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## Too Low a Price: Waiver and the Right to Counsel

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# TOO LOW A PRICE: WAIVER AND THE RIGHT TO COUNSEL

*Zachary L. Heiden*

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## TOO LOW A PRICE: WAIVER AND THE RIGHT TO COUNSEL

Zachary L. Heiden \*

### I. INTRODUCTION

Easy waiver of the right to counsel is at the heart of the problem with inadequate funding for criminal defense counsel for the indigent: without freely granted waiver of the right to counsel, the crisis in funding for indigent defense would, in the short term, be greatly magnified. But, the ready acceptance of the waivability of the right to counsel devalues and diminishes the significance of the assistance of counsel in criminal matters.

#### A. *The Current Scope of the Right to Counsel*

As it stands today, when the government accuses an individual of a crime, that person has the right to the assistance of counsel for their defense.<sup>1</sup> If conviction carries the potential for the deprivation of life or liberty, or if the accused is a juvenile,<sup>2</sup> then the government must bear the expense of representation if the accused also meets the eligibility requirements for indigence.<sup>3</sup> For most others in the criminal system, the choice is between hired private counsel or self-representation.<sup>4</sup>

The right to counsel in criminal proceedings is guaranteed by the Sixth

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\* Legal Director, Maine Civil Liberties Union Foundation. The views expressed here are the author's own and may not be shared by the Maine Civil Liberties Union or the American Civil Liberties Union. Then again, they may. Thanks to Shenna Bellows, Kent Greenfield, Alisha Goldblatt, Gregory Heiden, Edward Reilly, Aviam Soifer, Corey Stoughton, and Ben Wizner for comments, suggestions, and encouragement. Thanks also to the *Maine Law Review* for the invitation to participate in this symposium edition and for devoting an issue to such a significant matter of public concern.

1. *Powell v. Alabama*, 287 U.S. 45, 73 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 345-46 (1963).

2. *In re Gault*, 387 U.S. 1, 41 (1967) (holding that the right to appointed counsel applies when proceedings may result in juvenile's commitment to an institution).

3. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972) (holding that the right to appointed counsel applies whenever actual deprivation of liberty could be imposed); *Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (holding that the right to appointed counsel applies even when sentence of incarceration is suspended and defendant is placed on probation). *But see* *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that no right to appointed counsel applies when crime carries potential punishment of incarceration but prosecution agrees to only seek fine). For a general overview of the right to counsel, see Marisa Van Dongen & Michelle B. Nadler, *Right to Counsel*, 86 GEO. L.J. 1593 (1998).

4. The right to counsel is generally regarded as a federal constitutional matter, though a number of states do provide greater protection under state common law, state statute, or state constitutions. All criminal defendants in Oregon have the right to appointed counsel, OR. CONST. art. I, § 11, as do all criminal defendants in Tennessee, TENN. CODE ANN. § 40-14-102 (2005). The class of defendants entitled to appointed counsel in Massachusetts is also larger than current interpretations of the federal constitution requires. MASS. CONST. pt. 1, art. 12; MASS. GEN. LAWS ch. 263, § 5 (2008). See NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL n.31 (2009), [http://www.nlada.org/DMS/Documents/1239831988.5/Justice\\_Denied\\_Right\\_to\\_Counsel\\_Report.pdf](http://www.nlada.org/DMS/Documents/1239831988.5/Justice_Denied_Right_to_Counsel_Report.pdf) (last visited Mar. 25, 2010).

Amendment, which states that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”<sup>5</sup> The Supreme Court has recognized an absolute right to the assistance of counsel in cases that carry the threat of imprisonment and an absolute obligation on the government to provide counsel when a person cannot afford a lawyer.<sup>6</sup> That right attaches when the adversarial proceeding begins, which, for many defendants, is when they are first brought to court, told of the charges against them, given an opportunity to enter a plea, and given an opportunity to negotiate bail.<sup>7</sup>

It is very significant that the right to counsel attaches at the very beginning of the criminal process and not only when a defendant actually goes to trial. Most criminal cases—as most readers of this paper no doubt know—do not go to trial.<sup>8</sup> They are resolved with a plea negotiation, and the opportunity for advocacy in that plea negotiation begins as soon as a person is aware of the charge against her. For those who can afford their own lawyer, advocacy begins as soon as the lawyer is hired. For those who must wait for the adversarial proceeding to formally begin, and for financial eligibility for court-appointed counsel to be sorted out, any further loss of advocacy opportunities only sinks the person deeper into the hole, having already potentially spent time in jail because of the lack of bail negotiations or having missed opportunities to begin speaking to witnesses. It is no understatement to say that the recognition of the fundamental right to counsel in *Gideon v. Wainwright*<sup>9</sup> was one of the most significant jurisprudential developments in our history; but it would be an overstatement to say that this recognition has succeeded in placing poor defendants on equal footing with those defendants able to hire counsel at the first sign of trouble.

The Supreme Court has recognized that lawyers in criminal cases are necessities, not luxuries.<sup>10</sup> Individuals handle their own criminal representation for one of two broad reasons: they cannot afford an attorney or they can afford an attorney but choose not to hire one. But, as lawyers and non-lawyer television watchers well know, “if you cannot afford an attorney, one will be provided for you,” where “you” is a criminal defendant and “provided” means at the government’s expense. Within the class of defendants who cannot afford an attorney, there are two further sub-classes worth delineating: those defendants who

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5. U.S. CONST. amend. VI.

6. *Gideon*, 372 U.S. at 344 (“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”).

7. *Coleman v. Alabama*, 399 U.S. 1 (1970).

8. A study by the United States Department of Justice based on charges filed in May 2004 in the seventy-five most populous counties in the United States found that, of the 57,497 felony cases filed, approximately 60 percent were convicted, with nearly 97 percent of the convictions resulting from a guilty plea. Tracey Kyckelhahn & Thomas H. Cohen, *State Court Processing Statistics: Felony Defendants in Large Urban Counties, 2004*, BUREAU OF JUSTICE STATISTICS BULLETIN, April 2008, at 1, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf> (last visited Apr. 25, 2010).

9. 372 U.S. 335.

