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# Potential Innocence: Making the Most of a Bleak Environment for Public Support of Indigent Defense

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# “Potential Innocence”: Making the Most of a Bleak Environment for Public Support of Indigent Defense

Robert P. Mosteller\*

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\* J. Dickson Phillips Distinguished Professor of Law and Associate Dean for Academic Affairs, University of North Carolina School of Law. I wish to thank the participants in the Symposium, *Gideon at 50: Reassessing the Right to Counsel*, for a thought-provoking exchange of ideas on this exciting topic and the wonderful support of the Washington and Lee University School of Law.

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### *I. The Future of the Right to Counsel*

An examination of *Gideon v. Wainwright*<sup>1</sup> after fifty years involves both its past failures and accomplishments and its future impact. *Gideon's* legacy is enormously positive with the expansion of rights to so many indigent defendants in need of representation against criminal charges that could deny them life and liberty, but its inadequacies in fulfilling its full promise are glaring as well. These competing themes are reflected in many articles that are part of this symposium.<sup>2</sup> I choose to focus principally on its future, which, of course, will likely be guided by its past.

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1. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. See, e.g., Stephanos Bibas, *Shrinking Gideon and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1290–91 (2013) (proposing a number of measures to reduce the range of cases covered by *Gideon* with the purpose of preserving its core); Cara H. Drinan, *Getting Real About Gideon: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1335–44 (2013) (suggesting, *inter alia*, exploration of nonlawyer alternatives for indigent representation); Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 916–24 (2013) (suggesting and critiquing a number of approaches both from the perspective of the liberal, conservative, and pragmatic agenda); Abbe Smith, *Gideon Was a Prisoner: On Criminal Defense in a Time of Mass Incarceration*, 70 WASH. & LEE L. REV. 1363, 1390–91 (2013) (arguing to address the problem of limited defense services by reducing overcriminalization and reducing our massive incarceration rate).

In this period of reflection on *Gideon*, I have had the opportunity to participate in three conferences examining this landmark decision. The first, which was held early in 2010,<sup>3</sup> recognized the difficulties in fulfilling *Gideon*'s promise of effective assistance to all those entitled to an attorney under the Sixth Amendment, but it differed from the latter two occurring in 2012 in its degree of (perhaps unrealistic) optimism. The latter two, including the wonderful symposium at Washington and Lee University School of Law,<sup>4</sup> exhibit their share of optimism, but they contain many more voices suggesting reexamination of the dimensions of *Gideon* and its costs and suggesting alternatives to traditional attorney representation.

For me, the obvious and sufficient explanation for the difference in focus is twofold. The first is the recognition of the magnitude of the economic downturn that was not yet fully appreciated in 2009. The second is the intervening mid-term election in 2010, which changed the conversation and the political landscape at the national, state, and local levels with respect to resources available for public purposes. While I wish we could address this new reality with traditional responses, I doubt that is possible and therefore applaud the new voices and proposals. They give us the chance to remake the system of representation of those charged with crime for the better and provide additional tools to meet the challenges of a much more difficult environment.

In considering new critiques and proposals, however, I suggest limitations both on the criticism of *Gideon* and on the types of proposals that should be entertained. *Gideon* can hardly be criticized because it has led to excessive spending on unneeded services. I have not seen the evidence that either excessive spending has occurred or that defense services are unneeded, particularly in the modern world of growing complexity in criminal litigation. While some government programs may be

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3. This earlier symposium was titled *Broke and Broken: Can We Fix Our State Indigent Defense System?* It was held at the University of Missouri School of Law in Columbia, Missouri on February 26, 2010.

4. The other more recent symposium concerned the Sixth Amendment, including the right to counsel, and was held at Texas Tech University School of Law on March 30, 2012.

criticized as fostering lavish expenditures and bloated bureaucracy, those are not criticisms of indigent defense. Instead, compensation for defenders is recognized as low and often inadequate, and work requirements are typically excessive.<sup>5</sup> The services are provided to those whom the government has charged with a crime in the limited area where their liberty may be denied.<sup>6</sup> These legal services are provided only to those determined to be unable to afford their own lawyer under standards of indigency that are generally very demanding.<sup>7</sup>

Those who support *Gideon*'s promise should be willing to embrace reform solutions that provide services in a more cost efficient way. Doctrinal retrenchments on what may be considered marginal elements of *Gideon*'s requirements,<sup>8</sup> however, should be supported only if such reductions come with guarantees of improvements elsewhere. I do not believe that monetary savings resulting from reductions in the scope of *Gideon* offered by its supporters will produce compensating increases to services within the core by heretofore resistant public officials.

