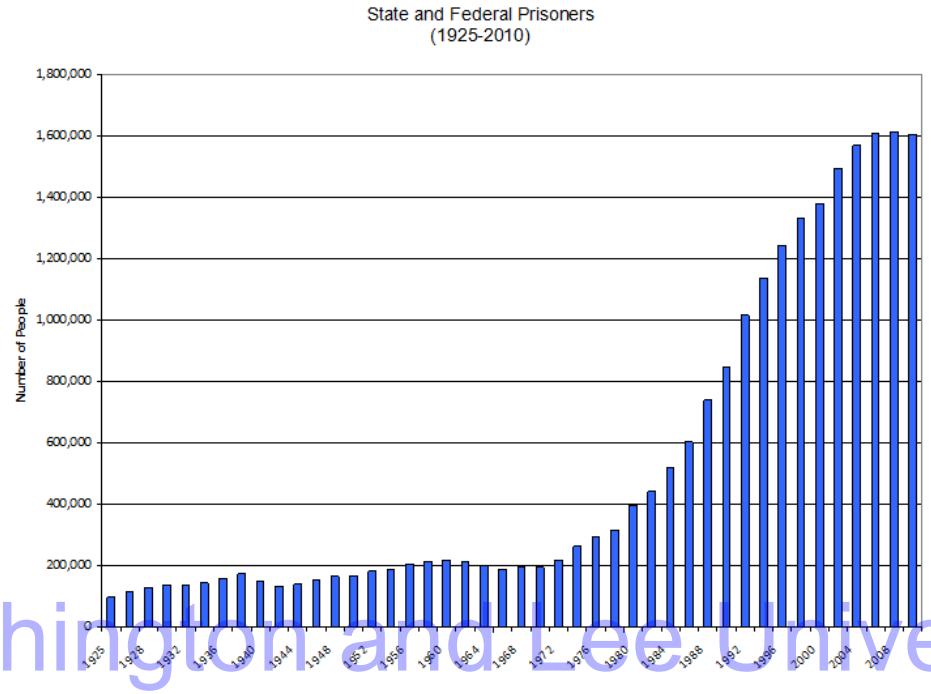
A. Incarceration

In the late 1970s and early 80s, America entered into an era of mass incarceration.[15] Fueled by "Three Strikes and You're Out" policies, mandatory minimums, harsh sentencing guidelines and the increased criminalization of non-violent, seemingly benign behavior, America's incarceration rates sky-rocketed. Even though it is understood among criminologists and practitioners that longer sentences and harsher penalties are not the most effective tool in

[14] Civil Liberties Union of Ohio, *The Outskirts of Hope: How Ohio's Debtors' Prisons are Ruining Lives and Costing Communities*, American Civil Liberties Union 5 (April 2013).
[15] Marc Maruer and Meda Chesney-Lind, *Introduction* in INVISIBLE PUNISHMENT 1, 11 (Marc Mauer & Meda Chesney-Lind eds., 2002).

crime prevention, the politicization of crime has fueled these unreasonable penalties.[16] Figure 2 shows the dramatic increase:

Figure 2. State and Federal Prison Population[17]



The populations depicted in Figure 2 have continued to swell and today America houses nearly 2.4 million people behind bars.[18] The mass incarceration of Americans is disproportionately suffered by low-income and minority communities. Men are around 90% and people of color are around 60% of the prison population.[19]

By purging our communities of fathers, brothers, and possible tax-payers there are grand social implications, including: erosion of familial bonds, entire communities with few active male figures, and the creation of a sub-community of disenfranchised people. These communities

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[16] *Id.* at 13.
[17] The Sentencing Project, 2012 *available at* http://www.sentencingproject.org/template/page.cfm?id=107 (last visited Apr. 10, 2013).
[18] Allen J. Beck, *Prison and Jail inmates at Midyear 1999*, Bureau of Justice Statistics (Apr. 2000) *available at* http://bjs.gov/content/pub/pdf/pjim99.pdf (last visited Apr. 10, 2013).
[19] Mary Pattillo, David Weiman, and Bruce Western, eds. Imprisoning America: The Social Effects of Mass Incarceration, Russell Sage Foundation at 1 (2006).

are becoming pockets of incarceration through cyclical patterns of incarceration. Todd Clear, the Dean of the School of Criminal Justice at Rutgers University, described the misguided theory behind mass incarceration as "addition by subtraction."[20] In short, communities will be improved if the "criminals" are removed from society and incarcerated. Unfortunately, it is not that simple:

> High Incarceration locations are always places where poor people live. In the face of the dearth of resources, incarceration in wholesale amounts exacerbated the limits of social support. Here is the blunt reality. Children who grow up in areas where substantial amounts of human capital are not easily acquired struggle with inadequate schools, limited leisure time choices, and insufficient formative supports. The systematic absence or weakening of male sources of support for human capital makes a bad situation worse and adds a further impediment to overcoming these disadvantages of birth.[21]

Clear describes the concept of *human capital* as "the talents a person brings to social life, innate and acquired." In communities disproportionately affected by high incarceration rates, Clear explains the inability to socially elevate. Because of the absence of, in some instances, nearly 25 percent of the adult males in a community,[22] the area is left severely crippled and unable to be stimulated economically. This destruction of social mobility can be observed in two contexts: the familial unit and the community unit.

