Gideon and Civil Gideon

New York American Inn of Court Program

November 9, 2022

6:30 – 7:30 pm

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<u>Timed Agenda</u>

Introduction 1 minute

(Hon Stewart D. Aaron)

Interview of Clarence Gideon 10 minutes

(Peter Giurgius, Jonathan Coppola, Henry A. Freedman)

Interview of Abe Fortas (Attorney who argued *Gideon v. Wainwright* on behalf of Clarence Gideon) 10 minutes

(Hon. Stewart D. Aaron, Maggie Maurone, Christopher Tumulty, Henry A. Freedman)

Musical Interlude ("Thank You, 6th") 7 minutes

(Raina Duggirala, Peter Dizozza, Marissa Balonon-Rosen, Hon. Stewart D. Aaron, Maggie Maurone, Peter Giurgius, Jonathan Coppola, Ali Rawaf, Henry A. Freedman, Chryssa Valletta, Christopher Tumulty)

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(Raina Duggirala, Ali Rawaf, Henry A. Freedman)

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(Henry A. Freedman)

"Civil Gideon" Debate 15 minutes

(Jonathan Coppola, Chryssa Valletta, Henry Freedman)

Audience Q&A 5 minutes

No. 837
U.S.

Betts v. Brady

316 U.S. 455 (1942) · 62 S. Ct. 1252 · 86 L. Ed. 1595
Decided Jun 1, 1942

CERTIORARI TO HON. CARROLL T. BOND, A JUDGE OF THE STATE OF MARYLAND, BEING A JUDGE OF THE COURT OF APPEALS OF MARYLAND FROM THE CITY OF BALTIMORE.

No. 837.

Argued April 13, 14, 1942. Decided June 1, 1942.

1. In the light of the applicable law of Maryland, an order of the Chief Judge of the Court of Appeals, he being also the judge of that court from the City of Baltimore, denying petitioner's release upon a writ of *habeas corpus, held* reviewable here by certiorari under Jud. Code § 237, as a "final judgment" of the "highest court" in which a decision of the federal question involved could be had. P. 458. 2. A judgment of a state tribunal denying release on *habeas corpus*, which is not reviewable in any other state court and ends the particular proceeding, is a final judgment within the meaning of Jud. Code § 237, notwithstanding that under the state law the prisoner retains the right to seek discharge by applications to other courts and judges successively. P. 460. 3. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment, although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of
456 law in violation of the Fourteenth. P. 461. *456 4. The application of the due process clause to state criminal proceedings is not governed by hard and fast rules. Asserted denial of due process is to be tested by appraisal of all facts in the case; and that which, in one setting, may constitute a denial of due process, because it is a denial of fundamental fairness shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such a denial. P. 462. 5. Decisions of this Court do not lay down a rule that in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State. P. 462. 6. A review of state constitutional and statutory provisions on the subject, in connection with the common law, demonstrates that, in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that an appointment of counsel for indigent defendants in criminal cases is not a fundamental right, essential to a fair trial, and that the matter has generally been deemed one of legislative policy. In the light of this evidence it can not be said that the concept of due process incorporated in the Fourteenth Amendment obliges the States, whatever may be their own views, to furnish counsel in every such case. P. 471. 7. Upon the facts of this case, the refusal of a state court to appoint counsel to represent an indigent defendant at a trial in which he was convicted of robbery, did not deny him due process of law in violation of the Fourteenth Amendment. P. 472. Affirmed.

CERTIORARI, 315 U.S. 791, to review an order of a judge of the Court of Appeals of Maryland from the City of Baltimore, denying petitioner's release upon a writ of *habeas corpus*.

Messrs. Jesse Slingluff, Jr. and *G. Van Velsor Wolf* for petitioner.

Messrs. William C. Walsh, Attorney General of Maryland, and *Robert E. Clapp, Jr.*, Assistant Attorney General, with whom *Mr. Morton E. Rome* was on the brief, for respondent.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner was indicted for robbery in the Circuit Court of Carroll County, Maryland. Due to
457 lack of funds, *457 he was unable to employ counsel, and so informed the judge at his arraignment. He requested that counsel be appointed for him. The judge advised him that this would not be done, as it was not the practice in Carroll County to appoint counsel for indigent defendants, save in prosecutions for murder and rape.

Without waiving his asserted right to counsel, the petitioner pleaded not guilty and elected to be tried without a jury. At his request witnesses were summoned in his behalf. He cross-examined the State's witnesses and examined his own. The latter gave testimony tending to establish an alibi. Although afforded the opportunity, he did not take the witness stand. The judge found him guilty and imposed a sentence of eight years.

While serving his sentence, the petitioner filed with a judge of the Circuit Court for Washington County, Maryland, a petition for a writ of *habeas corpus* alleging that he had been deprived of the right to assistance of counsel guaranteed by the Fourteenth Amendment of the Federal Constitution. The writ issued, the cause was heard, his contention was rejected, and he was remanded to the custody of the prison warden.

Some months later, a petition for a writ of *habeas corpus* was presented to Hon. Carroll T. Bond, Chief Judge of the Court of Appeals of Maryland, setting up the same grounds for the prisoner's release as the former petition. The respondent answered, a hearing was afforded, at which an agreed statement of facts was offered by counsel for the parties, the evidence taken at the petitioner's trial was incorporated in the record, and the cause was argued. Judge Bond granted the writ but, for reasons set forth in an opinion, denied the relief prayed and remanded the petitioner to the respondent's custody.

The petitioner applied to this court for certiorari directed to Judge Bond. The writ was issued on account of the importance of the jurisdictional
458 questions involved *458 and conflicting decisions[1] upon the constitutional question presented. In awarding the writ, we requested counsel to discuss the jurisdiction of this court, "particularly (1) whether the decision below is that of a court within the meaning of § 237[2] of the Judicial Code, and (2) whether state remedies, either by appeal or by application to other judges or any other state court, have been exhausted."

[1] *In re McKnight*, 52 F. 799; *Wilson* v. *Lanagan*, 99 F.2d 544; *Boyd* v. *O'Grady*, 121 F.2d 146; *Carey* v. *Brady*, 125 F.2d 253; *Commonwealth ex rel. Schultz* v. *Smith*, 139 Pa. Super. 357, 11 A.2d 656; *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41, 24 A.2d 1.

[2] Page 458 28 U.S.C. § 344 (b).

1. Sec. 237 of the Judicial Code declares this court competent to review, upon certiorari, "any cause wherein a final judgment . . . has been rendered . . . by the highest court" of a State "in which a decision could be had" on a federal question. Was Judge Bond's judgment that of a court within the meaning of the statute? Answer must be made in the light of the applicable law of Maryland.

Art. 4, § 6 of the State Constitution provides: "All Judges shall by virtue of their offices be Conservators of the Peace throughout the State; . . ." Sec. 1 of Art. 42 of the Public General Laws of Maryland (Flack's 1939 Edition) invests the Court of Appeals and the Chief Judge thereof, the Circuit Courts for the respective counties, and the

several judges thereof, the Superior Court of Baltimore City, the Court of Common Pleas of that city, the Circuit Court and Circuit Court No. 2 of Baltimore City, the Baltimore City Court, and the judges of the said courts, out of court, and the Judge of the Court of Appeals from the City of Baltimore, with power to grant writs of *habeas corpus* and to exercise jurisdiction in all matters
459 pertaining thereto. *459

Although it is settled that the grant to the Court of Appeals of the power to issue the writ is unconstitutional and void,[3] and although the statute does not confer on individual judges of the Court of Appeals the power to issue a writ and proceed thereon, nevertheless, those judges, as conservators of the peace, have the power under the quoted section of the Constitution.[4] In any event, Judge Bond is the Chief Judge of the Court of Appeals and the judge of that court from the City of Baltimore and, as such, is empowered to act.

[3] *State* v. *Glenn*, 54 Md. 572, 596; *Sevinskey* v. *Wagus*, 76 Md. 335, 25 A. 468.

[4] *Ex parte O'Neill*, 8 Md. 227; *Ex parte Maulsby*, 13 Md. 625.

Sections 2 to 6, inclusive, 9 to 12 inclusive, and 17 of the statute prescribe the procedure governing the issue of the writ, its service, the return, and the hearing. No question is made but that Judge Bond complied with these provisions. It is, therefore, apparent that in all respects he acted in a judicial capacity and that, in his proper person, he was a judicial tribunal having jurisdiction, upon pleadings and proofs, to hear and to adjudicate the issue of the legality of the petitioner's detention. If Judge Bond had been sitting in term time as a member of a court, clothed with power to act as one of the members of that court, his judgment would be that of a court within the scope of § 237. Doubt that his judgment in the present instance is such arises out of our decision in *McKnight* v. *James*, 155 U.S. 685, where we refused to review the denial of a discharge by a judge of an inferior court of Ohio who issued the writ and heard the case at chambers. It appeared that the petitioner had addressed his petition to a judge of the Circuit Court instead of the court itself; and that, for this reason, the order of the judge was not reviewable by the Supreme Court of Ohio as it would have
460 been had the writ been addressed *460 to the Circuit Court though heard by a single judge. The petitioner had not exhausted his state remedy since, though he could have obtained a decision by the highest court of the State, he had avoided doing so, and then sought to come to this court directly from the order of the Circuit Judge on the theory that that judge's order was the final order of the highest court of the State which could decide his case. In a later decision, we referred to this and other cognate cases as deciding that appeals do not lie to this court from orders by judges at chambers,[5] but the fundamental reason for denying our jurisdiction was that the appellant had not exhausted state remedies.

[5] *Craig* v. *Hecht*, 263 U.S. 255, 276.

In view of what has been said of the power of Judge Bond as a judicial tribunal to hear and finally decide the cause, and of the judicial quality of his action we are of opinion that his judgment was that of a court within the intendment of § 237.

2. Did the judgment entered comply with the requirement of § 237 that it must be a final judgment rendered by the highest court in which a decision could be had? Again answer must be made in the light of the applicable law of Maryland. The judgment was final in the sense that an order of a Maryland judge in a *habeas corpus* case, whatever the court to which he belongs, is not reviewable by any other court of Maryland except in specific instances named in statutes which are here inapplicable.[6] It is true that the order was not final, and the petitioner has not exhausted state remedies in the sense that in Maryland, as in England, in many of the States, and in the federal courts, a prisoner may apply
461 successively *461 to one judge after another and to

one court after another without exhausting his right.[7] We think this circumstance does not deny to the judgment in a given case the quality of finality requisite to this court's jurisdiction. Although the judgment is final in the sense that it is not subject to review by any other court of the State, we may, in our discretion, refuse the writ when there is a higher court of the State to which another petition for the relief sought could be addressed,[8] but this is not such a case. To hold that, since successive applications to courts and judges of Maryland may be made as of right, the judgment in any case is not final, would be to deny all recourse to this court in such cases.

6 *Bell* v. *State*, 4 Gill. 301; *Ex parte O'Neill*, 8 Md. 227; *In re Coston*, 23 Md. 271; *Coston* v. *Coston*, 25 Md. 500; *State* v. *Glenn*, 54 Md. 572; *Annapolis* v. *Howard*, 80 Md. 244, 30 A. 910; *Petition of Otho Jones*, 179 Md. 240, 16 A.2d 901.

7 Judge Bond intimates that § 3 of Art. 42, as amended by Laws 1941, c. 484 permits the use of a rule to show cause (cf. *Holiday* v. *Johnston*, 313 U.S. 342) or other form of preliminary inquiry to avoid the necessity of the issue of a writ and a hearing where a redundant petition is filed disclosing no new matter. See, *Salinger* v. *Loisel*, 265 U.S. 224, 231-232. He determined, however, in this case to issue the writ and afford a hearing.

8 *Tenner* v. *Dullea*, 314 U.S. 692.

Since Judge Bond's order was a final disposition by the highest court of Maryland in which a judgment could be had of the issue joined on the instant petition we have jurisdiction to review it.

3. Was the petitioner's conviction and sentence a deprivation of his liberty without due process of law, in violation of the Fourteenth Amendment, because of the court's refusal to appoint counsel at his request?

The Sixth Amendment of the national Constitution applies only to trials in federal courts.[9] The due process clause of the Fourteenth Amendment does
462 not incorporate, *462 as such, the specific guarantees found in the Sixth Amendment,[10] although a denial by a State of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.[11] Due process of law is secured against invasion by the federal Government by the Fifth Amendment, and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[12] In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules, the application of which in a given case may be to ignore the qualifying factors therein disclosed.

9 *United States* v. *Dawson*, 15 How. 467, 487; *Twitchell* v. *Pennsylvania*, 7 Wall. 321, 325; *Spies* v. *Illinois*, 123 U.S. 131, 166; *In re Sawyer*, 124 U.S. 200, 219; *Brooks* v. *Missouri*, 124 U.S. 394, 397; *Eilenbecker* v. *District Court*, 134 U.S. 31, 34, 35; *West* v. *Louisiana*, 194 U.S. 258, 263; *Howard* v. *Kentucky*, 200 U.S. 164, 172.

10 *Hurtado* v. *California*, 110 U.S. 516; *Maxwell* v. *Dow*, 176 U.S. 581; *West* v. *Louisiana*, 194 U.S. 258; *Twining* v. *New Jersey*, 211 U.S. 78; *Frank* v. *Mangum*,

237 U.S. 309; *Snyder* v. *Massachusetts*, 291 U.S. 97; *Palko* v. *Connecticut*, 302 U.S. 319.

11 Compare *Twining* v. *New Jersey*, 211 U.S. 78, 98; *Powell* v. *Alabama*, 287 U.S. 45; *Palko* v. *Connecticut*, 302 U.S. 319, 323 ff.

12 Compare *Lisenba* v. *California*, 314 U.S. 219, 236-237.

The petitioner, in this instance, asks us, in effect, to apply a rule in the enforcement of the due process clause. He says the rule to be deduced from our former decisions is that, in every case, whatever the circumstances, one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State. Expressions in the
463 *463 opinions of this court lend color to the argument,[13] but, as the petitioner admits, none of our decisions squarely adjudicates the question now presented.

13 *Powell* v. *Alabama*, 287 U.S. 45, 73; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243, 244; *Johnson* v. *Zerbst*, 304 U.S. 458, 462; *Avery* v. *Alabama*, 308 U.S. 444, 447.

In *Powell* v. *Alabama*, 287 U.S. 45, ignorant and friendless negro youths, strangers in the community, without friends or means to obtain counsel, were hurried to trial for a capital offense without effective appointment of counsel on whom the burden of preparation and trial would rest, and without adequate opportunity to consult even the counsel casually appointed to represent them. This occurred in a State whose statute law required the appointment of counsel for indigent defendants prosecuted for the offense charged. Thus the trial was conducted in disregard of every principle of fairness and in disregard of that which was declared by the law of the State a requisite of a fair trial. This court held the resulting convictions were without due process of law. It said that, in the light of all the facts, the failure of the trial court to afford the defendants reasonable time and opportunity to secure counsel was a clear denial of due process. The court stated further that "under the circumstances . . . the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process," but added: "Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that, in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested
464 or not, to assign *464 counsel for him as a necessary requisite of due process of law, . . ."

Likewise, in *Avery* v. *Alabama*, 308 U.S. 444, the state law required the appointment of counsel. The claim which we felt required examination, as in the *Powell* case, was that the purported compliance with this requirement amounted to mere lip service. Scrutiny of the record disclosed that counsel had been appointed and the defendant had been afforded adequate opportunity to prepare his defense with the aid of counsel. We, therefore, overruled the contention that due process had been denied.

In *Smith* v. *O'Grady*, 312 U.S. 329, the petition for *habeas corpus* alleged a failure to appoint counsel but averred other facts which, if established, would prove that the trial was a mere sham and pretense, offensive to the concept of due process. There also, state law required the appointment of counsel for one on trial for the offense involved.

Those cases, which are the petitioner's chief reliance, do not rule this. The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant. Is the furnishing of counsel in all cases whatever dictated by natural, inherent, and fundamental principles of fairness? The answer to the question may be found in the

common understanding of those who have lived under the Anglo-American system of law. By the Sixth Amendment the people ordained that, in all criminal prosecutions, the accused should "enjoy the right . . . to have the assistance of counsel for his defence." We have construed the provision to require appointment of counsel in all cases where a defendant is unable to procure the services of an attorney, and where the right has not been
465 intentionally and *465 competently waived.[14] Though, as we have noted, the Amendment lays down no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment. Relevant data on the subject are afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date. These constitute the most authoritative sources for ascertaining the considered judgment of the citizens of the States upon the question.

14 *Johnson* v. *Zerbst*, 304 U.S. 458.

The Constitutions of the thirteen original States, as they were at the time of federal union, exhibit great diversity in respect of the right to have counsel in criminal cases. Rhode Island had no constitutional provision on the subject until 1843, North Carolina and South Carolina had none until 1868. Virginia has never had any. Maryland, in 1776, and New York, in 1777, adopted provisions to the effect that a defendant accused of crime should be "allowed" counsel. A constitutional mandate that the accused should have a right to be heard by himself and by his counsel was adopted by Pennsylvania in 1776, New Hampshire in 1774, by Delaware in 1782, and by Connecticut in 1818. In 1780 Massachusetts ordained that the defendant should have the right to be heard by himself or his counsel at his election. In 1798 Georgia provided that the accused might be heard by himself or counsel, or both. In 1776 New Jersey guaranteed the accused the same privileges of witnesses and counsel as their prosecutors "are
466 or shall be entitled to." *466

The substance of these provisions of colonial and early state constitutions is explained by the contemporary common law. Originally, in England, a prisoner was not permitted to be heard by counsel upon the general issue of not guilty on any indictment for treason or felony.[15] The practice of English judges, however, was to permit counsel to advise with a defendant as to the conduct of his case and to represent him in collateral matters and as respects questions of law arising upon the trial.[16] In 1695 the rule was relaxed by statute[17] to the extent of permitting one accused of treason the privilege of being heard by counsel. The rule forbidding the participation of counsel stood, however, as to indictments for felony, until 1836, when a statute accorded the right to defend by counsel against summary convictions and charges of felony.[18] In misdemeanor cases and, after 1695, in prosecutions for treason, the rule was that the defense must be conducted either by the defendant in person or by counsel, but that both might not participate in the trial.[19]

15 Chitty Criminal Law (5th Am. Ed.) Vol. 1, p. 406.

16 Chitty, *supra*, Vol. I, p. 407; *Rex* v. *Parkins*, 1 C. P. 314.

17 Page 466 7 Will. 3, c. 3, § 1.

18 Page 466 6 7 Will. 4, c. 114, §§ I and II.

19 *Rex* v. *White*, 3 Camp. N.P. 97; *Regina* v. *Boucher*, 8 C. P. 655.

In the light of this common law practice, it is evident that the constitutional provisions to the effect that a defendant should be "allowed" counsel or should have a right "to be heard by himself and his counsel," or that he might be heard

by "either or both," at his election, were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the State to provide counsel for a defendant. At the least, such a construction by State courts and legislators can not be said to lack
467 reasonable basis. *467

The statutes in force in the thirteen original States at the time of the adoption of the Bill of Rights are also illuminating. It is of interest that the matter of appointment of counsel for defendants, if dealt with at all, was dealt with by statute rather than by constitutional provision. The contemporary legislation exhibits great diversity of policy.[20]

20 Connecticut had no statute, although it was the custom of the courts to assign counsel in all criminal cases. Swift, "System of Laws, Connecticut," 1796, Vol. II, p. 392. In Delaware Penn's Laws of 1719, c. XXII, and in Pennsylvania the Act of May 31, 1718, § III (Mitchell and Flanders' Statutes at Large of Penna., 1682-1801, Vol. III, p. 201) provided for appointment only in case of "felonies of death." Georgia has never had any law on the subject. Maryland had no such law at the time of the adoption of the Bill of Rights. An Act of 1777 in Massachusetts gave the right to have counsel appointed in cases of treason or misprision of treason. Laws of the Commonwealth of Massachusetts from Nov. 28, 1780 to Feb. 28, 1807, c. LXXI, Vol. II, Appendix, p. 1049. By an Act of Feb. 8, 1791, New Hampshire required appointment in all cases where the punishment was death. Metcalf's Laws of New Hampshire, 1916, Vol. 5, pp. 596, 599. An Act of New Jersey of March 6, 1795, § 2, required appointment in the case of any person tried upon an indictment. Acts of the General Assembly of the Session of 1794, c. DXXXII, p. 1012. New York apparently had no statute on the subject. See Act. Feb. 20, 1787, Laws of New York, Sessions 1st to 20th (1798), Vol. I, pp. 356-7. An Act of 1777 of North Carolina made no provision for appointment, but accorded defendants the right to have counsel. Laws of North Carolina, 1789, pp. 40, 56. Rhode Island had no statute until 1798, when one was passed in the words of the Sixth Amendment. Laws 1798, p. 80. South Carolina, by Act of August 20, 1731, limited appointment to capital cases. Grimke's So. Car. Pub. Laws, 1682-1790, p. 130. Virginia, by Act of Oct. 1786, enacted with respect to one charged with treason or felony that "the court shall allow him counsel . . . if he desire it." Hening's Statutes of Virginia, 1785-1788, Vol. 12, p. 343.

The constitutions of all the States, presently in force, save that of Virginia, contain provisions with respect to the assistance of counsel in
468 criminal trials. Those of nine *468 States[21] may be said to embody a guarantee textually the same as that of the Sixth Amendment, or of like import. In the fundamental law of most States, however, the language used indicates only that a defendant is not to be denied the privilege of representation by counsel of his choice.[22]

21 *Georgia* (Art. I, Par. V); *Iowa* (Art. I, § 10); *Louisiana* (Art. I, § 9); *Michigan* (Dec. of Rights, Art. II, § 19); *Minnesota* (Art. I, § 6); *New Jersey* (Art. I, § 8); *North Carolina* (Art. I, § 11); *Rhode Island* (Art. I, § 10); *West Virginia* (Art. III, § 14).

22 Some assert the right of a defendant "to appear and defend in person and by counsel." *Arizona* (Art. II, § 24); *Colorado* (Art. II, § 16); *Illinois* (Art. II, § 9); *Missouri* (Art. II, § 22); *Montana* (Art. III, § 16); *New Mexico* (Art. II, § 14); *South Dakota* (Art. VI, § 7); *Utah* (Art. I, § 12); *Wyoming* (Art. I, § 10). Others phrase the right as that "to be heard by himself and [his] counsel": *Arkansas* (Art. II, § 10); *Delaware* (Art. I, § 7); *Indiana* (Art. I, § 13); *Kentucky* (Bill of Rights, § 11); *Pennsylvania* (Art. I, § 9); *Tennessee* (Art.

I, § 9); *Vermont* (Ch. I, Art. 10th); or "by himself and by counsel": *Connecticut* (Art. I, § 9); or "by himself and counsel": *New Hampshire* (Bill of Rights, 15th); *Oklahoma* (Art. II, § 20); *Oregon* (Art. I, § 11); *Wisconsin* (Art. I, § 7); or "by himself and counsel or either": *Alabama* (Art. I, § 6); "by himself or counsel or [by] both": *Florida* (Dec. of Rights, § 11); *Mississippi* (Art. III, § 26); *South Carolina* (Art. I, § 18); *Texas* (Art. I, § 10). The verbiage sometimes employed is: "to appear and defend in person and with counsel": *California* (Art. I, § 13), *Idaho*, (Art. I, § 13); *North Dakota* (Art. I, § 13); *Ohio* (Art. I, § 10); or "in person or by counsel"; *Kansas* (Bill of Rights, § 10); *Nebraska* (Art. I, § 11); *Washington* (Art. I, § 22). *Nevada* (Art. I, § 8) and *New York* (Art. I, § 6) add: "as in civil actions." Some constitutions formulate the right as one "to be heard by himself and his counsel at his election" or "himself and his counsel or either at his election": *Massachusetts* (Part I, § 12), *Maine* (Art. I, § 6). *Maryland* (Dec. of Rights, Art. 21) states the right as that "to be allowed counsel."

In three States, the guarantee, whether or not in the exact phraseology of the Sixth Amendment, has been held to require appointment in all cases
469 where the defendant *469 is unable to procure counsel.[23] In six, the provisions (one of which is like the Sixth Amendment) have been held not to require the appointment of counsel for indigent defendants.[24] In eight, provisions, one of which is the same as that of the Sixth Amendment, have evidently not been viewed as requiring such appointment, since the courts have enforced statutes making appointment discretionary, or obligatory only in prosecutions for capital offenses or felonies.[25]

23 *Elam* v. *Johnson*, 48 Ga. 348; *Delk* v. *State*, 99 Ga. 667, 26 S.E. 752; *Fugate* v. *Commonwealth*, 254 Ky. 663, 72 S.W.2d 47; *Carpenter* v. *Dane County*, 9 Wis. 274.

24 *Cutts* v. *State*, 54 Fla. 21, 45 So. 491; *McDonald* v. *Commonwealth*, 173 Mass. 322, 53 N.E. 874; *People* v. *Dudley*, 173 Mich. 389, 138 N.W. 1044; *People* v. *Williams*, 225 Mich. 133, 195 N.W. 818; *People* v. *Harris*, 266 Mich. 317, 253 N.W. 312; *People* v. *Crandell*, 270 Mich. 124, 258 N.W. 224; *Commonwealth* v. *Smith*, 344 Pa. 41, 24 A.2d 1; *State* v. *Sweeney*, 48 S.D. 248, 203 N.W. 460; *State* v. *Yoes*, 67 W. Va. 546, 68 S.E. 181; cf. *Pardee*, v. *Salt Lake County*, 39 Utah 482, 118 P. 122.

25 *Alabama:* Code (1940) Tit. 15, § 318; *Campbell* v. *State*, 182 Ala. 18, 62 So. 57; *Gilchrist* v. *State*, 234 Ala. 73, 173 So. 651; *Clark* v. *State*, 239 Ala. 380, 195 So. 260. *Louisiana:* Code Crim. Proc. (Dart, 1932) Tit. XIII, Art. 143; *State* v. *Davis*, 171 La. 449, 131 So. 295. *Maryland:* Annotated Code (Flack, 1939), Art. 26, Par. 7, p. 1060; cf. the decision below and *Coates* v. *Maryland*, 180 Md. 502, 25 A.2d 676. *Mississippi:* Annotated Code (1930) Crim. Proc., c. 21, § 1262; Laws 1934, c. 303; *Reed* v. *State*, 143 Miss. 686, 109 So. 715; *Robinson* v. *State*, 178 Miss. 568, 173 So. 451. *Rhode Island:* General Laws 1938, c. 625, § 62; Acts Resolves, 1891, c. 921, p. 165; *State* v. *Hudson*, 55 R.I. 141, 179 A. 130. *South Carolina:* Code 1932, Vol. 1, § 979; *State* v. *Jones*, 172 S.C. 129, 173 S.E. 77. *Texas: Lopez* v. *State*, 46 Tex.Crim. 473, 80 S.W. 1016; *Faggett* v. *State*, 122 Tex.Crim. 399, 55 S.W.2d 842; *Thomas* v. *State*, 132 Tex.Crim. 549, 106 S.W.2d 289; *Austin* v. *State*, 51 S.W. 249. *Vermont:* Public Laws (1933) c. 57, § 1424; c. 101, § 2327; c. 102, § 2370; *State* v. *Gomez*, 89 Vt. 490, 96 A. 190.

In twelve States, it seems to be understood that the constitutional provision does not require
470 appointment of *470 counsel, since statutes of greater or less antiquity call for such appointment only in capital cases or cases of felony or other grave crime,[26] or refer the matter to the discretion of the court.[27] In eighteen States the statutes now

require the court to appoint in all cases where defendants are unable to procure counsel.[28] But
471 this has not always been *471 the statutory requirement in some of those States.[29] And it seems to have been assumed by many legislatures that the matter was one for regulation from time to time as deemed necessary, since laws requiring appointment in all cases have been modified to require it only in the case of certain offenses.[30]

26 *Arkansas:* Steel McCampbell's Compiled Laws of Arkansas Territory, 1835, "Crimes and Misdemeanors," § 37, p. 194; Gantt's Digest of Ark. Stats. 1874, Crim. Proc. c. 43, Art. XII, § 1824, p. 410; Pope's Digest (1937), Vol. 1, c. 43, § 3877, p. 1180. *Delaware:* Penn's Laws, c. XXII (1719); Rev. Code (1935) c. 114, 4305-6. *Kansas:* Gen. Stats. 1868, c. 82, § 160, p. 845; Gen. Stats. 1935, c. 62, § 1304, p. 1449. *Maine:* Act of March 8, 1826, § 6, p. 146; R.S. Apr. 17, 1857, c. 134, § 12, p. 713; R.S. 1930, c. 146, § 14, p. 1655. *Minnesota:* Act of March 5, 1869, G.L. 1869, c. LXXII, § 1; Mason's Minn. Stats. (1927) Vol. 2, c. 94, § 9957. *Missouri:* Casselberry's Rev. Stats. 1845, pp. 434, 443-4, 458; Rev. Stats. (1939) Crim. Proc. § 4003. *Nebraska:* Gen. Stats. 1873, c. 58, § 437, p. 821; Comp. Stat. (1929) Crim. Proc. Art. 18, § 29-1803. *New Hampshire:* R.S. 1843, Tit. XXVII, c. 225, p. 457; Pub. Laws (1926), c. 368, Laws 1937, c. 22. *Washington:* Territorial Stats. 1881, c. LXXXV, § 1063; Rem. Rev. Stats. Vol. 4, c. 2, § 2305.

27 *Arizona:* Code (1939) Art. 9, §§ 44-904, 44-905. *Colorado:* Colo. Stats. Annotated (1935), Vol. 2, c. 48, § 502, p. 1148. *Maryland:* Laws 1886, c. 46, p. 66; Anno. Code (Flack, 1939), Art. 26, par. 7.