I believe that such quid pro quo exchanges are not available. First, I doubt that there is any realistic mechanism for negotiation. The process of change requires two steps: doctrinal

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5. See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Outcomes*, 122 YALE L. J. 154, 162–64 (2012) (presenting a study documenting the low pay received for demanding work of Philadelphia-based lawyers providing indigent defense).

6. See *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979) (limiting right to counsel cases where the defendant is imprisoned and excluding cases when the defendant is only fined); see also *Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (interpreting *Scott* to apply to cases where defendant is sentenced to imprisonment and the sentence is suspended and placed on probation because imprisonment is the result of the sentence if the probation is revoked).

7. See John P. Gross, *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of their Sixth Amendment Right to Counsel*, 70 WASH. & LEE L. REV. 1173, 1176 (2013) (describing the various ways indigency is defined and demonstrating the extreme level of poverty generally required to qualify for appointed counsel without some level of contribution from the accused).

8. See Bibas, *supra* note 2, at 1290 (arguing that the extension to cases carrying no immediate incarceration but only a probationary sentence that may result in incarceration upon violation of probation was a step too far and should be eliminated as part of a bargain to shrink *Gideon*'s scope to preserve its core).

change by the United States Supreme Court and a change in funding. Unless the Supreme Court undertakes what it has not done before, it will not link doctrinal change to funding. Indeed, I have difficulty imagining a mechanism that would accomplish this purpose and do not believe past cases provide any models. As a result, the reduction in rights at the doctrinal level must happen first and cannot be linked to the political realities that must occur at multiple levels throughout the state indigent defense systems.<sup>9</sup> Next, I believe there is no obvious level of reductions that would be considered sufficient to justify the expenditure of scarce public resources by those states and localities that now systemically underfund *Gideon*.

Finally, I suggest that any reforms recognize the human and institutional elements of meaningful public defense employment. Many law students and lawyers who enter that work today do so because they recognize its importance. They, however, are not unrealistic about uncertainty and the need to prepare for other potential careers. If indigent defendants are to be given what I believe is due under the Sixth Amendment—the prospect of representation at the quality level of those able to afford their own attorney—then lawyers who enter indigent defense must be first rate. These lawyers may be economically trained, but for reasons of self-interest in an uncertain world, they cannot be on an isolated track that leads only to a limited practice option in the underpaid world of indigent defense.<sup>10</sup>

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9. The inadequacies of *Gideon* are felt at the state, rather than the federal, level. See Dripps, *supra* note 2, at 894 (introducing the “failure” of *Gideon* to provide for indigent defense). An often-missed reality of state criminal justice operations and reforms is that those systems are generally disorganized rather than highly hierarchical. See Robert P. Mosteller, *The Sixth Amendment Rights to Fairness: The Touchstones of Effectiveness and Pragmatism*, 45 TEX. TECH L. REV. 1, 5 (2012) (“[T]he vast majority of serious criminal prosecutions are handled in the much more chaotic and underfunded state courts.”).

10. I applaud the efforts of Professor Don Dripps in looking at fundamental reform in a broad, conceptual way and trying to cure the inadequacies of *Gideon* by limiting the supply of cases that need to be handled or the supply of lawyers and resources to handle them. One potential mechanism he suggests is to make the credential to provide defense services more readily available by developing a different track in legal education. See Donald A. Dripps, *Up from Gideon*, 45 TEX. TECH L. REV. 113, 129–30 (2013) (arguing that a separate track in legal education would both address issues in the cost of obtaining a law degree and

*II. The Need for Excellent Lawyers to Represent the Truly  
Innocent Armed Only with Reasonable Doubt, Which Is  
Perceived Objectively as “Potential Innocence”*