10. *Id.* at 344. See also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (holding that a defendant’s right to counsel was of paramount importance; that courts should strongly disfavor relinquishment of that right; and that waiver of the Sixth Amendment right to counsel must be knowing, intelligent, and voluntary).

are not eligible for court-appointed counsel because their offense does not carry the threat of incarceration (“indigent misdemeanants”) and those defendants who cannot as a matter of personal finance actually afford an attorney, but who are nonetheless not eligible for court-appointed counsel because they are not indigent enough (“insufficiently indigent”).<sup>11</sup>

This Article discusses the interconnectedness of the plights of these three classes of defendants. Allowing too many participants in the criminal justice system to proceed without counsel contributes to a public perception—and a perception on the part of the legislators who authorize funding for indigent legal services—that criminal defense lawyers are not a necessary component in a fair criminal trial. This, in turn, means that legislatures are unwilling to adequately fund indigent defense systems, leading to a crisis in the courts that seals the fate of future indigent defendants. The acceptance of easy waivers today means that there will never be money tomorrow to provide court-appointed counsel to defendants facing only fines—plus collateral consequences—or to expand the definition of indigence to take account of the high cost of private defense.

### B. *The Undervalued Lawyer*

It is beyond question that the indigent defense systems in this country are broken, and many states are in the process of considering mechanisms for addressing the shortcomings.<sup>12</sup> Some states have come to this realization on their own,<sup>13</sup> while others have had their hands forced by class-action law reform cases addressed at inadequate fulfillment of *Gideon*’s promise.<sup>14</sup> Proposed solutions

11. In Virginia, a single person must make less than \$13,538 per year to be eligible for court-appointed counsel. State of Virginia Eligibility for Court-Appointed Counsel (July 1, 2009), [http://www.courts.state.va.us/courtadmin/aoc/djs/resources/indigency\\_guidelines.pdf](http://www.courts.state.va.us/courtadmin/aoc/djs/resources/indigency_guidelines.pdf) (last visited Mar. 25, 2010). In Maine, a single person must make less than \$11,963, while a family of four must not have a combined gross income of more than \$24,188. State of Maine Guidelines for Determination of Financial Eligibility for Court-Appointed Counsel and Reimbursement for Court-Appointed Counsel, Admin. Order JB-05-6 (Aug. 1, 2005), [http://www.courts.state.me.us/court\\_info/opinions/adminorders/JB-05-6\\_Fin\\_Eligibility.htm](http://www.courts.state.me.us/court_info/opinions/adminorders/JB-05-6_Fin_Eligibility.htm) (last visited Mar. 25, 2010).

12. See generally NAT’L RIGHT TO COUNSEL COMM., *supra* note 4; *Representation of Indigent Defendants in Criminal Cases: A Constitutional Crisis in Michigan and Other States?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the Comm. on the Judiciary*, 111th Cong. (2009), [http://judiciary.house.gov/hearing/printers/111th/111-20\\_48233.pdf](http://judiciary.house.gov/hearing/printers/111th/111-20_48233.pdf) (last visited Apr. 25, 2010); Ronald W. Schneider, Jr., Comment, *A Measure of Our Justice System: A Look at Maine’s Indigent Criminal Defense Delivery System*, 48 ME. L. REV. 335 (1996).

13. In 2008, a group of judges, legislators, executive branch officials, and other stakeholders in Maine came together to produce a report on deficiencies in Maine’s indigent legal services system, along with strategies for improvement. This led to the drafting of legislation, An Act to Establish the Maine Commission on Indigent Legal Services, which was signed into law in June 2009. L.D. 1132, 124th Leg., 1st Reg. Sess. (Me. 2009) (enacted), [http://www.mainelegislature.org/legis/bills/bills\\_124th/billpdfs/SP042301.pdf](http://www.mainelegislature.org/legis/bills/bills_124th/billpdfs/SP042301.pdf) (last visited Mar. 25, 2010). The Act created and funded a five-person commission, with the authority to oversee the provision of legal representation in criminal and child-protective proceedings in Maine. L.D. 1132 at 2.

14. *A.M. v. Martin*, No. 1:96-cv-02316-JEC (N. D. Ga. judgment entered Sept. 2, 1998); *Hurrell-Harring v. New York*, 883 N.Y.S.2d 349 (2009); *Plaintiffs’ Original Class Action Petition, Heckman v. Williamson County*, No. 06-453-C277 (D. Tex. June 12, 2006); *White v. Martz*, No. CDV-2002-133, 2006 Mont. Dist. LEXIS 136 (D. Mont. Jan. 25, 2006); Third Amended Class Action Complaint at 14-34, *Doyle v. Allegheny County Salary Bd.*, No. DG-96-13606 (Pa. D. & C.5th Nov. 21, 1997). All were

abound. One scholar has observed that further limiting the right to counsel for indigent misdemeanants to also exclude those only facing minimal jail time would free up scarce resources for felony representation, where counsel might make more of a difference.<sup>15</sup> In part, she blames the problem of excessive caseloads on the expansion of the right to counsel in misdemeanor cases.<sup>16</sup> “Lacking sufficient funds to hire additional attorneys to handle the influx of new cases,” she observes, “decision makers at every level of government have simply piled additional cases on top of the existing caseloads of indigent defense attorneys.”<sup>17</sup> Her solution—reduce the caseload of defense counsel by restricting the right to counsel—sounds eminently practical, but I would like to argue that it is precisely backwards.

Instead, the way to ensure improvement in the indigent defense system is to make decision-makers reevaluate the importance of defense counsel. If legislators believe that defense counsel is a critical component to the criminal justice system, and that the criminal justice system itself is important, they will fund it accordingly and appropriately. However, legislators will never believe that defense counsel is necessary if millions of defendants each year continue to act as their own lawyers. Rather than restricting the access to defense counsel, the solution to our indigent defense system problems rests with further restricting the waiver of the right to counsel.

## II. THE CRISIS IN INDIGENT LEGAL DEFENSE

### A. *Guilty or Not*

Visit the local trial court when arraignments are taking place and what greets you is a parade of people looking for the fastest way to conclude their business at the court that day.<sup>18</sup> Tell them, or even just suggest to them, that waiving the right to counsel and entering a plea of guilty will allow them to make a short stop at the fine window before going home, and evidence suggests that this is exactly what many of them will choose, whether they understand the nature of the offense with which they are being charged, the scope of the right to counsel, the availability of legal defenses, or the collateral consequences of a guilty plea.