The Bureau of Justice Statistics reported that in 1999, there were 1,498,800 children with parents incarcerated in both State and Federal Prisons.[23] And, although there is not more current data, we can assume that as the prison population has increased, so too has this figure. Visible in Figure 2 above in 1999, 1,860,520 were imprisoned in state and federal facilities.[24] By 2011, that

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[20] Todd R. Clear, *Addition By Subtraction*, in INVISIBLE PUNISHMENT 181, 181 (Marc Mauer & Meda Chesney-Lind eds., 2002).
[21] *Id* at 188.
[22] *Id* at 185.
[23] Christopher J. Mumola, *Incarcerated Parents and Their Children*, Bureau of Justice Statistics, NCJ 182335 (August 30, 2000).
[24] Allen J. Beck, *Prison and Jail inmates at Midyear 1999*, Bureau of Justice Statistics (Apr. 2000) *available at* http://bjs.gov/content/pub/pdf/pjim99.pdf (last visited Apr. 10, 2013).

number swelled to nearly 2,239,751.[25] Children often learn about consequences from good and bad behavior from their family.[26] Unfortunately, if a child grows up in a community where incarceration is the norm, it will be far more likely that he or she will have run-ins with the law. Sadly, "families that lack adult male role members are known, on average, to face economic stresses and provide reduced levels of child supervision. When these families live in settings where the absence of adult males is common, there are widespread problems in recruiting males as fathers, mentors, providers, and role models."[27]

Mass incarceration affects more people than just those who are locked behind bars. As we just saw it affects their children, partners, and extended family, but it also affects the stability of the greater community. In areas of high incarceration, as more and more adult men are wrenched from their community it becomes increasingly unstable. Family members left on the outside sometimes retreat from community involvement due to social stigma associated with incarceration, new economic pressures, and other social ramifications.[28] This leaves holes not only in the family but also in churches, neighborhoods, school systems, and other organizations.

Additionally, the financial security of the family and the community is shaken by high rates of concentrated incarceration. In their chapter in *Black Economic Progress*, Bruce Western, Becky Pettit, and Josh Guetzkow describe the economic phenomenon that vexes low-income communities and increases inequality. The authors discuss hypothetical "spillover" effects of incarceration on low-income neighborhoods.[29] One of these "spillover" effects is the damaged reputation of all young black men in high-incarceration neighborhoods. The authors contend that

[25] According to the Bureau of Justice Statistics there were 735,601 in local jails, 1,504,150 in state or federal prisons.
[26] Clear, *supra* note 20, at 186.
[27] *Id.* at 188.
[28] *Id.* at 191.
[29] Bruce Western, Becky Pettit, & Josh Guetzkow, *Black Economic Progress*, in INVISIBLE PUNISHMENT 165, 175-176 (Marc Mauer & Meda Chesney-Lind eds., 2002).

because in some communities about a third of black men have been sentenced to time in prison, potential employers think every young black man must be associated with crime. This stigma reduces job opportunities for individuals in the community.[30] "In these cases, an individual's employment opportunities are limited by coming from a particular neighborhood rather than by having a criminal history." The authors attribute this inequality to three primary causes: the stigma of a criminal conviction, the erosion of job skills because of incarceration, and the corrosion of "social connections to good job opportunities."[31]

Finally, one of the most upsetting effects of mass incarceration is the disenfranchisement of an entire sector of Americans. Based on a retributive theory of punishment, an individual's sentence is a message from the court. The court is telling the individual that in order to "repay" society for his or her (bad) behavior she or he must spend a certain number of years behind bars. Then after "serving his or her time," theoretically, the debt is settled. Unfortunately, that is not the case. After an individual pleads guilty or is convicted at trial there are a plethora of collateral consequences, or unintended side effects, that will afflict the individual and their community.

B. Collateral Sentencing Consequences

Collateral consequences are the legally sanctioned effects of a criminal conviction that lie outside of the traditional punishments imposed by the courts. Collateral consequences are particularly disturbing because most of the time they are not rooted in conventional theories of punishment.[32] The severity of collateral consequences mark previously incarcerated people as

[30] *Id.*
[31] *Id.*
[32] Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L & POL'Y REV. 153, 154 (2004).

pariahs of our community. Unsurprisingly, ostracizing these people can pose a great risk to the individual, their neighborhood, and the greater community.[33]

1. Employment

Employment consequences are particularly damaging to a previously incarcerated or convicted individual because they limit a person's opportunity to reintegrate into society and to provide for themselves. At a town hall meeting in Atlanta this summer, a young man spoke about his post-incarceration life. The young man, who was represented by an overworked public defender, was wrongfully convicted of assault with a deadly weapon and armed robbery and sentenced to the mandatory minimum – 20 years. In a system without parole he served every minute of that time. In prison, he did everything he could to improve himself, taking vocational classes, college courses, and working in the kitchen. When he emerged from prison with a marred record he had no job prospects and was offered scant reentry services. At thirty-eight, he had to live with his mother and work under-the-table jobs with people in the neighborhood. He had no job security and felt helpless as he teetered on the edge of recidivism. Every year the Department of Corrections releases nearly 700,000 people nationally, not including those that face barriers because of non-incarceration convictions.[34] Based on the number of individuals

[33] This paper will not delve into the issues of reporting but it is very important to mention the practice. "In 1986, only eight states required released offenders to register with the local police. Following some well-publicized crimes committed by parolees, a tidal wave of registration laws, spurred on by federal funding, swept across the country. By 1998, every state had enacted legislation requiring that convicted sex offenders register with the police upon release from prison, an increase of forty-two states in twelve years." (Demleitner at 155). Supporters of criminal reporting would say that the measure is important to ensure public safety. Although this may be the case, it is also the gateway to many of the other implications of a criminal record and is an often-permanent brand of a previous indiscretion.

[34] E. Ann Carson, Ph.D., and William J. Sabol, Ph.D., *Prisoners in 2011*, Bureau of Statistics, NCJ *available at* 239808, http://bjs.gov/content/pub/pdf/p11.pdf (Dec. 2012).

released and their inability to secure employment on the outside, it is clear that our system is not sustainable.

Another issue surrounding employment barriers is that in the last few decades state occupational bars have expanded contemporaneously with improvements in technology that reduce obstacles in obtaining criminal background checks. The ease with which employers can obtain criminal and arrest records, paired with heightened occupational restrictions, has resulted in greatly limited employment opportunities.[35] Nora V. Demleitner, in an article for the *Stanford Law and Policy Review*, noted a change in the barriers created by a criminal background. She asserted that "at a time when the regulation of employment by governmental agencies and professional bodies was minimal and most labor force participants were employed as unskilled or low-skilled workers in the agricultural, or later, in the manufacturing sector, the exclusion of ex-offenders from certain types of employment had a limited effect." Unfortunately, Demleitner cautioned that as low-skilled jobs vanish from our economic sector and "professional organizations" control a larger portion of the labor force, these collateral consequences will have an even greater effect on previously incarcerated individuals.[36]