I spent seven eventful years at the Public Defender Service for the District of Columbia (PDS). I have written about a set of cases I handled there that raised difficult factual issues about guilt and innocence.<sup>11</sup> I am a firm believer in two propositions regarding the role of quality indigent defense in protecting the innocent. First, many truly innocent defendants are hidden among reasonable doubt cases. A substantial percentage of these truly innocent defendants have no real prospects of conclusively proving their innocence on the model of DNA exonerations, which is often considered the standard for “actual innocence.”<sup>12</sup> Second,

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fulfill a need for indigent representation). That effort causes me considerable concern because it diminishes the excellence, the standing, and the career options of those trained in a more economical way for the specific task of criminal representation. I suggest that the problems associated with this particular proposal would be insuperable.

11. See Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 954–57 (2010) [hereinafter Mosteller, *Protecting the Innocent*] (providing experiences representing apparently typical clients shown in some instances by chance events to be factually innocent and in others to have concrete but unknowable prospects for innocence); Robert P. Mosteller, *Why Defense Counsel Cannot, but Do, Care About Innocence*, 50 SANTA CLARA L. REV. 1, 1–6 (2010) [hereinafter Mosteller, *Caring About Innocence*] (arguing that although defense counsels’ feelings about the guilt or innocence of their clients are irrelevant or even dangerous to the quality of representation they deliver, such concerns, particularly about innocence, nonetheless exist).

12. The concept of actual innocence plays a key role in the terminology of the innocence movement. See, e.g., BARRY SCHECK ET AL., *ACTUAL INNOCENCE* 71 (2000) (providing the title for a major book describing important early successes in the innocence movement). One influence of the high standard of proof associated with this term is exemplified by its use in connection with the emergence of a substantive constitutional claim of habeas corpus sufficient to bar execution, as seen in *Herrera v. Collins*. See 506 U.S. 390, 417 (1993) (“[I]n a capital case a truly persuasive demonstration of ‘actual innocence’ made after trial would render the execution of a defendant unconstitutional and warrant federal habeas relief if there were no state avenue open to process such a claim . . .”). More generally, Brandon Garrett states:

The word “innocence” is used casually in the media and by lawyers, convicts, scholars, and courts. I define the innocent as those who did not commit the charged crime. Even though they know they are actually innocent, many lack the evidence to prove their innocence to

the best prospect for protecting these innocent defendants is to provide them with excellent legal assistance.

I chose the term “potential innocence” for my title to be an accurate descriptive term that was not tailored to capture the public’s imagination, which I believe is an unfortunate reality of this type of innocence. On the other hand, I mean to convey by the term that truly innocent defendants are found among reasonable doubt cases and that these potentially innocent defendants when well represented are not acquitted because of legal technicalities. Many are just as truly innocent as defendants exonerated by DNA in every sense but one: their innocence cannot be demonstrated definitively.

The types of cases I am contemplating here may be difficult to visualize in the abstract. To help make these cases more concrete, I have described examples from cases I handled in my practice at PDS,<sup>13</sup> but I need not recite those here. Instead, the *Gideon* case itself provides a helpful example.<sup>14</sup> And the work of Gideon’s attorney, W. Fred Turner, at the retrial after remand from the United States Supreme Court, shows the importance of

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others, making it difficult to distinguish them from the convicts and prisoners who falsely claim innocence.

Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1645–46 (2008) (citation omitted). Although not always employed consistently, I find that the term actual innocence is generally used—and I use it in this Article—to describe those cases that Professor Garrett would categorize in his study as “substantial claims” of innocence. *See id.* at 1647–49 (discussing substantial claims of innocence). These cases are epitomized by “complete exonerations,” in which evidence of innocence that is highly dispositive of identity exculpates the defendant, employing DNA or other technology-based proof such as video evidence. *See id.* (discussing substantial claims of innocence); *see also* Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1085–86 (2011) (“The media and legal scholars often use the terms ‘actually innocent’ and ‘factually innocent’ to describe a person who had nothing to do with a crime: he is not actually the person who committed the crime; the facts show that somebody else did it.”).

13. *See* Mosteller, *Protecting the Innocent*, *supra* note 11, at 938–59 (describing the difficulty of separating those who *may be* innocent but have only strong arguments of reasonable doubt from those who *are* innocent).