To visit a court house on arraignment day is to be confronted with a disturbing spectacle of justice as applied. The courtroom is mostly full of young people (some with parents by their side), adults on their way to work, individuals speaking

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law-reform class-action cases brought to address deficiencies in the availability and adequacy of counsel in for indigent criminal defendants.

15. Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007).

16. *Id.* at 465.

17. *Id.*

18. My personal observations are drawn from my experiences observing courts in Maine, where I practice, but the experiences of other lawyers throughout the country suggest that these observances are the norm. For a particularly insightful discussion of the chasm between the right to counsel and the reality for many defendants, see Andrew Horowitz, *The Right to Counsel in Criminal Cases: The Law and the Reality in Rhode Island District Court*, 9 ROGER WILLIAMS U. L. REV. 409 (2004).

many different languages, and more than a few speaking to themselves.<sup>19</sup> Some of the people are in shackles and orange jumpsuits, having been brought to the courthouse directly from jail. Some people—very few—have brought lawyers with them. For most people able to afford a lawyer, the lawyer takes care of many of the details usually associated with an initial appearance by mail or phone. There may be a lawyer in the back of the room or in the hallway—a “lawyer of the day”—attempting to provide emergency advice, but the advice is necessarily boilerplate and barely resembles the considered, researched, individualized assessment that is usually what people mean when they say “legal advice.”

When I have attended arraignment day as an observer, I have found myself barraged with questions—questions that, despite my legal training, my courtroom experience, and my expertise in some areas of constitutional criminal procedure, I felt woefully incapable of answering. Without knowing the specifics of a person’s alleged offense, seeing the prosecution’s evidence, researching the available defenses, and calculating the consequences of various convictions, how could I possibly provide advice in such a situation? What would the law professors and judges and lawyers who oversaw my training think of me if I were to offer off-the-cuff guidance masquerading as legal advice? But at the same time, though I was at a loss as to what the proper course of action was for the dozens of defendants present that day, I was still, objectively, one of the most well informed people in the room. I am a law school graduate, a member in good standing of the state and federal bar, a former law clerk who has reviewed many criminal cases, and a practicing lawyer. Though I do not usually practice criminal law, I have written, spoken, and lobbied on topics in criminal law and constitutional criminal procedure, including the definition of crimes, lengths and types of sentences, police conduct, personal privacy and government investigation, and the right to counsel. Though I did not know enough to provide what I would regard with confidence as sound legal advice, I certainly knew more than most of the people in the courtroom making their initial (and in many case, final) appearance before the judge. If I did not know enough to say with confidence what the right course of action was, then surely these defendants did not either.

And what these defendants were being called upon to say had substantial consequences for their future well-being. As two scholars have argued, “The most important service that criminal defense lawyers perform for their clients is not dramatic cross-examination of prosecution witnesses or persuasive closing arguments to the jury; it is advising clients whether to plead guilty and on what terms.”<sup>20</sup> Justice Thomas noted, in *Godinez v. Moran*, that the act of pleading guilty involves a number of critical decisions, including whether to waive the privilege against compulsory self-incrimination; whether to waive the right to trial

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19. Mental health and self-representation is a pressing problem and a rich topic for research. For one perceptive take on the issue, see Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921 (1985). See also *Godinez v. Moran*, 509 U.S. 389 (1993) (holding that the competency standard for waiving the right to counsel is the same as the competency standard for standing trial). Individuals with mental illness subject to involuntary commitment proceedings are entitled to court-appointed counsel. *Vitek v. Jones*, 445 U.S. 480, 497 (1979).

20. Gabriel J. Chin & Richard Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698 (2002).

by jury; and whether to waive the right to confront accusers.<sup>21</sup> Individuals without counsel must make this critical decision without the aid of informed educated advice. By allowing individuals to make these decisions, it devalues the perception of the role that lawyers play in providing such counsel.

### B. *Netflix Justice*

Arraignment, or initial appearance, in a criminal matter can mean many different things, and the practices vary from courtroom to courtroom, even within the same justice system in the same state. But, typically, the assembled group is read a speech explaining the operation of the courtroom, the order of events that will occur, and the right of everyone accused of a crime to be assisted by an attorney. Often, in particularly busy courts, the speech is presented by video—”Netflix Justice”—and even if a person is paying attention, and is capable of absorbing complex concepts of constitutional criminal defense via video, there is no guarantee that that person will have an unencumbered view of the screen or an adequate opportunity to hear the audio portion.<sup>22</sup>

The clerk then begins calling out names. As a name is called, a person comes forward and is formally notified of the criminal charge with which he is being accused. Depending on the court and the offense, the prosecutor may inform the individual (and the court) whether there is a possibility of jail time for that offense; if so, or if the person is a juvenile, he may be entitled to a free attorney. In 1963, the Supreme Court recognized this obligation in *Gideon v. Wainwright*, where the Court noted that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial” without counsel.<sup>23</sup>

For most people brought into the criminal justice system, this is as far as it gets. The prosecutor informs the judge that no jail time is being sought; the defendant tells the judge that she would like to plead guilty; and the judge asks her whether she understand the consequences of a guilty plea. I would like to stipulate that it is not possible that most of these defendants actually understand the consequences of their guilty plea, but they almost always claim that they do and the judge then accepts their plea. The individual now has a criminal record, and she typically then leaves the courtroom to find the window where she can pay the fine.

### C. *Collateral Consequences*

Beyond the fine and the hassle of having to show up in court, listen to a video, and then talk to a judge, some of the consequences of that guilty plea include: being asked whether he or she has a criminal record when applying for employment, housing, or bank loans. Individuals can be denied jobs, housing,<sup>24</sup> and credit based

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21. *Godinez*, 509 U.S. at 398-99 (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).

22. For a discussion of a number of the problems of arraignment day, including the seemingly ubiquitous arraignment video, see Andrew Horowitz, *supra* note 18. Horowitz’s observations support many of the generalities that I have noted.

23. 372 U.S. 335, 344.

24. For more on the lack of housing options for individuals with criminal records, even records for shoplifting charges and not paying for video rentals, see HUMAN RIGHTS WATCH, NO SECOND CHANCE:

on their criminal record, with no legal recourse. If an individual is not a citizen, he or she can also be deported as a consequence of a conviction for a number of different crimes.