Because low-income and minority Americans are imprisoned at far greater rates, hiring practices that exclude potential employees based on criminal records disproportionately affect minority and low-income communities and individuals. The Equal Employment Opportunity Commission ("EEOC") has been trying to rectify this disadvantage. Recently the EEOC released their "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions."[37] Recognizing the boom in the incarcerated portion of working age

[35] *Id.* at 22.
[36] Demleitner, *supra* note 32, at 156.
[37] U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL

Americans, the EEOC is trying to rebalance the playing field. The EEOC intends for the Enforcement Guidance to be used "by employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions."[38]

2. Political Disenfranchisement

In every jurisdiction, upon release there is some restriction to an individual's political expression – the core of citizenship. Previously incarcerated individuals have their voting rights taken away, they are banned from running for public office, and they are disqualified from sitting on juries.[39] Judge Henry Wingate articulated this troubling condition:

> [T]he disenfranchised is severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box...the disinherited must sit idly by while others elect his civil leaders and while others choose the fiscal and governmental policies which will govern him and his family.[40]

Even though voting is considered the most fundamental act of our citizenry, in fourteen states, there is a permanent ban on exercising that fundamental right if you have been convicted of a felony.[41]

Joe Loya, a previously incarcerated man, said "without a vote, a voice, I am a ghost inhabiting a citizen's space...I want to walk calmly into a polling place with other citizens, to carry my placid ballot into the booth, check off my choices, then drop my conscience in the

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RIGHTS ACT OF 1964, n1 (Apr. 25, 2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#sdendnote1sym (last visited Apr. 2, 2013).

[38] *Id.*

[39] Demleitner, *supra* note 32, at 157.

[40] *McLaughlin v. City of Canton*, 947 F. Supp. at 971 (S.D. Miss. 1995).

[41] Demleitner, *supra* note 32, at 158.

common box."[42] The racially and economically disparate impact of disenfranchisement is what makes it particularly disturbing. After the Civil War in an attempt to keep black voters from the polls many Southern states imposed poll taxes, literacy tests, grandfather clauses, and they expanded exclusions based on criminal activity. Interestingly, the exclusions included only those crimes for which blacks were most often convicted, conveniently omitting murder and fighting crimes that were more often perpetrated by whites.[43] Although today, this is not an explicit goal of political exclusion it does still have that effect because of the disproportionate number of African-Americans experiencing incarceration. There are great implications relating to the disenfranchisement of large portions of specific racial and socio-economic groups. By silencing their vote, our current system is further estranging groups that have very little political power.

3. Benefits

The collateral consequences surrounding the discontinuance of government support are critical because low-income communities are disproportionately affected by high-incarceration rates. A felony conviction can permanently prohibit an individual from collecting SNAP or TANF benefits, it can bar them from public housing, and it can remove the possibility of education grants and scholarships.

When welfare reform was passed in 1996 and the country underwent a transition from an individual entitlement system to block grants the Temporary Assistance to Needy Families ("TANF") was created. TANF included a provision that required a permanent ban of federally funded public assistance and food stamps for individuals who were convicted of felony drug

[42] HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE 1 (1998).
[43] Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 540, 541 (1993) (quoting Francis B. Simpkins, Pitchfork Ben Tillman).

charges.[44] Although an individual can reapply for TANF as soon as he or she is reinstated as the primary caretaker of minor children, regaining SNAP benefits, or food stamps, can prove more challenging. There are 24 states that permanently ban SNAP benefits after a felony drug conviction.[45] Of the remaining states, 17 others have requirements to reenter the program, such as completion of drug abuse programs.[46]

Additionally, those charged with drug offenses and some violent crimes can be excluded from Section 8 public housing. In fact, included in some leases are provisions that prohibit, not only leaseholders from having drug or violent crime charges on their record, but exclude those people as members of the household, as guests, or as people under the tenant's control.[47] If these provisions are violated the leaseholder can be evicted. This is a very severe consequence. For example, if a grandmother is living in public housing and her grandchild, who had been previously incarcerated for possession of marijuana charges, comes to stay with her, she can be evicted. These social programs that are meant to be the "safety nets" of our community are effectively ripped out from under people who desperately need them. Critics will say that previously convicted persons have forfeited their privilege to use the social programs by committing a crime against the public. This theory, however, is flawed. By ostracizing those people from government benefits it forces already strained communities to support these people from within, and as we saw in high-incarceration areas this could be a tremendous and

[44] 42 U.S.C. § 86(2)(a).
[45] Alabama, Alaska, Arizona, California, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Maine, Massachusetts, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Pennsylvania, South Dakota, Tennessee, Virginia, West Virginia and Wyoming. *See* The Bazelon Center for Mental Health Law, *Arrested? What Happens To Your Federal Benefits* 10 (2011) *available at* http://www.policyarchive.org/handle/10207/bitstreams/19017.pdf (last visited Apr. 20, 2013).
[46] *Id.*
[47] Gwen Rubinstein and Debbie Muskamal, *Welfare and Housing*, in INVISIBLE PUNISHMENT 37, 44 (Marc Mauer & Meda Chesney-Lind eds., 2002).

detrimental burden. These benefit restrictions make it difficult for individuals to reassimilate and particularly hard for them to contribute to their family's wellbeing.

4. Immigration Implications

"The most blatant form of social exclusion is the deportation of criminal aliens, akin to the ancient practice of exile."[48] In the Immigration Reform and Control Act of 1986 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1986 the government expanded the classifications of crimes that would cause deportation. This drastically expanded legislation led to an increase in deportations based on criminal activity from 7,338 in 1989 to 56,011 in 1998.[49] In the United States today, the immigrant population represents the fastest growing population of incarcerated people.[50]

Figure 2. Number of Deportations Due to Criminal Charges 1908-2003[51]