14. *See generally* ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964) (describing the facts of the case and the events and proceedings that led to the landmark Supreme Court decision).

good lawyering in protecting that potential innocence. Turner's work is ably described by Professor Abbe Smith.<sup>15</sup>

As I read the facts of Gideon's case, I cannot conclude he is innocent because of the absence of any firm exculpatory evidence and the large number of coins he had in his pockets, which seems to match the missing proceeds of the burglarized pool hall.<sup>16</sup> Even more absolutely, I cannot put him in the category of those who would in today's nomenclature be considered actually innocent.<sup>17</sup> However, he may well have been innocent—not under some legal technicality—but truly innocent. The key problem is that we do not know, and along with many other cases in this category today, we can never know for certain because unchallengeable evidence of innocence does not exist. Gideon's case illustrates the uncertainties we face in determining innocence, and the work of his attorney reflects the best that most defense attorneys can ever do to protect the truly innocent. Such attorneys are the difference between conviction and acquittal for defendants who have potential, sometimes strong potential, for being truly innocent.

### *III. Defenders Think They Know Who Is Guilty, and They Do Much of the Time, but Not Necessarily When It Matters Most*

In my writing, I noted that the job of a public defender is not to concentrate on whether a client is innocent or guilty.<sup>18</sup> Indeed, it is *almost* antithetical to that concern in that public defenders' work must presume the worth of each client and the value of

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15. See Smith, *supra* note 2, at 1375, 1378–79 (recounting Turner's effective defense work in the areas of jury selection and cross-examination of the key prosecution witness).

16. See LEWIS, *supra* note 14, at 232–36 (describing the large amount of change in Gideon's pockets and its impact as circumstantial proof that he burglarized the pool hall because a cigarette machine and the juke box had been broken into and coins taken).

17. See cases and materials cited *supra* note 12 and accompanying text (discussing the concept of actual innocence).

18. See Mosteller, *Caring About Innocence*, *supra* note 11, at 1–6 (noting that concentrating on the question of the accused client's guilt has negative ethical consequences).

mounting at the minimum a due process battle against the prosecution. Public defenders with adequate resources seek to provide excellent representation to all.<sup>19</sup>

My job as a public defender was to help the people I met in lockup regardless of who they were or whether they were innocent or guilty. I noted, however, that the perception a client might well be innocent had an impact on me (and I assume other defenders) even though I knew it should not.<sup>20</sup>

I felt a kinship in my perspective as a public defender to the attitude exhibited by Tommy Lee Jones in *The Fugitive* when he responded to Harrison Ford’s claim that he was innocent with the memorable line, “I don’t care.”<sup>21</sup> Just as Deputy Marshal Sam Gerad, played by Jones, could not function in his professional role if he made decisions based on his personal beliefs about the guilt or innocence of fugitives, defenders cannot survive in the job if they assume they defend only the innocent. Thoughts nevertheless turn in that direction.

It is quite difficult in many cases to have confidence in the difference between the innocent, the likely innocent, the possibly innocent, and the probably guilty. Of course, there are cases where guilt is almost certainly established, but my experience is that guilt was rarely established for defense counsel on the basis of the client’s confidential admission. Rather, it was established on the basis of the evidence and information I encountered through discovery and investigation. Conceptually, however, there are two basic groups of cases: Group 1, the innocent (with varying degrees of certainty) and Group 2, the guilty (also with varying degrees of certainty). Group 2 is the much larger of the two, and it clearly should be since the police and prosecutors have the ability to investigate and prosecute cases on the basis of the apparent strength of the proof.

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19. See *id.* at 5–8 (describing the attitude of defense attorneys as not caring about innocence because professionally and practically they cannot care and do the lawyering tasks entailed effectively).

20. See *id.* at 13–22 (examining the handling of innocent clients’ cases).

21. *THE FUGITIVE* (Warner Bros. Pictures 1993).