Approximately 5.3 million American citizens have lost the right to vote because of a criminal conviction.<sup>25</sup> Most states only disenfranchise felons, but as a result of widespread confusion about the law, possibly hundreds of thousands of eligible voters with misdemeanor convictions are denied the right to vote.<sup>26</sup> The defendant hurriedly pleading guilty to a misdemeanor shoplifting offense is probably unaware at that moment whether that plea will, as a matter of law, temporarily or permanently jeopardize his ability to exercise his fundamental right to vote in the future, or whether officials in his state are adequately informed about the law to make sure he is not mistakenly purged from the voter rolls.

Finally, every state in the country maintains a registry for sex-related offenses.<sup>27</sup> Just as every state defines what constitutes a crime within its borders, each state also defines which offenses trigger sex-offender registration requirements. Typical requirements include notifying the police of any change in address or employment; appearing at the police station for regular fingerprinting and photographing; not living in certain neighborhoods; not visiting certain areas; not coming in contact with children; and not holding certain professions. The requirements shift from year to year, as does the definition of a registrant, and, as far as the federal courts are concerned, these shifts do not trigger a right to notice and a hearing.<sup>28</sup>

### III. UNKNOWING, UNINTELLIGENT, INVOLUNTARY: *FARETTA*'S LEGACY

Understanding the “collateral consequences”<sup>29</sup> of a guilty plea, though, is

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PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 54 (2004), <http://www.hrw.org/reports/2004/usa1104/usa1104.pdf> (last visited Apr. 25, 2010).

25. ERIKA WOOD & RACHEL BLOOM, *DE FACTO DISENFRANCHISEMENT: A REPORT OF THE AMERICAN CIVIL LIBERTIES UNION AND THE BRENNAN CENTER FOR JUSTICE* 1, [http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement\\_report.pdf](http://www.aclu.org/pdfs/racialjustice/defactodisenfranchisement_report.pdf) (last visited Mar. 25, 2010).

26. *Id.* at 1-2.

27. *See* 42 U.S.C. §14071 (2009) (requiring each state to establish a sex-offender registry meeting certain federal requirements).

28. *See, e.g.*, *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003) (“We find it unnecessary to reach this question, however, because even assuming, *arguendo*, that respondent has been deprived of a liberty interest, due process does not entitle him to a hearing to establish a fact that is not material under the Connecticut statute.”); *Doe v. Miller*, 405 F.3d 700, 708-11 (8th Cir. 2005) (finding no due process violation on residency and travel restrictions for Iowa sex-offender registrants).

29. In this context, “collateral consequences” is the term generally used to refer to the negative consequences of a guilty plea or criminal condition beyond the sentence or fine imposed by the court, though this delineation has the unfortunate effect of subordinating penalties that may have severe lasting impacts on an individual—such as loss of the ability to vote; hindrance of the ability to get a job, an apartment, an education, or a loan; forced deportation; or imposition of lifetime criminal registry requirements—to penalties that may be resolved in a few hours or days. Curiously, while it has long been clear that failing to advise a client of the criminal penalties attendant upon a certain course of action can constitute ineffective assistance of counsel, only recently have courts begun to recognize an obligation on the part of defense counsel to advise clients of all the other negative consequences not encapsulated in the criminal code. *Compare Santos-Sanchez v. United States*, 548 F.3d 327, 333-34

obviously only relevant for those individuals inclined to plead guilty—the stakes are even higher for those people who did not actually do anything wrong. For those individuals mistakenly accused of a crime, or accused of a crime for which there exists an adequate legal defense, the challenges are greatly magnified.<sup>30</sup> Criminal defense is a specialized profession, and people who understand how to do it can make a good living at it. Once in a great while, someone without any education or training does a capable job of representing himself or herself in court. But, like the piano prodigy who begins composing without ever taking a lesson, these individuals are not the norm. For over seventy-five years, lawyers and judges have quoted (probably with some self-regard) Justice Sutherland's opinion from *Powell v. Alabama*, as the last word on this subject:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.<sup>31</sup>

What if it was done differently? Imagine instead if courts took seriously the notion of strongly disfavoring waiver of fundamental rights and refused to take the plea of someone who had not spoken with an attorney familiar with the defendant's particular alleged offense as well as criminal law generally. That person could not only help the defendant evaluate whether the prosecution would be able to meet its burden of proving each element of the crime beyond a reasonable doubt, and whether there might be a lesser offense that a person might bargain for, but they could also explain in greater detail the consequences of pleading guilty to a crime.

The short, simple answer for why our justice system is not organized in this way—money—only serves to raise more concerns: there is always public money for some things and not for others, and what programs receive funding is not arbitrary.<sup>32</sup> Defense counsel for people accused of crimes is required by the U.S.

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(2008) (finding no ineffective assistance of counsel when defense counsel failed to accurately advise defendant of possibility of deportation following a guilty plea) *with* *United States v. Kwan*, 407 F.3d 1005, 1015-16 (2005) (holding that counsel provided ineffective assistance when he misled his client about the immigration consequences of a conviction).

30. Defendants must understand the direct consequences of a guilty plea for it to be valid, *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969), but it is not a due process violation for an individual to plead guilty simply for the purpose of avoiding the death penalty, *Brady v. United States*, 397 U.S. 742, 755 (1970).

31. *Powell*, 287 U.S. at 68-69. Westlaw shows 11,421 citing references for *Powell*.

32. The political science literature on this general topic is well developed, and it is beyond the scope of this paper to represent it here. For two specific insightful analyses, see Barbara Norrander & Clyde Wilcox, *Public Opinion and Policymaking in the States: The Case of Post-Roe Abortion Policy*, 27 *POL'Y STUD. J.* 707 (1999) and Gregory B. Lewis & Michael Rushton, *Understanding State*

Constitution, while most government programs that receive their fair share of funding are not. That should, in theory, make a difference. It does not.<sup>33</sup>