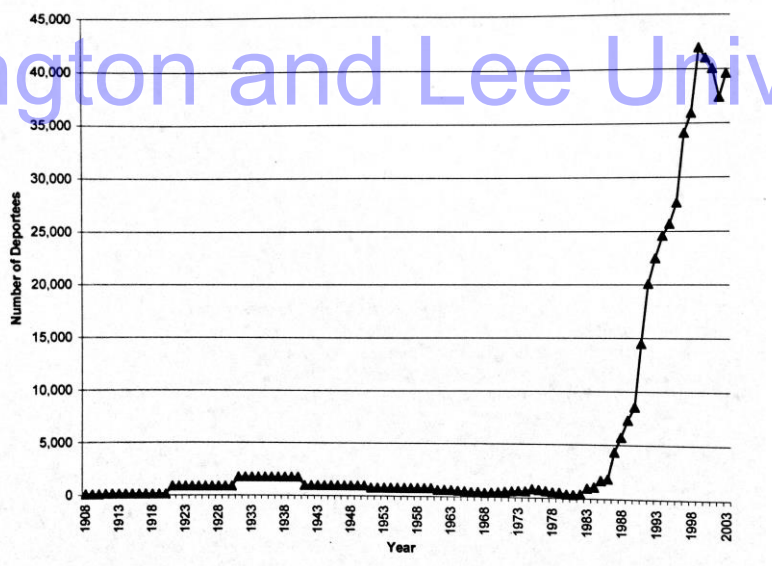

Figure 2 shows a sharp increase in criminal deportations in the 1980s and 1990s. As this number continues to grow, the collateral

[48] Jeremy Travis, *Introduction*, in INVISIBLE PUNISHMENT 1, 23 (Marc Mauer & Meda Chesney-Lind eds., 2002).
[49] *Id.*
[50] Teresa A. Miller, *The Impact of Mass Incarceration on Immigration Policy*, in INVISIBLE PUNISHMENT 214, 214 (Marc Mauer & Meda Chesney-Lind eds., 2002).
[51] Wheelock, *supra* note 12, at 23 (Table at 47).

sentencing consequences to those people who are legally in the United States becomes more important.

Although this paper will not detail the plight of the legal and illegal immigrant in the American justice system, it is important to outline briefly the ramifications of lack of effective counsel in the process. In a recent Supreme Court case, *Padilla v. Kentucky*[52], the court ruled that it was a violation of the Due Process Clause and the Sixth Amendment for lawyers not to inform their clients about deportation implications of a guilty plea.[53] Because status issues have become more volatile, legal immigrants are being more often deported for criminal violations, and the stakes of plea-bargaining have risen. After *Padilla*, a defendant may have an ineffective counsel claim if their attorney neglects important information about the consequences of a guilty plea.

The American "justice" system continuously slights the poor; a tragic, not always unintentional fact that is exacerbated at every stage of a criminal investigation and adjudication. This stratification is caused because we are operating in a broken system that does not fulfill the spirit of the *Gideon* holding. In the next part, this paper outlines the current types of legal services available to the poor today. Then the part hones in on the lack of effective representation as evidenced by overworked attorneys or incompetent attorneys. Although poverty issues will not be resolved instantaneously upon access to effective representation for low-income Americans, better representation will help to ensure a more even playing field, protecting the foundations of American justice and the adversarial system.

[52] 130 S.Ct. 1473, 1478 (2010).
[53] *Id.* at 1481.

III.

LANDSCAPE OF LEGAL SERVICES TODAY

Gideon's shortcomings do not always fall on the shoulders of those providing services to low-income citizens, but instead the entirety of the judicial system. Today, "roughly three quarters of all federal defendants rely on lawyers paid for by the government, about evenly divided between salaried public defenders and appointed attorneys paid by the hour."[54] It is time to adjust the American criminal justice system as it stands. Before proceeding into the changes necessitated by a broken system, it is prudent to examine what representation is available currently. In response to *Gideon,* states and localities had to ensure access to effective counsel for low-income individuals in criminal cases, and three systems of representation emerged:[55] (1) Public-Defender programs; (2) Counsel that is Court-Appointed on a case-by-case basis; and (3) Counsel that is appointed by the court to handle all of the indigent cases for a flat fee in a fixed term. Many jurisdictions use a combination of the three systems in order to fulfill their indigent defendants' needs.[56]

[54] Adam Liptak, *Gap Seen Between Court-Appointed Lawyers and Public Defenders*, THE N. Y. TIMES (2007) *available at* http://www.nytimes.com/2007/07/13/us/13cnd-defenders.html?_r=0.

[55] This paper will evaluate services available to indigent clients. There is also a population of American's who are legally denied representation in criminal cases that will not be discussed at length here. There is a financial cross-section of Americans that falls above the income cut-off for free representation but is not affluent enough to afford private representation. These people are not considered "indigent" after being run through a financial screening and therefore are not entitled to representation. Unfortunately, because the income cut-off is so low there are many people who are affectively poor and are definitely "near poor" that are not able to access effective representation. This formula leaves those facing the criminal system alone in a very difficult position with very harsh consequences.

[56] American Bar Association Standing Committee on Legal Aid and Indigent Defense, *Gideon's Broken Promise: America's Continuing Quest For Equal Justice* at 14 (December 2004).

I. Systems of Defense

Public Defender ("PD") programs are arguably the most effective models of representation available to low-income clients.[57] Although PD offices can vary in structure, they generally employ full and part-time attorneys who are dedicated to indigent defense. PD offices can be a part of the executive branch in the jurisdiction or, in some rare instances, privately funded.[58] In the aftermath of *Gideon*, some fantastic offices with dedicated staff and fairly reasonable access to resources emerged, but these offices were the exception. Law firms were recruiting the majority of the top students, and the promise of well-paid, lavish lifestyles won the day. In today's economic environment, however, hiring practices nationwide have become far more competitive. As a result, PD offices are hiring top students and practitioners.[59] Unfortunately, this is a rosy description of a grey environment. Even with very capable and intelligent attorneys guiding offices with very competitive hiring practices, offices are still inundated with crushing caseloads. Attorney General Eric Holder addressed these issues in a 2010 speech at the Department of Justice's National Symposium on Indigent Defense:

> As we all know, public defender programs are too many times under-funded. Too often, defenders carry huge caseloads that make it difficult, if not impossible, for them to fulfill their legal and ethical responsibilities to their clients. Lawyers buried under these caseloads often can't interview their clients properly, file appropriate motions, conduct fact investigations, or spare the time needed to ask and apply for additional grant funding. And the problem is about more than just resources. In some parts of the country, the primary institutions for the delivery of

[57] Liptak, *supra* note 54, at 1.
[58] Stephen J. Schulhofer and David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Free of Choice for all Criminal Defendants*, 84, 31 Am. Crim. L. Rev. 73 (1993-1994).
[59] Lisa D. Williams, *Careers in Indigent Defense A Guide to Public Defender Programs*, President and Fellows of Harvard College (2012) *available at* http://www.law.harvard.edu/current/careers/opia/toolkit/guides/documents/pd-guide_final.pdf (last visited Apr. 6, 2013).