*IV. The Theoretically Easy Answer of Good Lawyers for All*

One solution that avoids difficult problems of choice among defendants is to provide excellent legal services to all.<sup>22</sup> That approach would help Group 1 establish their innocence, and it would provide important benefits to Group 2 in addition to the possibility of an acquittal. Proving an effective defense is clearly indicated for both groups under the specific guarantees of the Sixth Amendment and the fundamental concepts of due process and equal protection that formed the constitutional foundations of *Gideon*.<sup>23</sup> Legal doctrine clearly provides broad support for full representation of both groups; the only impediments, which are huge, are developing practical support to fund broad, effective representation, and to find the means within our available public resources to do so.

I personally favor this broad approach and believe that innocence protection broadly conceived can and should be part of the supporting basis for expanded funding.<sup>24</sup> My contention is that uncertainty about innocence and the difficulty of a defender confidently determining each defendant's probable level of innocence or guilt strongly counsel for treating all clients as worthy of a quality defense, lest some who are innocent are wrongfully and needlessly convicted.

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22. I recognize that PDS was unusually well resourced. As a result, it in fact permitted lawyers to provide, not the type of representation the wealthy can afford, but effective counsel to all its clients, which I believe is generally true for federal public defenders offices.

23. See *Gideon v. Wainwright*, 372 U.S. 335, 339–45 (1963) (locating the right within the specific guarantees of the Sixth Amendment with justification based on fundamental principles of due process supplemented by the demands of equal justice before the law).

24. See Mosteller, *Protecting the Innocent*, *supra* note 11, at 937, 985–87 (describing a public role of innocent protection in representing those with reasonable doubt cases and its potential to provide support for adequate funding of indigent defense).

*V. The Harsh Present Reality Based in Fiscal and Empathy Limitations*

The arguments set out immediately above for robust implementation of *Gideon*’s promise are, I believe, well taken and should be continued. Economic and political events, however, that have moved at a rapid pace over the past few years as the impact of the great recession has settled upon us have altered, in my judgment, the likelihood of success in developing change in support for indigent defense using general innocence arguments. We have entered a period where public resources are quite scarce and are likely to remain scarce for the foreseeable future, and where a substantial portion of the public expresses a declining interest in government providing services generally and are arguably particularly resistant to providing services to those at the margins of society.<sup>25</sup> Those charged with crime, especially those who have substantial criminal records, likely epitomize the groups for whom concern is lacking.<sup>26</sup>

I will note two suggestive pieces of information indicating the magnitude of the change in state financing status. First, the

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25. Conservatives complain frequently that the government takes income from those who work and are generating jobs to provide benefits to what is most provocatively termed the “moocher class”—terminology used by syndicated talk show host Neal Boortz. See *Neal Boortz on the Moocher Class*, REAL CLEAR POLITICS (Oct. 14, 2010), [http://www.realclearpolitics.com/video/2010/10/14/neal\\_boortz\\_on\\_the\\_moocher\\_class.html](http://www.realclearpolitics.com/video/2010/10/14/neal_boortz_on_the_moocher_class.html) (last visited Apr. 2, 2013) (describing the moocher class as “people who are ‘perfectly content to live at the expense of others’”) (on file with the Washington and Lee Law Review); see also AYN RAND, *THE VIRTUE OF SELFISHNESS* 32 (1964).

Parasites, moochers, looters, brutes and thugs can be of no value to a human being—nor can he gain any benefit from living in a society geared to their needs, demands and protection, a society that treats him as a sacrificial animal and penalizes him for his virtues in order to reward them for their vices, which means: a society based on the ethics of altruism.

*Id.*

26. On the other hand, even conservative state politicians such as Governor Rick Snyder of Michigan recognize that indigent defense is an obligation of government. See Mich. Exec. Order No. 2011-12 (Oct. 13, 2011), [http://www.nlada.net/sites/default/files/mi\\_executiveorderno2011-12\\_10132011.pdf](http://www.nlada.net/sites/default/files/mi_executiveorderno2011-12_10132011.pdf) (noting the state’s interest in effective defense for indigents and the need for adequate funding in signing an executive order establishing the Indigent Defense Commission).