28 *California*, Penal Code, Deering (1937), Pt. 2, Tit. 6, c. 1, § 987; *Idaho*, Code Anno. (1932) § 19-1412; *Illinois*, R.S. 1935, c. 38, ¶ 754; *Iowa*, Code 1939, c. 640, § 13773; *Kansas*, Laws 1941, c. 291; *Michigan*, Statutes Ann. § 28. 1253; *Montana*, Rev. Codes Ann. (1935) c. 73, § 11886; *Nevada*, Comp. Laws (1929) Cr. L. Proc. § 10883; *New Jersey*, N.J. Stat. Ann. § 2: 190-3; *New York*, Thompson's Laws (1939) Pt. II, Code of Crim. Proc. § 308; *North Dakota*, Comp. Laws (1913) Vol. II, § 8965; *Ohio*, Throckmorton's Code Ann. (1940) § 13439-2; *Oklahoma*, Stats. Ann. Tit. 22, § 1271; *Oregon*, Comp. Laws Ann. Vol. 3, § 26-804; *South Dakota*, Code (1939) § 34.1901; *Tennessee*, Michie's Code (1938) § 11734; *Utah*, R.S. (1938) Code Cr. Proc. § 105-22-12; *Wyoming*, R.S. (1931) § 33-501. Connecticut provides official public defenders available to all persons unable to retain counsel. G.S. (Revision of 1930), c. 335, § 6476.

At least as early as 1903 (3 Edw. 7, c. 38) England adopted a Poor Prisoners' Defence Act, under which a rule was adopted whereby an Page 471 accused might defend by counsel assigned by the court. Bowen-Rowlands, Criminal Proceedings, London (1904) pp. 46-47. The existing statute is the Poor Prisoners' Defence Act (1930) 20 21 Ga. 5, c. 32. See Archbold's Criminal Pleading, Evidence and Practice, 30th Ed. (1938) p. 167. Under this act a poor defendant is entitled as of right to counsel on a charge of murder, but assignment of counsel is discretionary in other cases.

29 See e.g. earlier and more restricted statutes: *Idaho*, Terr. Laws, 2d Sess., 1864, c. II, p. 246; *Iowa*, Act of January 4, 1839, § 64; *Korf* v. *Jasper County*, 132 Iowa 682, 108 N.W. 1031; *Michigan*, Laws 1857, Act No. 109, p. 239; *Montana*, Act January 12, 1872, c. IX, § 196; *Nevada*, Comp. L. 1861-73, c. LIII. Changes in the statutes of other States might be cited. Compare Notes 20 and 28.

30 *Louisiana*. Compare Laws, 1855, Act No. 121; *State* v. *Ferris*, 16 La. Ann. 424; *State* v. *Bridges*, 109 La. 530, 33 So. 589, with La. Code Crim. Proc. (Dart) 1932, Tit. XIII, Art. 143. *Nebraska*. Compare Laws

of 1869, p. 163, with Comp. Stats. (1929) § 29-1803. *Washington*. Compare Code of Washington Terr. (1881) c. LXXXV, § 1063 with Rem. Rev. Stats. Vol. 4, c. 2, § 2305. And compare Texas Code Crim. Proc. (1856), Pt. III, Arts. 466-7 with Vernon's Stats. (1936), Art. 1917, and *Lopez* v. *State*, 46 Tex.Crim. 473, 80 S.W. 1016, and *Thomas* v. *State*, 132 Tex.Crim. 549, 106 S.W.2d 289.

This material demonstrates that, in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such
472 case. Every court has power, if it deems *472 proper, to appoint counsel where that course seems to be required in the interest of fairness.

The practice of the courts of Maryland gives point to the principle that the States should not be straight-jacketed in this respect, by a construction of the Fourteenth Amendment. Judge Bond's opinion states, and counsel at the bar confirmed the fact, that in Maryland the usual practice is for the defendant to waive a trial by jury. This the petitioner did in the present case. Such trials, as Judge Bond remarks, are much more informal than jury trials and it is obvious that the judge can much better control the course of the trial and is in a better position to see impartial justice done than when the formalities of a jury trial are involved.[31]

31 Judge Bond adds: "Certainly my own experience in criminal trials over which I have presided (over 2000, as I estimate it), has demonstrated to me that there are fair trials without counsel employed for the prisoners."

In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as the perpetrator. The defense was an alibi. Petitioner called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bond says, the accused was not helpless, but was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial of that narrow issue. He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that the petitioner was, for any reason, at a serious disadvantage by reason of the
473 lack *473 of counsel, a refusal to appoint would have resulted in the reversal of a judgment of conviction. Only recently the Court of Appeals has reversed a conviction because it was convinced on the whole record that an accused, tried without counsel, had been handicapped by the lack of representation.[32]

32 *Coates* v. *State*, 180 Md. 502, 25 A.2d 676.

To deduce from the due process clause a rule binding upon the States in this matter would be to impose upon them, as Judge Bond points out, a requirement without distinction between criminal charges of different magnitude or in respect of courts of varying jurisdiction. As he says: "Charges of small crimes tried before justices of the peace and capital charges tried in the higher courts would equally require the appointment of counsel. Presumably it would be argued that trials in the Traffic Court would require it." And, indeed, it was said by petitioner's counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold

with the petitioner, logic would require the furnishing of counsel in civil cases involving property.

As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the Amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel.

The judgment is

Affirmed.

474 *474

MR. JUSTICE BLACK, dissenting, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MURPHY concur.

To hold that the petitioner had a constitutional right to counsel in this case does not require us to say that "no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." This case can be determined by a resolution of a narrower question: whether in view of the nature of the offense and the circumstances of his trial and conviction, this petitioner was denied the procedural protection which is his right under the Federal Constitution. I think he was.

The petitioner, a farm hand, out of a job and on relief, was indicted in a Maryland state court on a charge of robbery. He was too poor to hire a lawyer. He so informed the court and requested that counsel be appointed to defend him. His request was denied. Put to trial without a lawyer, he conducted his own defense, was found guilty, and was sentenced to eight years' imprisonment. The court below found that the petitioner had "at least an ordinary amount of intelligence." It is clear from his examination of witnesses that he was a man of little education.

If this case had come to us from a federal court, it is clear we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the Federal Government. I believe that the Fourteenth Amendment made the Sixth applicable to the states.[1] But this view, although often urged in dissents, has never been accepted by a majority of
475 this Court *475 and is not accepted today. A statement of the grounds supporting it is, therefore, unnecessary at this time. I believe, however, that, under the prevailing view of due process, as reflected in the opinion just announced, a view which gives this Court such vast supervisory powers that I am not prepared to accept it without grave doubts, the judgment below should be reversed.

[1] Discussion of the Fourteenth Amendment by its sponsors in the Senate and House shows their purpose to make secure against invasion by the states the fundamental liberties and safeguards set out in the Bill of Rights. The legislative history and subsequent course of the amendment to its final adoption have been discussed in Flack, "The Adoption of the Fourteenth Amendment." Flack cites the Congressional Page 475 debates, committee reports, and other data on the subject. Whether the amendment accomplished the purpose its sponsors intended has been considered by this Court in the following decisions, among others: *O'Neil* v. *Vermont*, 144 U.S. 323, dissent, 337; *Maxwell* v. *Dow*, 176 U.S. 581, dissent, 605; *Twining* v. *New Jersey*, 211 U.S. 78, 98-99, dissent, 114.

This Court has just declared that due process of law is denied if a trial is conducted in such manner that it is "shocking to the universal sense of justice" or "offensive to the common and fundamental ideas of fairness and right." On

another occasion, this Court has recognized that whatever is "implicit in the concept of ordered liberty" and "essential to the substance of a hearing" is within the procedural protection afforded by the constitutional guaranty of due process. *Palko* v. *Connecticut*, 302 U.S. 319, 325, 327.

The right to counsel in a criminal proceeding is "fundamental." *Powell* v. *Alabama*, 287 U.S. 45, 70; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243-244. It is guarded from invasion by the Sixth Amendment, adopted to raise an effective barrier against arbitrary or unjust deprivation of liberty by the Federal Government. *Johnson* v. *Zerbst*, 304 U.S. 458, 462.

An historical evaluation of the right to a full hearing in criminal cases, and the dangers of denying it, were set out in the *Powell* case, where this Court said: "What . . . does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the person
476 asserting the right . . . Even the intelligent *476 and educated layman . . . 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 in 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." *Powell* v. *Alabama, supra*, 68-69. Cf. *Johnson* v. *Zerbst, supra*, 462-463.

A practice cannot be reconciled with "common and fundamental ideas of fairness and right," which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented. No one questions that due process requires a hearing before conviction and sentence for the serious crime of robbery. As the Supreme Court of Wisconsin said, in 1859, ". . . would it not be a little like mockery to secure to a pauper these solemn constitutional guaranties for a fair and full trial of the matters with which he was charged, and yet say to him when on trial, that he must employ his own counsel, who could alone render these guaranties of any real permanent value to him. . . . Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?" *Carpenter* v. *Dane County*, 9 Wis. 274, 276-277.

Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the "universal sense of justice" throughout this country. In 1854, for example, the Supreme Court of Indiana said: "It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself,
477 to sit and hear *477 such a trial. The defence of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public." *Webb* v. *Baird*, 6 Ind. 13, 18. And most of the other States have shown their agreement by constitutional provisions, statutes, or established practice judicially approved, which assure that no man shall be deprived of counsel merely because of his poverty.[2] Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law.

[2] In thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in serious non-capital as well as capital criminal cases (*e.g.*, where the crime charged is a felony, a "penitentiary offense," an offense punishable by imprisonment for several years) be provided with counsel on request. In nine states, there are no clearly controlling statutory or constitutional provisions and no decisive reported cases on the subject. In two states, there are dicta

> in judicial decisions indicating a probability that the holding of the court below in this case would be followed under similar circumstances. In only two states (including the one in which this case arose) has the practice here upheld by this Court been affirmatively sustained. Appended to this opinion is a list of the several states divided into these four categories.

APPENDIX

I. States which require that indigent defendants in noncapital as well as capital criminal cases be provided with counsel on request:

A. *By Statute*. ARIZONA: Revised Statutes of Arizona Territory, 1901, Penal Code, Pt. II, Title VII, § 858; Arizona Code Ann. 1939, Vol. III, § 44-904. ARKANSAS: Compiled Laws, Arkansas Territory, 1835, Crimes and Misdemeanors, § 37; Pope's Digest, 1937, Vol. I, c. 43, § 3877. CALIFORNIA: California Penal Code of 1872, § 987; Deering's Penal Code, 1937, § 987. IDAHO: Territorial Criminal Practice Act, 1864, § 267; Idaho Code, 1932, §§ 19-1412, 19-1413. ILLINOIS: Rev. Stat. 1874, Criminal Code, § 422;
478 Jones's Ill. Stat. Ann. 1936, § 37.707. *478 *Cf.* Laws, 1933, 430-431. See also, *Vise* v. *County of Hamilton*, 19 Ill. 78, 79 (1857). IOWA: Territorial Laws, 1839, Courts, § 64; Iowa Code, 1939, § 13773. KANSAS: See Compilation published in 1856 as S. Doc. No. 23, 34th Cong., 1st Sess., 520 (c. 129, Art. V, § 4). Laws, 1941, c. 291. LOUISIANA: Act of May 4, 1805, of the Territory of Orleans, § 35; Dart's Louisiana Code of Criminal Procedure, 1932, Title XIII, Art. 143. MINNESOTA: Minnesota General Laws, 1869, c. LXXII, § 1; Mason's Minnesota Statutes, 1927, §§ 9957, 10667. MISSOURI: Digest of Laws of Missouri Territory, 1818, Crimes and Misdemeanours, § 35; Rev. Stat. 1939, § 4003. MONTANA: Montana Territory Criminal Practice Act of 1872, § 196 (Laws of Montana, Codified Stat. 1871-1872, 220); Revised Code, 1935, § 11886. NEBRASKA: General Statutes, 1873, c. 58, § 437; Compiled Stat. 1929, § 29-1803. NEVADA: Act of November 26, 1861 (Compiled Laws, 1861-1873, Vol. I, 477, 493); Compiled Laws, 1929, Vol. 5, § 10883. NEW HAMPSHIRE: Laws, 1907, c. 136; Laws, 1937, c. 22. NEW JERSEY: Act of March 6, 1795, § 2; New Jersey Stat. § 2.190-3. NEW YORK: Code of Criminal Procedure, § 308 (enacted in 1881, still in force). See *People* v. *Supervisors of Albany County*, 28 How. Pr. 22, 24 (1864). NORTH DAKOTA: Dakota Territory Code of Procedure, 1863, § 249 (Rev. Codes, 1877, Criminal Procedure, 875); Compiled Laws, 1913, Vol. II, §§ 8965, 10721. OHIO: Act of February 26, 1816, § 14 (Chase, Statutes of Ohio, 1788-1833, Vol. II, 982); Throckmorton's Ohio Code Ann. 1940, Vol. II, § 13439-2. OKLAHOMA: Oklahoma Territorial Stat. 1890, c. 70, § 10; Stat. Ann. 1941 Supp., Title 22, § 464. OREGON: Act of October 19, 1864 (General Laws, 1845-1864, c. 37, § 381; Laws 1937, c. 406 (Compiled Laws Ann., Vol. III, § 26-804). SOUTH DAKOTA: Dakota Territory Code of Procedure, 1863, § 249 (Rev. Codes, 1877, Criminal Procedure 875); Code of 1939, Vol. II, § 34.1901. TENNESSEE: Code of 1857-
479 1858, §§ 5205, 5206; Code of 1938, *479 §§ 11733, 11734. UTAH: Laws of Territory of Utah, 1878, Criminal Procedure, § 181; Rev. Stat. 1933, § 105-22-12. WASHINGTON: Statutes of Territory of Washington, 1854, Criminal Practice Act, § 89; Remington's Revised Statutes, 1932, Vol. IV, §§ 2095, 2305. WYOMING: Laws of Wyoming Territory, 1869, Criminal Procedure, § 98; Rev. Stat. 1931, § 33-501.

B. By *judicial decision or established practice judicially approved*. CONNECTICUT: For an account of early practice in Connecticut, see Zephaniah Swift "A System of the Laws of the State of Connecticut," Vol. II, 392: "The chief justice then, before the prisoner is called upon to plead, asks the prisoner if he desires counsel, which if requested, is always granted, as a matter of course. On his naming counsel, the court will appoint or assign them. If from any cause, the prisoner decline to request or name counsel, and a

trial is had, especially in the case of minors, the court will assign proper counsel. When counsel are assigned, the court will enquire of them, whether they have advised with the prisoner, so that he is ready to plead, and if not, will allow them proper time for that purpose. But it is usually the case that the prisoner has previously employed and consulted counsel, and of course is prepared to plead." See *Powell* v. *Alabama*, 287 U.S. 45, footnote, 63-64. See also, Connecticut General Statutes, Revision of 1930, §§ 2267, 6476. FLORIDA: *Cutts* v. *State*, 54 Fla. 21, 23, 45 So. 491 (1907). See Compiled General Laws, 1927, § 8375 (capital crimes). INDIANA: *Webb* v. *Baird*, 6 Ind. 13, 18 (1854). See also *Knox County Council* v. *State ex rel. McCormick*, 217 Ind. 493, 497-498, 29 N.E.2d 405 (1940); *State* v. *Hilgemann*, 218 Ind. 572, 34 N.E.2d 129, 131 (1941). MICHIGAN: *People* v. *Crandell*, 270 Mich. 124, 127, 258 N.W. 224 (1935). PENNSYLVANIA: *Commonwealth* v. *Richards*, 111 Pa. Super. 124, 169 A. 464 (1933). See *Commonwealth ex rel. McGlinn* v. *Smith*, 344 Pa. 41, 49, 59, 24 A.2d 1. VIRGINIA: *Watkins* v. *Commonwealth*, 174 Va. 518, 521-525, 6 S.E.2d
480 670 (1940). *480 WEST VIRGINIA: *State* v. *Kellison*, 56 W. Va. 690, 692-693, 47 S.E. 166 (1904). WISCONSIN: *Carpenter* v. *Dane County*, 9 Wis. 274 (1859). See Stat. 1941, § 357.26.

C. *By constitutional provision*. GEORGIA: Constitution of 1865, Art. 1, Par. 8. See *Martin* v. *Georgia*, 51 Ga. 567, 568 (1874). KENTUCKY: Kentucky Constitution, § 11. See *Fugate* v. *Commonwealth*, 254 Ky. 663, 665, 72 S.W.2d 47 (1934).

II. States which are without constitutional provision, statutes, or judicial decisions clearly establishing this requirement:

COLORADO: General Laws, 1877, §§ 913-916; Colorado Stat. Ann. 1935, Vol. 2, c. 48, §§ 502, 505, as amended by Laws of 1937, 498, § 1. See *Abshier* v. *People*, 87 Colo. 507, 517, 289 P. 1081. DELAWARE: See 6 Laws of Delaware 741; 7 *id*. 410; Rev. Code, 1935, §§ 4306, 4310. MAINE: See Rev. Stat. 1857, 713; Rev. Stat. 1930, c. 146, § 14. MASSACHUSETTS: See *McDonald* v. *Commonwealth*, 173 Mass. 322, 327, 53 N.E. 874 (1899). NEW MEXICO. NORTH CAROLINA. RHODE ISLAND: See *State* v. *Hudson*, 55 R.I. 141, 179 A. 130 (1935); General Laws, 1938, c. 625, § 62. SOUTH CAROLINA: See *State* v. *Jones*, 172 S.C. 129, 130, 173 S.E. 77 (1934); Code, 1932, Vol. I, § 980. VERMONT.

III. States in which dicta of judicial opinions are in harmony with the decision by the court below in this case:

ALABAMA: *Gilchrist* v. *State*, 234 Ala. 73, 74, 173 So. 651. MISSISSIPPI: *Reed* v. *State*, 143 Miss. 686, 689, 109 So. 715.

IV. States in which the requirement of counsel for indigent defendants in non-capital cases has been affirmatively rejected:

MARYLAND: See, however, *Coates* v. *State*, 180 Md. 502, 25 A.2d 676. TEXAS: *Gilley* v. *State*, 114 Tex.Crim. 548, 26 S.W.2d 1070. But *cf. Brady* v. *State*, 122 Tex.Crim. 275, 278, 54 S.W.2d 513 .

481 *481

No. 155
U.S.

Gideon v. Wainwright

372 U.S. 335 (1963) · 83 S. Ct. 792
Decided Mar 18, 1963

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 155.

Argued January 15, 1963. Decided March 18, 1963.

Charged in a Florida State Court with a noncapital felony, petitioner appeared without funds and without counsel and asked the Court to appoint counsel for him; but this was denied on the ground that the state law permitted appointment of counsel for indigent defendants in capital cases only. Petitioner conducted his own defense about as well as could be expected of a layman; but he was convicted and sentenced to imprisonment. Subsequently, he applied to the State Supreme Court for a writ of habeas corpus, on the ground that his conviction violated his rights under the Federal Constitution. The State Supreme Court denied all relief. *Held:* The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment. *Betts* v. *Brady*, 316 U.S. 455, overruled. Pp. 336-345.

Reversed and cause remanded.

Abe Fortas, by appointment of the Court, 370 U.S. 932, argued the cause for petitioner. With him on the brief were *Abe Krash* and *Ralph Temple*.

Bruce R. Jacob, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief were *Richard W. Ervin*, Attorney General, and *A. G. Spicola, Jr.*, Assistant Attorney General.

J. Lee Rankin, by special leave of Court, argued the cause for the American Civil Liberties Union et al., as *amici curiae*, urging reversal. With him on the brief were *Norman Dorsen, John Dwight Evans, Jr., Melvin L. Wulf, Richard J. Medalie, Howard W. Dixon* and *Richard Yale Feder*.

George D. Mentz, Assistant Attorney General of Alabama, argued the cause for the State of
336 Alabama, as *336 *amicus curiae*, urging affirmance. With him on the brief were *MacDonald Gallion*, Attorney General of Alabama, *T. W. Bruton*, Attorney General of North Carolina, and *Ralph Moody*, Assistant Attorney General of North Carolina.

A brief for the state governments of twenty-two States and Commonwealths, as *amici curiae*, urging reversal, was filed by *Edward J. McCormack, Jr.*, Attorney General of Massachusetts, *Walter F. Mondale*, Attorney General of Minnesota, *Duke W. Dunbar*, Attorney General of Colorado, *Albert L. Coles*, Attorney General of Connecticut, *Eugene Cook*, Attorney General of Georgia, *Shiro Kashiwa*, Attorney General of Hawaii, *Frank Benson*, Attorney General of Idaho, *William G. Clark*, Attorney General of Illinois, *Evan L. Hultman*, Attorney General of Iowa, *John B. Breckinridge*, Attorney General of Kentucky, *Frank E. Hancock*, Attorney General of Maine, *Frank J. Kelley*, Attorney General of Michigan, *Thomas F. Eagleton*, Attorney General of Missouri, *Charles E. Springer*, Attorney General of Nevada, *Mark*

McElroy, Attorney General of Ohio, *Leslie R. Burgum*, Attorney General of North Dakota, *Robert Y. Thornton*, Attorney General of Oregon, *J. Joseph Nugent*, Attorney General of Rhode Island, *A. C. Miller*, Attorney General of South Dakota, *John J. O'Connell*, Attorney General of Washington, *C. Donald Robertson*, Attorney General of West Virginia, and *George N. Hayes*, Attorney General of Alaska.

Robert Y. Thornton, Attorney General of Oregon, and *Harold W. Adams*, Assistant Attorney General, filed a separate brief for the State of Oregon, as *amicus curiae*.

MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony
337 under *337 Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

> "The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.
>
> "The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government."[1] Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. Since 1942, when *Betts* v. *Brady*,
338 316 U.S. 455, was decided by a divided *338 Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts.[2] To give this problem another review here, we granted certiorari. 370 U.S. 908. Since Gideon was proceeding *in forma pauperis*, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in *Betts* v. *Brady*, 316 U.S. 455, be reconsidered?"

[1] Later in the petition for habeas corpus, signed and apparently prepared by petitioner himself, he stated, "I, Clarence Earl Gideon, claim that I was denied the rights of the 4th, 5th and 14th amendments of the Bill of Rights."

[2] Of the many such cases to reach this Court, recent examples are *Carnley* v. *Cochran*, 369 U.S. 506 (1962); *Hudson* v. *North Carolina*, 363 U.S. 697 (1960); *Moore* v. *Michigan*, 355 U.S. 155 (1957). Illustrative cases in the state courts are *Artrip* v. *State*, 136 So.2d 574 (Ct.App.Ala. 1962); *Shaffer* v. *Warden*, 211 Md. 635, 126 A.2d 573 (1956). For examples of commentary, see Allen, The Supreme Court, Federalism, and State Systems of Criminal Justice, 8 De Paul L. Rev. 213 (1959); Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most

Pervasive Right" of an Accused, 30 U. of Chi. L. Rev. 1 (1962); The Right to Counsel, 45 Minn. L. Rev. 693 (1961).

I.

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. Betts was indicated for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in
339 prison. *339 Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision. The Court said:

> "Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial." 316 U.S., at 462.

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the *Betts* case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts* v. *Brady* holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that *Betts* v. *Brady* should be overruled.

II.

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."
340 We have construed *340 this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.[3] Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment." 316 U.S., at 465. In order to decide whether the Sixth Amendment's guarantee of counsel is of this fundamental nature, the Court in *Betts* set out and considered "[r]elevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date." 316 U.S., at 465. On the basis of this historical data the Court concluded that "appointment of counsel is not a fundamental right, essential to a fair trial." 316 U.S., at 471. It was for this reason the *Betts* Court refused to

accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon the States by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial." it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the
341 Sixth Amendment requires in a federal court. *341

[3] *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in *Powell* v. *Alabama*, 287 U.S. 45 (1932), a case upholding the right of counsel, where the Court held that despite sweeping language to the contrary in *Hurtado* v. *California*, 110 U.S. 516 (1884), the Fourteenth Amendment "embraced" those "`fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,'" even though they had been "specifically dealt with in another part of the federal Constitution." 287 U.S., at 67. In many cases other than *Powell* and *Betts*, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this "fundamental nature" and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances.[4] For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the
342 States the Fifth Amendment's command that *342 private property shall not be taken for public use without just compensation,[5] the Fourth Amendment's prohibition of unreasonable searches and seizures,[6] and the Eighth's ban on cruel and unusual punishment.[7] On the other hand, this Court in *Palko* v. *Connecticut*, 302 U.S. 319 (1937), refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States. In so refusing, however, the Court, speaking through Mr. Justice Cardozo, was careful to emphasize that "immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states" and that guarantees "in their origin . . . effective against the federal government alone" had by prior cases "been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption." 302 U.S., at 324-325, 326.

[4] *E. g., Gitlow* v. *New York*, 268 U.S. 652, 666 (1925) (speech and press); *Lovell* v. *City of Griffin*, 303 U.S. 444, 450 (1938) (speech and press); *Staub* v. *City of Baxley*, 355 U.S. 313, 321 (1958) (speech); *Grosjean* v. *American Press Co.*, 297 U.S. 233, 244 (1936) (press); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) (religion); *De Jonge* v. *Oregon*, 299 U.S. 353, 364 (1937) (assembly); *Shelton* v. *Tucker*, 364 U.S. 479, 486, 488 (1960) (association); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296 (1961) (association); *Edwards* v. *South Carolina*, 372 U.S. 229 (1963) (speech, assembly, petition for redress of grievances).

[5] *E. g., Chicago, B. Q. R. Co.* v. *Chicago*, 166 U.S. 226, 235-241 (1897); *Smyth* v. *Ames*, 169 U.S. 466, 522-526 (1898).

[6] *E. g., Wolf* v. *Colorado*, 338 U.S. 25, 27-28 (1949); *Elkins* v. *United States*, 364 U.S. 206, 213 (1960); *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961).

7 *Robinson* v. *California*, 370 U.S. 660, 666 (1962).

We accept *Betts* v. *Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before *Betts* v. *Brady*, this Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that "the right to the aid of
343 *343 counsel is of this fundamental character." *Powell* v. *Alabama*, 287 U.S. 45, 68 (1932). While the Court at the close of its *Powell* opinion did by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

> "We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 243-244 (1936).

And again in 1938 this Court said:

> "[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not `still be done.'" *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938). To the same effect, see *Avery* v. *Alabama*, 308 U.S. 444 (1940), and *Smith* v. *O'Grady*, 312 U.S. 329 (1941).

In light of these and many other prior decisions of this Court, it is not surprising that the *Betts* Court, when faced with the contention that "one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State," conceded that "[e]xpressions in the opinions of this court lend color to the argument . . . ." 316 U.S., at 462-463. The fact is that in deciding as it did — that "appointment of counsel is not a fundamental
344 right, *344 essential to a fair trial" — the Court in *Betts* v. *Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. 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. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. 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. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell* v. *Alabama:*

> "The right to be heard would be, in many cases, of little avail if it did not
345 comprehend the right to be *345 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." 287 U.S., at 68-69.

The Court in *Betts* v. *Brady* departed from the sound wisdom upon which the Court's holding in *Powell* v. *Alabama* rested. Florida, supported by two other States, has asked that *Betts* v. *Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was "an anachronism when handed down" and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten Justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by
346 the Bill of Rights. *346

Justice Field, the first Justice Harlan, and probably Justice Brewer, took that position in *O'Neil* v. *Vermont*, 144 U.S. 323, 362-363, 370-371, as did Justices BLACK, DOUGLAS, Murphy and Rutledge in *Adamson* v. *California*, 332 U.S. 46, 71-72, 124. And see *Poe* v. *Ullman*, 367 U.S. 497, 515-522 (dissenting opinion). That view was also expressed by Justice Bradley and Swayne in the *Slaughter-House Cases*, 16 Wall. 36, 118-119, 122, and seemingly was accepted by Justice Clifford when he dissented with Justice Field in *Walker* v. *Sauvinet*, 92 U.S. 90, 92.[1] Unfortunately it has never commanded a Court. Yet, happily, all constitutional questions are always open. *Erie R. Co*. v. *Tompkins*, 304 U.S. 64. And what we do today does not foreclose the matter.

[1] Justices Bradley, Swayne and Field emphasized that the first eight Amendments granted citizens of the United States certain privileges and immunities that were protected from abridgment by the States by the Fourteenth Amendment. See *Slaughter-House Cases, supra*, at 118-119; *O'Neil* v. *Vermont, supra*, at 363. Justices Harlan and Brewer accepted the same theory in the *O'Neil* case (see *id.*, at 370-

371), though Justice Harlan indicated that all "persons," not merely "citizens," were given this protection. *Ibid*. In *Twining* v. *New Jersey*, 211 U.S. 78, 117, Justice Harlan's position was made clear:

"In my judgment, immunity from self-incrimination is protected against hostile state action, not only by . . . [the Privileges and Immunities Clause], but [also] by . . . [the Due Process Clause]."

Justice Brewer, in joining the opinion of the Court, abandoned the view that the entire Bill of Rights applies to the States in *Maxwell* v. *Dow*, 176 U.S. 581.

My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that same guarantee as applied to the Federal Government.[2] Mr. Justice Jackson shared that
347 view.[3] *347 But that view has not prevailed[4] and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

[2] See *Roth* v. *United States*, 354 U.S. 476, 501, 506; *Smith* v. *California*, 361 U.S. 147, 169.

[3] *Beauharnais* v. *Illinois*, 343 U.S. 250, 288. Cf. the opinions of Justices Holmes and Brandeis in *Gitlow* v. *New York*, 268 U.S. 652, 672, and *Whitney* v. *California*, 274 U.S. 357, 372.

[4] The cases are collected by MR. JUSTICE BLACK in *Speiser* v. *Randall*, 357 U.S. 513, 530. And see, *Eaton* v. *Price*, 364 U.S. 263, 274-276.

MR. JUSTICE CLARK, concurring in the result.