> defense to the poor – I'm talking about basic public defender systems – simply do not exist.[60]

Under this system, even the best intentioned, hardworking, and intelligent lawyers become ineffective.

The Court-Appointed system appears even more damaged. There are two possible cost structures for Court-Appointed work – either an attorney can have a contract with the city to handle a certain number of cases yearly for a flat fee or, they can be appointed on a case-by-case basis and be paid hourly.[61] This system is necessary to defend those people who may be conflicted out of the PD and to ease the burden of great caseloads.[62] Court-Appointed systems have undergone severe criticism by both the indigent community and the Bar. As these people are often paid less than minimum wage for major cases, it is easy to see how they would be set-aside for more lucrative clients. In some jurisdictions there are fee caps on cases, an attorney may be asked to defend a client in a capital case and will only be able to report up to $1,000 of expenses. For a case that may last months, require detailed investigation of the crime and the defendant, need expert testimony about the crime, this is just not enough money to provide effective counsel.[63]

People who are unable to make autonomous decisions about their representation suffer in our system. The only relief to clients for the result of decapitating caseloads, lack of access to resources, and sometimes the incompetence of counsel is an ineffective counsel claim.

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[60] *Attorney General Eric Holder Addresses the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010,* Feb. 18, 2010, available at http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html

[61] Shulhofer, *supra* note 58, at 92.

[62] If a two co-defendants both require free legal services they can not be represented by the same office because there is a concern that the attorney(s) representing them would experience a conflict of interest and the quality of representation would suffer because of that.

[63] Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liverty Are at Stake,* 1997 ANN. SURV. AM. L. 783, 794 (1997).

II. What is Ineffective Counsel

In 1984, the Court imposed a post-conviction measure for asserting ineffective counsel claims. In *Strickland v. Washington,*[64] the Court articulated "the principle that a defendant is entitled not just to a lawyer, but a reasonably effective advocate."[65] In order to evaluate counsel, the Court established a two-pronged test: (1) the defendant must prove that the attorney's performance was deficient and fell below the standards of the practice, and (2) the defendant must show that the deficiency in representation prejudiced the outcome of the trial.[66] Although the *Strickland* test provides a vehicle for indigent clients to request relief from the court for sub-par representation, the bar is incredibly high. On review, the presumption is of effective representation and reviewing court's give a great deal of deference to attorney autonomy.[67] *Strickland's* practical application, however, looks far different than what one might expect. After understanding how courts evaluate claims of ineffective counsel, we now look at how attorneys can fall below the standards of legal practice but not rise to the level of an ineffective counsel claim.

1. Clear Cases of Ineffective Counsel Determined by the Court

After *Strickland,* there are only a few instances where courts have established bright-line rules for deficient representation. Those instances include actual absence of representation when

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[64] *Strickland v. Washington*, 466 U.S. 668 (1984).
[65] Brandon L. Garrett, *Validating the Right to Counsel,* discussion draft, Wash. & Lee L. R. Symposium (2012).
[66] *Strickland* at 687.
[67] *Id.* at 688- 690. (After a 10-day violence bender David Washington, the defendant, surrendered himself to police and confessed to a portion of the crimes. At that point, a well-respected attorney was assigned his case. Throughout the investigation and pre-trial stage, Mr. Strickland acted against his attorneys express instructions and the attorney said that he began to help "hopeless" in his defense of Mr. Strickland. Because of this feeling, and a nod from the judge that he "a great deal of respect for people who are willing to step forward and admit their responsibility," the defense attorney didn't present any mitigating evidence at the sentencing portion of Mr. Strickland's hearing and he was sentenced to death.)

representation should have been afforded, severe restriction on representation, and conflict of interest cases. The *Strickland* court distinguished between "actual or constructive denial of the assistance of counsel altogether," and the denial through "actual ineffectiveness."[68] The former category present instances where representation is completely denied (such as *Gideon*) or where representation is severely limited during a critical period of the trial (such as *Geders v. United States*[69]). In these scenarios ineffective assistance is generally easy to establish.[70]

Additionally, in *Holloway v. Arkansas* the court established a presumption of ineffectiveness where the court *is put on notice* of a conflict of interest in the defense of the criminal defendants but refuses to provide relief.[71] This is only the case, however, where the defendant informs the court of the conflict. When the bench is not put on notice of the conflict, the defendants on appeal must prove prejudice in order to get relief.[72]

2. Incompetent Counsel Resulting in Incompetence Claim

The American Bar Association has drafted Model Rules for Professional Conduct as an authority for ethical behavior. To the extent a state has adopted the provisions, they bind every barred American attorney and require lawyers to "provide competent representation to a client."[73]"Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[74] Incompetency can result from a variety of

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[68] *Strickland* at 693**.**
[69] 425 U.S. 80 (1976) (The Court decided that a trial judge's refusal to allow the defendant and his counsel to meet during an overnight recess was a violation of the defendants right to effective counsel within the Sixth Amendment).
[70] Joshua Dressler and George C. Thomas III, Criminal Procedure: Principles, Policies, and Perspectives, American Casebook Series 4th Ed. (2010).
[71] *Holloway v. Arkansas*,435 U.S. 475 (1978).
[72] *Cuyler v. Sullivan*, 446 U.S. 335 (1980).
[73] ABA MODEL RULES OF PROF'L CONDUCT R. 1.1 (2008) [hereinafter ABA MODEL RULES].
[74] *Id.*

behavior including sleeping during trial, being drunk in hearings, or failing to perform pre-trial discovery – but, only some of this behavior raises to the degree of a *Strickland* violation.