State Budget Crisis Task Force issued a report in July 2012 stating that the fiscal crisis for the states will continue for a long period after the economy revives.<sup>27</sup> This is because of expected increasing health care costs, a pattern of underfunded pensions, generally disregarded infrastructure needs, and eroding revenues, a part of which will be expected federal budget cuts.<sup>28</sup> Second, a number of states cut services, such as school funding with rising class sizes, when revenues declined substantially during the worst of the recession and have chosen not to restore services to their earlier level even as revenues have rebounded.<sup>29</sup> This response may just be prudence in waiting to see if economic improvements continue, but the initial decision is consistent with an effort to decrease the level of services by holding them at levels prompted by the recessionary budget crisis.<sup>30</sup>

One plausible view of the next decade is that spending by state and local governments for all services will not only not increase, but may well decline. We could see a situation in which citizens are expecting and receiving less in a broad range of public services. Spending for indigent defense in this environment will be hard pressed to hold its own, and increases will be unrealistic.

The expectation of reduced federal discretionary spending for a sustained period of time adds to the bleak picture of hope for substantial increased government outlays for indigent defense. In

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27. See STATE BUDGET CRISIS TASK FORCE, FULL REPORT 6, 50 (July 31, 2012), <http://www.statebudgetcrisis.org/wpcms/wp-content/images/Report-of-the-State-Budget-Crisis-Task-Force-Full.pdf> (stating that states will continue to suffer economically after the recession partly because the great share of their tax bases are highly economically sensitive); Mary Williams Walsh & Michael Cooper, *Gloomy Forecast for States, Even if Economy Rebounds*, N.Y. TIMES, July 18, 2012, at A1 (discussing the report).

28. Walsh & Cooper, *supra* note 27; see also STATE BUDGET CRISIS TASK FORCE, *supra* note 27, at 2–3.

29. See Jim Siegel, *Ohio's Rainy-Day Fund Goes from 89 Cents to \$482 Million*, COLUMBUS DISPATCH (July 4, 2012), <http://www.dispatch.com/content/stories/local/2012/07/04/surplus-goes-from-89-cents-to-482-million.html> (last visited Apr. 2, 2013) (using Ohio, which saw a surplus of \$235 million and refused to spend it, as an example) (on file with the Washington and Lee Law Review).

30. Rahm Emanuel stated in November 2008, “Never let a serious crisis go to waste. What I mean by that is it’s an opportunity to do things you couldn’t do before.” *A Forty-Year Wish List*, WALL ST. J., Jan. 28, 2009, at A14.

my judgment, one of the most promising recent proposals to improve the quality of indigent services was made by Professor Norm Lefstein.<sup>31</sup> A central component of his proposal is a new federal center for defense services and the availability of federal funding to support model programs.<sup>32</sup> Without federal leadership and the support of federal funding, which are intertwined and are now quite problematic both in the near term and the likely long term, significant reforms are far less likely to occur.

These changes in the environment have caused me to recalibrate my thinking on how to approach innocence protection and support of indigent defense. Realism in a likely harsh form counsels a less optimistic view of what arguments will win funding support. I now expect that a concern with innocence may not have enough power figuratively to move the “funding needle” except when it is innocence in the clearest sense. The innocence movement’s standard of actual innocence, which I believe is underinclusive, may well be the only form of innocence that has significance to the public and therefore to legislators.

One sub-point that I sense is likely of relevance is that unless the person is relatively uninvolved in crime or the crime where innocence is shown is very serious (e.g., homicide) and far beyond the level of the accused’s previous criminal involvement, being innocent of the particular crime may not matter very much to the public.<sup>33</sup> I have noted that I believe many of those who are not demonstrably innocent, but innocent in fact, may have the type of background in crime that suggests their involvement in the particular crime under investigation.<sup>34</sup> A person picked from a photo array assembled by the police for display to an armed

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31. See Norman Lefstein, *In Search of Gideon’s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 928–29 (2004) (describing a proposal that depends on federal funding and the creation of a federal center for defense services).

32. *Id.*

33. See Mosteller, *Caring About Innocence*, *supra* note 11, at 41–43 (relating the story of Lee Wayne Hunt, who was convicted solely on the basis of informant testimony); see also D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 780–82 (2007) (discussing some elements of a potential typology).