In *Bute* v. *Illinois*, 333 U.S. 640 (1948), this Court found no special circumstances requiring the appointment of counsel but stated that "if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps." *Id.*, at 674. Prior to that case I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment.[1] At the next Term of the Court Mr. Justice Reed revealed that the Court was divided as to noncapital cases but that "the due process clause . . . requires counsel for all persons charged with serious crimes . . . ." *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441 (1948). Finally, in *Hamilton* v. *Alabama*, 368 U.S. 52 (1961), we said that "[w]hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted."
348 *Id.*, at 55. *348

[1] It might, however, be said that there is such an implication in *Avery* v. *Alabama*, 308 U.S. 444 (1940), a capital case in which counsel had been appointed but in which the petitioner claimed a denial of "effective" assistance. The Court in affirming noted that "[h]ad petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required reversal of his conviction." *Id.*, at 445. No "special circumstances" were recited by the Court, but in citing *Powell* v. *Alabama*, 287 U.S. 45 (1932), as authority for its dictum it appears that the Court did not rely solely on the capital nature of the offense.

That the Sixth Amendment requires appointment of counsel in "all criminal prosecutions" is clear, both from the language of the Amendment and from this Court's interpretation. See *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). It is equally clear from the above cases, all decided after *Betts* v. *Brady*, 316 U.S. 455 (1942), that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an

increasingly eroded basis in authority. In *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960), we specifically rejected any constitutional distinction between capital and noncapital offenses as regards congressional power to provide for court-martial trials of civilian dependents of armed forces personnel. Having previously held that civilian dependents could not constitutionally be deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, *Reid* v. *Covert*, 354 U.S. 1 (1957), we held that the same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today,[2] as we noted that:

> "Obviously Fourteenth Amendment cases dealing with state action have no application here, but if *349 they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here . . . would be as invalid under those cases as it would be in cases of a capital nature." 361 U.S., at 246-247.

I must conclude here, as in *Kinsella, supra*, that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprivation of "liberty" just as for deprivation of "life," and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprivation of liberty may be less onerous than deprivation of life — a value judgment not universally accepted[3] — or that only the latter deprivation is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

[2] Portents of today's decision may be found as well in *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and *Ferguson* v. *Georgia*, 365 U.S. 570 (1961). In *Griffin*, a noncapital case, we held that the petitioner's constitutional rights were violated by the State's procedure, which provided free transcripts for indigent defendants only in capital cases. In *Ferguson* we struck down a state practice denying the appellant the effective assistance of counsel, cautioning that "[o]ur decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel." 365 U.S., at 596.

[3] See, *e. g.*, Barzun, In Favor of Capital Punishment, 31 American Scholar 181, 188-189 (1962).

MR. JUSTICE HARLAN, concurring.

I agree that *Betts* v. *Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts* v. *Brady* represented "an abrupt break with its own well-considered precedents." *Ante*, p. 344. In 1932, in *Powell* v. *Alabama*, 287 U.S. 45, a capital case, this Court declared that under the particular facts there presented — "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . and above all that they stood in deadly peril of their lives" (287 U.S., at 71) — the 350 state court had a duty to assign counsel for *350 the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an afterthought; they were repeatedly emphasized, see 287 U.S., at 52, 57-58, 71, and were clearly regarded as important to the result.

Thus when this Court, a decade later, decided *Betts* v. *Brady*, it did no more than to admit of the possible existence of special circumstances in noncapital as well as capital trials, while at the

same time insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, see *Johnson* v. *Zerbst*, 304 U.S. 458, but to have imposed these requirements on the States would indeed have been "an abrupt break" with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in *Powell* v. *Alabama*, was not limited to capital cases was in truth not a departure from, but an extension of, existing precedent.

The principles declared in *Powell* and in *Betts*, however, have had a troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the *Betts* decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases.[1] Such dicta continued to appear in subsequent decisions,[2] and any lingering doubts were finally eliminated by the holding of *Hamilton* v. *Alabama*, 368 U.S. 52.

[1] *Avery* v. *Alabama*, 308 U.S. 444, 445.

[2] *E. g., Bute* v. *Illinois*, 333 U.S. 640, 674; *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441.

In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts*, there were
351 cases in which the Court *351 found special circumstances to be lacking, but usually by a sharply divided vote.[3] However, no such decision has been cited to us, and I have found none, after *Quicksall* v. *Michigan*, 339 U.S. 660, decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty.[4] The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts* v. *Brady* rule is no longer a reality.

[3] *E. g., Foster* v. *Illinois*, 332 U.S. 134; *Bute* v. *Illinois*, 333 U.S. 640; *Gryger* v. *Burke*, 334 U.S. 728.

[4] *E. g., Williams* v. *Kaiser*, 323 U.S. 471; *Hudson* v. *North Carolina*, 363 U.S. 697; *Chewning* v. *Cunningham*, 368 U.S. 443.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights.[5] To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.

[5] See, *e. g., Common wealth ex rel. Simon* v. *Maroney*, 405 Pa. 562, 176 A.2d 94 (1961); *Shaffer* v. *Warden*, 211 Md. 635, 126 A.2d 573 (1956); *Henderson* v. *Bannan*, 256 F.2d 363 (C.A. 6th Cir. 1958).

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to *all* criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been
352 foreshadowed in our decisions. *352

In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment, I wish to make a further observation. When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty"[6] and thus valid against the States, I do not read our past decisions to suggest that by so holding, we

automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. Cf. *Roth* v. *United States*, 354 U.S. 476, 496-508 (separate opinion of this writer). In what is done today I do not understand the Court to depart from the principles laid down in *Palko* v. *Connecticut*, 302 U.S. 319, or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.

[6] *Palko* v. *Connecticut*, 302 U.S. 319, 325.

On these premises I join in the judgment of the Court.

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No. 79-6423
U.S.

Lassiter v. Department of Social Services

452 U.S. 18 (1981) · 101 S. Ct. 2153
Decided Jun 1, 1981

CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA.

No. 79-6423.

Argued February 23, 1981. Decided June 1, 1981.

In 1975, a North Carolina state court adjudicated petitioner's infant son to be a neglected child and transferred him to the custody of respondent Durham County Department of Social Services. A year later, petitioner was convicted of second-degree murder, and she began a sentence of 25 to 40 years of imprisonment. In 1978, respondent petitioned the court to terminate petitioner's parental rights. Petitioner was brought from prison to the hearing on the petition, and the court, after determining, *sua sponte*, that she had been given ample opportunity to obtain counsel and that her failure to do so was without just cause, did not postpone the proceedings. Petitioner did not aver that she was indigent, and the court did not appoint counsel for her. At the hearing, petitioner cross-examined a social worker from respondent, and both petitioner and her mother testified under the court's questioning. The court thereafter terminated petitioner's parental status, finding that she had not contacted respondent about her child since December 1975, and that she had "wilfully failed to maintain concern or responsibility for the welfare of the minor." The North Carolina Court of Appeals rejected petitioner's sole contention on appeal that because she was indigent, the Due Process Clause of the Fourteenth Amendment required the State to provide counsel for her. The North Carolina Supreme Court summarily denied discretionary review.

Held:

1. The Constitution does not require the appointment of counsel for indigent parents in every parental status termination proceeding. The decision whether due process calls for the appointment of counsel is to be answered in the first instance by the trial court, subject to appellate review. Pp. 24-32.

(a) With regard to what the "fundamental fairness" requirement of the Due Process Clause means concerning the right to appointed counsel, there is a presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. The other elements of the due process decision — the private interest at stake, the government's interest, and the risk that the procedures used will lead to erroneous
19 decisions, *Mathews* v. *19 *Eldridge*, 424 U.S. 319, 335 — must be balanced against each other and then weighed against the presumption. Pp. 25-27.

(b) The parent's interest in the accuracy and justice of the decision to terminate parental status is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest in avoiding the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high. Thus if, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, the *Eldridge* factors would overcome the presumption against the right to appointed counsel, and due process would require appointment of counsel. Pp. 27-32.

2. In the circumstances of this case, the trial judge did not deny petitioner due process of law when he did not appoint counsel for her. The record shows, *inter alia*, that the petition to terminate petitioner's parental rights contained no allegations of neglect or abuse upon which criminal charges could be based; no expert witnesses testified; the case presented no specially troublesome points of law; the presence of counsel could not have made a determinative difference for petitioner; she had expressly declined to appear at the 1975 child custody hearing; and the trial court found that her failure to make an effort to contest the termination proceeding was without cause. Pp. 32-33.

43 N.C. App. 525, 259 S.E.2d 336, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, POWELL, and REHNQUIST, JJ., joined. BURGER, C.J., filed a concurring opinion, *post*, p. 34. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 35. STEVENS, J., filed a dissenting opinion, *post*, p. 59.

Leowen Evans argued the cause *pro hac vice* for petitioner. With him on the briefs were *Gregory C. Malhoit* and *Robert L. Walker*.

Thomas Russell Odom argued the cause for respondent. With him on the brief was *Lester W. Owen*. *20 *Steven Mansfield Shaber*, Assistant Attorney General, argued the cause for the State of North Carolina as *amicus curiae* urging affirmance. With him on the brief for the State of North Carolina et al. as *amici curiae* were *Rufus L. Edmisten*, Attorney General of North Carolina; *Richard S. Gebelein*, Attorney General of Delaware, and *Regina Mullen Small*, State Solicitor; *Bill Allain*, Attorney General of Mississippi, and *Jim R. Bruce*, Special Assistant Attorney General; *Jim Smith*, Attorney General of Florida, and *Sidney H. McKenzie*, Assistant Attorney General; *Richard R. Bryan*, Attorney General of Nevada, and *Claudia K. Cormier*, Deputy Attorney General; and *Steve Clark*, Attorney General of Arkansas, and *Robert R. Ross*, Deputy Attorney General.–

– Briefs of *amici curiae* urging reversal were filed by *Louise Gruner Gans, Catherine P. Mitchell*, and *Phyllis Gelman* for the National Center on Women and Family Law, Inc., et al.; by *David R. Lundberg* for the National Legal Aid and Defender Association; and by *Robert S. Payne* for the North Carolina Civil Liberties Union.

Wm. Reece Smith, Jr., filed a brief for the American Bar Association as *amicus curiae*.

JUSTICE STEWART delivered the opinion of the Court.

I

In the late spring of 1975, after hearing evidence that the petitioner, Abby Gail Lassiter, had not provided her infant son William with proper medical care, the District Court of Durham County, N.C., adjudicated him a neglected child and transferred him to the custody of the Durham County Department of Social Services, the respondent here. A year later, Ms. Lassiter was charged with first-degree murder, was convicted of second-degree murder, and began a sentence of 25 to 40 years of imprisonment.[1] In 1978 the
21 Department *21 petitioned the court to terminate Ms. Lassiter's parental rights because, the Department alleged, she "has not had any contact with the child since December of 1975" and "has willfully left the child in foster care for more than two consecutive years without showing that substantial progress has been made in correcting the conditions which led to the removal of the child, or without showing a positive response to the diligent efforts of the Department of Social Services to strengthen her relationship to the child, or to make and follow through with constructive planning for the future of the child."

[1] The North Carolina Court of Appeals, in reviewing the petitioner's conviction, indicated that the murder occurred during an altercation between Ms. Lassiter, her mother, and the deceased:

"Defendant's mother told [the deceased] to 'come on.' They began to struggle and deceased fell or was knocked to the floor. Defendant's Page 21 mother was beating deceased with a broom. While deceased was still on the floor and being beaten with the broom, defendant entered the apartment. She went into the kitchen and got a butcher knife. She took the knife and began stabbing the deceased who was still prostrate. The body of deceased had seven stab wounds . . . ." *State* v. *Lassiter*, No. 7614SC1054 (June 1, 1977).

After her conviction was affirmed on appeal, Ms. Lassiter sought to attack it collaterally. Among her arguments was that the assistance of her trial counsel had been ineffective because he had failed to "seek to elicit or introduce before the jury the statement made by [Ms. Lassiter's mother,] 'And I did it, I hope she dies.'" Ms. Lassiter's mother had, like Ms. Lassiter, been indicted on a first-degree murder charge; however, the trial court granted the elder Ms. Lassiter's motion for a nonsuit. The North Carolina General Court of Justice, Superior Court Division, denied Ms. Lassiter's motion for collateral relief. File No. 76-CR-3102 (Mar. 20, 1979).

Ms. Lassiter was served with the petition and with notice that a hearing on it would be held. Although her mother had retained counsel for her in connection with an effort to invalidate the murder conviction, Ms. Lassiter never mentioned the forthcoming hearing to him (or, for that matter, to any other person except, she said, to "someone" in the prison). At the behest of the Department of Social Services' attorney, she was brought from prison to the hearing, which was held August 31, 1978. The hearing opened, apparently at the judge's instance, with a discussion of whether Ms. Lassiter should have more time in which to find
22 legal assistance. *22 Since the court concluded that she "has had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and [that] her failure to do so is without just cause," the court did not postpone the proceedings. Ms. Lassiter did not aver that she was indigent, and the court did not appoint counsel for her.

A social worker from the respondent Department was the first witness. She testified that in 1975 the Department "received a complaint from Duke Pediatrics that William had not been followed in the pediatric clinic for medical problems and that they were having difficulty in locating Ms. Lassiter . . . ." She said that in May 1975 a social worker had taken William to the hospital, where

doctors asked that he stay "because of breathing difficulties [and] malnutrition and [because] there was a great deal of scarring that indicated that he had a severe infection that had gone untreated." The witness further testified that, except for one "prearranged" visit and a chance meeting on the street, Ms. Lassiter had not seen William after he had come into the State's custody, and that neither Ms. Lassiter nor her mother had "made any contact with the Department of Social Services regarding that child." When asked whether William should be placed in his grandmother's custody, the social worker said he should not, since the grandmother "has indicated to me on a number of occasions that she was not able to take responsibility for the child" and since "I have checked with people in the community and from Ms. Lassiter's church who also feel that this additional responsibility would be more than she can handle." The social worker added that William "has not seen his grandmother since the chance meeting in July of '76 and that was the only time."

After the direct examination of the social worker, the judge said:

> "I notice we made extensive findings in June of '75 that you were served with papers and called the social *23 services and told them you weren't coming; and the serious lack of medical treatment. And, as I have said in my findings of the 16th day of June '75, the Court finds that the grandmother, Ms. Lucille Lassiter, mother of Abby Gail Lassiter, filed a complaint on the 8th day of May, 1975, alleging that the daughter often left the children, Candina, Felicia and William L. with her for days without providing money or food while she was gone."

Ms. Lassiter conducted a cross-examination of the social worker, who firmly reiterated her earlier testimony. The judge explained several times, with varying degrees of clarity, that Ms. Lassiter should only ask questions at this stage; many of her questions were disallowed because they were not really questions, but arguments.

Ms. Lassiter herself then testified, under the judge's questioning, that she had properly cared for William. Under cross-examination, she said that she had seen William more than five or six times after he had been taken from her custody and that, if William could not be with her, she wanted him to be with her mother since, "He knows us. Children know they family. . . . They know they people, they know they family and that child knows us anywhere. . . . I got four more other children. Three girls and a boy and they know they little brother when they see him."

Ms. Lassiter's mother was then called as a witness. She denied, under the questioning of the judge, that she had filed the complaint against Ms. Lassiter, and on cross-examination she denied both having failed to visit William when he was in the State's custody and having said that she could not care for him.

The court found that Ms. Lassiter "has not contacted the Department of Social Services about her child since December, 1975, has not expressed any concern for his care and welfare, and has made no efforts to plan for his future." Because *24 Ms. Lassiter thus had "wilfully failed to maintain concern or responsibility for the welfare of the minor," and because it was "in the best interests of the minor," the court terminated Ms. Lassiter's status as William's parent.[2]

> [2] The petition had also asked that the parental rights of the putative father, William Boykin, be terminated. Boykin was not married to Ms. Lassiter, he had never contributed to William's financial support, and indeed he denied that he was William's father. The court granted the petition to terminate his alleged parental status.

On appeal, Ms. Lassiter argued only that, because she was indigent, the Due Process Clause of the Fourteenth Amendment entitled her to the assistance of counsel, and that the trial court had therefore erred in not requiring the State to provide counsel for her. The North Carolina Court of Appeals decided that "[w]hile this State action does invade a protected area of individual privacy, the invasion is not so serious or unreasonable as to compel us to hold that appointment of counsel for indigent parents is constitutionally mandated." *In re Lassiter*, 43 N.C. App. 525, 527, 259 S.E.2d 336, 337. The Supreme Court of North Carolina summarily denied Ms. Lassiter's application for discretionary review, 299 N.C. 120, 262 S.E.2d 6, and we granted certiorari to consider the petitioner's claim under the Due Process Clause of the Fourteenth Amendment, 449 U.S. 819.

II

For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which
25 *25 must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

A

The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation. Thus, when the Court overruled the principle of *Betts* v. *Brady*, 316 U.S. 455, that counsel in criminal trials need be appointed only where the circumstances in a given case demand it, the Court did so in the case of a man sentenced to prison for five years. *Gideon* v. *Wainwright*, 372 U.S. 335. And thus *Argersinger* v. *Hamlin*, 407 U.S. 25, established that counsel must be provided before any indigent may be sentenced to prison, even where the crime is petty and the prison term brief.

That it is the defendant's interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel is demonstrated by the Court's announcement in *In re Gault*, 387 U.S. 1, that "the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency *which may result in commitment to an institution in which the juvenile's freedom is curtailed*," the juvenile has a right to appointed counsel even though those proceedings may be styled "civil" and not "criminal." *Id.*, at 41 (emphasis added). Similarly, four of the five Justices who reached the merits in *Vitek* v. *Jones*, 445 U.S. 480, concluded that an indigent prisoner is entitled to appointed counsel before being involuntarily transferred for treatment to a state mental hospital. The fifth Justice differed from the other four only in declining to exclude the "possibility that the
26 required assistance *26 may be rendered by competent laymen in some cases." *Id.*, at 500 (separate opinion of POWELL, J.).

Significantly, as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel. In *Gagnon* v. *Scarpelli*, 411 U.S. 778, the Court gauged the due process rights of a previously sentenced probationer at a probation-revocation hearing. In *Morrissey* v. *Brewer*, 408 U.S. 471, 480, which involved an analogous hearing to revoke parole, the Court had said: "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." Relying on that discussion, the Court

in *Scarpelli* declined to hold that indigent probationers have, *per se*, a right to counsel at revocation hearings, and instead left the decision whether counsel should be appointed to be made on a case-by-case basis.

Finally, the Court has refused to extend the right to appointed counsel to include prosecutions which, though criminal, do not result in the defendant's loss of personal liberty. The Court in *Scott* v. *Illinois*, 440 U.S. 367, for instance, interpreted the "central premise of *Argersinger*" to be "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment," and the Court endorsed that premise as "eminently sound and warrant[ing] adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel." *Id.*, at 373. The Court thus held "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." *Id.*, at 373-374.

In sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them
27 the presumption that an indigent litigant has a *27 right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

B

The case of *Mathews* v. *Eldridge*, 424 U.S. 319, 335, propounds three elements to be evaluated in deciding what due process requires, viz., the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. We must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent, if he is unsuccessful, may lose his personal freedom.

This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody, and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley* v. *Illinois*, 405 U.S. 645, 651. Here the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation. Cf. *May* v. *Anderson*, 345 U.S. 528, 533; *Armstrong* v. *Manzo*, 380 U.S. 545. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.[3]

> [3] Some parents will have an additional interest to protect. Petitions to terminate parental rights are not uncommonly based on alleged criminal activity. Parents so accused may need legal counsel to guide them in understanding the problems such petitions may create.

Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision. For this reason, the State may share the indigent parent's interest in
28 the availability of appointed counsel. *28 If, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal. North Carolina itself acknowledges as much by providing that where a parent files a written answer to a termination petition, the State must supply a lawyer to represent the child. N.C. Gen. Stat. § 7A-289.29 (Supp. 1979).

The State's interests, however, clearly diverge from the parent's insofar as the State wishes the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause. But though the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the respondent's brief that the "potential costs of appointed counsel in termination proceedings . . . is [*sic*] admittedly *de minimis* compared to the costs in all criminal actions."

Finally, consideration must be given to the risk that a parent will be erroneously deprived of his or her child because the parent is not represented by counsel. North Carolina law now seeks to assure accurate decisions by establishing the following procedures: A petition to terminate parental rights may be filed only by a parent seeking the termination of the other parent's rights, by a county department of social services or licensed child-placing agency with custody of the child, or by a person with whom the child has lived continuously for the two years preceding the petition. § 7A-289.24. A petition must describe facts sufficient to warrant a finding that one of the grounds for termination exists, § 7A-289.25(6), and the parent must be notified of the petition and given 30 days in which to file a written answer to
29 it, *29 § 7A-289.27. If that answer denies a material allegation, the court must, as has been noted, appoint a lawyer as the child's guardian *ad litem* and must conduct a special hearing to resolve the issues raised by the petition and the answer. § 7A-289.29. If the parent files no answer, "the court shall issue an order terminating all parental and custodial rights . . .; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition." § 7A-289.28. Findings of fact are made by a court sitting without a jury and must "be based on clear, cogent, and convincing evidence." § 7A-289.30. Any party may appeal who gives notice of appeal within 10 days after the hearing. § 7A-289.34.[4]

[4] The respondent also points out that parental termination hearings commonly occur only after a custody proceeding in which the child has judicially been found to be abused, neglected, or dependent, and that an indigent parent has a right to be represented by appointed counsel at the custody hearing. § 7A-587.

Ms. Lassiter's hearing occurred before some of these provisions were enacted. She did not, for instance, have the benefit of the "clear, cogent, and convincing" evidentiary standard, nor did she have counsel at the hearing in which William was taken from her custody.

The respondent argues that the subject of a termination hearing — the parent's relationship with her child — far from being abstruse, technical, or unfamiliar, is one as to which the parent must be uniquely well informed and to which the parent must have given prolonged thought. The respondent also contends that a termination hearing is not likely to produce difficult points of evidentiary law, or even of substantive law, since the evidentiary problems peculiar to criminal trials are not present and since the standards for termination are not complicated. In fact, the respondent reports, the North Carolina Departments of Social Services are themselves sometimes represented at termination hearings by
30 social workers instead of by lawyers.[5] *30

[5] Both the respondent and the Columbia Journal of Law and Social Problems, 4 Colum. J. L. Soc. Prob. 230 (1968), have conducted surveys Page 30 purporting to reveal whether the presence of counsel reduces the number of erroneous determinations in parental termination proceedings. Unfortunately, neither survey goes beyond presenting statistics which, standing alone, are unilluminating. The Journal note does, however, report that it

questioned the New York Family Court judges who preside over parental termination hearings and found that 72.2% of them agreed that when a parent is unrepresented, it becomes more difficult to conduct a fair hearing (11.1% of the judge disagreed); 66.7% thought it became difficult to develop the facts (22.2% disagreed).

Yet the ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made. See, *e.g., Davis* v. *Page*, 442 F. Supp. 258, 261 (SD Fla. 1977); *State* v. *Jamison*, 251 Or. 114, 117-118, 444 P.2d 15, 17 (1968). Thus, courts have generally held that the State must appoint counsel for indigent parents at termination proceedings. *State ex rel. Heller* v. *Miller*, 61 Ohio St.2d 6, 399 N.E.2d 66 (1980); *Department of Public Welfare* v. *J. K. B.*, 379 Mass. 1, 393 N.E.2d 406 (1979); *In re Chad S.*, 580 P.2d 983 (Okla. 1978); *In re Myricks*, 85 Wn.2d 252, 533 P.2d 841 (1975); *Crist* v. *Division of Youth and Family Services*, 128 N.J. Super. 102, 320 A.2d 203 (1974); *Danforth* v. *Maine Dept. of Health and Welfare*, 303 A.2d 794 (Me. 1973); *In re Friesz*, 190 Neb. 347, 208 N.W.2d 259 (1973).[6] The respondent is able to point to no presently authoritative case, except for the North Carolina
31 *31 judgment now before us, holding that an indigent parent has no due process right to appointed counsel in termination proceedings.

[6] A number of courts have held that indigent parents have a right to appointed counsel in child dependency or neglect hearings as well. *E.g., Davis* v. *Page*, 640 F.2d 599 (CA5 1981) (en banc); *Cleaver* v. *Wilcox*, 499 F.2d 940 (CA9 1974) (right to be decided case by case); *Smith* v. *Edmiston*, 431 F. Supp. 941 (WD Tenn. 1977).

C

The dispositive question, which must now be addressed, is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status. To summarize the above discussion of the *Eldridge* factors: the parent's interest is an extremely important one (and may be supplemented by the dangers of criminal liability inherent in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of an erroneous deprivation of the parent's rights insupportably high.

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel. But since the *Eldridge* factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed," *Gagnon* v. *Scarpelli*, 411 U.S., at 788, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon* v.

32 *Scarpelli*, *32 and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review. See, *e.g., Wood* v. *Georgia*, 450 U.S. 261.

III

Here, as in *Scarpelli*, "[i]t is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements," since here, as in that case, "[t]he facts and circumstances . . . are susceptible of almost infinite variation . . . ." 411 U.S., at 790. Nevertheless, because child-custody litigation must be concluded as rapidly as is consistent with fairness,[7] we decide today whether the trial judge denied Ms. Lassiter due process of law when he did not appoint counsel for her.

[7] According to the respondent's brief, William Lassiter is now living "in a pre-adoptive home with foster parents committed to formal adoption to become his legal parents." He cannot be legally adopted, nor can his status otherwise be finally clarified, until this litigation ends.

The respondent represents that the petition to terminate Ms. Lassiter's parental rights contained no allegations of neglect or abuse upon which criminal charges could be based, and hence Ms. Lassiter could not well have argued that she required counsel for that reason. The Department of Social Services was represented at the hearing by counsel, but no expert witnesses testified, and the case presented no specially troublesome points of law, either procedural or substantive. While hearsay evidence was no doubt admitted, and while Ms. Lassiter no doubt left incomplete her defense that the Department had not adequately assisted her in rekindling her interest in her son, the weight of the evidence that she had few sparks of such an interest was sufficiently great that the

33 *33 presence of counsel for Ms. Lassiter could not have made a determinative difference. True, a lawyer might have done more with the argument that William should live with Ms. Lassiter's mother — but that argument was quite explicity made by both Lassiters, and the evidence that the elder Ms. Lassiter had said she could not handle another child, that the social worker's investigation had led to a similar conclusion, and that the grandmother had displayed scant interest in the child once he had been removed from her daughter's custody was, though controverted, sufficiently substantial that the absence of counsel's guidance on this point did not render the proceedings fundamentally unfair.[8] Finally, a court deciding whether due process requires the appointment of counsel need not ignore a parent's plain demonstration that she is not interested in attending a hearing. Here, the trial court had previously found that Ms. Lassiter had expressly declined to appear at the 1975 child custody hearing, Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing, and the court specifically found that Ms. Lassiter's failure to make an effort to contest the termination proceeding was without cause. In view of all these circumstances, we hold that the trial court did not err in failing to appoint counsel for Ms. Lassiter.

[8] Ms. Lassiter's argument here that her mother should have been given custody of William is hardly consistent with her argument in the collateral attack on her murder conviction that she was innocent because her mother was guilty. See n. 1, *supra*.

IV

In its Fourteenth Amendment, our Constitution imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair. A wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution. Informed opinion has clearly come to hold that an

34 indigent parent is *34 entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well. IJA-ABA Standards for Juvenile Justice, Counsel for Private Parties 2.3(b) (1980); Uniform Juvenile Court Act § 26(a), 9A U. L. A. 35 (1979); National Council on Crime and Delinquency, Model Rules for Juvenile Courts, Rule 39 (1969); U.S. Dept. of HEW, Children's Bureau, Legislative Guide for Drafting Family and Juvenile Court Acts § 25(b) (1969); U.S. Dept. of HEW, Children's Bureau, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children, Pt. II, § 8 (1961); National Council on Crime and Delinquency, Standard Juvenile Court Act § 19 (1959). Most significantly, 33 States and the District of Columbia provide statutorily for the appointment of counsel in termination cases. The Court's opinion today in no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise.

For the reasons stated in this opinion, the judgment is affirmed.

It is so ordered.

CHIEF JUSTICE BURGER, concurring.

I join the Court's opinion and add only a few words to emphasize a factor I believe is misconceived by the dissenters. The purpose of the termination proceeding at issue here was not "punitive." *Post*, at 48. On the contrary, its purpose was *protective* of the child's best interests. Given the record in this case, which involves the parental rights of a mother under lengthy sentence for murder who showed little interest in her son, the writ might well have been a "candidate" for dismissal as improvidently granted. See *ante*, at 32-33. However, I am content to join the narrow holding of the Court, leaving the appointment of

35 counsel in termination *35 proceedings to be determined by the state courts on a case-by-case basis.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

The Court today denies an indigent mother the representation of counsel in a judicial proceeding initiated by the State of North Carolina to terminate her parental rights with respect to her youngest child. The Court most appropriately recognizes that the mother's interest is a "commanding one," *ante*, at 27, and it finds no countervailing state interest of even remotely comparable significance, see *ante*, at 27-28, 31. Nonetheless, the Court avoids what seems to me the obvious conclusion that due process requires the presence of counsel for a parent threatened with judicial termination of parental rights, and, instead, revives an ad hoc approach thoroughly discredited nearly 20 years ago in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Because I believe that the unique importance of a parent's interest in the care and custody of his or her child cannot constitutionally be extinguished through formal judicial proceedings without the benefit of counsel, I dissent.