The situation I have described is most acute for the insufficiently indigent and the indigent misdemeanant, who are unable to rely on the guidance of counsel for plea decisions and bail negotiations. But there is also an unfortunate dimension to the cases of those defendants who are eligible for court-appointed counsel, or who are able to afford counsel, but nonetheless find themselves in the position of making these critical decisions without counsel. In *Faretta v. California*, the Supreme Court recognized that the Sixth Amendment right to counsel also includes a right to self-representation.<sup>34</sup> *Faretta* involved a man accused of grand theft who requested that he be allowed to handle his own defense at trial.<sup>35</sup> The defendant was warned by the court that it would be a mistake, but if that was the defendant's wish, he would be allowed to defend himself.<sup>36</sup> Then, the court changed its mind, and forced an attorney on the defendant, requiring that the entire defense be conducted by the court-appointed attorney.<sup>37</sup> The jury found the defendant guilty, and the defendant appealed.<sup>38</sup> After affirmance in the appellate court and denial of the appeal by the Supreme Court of California, the United States Supreme Court granted certiorari and held that, because "[Mr.] Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will," it was not appropriate for the trial court to force counsel on him.<sup>39</sup> *Faretta* ought to be regarded as a retreat from the understanding of the role of criminal defense counsel in the criminal process put in place under *Gideon*. While in *Gideon* (and *Shelton*) the Court placed enormous weight on both the complexities of the criminal justice process and the training of counsel in the science of law, *Faretta* demotes the defense attorney to a clerk, observing of the Sixth Amendment: "It speaks of the 'assistance' of counsel, and an assistant, however expert, is still an assistant."<sup>40</sup> Too easily, *Faretta* couches the waiver of the right to counsel in terms of the right of the individual to make decisions about his or her own fate.<sup>41</sup> So long

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*Government Appropriations for the Arts: 1976-1999* (Andrew Young School of Policy Studies, Working Paper No. 07-02, 2007).

33. In evaluating the relationship between the state budget crises and funding for indigent defense services, the National Right to Counsel Committee cited an insightful column from Greg Kesich of the *Portland Press Herald*: "[T]his issue is not going to get the attention it deserves from the Legislature because it has come up at a time when budgets are being cut, not increased. . . . And there is no political muscle behind indigent defense. . . . But the difference is, none of those programs is required by the U.S. Constitution. According to the Supreme Court, indigent defense is, so failing to meet that responsibility is against the law." NAT'L RIGHT TO COUNSEL COMM., *supra* note 4, at 183 (quoting Greg Kesich, *Criminal Defense Costs Could Be the State's Next Crisis*, PORTLAND PRESS HERALD, Dec. 17, 2008, at A10).

34. 422 U.S. 806, 832 (1975).

35. *Id.* at 807.

36. *Id.* at 807-08.

37. *Id.* at 810.

38. *Id.* at 811.

39. *Faretta*, 422 U.S. at 835-36.

40. *Id.* at 820.

41. See *United States v. Farhad*, 190 F.3d 1097, 1106-07 (9th Cir. 1999) (Frankfurter, J. concurring) (discussing ways that autonomy concerns are outweighed by due process right to fair trial); compare Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N. C. L. REV. 621 (2005) (exploring the

as waiver is knowing, intelligent, and voluntary, it would be the height of paternalism to tell someone the best way to defend herself, or whether she ought to even bother defending herself.

That would be bad enough, but most “waiver” cases are not *Faretta*—after-the-fact challenges to the denial of the right to self-representation. In *Martinez v. Court of Appeal of California*, in the course of rejecting the notion of a right to self-representation on direct appeal, the Supreme Court observed that the “right” to self-representation was less likely to be used as a shield for wrongly convicted defendants than as a sword in the hands of prosecutors to argue that an unrepresented defendant had waived the right to counsel and should be held responsible for his missteps and mistakes.<sup>42</sup> Instead of protecting defendants, *Faretta* protects judges from reversal, so long as they are able to make a record that a defendant knowingly, intelligently, and voluntarily relinquished the right to counsel and exercised the right to go it alone.

The fiction that waivers are always, or even usually, or even occasionally, knowing and intelligent is easily pierced. In the case *United States v. Cronin*, the Supreme Court explained that the right to counsel in criminal matters is the right to a fair fight in the adversarial criminal process; criminal counsel for the poor need the training, the skill, and the resources to meaningfully test the prosecution’s case—“the crucible of meaningful adversarial testing.”<sup>43</sup> In essence, *Cronin* stands for the premise that, evidence aside, both sides in a criminal matter start out on roughly equal footing. We can try to imagine, as a thought experiment, whether there is any setting when the State might waive its right to the assistance of counsel. If proceeding to trial without the assistance of counsel is an action that might knowingly and intelligently be undertaken, shouldn’t we be able to imagine when the government simply decides that the evidence in the case speaks for itself and that its prosecutors could busy themselves with other tasks? Unless you are more imaginative than I, it is impossible to envision such a scenario.<sup>44</sup>

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challenges facing the pro se defendant as well as the effect pro se representation has on the justice system as a whole), with Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N. C. L. REV. 423, 460-70 (2007) (discussing the legitimacy of the right to self-representation in terms of personal agency, with particular attention to the defendant’s interest in self-preservation).

42. 528 U.S. 152, 157 n.4 (2000).

43. 466 U.S. 648, 656 (1984).

44. Or, as Justice Black put it in his majority opinion in *Gideon v. Wainwright*:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

372 U.S. at 344.

## IV. THE COST AND VALUE OF CRIMINAL DEFENSE COUNSEL

A. *Resource Crisis in the Courts*

Providing counsel to poor defendants is expensive. As Chief Justice of the State of Maine Leigh Saufley recounted in her State of the Judiciary address in 2008, Maine spent \$12.8 million on constitutionally required counsel and \$45 million on all other judiciary expenses including salaries, facilities, and materials.<sup>45</sup> And though, according to Chief Justice Saufley, “[t]hose attorneys receive payments far below ordinary professional charges,” providing counsel for those unable to afford counsel in Maine is a rapidly rising budget item.<sup>46</sup> For the 73,039 criminal charges filed in the State of Maine in 2007, the state paid for attorneys for 16,950 people, at an average of \$254 per case in the state’s district court, which handles misdemeanors and non-jury trials, and \$490 per case in the state’s superior court, which handles felonies and jury trials.<sup>47</sup> Though the Maine Legislature budgeted \$12.1 million for indigent legal services in 2007, the actual expenditures were expected to rise to \$13.6 million for 2008, an increase of more than 11 percent.<sup>48</sup>