34. Mosteller, *Caring About Innocence*, *supra* note 11, at 41–43.

robbery victim, for example, may have committed other similar robberies but not be guilty of the particular robbery.<sup>35</sup> Or she may be the companion of a drug dealer who herself has prior involvement with the use and sale of drugs but may not have been involved in the specific drug deal at issue in the prosecution.<sup>36</sup> If it ever was enough to garner public support, innocence of the precise crime charged, but not general innocence, may no longer be enough to justify increased funding for indigent defense.<sup>37</sup>

In particular cases, and for those who know the individual charged and the local facts, all possibilities of potential innocence will no doubt continue to matter. Occasionally, when a case with compelling facts attracts attention or when it involves salient stereotypes, good lawyering, including defense work, is appreciated.<sup>38</sup> Innocence, the possibility of innocence, due process for the guilty, and providing assistance to fellow citizens dealing with an unforgiving governmental structure should all matter as values served by the system that *Gideon* spawned. A high percentage of the work of those who defend the indigents, however, aids clients who are typically guilty, even if not culpable in the charged crime, or who are clearly guilty but are only

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35. See *id.* at 23–26 (describing a former client whose case fit this pattern).

36. See *United States v. Hernandez*, 975 F.2d 1035, 1035–37 (4th Cir. 1992) (describing the fact pattern of a female companion of a clearly guilty male defendant in which her guilt was uncertain as to the specific drug distribution scheme prosecuted, but who was obviously knowledgeable about drug sales generally).

37. To my eye, Clarence Gideon may well be an exception to my general sense that the potential for innocence by one who has a substantial record and therefore might be considered figuratively one of the “usual suspects” cannot capture the public imagination. As his case is generally described, particularly when Gideon’s picture accompanies that description, his case seems an outrage and innocence is almost beside the point. I suspect my reaction may be based on what seems to be a very long sentence for a fragile and elderly man who is apparently harmless, has endured a substantial imprisonment already, and is noble in his demand for fair treatment. Switch a few of those stereotypes to the modern day young inter-city defendant convicted of drug trafficking, and I suspect the reaction begins to change markedly.

38. For example, both Trayvon Martin, the decedent, and George Zimmerman, the defendant, have personal characteristics and represent political and societal positions that could make substantial elements of the public supportive of good lawyering for their positions.

insisting on their rights to due process. For most defendants, the public likely sees excellent defense work as taking advantage of procedural protections considered “legal technicalities.”<sup>39</sup>

*VI. Those Who Care About Innocence Should Stick Together: The Argument that Public Defenders Protect Some of the Innocent May Be Inadequate, but It Is the Best Argument Available, and It Has the Benefit of Being True*

Despite its relative weaknesses in the current environment, innocence protection is likely the best available option to develop public support for indigent defense. The innocence movement’s standard of almost absolute proof, however, effectively limits its support of *Gideon*’s command to a small subset of defendants. On the other hand, despite being narrowly focused, the innocence movement has been a strong enabling force for important procedural protections for those charged with crime.

*A. Help Those Innocent Defendants We Can with Arguments for Innocence*

Given the difficulty of raising support for lawyers for the indigent in general, second best solutions may be in order. Some of these that tend to separate the innocent from the guilty may be the most effective responses for those who are truly innocent, with the paths of advocacy diverging based on the clarity and availability of the proof.<sup>40</sup> For example, greater access to DNA testing can help the innocent in cases where DNA trace evidence is definitive. But emphasis on DNA can suggest that those

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39. See, e.g., Eugene R. Gaetke, *Expecting Too Much and Too Little of Lawyers*, 67 U. PITT. L. REV. 693, 695 n.2 (2006) (presenting one A.B.A. sponsored poll in which 73% of respondent consumers believed that “lawyers spend too much time finding technicalities to get criminals released” (citation omitted)).

40. See Mosteller, *supra* note 9, at 12 (arguing that different conceptions of fairness can lead to support for all defendants or only to defendants who are likely innocent, and that reforms that focus on the latter may have the effect of reducing support for broader measures).

without proof of exoneration are not only not innocent, but are likely guilty. Proof of the type offered by DNA tends to give the public false hope of certainty regarding both innocence and—where it is not established—guilt.