I

This Court is not unfamiliar with the problem of determining under what circumstances legal representation is mandated by the Constitution. In *Betts* v. *Brady*, 316 U.S. 455 (1942), it reviewed at length both the tradition behind the Sixth Amendment right to counsel in criminal trials and the historical practices of the States in that area. The decision in *Betts* — that the Sixth Amendment right to counsel did not apply to the States and that the due process guarantee of the Fourteenth Amendment permitted a flexible, case-by-case determination of the defendant's need for counsel in state criminal trials — was overruled in *Gideon* v. *Wainwright*, 372 U.S., at 345. The Court

in *Gideon* rejected the *Betts* *36 reasoning to the effect that counsel for indigent criminal defendants was "'not a fundamental right, essential to a fair trial.'" 372 U.S., at 340 (quoting *Betts* v. *Brady*, 316 U.S., at 471). Finding the right well founded in its precedents, the Court further concluded that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U.S., at 344. Similarly, in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), assistance of counsel was found to be a requisite under the Sixth Amendment, as incorporated into the Fourteenth, even for a misdemeanor offense punishable by imprisonment for less than six months.[1]

[1] In *Scott* v. *Illinois*, 440 U.S. 367 (1979), the Court's analysis of Sixth Amendment jurisprudence led to the conclusion that the right to counsel is not constitutionally mandated when imprisonment is not actually imposed.

Outside the criminal context, however, the Court has relied on the flexible nature of the due process guarantee whenever it has decided that counsel is not constitutionally required. The special purposes of probation revocation determinations, and the informal nature of those administrative proceedings, including the absence of counsel for the State, led the Court to conclude that due process does not require counsel for probationers. *Gagnon* v. *Scarpelli*, 411 U.S. 778, 785-789 (1973). In the case of school disciplinary proceedings, which are brief, informal, and intended in part to be educative, the Court also found no requirement for legal counsel. *Goss* v. *Lopez*, 419 U.S. 565, 583 (1975). Most recently, the Court declined to intrude the presence of counsel for a minor facing voluntary civil commitment by his parent, because of the parent's substantial role in that decision and because of the decision's essentially medical and informal nature. *Parham* v. *J. R.*, 442 U.S. 584, 604-609 (1979).

In each of these instances, the Court has recognized that *37 what process is due varies in relation to the interests at stake and the nature of the governmental proceedings. Where the individual's liberty interest is of diminished or less than fundamental stature, or where the prescribed procedure involves informal decisionmaking without the trappings of an adversarial trial-type proceeding, counsel has not been a requisite of due process. Implicit in this analysis is the fact that the contrary conclusion sometimes may be warranted. Where an individual's liberty interest assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding seeks to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness. See *In re Gault*, 387 U.S. 1 (1967). To say this is simply to acknowledge that due process allows for the adoption of different rules to address different situations or contexts.

It is not disputed that state intervention to terminate the relationship between petitioner and her child must be accomplished by procedures meeting the requisites of the Due Process Clause. Nor is there any doubt here about the kind of procedure North Carolina has prescribed. North Carolina law required notice and a trial-type hearing before the State on its own initiative may sever the bonds of parenthood. The decisionmaker is a judge, the rules of evidence are in force, and the State is represented by counsel. The question, then, is whether proceedings in this mold, that relate to a subject so vital, can comport with fundamental fairness when the defendant parent remains unrepresented by counsel. As the Court today properly acknowledges, our consideration of the process due in this context, as in others, must rely on a balancing of the competing private and public interests, an approach succinctly described in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).[2] As does the majority, I *38 evaluate the "three distinct factors" specified in *Eldridge:* the private interest affected; the risk of error under the

procedure employed by the State; and the countervailing governmental interest in support of the challenged procedure.

[2] See also *Little* v. *Streater, ante*, at 5-6, 13-16; *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 848-849 (1977); *Morrissey* v. *Brewer*, Page 38 408 U.S. 471, 481 (1972); *Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961).

A

At stake here is "the interest of a parent in the companionship, care, custody, and management of his or her children." *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972). This interest occupies a unique place in our legal culture, given the centrality of family life as the focus for personal meaning and responsibility. "[F]ar more precious . . . than property rights," *May* v. *Anderson*, 345 U.S. 528, 533 (1953), parental rights have been deemed to be among those "essential to the orderly pursuit of happiness by free men," *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923), and to be more significant and priceless than "'liberties which derive merely from shifting economic arrangements.'" *Stanley* v. *Illinois*, 405 U.S., at 651, quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring). Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment. *Smith* v. *Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore* v. *East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion); *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Meyer* v. *Nebraska*, 262 U.S., at 399. Within the general ambit of family integrity, the Court has accorded a high degree of constitutional respect to a natural parent's interest both in controlling the details of the child's upbringing,

39 *39 *Wisconsin* v. *Yoder*, 406 U.S. 205, 232-234 (1972); *Pierce* v. *Society of Sisters*, 268 U.S., at 534-535, and in retaining the custody and companionship of the child, *Smith* v. *Organization of Foster Families*, 431 U.S., at 842-847; *Stanley* v. *Illinois*, 405 U.S., at 651.

In this case, the State's aim is not simply to influence the parent-child relationship but to *extinguish* it. A termination of parental rights is both total and irrevocable.[3] Unlike other custody proceedings, it leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development. It is hardly surprising that this forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts,[4] Congress,[5] and
40 commentators.[6] *40 The Court candidly notes, as it must, *ante*, at 27, that termination of parental rights by the State is a "unique kind of deprivation."

[3] Under North Carolina law, when a child is adjudged to be abused, neglected, or dependent, the dispositional alternatives are not couched in terms of permanence. See N.C. Gen. Stat. §§ 7A-647, 7A-651 (Supp. 1979). In contrast, the State's termination statute specifically provides that an order terminating parental rights "completely and permanently terminates all rights and obligations" between parent and child, except that the child's right of inheritance continues until such time as the child may be adopted. § 7A-289.33. Such absolute and total termination is not unusual. See, *e.g.*, Ariz. Rev. Stat. Ann. § 8-539 (1974); Cal. Civ. Code Ann. § 232.6 (West Supp. 1981); Ind. Code § 31-6-5-6 (a) (Supp. 1980); Ky. Rev. Stat. § 199.613(2) (Supp. 1980); Mo. Rev. Stat. § 211.482 (Supp. 1980).

[4] Page 39 *E.g., Davis* v. *Page*, 640 F.2d 599, 604 (CA5 1981) (en banc); *Brown* v. *Guy*, 476 F. Supp. 771, 773 (Nev. 1979); *State ex*

rel. Lemaster v. *Oakley*, 157 W. Va. 590, 598, 203 S.E.2d 140, 144 (1974); *Danforth* v. *State Dept. of Health Welfare*, 303 A.2d 794, 799-800 (Me. 1973); *In re Howard*, 382 So.2d 194, 199 (La.App. 1980).

[5] See H.R. Rep. No. 95-1386, p. 22 (1978) ("removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty . . ."). This Report accompanied the Indian Child Welfare Act of 1978, Pub.L. 95-608, 92 Stat. 3069. Congress there provided for court-appointed counsel to indigent Indian parents facing a termination Page 40 proceeding. § 102(b), 92 Stat. 3071, 25 U.S.C. § 1911 (b) (1976 ed., Supp. III).

[6] See, *e.g.*, Levine, Caveat Parens: A Demystification of the Child Protection System, 35 U. Pitt. L. Rev. 1, 52 (1973); Note, Child Neglect: Due Process for the Parent, 70 Colum. L. Rev. 465, 478 (1970); Representation in Child-Neglect Cases: Are Parents Neglected?, 4 Colum. J. L. Soc. Prob. 230, 250 (1968) (Parent Representation Study).

The magnitude of this deprivation is of critical significance in the due process calculus, for the process to which an individual is entitled is in part determined "by the extent to which he may be 'condemned to suffer grievous loss.'" *Goldberg* v. *Kelly*, 397 U.S. 254, 263 (1970), quoting *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). See *Little* v. *Streater, ante*, at 12; *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). Surely there can be few losses more grievous than the abrogation of parental rights. Yet the Court today asserts that this deprivation somehow is less serious than threatened losses deemed to require appointed counsel, because in this instance the parent's own "personal liberty" is not at stake.

I do not believe that our cases support the "presumption" asserted, *ante*, at 26-27, that physical confinement is the only loss of liberty grievous enough to trigger a right to appointed counsel under the Due Process Clause. Indeed, incarceration has been found to be neither a necessary nor a sufficient condition for requiring counsel on behalf of an indigent defendant. The prospect of canceled parole or probation, with its consequent deprivation of personal liberty, has not led the Court to require counsel for a prisoner facing a revocation proceeding. *Gagnon* v. *Scarpelli*, 411 U.S., at 785-789; *Morrissey* v. *Brewer*, 408 U.S., at 489. On the other hand, the fact that no new incarceration was threatened by a transfer from prison to a mental hospital did not preclude the Court's recognition of adverse changes in the conditions of *41 confinement and of the stigma that presumably is associated with being labeled mentally ill. *Vitek* v. *Jones*, 445 U.S. 480, 492, 494 (1980). For four Members of the Court, these "other deprivations of liberty," coupled with the possibly diminished mental capacity of the prisoner, compelled the provision of counsel for any indigent prisoner facing a transfer hearing. *Id.*, at 496-497 (opinion of WHITE, J., joined by BRENNAN, MARSHALL, and STEVENS, JJ.).[7] See also *In re Gault*, 387 U.S., at 24-25.

41

[7] JUSTICE POWELL agreed with the plurality that independent representation must be provided to an inmate facing involuntary transfer to a state mental hospital, but concluded that this representative need not be an attorney because the transfer hearing was informal and the central issue was a medical one. 445 U.S., at 498-500.

Moreover, the Court's recourse to a "pre-eminent generalization," *ante*, at 25, misrepresents the importance of our flexible approach to due process. That approach consistently has emphasized attentiveness to the particular context. Once an individual interest is deemed sufficiently substantial or fundamental, determining the constitutional necessity of a requested procedural protection requires that we examine the nature of

the proceeding — both the risk of error if the protection is not provided and the burdens created by its imposition.[8] Compare *Goldberg* v. *Kelly*, 42 397 U.S. 254 (1970), *42 with *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), with *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974).

> 8 By emphasizing the value of physical liberty to the exclusion of all other fundamental interests, the Court today grafts an unnecessary and burdensome new layer of analysis onto its traditional three-factor balancing test. Apart from improperly conflating two distinct lines of prior cases, see *supra*, at 35-38, the Court's reliance on a "rebuttable presumption" sets a dangerous precedent that may undermine objective judicial review regarding other procedural protections. Even in the area of juvenile court delinquency proceedings, where the threat of incarceration arguably supports an automatic analogy to the criminal process, the Court has eschewed a bright-line approach. Instead, it has evaluated each requested procedural protection in light of its consequences for fair play and truth determination. See generally *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

Rather than opting for the insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel, I would abide by the Court's enduring commitment to examine the relationships among the interests on both sides, and the appropriateness of counsel in the specific type of proceeding. The fundamental significance of the liberty interests at stake in a parental termination proceeding is undeniable, and I would find this first portion of the due process balance weighing heavily in favor of refined procedural protections. The second *Eldridge* factor, namely, the risk of error in the procedure provided by the State, must then be reviewed with some care.

B

The method chosen by North Carolina to extinguish parental rights resembles in many respects a criminal prosecution. Unlike the probation revocation procedure reviewed in *Gagnon* v. *Scarpelli*, on which the Court so heavily relies, the termination procedure is distinctly formal and adversarial. The State initiates the proceeding by filing a petition in district court, N.C. Gen. Stat. §§ 7A-289.23 and 7A-289.25 (Supp. 1979),[9] and serving a summons on the parent, § 7A-289.27(1). A state judge presides over the adjudicatory hearing that follows, and the hearing is conducted pursuant to the formal rules of evidence and procedure. N.C. Rule Civ. Proc. 1, N.C. Gen. Stat. § 1A-1 (Supp. 43 1979). In general, *43 hearsay is inadmissible and records must be authenticated. See, *e.g.*, § 1A-1, Rules 1, 43, 44, 46.

> 9 A petition for termination may also be filed by a private party, such as a judicially appointed guardian, a foster parent, or the other natural parent. N.C. Gen. Stat. § 7A-289.24 (Supp. 1979). Because the State in those circumstances may not be performing the same adversarial and accusatory role, an application of the three *Eldridge* factors might yield a different result with respect to the right to counsel.

In addition, the proceeding has an obvious accusatory and punitive focus. In moving to terminate a parent's rights, the State has concluded that it no longer will try to preserve the family unit, but instead will marshal an array of public resources to establish that the parent-child separation must be made permanent.[10] The State has legal representation through the county attorney. This lawyer has access to public records concerning the family and to professional social workers who are empowered to investigate the family situation and to testify against the parent. The State's legal representative may also call upon experts in family relations, psychology, and medicine to bolster the State's case. And, of

course, the State's counsel himself is an expert in the legal standards and techniques employed at the termination proceeding, including the methods of
44 cross-examination. *44

10 Significantly, the parent's rights and interests are not mentioned at all under the statement of purpose for the North Carolina termination statute. See N.C. Gen. Stat. § 7A-289.22 (Supp. 1979). In contrast, in abuse, neglect, and dependency proceedings the State has a statutory obligation to keep a family together whenever possible. § 7A-542. Thus, the State has chosen to provide counsel for parents, § 7A-587, in circumstances where it shares at least in part their interest in family integrity but not where it regards the parent as an opponent. The Assistant Attorney General of North Carolina explained the decision to furnish appointed counsel at the abuse and neglect stage by pointing to the State's need to avoid an awkward situation, given its possibly conflicting responsibilities to parent and child. Tr. of Oral Arg. 39-40. While this may be sound as a matter of public policy, it cannot excuse the failure to provide counsel at the termination stage, where the State and the indigent parent are adversaries, and the inequality of power and resources is starkly evident.

The possibility of providing counsel for the *child* at the termination proceeding has not been raised by the parties. That prospect requires consideration of interests different from those presented here, and again might yield a different result with respect to the right to counsel. See generally *Parham* v. *J. R.*, 442 U.S. 584 (1979); *Smith* v. *Organization of Foster Families*, 431 U.S. 816 (1977).

In each of these respects, the procedure devised by the State vastly differs from the informal and rehabilitative probation revocation decision in *Scarpelli*, the brief, educative school disciplinary procedure in *Goss*, and the essentially medical decision in *Parham*. Indeed, the State here has prescribed virtually all the attributes of a formal trial as befits the severity of the loss at stake in the termination decision — every attribute, that is, except counsel for the defendant parent. The provision of counsel for the parent would not alter the character of the proceeding, which is already adversarial, formal, and quintessentially legal. It, however, would diminish the prospect of an erroneous termination, a prospect that is inherently substantial, given the gross disparity in power and resources between the State and the uncounseled indigent parent.[11]

11 Cf. *Parham* v. *J. R.*, 442 U.S., at 606-607; *Goldberg* v. *Kelly*, 397 U.S., at 266.

The prospect of error is enhanced in light of the legal standard against which the defendant parent is judged. As demonstrated here, that standard commonly adds another dimension to the complexity of the termination proceeding. Rather than focusing on the facts of isolated acts or omissions, the State's charges typically address the nature and quality of complicated ongoing relationships among parent, child, other relatives, and even unrelated parties. In the case at bar, the State's petition accused petitioner of two of the several grounds authorizing termination of parental rights under North Carolina law:

> "That [petitioner] has *without cause*, failed to establish or maintain *concern or responsibility* as to the child's welfare.

. . . . .

"That [petitioner] has *willfully* left the child in foster care for more than two
45 consecutive years without showing *45 that *substantial progress has been made* in correcting the conditions which led to the removal of the child [for neglect], or without showing a *positive response* to the *diligent efforts of the Department of Social Services* to strengthen her relationship to the child, or *to make and follow through with constructive planning* for the future of the child." (Emphasis supplied.) Juvenile Petition ¶¶ 6, 7, App. 3.[12]

[12] See N.C. Gen. Stat. §§ 7A-289.32(1), 7A-289.32(3) (Supp. 1977). Subdivision § 7A-289.32(1) was repealed by 1979 N.C. Sess. Laws, ch. 669, § 2.

The legal issues posed by the State's petition are neither simple nor easily defined. The standard is imprecise and open to the subjective values of the judge.[13] A parent seeking to prevail against the State must be prepared to adduce evidence about his or her personal abilities and lack of fault, as well as proof of progress and foresight as a parent that the State would deem adequate and improved over the situation underlying a previous adverse judgment of child neglect. The parent cannot possibly succeed without being able to identify material issues, develop defenses, gather and
46 present *46 sufficient supporting nonhearsay evidence, and conduct cross-examination of adverse witnesses.

[13] Under North Carolina law, there is a further stage to the termination inquiry. Should the trial court determine that one or more of the conditions authorizing termination has been established, it then must consider whether the best interests of the child require maintenance of the parent-child relationship. N.C. Gen. Stat. § 7A-289.31(a) (Supp. 1979).

This Court more than once has adverted to the fact that the "best interests of the child" standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values. See, *e.g., Smith* v. *Organization of Foster Families*, 431 U.S., at 835, n. 36; *Bellotti* v. *Baird*, 443 U.S. 622, 655 (1979) (STEVENS, J., concurring in judgment). See also *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978). Several courts, perceiving similar risks, have gone so far as to invalidate parental termination statutes on vagueness grounds. See, *e.g., Alsager* v. *District Court of Polk Cty.*, 406 F. Supp. 10, 18-19 (SD Iowa 1975), aff'd on other grounds, 545 F.2d 1137 (CA8 1976); *Davis* v. *Smith*, 266 Ark. 112, 121-123, 583 S.W.2d 37, 42-43 (1979).

The Court, of course, acknowledges, *ante*, at 30, that these tasks "may combine to overwhelm an uncounseled parent." I submit that is a profound understatement. Faced with a formal accusatory adjudication, with an adversary — the State — that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State's "expertise," the defendant parent plainly is outstripped if he or she is without the assistance of "'the guiding hand of counsel.'" *In re Gault*, 387 U.S., at 36, quoting *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). When the parent is indigent, lacking in education, and easily intimidated by figures of authority,[14] the imbalance may well become insuperable.

[14] See Schetky, Angell, Morrison, Sack, Parents Who Fail: A Study of 51 Cases of Termination of Parental Rights, 18 J. Am. Acad. Child Psych. 366, 375 (1979) (citing minimal educational backgrounds). See also *Davis* v. *Page*, 442 F. Supp. 258, 260 (SD Fla. 1977) (uncounseled parent, ignorant of governing substantive law, "was little more than a spectator in the adjudicatory [dependency] proceeding," and "sat silently through most of the

hearing . . . fearful of antagonizing the social workers"), aff'd in part, 640 F.2d 599 (CA5 1981) (en banc).

The risk of error thus is severalfold. The parent who actually has achieved the improvement or quality of parenting the State would require may be unable to establish this fact. The parent who has failed in these regards may be unable to demonstrate cause, absence of willfulness, or lack of agency diligence as justification. And errors of fact or law in the State's case may go unchallenged
47 and uncorrected.[15] Given *47 the weight of the interests at stake, this risk of error assumes extraordinary proportions. By intimidation, inarticulateness, or confusion, a parent can lose forever all contact and involvement with his or her offspring.

15 See Parent Representation Study, at 241 (parents appearing in Kings County, N. Y., Family Court, charged with neglect and represented by counsel, had higher rate of dismissed petitions, 25% to 7.9%, and lower rate of neglect adjudications, 62.5% to 79.5%, than similarly charged parents appearing without counsel); Brief for Respondent 38-39, 25a-31a Page 47 (study of state-initiated termination actions in 73 North Carolina counties; parent prevailed in 5.5% of proceedings where represented by counsel, and in 0.15% of proceedings where unrepresented).

While these statistics hardly are dispositive, I do not share the Court's view, *ante*, at 29-30, n. 5, that they are "unilluminating." Since no evidence in either study indicates that the defendant parent who can retain or is offered counsel is less culpable than the one who appears unrepresented, it seems reasonable to infer that a sizable number of cases against unrepresented parents end in termination solely because of the absence of counsel. In addition, as the Court acknowledges, *ante*, at 30, n. 5, the judges who preside over termination hearings perceive them as less fair when the parent is without counsel.

C

The final factor to be considered, the interests claimed for the State, do not tip the scale against providing appointed counsel in this context. The State hardly is in a position to assert here that it seeks the informality of a rehabilitative or educative proceeding into which counsel for the parent would inject an unwelcome adversarial edge. As the Assistant Attorney General of North Carolina declared before this Court, once the State moves for termination, it "has made a decision that the child cannot go home and should not go home. It no longer has an obligation to try and restore that family." Tr. of Oral Arg. 40.

The State may, and does, properly assert a legitimate interest in promoting the physical and emotional well-being of its minor children. But this interest is not served by terminating the rights of any concerned, responsible parent. Indeed, because North Carolina is committed to "protect[ing] all children from the unnecessary severance of a relationship with biological or legal parents," § 7A-289.22(2), "the State spites its own
48 articulated goals when it needlessly *48 separates" the parent from the child. *Stanley* v. *Illinois*, 405 U.S., at 653.[16]

16 The Court apparently shares this view. See *ante*, at 27-28.

The State also has an interest in avoiding the cost and administrative inconvenience that might accompany a right to appointed counsel. But, as the Court acknowledges, the State's fiscal interest "is hardly significant enough to overcome private interests as important as those here." *Ante*, at 28. The State's financial concern indeed is a limited one, for the right to appointed counsel may well be restricted to those termination proceedings that are instituted by the State. Moreover, no difficult line-drawing problem would arise with respect to other types of civil proceedings. The instant due process

analysis takes full account of the fundamental nature of the parental interest, the permanency of the threatened deprivation, the gross imbalance between the resources employed by the prosecuting State and those available to the indigent parent, and the relatively insubstantial cost of furnishing counsel. An absence of any one of these factors might yield a different result.[17] But where, as here, the threatened loss of liberty is severe and absolute, the State's role is so clearly adversarial and punitive, and the cost involved is relatively slight, there is no sound basis for refusing to recognize the right to counsel as a requisite of due process in a proceeding initiated by the State to terminate parental rights.

17 Thus, for example, the State's involvement in adjudicating the competing claims for child custody between parents in a divorce proceeding need not obligate it to provide counsel for indigent parents.

II A

The Court's analysis is markedly similar to mine; it, too, analyzes the three factors listed in *Mathews* v. *Eldridge*, and it, too, finds the private interest weighty, the procedure devised by the State fraught with risks of error, and the countervailing
49 *49 governmental interest insubstantial. Yet, rather than follow this balancing process to its logical conclusion, the Court abruptly pulls back and announces that a defendant parent must await a case-by-case determination of his or her need for counsel. Because the three factors "will not *always* be so distributed," reasons the Court, the Constitution should not be read to "requir[e] the appointment of counsel in *every* parental termination proceeding." *Ante*, at 31 (emphasis added). This conclusion is not only illogical, but it also marks a sharp departure from the due process analysis consistently applied heretofore. The flexibility of due process, the Court has held, requires case-by-case consideration of different decisionmaking *contexts*, not of different *litigants* within a given context. In analyzing the nature of the private and governmental interests at stake, along with the risk of error, the Court in the past has not limited itself to the particular case at hand. Instead, after addressing the three factors as generic elements in the context raised by the particular case, the Court then has formulated a rule that has general application to similarly situated cases.

The Court's own precedents make this clear. In *Goldberg* v. *Kelly*, the Court found that the desperate economic conditions experienced by welfare recipients *as a class* distinguished them from other recipients of governmental benefits. 397 U.S., at 264. In *Mathews* v. *Eldridge*, the Court concluded that the needs of Social Security disability recipients were *not* of comparable urgency, and, moreover, that existing pretermination procedures, based largely on written medical assessments, were likely to be more objective and evenhanded than typical welfare entitlement decisions. 424 U.S., at 339-345. These cases established rules translating due process in the welfare context as requiring a pretermination hearing but dispensing with that requirement in the disability benefit context. A showing that a particular welfare recipient had access to additional income, or that a disability recipient's eligibility turned on testimony rather
50 than *50 written medical reports, would not result in an exception from the required procedural norms. The Court reasoned in *Eldridge:*

> "To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Id.*, at 344.

There are sound reasons for this. Procedural norms are devised to ensure that justice may be done in every case, and to protect litigants against unpredictable and unchecked adverse governmental action. Through experience with decisions in varied situations over time, lessons

emerge that reflect a general understanding as to what is minimally necessary to assure fair play. Such lessons are best expressed to have general application which guarantees the predictability and uniformity that underlie our society's commitment to the rule of law. By endorsing, instead, a retrospective review of the trial record of each particular defendant parent, the Court today undermines the very rationale on which this concept of general fairness is based.[18]

[18] The Court's decision in *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), is not to the contrary. In *Scarpelli*, the Court determined that due process requires an individualized approach to requests for counsel by probationers facing revocation. The rule established there was based on respect for the rehabilitative focus of the probation system, the informality of probation proceedings, and the diminished liberty interest of an already-convicted probationer. *Id*, at 785-789. None of these elements is present here. See also *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974).

Moreover, the case-by-case approach advanced by the Court itself entails serious dangers for the interests at stake and the general administration of justice. The Court assumes that a review of the record will establish whether a defendant, proceeding without counsel, has suffered an unfair
51 *51 disadvantage. But in the ordinary case, this simply is not so. The pleadings and transcript of an uncounseled termination proceeding at most will show the obvious blunders and omissions of the defendant parent. Determining the difference legal representation would have made becomes possible only through imagination, investigation, and legal research focused on the particular case. Even if the reviewing court can embark on such an enterprise in each case, it might be hard pressed to discern the significance of failures to challenge the State's evidence or to develop a satisfactory defense. Such failures, however, often cut to the essence of the fairness of the trial, and a court's inability to compensate for them effectively eviscerates the presumption of innocence. Because a parent acting *pro se* is even more likely to be unaware of controlling legal standards and practices, and unskilled in garnering relevant facts, it is difficult, if not impossible, to conclude that the typical case has been adequately presented. Cf. *Betts* v. *Brady*, 316 U.S., at 476 (dissenting opinion).[19]

[19] Of course, the case-by-case approach announced by the Court today places an even heavier burden on the trial court, which will be required to determine in advance what difference legal representation might make. A trial judge will be obligated to examine the State's documentary and testimonial evidence well before the hearing so as to reach an informed decision about the need for counsel in time to allow adequate preparation of the parent's case.

Assuming that this ad hoc review were adequate to ensure fairness, it is likely to be both cumbersome and costly. And because such review involves constitutional rights implicated by state adjudications, it necessarily will result in increased federal interference in state proceedings. The Court's implication to the contrary, see *ante*, at 33, is belied by the Court's experience in the aftermath of *Betts* v. *Brady*. The Court was confronted with innumerable postverdict challenges to the fairness of particular trials, and
52 expended much *52 energy in effect evaluating the performance of state judges.[20] This level of intervention in the criminal processes of the States prompted Justice Frankfurter, speaking for himself and two others, to complain that the Court was performing as a "super-legal-aid bureau." *Uveges* v. *Pennsylvania*, 335 U.S. 437, 450 (1948) (dissenting opinion). I fear that the decision today may transform the Court into a "super family court."

[20] See, *e.g., Quicksall* v. *Michigan*, 339 U.S. 660 (1950); *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948); *Bute* v. *Illinois*, 333 U.S.

640 (1948); *Marino* v. *Ragen*, 332 U.S. 561 (1947); *Hawk* v. *Olson*, 326 U.S. 271 (1945); *Tomkins* v. *Missouri*, 323 U.S. 485 (1945). See generally W. Beaney, The Right to Counsel in American Courts 160-198 (1955).

B

The problem of inadequate representation is painfully apparent in the present case. Petitioner, Abby Gail Lassiter, is the mother of five children. The State moved to remove the fifth child, William, from petitioner's care on the grounds of parental neglect. Although petitioner received notice of the removal proceeding, she did not appear at the hearing and was not represented. In May 1975, the State's District Court adjudicated William to be neglected under North Carolina law and placed him in the custody of the Durham County Department of Social Services. At some point, petitioner evidently arranged for the other four children to reside with and be cared for by her mother, Mrs. Lucille Lassiter. They remain under their grandmother's care at the present time.

As the Court notes, *ante*, at 22, petitioner did not visit William after July 1976. She was unable to do so, for she was imprisoned as a result of her conviction for second-degree murder. In December 1977, she was visited in prison by a Durham County social worker who advised her that the Department planned to terminate her parental rights with respect to William. Petitioner
53 immediately expressed strong *53 opposition to that plan and indicated a desire to place the child with his grandmother. Hearing Tr. 15. After receiving a summons, a copy of the State's termination petition, and notice that a termination hearing would be held in August 1978, petitioner informed her prison guards about the legal proceeding. They took no steps to assist her in obtaining legal representation, *id.*, at 4; App. I to Reply to Brief in Opposition 4, nor was she informed that she had a right to counsel.[21] Under these circumstances, it scarcely would be appropriate, or fair, to find that petitioner had knowingly and intelligently waived a right to counsel.

[21] During her imprisonment, petitioner had spoken with an attorney concerning her criminal conviction. She did not discuss the termination proceeding with this lawyer, and he has stated under oath that in view of her indigency he would not have been interested in representing her at that proceeding even had she asked him to do so. App. 10-11, 16.

At the termination hearing, the State's sole witness was the county worker who had met petitioner on the one occasion at the prison. This worker had been assigned to William's case in August 1977, yet much of her testimony concerned events prior to that date; she represented these events as contained in the agency record. Hearing Tr. 10-13. Petitioner failed to uncover this weakness in the worker's testimony. That is hardly surprising, for there is no indication that an agency record was introduced into evidence or was present in court, or that petitioner or the grandmother ever had an opportunity to review any such record. The social worker also testified about her conversations with members of the community. In this hearsay testimony, the witness reported the opinion of others that the grandmother could not handle the additional responsibility of caring for the fifth child. *Id.*, at 14-15. There is no indication that these community members were unavailable to testify, and the County Attorney did not justify the admission of the hearsay. Petitioner made no
54 objection to its admission. *54

The court gave petitioner an opportunity to cross-examine the social worker, *id.*, at 19, but she apparently did not understand that cross-examination required questioning rather than declarative statements. At this point, the judge became noticeably impatient with petitioner.[22]
55 Petitioner then *55 took the stand, and testified that she wanted William to live with his grandmother and his siblings. The judge

questioned her for a brief period, and expressed open disbelief at one of her answers.[23] The final witness was the grandmother. Both the judge and the County Attorney questioned her. She denied having expressed unwillingness to take William into her home, and vehemently contradicted the social worker's statement that she had complained to the Department about her daughter's neglect of the child.[24] Petitioner was not told that she could question her mother, and did not do so.[25] The County Attorney made a closing argument, *id.*, at
56 58-60, *56 and the judge then asked petitioner if she had any final remarks. She responded: "Yes. I don't think its right." *Id.*, at 61.