In *Berry v. King*, the 5th Circuit found that evidence of a lawyer's drug use did not in itself establish an ineffective counsel claim. [75] Instead, the 5th Circuit decided that the appellant must establish prejudice under the *Strickland* test. The 5th Circuit revisited the ineffective assistance premise, when a defendant on appeal claimed that his attorney constantly smelled of alcohol during trial and after the commencement of his trial the attorney was admitted to a alcohol abuse treatment facility.[76] Again, the court found that the defendant failed to show prejudice and dismissed his claim for ineffective assistance. The issue came to ahead in *Burdine v. Johnson*, again another 5th Circuit case, where the court found that Mr. Burdine's lawyer slept through large portions of his hearing. Even after the Panel was convinced he slept through much of the trial, they did not believe this *per se* rose to a level of ineffectiveness. [77] Thankfully, the 5th Circuit reheard the case *en banc* and determined in a nine to five vote that this behavior did, by itself, warrant a claim of ineffectiveness.[78]

Issues of ineffectiveness bleed over to claims of psychological[79] and physiological ineptitudes. In *Bellamy v. Cogdell*, the defendant was represented in a murder trial by a seventy-one year old man, Sidney Guran, who was suffering from multiple physical ailments, including "black outs." [80] His physician testified that he was "virtually incapacitated" and had issues concentrating.[81] The Second Circuit on initial review found that this behavior was *per se*

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[75] *Berry v. King*, 765 F.2d 451, 454 (5th Cir.1985), *cert. denied*, 476 U.S. 1164 (1986).
[76] *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993).
[77] 231 F.3d 950 (5th Cir. 2000).
[78] *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).
[79] *McDougall v. Dixon*, 921 F.2d 518, 534-35 (4th Cir. 1990)
[80] *Bellamy v. Cogdell*, 974 F.2d 302 (2nd Cir. 1992)(en banc), *vacating* 952 F.2d 626 (2d Cir. 1991) *cert. denied*, 507 U.S. 960 (1993).
[81] *Id.*

ineffective, however, on a rehearing *en banc* the court overruled the *per se* decision and applied *Strickland* – determining that Mr. Bellamy had not established prejudice. Based on the egregious nature of these cases and the courts decision not to vacate the trial court's rulings, it is clear that *Strickland* does not provide much protection for those clients unfortunate enough to be stuck with ineffective counsel.

3. **Competent Counsel with Resource Limitations**

Gerald Lefcourt described his first experience with indigent criminal defense, when he worked with the Legal Aid Society lawyers, one of the organizations in New York City that represents indigent criminal defendants:

> The holding pens were filled with huddling defendants, most of whom were standing because there was only one bench. Virtually the entire population of the pens was nonwhite and poor, without the resources or stable families to allow them bail. Most were in shock or panic, yelling questions and begging for help… I came to see that most of them were not really represented at all. Not only would they not make bail, but most would ultimately plead guilty to something, anything, just to move out of the system. I realized that with a lawyer who had a few days to spend with the client instead of a few minutes, a proper fight could be waged, both to get the defendant out on bail and ultimately, to get a favorable disposition.[82]

Unfortunately, Mr. Lefcourt's perception is the reality for indigent clients in many jurisdictions. Based on research by the Brennan Center for Justice, the average public defender has spent less than six minutes preparing for his or her clients case at arraignment.[83] These stories and figures are staggering and tragically unchanging. In the mid-1990s, the American Bar Association reestablished standards that were first advanced by the National Advisory Commission in 1973.[84]

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[82] Gerald B. Lefcourt, *Responsibilities of a Criminal Defense Attorney*, 30 Loyola of Los Angeles L.R. 59, 59-63 (1996).
[83] Thomas Giovanni, *Community-Oriented Defense: Start Now*, Brennan Center for Justice, 2 (2012).
[84] American Bar Association, *Standards for Criminal Justice: Providing Defense Services* at 72 (3ed. 1990). The ABA suggests that an attorney's caseload not go beyond:
50 felonies per attorney per year; or

In a study undertaken by the Bureau of Justice Statistics only 4 out of 17 states[85] reported having a sufficient number of attorneys to fulfill the needs of indigent defendants.

Table 1: Available Attorneys Compared to Need

State	FTE litigating attorneys	Attorneys needed to meet caseload standards	Attorneys as a percent of number needed
All	3,159	4,655	66
Median	128	151	67
Massachusetts	197	107	185
Montana	128	87	148
Wyoming	38	36	108
New Hampshire	107	103	104
Vermont	31	46	67
Virginia	305	461	66
Colorado	241	479	50
Wisconsin	294	671	44
Iowa	99	307	31

Table 1 only reflects states where complete data was collected and does not include information from privately funded organizations.[86]

Tragically, delay in representation or insufficient representation can have disastrous consequences that will be discussed in the next section.

IV.

REWORKING GIDEON'S PROMISE

The Warren Court's unanimous decision in Clarence Earl Gideon's case secured trial representation for all indigent defendants charged with a felony. Over time *Gideon's* coverage

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400 misdemeanors per attorney per year; or
200 juvenile cases per attorney per year; or
200 mental commitment cases per attorney per year; or
25 appeals per attorney per year.

[85] There was only complete data collected in 17 states, accounting for the same sample group.

[86] Donald J. Farole, *A National Assessment of Public Defender Office Caseloads,* Bureau of Justice Statistics, Department of Justice (Oct. 28, 2010) *available at* http://www.jrsa.org/events/conference/presentations-10/Donald_Farole.pdf.

extended but, unfortunately, the systems of representation have not also adjusted to meet growing and changing needs. This part will investigate proposed changes to criminal indigent defense services. Two popular proposals, deregulation and voucher programs will be assessed and quickly dismissed as infeasible. Finally, there are two, more practical proposals that this paper will investigate: the use Court Room Advocates in the criminal defense model and increased pro-bono requirements for practitioners and students.

Before proposing particular modifications, I must first address the reality versus theory question. In reality, every year hundreds of indigent defendants are being "loosing" in our current system. It would follow that in order to curtail the mass incarceration of low-income people, organizations defending indigents would make changes within the system. In theory, however, there are very compelling arguments against "improving" the system. The argument stands that by reworking the indigent defense system to operate more effectively, and therefore more efficiently, it justifies our increasingly punitive system. In some way, by trying to help clients in our relatively recent culture of hyper-criminalization and mass incarceration the defense bar would be conceding. Although I am sympathetic to this argument, this paper focuses on how to attain more effective representation in our present system. Hopefully, however, the proposed changes will be coupled with other legislative and cultural changes to moderate this environment of hyper-incarceration.