*B. Assist the Innocent with Organizational and Procedural Mechanisms that Engender Neutrality in Investigation and Charging and Augment Reliability*

Another approach is to provide greater neutrality to investigating agencies and prosecutors. This approach could help both the clearly guilty and those who are stereotyped as guilty by investigators caught up in the competitive process of ferreting out crime. But it would not help those who are implicated by a thorough, neutral investigation and instead need a vigorous challenge to the government's case in order to give effect to potential reasonable doubts.

*C. Open up the Information: Full Open-File Discovery*

The one reform that I believe has the greatest potential to aid indigent defense across the board is full, open-file discovery. Such broad discovery makes defending cases cheaper; it aids defense counsel with limited investigative resources; and it can unearth the truth. Realistically, it can also aid the clearly guilty by permitting fabrication of a defense or witness tampering. Broad discovery's potential to aid the guilty is the major basis on which full, open-file discovery is often resisted, and it is hardly the basis on which any supporter can argue for an extension of disclosure. With sufficient protections and reciprocity of discovery obligations for the defense, however, I believe its value is undeniable and helps protect many of the same interests upon which *Gideon* rests.

*VII. Support Reforms that Reduce the Impact of Inadequate Counsel but Not Those that Diminish the Command for Excellent Counsel*

In the near future, and perhaps in the long run, there is little prospect of substantially improving the level of funding for indigent services. That point, however, does not justify reducing the demand for excellence. That demand is fulfilled in some situations, such as in federal court, and it should not be diminished. Moreover, when enforced through ineffective assistance claims, it provides relief for potentially innocent defendants since the standard for reversal effectively requires a showing of a plausible prospect of innocence.<sup>41</sup> I have not seen a persuasive argument for how diminishing the requirement will result in any guarantee for greater provision of resources.

My proposals for reform, which include administrative changes to make the prosecution function and the investigative and forensic process more neutral, and for open-file discovery, have a different impact than diminishing the demand for excellent representation or reducing the scope of the right to counsel. Instead, they supplement or provide benefits to the efforts of defense counsel. I suggest reforms of that nature are to be advanced, particularly those that do not require extensive monetary outlays to be effective.<sup>42</sup>

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41. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (requiring that the defendant demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different”).

42. See *Mosteller*, *supra* note 9, at 15–16 (emphasizing the importance of fostering reforms, even if ostensibly based on constitutional commands, which entail limited costs because of the unlikelihood that they will be fully implemented in a criminal justice system faced with woefully inadequate resources). The fact that substantial expenditures are not required does not suggest these reforms will be easily accomplished politically or organizationally. I believe, however, that in the present environment, requirements of substantial financial outlays make the proposal not only ultimately difficult to accomplish, but also likely to be recognized as a nonstarter that therefore has no chance of success.

### VIII. Conclusion

I believe robust Sixth Amendment protections, including assisting individuals in navigating the criminal justice system, are worthy arguments to support indigent defense. But I am becoming convinced they will not prevail with the public in the current economic and political environment. Innocence protection is the only available option to develop public support, but I believe the innocence movement's standard of almost absolute proof makes using innocence as a motivating factor very difficult for all but a small subset of defendants who can demonstrate innocence or can connect with the public on a personal level. These are not the bases for broad support for indigent defense. Unfortunately, the innocence argument that can prevail is likely not figuratively a tide powerful enough to lift all boats.

My sense of hope and reality collide. Some levels of hope must realistically be abandoned. Those who support *Gideon* are likely unable to convince the public of the value of broad support for indigent defense in that the values it protects are either not considered worthy at all or are considered insufficiently important when weighed against other unmet public needs. Actual innocence is likely the only realistically available argument to further *Gideon*, but its power is only sufficient to carry the day for a limited group of cases.

Innocence concerns, however, provide a modicum of leverage for due process arguments in general and for support for a substantial right to counsel in particular. The arguments for innocence among the group I highlight—the potentially innocent who are only able to show degrees of doubt regarding their guilt—are likely inadequate in their own right. Nevertheless, they are important to prevent isolation of the effective innocence argument to the narrow group of those defendants demonstrated to be actually innocent, which could even further disadvantage all others charged with crime.