

ROGER A. FAIRFAX, JR.

## Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda

**ABSTRACT.** As we mark the fiftieth anniversary of the *Gideon v. Wainwright* decision, the nearly universal assessment is that our indigent defense system remains too under-resourced and overwhelmed to fulfill the promise of the landmark decision, and needs to be reformed. At the same time, fiscal necessity and moral outrage have prompted a historic reexamination of outdated policies that have led to an overreliance on incarceration and inefficiencies in the administration of criminal justice. This Essay argues that there are synergies between the indigent defense reform agenda and the broader criminal justice reform agenda, which places a premium on cost-effective, evidence-based, innovative ways to reduce crime and recidivism and enhance public safety. By integrating indigent defense reform into this emerging “smart-on-crime” reform movement, we not only make better criminal justice policy, we also reaffirm our fidelity to the constitutional values undergirding *Gideon*.

**AUTHOR.** Professor of Law, George Washington University Law School. I would like to thank Melanca Clark, Andrea Dennis, Lisa Fairfax, Kristin Henning, Renée Hutchins, Michael Pinard, Kami Simmons, and Yolanda Vázquez for their feedback and suggestions on this Essay. This Essay is dedicated to the memory of Mr. Francis Leroy Butler.



## **ESSAY CONTENTS**

<b>INTRODUCTION</b>	2318
<b>I. FALLING SHORT OF <i>GIDEON'S</i> DREAM</b>	2321
<b>II. SMART-ON-CRIME CRIMINAL JUSTICE REFORM</b>	2325
<b>III. INDIGENT DEFENSE REFORM AND THE BROADER SMART-ON-CRIME REFORM AGENDA</b>	2327
A. Reclassification and Diversion	2329
B. Greater Collaboration with Criminal Justice Stakeholders	2332
<b>CONCLUSION</b>	2335

## INTRODUCTION

*Gideon*'s semicentennial year will prompt both a celebration of the decision's watershed moment in American legal history and a searing critique of its unfulfilled promise.<sup>1</sup> Although *Gideon* and its progeny established the contours of the state's obligation to provide counsel to indigent criminal defendants,<sup>2</sup> they did not specify a blueprint for the state and local governments charged with discharging that obligation.<sup>3</sup> As a result, many jurisdictions have been unable or unwilling to commit the resources necessary to fully implement *Gideon*'s vision.<sup>4</sup> Indeed, fifty years after *Gideon* was decided, there is near-universal acceptance of the notion that our system of indigent defense is broken.<sup>5</sup>

The failings of *Gideon* have been thoroughly documented,<sup>6</sup> and are

- 
1. See Eric H. Holder, Jr., *Gideon—A Watershed Moment*, CHAMPION, June 2012, at 56 (“[D]espite the significant progress that’s been made in recent decades, in jurisdictions nationwide, the full promise of the rights guaranteed under *Gideon* has yet to be fully realized . . .”).
  2. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that right to counsel turns on actual imprisonment, rather than mere authorization for imprisonment); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending the right to counsel to trials for jailable misdemeanors). At the time *Gideon* was argued, thirty-five states provided indigent defendants the right to counsel under state constitutional or statutory provisions. See Brief for the State Government Amici Curiae at 2, *Gideon*, 372 U.S. 335 (No. 155).
  3. See NAT’L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 29–30, 52–53 (2009), <http://www.constitutionproject.org/pdf/139.pdf> [hereinafter JUSTICE DENIED]; Kim Taylor-Thompson, *Tuning Up Gideon’s Trumpet*, 71 FORDHAM L. REV. 1461, 1462 (2003).
  4. See Anthony Lewis, *Foreword to ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE*, at i (2004), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings\\_authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings_authcheckdam.pdf) [hereinafter BROKEN PROMISE].
  5. See Paul Marcus, *Why the United States Supreme Court Got Some (but Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 152 (2009) (“Study after study, review upon review, report after report, make certain—with virtually no dissent—that the hope of providing capable lawyers to all poor defendants in criminal cases is not being realized. In spite of enormous sums of money being spent throughout the United States on tremendous numbers of cases, the system of providing counsel across much of our nation is, in a word, broken.”) (footnote omitted).
  6. See generally JUSTICE DENIED, *supra* note 3; BROKEN PROMISE, *supra* note 4.

properly attributed in large part to the crisis in indigent defense funding.<sup>7</sup> Amid the frustration over the futility of efforts to address the indigent defense funding crisis,<sup>8</sup> it is important to recognize that the lack of commitment of resources to the indigent defense system is, at its core, symptomatic of key failings of our modern criminal justice system—overcriminalization and overreliance on incarceration. Over the past few decades—over half of *Gideon*'s life—we have seen an unprecedented increase in criminalization, enforcement, and incarceration in the United States.<sup>9</sup>

Both the causes and the effects of this criminalization and incarceration explosion have been obstacles to the realization of *Gideon*'s potential. The overbroad criminalization and enforcement strategies that have helped to swell prison and jail cells also have contributed to unmanageable caseloads for attorneys delivering indigent criminal defense services.<sup>10</sup> At the same time, the tremendous fiscal costs of these criminal justice strategies drain the system of resources that the indigent defense system desperately needs.<sup>11</sup> The end result is that the right to counsel and the quality of criminal justice suffer.

However, recent years have seen a seismic shift in the politics of crime in the United States. Confronting a difficult budgetary environment and the fiscal and human consequences of the costly criminalization and incarceration binge, policymakers at all levels of government have reassessed the efficiency and logic of our criminal justice strategies and outcomes.<sup>12</sup> For the first time in more than a generation, political leaders have shown a willingness to move away from the

- 
7. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045-46 (2006); Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 972-77 (2012); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 81 & n.2 (1995).
  8. See generally Backus & Marcus, *supra* note 7.
  9. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).
  10. See Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339, 342-43 (2006); Joel M. Schumm, Standing Comm. on Legal Aid & Indigent Defendants, *National Indigent Defense Reform: The Solution Is Multifaceted*, A.B.A. 37 (2012), [http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_national\\_indigent\\_defense\\_reform.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_national_indigent_defense_reform.authcheckdam.pdf).
  11. See Schumm, *supra* note 10, at 14.
  12. See Roger A. Fairfax, Jr., *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J.L. ECON. & POL'Y 597, 611 (2011).