Add a few zeros to these dollar figures, and you can get a good estimate of the analogous situation in New York. In 2004, Judith Kaye, then-Chief Judge of the State of New York, convened a commission to study the effectiveness of the state’s indigent criminal defense system.<sup>49</sup> The Kaye Commission found that “New York’s indigent defense system is in a serious state of crisis and suffers from an acute and chronic lack of funding,” which has had a “deleterious impact on all aspects of indigent defense representation.”<sup>50</sup> Specifically, the Kaye Commission found that a lack of adequate funding lead to excessive caseloads; lack of full-time public defenders; lack of access to investigators, social workers, interpreters, and other necessary support services; lack of training; and minimal contact between defense counsel and their clients and the clients’ families.<sup>51</sup>

B. *Judges Take Notice*

Concern about costs is not just something that commissions worry over in reports, or chief justices complain about to legislators. This concern has also penetrated the courthouse walls, where it has shaped the interpretation of the right to counsel, not just the states’ responsibility under that right. In his concurring opinion in *Argersinger v. Hamlin*, Justice Powell worried that the Court’s decision

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45. Leigh I. Saufley, Chief Justice, Me. Sup. Jud. Ct., *The State of the Judiciary: A Report to the Joint Convention of the Second Regular Session of the 123rd Legislature 1* (Feb. 5, 2008), (transcript available at [http://www.courts.state.me.us/maine\\_courts/supreme/speeches/2008soj\\_rev2-12-08.pdf](http://www.courts.state.me.us/maine_courts/supreme/speeches/2008soj_rev2-12-08.pdf) (last visited Mar. 25, 2010)).

46. *Id.* at 6.

47. *Id.* at 6-7.

48. *Id.* at 6.

49. COMM’N ON THE FUTURE OF INDIGENT DEF. SERVS., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 1 (2006), [http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission\\_report06.pdf](http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf).

50. *Id.* at 17.

51. *Id.*

recognizing that the right to court-appointed counsel in all cases where the defendant faces the threat of incarceration imposed an unjustified financial burden on the state courts and their budgets: “It is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel.”<sup>52</sup>

Justice Powell’s candid observation has both a positive and normative component. The positive component—that financial concerns shape the interpretation of the scope of a constitutional right—is not surprising to anyone familiar with legal realism,<sup>53</sup> or its progeny, Critical Legal Studies<sup>54</sup> (in other words, anyone who attended law school in the past one-hundred years), with their emphasis on empirical evaluation of the consequences of legal decisions, as opposed to consideration of legal doctrine or text in exclusively formal terms. Its normative dimension is more troubling. One could retreat to a formal reading of the Sixth Amendment, and question why Justice Powell found the need to interpret the phrase “to have the Assistance of Counsel for his defense” to include the condition: “if it is not too much of a burden on the budget,”<sup>55</sup> or to limit the scope of the right to counsel only to cases where life or liberty is in jeopardy. After all, the framers of the Bill of Rights were capable of including the phrase “deprived of life, liberty, or property” in the Fifth Amendment, and there is no formal reason to believe that this limitation on the scope of the right to counsel would be implied in the Sixth Amendment simply because it was explicit in the Fifth Amendment; in fact, the opposite conclusion seems more likely.

But, instead of formalism, a more fruitful critique proceeds from the recognition that while government expenditures are always a scarce resource, there are always funds available for some programs and not for others. Starving the courts of resources by further limiting, for example, the classes of defendants for whom government-funded defense is available, does not make them more attractive to funders.

Though there are problems with felony representation,<sup>56</sup> the real problem is in

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52. 407 U.S. 25, 55 (1972) (Powell, J. concurring).

53. “Legal realism understands the law as indeterminate, necessitating judges to look to extralegal considerations.” Megan Gaffney, Note, *Boumediene v. Bush: Legal Realism and the War on Terror*, 44 HARV. C.R.-C.L. L. REV. 197, 197 (2009) (citing Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1922 (2005)).

54. “The basic ambition, to facilitate the reali[z]ation of a more ‘reflective’ politics, remained, but Unger’s critique was now directed more immediately against the formalist pretensions of positivist theories of law. . . . [I]t emphasi[z]ed the empirical in order to reveal the politics of law.” IAN WARD, INTRODUCTION TO CRITICAL LEGAL THEORY 60 (2d ed. 2004).

55. This is precisely the complaint that Justice Brennan levels in his dissent in *Scott v. Illinois*, 440 U.S. 367, 384 (1979) (Brennan, J., dissenting), which held that the right to counsel does not extend to a person accused of an offense that carries the potential punishment of incarceration, but only to defendants against whom a punishment of incarceration will actually be sought: “In my view, the plain wording of the Sixth Amendment and the Court’s precedents compel the conclusion that Scott’s uncounseled conviction violated the Sixth and Fourteenth Amendments and should be reversed.” *Id.* at 376.

56. In our nation’s seventy-five largest counties in May 2004 alone, there were 57,497 felony charges filed, and in 95 percent of the cases in which a conviction was obtained, it came as a result of a guilty plea. TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 1 (2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf> (last visited Mar. 25, 2010).

misdemeanor representation in state court. Most individuals charged with felonies do have counsel,<sup>57</sup> though there are still too many that do not. At the misdemeanor level, conversely, the discrepancy is particularly stark. Approximately one-third of individuals charged with a misdemeanor in federal court represent themselves during the proceedings.<sup>58</sup> Federal courts are able to draw on the federal public defender program, as well as attorneys appointed under the Criminal Justice Act,<sup>59</sup> to fulfill the need for representation; so if the federal system cannot assure representation, it is not surprising how much more worse off a state defendant can be.

State court prosecutions represent approximately 95 percent of all prosecutions in a given year.<sup>60</sup> In a survey of jail inmates, 28.3 percent of individuals who had been charged with a misdemeanor had no counsel.<sup>61</sup> In 2005 alone, state court prosecutors closed nearly 7.5 million misdemeanor cases.<sup>62</sup> Extrapolating from these statistics, we can assume that almost 2.2 million defendants participated in the criminal justice system without the aid of counsel in one year. Or, put another way, the right to counsel is not offended, in its current interpretive incarnation, by the practice of bringing more than two million people a year into court and imposing serious consequences upon them based on their unaided responses to accusations and questions they likely do not understand. That, one would hope, does not sound like a very fair system. And, if fairness is a quality that is valued in criminal justice systems, this inequity means that it is less likely that the legislators who control the county, state, and federal purse strings will devote additional funding to the system. In other words, if we recognize that it is important for legislators to have confidence in the fairness of the criminal justice system, we should be concerned about the outward manifestations of fairness. Nobody will believe our criminal justice system is fair if, at a minimum, it does not even look fair.