22 Hearing Tr. 19-20:

"THE COURT: All right. Do you want to ask her any questions?

"[PETITIONER]: About what? About what she —

"THE COURT: About this child.

"[PETITIONER]: Oh, yes.

"THE COURT: All right. Go ahead.

"[PETITIONER]: The only thing I know is that when you say —

"THE COURT: I don't want you to testify.

"[PETITIONER]: Okay.

"THE COURT: I want to know whether you want to cross-examine her or ask any questions.

"[PETITIONER]: Yes, I want to. Well, you know, the only thing I know about is my part that I know about it. I know —

"THE COURT: I am not talking about what you know. I want to know if you want to ask her any questions or not.

"[PETITIONER]: About that?

"THE COURT: Yes. Do you understand the nature of this proceeding?

"[PETITIONER]: Yes.

"THE COURT: And that is to terminate any rights you have to the child and place it for adoption, if necessary.

"[PETITIONER]: Yes, I know.

"THE COURT: Are there any questions you want to ask her about what she has testified to?

"[PETITIONER]: Yes.

"THE COURT: All right. Go ahead.

"[PETITIONER]: I want to know why you think you are going to turn my child over to a foster home? He knows my mother and he knows all of us. He knows her and he knows all of us.

"THE COURT: Who is he?

"[PETITIONER]: My son, William.

"[SOCIAL WORKER]: Ms. Lassiter, your son has been in foster care since May of 1975 and since that time —

"[PETITIONER]: Yeah, yeah and I didn't know anything about it either."

23 Page 55 *Id.*, at 30:

"[THE COURT]: Did you know that your mother filed a complaint on the 8th day of May, 1975 . . . . ?

"A: No, 'cause she said she didn't file no complaint.

"[THE COURT]: That was some ghost who came up here and filed it I suppose."

The judge concluded his questioning by saying to the County Attorney:

"All right, Mr. Odom, see what you can do." *Id.*, at 36.

24 This latter denial produced the following reaction from the court, *id.*, at 55:

"Q [from respondent]: Did you tell Ms. Mangum on the 8th day of May, 1975, that when your daughter was in the hospital having William that she left the children in the cold house with no heat?

"A: No, sir, no, sir, unh unh, no, sir.

"[PETITIONER]: That's a lie.

"A: No, sir, no, sir. God knows, I'll raise my right hand to God and die saying that. Somebody else told that.

"THE COURT: I wish you wouldn't talk like that it scares me to be in the same room with you."

25 The judge had initiated the examination of Mrs. Lassiter; subsequently he expressed exasperation with the rambling quality of her answers, *id.*, at 52:

"THE COURT: I tell you what, let's just stop all this. You question her, please. Just answer his questions. We'll be here all day at this rate. I mean, we are just wasting time, we're skipping from one subject to another —

"CROSS EXAMINATION BY [RESPONDENT]; . . . ."

It is perhaps understandable that the District Court Judge experienced difficulty and exasperation in conducting this hearing. But both the difficulty and the exasperation are attributable in large measure, if not entirely, to the lack of counsel. An experienced attorney might have translated petitioner's reaction and emotion into several substantive legal arguments. The State charged petitioner with failing to arrange a "constructive plan" for her child's future or to demonstrate a "positive response" to the Department's intervention. A defense would have been that petitioner had arranged for the child to be cared for properly by his grandmother, and evidence might have been adduced to demonstrate the adequacy of the grandmother's care of the other children. See, *e.g., In re Valdez*, 29 Utah 2d 63, 504 P.2d 1372 (1973); *Welfare Commissioner* v. *Anonymous*, 33 Conn. Sup. 100, 364 A.2d 250 (1976); *Diernfeld* v. *People*, 137 Colo. 238, 323 P.2d 628 (1958). See generally *Moore* v. *East Cleveland*, 431 U.S., at 504 (plurality opinion); *id.*, at 508-510 (opinion of BRENNAN, J.). The Department's own "diligence" in promoting the family's integrity was never put in issue during the hearing, yet it is surely significant in light of petitioner's incarceration and lack of access to her child. See, *e.g., Weaver* v. *Roanoke Dept. of Human Resources*, 220 Va. 921, 929, 265 S.E.2d 692, 697 (1980); *In re Christopher H.*, 577 P.2d 1292, 1294 (Okla. 1978); *In re Kimberly I.*, 72 A.D.2d 831, 833, 421 N.Y.S.2d 649, 651 (1979). Finally, the asserted willfulness of petitioner's lack of concern could obviously have been attacked since she was physically unable to regain custody or perhaps even to receive meaningful visits during 21 of the 24 months preceding the action. Cf. *In re Dinsmore*, 36 N.C. App. 720, 245 S.E.2d
57 386 (1978). *57

III

Petitioner plainly has not led the life of the exemplary citizen or model parent. It may well be that if she were accorded competent legal representation, the ultimate result in this particular case would be the same. But the issue before the Court is not petitioner's character; it is whether she was given a meaningful opportunity to be heard when the State moved to terminate absolutely her parental rights.[26] In light of the unpursued avenues of defense, and of the experience petitioner underwent at the hearing, I find virtually incredible the Court's conclusion today that her termination proceeding was fundamentally fair. To reach that conclusion, the Court simply ignores the defendant's obvious inability to speak effectively for herself, a factor the Court has found to be highly significant in past cases. See *Gagnon* v. *Scarpelli*, 411 U.S., at 791; *Uveges* v. *Pennsylvania*, 335 U.S., at 441-442; *Bute* v. *Illinois*, 333 U.S. 640, 677 (1948). See also *Vitek* v. *Jones*, 445 U.S., at 496-497 (plurality opinion); *id.*, at 498 (opinion of POWELL, J.). I am unable to ignore that factor; instead, I believe that the
58 record, and the norms of *58 fairness acknowledged by the majority, compel a holding according counsel to petitioner and persons similarly situated.

26 Unfortunately, the Court does not confine itself to the issue at hand. By going outside the official record of this case, *ante*, at 20-21, n. 1, to unearth and recite details of petitioner's second-degree murder conviction set forth in an unpublished state appellate opinion, see *State* v. *Lassiter*, 33 N.C. App. 405, 235 S.E.2d 289 (1977); Rule 30(e)(3), N.C. Rules of Appellate Procedure, N.C. Gen. Stat. (Supp. 1979 to

vol. 4A), the Court apparently believes it has contributed evidence relevant to petitioner's fitness as a parent, and perhaps to the fitness of petitioner's mother as well. But while some States retain statutes permitting parental rights to be terminated upon a parent's criminal conviction, North Carolina is not among them. See N.C. Gen. Stat. § 7A-289.32 (Supp. 1979). See Note, On Prisoners and Parenting: Preserving the Tie that Binds, 87 Yale L. J. 1408, 1409-1410 (1978). Reliance on such evidence is likely to encourage the kind of subjective value judgments that an adversarial judicial proceeding is meant to avoid.

Finally, I deem it not a little ironic that the Court on this very day *grants*, on due process grounds, an indigent putative father's claim for state-paid blood grouping tests in the interest of according him a meaningful opportunity to disprove his paternity, *Little* v. *Streater, ante*, p. 1, but in the present case *rejects*, on due process grounds, an indigent mother's claim for state-paid legal assistance when the State seeks to take her own child away from her in a termination proceeding. In *Little* v. *Streater*, the Court stresses and relies upon the need for "procedural fairness," the "compelling interest in the accuracy of [the] determination," the "not inconsiderable" risk of error, the indigent's "fac[ing] the State as an adversary," and "fundamental fairness," *ante*, at 13, 14, and 16.

There is some measure of inconsistency and tension here, it seems to me. I can attribute the distinction the Court draws only to a presumed difference between what it views as the "civil" and the "quasi-criminal," *Little* v. *Streater, ante*, at 10. Given the factual context of the two cases decided today, the significance of that presumed difference eludes me.

Ours, supposedly, is "a maturing society," *Trop* v. *Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion), and our notion of due process is, "perhaps, the least frozen concept of our law." *Griffin* v. *Illinois*, 351 U.S. 12, 20 (1956) (opinion concurring in judgment). If the Court in *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), was able to perceive as constitutionally necessary the access to judicial resources required to dissolve a marriage at the behest of private parties, surely it should perceive as similarly necessary the requested access to legal resources when the State itself seeks to dissolve the intimate and personal family bonds between parent and child. It will not open
59 the "floodgates" that, I suspect, the Court *59 fears. On the contrary, we cannot constitutionally afford the closure that the result in this sad case imposes upon us all.

I respectfully dissent.

JUSTICE STEVENS, dissenting.

A woman's misconduct may cause the State to take formal steps to deprive her of her liberty. The State may incarcerate her for a fixed term and also may permanently deprive her of her freedom to associate with her child. The former is a pure deprivation of liberty; the latter is a deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationship may be destroyed. Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two. The plain language of the Fourteenth Amendment commands that both deprivations must be accompanied by due process of law.–

– The Fourteenth Amendment provides in part:

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Without so stating explicitly, the Court appears to treat this case as though it merely involved the deprivation of an interest in property that is less worthy of protection than a person's liberty. The analysis employed in *Mathews* v. *Eldridge*, 424 U.S. 319, in which the Court balanced the costs and benefits of different procedural mechanisms

for allocating a finite quantity of material resources among competing claimants, is an appropriate method of determining what process is due in property cases. Meeting the Court on its own terms, JUSTICE BLACKMUN demonstrates that the *Mathews* v. *Eldridge* analysis requires the appointment of counsel in this type of case. I agree with his conclusion, but I would take one further step.

In my opinion the reasons supporting the conclusion that the Due Process Clause of the
60 Fourteenth Amendment entitles *60 the defendant in a criminal case to representation by counsel apply with equal force to a case of this kind. The issue is one of fundamental fairness, not of weighing the pecuniary costs against the societal benefits. Accordingly, even if the costs to the State were not relatively insignificant but rather were just as great as the costs of providing prosecutors, judges, and defense counsel to ensure the fairness of criminal proceedings, I would reach the same result in this category of cases. For the value of protecting our liberty from deprivation by the State without due process of law is priceless.

61 *61

No. 20-1009
Supreme Court of the United States

Shinn v. Ramirez

Decided May 23, 2022

20-1009

05-23-2022

DAVID SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, REHABILITATION AND REENTRY, PETITIONER v. DAVID SHINN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, REHABILITATION AND REENTRY, ET AL., PETITIONERS DAVID MARTINEZ RAMIREZ v. BARRY LEE JONES

THOMAS, JUSTICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Argued December 8, 2021

Respondents David Martinez Ramirez and Barry Lee Jones were each convicted of capital crimes in Arizona state court and sentenced to death. The Arizona Supreme Court affirmed each case on direct review, and each prisoner was denied state postconviction relief. Each also filed for federal habeas relief under 28 U.S.C. §2254, arguing that trial counsel had been ineffective for failing to conduct adequate investigations. The Federal District Court held in each case that the prisoner's ineffective-assistance claim was procedurally defaulted because it was not properly presented in state court. To overcome procedural default in such cases, a prisoner must demonstrate "cause" to excuse the procedural defect and "actual prejudice." *Coleman v. Thompson,* 501 U.S. 722, 750. To demonstrate cause, Ramirez and Jones relied on *Martinez v. Ryan,* 566 U.S. 1, which held that ineffective assistance of postconviction counsel may be cited as cause for the procedural default of an ineffective-assistance-of-trial-counsel claim. In Ramirez's case, the District Court permitted him to supplement the record with evidence not presented in state court to support his case to excuse the procedural default. Assessing the new evidence, the court excused the procedural default but rejected Ramirez's ineffective-assistance claim on the merits. The Ninth Circuit reversed and remanded for more evidentiary development to litigate the merits of
1 *1 Ramirez's ineffective-assistance-of-trial-counsel claim. In Jones' case, the District Court held a lengthy evidentiary hearing on "cause" and "prejudice," forgave his procedural default, and held that his state trial counsel had provided ineffective assistance. The State of Arizona petitioned this Court in both cases, arguing that §2254(e)(2) does not permit a federal court to order evidentiary development simply because postconviction counsel is alleged to have negligently failed to develop the state-court record.

Held:

> Under §2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on the ineffective assistance of state postconviction counsel. Pp. 6-22.

(a) To respect federal-state dual sovereignty, see *Printz v. United States,* 521 U.S. 898, 918, the availability of federal habeas relief is narrowly circumscribed, see *Brown v. Davenport,* 596 U.S. ___, ___- ___. For example, only rarely may a federal habeas court hear a claim or consider evidence that a prisoner did not previously present to the state courts in compliance with state procedural rules. Pp. 6-13.

(1) Federal habeas review overrides the States' core power to enforce criminal law-an intrusion that "imposes special costs" on the federal system. *Engle v. Isaac,* 456 U.S. 107, 128. Two of those costs are particularly relevant here. First, a federal order to retry or release a state prisoner overrides the State's sovereign power to enforce "societal norms through criminal law." *Calderon v. Thompson,* 523 U.S. 538, 556. Second, federal intervention imposes significant costs on state criminal justice systems. See, *e.g., Wainwright v. Sykes,* 433 U.S. 72, 90. Pp. 6-8.

(2) In light of these costs, this Court recognizes that federal habeas review is not "a substitute for ordinary error correction through appeal," but is an "extraordinary remedy" that guards only against "extreme malfunctions in the state criminal justice systems." *Harrington v. Richter,* 562 U.S. 86, 102-103. To ensure that federal habeas retains its narrow role, both Congress and federal habeas courts have set out strict rules requiring prisoners to raise all of their federal claims in state court before seeking federal relief. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires state prisoners to "exhaus[t] the remedies available in the courts of the State" before seeking federal habeas relief. §2254(b)(1)(A). And the doctrine of procedural default-"an important 'corollary' to the exhaustion requirement," *Davila v. Davis,* 582 U.S.___, ___ -generally prevents federal courts from hearing any federal claim that was not presented to the state courts "consistent with [the State's] own procedural rules," *Edwards v. Carpenter,* 529 U.S. 446, 453. Together, exhaustion and procedural default promote federal-state comity by affording States

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"an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," *Duckworths. Serrano,* 454 U.S. 1, 3 *(per curiam),* and by protecting against "the significant harm to the States that results from the failure of federal courts to respect" state procedural rules, *Coleman,* 501 U.S., at 750. Pp. 8-10.

(3) Nonetheless, a federal court is not required to automatically deny unexhausted or procedurally defaulted claims. For instance, when a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse. And if the state-court record for that defaulted claim is undeveloped, the prisoner must show that factual development in federal court is appropriate. Pp. 10-13.

(i) Federal courts may excuse procedural default only if a prisoner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman,* 501 U.S., at 750. With respect to cause, "attorney error cannot provide cause to excuse a default" "in proceedings for which the Constitution does not guarantee the assistance of counsel at all." *Davila,* 582 U.S., at ___. But in *Martinez,* this Court recognized a "narrow exception" to that rule, holding that ineffective assistance of state postconviction counsel may constitute "cause" to forgive procedural default of a trial-ineffective-assistance claim, but only if the State requires prisoners to raise such claims for the first time during state collateral proceedings. 566 U.S., at 9. Pp. 10-11.

(ii) Excusing a prisoner's failure to develop the state-court record faces an even higher bar. Section 2254(e)(2) applies when a prisoner "has failed to develop the factual basis of a claim," *i.e.,* is "at fault" for the undeveloped record in state court, *Williams v. Taylor,* 529 U.S. 420, 432. If a prisoner is "at fault," a federal court may hold "an evidentiary hearing on the claim" in only two limited scenarios not relevant here. See §§2254(e)(2)(A)(i), (ii). The prisoner also must show that further factfinding would demonstrate, by clear and convincing evidence, that he is innocent of the crime charged. Pp. 12-13.

(b) Although respondents do not satisfy §2254(e)(2)'s narrow exceptions, the Court of Appeals forgave respondents' failures to develop the state-court record because, in its view, they each received ineffective assistance of state postconviction counsel. The Court of Appeals erred. Pp. 13-22.

(1) Respondents primarily argue that a prisoner is not "at fault" for the undeveloped record if state postconviction counsel negligently failed to develop the state record for a claim of ineffective assistance of trial counsel. But under AEDPA and this Court's precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to the prisoner. Pp. 13-19.

(i) A prisoner "bears the risk in federal habeas for all attorney errors made in the course of the representation." *Coleman,* 501 U.S., at 754. And, because there is no constitutional right to counsel in state postconviction proceedings, a prisoner must ordinarily "bea[r] responsibility" for all attorney errors during those proceedings, *Williams,* 529 U.S., at 432, including responsibility for counsel's negligent failure to develop the state postconviction record. This Court's prior cases make this point clear. See, *e.g., Keeney v. Tamayo-Reyes,* 504 U.S. 1; *Williams,* 529 U.S. 420; *Hollands. Jackson,* 542 U.S. 649 *(per curiam).* Thus, a prisoner is "at fault" even when state postconviction counsel is negligent. Pp. 14-15.

(ii) Respondents propose extending *Martinez* so that ineffective assistance of postconviction counsel can excuse a prisoner's failure to develop the state-court record under §2254(e)(2). But unlike judge-made exceptions to procedural default, §2254(e)(2) is a statute, and thus, this Court has no power to redefine when a prisoner "has failed to develop the factual basis of a claim in State court proceedings." Nor is it plausible, as respondents contend, that Congress might have enacted §2254(e)(2) with the expectation that this Court would one day open the door to allowing the ineffective assistance of state postconviction counsel to be cause to forgive procedural default. Finally, *Martinez* itself cuts against respondents' proposed result. *Martinez* foreclosed any extension of its holding beyond the "narrow exception" to procedural default at issue in that case. See 566 U.S., at 9. That assurance has bite only if the State can rely on the state-court record. The cases here demonstrate the improper burden imposed on the States when *Martinez* applies beyond its narrow scope, with the sprawling evidentiary hearing in Jones' case being particularly poignant. Pp. 15-19.

(2) Respondents propose a second reading of §2254(e)(2) that supposedly permits consideration of new evidence in their habeas cases. First, they argue that because §2254(e)(2) bars only "an evidentiary hearing on the claim," a federal court may hold an evidentiary hearing to determine whether there is cause and prejudice. Second, respondents contend that the habeas court may then consider that new evidence to evaluate the merits of the underlying ineffective-assistance claim. By considering already admitted evidence, respondents reason, the habeas court is not holding a "hearing" prohibited by §2254(e)(2). But, in *Holland,* this Court explained that §2254(e)(2)'s "restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence without an evidentiary hearing." 542 U.S., at 653 (emphasis deleted). Therefore, when a federal habeas court convenes an evidentiary hearing for any purpose, or otherwise reviews any evidence for any purpose, it may not consider that evidence on the merits of a negligent

4 *4

prisoner's defaulted claim unless the exceptions in §2254(e)(2) are satisfied. Pp. 19-22.

937 F.3d 1230 and 943 F.3d 1211, reversed.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. SOTOMAYOR, J., filed a dissenting opinion, in which BREYER and KAGAN, JJ., 5 joined. *5

OPINION

THOMAS, JUSTICE

A federal habeas court generally may consider a state prisoner's federal claim only if he has first presented that claim to the state court in accordance with state procedures. When the prisoner has failed to do so, and the state court would dismiss the claim on that basis, the claim is "procedurally defaulted." To overcome procedural default, the prisoner must demonstrate "cause" to excuse the procedural defect and "actual prejudice" if the federal court were to decline to hear his claim. *Coleman v. Thompson,* 501 U.S. 722, 750 (1991). In *Martinez v. Ryan,* 566 U.S. 1 (2012), this Court explained that ineffective assistance of postconviction counsel is "cause" to forgive procedural default of an ineffective-assistance-of-trial-counsel claim, but only if the 6 State required the prisoner to raise that claim *6 for the first time during state postconviction proceedings.

Often, a prisoner with a defaulted claim will ask a federal habeas court not only to consider his claim but also to permit him to introduce new evidence to support it. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the standard to expand the state-court record is a stringent one. If a prisoner has "failed to develop the factual basis of a claim in State court proceedings," a federal court "shall not hold an evidentiary hearing on the claim" unless the prisoner satisfies one of two narrow exceptions, see 28 U.S.C. §2254(e)(2)(A), and demonstrates that the new evidence will establish his innocence "by clear and convincing evidence," §2254(e)(2)(B). In all but these extraordinary cases, AEDPA "bars evidentiary hearings in federal habeas proceedings initiated by state prisoners." *McQuiggin v. Perkins,* 569 U.S. 383, 395 (2013).

The question presented is whether the equitable rule announced in *Martinez* permits a federal court to dispense with §2254(e)(2)'s narrow limits because a prisoner's state postconviction counsel negligently failed to develop the state-court record. We conclude that it does not.

I

In this case, we address two petitions brought by the State of Arizona. See *Ramirez v. Ryan,* 937 F.3d 1230 (CA9 2019); *Jones v. Shinn,* 943 F.3d 1211 (CA9 2019).

A

On May 25, 1989, David Ramirez fatally stabbed his girlfriend, Mary Ann Gortarez, and her 15-year-old daughter, Candie, in their home. 937 F.3d, at 1234-1235; *State v. Ramirez,* 178 Ariz. 116, 119, 121, 871 P.2d 237, 240, 242 (1994). Ramirez stabbed Mary Ann 18 times in the neck with a pair of scissors, and Candie 15 times in the neck with a box cutter. *Id.,* at 121, 871 P.2d, at 242. Police also found physical evidence that
7 Ramirez had raped Candie, and *7 Ramirez later admitted that he had sex with the child on the night of the murders and four times before. *Ibid.* A jury convicted Ramirez of two counts of premeditated first-degree murder. *Ibid.* The trial court sentenced Ramirez to death, *ibid.,* and the Arizona Supreme Court affirmed on direct review, *id.,* at 132, 871 P.2d, at 253.

Ramirez then filed his first petition for state postconviction relief. That petition raised myriad claims, but it did not raise the one at issue here: that Ramirez's trial counsel provided ineffective assistance for "failing to conduct a complete mitigation investigation" or "obtai[n] and present available mitigation evidence at sentencing." App. 402. Ramirez did not raise this ineffective-assistance claim until he subsequently filed a successive state habeas petition, which the state court summarily denied as untimely under Arizona law. See *ibid.*

Ramirez also petitioned the U.S. District Court for the District of Arizona for a writ of habeas corpus under 28 U.S.C. §2254. As relevant here, the District Court held that Ramirez had procedurally defaulted his ineffective-assistance claim by failing to raise it before the Arizona courts in a timely fashion. See App. 402-403. Ramirez responded that the District Court should forgive the procedural default because his state postconviction counsel was himself ineffective for failing to raise the trial-ineffective-assistance claim and develop the facts to support it.

The District Court permitted Ramirez to file several declarations and other evidence not presented to the state court to support his request to excuse his procedural default. See 937 F.3d, at 1238. Assessing the new evidence, the District Court excused the procedural default but rejected Ramirez's ineffective-assistance claim on the merits. See *id.,* at 1240.

The Ninth Circuit reversed and remanded. Like the District Court, it held that Ramirez's state
8 postconviction coun- *8 sel's failure to raise and develop the trial-ineffective-assistance claim was cause to forgive the procedural default. See *id.,* at 1247-1248. The Ninth Circuit also held that Ramirez's underlying trial-ineffective-assistance claim was substantial, and that Ramirez therefore had suffered prejudice. See *id.,* at 1243-1247. But, unlike the District Court, the Court of Appeals declined to decide the merits of Ramirez's claim. The court remanded the case for further factfinding because, in its view, Ramirez was "entitled to evidentiary development to litigate the merits of his ineffective assistance of trial counsel claim." *Id.,* at 1248.

Arizona petitioned for rehearing en banc, arguing that the Ninth Circuit's remand for additional evidentiary development violated 28 U.S.C. §2254(e)(2). The Ninth Circuit denied rehearing over an eight-judge dissent by Judge Collins. See 971 F.3d 1116 (2020).

B

On May 1, 1994, Barry Lee Jones repeatedly beat his girlfriend's 4-year-old daughter, Rachel Gray. See 943 F.3d, at 1215-1216; *State v. Jones,* 188 Ariz. 388, 391, 937 P.2d 310, 313 (1997). One blow to Rachel's abdomen ruptured her small intestine. See *id.,* at 391, 937 P.2d, at 313. She also sustained several injuries to her vagina and labia consistent with sexual assault. *Ibid.* Early the next

morning, Jones drove Rachel to the hospital, where she was pronounced dead on arrival. See *ibid.* Rachel died of peritonitis-"an infection of the lining of the abdomen caused by a ruptured intestine." *Ibid.* A jury convicted Jones of sexual assault, three counts of child abuse, and felony murder. *Ibid.* The trial judge sentenced Jones to death, *ibid.,* and the Arizona Supreme Court affirmed on direct review, see *id.,* at 401, 937 P.2d, at 323.

Jones then petitioned for state postconviction relief. He alleged ineffective assistance by his trial counsel, but not the specific trial-ineffective-
9 assistance claim at issue here: *9 that his counsel "fail[ed] to conduct sufficient trial investigation." 943 F.3d, at 1218. The Arizona Supreme Court summarily denied relief. See *ibid.*

Jones next filed a habeas petition in the U.S. District Court for the District of Arizona. The District Court held that Jones' trial-ineffective-assistance claim was procedurally defaulted, so Jones, like Ramirez, invoked his postconviction counsel's ineffective assistance as grounds to forgive the default. *Ibid.* To bolster his case for cause and prejudice, Jones also moved to supplement the undeveloped state-court record. *Ibid.* The District Court held a 7-day evidentiary hearing with more than 10 witnesses and ultimately decided to forgive Jones' procedural default. See *id.,* at 1219, 1225-1226. The court then relied on the new evidence from the cause-and-prejudice hearing to hold, on the merits, that Jones' trial counsel had provided ineffective assistance. See *id.,* at 1219.

Arizona appealed, arguing that §2254(e)(2) did not permit the evidentiary hearing. The Ninth Circuit affirmed, holding that §2254(e)(2) did not apply because Jones' state postconviction counsel was ineffective for failing to develop the state-court record for Jones' trial-ineffective-assistance claim. See *id.,* at 1220-1222.

As in *Ramirez,* Arizona petitioned for rehearing en banc. And, also as in *Ramirez,* the Ninth Circuit denied Arizona's petition over the dissent of Judge Collins, joined by seven other judges. *Jones v. Shinn,* 971 F.3d 1133 (2020).

C

As noted above, Arizona petitioned for a writ of certiorari in both *Ramirez* and *Jones.* The State maintains that 28 U.S.C. §2254(e)(2) does not permit a federal court to order evidentiary development simply because postconviction counsel is alleged to have negligently failed to develop the state-court record. Respondents do not dispute, and therefore concede, that their habeas
10 petitions fail on the state- *10 court record alone. We granted certiorari, 593 U.S. ___ (2021).[*]

II

A state prisoner may request that a federal court order his release by petitioning for a writ of habeas corpus. See 28 U.S.C. §2254. The writ may issue "only on the ground that [the prisoner] is in custody in violation of the Constitution or laws or treaties of the United States." §2254(a). To respect our system of dual sovereignty, see *Printz v. United States,* 521 U.S. 898, 918 (1997), the availability of habeas relief is narrowly circumscribed, see *Brown v. Davenport,* 596 U.S. ___, ___-___ (2022) (slip op., at 11-14). Among other restrictions, only rarely may a federal habeascourt hear a claim or consider evidence that a prisoner did not previously present to the state courts in compliance with state procedural rules.

A

"From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States." *Kansas v. Garcia,* 589 U.S. ___, ___(2020) (slip op., at 19). The power to convict and punish criminals lies at the heart of the States' "residuary and inviolable sovereignty." The Federalist No. 39, p. 245 (C. Rossiter ed. 1961) (J.
11 Madison); *11 see also *Gamble v. United States,* 587 U.S. ___, ___-___ (2019) (slip op., at 9-10).

Thus, "[t]he States possess primary authority for defining and enforcing the criminal law, " *Engle v. Isaac,* 456 U.S. 107, 128 (1982), and for adjudicating "constitutional challenges to state convictions, " *Harrington v. Richter,* 562 U.S. 86, 103 (2011).

Because federal habeas review overrides the States' core power to enforce criminal law, it "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." Ibid. (internal quotation marks omitted).That intrusion "imposes special costs on our federal system." *Engle*, 456 U.S., at 128; see also *Kuhlmann v. Wilson,* 477 U.S. 436, 453, n. 16 (1986); *Davila v. Davis,* 582 U.S. ___, ___ (2017) (slip op., at 15). Here, two of those costs are particularly relevant.

First, a federal order to retry or release a state prisoner overrides the State's sovereign power to enforce "societal norms through criminal law." *Calderon v. Thompson,* 523 U.S. 538, 556 (1998) (internal quotation marks omitted). That is so because habeas relief "frequently cost[s] society the right to punish admitted offenders." *Engle,* 456 U.S., at 127; see also *Edwards v. Vannoy,* 593 U.S.___, ___ (2021) (slip op., at 6) ("When previously convicted perpetrators of violent crimes go free merely because the evidence needed to conduct a retrial has become stale or is no longer available, the public suffers, as do the victims"). "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon,* 523 U.S., at 556. "To unsettle these expectations is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty, an interest shared by the State and the victims of crime alike." *Ibid,* (internal quotation marks and citation omitted).