“soft-on-crime” and “tough-on-crime” binary<sup>13</sup> and take a hard look at whether we are receiving a proper return on the tremendous societal investment in our criminal justice policies.<sup>14</sup> What has emerged is a new approach, called “smart-on-crime” criminal justice reform.<sup>15</sup> Advanced by reform advocates and gaining acceptance among legislators and policymakers across the political spectrum, the smart-on-crime agenda emphasizes evidence-based, data-driven strategies calculated to reduce crime and recidivism, promote public safety, reduce the reliance on criminalization and incarceration, all while saving budgetary resources.<sup>16</sup>

As *Gideon* turns fifty, it is time to fully engage and integrate the indigent defense reform agenda with the broader smart-on-crime criminal justice reform agenda. By pursuing strategies that reconsider our reliance on criminalization and incarceration, we can move toward a regime with fewer indigent criminal defendants in need of representation, and a greater share of resources made available to strengthen the indigent defense system. Additionally, by associating with the smart-on-crime movement, indigent defense reformers will be more likely to gain influence with those policymakers who control resource allocation within the criminal justice system. In turn, those receptive to the smart-on-crime approach are likely to recognize that strengthening the indigent defense system can help us achieve important objectives at the heart of the broader criminal justice reform agenda. As the nation finally begins to confront the realities of our failed criminal justice policies, the indigent defense community can capitalize on these synergies and move closer to fulfilling the dream of *Gideon*.

---

13. *Id.* at 611.

14. See *id.*; Vincent Schiraldi, *Getting Smart on Crime: Many States Are Questioning the Wisdom of Hard-Line Prison Policies*, ALB. TIMES UNION, Dec. 7, 2003, at B1.

15. See Roger A. Fairfax, Jr., *The “Smart on Crime” Prosecutor*, 25 GEO. J. LEGAL ETHICS 905, 906-07 (2012).

16. See *id.*; see also *Exploring the National Criminal Justice Commission Act of 2009: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 130 (2009) (written testimony of Charles J. Ogletree, Jr., Jesse Climenko Professor of Law, Harvard Law Sch.); Nancy Gertner, Op-Ed., *Be Tough, and Smart, on Crime*, BOS. GLOBE, Feb. 22, 2012, <http://www.bostonglobe.com/opinion/2012/02/22/tough-and-smart-crime/fRIBDWpcibhmX4gEE5NGoL/story.html>.

## I. FALLING SHORT OF *GIDEON'S DREAM*

Fifty years after the landmark decision in *Gideon v. Wainwright*, the state of indigent defense in the United States is dire. Far from what would be ideal,<sup>17</sup> many attorneys representing poor criminal defendants face excessive workloads,<sup>18</sup> inadequate resources,<sup>19</sup> and a lack of independence.<sup>20</sup> As commentators have observed for decades,<sup>21</sup> the root of these and other deficiencies is the severe underfunding of indigent defense.<sup>22</sup> Budgetary constraints have forced lawyers representing indigent defendants to do more with less, which translates into too many cases and too few attorneys and supporting professionals, severely compromising the quality of representation

- 
17. See generally Standing Comm. on Legal Aid & Indigent Defendants, *Ten Principles of a Public Defense Delivery System*, A.B.A. (2002), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) (setting forth basic principles for a well-functioning public defense system).
  18. See generally NORMAN LEFSTEIN, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE* (2011), [http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf); Standing Comm. on Legal Aid & Indigent Defendants, *Eight Guidelines of Public Defense Related to Excessive Workloads*, A.B.A. (2009), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_eight\\_guidelines\\_of\\_public\\_defense.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf) (discussing strategies to address the challenge of excessive indigent defense caseloads).
  19. See, e.g., JUSTICE POLICY INST., *SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE* (2011); Backus & Marcus, *supra* note 7, at 1096-1103.
  20. See, e.g., LEFSTEIN, *supra* note 18, at 22-23; JUSTICE DENIED, *supra* note 3, at 80-84; Backus & Marcus, *supra* note 7, at 1069-72.
  21. See, e.g., *Conference on the 30th Anniversary of the United States Supreme Court's Decision in Gideon v. Wainwright: Gideon and the Public Service Role of Lawyers in Advancing Equal Justice*, 43 AM. U. L. REV. 1, 43-48 (1993) (remarks of Angela Jordan Davis, Dir., Pub. Defender Serv. for D.C.); Ellen S. Podgor, *Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 131 (2004); *Gideon Undone: The Crisis in Indigent Defense Funding*, A.B.A. (Nov. 1982), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/gideonundone.authcheckdam.pdf>.
  22. See, e.g., BROKEN PROMISE, *supra* note 4, at iv-v; JUSTICE POLICY INST., *supra* note 19, at 27; JUSTICE DENIED, *supra* note 3, at 59-60; Backus & Marcus, *supra* note 7, at 1045-46 & n.60; Susan Herlofsky & Geoffrey Isaacman, *Minnesota's Attempts To Fund Indigent Defense: Demonstrating the Need for a Dedicated Funding Source*, 37 WM. MITCHELL L. REV. 559, 571-79 (2011).

provided to indigent defendants.<sup>23</sup>

States and counties, which hold the purse strings for the bulk of indigent criminal defense in the United States, are constantly weighing *Gideon's* mandate against other priorities both within and outside the criminal justice system.<sup>24</sup> Public defender agencies, often lacking the political clout, independence, and legislative expertise to effectively navigate the appropriations process, face an uphill battle to secure scarce funding, particularly when the law enforcement and corrections functions are viewed as more central to the state's core criminal justice function.<sup>25</sup>