In order to alter the funding priorities of decision-makers, I suggest that 2.2 million misdemeanor defendants each year should not be allowed to enter a plea or negotiate bail or conditions of release without the advice and assistance of counsel who is familiar with their cases and trained in criminal law.

## V. CHANGING THE VALUE CALCULATION

### A. *Cross-discipline Insights*

The decision-makers who fund indigent legal services are economic actors, subject to the same forces (rational and otherwise) that guide the decisions of other economic actors. As such, it is worth considering their decisions about the proper funding level for indigent legal services in the context of economic analysis, particularly the advances that have been made by researchers and scholars in the

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57. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 3 (2002), <http://www.pretrial.org/Docs/Documents/dccc.pdf> (last visited Mar. 25, 2010).

58. *Id.* at 3 tbl.2.

59. 18 U.S.C. § 3006A (2006).

60. *Id.* at 4.

61. *Id.* at 6 tbl.13.

62. STEVEN W. PERRY, U.S. DEP'T OF JUSTICE, PROSECUTORS IN STATE COURTS 6 (2006), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pse05.pdf> (last visited Mar. 25, 2010).

field of “behavioral law and economics.”<sup>63</sup>

Traditional economic analysis of law presumes that all human behavior involves participants who maximize utility from a stable set of preferences and accumulate an optimal amount of information in a variety of markets,<sup>64</sup> and it then attempts to analyze the legal implications of that presumption on markets and other institutions.<sup>65</sup>

Traditional law and economics would suggest that the scope of the right to counsel—an entitlement—should be limited, as it constitutes a transaction cost, which interferes with the free ability of parties to influence the funding outcome. If there is such a thing as an ideal amount of funding for indigent legal services, one might argue that the existence of an entitlement to this funding actually constitutes a barrier to reaching that equilibrium.<sup>66</sup>

Because there is not a fixed appropriate level for funding of representation of criminal defendants who cannot afford counsel, which is determinable with sole reference to the utility of the justice system to society, those of us who care about the viability of our indigent defense systems need to take account of how these systems are perceived. The perception of fairness, in addition to the actual fairness that must be a part of these systems, plays an important part in the evaluation of these programs by the government officials who ultimately fund them. Value does not exist in a vacuum of rationality.

Behavioral law and economics, in contrast to traditional law and economics, begins with the presumption that human behavior usually involves much more than maximizing utility for a stable set of preferences based on an optimal amount of information. Instead, drawing on psychology and the social sciences, behavioral law and economics explores the legal implications of predictable, systematic departures from the rational model of human behavior, including the absence of

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63. In 2002, Kent Greenfield noted that “if one could invest in areas of legal scholarship, ‘behavioral law and economics’ (BLE) would be a growth stock. During the last several years, BLE has become the hottest area of legal scholarship.” Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 583 (2002). The past seven years have seen nothing that would slow its growth. In fact, one of the principle proponents of the approach, Cass Sunstein, was recently confirmed as Administrator of the United States Office of Information and Regulatory Affairs, part of the Office of Management and Budget. Office of Management and Budget, About OIRA, [http://www.whitehouse.gov/omb/inforeg\\_administrator/](http://www.whitehouse.gov/omb/inforeg_administrator/) (last visited Mar. 25, 2010). For an introduction to the application of behavioral research to economic analysis of legal problems, see Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997) and Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998). For an application of behavioral law and economics theory to social policy, see RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009).

64. GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976).

65. Jolls et al., *supra* note 63, at 1476.

66. Ronald Coase’s *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960), is likely the most-cited paper in all of economics, and I see no reason to stop the trend here. Coase argued that, in the absence of transaction costs, parties will negotiate to optimize allocation of resources. Though there is no record of Professor Coase himself considering the application of this generalization to the problem of constitutional rights and government funding, this line of thinking has apparently influenced scholars on constitutional rights such as Professor Erica Hashimoto, discussed *supra*, who analyze the scope of the right to counsel as a response to the challenges of supply and demand in the government-funding context, rather than a force for shaping perceptions of proper allocation. Hashimoto, *supra* note 15.

infinite rationality, the presence of limited willpower, and the limits of self-interest.<sup>67</sup>

One behavioral economics experiment demonstrates how rational choice does not adequately explain the way people assign value: the ultimatum game.<sup>68</sup> An ultimatum game involves two subjects. One party, the proposer, is given an amount of money and told to offer some portion of it to the other party, the responder. The proposer has three choices: offer nothing, offer a small amount, or offer a large amount. The responder has only two choices: accept the offer or reject the offer. If the responder accepts, the money is divided accordingly. If the responder rejects, neither the responder nor the proposer get anything. If the participants only acted rationally, every responder would accept any offer greater than zero. The responder starts with nothing and will continue to have nothing if the responder rejects. Even if the responder is only offered a small amount, she should prefer something to nothing.

But, that is not what happens. As a general matter, these experiments show that responders typically reject offers of less than 20 percent of the amount proposed, and the average amount that responders say they will accept is between twenty and thirty percent.<sup>69</sup> Decision-makers often prefer no deal to an unfair deal.

#### *B. Application to the Right to Counsel Crisis*

This experiment should provide some guidance in the consideration of the right to counsel. Leave aside whether Justice Powell is correct as a normative matter—as a purely positive observation, he is undoubtedly correct that concern over resources does shape the interpretation of the proper scope of the right to counsel. If the right to defense counsel is important, and all other things being equal, more government funding would improve the ability of courts to meet the obligation to provide counsel, then the proper response from courts should be to require counsel in more cases. If courts actually treat defense counsel as necessary—that is, if they refuse to proceed with a case unless defense counsel is present and prepared—then it follows that it is more likely that defense counsel will appear necessary to outsiders, such as the legislators who pay the bills. And, if courts will not punish individuals who do not have appropriate assistance, then courts will seem more fair. “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done.”<sup>70</sup> The crisis in funding of indigent defense systems could be seen as further evidence that sometimes legislators prefer no deal to an unfair deal. By embracing the changes I am suggesting, criminal defense systems could become more of a fair deal.

While I focused on the problem of representation in criminal matters as if it exists in a vacuum, I do want to briefly acknowledge that a potential solution to this problem can at the same time exacerbate a related crisis: the right to a speedy

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67. Jolls et al., *supra* note 63, at 1477-79.