Second, federal intervention imposes significant costs on state criminal justice systems. It "disturbs
12 the State's significant *12 interest in repose for concluded litigation," *Harrington,* 562 U.S., at 103 (internal quotation marks omitted), and undermines the States' investment in their criminal trials. If the state trial is merely a "'tryout on the road'" to federal habeas relief, that "detract[s] from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977).

B

In light of these significant costs, we have recognized that federal habeas review cannot serve as "a substitute for ordinary error correction through appeal." *Harrington,* 562 U.S., at 102-103. The writ of habeas corpus is an "extraordinary remedy" that guards only against "extreme malfunctions in the state criminal justice systems." *Id.,* at 102 (internal quotation marks omitted); see also *Brecht v. Abrahamson,* 507 U.S. 619, 633-634 (1993). To ensure that federal habeas corpus retains its narrow role, AEDPA imposes several limits on habeas relief, and we have prescribed several more. See, *e.g., Brown,* 596 U.S., at ___- ___ (slip op., at 11-13). And even if a prisoner overcomes all of these limits, he is never entitled to habeas relief. He must still "persuade a federal habeas court that law and justice require [it]." *Id.,* at ___ (slip op., at 11) (internal quotation marks omitted).

As relevant here, both Congress and federal habeas courts have set out strict rules requiring prisoners to raise all of their federal claims in state court before seeking federal relief. First, AEDPA requires state prisoners to "exhaus[t] the remedies available in the courts of the State" before seeking federal habeas relief. 28 U.S.C. §2254(b)(1)(A). Ordinarily, a state prisoner satisfies this exhaustion requirement by raising his federal claim before the state courts in accordance with state procedures. See *O'Sullivan v. Boerckel,* 526
13 U.S. 838, 848 (1999). If he does *13 so, a federal habeas court may hear his claim, but its review is highly circumscribed. In particular, the federal court may review the claim based solely on the state-court record, see *Cullen v. Pinholster,* 563 U.S. 170, 180 (2011), and the prisoner must

demonstrate that, under this Court's precedents, no "fairminded juris[t]" could have reached the same judgment as the state court, *Harrington,* 562 U.S., at 102; see §2254(d).

State prisoners, however, often fail to raise their federal claims in compliance with state procedures, or even raise those claims in state court at all. If a state court would dismiss these claims for their procedural failures, such claims are technically exhausted because, in the habeas context, "state-court remedies are . . . 'exhausted' when they are no longer available, regardless of the reason for their unavailability." *Woodford v. Ngo,* 548 U.S. 81, 92-93 (2006). But to allow a state prisoner simply to ignore state procedure on the way to federal court would defeat the evident goal of the exhaustion rule. See *Coleman,* 501 U.S., at 732. Thus, federal habeas courts must apply "an important 'corollary' to the exhaustion requirement": the doctrine of procedural default. *Davila,* 582 U.S., at ___ (slip op., at 4). Under that doctrine, federal courts generally decline to hear any federal claim that was not presented to the state courts "consistent with [the State's] own procedural rules." *Edwards v. Carpenter,* 529 U.S. 446, 453 (2000).

Together, exhaustion and procedural default promote federal-state comity. Exhaustion affords States "an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights," *Duckworth v. Serrano,* 454 U.S. 1, 3 (1981) *(per curiam),* and procedural default protects against "the significant harm to the States that results from the failure of federal courts to respect" state procedural rules, *Coleman,* 501 U.S., at 750. Ultimately, "it would be unseemly in
14 our dual system of government for a federal *14 district court to upset a state court conviction without [giving] an opportunity to the state courts to correct a constitutional violation," *Darr v. Burford,* 339 U.S. 200, 204 (1950), and to do so consistent with their own procedures, see *Edwards,* 529 U.S., at 452-453.

C

Despite the many benefits of exhaustion and procedural default, and the substantial costs when those doctrines are not enforced, we have held that a federal court is not required to automatically deny unexhausted or procedurally defaulted claims. When a claim is unexhausted, the prisoner might have an opportunity to return to state court to adjudicate the claim. See, *e.g., Rose v. Lundy,* 455 U.S. 509, 520 (1982). When a claim is procedurally defaulted, a federal court can forgive the default and adjudicate the claim if the prisoner provides an adequate excuse. Likewise, if the state-court record for that defaulted claim is undeveloped, the prisoner must show that factual development in federal court is appropriate.

1

"Out of respect for finality, comity, and the orderly administration of justice," *Dretke v. Haley,* 541 U.S. 386, 388 (2004), federal courts may excuse procedural default only if a prisoner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law," *Coleman,* 501 U.S., at 750. To establish cause, the prisoner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488 (1986). Then, to establish prejudice, the prisoner must show not merely a substantial federal claim, such that" 'the errors at. . . trial created *& possibility* of prejudice," but rather that the constitutional violation "worked to his *actual*
15 and substantial disadvantage.'" *Id.,* at 494 *15 (quoting *United States v. Frady,* 456 U.S. 152, 170 (1982)).

With respect to cause, "[a]ttorney ignorance or inadvertence" cannot excuse procedural default. *Coleman,* 501 U.S., at 753. "[T]he attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must bear the risk of attorney error." *Ibid.* (internal quotation marks omitted). That said, "if the

procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." *Murray,* 477 U.S., at 488. That is not because a constitutional error "is so bad that the lawyer ceases to be an agent" of the prisoner, but rather because a violation of the right to counsel "must be seen as an external factor" to the prisoner's defense. *Coleman,* 501 U.S., at 754 (internal quotation marks omitted). "It follows, then, that in proceedings for which the Constitution does not guarantee the assistance of counsel at all, attorney error cannot provide cause to excuse a default." *Davila,* 582 U.S., at(slip op., at 6).

In *Martinez,* this Court recognized a "narrow exception" to the rule that attorney error cannot establish cause to excuse a procedural default unless it violates the Constitution. 566 U.S., at 9. There, the Court held that ineffective assistance of state postconviction counsel may constitute "cause" to forgive procedural default of a trial-ineffective-assistance claim, but only if the State requires prisoners to raise such claims for the first time during state collateral proceedings. See *ibid.* One year later, in *Trevino v. Thaler,* 569 U.S. 413 (2013), this Court held that this "narrow exception" applies if the State's judicial system effectively forecloses direct review of trial-ineffective-assistance claims. *Id.,* at 428. Otherwise, attorney error where there is no right to counsel remains insufficient to show cause.
16 *Martinez,* 566 U.S., at 16. *16

2

There is an even higher bar for excusing a prisoner's failure to develop the state-court record. Shortly before AEDPA, we held that a prisoner who "negligently failed" to develop the state-court record must satisfy *Coleman's* cause-and-prejudice standard before a federal court can hold an evidentiary hearing. *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 9 (1992). *In Keeney,* we explained that "little [could] be said for holding a habeas petitioner to one standard for failing to bring a claim in state court and excusing the petitioner under another, lower standard for failing to develop the factual basis of that claim in the same forum." *Id.,* at 10. And, consistent with *Coleman,* we held that evidentiary development would be inappropriate "where the cause asserted is attorney error." 504 U.S., at 11, n. 5.

Four years later, Congress enacted AEDPA and replaced *Keeney a* cause-and-prejudice standard for evidentiary development with the even "more stringent requirements" now codified at 28 U.S.C. §2254(e)(2). *Williams v. Taylor,* 529 U.S. 420, 433 (2000) *(Michael Williams).* Section 2254(e)(2) provides that, if a prisoner "has failed to develop the factual basis of a claim in State court proceedings," a federal court may hold "an evidentiary hearing on the claim" in only two limited scenarios. Either the claim must rely on (1) a "new" and "previously unavailable" "rule of constitutional law" made retroactively applicable by this Court, or (2) "a factual predicate that could not have been previously discovered through the exercise of due diligence." §§2254(e)(2)(A)(i), (ii). If a prisoner can satisfy either of these exceptions, he also must show that further factfinding would demonstrate, "by clear and convincing evidence," that "no reasonable factfinder" would have convicted him of the crime charged. §2254(e)(2)(B). Finally, even if all of these requirements are satisfied, a federal habeas court still is not *required* to hold a hearing or take any evidence. Like the decision to grant habeas
17 relief itself, the *17 decision to permit new evidence must be informed by principles of comity and finality that govern every federal habeas case. Cf. *Brown,* 596 U.S., at ___- ___(slip op., at 13-14).

Even though AEDPA largely displaced *Keeney,* §2254(e)(2) retained "one aspect of *Keeney*'s holding." *Michael Williams,* 529 U.S., at 433. Namely, §2254(e)(2) applies only when a prisoner "has failed to develop the factual basis of a claim." We interpret "fail," consistent with *Keeney,* to

mean that the prisoner must be "at fault" for the undeveloped record in state court. 529 U.S., at 432. A prisoner is "at fault" if he "bears responsibility for the failure" to develop the record. *Ibid.*

III

Respondents concede that they do not satisfy §2254(e)(2)'s narrow exceptions. Nonetheless, the Court of Appeals forgave respondents' failures to develop the state-court record because, in its view, they each received ineffective assistance of state postconviction counsel. We now hold that, under §2254(e)(2), a federal habeas court may not conduct an evidentiary hearing or otherwise consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel.

A

Respondents' primary claim is that a prisoner is not "at fault," *Michael Williams,* 529 U.S., at 432, and therefore has not "failed to develop the factual basis of a claim in State court proceedings," §2254(e)(2), if state postconviction counsel negligently failed to develop the state record for a claim of ineffective assistance of trial counsel. But under AEDPA and our precedents, state postconviction counsel's ineffective assistance in developing the state-court record is attributed to
18 the prisoner. *18

1

As stated above, a prisoner "bears the risk in federal habeas for all attorney errors made in the course of the representation," *Coleman,* 501 U.S., at 754, unless counsel provides "constitutionally ineffective" assistance, *Murray,* 477 U.S., at 488. And, because there is no constitutional right to counsel in state postconviction proceedings, see *Davila,* 582 U.S., at ___ (slip op., at 6), a prisoner ordinarily must "bea[r] responsibility" for all attorney errors during those proceedings, *Michael Williams,* 529 U.S., at 432. Among those errors, a state prisoner is responsible for counsel's negligent failure to develop the state postconviction record.

Both before and after AEDPA, our prior cases have made this point clear. First, in *Keeney,* "material facts had not been adequately developed in the state postconviction court, apparently due to the negligence of postconviction counsel." 504 U.S., at 4 (citation omitted). We required the prisoner to demonstrate cause and prejudice to forgive postconviction counsel's deficient performance, see *id.,* at 11, and recognized that counsel's negligence, on its own, was not a sufficient cause, see *id.,* at 10, n. 5.

Second, in *Michael Williams,* we confirmed that "the opening clause of §2254(e)(2) codifies *Keeney*'s threshold standard of diligence, so that prisoners who would have had to satisfy *Keeney*'s [cause-and-prejudice] test . . . are now controlled by §2254(e)(2)." 529 U.S., at 434. In other words, because *Keeney* held a prisoner responsible for state postconviction counsel's negligent failure to develop the state-court record, the same rule applied under §2254(e)(2). For that reason, "a failure to develop the factual basis of a claim," as §2254(e)(2) requires, "is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner *or the prisoner's counsel*" 529 U.S., at 432 (emphasis added). We then applied that rule and held that state postconviction counsel's "failure to investigate ... in anything but a cursory manner triggered] the
19 opening *19 clause of §2254(e)(2)." *Id.,* at 439-440.

Third, in *Holland v. Jackson,* 542 U.S. 649 (2004) *(per curiam),* we again held a prisoner responsible for state postconviction counsel's negligent failure to develop the state-court record. Seven years after the prisoner's conviction, and after he had already been denied state postconviction relief, the prisoner found a new witness to provide impeachment testimony. See id., at 650-651. The prisoner claimed that he discovered the witness so

late because "state postconviction counsel did not heed his pleas for assistance." *Id.,* at 653. Citing *Coleman* and *Michael Williams,* we rejected the prisoner's claim. "Attorney negligence," we held, "is chargeable to the client and precludes relief unless the conditions of §2254(e)(2) are satisfied." 542 U.S., at 653.

In sum, under §2254(e)(2), a prisoner is "at fault" even when state postconviction counsel is negligent. In such a case, a federal court may order an evidentiary hearing or otherwise expand the state-court record only if the prisoner can satisfy §2254(e)(2)'s stringent requirements.

2

Respondents dispute none of this. Instead, they rely almost exclusively on *Martinez's* holding that ineffective assistance of postconviction counsel can be "cause" to forgive procedural default of a trial-ineffective-assistance claim if a State forecloses direct review of that claim, as Arizona con-cededly does. See 566 U.S., at 9. Respondents contend that where, per *Martinez,* a prisoner is not responsible for state postconviction counsel's failure to raise a claim, it makes little sense to hold the prisoner responsible for the failure to develop that claim. Thus, respondents propose extending *Martinez* so that ineffective assistance of postconviction counsel can excuse a prisoner's failure to develop the state-court record under §2254(e)(2).

Congress foreclosed respondents' proposed expansion of *Martinez* when it passed AEDPA. 20 *Martinez* decided that, *20 in the exercise of our "equitable judgment" and "discretion," it was appropriate to modify "[t]he rules for when a prisoner may establish cause to excuse a procedural default." *Id.,* at 13. Such "exceptions" to procedural default "are judge-made rules" that we may modify "only when necessary." *Dretke,* 541 U.S., at 394. Here, however, §2254(e)(2) is a statute that we have no authority to amend. "Where Congress has erected a constitutionally valid barrier to habeas relief, a court *cannot* decline to give it effect." *McQuiggin,* 569 U.S., at 402 (Scalia, J., dissenting); see also *Ex parte Bollman,* 4 Cranch 75, 94 (1807) (Marshall, C. J., for the Court). For example, in *McQuiggin,* we explained that we have no power to layer a miscarriage-of-justice or actual-innocence exception on top of the narrow limitations already included in §2254(e)(2). See 569 U.S., at 395-396 (majority opinion).

The same follows here. We have no power to redefine when a prisoner "has failed to develop the factual basis of a claim in State court proceedings." §2254(e)(2). Before AEDPA, *Keeney* held that "attorney error" during state postconviction proceedings was not cause to excuse an undeveloped state-court record. 504 U.S., at 11, n. 5. And, in *Michael Williams,* we acknowledged that §2254(e)(2) "raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings," 529 U.S., at 433, while reaffirming that prisoners are responsible for attorney error, see *id.,* at 432. Yet here, respondents claim that attorney error alone permits a federal court to expand the federal habeas record. That result makes factfinding more readily available than *Keeney* envisioned pre-AEDPA and ignores *Michael Williams* admonition that "[c]ounsel's failure" to perform as a "diligent attorney" "triggers the opening clause of §2254(e)(2)." 529 U.S., at 439-440. We simply cannot square respondents' proposed result with AEDPA or our precedents.

Respondents propose that Congress may have 21 actually *21 invited their judicial update. According to respondents, *Martinez* explained that *Coleman* left open whether ineffective assistance of state postconviction counsel might one day be cause to forgive procedural default, at least in an "initial-review collateral proceeding," *Martinez,* 566 U.S., at 5, "where state collateral review is the first place a prisoner can present a challenge to his conviction," *Coleman,* 501 U.S., at 755.

Respondents contend that Congress might have enacted §2254(e)(2) with the expectation that this Court one day would open that door.

We do not agree. First, "[g]iven our frequent recognition that AEDPA limited rather than expanded the availability of habeas relief ... it is implausible that, without saying so," *Fry v. Pliler,* 551 U.S. 112, 119 (2007), Congress intended this Court to liberalize the availability of habeas relief generally, or access to federal factfinding specifically. Second, in *Coleman,* we "reiterate[d] that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation," and surmised that a hypothetical constitutional right to initial-review postconviction counsel could give rise to a corresponding claim for cause. 501 U.S., at 755; see also *Martinez,* 566 U.S., at 8-9. Since then, however, we have repeatedly reaffirmed that there is no constitutional right to counsel in state postconviction proceedings. See, *e.g., Davila,* 582 U.S., at ___(slip op., at 6).

We also reject respondents' equitable rewrite of §2254(e)(2) because it lacks any principled limit. This Court's holding in *Martinez* addressed only one kind of claim: ineffective assistance of trial counsel. See 566 U.S., at 9. We limited our holding in that way to reflect our "equitable judgment" that trial-ineffective-assistance claims are uniquely important. *Id.,* at 12-13. Respondents propose that we similarly should permit factual development under §2254(e)(2) only for trial-ineffective-assistance claims. But §2254(e)(2) applies whenever any state prisoner "failed to
22 develop the factual basis of *a claim, "* *22 §2254(e)(2) (emphasis added), without limitation to any specific claim. There would be no reason to limit respondents' reconstruction of §2254(e)(2) as they propose. Unlike for procedural default, we lack equitable authority to amend a statute to address only a subset of claims. Thus, if a prisoner were not "at fault" under §2254(e)(2) simply because postconviction counsel provided ineffective assistance, *Michael Williams,* 529 U.S., at 432, the prisoner's blamelessness necessarily would extend to *any claim* that postconviction counsel negligently failed to develop. Not even *Martinez* sweeps that broadly.

Finally, setting aside that we lack authority to amend §2254(e)(2)'s clear text, *Martinez* itself cuts against respondents' proposed result. *Martinez* was "unusually explicit about the narrowness of our decision." *Trevino,* 569 U.S., at 431 (ROBERTS, C. J., dissenting). The Court left no doubt that "[t]he rule of *Coleman* governs in *all* but the limited circumstances recognized here." *Martinez,* 566 U.S., at 16 (emphasis added). "This aggressively limiting language was not simply a customary nod to the truism that we decide only the case before us." *Trevino,* 569 U.S., at 432 (ROBERTS, C. J., dissenting) (internal quotation marks omitted). "It was instead an important part" of the Court's holding. *Ibid.* In short, *Martinez* foreclosed any extension of its holding beyond the "narrow exception" to procedural default at issue in that case. 566 U.S., at 9.

To be sure, *Martinez* recognized that state prisoners often need "evidence outside the trial record" to support their trial-ineffective-assistance claims. *Id., at IS.* But *Martinez* did not prescribe largely unbounded access to new evidence whenever postconviction counsel is ineffective, as respondents propose. Rather, *Martinez* recognized our overarching responsibility "to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Id.,*
23 at 9. In particular, the Court explained that its *23 "holding . . . ought not to put a significant strain on state resources," because a State "faced with the question whether there is cause for an apparent default. . . may answer" that the defaulted claim "is wholly without factual support." *Id.,* at 15-16. That assurance has bite only if the State can rely on the state-court record. Otherwise, "federal habeas courts would routinely be required to hold

evidentiary hearings to determine" whether state postconviction counsel's factfinding fell short. *Murray,* 477 U.S., at 487.

The cases under review demonstrate the improper burden imposed on the States when *Martinez* applies beyond its narrow scope. The sprawling evidentiary hearing in *Jones* is particularly poignant. Ostensibly to assess cause and prejudice under *Martinez,* the District Court ordered a 7-day hearing that included testimony from no fewer than 10 witnesses, including defense trial counsel, defense postconviction counsel, the lead investigating detective, three forensic pathologists, an emergency medicine and trauma specialist, a biomechanics and functional human anatomy expert, and a crime scene and bloodstain pattern analyst. See 943 F.3d, at 1219, 1225-1226. Of these witnesses, only one of the forensic pathologists and the lead detective testified at the original trial. See *id.,* at 1223-1225. The remainder testified on virtually every disputed issue in the case, including the timing of Rachel Gray's injuries and her cause of death. See *id.,* at 1226-1228. This wholesale relitigation of Jones' guilt is plainly not what *Martinez* envisioned.

B

Martinez aside, respondents propose a second reading of §2254(e)(2) that supposedly permits consideration of new evidence in their habeas cases. Their interpretation proceeds in two steps. First, respondents argue that because §2254(e)(2) bars only "an evidentiary hearing on the claim, "
24 *24 a federal court may hold an evidentiary hearing to determine whether there is cause and prejudice. In respondents' view, a so-called *"Martinez* hearing" is not a "hearing *on the claim."* §2254(e)(2) (emphasis added). Second, with that evidence admitted for cause and prejudice, respondents contend that the habeas court may then consider the new evidence to evaluate the merits of the underlying ineffective-assistance claim. By considering already admitted evidence, respondents reason, the habeas court is not holding a "hearing" that §2254(e)(2) otherwise would prohibit. *Ibid.*

There are good reasons to doubt respondents' first point, but we need not address it because our precedent squarely forecloses the second. In *Holland,* we explained that §2254(e)(2)'s "restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence without an evidentiary hearing." 542 U.S., at 653 (emphasis deleted). The basis for our decision was obvious: A contrary reading would have countenanced an end-run around the statute. Federal habeas courts could have accepted any new evidence so long as they avoided labeling their intake of the evidence as a "hearing." Therefore, when a federal habeas court convenes an evidentiary hearing for any purpose, or otherwise admits or reviews new evidence for any purpose, it may not consider that evidence on the merits of a negligent prisoner's defaulted claim unless the exceptions in §2254(e)(2) are satisfied.

Respondents all but concede that their argument amounts to the same kind of evasion of §2254(e)(2) that we rejected in *Holland.* They nonetheless object that *Holland* renders many *Martinez* hearings a nullity, because there is no point in developing a record for cause and prejudice if a federal court cannot later consider that evidence on the merits. While we agree that any such *Martinez* hearing would serve no purpose, that is a reason to dispense with *Martinez* hearings
25 altogether, not to set §2254(e)(2) aside. *25 Thus, if that provision applies and the prisoner cannot satisfy its "stringent requirements," *Michael Williams,* 529 U.S., at 433, a federal court may not hold an evidentiary hearing-or otherwise consider new evidence-to assess cause and prejudice under *Martinez.*

This follows from our decision in *Schriro v. Landrigan,* 550 U.S. 465 (2007). There, we held that a federal court, "[i]n deciding whether to grant an evidentiary hearing, . . . must consider whether

such a hearing could enable an applicant to prove . . . factual allegations [that] would entitle [him] to federal habeas relief." *Id.,* at 474. "This approach makes eminent sense," for if "district courts held evidentiary hearings without first asking whether the evidence the petitioner seeks to present would satisfy AEDPA's demanding standards, they would needlessly prolong federal habeas proceedings." *Cullen,* 563 U.S., at 208-209 (SOTOMAYOR, J., dissenting). Here, holding a *Martinez* hearing when the prisoner cannot "satisfy AEDPA's demanding standards" in §2254(e)(2) would "prolong federal habeas proceedings" with no purpose. 563 U.S., at 209 (SOTOMAYOR, J., dissenting). And because a federal habeas court may *never* "needlessly prolong" a habeas case, *ibid.,* particularly given the "essential" need to promote the finality of state convictions, *Calderon,* 523 U.S., at 555, *a Martinez* hearing is improper if the newly developed evidence never would "entitle [the prisoner] to federal habeas relief," *Schriro,* 550 U.S., at 474.

C

Ultimately, respondents' proposed expansion of factfinding in federal court, whether by *Martinez* or other means, conflicts with any appropriately limited federal habeas review. In our dual-sovereign system, federal courts must afford unwavering respect to the centrality "of the trial of a criminal case in state court." *Wainwright,* 433 U.S., at 90. That is the moment at which "
26 [s]ociety's resources have *26 been concentrated ... in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens." *Ibid.;* see also *Herrera v. Collins,* 506 U.S. 390, 416 (1993); *Davila,* 582 U.S., at ___ (slip op., at 8). Such intervention is also an affront to the State and its citizens who returned a verdict of guilt after considering the evidence before them. Federal courts, years later, lack the competence and authority to relitigate a State's criminal case.

The dissent contends that we "overstate] the harm to States that would result from allowing" prisoners to develop evidence outside §2254(e)(2)'s narrow exceptions. *Post,* at 17. Not so. Serial relitigation of final convictions undermines the finality that "is essential to both the retributive and deterrent functions of criminal law." *Calderon,* 523 U.S., at 555; see also *Engle,* 456 U.S., at 126-127, and n. 32. Further, broadly available habeas relief encourages prisoners to "'sandba[g]'" state courts by "selecting] a few promising claims for airing" on state postconviction review, "while reserving others for federal habeas review" should state proceedings come up short. *Murray,* 477 U.S., at 492; see also *Wainwright,* 433 U.S., at 89. State prisoners already have a strong incentive to save claims for federal habeas proceedings in order to avoid the highly deferential standard of review that applies to claims properly raised in state court. See §2254(d); *Harrington,* 562 U.S., at 105. Permitting federal factfinding would encourage yet more federal litigation of defaulted claims.

* * *

Because we have no warrant to impose any factfinding beyond §2254(e)(2)'s narrow exceptions to AEDPA's "gen-era[l] ba[r on] evidentiary hearings," *McQuiggin,* 569 U.S., at 395, we reverse the judgments of the Court of Appeals.

27 *It is so ordered.* *27

Justice Sotomayor, with whom Justice Breyer and Justice Kagan join, dissenting.

The Sixth Amendment guarantees criminal defendants the right to the effective assistance of counsel at trial. This Court has recognized that right as "a bedrock principle" that constitutes the very "foundation for our adversary system" of criminal justice. *Martinez v. Ryan,* 566 U.S. 1, 12 (2012). Today, however, the Court hamstrings the federal courts' authority to safeguard that right. The Court's decision will leave many people who

were convicted in violation of the Sixth Amendment to face incarceration or even execution without any meaningful chance to vindicate their right to counsel.

In reaching its decision, the Court all but overrules two recent precedents that recognized a critical exception to the general rule that federal courts may not consider claims on habeas review that were not raised in state court. Just 10 years ago, the Court held that a federal court may consider
28 *28 a habeas petitioner's substantial claim of ineffective assistance of trial counsel (a "trial-ineffectiveness" claim), even if not presented in state court, if the State barred the petitioner from asserting that claim until state postconviction proceedings, and the petitioner's counsel in those proceedings was also ineffective. See *id.,* at 17; see also *Trevino v. Thaler,* 569 U.S. 413, 429 (2013). *Martinez* and *Trevino* establish that such a petitioner is not at fault for any failure to bring a trial-ineffectiveness claim in state court. Despite these precedents, the Court today holds that such a petitioner is nonetheless at fault for the ineffective assistance of postconviction counsel in developing the evidence of trial ineffectiveness in state court. The Court instead holds that a petitioner in these circumstances, having received ineffective assistance of trial and postconviction counsel, is barred from developing such evidence in federal court.

This decision is perverse. It is illogical: It makes no sense to excuse a habeas petitioner's counsel's failure to raise a claim altogether because of ineffective assistance in postconviction proceedings, as *Martinez* and *Trevino* did, but to fault the same petitioner for that postconviction counsel's failure to develop evidence in support of the trial-ineffectiveness claim. In so doing, the Court guts *Martinez's* and *Trevino s* core reasoning. The Court also arrogates power from Congress: The Court's analysis improperly reconfigures the balance Congress struck in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) between state interests and individual constitutional rights.

By the Court's telling, its holding (however implausible) is compelled by statute. Make no mistake. Neither AEDPA nor this Court's precedents require this result. I respectfully dissent.

I

The majority sets forth the gruesome nature of the
29 murders *29 with which respondents were charged. Our Constitution insists, however, that no matter how heinous the crime, any conviction must be secured respecting all constitutional protections. The history of respondents' trials and their state postconviction proceedings illustrates the breakdown in the adversarial system caused by ineffective assistance of counsel, a violation of the Sixth Amendment.

A

Respondent Barry Lee Jones was charged with the murder of his girlfriend's 4-year-old daughter, Rachel Gray. The State argued that Rachel died as a result of an injury she sustained while in Jones' care. Jones' trial counsel failed to undertake even a cursory investigation and, as a result, did not uncover readily available medical evidence that could have shown that Rachel sustained her injuries when she was not in Jones' care. Having heard none of this evidence, the jury convicted Jones and the trial judge sentenced him to death.

Jones filed for postconviction review in Arizona state court. Under Arizona law, Jones was not permitted to argue on direct appeal that his trial counsel rendered constitutionally ineffective assistance; accordingly, state postconviction review was his first opportunity to raise his trial-ineffectiveness claim. See *State v. Spreitz,* 202 Ariz. 1, 3, 39 P.3d 525, 527 (2002). At this stage, however, Jones was met with another egregious failure of counsel. Arizona state law sets minimum qualifications that attorneys must meet to be

appointed in capital cases like Jones', but the Arizona Supreme Court waived those requirements in Jones' case, and the state court appointed postconviction counsel who lacked those qualifications. See *Jones v. Ryan,* 327 F.Supp.3d 1157, 1214 (Ariz. 2018) (citing Ariz. Rev. Stat. Ann. §13-4041 (2019)). Jones' new counsel conducted almost no investigation outside
30 of the evidence in the trial *30 record. In short, Jones' postconviction counsel failed to investigate the ineffective assistance of Jones' trial counsel. Counsel moved for the appointment of an investigator, but did so under the wrong provision of Arizona law. The motion was denied. Counsel ultimately filed a petition for postconviction relief that failed to advance any argument that Jones' trial counsel was ineffective for failing to investigate the State's medical evidence. Arizona courts denied the petition. See *ante,* at 4-5.

Jones then sought federal habeas relief, at last represented by competent counsel, and alleged that his trial counsel provided ineffective assistance by failing adequately to investigate his case. The District Court held an evidentiary hearing at which Jones presented evidence that the injuries to Rachel could not have been inflicted at the time the State alleged that Jones was with her, and that this evidence would have been readily available to Jones' trial and state postconviction counsel, had they investigated the case. The District Court concluded that Jones' postconviction counsel had rendered ineffective assistance in failing to raise this claim in state postconviction proceedings and therefore held that Jones could raise it for the first time in federal court under *Martinez.* The District Court also relied on this evidence to hold, on the merits, that Jones received ineffective assistance at trial. The court found that there was a "reasonable probability that the jury would not have unanimously convicted [Jones] of any of the counts" if Jones' trial counsel had "adequately investigated and presented medical and other expert testimony to rebut the State's theory" of Jones' guilt. 327 F.Supp.3d, at 1211.