Importantly, the indigent defense funding crisis exists even as the threshold for effectiveness of counsel has risen dramatically. The most prominent example can be found in *Padilla v. Kentucky*,<sup>26</sup> which held that effective assistance of counsel requires a criminal defense lawyer to explain to a client the immigration consequences of a criminal conviction.<sup>27</sup> This decision was met with great apprehension over how its mandate would be implemented and what it would mean for criminal defense practice.<sup>28</sup>

- 
23. See generally BROKEN PROMISE, *supra* note 4 (reporting on the American Bar Association's hearings on the right to counsel in criminal proceedings); JUSTICE DENIED, *supra* note 3 (assessing the degree to which states and other localities successfully provide legal representation to those who cannot hire their own lawyers).
  24. See, e.g., JUSTICE POLICY INST., *supra* note 19, at 27. Additional problems arise when states require counties—which command fewer resources—to fund indigent defense. See JUSTICE DENIED, *supra* note 3, at 53-57.
  25. See BROKEN PROMISE, *supra* note 4, at 13-14; JUSTICE DENIED, *supra* note 3, at 57 (“In the competition for state funds, indigent defense is frequently at the back of the line.”); *id.* at 61-64; Backus & Marcus, *supra* note 7, at 1045-46 & n.60. The funding commitment to *Gideon* is even more tenuous in jurisdictions that outsource indigent criminal defense to private contract attorneys, and where criminal justice budgeting models pit the funding of private counsel against the funding of police officers, correctional officers, prosecutors, and other public employees. See, e.g., BROKEN PROMISE, *supra* note 4, at 27.
  26. 130 S. Ct. 1473 (2010).
  27. See *id.*; JUSTICE DENIED, *supra* note 3, at 72.
  28. See, e.g., Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 165-66 (2012); Yolanda Vázquez, *Realizing Padilla's Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169 (2011); Lisa M. Wayne & Norman L. Reimer, *Gideon's Next Frontier: No Detention and No Conviction Without Counsel*, CHAMPION, June 2012, at 4. The Supreme Court determined that *Padilla* does not have retroactive application in *Chaidez v. United States*, 131 S. Ct. 1103 (2013).

In a similar vein, the Supreme Court recently decided *Missouri v. Frye*<sup>29</sup> and its companion case, *Lafler v. Cooper*,<sup>30</sup> which clarified that criminal defendants are entitled to effective assistance of counsel in the plea bargaining context. Given the ubiquity of guilty pleas in the criminal justice system,<sup>31</sup> these decisions potentially could have a tremendous impact on the day-to-day work of criminal defense attorneys, particularly those public defenders already laboring under the pressure of excessive caseloads.<sup>32</sup> These greater demands on the indigent defense system will only exacerbate the funding crisis.<sup>33</sup>

Against this backdrop, the criminal defense advocacy community has sought alternative solutions.<sup>34</sup> Recognizing that a sudden robust increase in indigent defense funding is unlikely, indigent defense reformers have pushed other ways to improve the public defense system. One such strategy is to resort to the courts for systemic relief.<sup>35</sup> Lawsuits have sought to address a variety of issues confronting the indigent defense system in various jurisdictions, including funding deficiencies and excessive caseloads.<sup>36</sup> Another strategy has

---

29. 132 S. Ct. 1399 (2012).

30. 132 S. Ct. 1376 (2012).

31. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancement in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001).

32. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2479-80 (2004).

33. In addition, there have been calls to expand the right to counsel to earlier stages of the criminal process. See Wayne & Reimer, *supra* note 28, at 4; Schumm, *supra* note 10, at 37. For example, in Maryland, the state's highest court recently held that all criminal defendants are entitled to counsel at the initial hearing with the bail commissioner, a court official who may order release or make a bail determination that may be reviewed by a judge. See *DeWolfe v. Richmond*, No. 34, 2012 WL 10853 (Md. Jan. 4, 2012); Douglas L. Colbert, *When the Cheering (for Gideon) Stops: The Defense Bar and Representation at Initial Bail Hearings*, CHAMPION, June 2010, at 10. Although the court found the expanded right to counsel in a state statutory provision and did not reach the federal or state constitutional arguments in that case, similar arguments are sure to be made in the future. See, e.g., Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333 (2011); Wayne & Reimer, *supra* note 28, at 4-5.

34. See, e.g., Backus & Marcus, *supra* note 7, at 1043-45, 1122-30.

35. See, e.g., JUSTICE DENIED, *supra* note 3, at 103-46; Cara H. Drinan, *Lafler and Frye: Good News for Public Defense Litigation*, 25 FED. SENT'G REP. 138, 138 (2012); Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 618-19 (2011).

36. See Backus & Marcus, *supra* note 7, at 1116 ("The cases have targeted the adequacy of attorney compensation, excessive caseloads, the overall system of providing counsel, and which level of government, state or local, must bear the expense of providing lawyers for



been to advocate for increased support of the many private lawyers who represent indigent defendants.<sup>37</sup> Despite their vital role in the nation's indigent defense system,<sup>38</sup> many of these private lawyers are less experienced and work in solo or small practice settings.<sup>39</sup> Given that these private defenders often do not have access to the shared resources found in many established public defender agencies, some indigent defense advocates have called for enhanced information sharing, as well as pooled training opportunities and practice resources for these private lawyers on *Gideon's* front lines.<sup>40</sup>

Strategies like these are certainly worth serious consideration at a time when the constitutional and statutory demands on criminal defense practitioners are expanding.<sup>41</sup> Unfortunately, despite the energy and effort on the part of the network of dedicated and capable indigent defense reform advocates, not much progress has been made in addressing what ails the indigent defense system. The lack of political traction and the inability to compete with other criminal justice fiscal priorities have stymied the many valiant efforts of the indigent defense reformers to realize the dream of *Gideon*.<sup>42</sup> As we continue to struggle for solutions to the indigent defense crisis a half century after the landmark decision, part of the answer may be found in greater engagement with the broader criminal justice reform agenda.