A. The Deregulation Model and the Voucher Programs

In 1993, Stephen J. Schulhofer and David Friedman proposed the deregulation model in their article *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Free of Choice for all Criminal Defendants* in the American Criminal

Law Review.[87] Schulhofer and Friedman suggest leaving significant portions of the indigent criminal defense system intact, as far as delivery methods and compensation schemes, but they propose altering the government's ability to regulate both the defendants and attorneys within the system.

The deregulation model suggests relaxing regulation in two areas. First, the model proposes reducing the eligibility requirements for those who are available to defend criminal clients. The advocates of this system believe that by increasing representation options there will be fewer barriers to access. Second, the proponents recommend relaxing the process of matching attorneys to clients. They hope that by increasing the defendant's autonomy the system will be more reliable and effective. Both of these suggestions sound like fantastic goals, however, the reality would be drastically different. As postulated earlier in this paper there are already a bevy of incompetent attorneys working within the indigent defense sector and by reducing the requirements to be a part of the indigent defense criminal bar it would increase the number of incompetent individuals who slip through. Additionally, if you are "deregulating" at the same time as increasing the number of attorneys there will be less ability for judicial oversight and life altering mistakes in representation will go unnoticed.

Another concern of this structure is that with the deregulation of the attorney selection process, lawyers will have the ability to say "no" more often and indigent defendants will fall through the cracks. In a defendant-guided system, attorneys must have the ability to refuse a client if they are already handling too many cases, there is a conflict of interest, or for some other reason they are unable to serve. Based on these concerns, it is clear that the deregulation model would allow needy clients to fall through the cracks and would enable unqualified lawyers to defend some of the others.

[87] Schulhofer, *supra* note 58, at 101.

There are similar issues with a voucher program. The basic idea of a voucher program is that rather than being assigned a lawyer in the indigent defense community, criminal defendants would be given vouchers to use in the private market.[88] The voucher system has two permutations, a lump-sum plan and an hourly plan. Unfortunately, however, neither of these iterations of the voucher system will work. Similar to the deregulation model, and the issues with current private contract attorneys, this system would neglect many of the most vulnerable criminal defendants. Often defendants are imprisoned from the time they are arrested until their first court appearance. Therefore, it would be very difficult for them to hire a private attorney without support from someone on the outside. Even though they are allowed "one phone call" the logistics of finding someone would prove unduly burdensome. Additionally, similar to the challenges that face the medical system, when lawyers are faced with clients who are paying them full wages and those paying on the voucher system there will be an implicit bias to work harder or longer on the full pay cases. It is easy to imagine that eventually private attorneys would stop taking voucher clients at all. This concern doesn't change whether you are working under a lump sum system or an hourly-rate; either will fall far below the fees of full-pay clients.

The prominent concerns of both the deregulation model and the voucher system clearly outweigh the possible benefits. This paper now turns to an exploration of two more plausible ideas.

[88] Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 L. & Contemp. Problems 31, 45 (Winter, 1995).

B. Use of Court Room Advocates

Before getting into how CRAs can be employed, it is important to understand the term. In this paper the term "Court Room Advocate" is used to describe someone who will be involved in the direct criminal representation of a client but has not attended law school and has not been barred in the jurisdiction. CRAs would need targeted training and a thorough understanding of their practice area.[89]

In order to alleviate the strain on public defenders' offices, CRAs could be used to support attorneys on their cases or they could act autonomously in routine offenses. A CRA could be the second man to a seasoned attorney, helping to prepare documents, sitting at the table during trial, corresponding with clients, other attorneys, and judges. Alternatively, the CRAs could act independently handling their own cases in a particularized and routine practice area. For example, a CRA could specialize in driving and traffic violations, ranging from parking tickets to driving with a suspended license. Even though these charges are considered relatively routine, they can have disastrous consequences for individuals who depend on their car to provide for their family. The CRA would be the equivalent of a nurse practitioner in the medical profession – they will diagnose issues, work with the client to determine an appropriate advocacy strategy, and provide counsel.

There are some challenges to the use of CRAs. First, and arguably the most difficult obstacle, is that current ABA regulations would need to be modified to allow non-barred individuals to advocate for clients in a formal, courtroom setting. This would require the ABA to loosen their monopoly on the professional Bar, something that neither the organization nor other

[89] The training of non-lawyers will not be fully explored in this paper. A possible idea, however, is a five-year degree focusing on a specific area of representation and a basic foundational curriculum. Alternatively, it could be a four-year degree with a year in an experiential mentoring program.

lawyers will allow to happen easily. This challenge, however, is not insurmountable. As the unrelenting need for indigent legal services is given increased attention something will have to change. Currently, there are very successful public defender's offices employing non-lawyers very effectively. For instance, the Bronx Defenders, an organization that is heralded as one of the top public defenders in the country, employs non-lawyers in advocacy roles.[90] At this point the Bronx Defenders are not allowed to use non-lawyers in courtrooms, but in order to meet their client's needs they stretch individual responsibilities as advocates.

The Bronx Defender model can be employed "without hiring additional staff" but instead "by creatively deploying …pre-existing staff in different roles."[91] They encourage using social workers as community builders and administrative staff as organization representatives that liaise between local government officials and the organization.[92] The CRA model would push this differentiated model a little further. These people who are already in well established organizations, like the Bronx Defenders or the Public Defender Services of Washington, know individual cases, they know the community pressures where they practice, and they show the commitment and knowledge to be able to effectively defend clients in court. It would not be a great burden on the Bar for these individuals to handle routine, petty crimes outside of the traditional lawyer-structure. In organizations that are not as developed, the same system could be employed. Although there would need to be organizational oversight, individuals could specialize in a particular area of law, possibly apprentice with lawyers in the organization, and then represent clients in that specific area.