Arizona moved to stay the granting of the habeas writ by arguing that 28 U.S.C. §2254(e)(2), a provision enacted as part of AEDPA, barred the District Court from considering on the merits the evidence that Jones developed to satisfy *Martinez's* requirements. The District Court denied the motion, and the Ninth Circuit affirmed
31 in relevant part. *31 Relying on *Martinez's* recognition that "'[c]laims of ineffective assistance at trial often require investigative work, '" the Ninth Circuit concluded that "§2254(e)(2) does not prevent a district court from considering new evidence, developed to overcome a procedural default under *Martinez v. Ryan,* when adjudicating the underlying claim on de novo review." 943 F.3d 1211, 1222 (2019) (quoting *Martinez,* 566 U.S., at 11).

B

Respondent David Ramirez was convicted for the capital murders of his girlfriend and her daughter. At the sentencing phase, the state court appointed a psychologist to conduct a mental health evaluation. Ramirez's counsel failed to provide the psychologist with evidence that Ramirez had an intellectual disability and failed to develop a claim of intellectual disability to present in mitigation against the imposition of a death sentence and in support of the imposition of a sentence of life without parole. Ramirez was sentenced to death.

As in Jones' case, an Arizona state court appointed Ramirez counsel for his state postconviction claim. And as in Jones' case, state postconviction proceedings were Ramirez's first opportunity to raise a claim of trial ineffectiveness. Ramirez's postconviction attorney, however, did not conduct any investigation beyond the existing trial record, despite being aware of indications that Ramirez might have intellectual disabilities, including that his mother drank when she was pregnant with him and that he demonstrated developmental delays as

a child. Nor did Ramirez's postconviction counsel argue that Ramirez's trial counsel provided ineffective assistance by failing to develop and present this mitigating evidence. Arizona courts denied Ramirez's postconviction petition.

Citing "'concerns regarding the quality'" of
32 Ramirez's *32 prior counsel, a Federal District Court appointed the Arizona Federal Public Defender to represent him in federal habeas proceedings. *Ramirez v. Ryan,* 937 F.3d 1230, 1238 (CA9 2019). In his habeas petition, Ramirez raised a claim concerning the ineffectiveness of his trial counsel. In support of his claim, Ramirez submitted evidence from family members, whom trial counsel and state postconviction counsel had never contacted, revealing the depths of abuse and neglect Ramirez experienced as a child and the life-long manifestations of his possible disability. The evidence showed that Ramirez grew up eating on the floor and sleeping on dirty mattresses in houses filthy with animal feces; that Ramirez's mother would beat him with electrical cords; and that Ramirez displayed multiple apparent developmental delays, including "delayed walking, potty training, and speech" and inability to maintain basic hygiene or to use utensils to eat. *Id.,* at 1239. In addition, the court-appointed psychologist who evaluated Ramirez during the sentencing phase of trial averred to the habeas court that if trial counsel had provided him with Ramirez's school records and prior IQ scores, he would have thought they suggested intellectual disability and insisted on more comprehensive testing.[1] Finally, Ramirez's trial counsel submitted an affidavit stating that she had not been "prepared to handle 'the representation of someone as mentally disturbed as . . . Ramirez'" and
33 explaining that the evidence from *33 Ramirez's family members, had she uncovered it in an investigation, "'would have changed the way [she] handled both [Ramirez's] guilt phase and his sentencing phase.'" *Id.,* at 1240. In light of this evidence, Ramirez sought an opportunity to develop his trial-ineffectiveness claim further.[2]

1 This evidence would have been relevant for the jurors' penalty deliberations. Arizona law requires the penalty phase jury to consider, in deciding whether to impose a death sentence, certain "mitigating circumstances," including the "defendant's capacity to appreciate the wrongfulness of his conduct." Ariz. Rev. Stat. Ann. §13-751(G)(1). The Constitution guarantees convicted capital defendants the right to present mitigating evidence. See *Eddings v. Oklahoma,* 455 U.S. 104 (1982).

2 The District Court initially denied Ramirez's petition, and Ramirez appealed. While his appeal was pending in the Ninth Circuit, this Court decided *Martinez v. Ryan,* 566 U.S. 1 (2012), and the Ninth Circuit remanded Ramirez's appeal to the District Court in light of that decision. See App. 452-453. On remand, the District Court ordered supplemental briefing, and Ramirez submitted affidavits from his family members and trial counsel in support of his trial-ineffectiveness claim. See *id.,* at 454- 455, 473-474.

The District Court denied relief on Ramirez's trial-ineffectiveness claim and declined to allow further evidentiary development. On appeal, Arizona conceded that Ramirez's postconviction counsel performed deficiently. The Ninth Circuit reversed and remanded, holding that Ramirez had satisfied the requirements of *Martinez* because postconviction counsel had provided ineffective representation and Ramirez's trial-ineffectiveness claim was substantial. The Ninth Circuit directed the District Court to allow evidentiary development of Ramirez's trial-ineffectiveness claim, recognizing that he had been "precluded from such development because of his post-conviction counsel's ineffective representation." 937 F.3d, at 1248.

II

Martinez and *Trevino* afford habeas petitioners like Jones and Ramirez the opportunity to bring certain trial-ineffectiveness claims for the first time in federal court. The question before the Court is whether Jones and Ramirez can make good on that opportunity by developing evidence in support of these claims, or whether AEDPA nevertheless requires them to rely on the state-court records, constructed by ineffective trial and
34 postconviction *34 counsel, because they "failed to develop the factual basis of [the ineffective assistance] claim[s] in State court proceedings." 28 U.S.C. §2254(e)(2).

Under this Court's precedents, the answer is clear. *Martinez* and *Trevino* establish that petitioners are not at fault for any failure to raise their claims in state court in these circumstances. Other precedents hold that AEDPA's §2254(e)(2)'s "failed to develop" language, too, incorporates a threshold requirement that the petitioner be at fault for not developing evidence. A petitioner cannot logically be faultless for not bringing a claim because of postconviction counsel's ineffectiveness, yet at fault for not developing its evidentiary basis for exactly the same reason.

A

This Court's precedents, culminating in *Martinez* and *Trevino,* explain the circumstances under which habeas petitioners are deemed accountable for their attorneys' failures to present claims in state court. A petitioner who does not properly present a claim in a state proceeding generally may not raise the claim in federal court, because the claim has been "procedurally defaulted." See, *e.g., Murray v. Carrier,* 477 U.S. 478, 486 (1986).

A federal court, however, can excuse a procedural default and permit a petitioner to raise a claim for the first time in federal court if the petitioner can "demonstrate cause for the procedural default in state court and actual prejudice as a result of the alleged violation of federal law." *Maples v. Thomas,* 565 U.S. 266, 280 (2012) (internal quotation marks and alterations omitted). This Court has held that "[c]ause for a procedural default exists where something external to the petitioner . . . that cannot fairly be attributed to him impeded his efforts to comply with the State's procedural rule." *Ibid,* (internal quotation marks and alterations omitted).

As a general matter, attorney error does not
35 constitute *35 cause to excuse procedural default because courts attribute attorneys' errors to their clients. *Coleman v. Thompson,* 501 U.S. 722, 753 (1991). In certain situations, however, attorney error will instead "be seen as an external factor" and therefore constitute cause. *Id.,* at 754. In *Maples,* we held that where an attorney abandoned his client without notice, "principles of agency law and fundamental fairness" required finding cause to excuse a procedural default, as the petitioner had been "disarmed by extraordinary circumstances quite beyond his control." 565 U.S., at 289. In *Coleman,* we explained that "[a]ttorney error that constitutes ineffective assistance of counsel" similarly demonstrates cause to excuse procedural default in the context of a direct appeal. 501 U.S., at 753-754. *Coleman* explained that error that "constitutes a violation of petitioner's right to counsel . . . must be seen as an external factor, *i.e.,* 'imputed to the State'" because the Sixth Amendment places the burden of guaranteeing effective assistance of counsel on the State. *Id.,* at 754.

Coleman left unanswered the question whether ineffective assistance of counsel at the postconviction stage, where defendants generally do not have a constitutional right to counsel, could also constitute cause to excuse default. See *id.,* at 755. This question is critical in Arizona and other States that do not allow defendants to raise trial-ineffectiveness claims on direct appeal, where individuals are constitutionally entitled to effective counsel, and instead require them to raise these claims for the first time in collateral proceedings, in which this Court has not recognized a constitutional right to counsel.

Martinez, 566 U.S. 1, held that in these States, postconviction counsel's failure to raise a substantial trial-ineffectiveness claim could constitute cause to excuse a procedural default. The Court observed that where a state collateral proceeding is the first time that a petitioner can press a trial-ineffectiveness claim, the collateral
36 proceeding is "the *36 equivalent of a prisoner's direct appeal," and constitutes the petitioner's "'one and only appeal'" as to that claim. *Id.,* at 8, 11 (quoting *Coleman,* 501 U.S., at 756). Because this result was occasioned by the State's "deliberat[e] cho[ice] to move [such] claims outside of the direct-appeal process, where counsel is constitutionally guaranteed," the Court held that the general attorney-attribution rule did not apply where postconviction counsel rendered ineffective assistance, just as it would not if appellate counsel on direct review had done so. *Martinez,* 566 U.S., at 13-14, 16. Instead, *Martinez* held, for a habeas petitioner with a "substantial" underlying trial-ineffectiveness claim who also has the misfortune of being represented by ineffective postconviction counsel, the failure of postconviction counsel to raise the trial-ineffectiveness claim is not properly attributable to the petitioner. *Id.,* at 14.

A year later, in *Trevino,* 569 U.S. 413, the Court reaffirmed and extended *Martinez's* core holding. *Trevino* held that where a State does not offer "a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal," a defendant whose collateral-review counsel renders ineffective assistance has demonstrated cause to excuse the procedural default of his trial-ineffectiveness claim. 569 U.S., at 428.[3]

[3] While *Martinez* analyzed a state statutory regime that expressly required defendants to raise an ineffective-assistance-of-trial-counsel claim on collateral review, *Trevino* confronted a state statutory regime that left open the theoretical possibility of raising such a claim on direct appeal, but made it "'virtually impossible'" for defendants to do so. 569 U.S., at 423.

B

There is no dispute here that respondents' trial-ineffectiveness claims clear the procedural default hurdle under *Martinez* and *Trevino.* The question is whether a habeas petitioner can be faultless for
37 a procedural default under *37 *Martinez* and nonetheless barred by AEDPA's §2254(e)(2) from seeking an evidentiary hearing in federal court, subject to exceptions not applicable here, because the petitioner "failed to develop the factual basis of [the procedurally defaulted] claim in State court proceedings."

Precedent establishes that §2254(e)(2) incorporates a threshold, fault-based "fail[ure] to develop" standard that must be understood in conjunction with the fault-based reasoning in *Martinez.* In *Williams v. Taylor,* 529 U.S. 420 (2000), this Court examined what it means to have "failed to develop the factual basis of a claim" under §2254(e)(2). The Court concluded that this language imposes a fault-based standard, meaning that it erects a bar only to those who bear some responsibility for a lack of evidentiary development in state-court proceedings. The Court acknowledged that "fail" is "sometimes used in a neutral way, not importing fault or want of diligence." *Id.,* at 431. As a matter of ordinary meaning, however, the Court concluded that "fail" in §2254(e)(2) connotes "some omission, fault, or negligence." *Ibid.* The Court explained that "a person is not at fault when his diligent efforts to perform an act are thwarted" by an external force. *Id.,* at 432.

Williams found further support for its fault-based reading of "failed to develop" in pre-AEDPA cases that foreshadowed the language of §2254(e)(2). Specifically, *Williams* noted the similarity between the text of §2254(e)(2) and the language of the Court's decision *in Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992). The *Williams* Court reasoned that

when it enacted AEDPA, Congress had "raised the bar *Keeney* imposed on prisoners who were *not* diligent" *(i.e.,* those who were at fault) "in state-court proceedings." 529 U.S., at 433 (emphasis added). At the same time, however, "the opening clause of §2254(e)(2) codifies *Keeney*'s threshold standard of diligence." *Id.,* at 434. Phrased differently, under AEDPA, "[i]f there has been no lack of diligence at the relevant stages in the state
38 proceedings, the prisoner has not 'failed *38 to develop' the facts under §2254(e)(2)'s opening clause, and he will be excused from showing compliance with the balance of the subsection's requirements." *Id.,* at 437.

The reasoning of *Martinez* and *Trevino* applies with equal force to the threshold diligence/fault standard of *Keeney, Williams,* and §2254(e)(2). Under *Williams,* whether petitioners who satisfy *Martinez* are nevertheless subject to §2254(e)(2) turns on whether they were at fault for not developing evidence in support of their trial-ineffectiveness claims in state postconviction proceedings. All agree that a habeas petitioner is not at fault when the responsibility for an error is properly imputed to the State or to some other external factor. *Martinez* cases are among the rare ones in which attorney error constitutes such an external factor. That is because a State's "deliberat[e] cho[ice]" to move trial ineffectiveness claims outside of direct appeal and into postconviction review "significantly diminishes prisoners' ability to file such claims." *Martinez,* 566 U.S., at 13. There is nothing nefarious about this choice, but it is "not without consequences." *Ibid.* Together, *Martinez, Trevino,* and *Williams* demonstrate that when a State both provides a criminal defendant with ineffective trial counsel and decides to remove his trial-ineffectiveness claim from appellate review, postconviction counsel's ineffectiveness cannot fairly be attributed to the defendant, and he therefore has not "failed to develop the factual basis of [his] claim." §2254(e)(2).

Any other reading hollows out *Martinez* and *Trevino*. *Martinez* repeatedly recognized that to prove a trial-ineffectiveness claim (or even to show that it is "substantial"), habeas petitioners frequently must introduce evidence outside of the trial record. See, *e.g.,* 566 U.S., at 13 ("Ineffective-assistance claims often depend on evidence outside the trial record"). Ineffective-assistance claims frequently turn on errors of
39 omission: evidence that was not obtained, wit- *39 nesses that were not contacted, experts who were not retained, or investigative leads that were not pursued. Demonstrating that counsel failed to take each of these measures by definition requires evidence beyond the trial record. See *Trevino,* 569 U.S., at 413 (observing that "'the inherent nature of most ineffective assistance'" claims means that the "trial court record will often fail to 'contai[n] the information necessary to substantiate' the claim"); Brief for Federal Defender Capital Habeas Units as *Amici Curiae* 4-6. Indeed, the very reason States like Arizona might choose to reserve a trial-ineffectiveness claim for a collateral proceeding is to allow development of the factual basis for the claim. *Martinez,* 566 U.S., at 13. To hold a petitioner at fault for not developing a factual basis because of postconviction counsel's ineffectiveness in the *Martinez* context, however, would be to eliminate altogether such evidentiary development and doom many meritorious trial-ineffectiveness claims that satisfy *Martinez*. Such a rule is not only inconsistent with the reasoning of *Martinez* and *Trevino* but renders those decisions meaningless in many, if not most, cases.

C

Applying this interpretation of §2254(e)(2) here makes clear that Jones and Ramirez are not at fault for their attorneys' failures to develop the state-court record. In Jones' case, the District Court found, and the Ninth Circuit agreed, that Jones satisfied the demanding requirements of *Martinez:* Arizona appointed postconviction counsel who did not meet the minimum qualifications for appointment and who failed to raise a substantial

(indeed, meritorious) trial-ineffectiveness claim. In Ramirez's case, too, the Ninth Circuit held that postconviction counsel was ineffective for failing to investigate Ramirez's upbringing (despite clear indications of his disability) and for failing to raise or develop a substantial claim of trial
40 ineffectiveness. The *40 lower courts thus held that both respondents satisfied the demanding requirements of *Martinez,* holdings that the Court does not question.

By definition, Jones and Ramirez are not at fault for their state postconviction counsel's failures to develop evidence. Jones and Ramirez acted diligently, but their attorneys' errors, paired with the State's choice of how to structure their review proceedings, constituted external impediments. As a result, Jones and Ramirez have not "failed to develop" the factual bases of their claims, and AEDPA's §2254(e)(2), properly interpreted, poses no bar to evidentiary development in federal court.

III

Rejecting the teachings of *Martinez* and *Trevino,* the Court adopts an irrational reading of §2254(e)(2). The Court begins with the uncontested proposition that, in the ordinary case, a habeas petitioner "'must bear the risk of attorney error.'" *Ante, at 11* (quoting *Coleman,* 501 U.S., at 753). From there, the Court leaps to the conclusion that a petitioner is at fault for not developing the evidentiary record on a trial-ineffectiveness claim even if that lack of development was the result of his postconviction counsel's ineffective assistance. *Ante, at 12.*

The Court's analysis rests on two fundamental errors. First, the Court eviscerates *Martinez* and *Trevino* and mis-characterizes other precedents. Second, the Court relies upon its own mistaken understanding of AEDPA's policies and the state interests at issue, recycling claims rejected by the *Martinez* Court and ignoring the careful balance struck by Congress. In doing so, the Court gives short shrift to the egregious breakdowns of the adversarial system that occurred in these cases, breakdowns of the type that federal habeas review
41 exists to correct. *41

A

The doctrinal consequence of the Court's distortion of precedent is to render *Martinez* and *Trevino* dead letters in the mine run of cases. As explained, those precedents are premised on the understanding that a habeas petitioner is not responsible for a postconviction attorney's ineffective failure to assert a substantial trial-ineffectiveness claim in States that do not offer petitioners a meaningful opportunity to raise such claims on direct appeal. The Court, however, does not grapple with this logic on its own terms. Instead, the Court limits *Martinez* and *Trevino* to their facts, emptying them of all meaning in the ordinary case (where, as those precedents explain, a trial-ineffectiveness claim will necessarily rely on evidence beyond the trial record). Tellingly, the Court relies on the *dissent* in *Trevino* to support its disregard of these cases' reasoning. See *ante,* at 18.

The Court's analysis also rests on a misplaced view of *Williams.* The Court fixates on *Williams* statement that §2254(e)(2) "raised the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings." 529 U.S., at 433; see *ante,* at 16. The Court emphasizes the first part of that statement while ignoring its qualification: that §2254(e)(2) raised the bar for "prisoners who were not diligent." In other words, it is undisputed that the "bar for excusing a prisoner's failure to develop the state-court record" is an onerous one, *ante,* at 12; the question is whether, in this context, a habeas petitioner has failed to develop the record in the first place. *Martinez* and *Trevino* make clear that habeas petitioners in Jones' and Ramirez's position do not lack diligence and are not at fault for the failures of their ineffective trial and postconviction counsel.

The Court further charges that respondents' interpretation of §2254(e)(2) "lacks any principled limit." *Ante,* at 17. Here again, the Court resuscitates a complaint that previously was relegated to a dissent. See *Martinez,* 566 U.S., at
42 19 *42 (Scalia, J., dissenting) ("[N]o one really believes that [the holding of *Martinez]* will remain limited to ineffective-assistance-of-trial-counsel cases"). The complaint is just as unavailing now that it has captured a majority. Respondents' interpretation only affects habeas petitioners raising substantial trial-ineffectiveness claims in the subset of States that limit such claims to postconviction review, just as *Martinez* did. In that context, postconviction review is a prisoner's "one and only appeal" of a trial-ineffectiveness claim, *Coleman,* 501 U.S., at 756 (internal quotation marks omitted; emphasis deleted), and the ineffective assistance of counsel at that stage forecloses review of a crucially important constitutional right. Any assertion that respondents' interpretation of the statute would blow the door open to myriad other claims is hyperbole that this Court, until today, consistently has rejected.

Finally, the Court finds it implausible that Congress would have considered the threshold diligence inquiry under §2254(e)(2) to account for the *Martinez* context. *Ante,* at 16-17. But Congress legislated against the backdrop of *Coleman. Coleman,* in turn, made clear (decades before *Martinez*) that in certain circumstances where attorney error could be "seen as an external factor, *i.e.,* 'imputed to the State, '" including the ineffective assistance of counsel on direct appeal, the prisoner would not properly be deemed at fault. *Coleman,* 501 U.S., at 754. Moreover, it is not uncommon for Congress to adopt statutory language that incorporates an evolving judicial doctrine, see, *e.g., Kimble v. Marvel Entertainment, LLC,* 576 U.S. 446, 461 (2015), and there is no reason this Court should second-guess Congress' choice to incorporate a judicially created diligence doctrine here.

B

Much of the Court's opinion focuses not on the text of §2254(e)(2), nor on the relevant
43 precedents, but on what the *43 Court views as AEDPA's unyielding purpose: ensuring that federal courts "afford unwavering respect" to state court criminal proceedings. *Ante,* at 21; see also *ante,* at 6-9, 18-19, 20-21. The Court seriously errs by suggesting that AEDPA categorically prioritizes maximal deference to state-court convictions over vindication of the constitutional protections at the core of our adversarial system.

It is of course true that AEDPA's rules are designed to "ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism." *Martinez,* 566 U.S., at 9. The enacting Congress, however, did not pursue these aims at all costs. AEDPA does not render state judgments unassailable, but strikes a balance between respecting state-court judgments and preserving the necessary and vital role federal courts play in "guarding] against extreme malfunctions in the state criminal justice systems." *Harrington v. Richter,* 562 U.S. 86, 102-103 (2011) (internal quotation marks omitted). Indeed," 'Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the imposition of the death penalty.'" *Christeson v. Roper,* 574 U.S. 373, 377 (2015) *(per curiam).* Absent that role, what this Court regularly calls "the Great Writ" hardly would be worthy of the label. See, *e.g., Holland v. Florida,* 560 U.S. 631, 649 (2010).

The Court today supplants the balance Congress struck with its single-minded focus on finality. In doing so, it overstates the harm to States that would result from allowing petitioners to develop facts in support of *Martinez* claims. See *ante,* at 18. Importantly, *Martinez* applies only where the underlying claim is one of trial ineffectiveness, and only if a petitioner demonstrates that the claim

is "substantial." 566 U.S., at 14. The Court reaches to support its holding by yet again repackaging a
44 dissenter's warning, this time *44 that *Martinez* would "put a significant strain on state resources." *Id.,* at 22 (opinion of Scalia, J.). Nearly a decade of experience with *Martinez,* however, has proved this unfounded prediction false. In a 9-year sample of three States (Florida, Pennsylvania, and South Carolina), federal courts adjudicated 1, 200 habeas petitions raising *Martinez* claims. See Brief for Habeas Scholars as *Amid Curiae* 7-8. These courts held evidentiary hearings in less than two percent of these cases. *Ibid.* The lower federal courts, in other words, are perfectly capable of policing *Martinez's* limits. There is no reason to expect that to change from an affirmance here.

In the same vein, the Court bemoans the "sprawling evidentiary hearing" conducted by the District Court in Jones' case. *Ante,* at 19. Of course, the scope of the District Court's hearing (including evidence from medical experts, forensic experts, law enforcement personnel, and others) was necessary only because trial counsel failed to present any of that evidence during the guilt phase of Jones' capital case. Far from constituting an inappropriate and "wholesale relitigation of Jones's guilt," *ibid.,* the District Court's hearing was wide-ranging precisely because the breakdown of the adversarial system in Jones' case was so egregious.

The Court suggests that evidentiary hearings like Jones' will "encourag[e] prisoners" to "'sandba[g]' state courts" by strategically holding back claims from state postconviction review to present them for the first time in federal court. *Ante,* at 22. That claim is odd, particularly in this context. It is a State's decision to divert trial-ineffectiveness claims from direct appeal to postconviction review, and then to provide ineffective postconviction counsel, that results in the failure to raise or develop such claims before state courts. No habeas petitioner or postconviction counsel could possibly perceive a strategic benefit from failing to raise a meritorious trial-ineffectiveness claim in an available forum. Indeed, the whole thrust of Jones' and Ramirez's argument is that their Sixth Amendment claims were so obvious
45 that *45 their state postconviction attorneys were ineffective in failing to assert them.

On the other side of the ledger, the Court understates, or ignores altogether, the gravity of the state systems' failures in these two cases. To put it bluntly: Two men whose trial attorneys did not provide even the bare minimum level of representation required by the Constitution may be executed because forces outside of their control prevented them from vindicating their constitutional right to counsel. It is hard to imagine a more "extreme malfunctio[n]," *Harrington,* 562 U.S., at 102 (internal quotation marks omitted), than the prejudicial deprivation of a right that constitutes the "foundation for our adversary system," *Martinez,* 566 U.S., at 12.

Nor will the damage be limited to these two cases. Even before *Martinez,* this Court recognized that a trial record is "often incomplete or inadequate" to demonstrate inadequate assistance of counsel. *Massaro v. United States,* 538 U.S. 500, 505 (2003). A trial record "may contain no evidence of alleged errors of omission," like a failure sufficiently to investigate a case. *Ibid.* For a court to discern "whether [any] alleged error was prejudicial," too, it is obvious that "additional factual development" may be required. *Ibid.* The on-the-ground experience of capital habeas attorneys confirms this commonsense notion. See Brief for Federal Defender Capital Habeas Units as *Amid Curiae* 3-4. The Court's decision thus reduces to rubble many habeas petitioners' Sixth Amendment rights to the effective assistance of counsel.

Contrary to the Court's account, the fundamental fairness concerns that arise from this particular type of breakdown are not unconditionally eclipsed by the need to accord finality and respect to state-court judgments. *Ante,* at 18. Finality interests are at their apex when the "essential

elements of a presumptively accurate and fair proceeding were present in the proceeding whose
46 result is challenged." *46 *Strickland v. Washington,* 466 U.S. 668, 694 (1984). The effective assistance of counsel is one of those essential elements. See *Martinez,* 566 U.S., at 12. When the effective assistance of counsel is absent, leaving a severely diminished basis for presuming fairness and accuracy, "finality concerns are somewhat weaker." *Strickland,* 466 U.S., at 694. Neither statute nor precedent supports the Court's assertion that the virtues of finality override fundamental fairness to such a degree that meaningful review of life-or-death judgments obtained through such deeply flawed proceedings should be foreclosed.

Ultimately, the Court's decision prevents habeas petitioners in States like Arizona from receiving any guaranteed opportunity to develop the records necessary to enforce their Sixth Amendment right to the effective assistance of counsel. For the subset of these petitioners who receive ineffective assistance both at trial and in state postconviction proceedings, the Sixth Amendment's guarantee is now an empty one. Many, if not most, individuals in this position will have no recourse and no opportunity for relief. The responsibility for this devastating outcome lies not with Congress, but with this Court.

* * *

Text and precedent instruct that in States that limit review of trial-ineffectiveness claims to postconviction proceedings, habeas petitioners who receive ineffective assistance of both trial and postconviction counsel are not responsible for any failure to raise their substantial claim of trial ineffectiveness, nor for any "fail[ure] to develop" evidence in support of that claim under AEDPA's §2254(e)(2). By holding otherwise, the Court not only extinguishes the central promise of *Martinez* and *Trevino,* but it makes illusory the protections of the Sixth Amendment. I respectfully dissent.
47 *47

[*] Together with *Shinn, Director, Arizona Department of Corrections, Rehabilitation and Reentry, et al. v. Jones* (see this Court's Rule 12.4), also on certiorari to the same court.

[*]Ramirez alleges that Arizona forfeited any §2254(e)(2) argument in his case because it did not object to some evidentiary development in the District Court or before the Ninth Circuit panel. But Arizona did object to further factfinding before the Ninth Circuit panel, see Respondents-Appellees' Answering Brief in *Ramirez v. Ryan,* No. 10-99023 (CA9), ECF Doc. 37, p. 58, and, in any event, the Ninth Circuit passed upon §2254(e)(2) when it ordered additional factfinding on remand, see *United States v. Williams,* 504 U.S. 36, 41 (1992). Further, because we have discretion to forgive any forfeiture, and because "our deciding the matter now will reduce the likelihood of further litigation" in a 30-year-old murder case, *Polar Tankers, Inc. v. City of Valdez,* 557 U.S. 1, 14 (2009) (plurality opinion), we choose to forgive the State's forfeiture before the District Court.

No. 82-1554
U.S.

Strickland v. Washington

466 U.S. 668 (1984) · 104 S. Ct. 2052
Decided May 14, 1984

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 82-1554.

Argued January 10, 1984 Decided May 14, 1984

Respondent pleaded guilty in a Florida trial court to an indictment that included three capital murder charges. In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility." In preparing for the sentencing hearing, defense counsel spoke with respondent about his background, but did not seek out character witnesses or request a psychiatric examination. Counsel's decision not to present evidence concerning respondent's character and emotional state reflected his judgment that it was advisable to rely on the plea colloquy for evidence as to such matters, thus preventing the State from cross-examining respondent and from presenting psychiatric evidence of its own. Counsel did not request a presentence report because it would have included respondent's criminal history and thereby would have undermined the claim of no significant prior criminal record. Finding numerous aggravating circumstances and no mitigating circumstance, the trial judge sentenced respondent to death on each of the murder counts. The Florida Supreme Court affirmed, and respondent then sought collateral relief in state court on the ground, *inter alia*, that counsel had rendered ineffective assistance at the sentencing proceeding in several respects, including his failure to request a psychiatric report, to investigate and present character witnesses, and to seek a presentence report. The trial court denied relief, and the Florida Supreme Court affirmed. Respondent then filed a habeas corpus petition in Federal District Court advancing numerous grounds for relief, including the claim of ineffective assistance of counsel. After an evidentiary hearing, the District Court denied relief, concluding that although counsel made errors in judgment in failing to investigate mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. The Court of Appeals ultimately reversed, stating that the Sixth
669 Amendment accorded *669 criminal defendants a right to counsel rendering "reasonably effective assistance given the totality of the circumstances." After outlining standards for judging whether a defense counsel fulfilled the duty to investigate nonstatutory mitigating circumstances and whether counsel's errors were sufficiently prejudicial to justify reversal, the Court of Appeals remanded the case for application of the standards.