---

poor criminal defendants.”). A recent focus group of indigent defense advocates cited support for litigation as a means to force reform of the nation's indigent criminal defense system. See Schumm, *supra* note 10, at 38. *But see* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 251 (2004) (expressing skepticism about the long-term efficacy of litigation strategies to address indigent defense funding).

37. See JUSTICE DENIED, *supra* note 3, at 91-93; Schumm, *supra* note 10, at 22, 38.
38. Although public defender agencies operate in many places around the country, private lawyers supply a significant amount of the indigent defense representation delivered in many jurisdictions. See LEFSTEIN, *supra* note 18, at 230-33; *see also* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 455 (2009) (“[T]he American system of criminal justice likely would collapse in the absence of the private criminal defense attorneys with whom the state contracts to supplement or replace public defender representation of indigent criminal defendants.”); Schumm, *supra* note 10, at 38 (“[E]ven where public defender systems have been established, the active participation and support of the private bar is essential in order to maintain manageable caseloads and broad support for indigent defense services.”).
39. See JUSTICE DENIED, *supra* note 3, at 91-93; Schumm, *supra* note 10, at 38.
40. See Schumm, *supra* note 10, at 38.
41. See *supra* text accompanying notes 26-33.
42. See, e.g., Bibas, *supra* note 28, at 167.

## II. SMART-ON-CRIME CRIMINAL JUSTICE REFORM

Could the members of the *Gideon* Court have contemplated the state of our modern system of criminal justice? The War on Drugs and other strategies of increased criminalization and enforcement have fueled mass incarceration, swelling prison cells, and criminal dockets. The sheer magnitude of the incarceration explosion cannot be overstated. Since *Gideon* was decided, the rate of incarceration in the United States has more than tripled, and is now the highest in the world.<sup>43</sup> With more than two million people incarcerated in American jails and prisons,<sup>44</sup> mass incarceration has taken a tremendous financial and human toll on communities throughout the United States.<sup>45</sup>

Not surprisingly, many of those caught up in this wave are indigent defendants in need of representation.<sup>46</sup> Most of the increased criminalization and enforcement strategies of the past few decades were undertaken without due consideration of how they would increase sharply the demand for indigent criminal defense services.<sup>47</sup> As a result, caseloads carried by indigent defense lawyers now are the highest they have ever been at a time when enforcement and corrections costs have sapped the bulk of available resources. As demands on the indigent defense system have increased in this era of overcriminalization and mass incarceration, it has become even more difficult for jurisdictions to commit the resources necessary to fulfill *Gideon*'s promise.

The aftermath of decades of overreliance on incarceration converging with scarce budgetary resources in the current economic climate has forced policymakers to ask a series of difficult but fundamental questions about criminal justice. Are we receiving an insufficient return on the tremendous investment of resources our existing criminal justice policies demand? Should we be shifting strategies in order to identify efficiencies in criminal justice and preserve resources for other important societal investments? Are there different

---

43. See, e.g., ALEXANDER, *supra* note 9, at 6-9; STUNTZ, *supra* note 9, at 247.

44. See, e.g., Michael A. Simons, *Sense and Sentencing: Our Imprisonment Epidemic*, 25 J. C.R. & ECON. DEV. 153, 155-56 (2010).

45. See, e.g., Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, 37 CRIME & JUST. 97 (2008); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004).

46. See, e.g., Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401 (2001); Stevenson, *supra* note 10, at 341-45.

47. See Stevenson, *supra* note 10, at 342-43; Schumm, *supra* note 10, at 38.

criminal justice approaches that promote public safety, reduce crime and recidivism, and save money?

The smart-on-crime movement has many legislators and policymakers beginning to answer these questions in the affirmative. As I have previously explained:

The smart on crime philosophy emphasizes: (1) fairness and accuracy in the administration of criminal justice; (2) recidivism-reducing alternatives to incarceration and traditional sanctions; (3) effective pre-emptive mechanisms for preventing criminal behavior; (4) the transition of formerly incarcerated individuals to law-abiding and productive lives; and (5) evidence-based assessments of the costliness, efficiency, and effectiveness of criminal justice policies.<sup>48</sup>

Advocates from across the political spectrum have gotten behind the smart-on-crime movement.<sup>49</sup> The broad-based support for this evidence-based, data-driven reexamination of criminal justice policy is prompted not only by economic reality but also by concerns over the human costs of mass incarceration.<sup>50</sup>

---

48. Fairfax, *supra* note 12, at 610.

49. See, e.g., SMART ON CRIME COALITION, SMART ON CRIME: RECOMMENDATIONS FOR THE ADMINISTRATION AND CONGRESS, at vi (2011) [hereinafter SMART ON CRIME]; Press Release, Am. Bar Ass'n, ABA Commission Cites Over-Reliance on Incarceration, Calls for New "Smart on Crime" Approach (June 23, 2004), <http://www.abanow.org/2004/06/aba-commission-cites-over-reliance-on-incarceration-calls-for-new-smart-on-crime-approach>; RIGHT ON CRIME: THE CONSERVATIVE CASE FOR REFORM, <http://www.rightoncrime.com> (last visited Mar. 28, 2013); see also Newt Gingrich & Pat Nolan, *Criminal Justice Reform Saving States Billions: Bipartisan Efforts Based on Core Conservative Principles*, WASH. TIMES, Dec. 27, 2012, <http://www.washingtontimes.com/news/2012/dec/27/criminal-justice-reform-saving-states-billions>. Legislation creating a "National Criminal Justice Commission" to undertake a comprehensive review of the nation's criminal justice system has been proposed during the last two sessions of Congress. See Fairfax, *supra* note 15, at 907-09; Rabiah Alicia Burks, *Webb Not Giving Up on Criminal Justice Act*, ABANOW (Nov. 2, 2011), <http://www.abanow.org/2011/11/sen-webb-not-giving-up-on-criminal-justice-act>.