[90] Robin Steinberg, *Heeding* Gideon's *Call in the 21st Century: Holistic Defense and the New Public Defense Paradigm,* discussion draft, Wash. & Lee L. R. Symposium 1, 24 (2013).
[91] *Id.* at 25.
[92] *Id.*

Another critique is a question of individual CRAs' motives. The question is 'why would someone earn a higher education degree and not pursue a more lucrative career.' There are a few responses to this question. First, for many it is the same answer for those incurring the debt of a law degree and then going into public interest work, it is meaningful work that someone can spend a lifetime doing. Additionally, a CRA employed in this position may have a specialized five-year degree or might undergo a practical training course rather than the seven years of education a law degree requires. This approach, requiring less time and money, may be very appealing for people who are interested in criminal justice but unable to make the jump financially or otherwise. Additionally, like a nurse practitioner, a CRA could hold a very respectable position without the same demands on time or personal liability.

Finally, there is concern that the quality of representation afforded by a non-lawyer will not be adequate. This is a two-pronged critique. First, there are concerns that CRAs would not have the same incentives, such as the threat of discipline from the Bar or an ethical code to adhere, to do a good job. If criminal representation were to be undertaken by CRAs it would be necessary to have an ethical system for those individuals to follow, a process of periodic review, and lawyers around that could assist or takeover cases when they were determined to be complex.[93] Currently, we have lawyers who, when threatened with disciplinary action, are still falling asleep and getting intoxicated during trials. It doesn't seem like the jump to non-lawyers is so drastic.

[93] According to the American Association of Nurse Practitioners "To be recognized as expert health care providers and ensure the highest quality of care, NPs undergo rigorous national certification, periodic peer review, clinical outcome evaluations, and adhere to a code for ethical practices. Self-directed continued learning and professional development is also essential to maintaining clinical competency." *Available at* http://www.aanp.org/all-about-nps/what-is-an-np (last visited Apr. 3, 2013).

Second, similar to the critique of the deregulation proposal dismissed earlier in this section, there is a fear that defendants would get substandard representation under a CRA model. The difference between CRAs and lawyers employed in the indigent defense bar, however, is that CRAs are not tasked with understanding every facet of the law. They have specialized knowledge in a routine area. In some European countries notaries act as transactional representatives in many civil cases, ranging from real estate conveyances, to wills, to tax planning.[94] The notaries are trained in the particular area of the law and because of the frequency with which they operate in the system they are very knowledgeable in that area. These systems use non-lawyers to even the playing field between "rich repeat players" and "poor, ignorant consumers."[95] Learning from this model, America could employ a similar structure to routine or petty criminal offenses.

Additionally, the use of laypersons in American courtrooms is not unprecedented. The Court Appointed Special Advocates, also known as CASA, was created in 1977 and has almost 1,000 programs nationwide.[96] CASA volunteers are appointed to represent the best interests of children in front of the court. Similar to a CASA volunteers, CRA staff would advocate for their client's interests. Because of CASA's success nationwide, the CRA model seems viable.

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[94] Stephanos Bibas, *Shrinking* Gideon *and Exapnding Alternatives to Lawyers*, discussion draft, Wash. & Lee L. R. Symposium 1, 11 (2013).
[95] *Id.*
[96] Court Appointed Special Advocates for Children Website, *available at* http://www.casaforchildren.org/site/c.mtJSJ7MPIsE/b.5301303/k.6FB1/About_Us__CASA_for_Children.htm (last visited Apr.10, 2013).

C. Increased Pro-bono Requirements

Currently, the Model Rules of Professional Conduct recommend that lawyers "aspire to render at least (50) hours of pro bono publico legal services per year."[97] To meet existing demands for indigent legal services it would be prudent for the ABA to either increase the number of hours or make pro bono work mandatory in the criminal setting. Of course, the challenge to this proposal is that attorneys are already putting in 80-hour weeks and won't have the time in their schedules. There are ways, however, around this challenge. An attorney could either fulfill the required hours or alternatively they could pay an hourly amount for the hours they were not able to donate.

Moreover, New York recently passed a law requiring students to engage in law-related community service in order to apply for the bar.[98] New York's initiative should be adopted by other states. This requirement encourages students to engage in the pro bono world and instills the fundamentals of professional responsibility in graduates.[99] This is another opportunity to extend criminal representation by requiring accredited law schools to create on-campus clinics and compel their students to participate in law-related service. Although this alteration seems minor, if paired with a CRA strategy it will help indigent clients. By having more professionals conscientious of indigent clients there will more eyes and ears on the indigent criminal defense sector and it will be less likely that other attorneys will get away with sub-par advocacy.

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[97] ABA MODEL RULES OF PROF'L CONDUCT R. 6.1 (2008), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_6_1_voluntary_pro_bono_publico_service.html (last visited Apr. 3, 2013). (Rule available in Appendix A).

[98] New York Courts, *New York State BAR Admission Pro Bono Requirement FAQs,* (Oct. 1, 2012 rev.) *available at:* http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf (last visited Apr. 10, 2013).

[99] Liz Tobin Tyler, *Is The New York 50 Hour Requirement Changing the Future of Law Student Pro Bono,* Bloomberg Law (2013) *available at* http://about.bloomberglaw.com/practitioner-contributions/is-the-new-york-50-hour-requirement-changing-the-future-of-law-student-pro-bono/ (last visited Apr.10, 2013).

Although these two changes will not fix all of the problems surrounding indigent defense they will help alleviate some of the present inadequacies.

V.

CONCLUSION

On August 5, 1963, Fred Turner represented Clarence Earl Gideon at his second trial. Turner vigorously cross-examined the state's best witness and put on a witness for the defense that disproved much of the state's case. After one hour of deliberation, the jury acquitted Gideon of all charges. [100] Gideon's story is at the heart of the American adversarial system. In order for the foundational principles of our system of justice to be upheld, we must commit to ensuring *effective* representation of all indigent defendants.

[100] Anthony Lewis, *The Silencing of Gideon's Trumpet,* THE N.Y. TIMES (2003) *available at* http://www.nytimes.com/2003/04/20/magazine/the-silencing-of-gideon-s-trumpet.html?pagewanted=all&src=pm (last visited Apr. 3, 2013).

Appendix A

Public Service
Rule 6.1 Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.