68. *Id.* at 1489-97; Greenfield, *supra* note 63, at 628-30.

69. Jolls et al., *supra* note 63, at 1490; Greenfield, *supra* note 63, at 629.

70. *Gideon*, 372 U.S. at 343 (internal quotations and citations omitted).

trial.<sup>71</sup> Thirty-five years ago, one scholar observed that the right to a speedy trial had reached the point where it was “more honored in the breach,” and that institutional arrangements had converted “the right of every criminal defendant to have a speedy trial into a very different sort of right: the right of a few defendants, most egregiously denied a speedy trial, to have the criminal charges against them dismissed on that account.”<sup>72</sup> The situation has not improved with age. My proposal to require courts to be more expansive in their recognition of the importance of the assistance of counsel can only make things worse if courts are already having difficulty resolving criminal charges. But as a more fundamental matter, as we think about the design and operation of the criminal justice system, it does not seem fair to require those accused of crimes yet still entitled to a presumption of innocence to bear the weight of the consequences of design flaws or funding meanness. Problems must be honestly confronted, whether in the provision of counsel, the training and supervision of counsel, or the speedy processing of claims. For too long, the constitutional doctrine has been forced to adapt to the funding, and that formula ought to be reversed.

## VI. CONCLUSION

The right to publicly funded counsel ought to apply to all cases where an individual is charged by the government with committing a crime, whether or not that crime carries the penalty of incarceration. And, the right to publicly funded counsel ought to be expanded beyond the current guidelines, which dictate public funding only for those defendants below the federal poverty line, and beyond those defendants who would otherwise be unable to provide their dependents with the necessities of life.<sup>73</sup>

This is the part of the Article when the author typically points out that there needs to be a lot more study on a particular question before a solution can be found, and then quits, quite pleased with the result. Instead of that, I urge consideration of tough medicine, with which, unfortunately, there is no sugar.

Courts must rethink the rules for waiver of the right to counsel<sup>74</sup> and the procedures for receiving such waivers. In the short-term, this will be expensive. Courts need to rethink the rules for waiver, as a fundamental matter, because they are in conflict with the purpose of the Sixth Amendment and they lead to the breakdown of the adversarial criminal process.

But as a practical, and political matter, courts need to rethink the process—the videos, the speeches, the lawyer-of-the-day—because they are an inadequate substitute for assistance of counsel that, nonetheless, becomes lodged in the

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71. For the American Bar Association Criminal Justice Section’s standards and guidelines on the right to a speedy trial, see *SPEEDY TRIAL AND TIMELY RESOLUTION OF CRIMINAL CASES* (2004), [http://www.abanet.org/crimjust/standards/speedytrial\\_toc.html](http://www.abanet.org/crimjust/standards/speedytrial_toc.html) (last visited Mar. 25, 2010).

72. Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 *STAN. L. REV.* 525, 525 (1975).

73. 7 Guide to Judiciary Policy § 210.40.30, [http://www.uscourts.gov/defenderservices/pdfTemplate.cfm?issue=vol7/Vol07A-Ch020DS-PostUSCOURTS-Appointment and Payment of Counsel.pdf](http://www.uscourts.gov/defenderservices/pdfTemplate.cfm?issue=vol7/Vol07A-Ch020DS-PostUSCOURTS-Appointment%20and%20Payment%20of%20Counsel.pdf) (last visited Mar. 25, 2010).

74. Courts need to rethink the rules for the effective assistance of counsel as well, but that monumental restructuring of criminal process will be left for another paper.

public's mind as a perfectly appropriate substitute. No government official will support spending millions of dollars for an adequate indigent defense system when he or she believes that a fifteen-minute video does the job just as well.

As a result of this, though, more defendants will request lawyers. Arraignments will take longer, as will bail hearings, plea negotiations, motions to suppress and appeals. Most courts in this country are experiencing some level of backlog and that will grow significantly. Courts will need more money to pay for staff and judge time for the increase in trials. And, the indigent defense systems will initially be put under enormous strain, because political priorities will lag behind reality with regard to funding.

If society treats defense counsel for the indigent as a luxury at best and an inconvenience more often, the incentive for government officials to fully fund, staff, and supervise the provision of such services drops to zero. No amount of pretty words in the Constitution or in decisions by the courts is capable of altering that basic equation. There is no shortage of lawyers, no shortage of intelligence, no shortage of office space, or of paper, or of ink. The only scarcity infecting our indigent defense system is a shortage of money. That money is being spent on things that legislators value.

What would we get in return? The guarantee of a right to counsel. More broadly, we can reaffirm the idea that we do not repeal our fundamental protections by neglect. We have a Constitution, and a process for repeal of provisions we find unnecessary or outdated or too expensive (for example, Prohibition). When any part of the Constitution can become inoperative as a function of looking the other way, how can we depend on any of its protections?

Defense counsel in Massachusetts and elsewhere have already taken it upon themselves to refuse to accept appointments until systems for reimbursement and caseload management are improved.<sup>75</sup> One scholar has argued persuasively that lawyers have an ethical obligation to refuse new cases, and to withdraw from existing cases, when excessive caseload diminish the attorney's ability to provide representation of an appropriate quality to clients.<sup>76</sup> These are admirable steps, but they are not likely enough.

In addition, prosecutors and judges should begin to refuse to process cases when actual counsel has not been provided to the defendant and given adequate time and resources to research and strategize about the case, whether or not the defendant faces the threat of actual incarceration, and whether or not the defendant makes more than a subsistence income. All lawyers, including prosecutors and judges, take an oath to uphold the Constitution. Continual participation in a criminal justice system in which the accused does not enjoy the assistance of counsel is a violation of this oath. This civil disobedience—or, rather, civil obedience to the letter and spirit of the Sixth Amendment—will restore some measure of fairness to the adversarial criminal process. Appropriate funding will follow.

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75. Scott Dolan, *Massachusetts Lawyers Refuse New Court Appointments Because Of Overdue Payments*, TAUNTON GAZETTE, July 26, 2003, <http://spd.iowa.gov/article.php?story=2005010611343369160> (last visited Mar. 25, 2010).

76. Jessica Hafkin, Comment, *A Lawyer's Ethical Obligation to Refuse New Cases or to Withdraw from Existing Ones When Faced with Excessive Caseloads that Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants*, 20 GEO. J. LEGAL ETHICS 657 (2007).