50. See, e.g., Marc Mauer, *Sentencing Reform Amid Mass Incarcerations—Guarded Optimism*, 26 CRIM. JUST. 27 (2011); Michelle Alexander, Op-Ed., *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES, May 14, 2011, <http://www.nytimes.com/2011/05/15/opinion/15alexander.html> ("Yes, some prison downsizing is likely to occur in the months and years to come. But we ought not fool ourselves: we will not end mass incarceration without a recommitment to the movement-building work that was begun in the 1950s and 1960s and left unfinished. A human rights nightmare is occurring on our watch. If we fail to rise to the challenge, and push past the politics of momentary interest convergence, future generations

This emerging change in the politics of crime has begun to liberate elected officials, many of whom have long felt the need to be unwavering in their tough-on-crime outlook.<sup>51</sup> Indeed, the appeal of the smart-on-crime approach is that it promotes evidence-based, innovative strategies designed to enhance public safety by reducing crime and recidivism.<sup>52</sup> In fact, many smart-on-crime strategies have been developed by, or in collaboration with, law enforcement and prosecutors, many of whom recognize the value of achieving desired criminal justice outcomes in more efficient and cost-effective ways.<sup>53</sup>

### III. INDIGENT DEFENSE REFORM AND THE BROADER SMART-ON-CRIME REFORM AGENDA

The smart-on-crime philosophy holds tremendous promise for indigent defense reform for a number of reasons. As an initial matter, the interests of the indigent defense reform agenda have significant overlap with the smart-on-crime agenda's core aims, such as promoting alternatives to incarceration, support for reentry of formerly incarcerated individuals, and

---

will judge us harshly.”); Mary D. Fan, *The Political Climate Change Surrounding Alternatives to Incarceration*, HUM. RTS., Summer 2011, at 6, 21-22, [http://www.americanbar.org/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol38\\_2011/human\\_rights\\_summer11/the\\_political\\_climate\\_change\\_surrounding\\_alternatives\\_to\\_incarceration.html](http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol38_2011/human_rights_summer11/the_political_climate_change_surrounding_alternatives_to_incarceration.html).

51. See Charles Ogletree, *Getting Tough on Crime: Does It Work?*, 38 BOS. BAR J. 9 (1994); Vanita Gupta, *From Incredible to Inevitable: How the Politics of Criminal Justice Reform May Be Shifting*, HUFFINGTON POST (Aug. 4, 2010, 4:00 PM), [http://www.huffingtonpost.com/vanita-gupta/from-incredible-to-inevit\\_b\\_670782.html](http://www.huffingtonpost.com/vanita-gupta/from-incredible-to-inevit_b_670782.html); see also Fairfax, *supra* note 15, at 910-11 (discussing elected prosecutors' embrace of smart-on-crime policies).
52. See, e.g., Fairfax, *supra* note 15.
53. See *id.* The Attorney General of the United States has been one of the most outspoken supporters of smart-on-crime policies:

There is no doubt that we must be “tough on crime.” But we must also commit ourselves to being “smart on crime.” . . . Getting smart on crime requires talking openly about which policies have worked and which have not. And we have to do so without worrying about being labeled as too soft or too hard on crime. Getting smart on crime means moving beyond useless labels and catch-phrases, and instead relying on science and data to shape policy. And getting smart on crime means thinking about crime in context—not just reacting to the criminal act, but developing the government's ability to enhance public safety before the crime is committed and after the former offender is returned to society.

Eric Holder, Att'y Gen., Address at the 2009 American Bar Association Convention (Aug. 3, 2009) (transcript available at <http://www.justice.gov/ag/speeches/2009/ag-speech-090803.html>).

balanced strategies that focus on prevention and rehabilitation rather than enforcement and punishment.<sup>54</sup> In addition, the smart-on-crime agenda places an emphasis on finding and reinvesting cost savings resulting from innovation. Resources that are freed up in other parts of the criminal justice system might be redirected to better fund and support indigent defense.<sup>55</sup> At the same time, the broader criminal justice reform agenda is served by a strengthened indigent defense system. Those who are receptive to the smart-on-crime approach eventually will recognize that the better equipped our indigent defense system is, the less waste and inefficiency our criminal justice system will produce.<sup>56</sup> Finally, given that smart-on-crime has gained traction as a politically palatable approach to reassessing criminal justice policy, the indigent defense reform agenda could benefit from the association. Unfortunately, those in need of indigent defense services are not a popular constituency, and this fact hampers the ability of indigent defense advocates to achieve desired reforms.<sup>57</sup> The built-in political appeal of the smart-on-crime philosophy can aid the indigent defense reform movement in its struggle for greater respect from elected officials and policymakers charged with the allocation of resources.

Therefore, we should encourage a tighter nexus between the indigent defense reform agenda and the broader smart-on-crime criminal justice reform agenda. The smart-on-crime movement should endeavor to embrace indigent defense reform as a core part of its agenda,<sup>58</sup> and the indigent defense reform community should be a full participant in the development and promotion of

- 
54. See, e.g., Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067 (2004).
  55. See, e.g., Heather Baxter, *Gideon's Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 383-84; Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 333 (2011).
  56. See JUSTICE POLICY INST., *supra* note 19, at 27 (“A good public defense system can reduce wasteful incarceration. Access to an effective public defense system can reduce corrections spending both on pretrial detention and subsequent sentences without compromising public safety.”); *id.* at 2 (“Failing to provide the constitutionally guaranteed right to effective counsel, regardless of one’s ability to pay, is not simply a denial of justice, it is costly to individuals, families, communities and taxpayers.”); see also Roberts, *supra* note 55, at 333; Margo Pierce, *Time To Try “Smart on Crime”: Public Defender Reform Could Improve Public Safety and State/Local Budgets*, CITY BEAT (Cincinnati), Mar. 25, 2009, [http://www.citybeat.com/cincinnati/article-17448-time\\_to\\_try\\_smart\\_on\\_crime.html](http://www.citybeat.com/cincinnati/article-17448-time_to_try_smart_on_crime.html).
  57. See, e.g., Bibas, *supra* note 28, at 167.
  58. See, e.g., SMART ON CRIME, *supra* note 49, at 70-89 (recommending indigent defense reform as one component of a smart-on-crime agenda).

smart-on-crime strategies at all levels of government.<sup>59</sup> Examples of such strategies include reclassification of minor offenses, diversion of minor offenders, and greater collaboration on reform and innovation within the criminal justice community. Mining the benefits of smart-on-crime reform and, indeed, packaging indigent defense reform as part of this energetic agenda for rethinking our approach to criminal justice, may be the path toward reinvigorating our indigent defense system as *Gideon* turns fifty.

### A. Reclassification and Diversion

One example of smart-on-crime reform that might work to the benefit of the indigent defense system is the emphasis on the reclassification of minor offenses and the diversion of minor offenders.<sup>60</sup> Reclassification—or “decriminalization,” as it is sometimes termed—typically transforms a low-level, often victimless act from a criminal offense to civil infraction.<sup>61</sup>

---

59. See, e.g., Jack King, *NACDL Sends Criminal Justice Advice to Obama Transition Team*, CHAMPION, Jan. 2009, at 12 (describing the participation of the National Association of Criminal Defense Lawyers in smart-on-crime policy development and advocacy).

60. See, e.g., Schumm, *supra* note 10, at 14-17.

61. See, e.g., SMART ON CRIME, *supra* note 49, at 79. It should be noted that there is an important definitional distinction between reclassification and decriminalization for purposes of the right-to-counsel debate. If a minor crime is reclassified and decriminalized, it becomes at most a civil infraction and does not implicate the criminal justice process (or the right to counsel) at all. If an offense is reclassified from a jailable criminal offense to a nonjailable criminal offense, the offense is often still characterized as criminal, but there is no longer a federal constitutional right to counsel for someone charged with such an offense since they cannot be incarcerated as a result of a conviction. See *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that the right to counsel extended only to cases resulting in actual incarceration, rather than mere authorization for incarceration). Dissenting from the Court’s holding in *Scott*, Justice Brennan suggested that a more robust entitlement to counsel would lead jurisdictions to consider the reclassification of minor offenses:

It may well be that adoption by this Court of an “authorized imprisonment” standard would lead state and local governments to re-examine their criminal statutes. A state legislature or local government might determine that it no longer desired to authorize incarceration for certain minor offenses in light of the expense of meeting the requirements of the Constitution. In my view, this re-examination is long overdue.

*Id.* at 388 (Brennan, J., dissenting) (citing *SHELDON KRANTZ ET AL., RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN* 445-606 (1976)). Although reclassification to a nonjailable criminal offense (rather than decriminalization) of minor offenses could reduce the burden on the indigent defense system if jurisdictions exercise the

Reclassification efforts have the potential to save significant amounts of money,<sup>62</sup> eliminating not just the costs of funding a defense against these crimes, but also the costs of prosecuting, processing, and punishing would-be criminal offenders.<sup>63</sup> These cost savings could be reinvested in the indigent defense system. Indeed, various states have begun to study the potential benefits of decriminalizing certain minor offenses.<sup>64</sup> Highly respected organizations such as the American Bar Association are on the record in support of the reclassification of certain minor crimes.<sup>65</sup>

From the perspective of indigent defense reform, the growth in caseloads has been fueled, in part, by the proliferation of minor criminal offenses that could be classified as civil infractions. Therefore, there is an incentive to reexamine, as Justice Brennan suggested in his dissenting opinion in *Scott v. Illinois*, whether there areailable offenses for which the costs of providing

---

option not to provide counsel, some like Paul Marcus argue that this approach is unacceptable, in part because even minor, nonailable criminal offenses may have collateral consequences down the road. See Marcus, *supra* note 5, at 188-89; see also Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213 (2010) (describing the expansion of collateral consequences and their impact on reentry).

62. See, e.g., Baxter, *supra* note 55, at 385-87; Primus, *supra* note 35, at 616. To be sure, calls for reclassification as a partial remedy for the indigent defense funding crisis are not new. Indeed, as the Supreme Court was working its way through the doctrinal questions left in the wake of *Gideon*, it seemed to acknowledge that the tremendous pressure the decision would place on jurisdictions could be alleviated by ridding the criminal courts of minor offenses. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 38 n.9 (1972) (noting that a “partial solution to the problem of minor offenses may well be to remove them from the court system”). In support of its observation, the Court quoted a 1972 American Bar Association recommendation that the “[r]egulation of various types of conduct which harm no one other than those involved (e.g., public drunkenness, narcotics addiction, vagrancy, and deviant sexual behavior) should be taken out of the courts.” *Id.* (quoting AM. BAR ASS’N, *NEW PERSPECTIVES ON URBAN CRIME* iv (1972)).
63. See, e.g., Backus & Marcus, *supra* note 7, at 1125; Robert C. Boruchowitz, *Diverting and Reclassifying Misdemeanors Could Save \$1 Billion per Year: Reducing the Need for and Cost of Appointed Counsel*, AM. CONST. SOC’Y FOR L. & POL’Y (2010), <http://www.acslaw.org/files/Boruchowitz%20-%20Misdemeanors.pdf>.
64. See, e.g., Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, NAT’L ASS’N OF CRIM. DEF. LAWYERS 27-28 (2009), <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808>.
65. See *State Policy Implementation Project*, A.B.A., <http://www2.americanbar.org/sections/criminaljustice/CR203800/Pages/statepolicyproject.aspx> (last visited Mar. 28, 2013).

indigent defense outweigh the benefits of incarcerating the accused.<sup>66</sup> Recently, a high-profile focus group on indigent defense reform cited reclassification as a key strategy for improving indigent defense in the United States:

Any solution to the indigent defense crisis in America must focus on the front end of the system, as much as the back end. There are simply too many cases coming into the indigent defense system. Overreliance upon criminal prosecution for petty, non-violent offenses, for which people seldom receive jail sentences, drives defender caseloads to unmanageable extremes, to the detriment of all accused persons and at enormous costs to the public.<sup>67</sup>

A related reform trumpeted by smart-on-crime advocates is the diversion of minor offenders from the criminal courts. Diversion programs, including specialty courts and mediation programs, have met with success in various jurisdictions.<sup>68</sup> Such programs, like reclassification efforts, have the potential

- 
66. *Scott*, 440 U.S. at 388 (Brennan, J., dissenting). See also JUSTICE DENIED, *supra* note 3, at 72-74; Erica Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 500 (2007) (“Eliminating imprisonment penalties for non-exceptional minor offenses would not impose significant burdens on the administration of justice if those penalties are being used only infrequently, and such action could result in significant resource savings for indigent defense systems.”).
67. Schumm, *supra* note 10, at 37; Debra Cassens Weiss, *Would Decriminalizing Minor Offenses Help Indigent Defense Crisis? ABA Committee Weighs In*, A.B.A. J. (Jan. 8, 2013), [http://www.abajournal.com/news/article/decriminalizing\\_minor\\_offenses\\_could\\_help\\_indigent\\_defense\\_crisis\\_aba\\_commi](http://www.abajournal.com/news/article/decriminalizing_minor_offenses_could_help_indigent_defense_crisis_aba_commi). To be sure, some have expressed the fear that, despite the emergence of the smart-on-crime agenda, the old, counterproductive “tough-on-crime” approach, which retains traction in many places, will diminish the likelihood that reforms such as reclassification efforts ultimately will be successful. See, e.g., Roberts, *supra* note 55, at 333. Of course, there will be serious disagreement over which crimes should be reclassified and which types of offenders should be diverted. Also, there is the very real concern that the cost savings obtained from reclassification efforts would be siphoned off for other uses and not reinvested into the indigent defense system. This complements the worry that as caseloads drop there will be a concomitant decrease in funding, thus defeating part of the purpose of the reclassification effort in the first place. Nevertheless, smart and measured reclassification efforts are a solid first step toward ending “America’s reliance upon the criminal justice system as the tool of first choice to influence social behavior that is not inherently criminal.” Schumm, *supra* note 10, at 37.
68. See, e.g., Boruchowitz et al., *supra* note 64, at 27-28; Roger A. Fairfax, Jr., *Criminal Mediation*, in AM. BAR ASS’N, THE STATE OF CRIMINAL JUSTICE 291 (2012); Fairfax, *supra* note 12, at 614-15; Mary D. Fan, *Street Diversion and Decarceration*, 50 AM. CRIM. L. REV. (forthcoming 2013). However, it should be noted that specialty courts have their critics, some of whom see



for tremendous cost savings.<sup>69</sup> They also may have net beneficial effects on indigent defender caseloads by moving low-level offenses and low-level offenders out of the mainstream criminal justice system and freeing attorneys and resources to focus on more serious matters.<sup>70</sup>

### *B. Greater Collaboration with Criminal Justice Stakeholders*

Another key feature of the smart-on-crime approach is an emphasis on partnership among criminal justice stakeholders in the development of policy.<sup>71</sup> This push toward greater collaboration among criminal justice stakeholders presents a tremendous opportunity for the increased input of indigent defense service providers.<sup>72</sup> If there has been a tendency for the indigent defense community to close ranks, such insularity is quite understandable given the neglect historically suffered by the indigent defense system. With policymakers often unreceptive to the frequent demands of the public defense system for adequate resources to fulfill their constitutional and ethical duties, those within the system, not surprisingly, may be reluctant to show their cards when discussions of resource allocation and policy innovation occur. Furthermore, established criminal defense ethics and the duty of zealous advocacy naturally produce a much narrower, client-centered professional focus than that which animates the roles played by other criminal justice actors.<sup>73</sup>

However, governmental entities and NGOs recently have encouraged the exploration of, and collective solutions to, problems in the criminal justice

---

these courts as potentially burdening defense counsel, interfering with the attorney-client relationship, and undermining the rights and interests of the defendants who participate. See, e.g., JUSTICE DENIED, *supra* note 3, at 77 (observing that specialty courts “place[] an additional burden on public defense”); Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 786-90 (2008); Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006); Eric J. Miller, *Embracing Addiction: Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L.J. 1479 (2004).

69. See, e.g., Roberts, *supra* note 55, at 331-33.

70. See LEFSTEIN, *supra* note 18, at 19-24; JUSTICE DENIED, *supra* note 3, at 65-70; Backus & Marcus, *supra* note 7, at 1125-26; Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 WASH. U. J.L. & POL’Y 205 (2011).

71. See, e.g., Fairfax, *supra* note 12, at 611 & n.106.

72. See Schumm, *supra* note 10, at 24-27.

73. See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations To Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1244-59 (1993) (highlighting client-centered and systemic norms animating the public defender role).

system,<sup>74</sup> many of which disproportionately burden indigent criminal defense. In this new environment, there are opportunities for the voices of the indigent defense community to be heard. For example, throughout the country, state and local coordinating commissions and councils bring together the principal stakeholders from across the criminal justice system to discuss issues of common interest.<sup>75</sup> Also, the Department of Justice recently funded and supported a high-level focus group of leaders in the indigent defense reform community.<sup>76</sup> The focus group, which was convened by the American Bar Association and the National Association of Criminal Defense Lawyers, brainstormed strategies that could be implemented to improve the delivery of indigent defense services. All of the proposed reforms contemplated the assistance and cooperation of the Justice Department, and the Attorney General has expressed optimism that the findings of the focus group would continue to serve as a blueprint.<sup>77</sup>

---

74. See, e.g., *About Us*, NAT'L CTR. FOR JUST. PLANNING, <http://www.ncjp.org/about-us> (last visited Mar. 28, 2013).

75. For example, the Criminal Justice Coordinating Commission in Montgomery County, Maryland, a large jurisdiction bordering the District of Columbia, features the participation of all of the principal criminal justice stakeholders in the county. See *Criminal Justice Coordinating Commission*, MONTGOMERY COUNTY, MD., <http://www6.montgomerycountymd.gov/mcgtmpl.asp?url=/Content/CJCC/index.asp> (last updated Apr. 26, 2011). Among these are the chief prosecutor, police chief, director of corrections, chief judges of the trial and appellate courts, county executive, chair of the judiciary committee of the county council, public representatives, and chief public defender. The commission meets quarterly and encourages robust discussion of the policy consequences and budgetary effects of actions being contemplated by the various agencies. Such interaction and communication increases the likelihood that policies will be designed and implemented with the benefit of the perspective of the indigent defense community. See also, e.g., *History of CJCC*, D.C. CRIM. JUST. COORDINATING COUNCIL, <http://cjcc.dc.gov/page/history-cjcc> (last visited Mar. 28, 2013) (“CJCC plays an important role in facilitating an independent collaborative forum for stakeholders to address the District’s longstanding and emerging public safety issues.”); ILL. CRIM. JUST. INFO. AUTHORITY, <http://www.icjia.state.il.us/public/index.cfm> (last visited Mar. 28, 2013) (“The authority brings together key leaders from the criminal justice system and the public to identify critical issues facing the criminal justice system in Illinois, and to propose and evaluate policies, programs and legislation that address those issues.”).

76. See Schumm, *supra* note 10, at 5-6.

77. See *id.*; Eric Holder, Att’y Gen., Address at the American Bar Association National Summit on Indigent Defense (Feb. 4, 2012) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html>). In addition, in 2010, the Obama Administration established the Access to Justice Initiative within the Justice Department, the purpose of which is to “address the access-to-justice crisis in the criminal and civil justice system.” *The Access to Justice Initiative*, U.S. DEP’T OF JUST., <http://www.justice.gov/atj> (last visited Mar.

Advocacy groups also have trumpeted collaboration as a key strategy to improve the delivery of indigent defense services.<sup>78</sup> One example is the suggestion made by a high-profile indigent defense focus group that prosecutors consult the indigent defense community when considering new enforcement initiatives.<sup>79</sup> In a similar vein, the National Legal Aid and Defender Association and the National Association of Criminal Defense Lawyers recently issued a joint resolution urging policymakers to issue “justice system impact statements” when proposing new criminal laws or policies.<sup>80</sup> The concern expressed by these groups is that criminalization and enforcement are often ramped up without due consideration of the costs imposed on all criminal justice stakeholders,<sup>81</sup> including “the impact on the nation’s over-extended and under-funded indigent defense system.”<sup>82</sup> With the collaborative spirit of the smart-on-crime agenda, the indigent defense community can better ensure its imprint on criminal justice policy. Having indigent defense

---

28, 2013). Also, the Department’s recent guidance for state applicants to the federal Edward Byrne Memorial Justice Assistance Grant Program emphasized that indigent defense was one of the Department’s top funding priorities and that all grant seekers are encouraged to engage in broad-based collaboration to consider the impact of potential funding on all stakeholders. See *Edward Byrne Memorial Justice Assistance Grant (JAG) Program FY 2012 State Solicitation*, U.S. DEP’T OF JUST. 12 (Mar. 28, 2012), <https://www.bja.gov/Funding/12JAGStateSol.pdf>. (“To ensure that the impact of Byrne JAG funding decisions is considered across the entire criminal justice system, we are redoubling our efforts to encourage state and local jurisdictions to bring *all* system stakeholders together in the strategic planning process. Our recommended guidelines are that at a minimum, the strategic planning process includes law enforcement, courts, prosecutors, indigent defense providers, victim advocates, and corrections officials.”).

78. See, e.g., Melanca Clark & Emily Savner, *Community Oriented Defense: Stronger Public Defenders*, BRENNAN CENTER FOR JUST. 39-41 (2010), <http://www.brennancenter.org/sites/default/files/legacy/Justice/COD%20Network/Community%20Oriented%20Defense-%20Stronger%20Public%20Defenders.pdf>. For example, the American Bar Association, which has been at the vanguard of partnership building in the criminal justice reform arena, see ABA CRIMINAL JUSTICE SECTION, ANNUAL REPORT 2011-2012, at 62 (describing roundtables of criminal justice stakeholders), has an explicit policy supporting collaborative approaches as a means to improve the delivery of indigent defense. See *Resolution 107*, A.B.A. (Aug. 9, 2005), [http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/20110325\\_aba\\_res107.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/20110325_aba_res107.authcheckdam.pdf).
79. See Schumm, *supra* note 10, at 38.
80. See Press Release, Nat’l Legal Aid & Defender Ass’n, DOJ Needs To Consider Its Full Impact on System, Say Public Defenders and Private Criminal Defense Lawyers (Aug. 20, 2012), <http://www.nacdl.org/newsreleases.aspx?id=24946>.
81. See Stevenson, *supra* note 10, at 342-43; Schumm, *supra* note 10, at 38.
82. See Press Release, *supra* note 80.

agencies at the policymaking table ensures that a proposed policy's effect on the delivery of indigent defense will not be ignored or overshadowed by other criminal justice priorities.

## **CONCLUSION**

As we celebrate the golden anniversary of *Gideon*, it is important to contextualize our commitment to improving indigent criminal defense within the broader criminal justice policy agenda. Whether it is the focus on reducing our reliance on incarceration, tackling overcriminalization, or working with other criminal justice actors to find cost-effective ways to reduce crime and recidivism, much of the promising new smart-on-crime agenda is compatible with the aims of the indigent defense reform effort. In turn, the stronger our indigent criminal defense system is, the more cost-effective and efficient our criminal justice system will be. In this view, fulfilling the dream of *Gideon* is, inherently, smart on crime.