Held:

1. The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. The same principle applies to a capital sentencing proceeding — such as the one provided by Florida law — that is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial. Pp. 684-687.

2. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or setting aside of a death sentence requires that the defendant show, first, that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Pp. 687-696.

(a) The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. Pp. 687-691.

(b) With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Pp. 691-696.

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3. A number of practical considerations are important for the application of the standards set forth above. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. The principles governing ineffectiveness claims apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. And in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d), but is a mixed question of law and fact. Pp. 696-698.

4. The facts of this case make it clear that counsel's conduct at and before respondent's sentencing proceeding cannot be found unreasonable under the above standards. They also make it clear that, even assuming counsel's conduct was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence. Pp. 698-700.

693 F.2d 1243, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C.J., and WHITE, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 701. MARSHALL, J., filed a dissenting opinion, *post*, p. 706.

Carolyn M. Snurkowski, Assistant Attorney General of Florida, argued the cause for petitioners. On the briefs were *Jim Smith*, Attorney General, and *Calvin L. Fox*, Assistant Attorney General.

Richard E. Shapiro argued the cause for respondent. With him on the brief was *Joseph H. Rodriguez*.–

– Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey*, and *Edwin S. Kneedler;* for the State of Alabama et al. by *Mike Greely*, Attorney General of Montana, and *John H. Maynard*, Assistant Attorney General, *Charles A. Graddick*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John Steven Clark*, Attorney General of Arkansas, *John Van de Kamp*, Attorney General of California, *Duane Woodard*, Attorney General of Colorado, *Austin Page 671 J. McGuigan*, Chief State's Attorney of Connecticut, *Michael J. Bowers*, Attorney General of Georgia, *Tany S. Hong*, Attorney General of Hawaii, *Jim Jones*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Robert T. Stephan*, Attorney General of Kansas, *Steven L. Beshear*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *James E. Tierney*, Attorney General of Maine, *Stephen H. Sachs*, Attorney General of Maryland, *Francis X. Bellotti*, Attorney General of Massachusetts, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *William A. Allain*, Attorney General of Mississippi, *John D. Ashcroft*, Attorney General of Missouri, *Paul L. Douglas*, Attorney General of Nebraska, *Brian McKay*, Attorney General of Nevada, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Paul Bardacke*, Attorney General of New Mexico, *Rufus L.*

Edmisten, Attorney General of North Carolina, *Robert Wefald*, Attorney General of North Dakota, *Anthony Celebrezze, Jr.*, Attorney General of Ohio, *Michael Turpen*, Attorney General of Oklahoma, *Dave Frohnmayer*, Attorney General of Oregon, *LeRoy S. Zimmerman*, Attorney General of Pennsylvania, *Dennis J. Roberts II*, Attorney General of Rhode Island, *T. Travis Medlock*, Attorney General of South Carolina, *Mark V. Meierhenry*, Attorney General of South Dakota, *William M. Leech, Jr.*, Attorney General of Tennessee, *David L. Wilkinson*, Attorney General of Utah, *John J. Easton*, Attorney General of Vermont, *Gerald L. Baliles*, Attorney General of Virginia, *Kenneth O. Eikenberry*, Attorney General of Washington, *Chauncey H. Browning*, Attorney General of West Virginia, and *Archie G. McClintock*, Attorney General of Wyoming; and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar*, and *Nicholas E. Calio*.

Richard J. Wilson, Charles S. Sims, and *Burt Neuborne* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae* urging affirmance.

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JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I A

During a 10-day period in September 1976, respondent planned and committed three groups of
672 crimes, which included *672 three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. App. 50-53. He also stated, however, that he accepted responsibility for the crimes. *E. g., id.*, at 54, 57. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision. *Id.*, at 62.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He
673 also spoke on *673 the telephone with respondent's wife and mother, though he did not follow up on

the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. *Id.*, at A266.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. See *id.*, at A282. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own. *Id.*, at A223-A225.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." *Id.*, at A227; App. 311. Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. App. to Pet. for Cert. A227-A228, A265-A266.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. *Id.*, at A265-A266.

Counsel also argued that respondent had no history of criminal activity and that respondent
674 committed *674 the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sisters-in-law, who sustained severe — in one case, ultimately fatal — injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances "would still clearly far outweigh" that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance and could appreciate the criminality of

his acts. Third, none of the victims was a participant in, or consented to, respondent's
675 conduct. Fourth, respondent's *675 participation in the crimes was neither minor nor the result of duress or domination by an accomplice. Finally, respondent's age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent's planning of the crimes and disposition of the proceeds of the various accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." See *Washington* v. *State*, 362 So.2d 658, 663-664 (Fla. 1978) (quoting trial court findings), cert. denied, 441 U.S. 937 (1979). He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel's assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner's reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent,
676 though not under the influence *676 of extreme mental or emotional disturbance, was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes. App. 7; see also *id.*, at 14.

The trial court denied relief without an evidentiary hearing, finding that the record evidence conclusively showed that the ineffectiveness claim was meritless. App. to Pet. for Cert. A206-A243. Four of the assertedly prejudicial errors required little discussion. First, there were no grounds to request a continuance, so there was no error in not requesting one when respondent pleaded guilty. *Id.*, at A218-A220. Second, failure to request a presentence investigation was not a serious error because the trial judge had discretion not to grant such a request and because any presentence investigation would have resulted in admission of respondent's "rap sheet" and thus would have undermined his assertion of no significant history of criminal activity. *Id.*, at A226-A228. Third, the argument and memorandum given to the sentencing judge were "admirable" in light of the overwhelming aggravating circumstances and absence of mitigating circumstances. *Id.*, at A228. Fourth, there was no error in failure to examine the medical examiner's reports or to cross-examine the medical witnesses testifying on the manner of death of respondent's victims, since respondent admitted that the victims died in the ways shown by the unchallenged medical evidence. *Id.*, at A229.

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of

extreme mental or emotional disturbance. All
677 three *677 reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack.

Applying the standard for ineffectiveness claims articulated by the Florida Supreme Court in *Knight* v. *State*, 394 So.2d 997 (1981), the trial court concluded that respondent had not shown that counsel's assistance reflected any substantial and serious deficiency measurably below that of competent counsel that was likely to have affected the outcome of the sentencing proceeding. The court specifically found: "[A]s a matter of law, the record affirmatively demonstrates beyond any doubt that even if [counsel] had done each of the . . . things [that respondent alleged counsel had
678 failed to do] *678 at the time of sentencing, there is not even the remotest chance that the outcome would have been any different. The plain fact is that the aggravating circumstances proved in this case were completely *overwhelming* . . . ." App. to Pet. for Cert. A230.

The Florida Supreme Court affirmed the denial of relief. *Washington* v. *State*, 397 So.2d 285 (1981). For essentially the reasons given by the trial court, the State Supreme Court concluded that respondent had failed to make out a prima facie case of either "substantial deficiency or possible prejudice" and, indeed, had "failed to such a degree that we believe, to the point of a moral certainty, that he is entitled to no relief . . . ." *Id.*, at 287. Respondent's claims were "shown conclusively to be without merit so as to obviate the need for an evidentiary hearing." *Id.*, at 286.

C

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. He advanced numerous grounds for relief, among them ineffective assistance of counsel based on the same errors, except for the failure to move for a continuance, as those he had identified in state court. The District Court held an evidentiary hearing to inquire into trial counsel's efforts to investigate and to present mitigating circumstances. Respondent offered the affidavits and reports he had submitted in the state collateral proceedings; he also called his trial counsel to testify. The State of Florida, over respondent's objection, called the trial judge to testify.

The District Court disputed none of the state court factual findings concerning trial counsel's assistance and made findings of its own that are consistent with the state court findings. The account of trial counsel's actions and decisions given above reflects the combined findings. On the legal issue of ineffectiveness, the District Court concluded that, although trial counsel made

679 errors in judgment in failing to *679 investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment. Relying in part on the trial judge's testimony but also on the same factors that led the state courts to find no prejudice, the District Court concluded that "there does not appear to be a likelihood, or even a significant possibility," that any errors of trial counsel had affected the outcome of the sentencing proceeding. App. to Pet. for Cert. A285-A286. The District Court went on to reject all of respondent's other grounds for relief, including one not exhausted in state court, which the District Court considered because, among other reasons, the State urged its consideration. *Id.*, at A286-A292. The court accordingly denied the petition for a writ of habeas corpus.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. 673 F.2d 879 (1982). The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. 679 F.2d 23 (1982). The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards. 693 F.2d 1243 (1982).

The court noted at the outset that, because respondent had raised an unexhausted claim at his evidentiary hearing in the District Court, the habeas petition might be characterized as a mixed petition subject to the rule of *Rose* v. *Lundy*, 455 U.S. 509 (1982), requiring dismissal of the entire petition. The court held, however, that the exhaustion requirement is "a matter of comity rather than a matter of jurisdiction" and hence admitted of exceptions. The court agreed with the District Court that this case came within an exception to the mixed petition rule. 693 F.2d, at
680 1248, n. 7. *680

Turning to the merits, the Court of Appeals stated that the Sixth Amendment right to assistance of counsel accorded criminal defendants a right to "counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." *Id.*, at 1250. The court remarked in passing that no special standard applies in capital cases such as the one before it: the punishment that a defendant faces is merely one of the circumstances to be considered in determining whether counsel was reasonably effective. *Id.*, at 1250, n. 12. The court then addressed respondent's contention that his trial counsel's assistance was not reasonably effective because counsel breached his duty to investigate nonstatutory mitigating circumstances.

The court agreed that the Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that "[t]he amount of pretrial investigation that is reasonable defies precise measurement." *Id.*, at 1251. Nevertheless, putting guilty-plea cases to one side, the court attempted to classify cases presenting issues concerning the scope of the duty to investigate before proceeding to trial.

If there is only one plausible line of defense, the court concluded, counsel must conduct a "reasonably substantial investigation" into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary. *Id.*, at 1252. The same duty exists if counsel relies at trial on only one line of defense, although others are available. In either case, the investigation need not be exhaustive. It must

include "`an independent examination of the facts, circumstances, pleadings and laws involved.'" *Id.*, at 1253 (quoting *Rummel* v. *Estelle*, 590 F.2d 103, 104 (CA5 1979)). The scope of the duty, however, 681 depends *681 on such facts as the strength of the government's case and the likelihood that pursuing certain leads may prove more harmful than helpful. 693 F.2d, at 1253, n. 16.

If there is more than one plausible line of defense, the court held, counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial. If counsel conducts such substantial investigations, the strategic choices made as a result "will seldom if ever" be found wanting. Because advocacy is an art and not a science, and because the adversary system requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment. *Id.*, at 1254.

If counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective. Counsel may not exclude certain lines of defense for other than strategic reasons. *Id.*, at 1257-1258. Limitations of time and money, however, may force early strategic choices, often based solely on conversations with the defendant and a review of the prosecution's evidence. Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based. Thus, "when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.*, at 1255 (footnote omitted). Among the factors relevant to deciding whether particular strategic choices are reasonable are the experience of the attorney, the inconsistency of unpursued and pursued lines of defense, and the potential for prejudice from taking an unpursued line of defense. *Id.*, at 1256-1257, n. 23.

Having outlined the standards for judging whether defense counsel fulfilled the duty to investigate, the Court of Appeals turned its attention to the 682 question of the prejudice to the *682 defense that must be shown before counsel's errors justify reversal of the judgment. The court observed that only in cases of outright denial of counsel, of affirmative government interference in the representation process, or of inherently prejudicial conflicts of interest had this Court said that no special showing of prejudice need be made. *Id.*, at 1258-1259. For cases of deficient performance by counsel, where the government is not directly responsible for the deficiencies and where evidence of deficiency may be more accessible to the defendant than to the prosecution, the defendant must show that counsel's errors "resulted in actual and substantial disadvantage to the course of his defense." *Id.*, at 1262. This standard, the Court of Appeals reasoned, is compatible with the "cause and prejudice" standard for overcoming procedural defaults in federal collateral proceedings and discourages insubstantial claims by requiring more than a showing, which could virtually always be made, of some conceivable adverse effect on the defense from counsel's errors. The specified showing of prejudice would result in reversal of the judgment, the court concluded, unless the prosecution showed that the constitutionally deficient performance was, in light of all the evidence, harmless beyond a reasonable doubt. *Id.*, at 1260-1262.

The Court of Appeals thus laid down the tests to be applied in the Eleventh Circuit in challenges to convictions on the ground of ineffectiveness of counsel. Although some of the judges of the court proposed different approaches to judging ineffectiveness claims either generally or when raised in federal habeas petitions from state prisoners, *id.*, at 1264-1280 (opinion of Tjoflat,

J.); *id.*, at 1280 (opinion of Clark, J.); *id.*, at 1285-1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); *id.*, at 1288-1291 (opinion of Hill, J.), and although some believed that no remand was necessary in this case, *id.*, at 1281-1285 (opinion of Johnson, J., joined by Anderson, J.); *id.*, at 1285-1288 (opinion of Roney, J., joined by Fay and Hill, JJ.); *id.*, at 1288-1291 (opinion of Hill, J.), a majority *683 of the judges of the en banc court agreed that the case should be remanded for application of the newly announced standards. Summarily rejecting respondent's claims other than ineffectiveness of counsel, the court accordingly reversed the judgment of the District Court and remanded the case. On remand, the court finally ruled, the state trial judge's testimony, though admissible "to the extent that it contains personal knowledge of historical facts or expert opinion," was not to be considered admitted into evidence to explain the judge's mental processes in reaching his sentencing decision. *Id.*, at 1262-1263; see *Fayerweather* v. *Ritch*, 195 U.S. 276, 306-307 (1904).

D

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. *E. g., United States* v. *Cronic, ante*, p. 648. With the exception of *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict of interest, the Court has never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial. Cf. *United States* v. *Agurs*, 427 U.S. 97, 102, n. 5 (1976).

In assessing attorney performance, all the Federal Courts of Appeals and all but a few state courts have now adopted the "reasonably effective assistance" standard in one formulation or another. See *Trapnell* v. *United States*, 725 F.2d 149, 151-152 (CA2 1983); App. B to Brief for United States in *United States* v. *Cronic*, O. T. 1983, No. 82-660, pp. 3a-6a; Sarno, *684 Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's Representation of Criminal Client, 2 A. L. R. 4th 99-157, §§ 7-10 (1980). Yet this Court has not had occasion squarely to decide whether that is the proper standard. With respect to the prejudice that a defendant must show from deficient attorney performance, the lower courts have adopted tests that purport to differ in more than formulation. See App. C to Brief for United States in *United States* v. *Cronic, supra*, at 7a-10a; Sarno, *supra*, at 83-99, § 6. In particular, the Court of Appeals in this case expressly rejected the prejudice standard articulated by Judge Leventhal in his plurality opinion in *United States* v. *Decoster*, 199 U.S.App.D.C. 359, 371, 374-375, 624 F.2d 196, 208, 211-212 (en banc), cert. denied, 444 U.S. 944 (1979), and adopted by the State of Florida in *Knight* v. *State*, 394 So.2d, at 1001, a standard that requires a showing that specified deficient conduct of counsel was likely to have affected the outcome of the proceeding. 693 F.2d, at 1261-1262.

For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. 462 U.S. 1105 (1983). We agree with the Court of Appeals that the exhaustion rule requiring dismissal of mixed petitions, though to be strictly enforced, is not jurisdictional. See *Rose* v. *Lundy*, 455 U.S., at 515-520. We therefore address the merits of the constitutional issue.

II

In a long line of cases that includes *Powell* v. *Alabama*, 287 U.S. 45 (1932), *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a
685 fair trial through *685 the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275, 276 (1942); see *Powell* v. *Alabama, supra*, at 68-69.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Gideon* v. *Wainwright, supra; Johnson* v. *Zerbst, supra*. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is
686 fair. *686

For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U.S. 759, 771, n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, *e. g., Geders* v. *United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring* v. *New York*, 422 U.S. 853 (1975) (bar on summation at bench trial); *Brooks* v. *Tennessee*, 406 U.S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia*, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," *Cuyler* v. *Sullivan*, 446 U.S., at 344. *Id.*, at 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases — that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose — to ensure a fair trial — as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct

so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of
687 standards for decision, see *Barclay* *687 v. *Florida*, 463 U.S. 939, 952-954 (1983); *Bullington* v. *Missouri*, 451 U.S. 430 (1981), that counsel's role in the proceeding is comparable to counsel's role at trial — to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. See *Trapnell* v. *United States*, 725 F.2d, at 151-152. The Court indirectly recognized as much when it stated in *McMann* v. *Richardson, supra*, at 770, 771, that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." See also *Cuyler* v. *Sullivan, supra*, at 344. When a
688 convicted defendant *688 complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. See *Michel* v. *Louisiana*, 350 U.S. 91, 100-101 (1955). The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. See *Cuyler* v. *Sullivan, supra*, at 346. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell* v. *Alabama*, 287 U.S., at 68-69.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e. g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can
689 satisfactorily take *689 account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. See *United States* v. *Decoster*, 199 U.S. App. D.C., at 371, 624 F.2d, at 208. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle* v. *Isaac*, 456 U.S. 107, 133-134 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel* v. *Louisiana, supra*, at 101. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in
690 the same way. See Goodpaster, *690 The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y. U. L. Rev. 299, 343 (1983).

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing

professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and
691 strategic *691 choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions. See *United States* v. *Decoster, supra*, at 372-373, 624 F.2d, at 209-210.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States* v. *Morrison*, 449 U.S. 361, 364-365 (1981). The purpose of the Sixth Amendment guarantee of
692 counsel is to ensure *692 that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States* v. *Cronic, ante*, at 659, and n. 25. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. *Ante*, at 658. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler* v. *Sullivan*, 446 U.S., at 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give

rise to conflicts, see, *e. g.*, Fed. Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler* v. *Sullivan, supra*, at 350, 693 348 (footnote omitted). *693

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 866-867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in 694 criminal proceedings. *694 Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as *Amicus Curiae* 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. *United States* v. *Johnson*, 327 U.S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States* v. *Agurs*,

427 U.S., at 104, 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States* v. *Valenzuela-Bernal, supra*, at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the
695 judge or jury acted according to law. *695 An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences
696 to *696 be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. Cf. *Trapnell* v. *United States*, 725 F.2d, at 153 (in several years of applying "farce and mockery" standard along with "reasonable competence" standard, court "never found that the result of a case hinged on the choice of a particular standard"). In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the 697 different *697 formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. See *United States* v. *Frady*, 456 U.S. 152, 162-169 (1982); *Engle* v. *Isaac*, 456 U.S. 107, 126-129 (1982). An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, see 698 *id.*, *698 at 126, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]," *Townsend* v. *Sain*, 372 U.S. 293, 309, n. 6 (1963). Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. See *Cuyler* v. *Sullivan*, 446 U.S., at 342. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles

applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. See *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-292 (1982).

Application of the governing principles is not difficult in this case. The facts as described above, see *supra*, at 671-678, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even
699 assuming the *699 challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, see App. 383-384, 400-401, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, see App. to Pet. for Cert. A282, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel
700 should have offered at the *700 sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Our conclusions on both the prejudice and performance components of the ineffectiveness inquiry do not depend on the trial judge's testimony at the District Court hearing. We therefore need not consider the general admissibility of that testimony, although, as noted *supra*, at 695, that testimony is irrelevant to the prejudice inquiry. Moreover, the prejudice question is resolvable, and hence the ineffectiveness claim can be rejected, without

regard to the evidence presented at the District Court hearing. The state courts properly concluded that the ineffectiveness claim was meritless without holding an evidentiary hearing.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing
701 proceeding was not fundamentally unfair. *701

We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE BRENNAN, concurring in part and dissenting in part.

I join the Court's opinion but dissent from its judgment. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U.S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vacate respondent's death sentence and remand the case for further
702 proceedings.[1] *702

[1] The Court's judgment leaves standing another in an increasing number of capital sentences purportedly imposed in compliance with the procedural standards developed in cases beginning with *Gregg* v. *Georgia*, 428 U.S. 153 (1976). Earlier this Term, I reiterated my view that these procedural requirements have proven unequal to the task of eliminating the irrationality that necessarily attends decisions by juries, trial judges, and appellate courts whether to take or spare human life. *Pulley* v. *Harris*, 465 U.S. 37, 59 (1984) (BRENNAN, J., dissenting). The inherent difficulty in imposing the ultimate sanction consistent with the rule of law, see *Furman* v. *Georgia*, 408 U.S. 238, 274-277 (1972) (BRENNAN, J., concurring); *McGautha* v. *California*, 402 U.S. 183, 248-312 (1971) (BRENNAN, J., dissenting), is confirmed by the extraordinary pressure put on our own deliberations in recent months by the growing number of applications to stay executions. See *Wainwright* v. *Adams, post*, at 965 (MARSHALL, J., dissenting) (stating that "haste and confusion surrounding . . . decision [to vacate stay] is degrading to our role as judges"); *Autry* v. *McKaskle*, 465 U.S. 1085 (1984) (MARSHALL, J., dissenting) (criticizing Court for "dramatically expediting its normal deliberative processes to clear the way for an impending execution"); *Stephens* v. *Kemp*, 464 U.S. 1027, 1032 (1983) (POWELL, J., dissenting) (contending that procedures by which stay applications are considered "undermines public confidence in the courts and in the laws we are required to follow"); *Sullivan* v. *Wainwright*, 464 U.S. 109, 112 (1983) (BURGER, C.J., concurring) (accusing lawyers seeking review of their client's death sentences of turning "the Page 702 administration of justice into [a] sporting contest"); *Autry* v. *Estelle*, 464 U.S. 1, 6 (1983) (STEVENS, J., dissenting) (suggesting that Court's practice in reviewing applications in death cases "injects uncertainty and disparity into the review procedure, adds to the burdens of counsel, distorts the deliberative process within this Court, and increases the risk of error"). It is difficult to believe that the decision whether to put an individual to death generates any less emotional pressure among juries, trial judges, and appellate courts than it does among Members of this Court.

I

This case and *United States* v. *Cronic, ante*, p. 648, present our first occasions to elaborate the appropriate standards for judging claims of ineffective assistance of counsel. In *Cronic*, the Court considers such claims in the context of cases "in which the surrounding circumstances [make] it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance at trial," *ante*, at 661. This case, in contrast, concerns claims of ineffective assistance based on allegations of specific errors by counsel — claims which, by their very nature, require courts to evaluate both the attorney's performance and the effect of that performance on the reliability and fairness of the proceeding. Accordingly, a defendant making a claim of this kind must show not only that his lawyer's performance was inadequate but also that he was prejudiced thereby. See also *Cronic, ante*, at 659, n. 26.

I join the Court's opinion because I believe that the standards it sets out today will both provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law. Like all federal courts and most state courts that have previously addressed the matter, see *ante*, at 683-684, the Court concludes that "the proper standard for attorney performance is that of reasonably effective assistance." *Ante*, at 687. 703 And, *703 rejecting the strict "outcome-determinative" test employed by some courts, the Court adopts as the appropriate standard for prejudice a requirement that the defendant "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," defining a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ante*, at 694. I believe these standards are sufficiently precise to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not; at the same time, the standards are sufficiently flexible to accommodate the wide variety of situations giving rise to claims of this kind.

With respect to the performance standard, I agree with the Court's conclusion that a "particular set of detailed rules for counsel's conduct" would be inappropriate. *Ante*, at 688. Precisely because the standard of "reasonably effective assistance" adopted today requires that counsel's performance be measured in light of the particular circumstances of the case, I do not believe our decision "will stunt the development of constitutional doctrine in this area," *post*, at 709 (MARSHALL, J., dissenting). Indeed, the Court's suggestion that today's decision is largely consistent with the approach taken by the lower courts, *ante*, at 696, simply indicates that those courts may continue to develop governing principles on a case-by-case basis in the common-law tradition, as they have in the past. Similarly, the prejudice standard announced today does not erect an insurmountable obstacle to meritorious claims, but rather simply requires courts carefully to examine trial records in light of both the nature and seriousness of counsel's errors and their effect in the particular circumstances of the case. *Ante*, at 704 695.[2] *704

[2] Indeed, counsel's incompetence can be so serious that it rises to the level of a constructive denial of counsel which can constitute constitutional error without any showing of prejudice. See *Cronic, ante*, at 659-660; Page 704 *Javor* v. *United States*, 724 F.2d 831, 834 (CA9 1984) ("Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all").

II

Because of their flexibility and the requirement that they be considered in light of the particular circumstances of the case, the standards announced today can and should be applied with concern for the special considerations that must

attend review of counsel's performance in a capital sentencing proceeding. In contrast to a case in which a finding of ineffective assistance requires a new trial, a conclusion that counsel was ineffective with respect to only the penalty phase of a capital trial imposes on the State the far lesser burden of reconsideration of the sentence alone. On the other hand, the consequences to the defendant of incompetent assistance at a capital sentencing could not, of course, be greater. Recognizing the unique seriousness of such a proceeding, we have repeatedly emphasized that "`where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" *Zant* v. *Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg* v. *Georgia*, 428 U.S., at 188-189 (opinion of Stewart, POWELL, and STEVENS, JJ.)).

For that reason, we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding. As JUSTICE MARSHALL emphasized last Term:

> "This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), it recognized that right in capital cases, *Powell* v. *Alabama*, 287 U.S. 45, 71-72 (1932). Time *705 and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case. See, *e. g., Bullington* v. *Missouri*, 451 U.S. 430 (1981); *Beck* v. *Alabama*, 447 U.S. 625 (1980); *Green* v. *Georgia*, 442 U.S. 95 (1979) *(per curiam); Lockett* v. *Ohio*, 438 U.S. 586 (1978); *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976). . . .
>
> "Because of th[e] basic difference between the death penalty and all other punishments, this Court has consistently recognized that there is `a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' *Ibid*." *Barefoot* v. *Estelle*, 463 U.S. 880, 913-914 (1983) (dissenting opinion).

See also *id.*, at 924 (BLACKMUN, J., dissenting). In short, this Court has taken special care to minimize the possibility that death sentences are "imposed out of whim, passion, prejudice, or mistake." *Eddings* v. *Oklahoma*, 455 U.S. 104, 118 (1982) (O'CONNOR, J., concurring).

In the sentencing phase of a capital case, "[w]hat is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). For that reason, we have repeatedly insisted that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." *Eddings*

v. *Oklahoma*, 455 U.S., at 112. In fact, as JUSTICE O'CONNOR has noted, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the "interests of justice" may impose on reviewing courts "a duty to remand [the] case for resentencing." *Id.*, at 117, n., and 119
706 (O'CONNOR, J., concurring). *706

Of course, "[t]he right to present, and to have the sentencer consider, any and all mitigating evidence means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing hearing." Comment, 83 Colum. L. Rev. 1544, 1549 (1983). See, *e. g., Burger* v. *Zant*, 718 F.2d 979 (CA11 1983) (defendant, 17 years old at time of crime, sentenced to death after counsel failed to present any evidence in mitigation), stay granted, *post*, at 902. Accordingly, counsel's general duty to investigate, *ante*, at 690, takes on supreme importance to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death; claims of ineffective assistance in the performance of that duty should therefore be considered with commensurate care.

That the Court rejects the ineffective-assistance claim in this case should not, of course, be understood to reflect any diminution in commitment to the principle that "`the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Eddings* v. *Oklahoma, supra*, at 112 (quoting *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.)). I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment.

JUSTICE MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is
707 the right to the effective assistance *707 of counsel." *McMann* v. *Richardson*, 397 U.S. 759, 771, n. 14 (1970). The state and lower federal courts have developed standards for distinguishing effective from inadequate assistance.[1] Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

[1] See Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After *United States* v. *Decoster*, 93 Harv. L. Rev. 752, 756-758 (1980); Note, Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1380, 1386-1387, 1399-1401, 1408-1410 (1983).

I

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." *Ante*, at 688. Second, the majority holds that only an error of

counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. *Ante*, at 694. I disagree with both of these rulings.

A

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must
708 behave *708 "reasonably" and must act like "a reasonably competent attorney," *ante*, at 687, is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

The debilitating ambiguity of an "objective standard of reasonableness" in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney? It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale?[2] The majority offers no clues as to the proper responses to these questions.

> [2] Cf., *e. g., Moore* v. *United States*, 432 F.2d 730, 736 (CA3 1970) (defining the constitutionally required level of performance as "the exercise of the customary skill and knowledge which normally prevails at the time and place").

The majority defends its refusal to adopt more specific standards primarily on the ground that "[n]o particular set of detailed rules for counsel's
709 conduct can satisfactorily take account *709 of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Ante*, at 688-689. I agree that counsel must be afforded "wide latitude" when making "tactical decisions" regarding trial strategy, see *ante*, at 689; cf. *infra*, at 712, 713, but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight. For example, much of the work involved in preparing for a trial, applying for bail, conferring with one's client, making timely objections to significant, arguably erroneous rulings of the trial judge, and filing a notice of appeal if there are colorable grounds therefor could profitably be made the subject of uniform standards.

The opinion of the Court of Appeals in this case represents one sound attempt to develop particularized standards designed to ensure that all defendants receive effective legal assistance. See 693 F.2d 1243, 1251-1258 (CA5 1982) (en banc). For other, generally consistent efforts, see *United States* v. *Decoster*, 159 U.S.App.D.C. 326, 333-334, 487 F.2d 1197, 1203-1204 (1973), disapproved on rehearing, 199 U.S.App.D.C. 359, 624 F.2d 196 (en banc), cert. denied, 444 U.S. 944 (1979); *Coles* v. *Peyton*, 389 F.2d 224, 226 (CA4), cert. denied, 393 U.S. 849 (1968); *People* v. *Pope*, 23 Cal.3d 412, 424-425, 590 P.2d 859, 866 (1979); *State* v. *Harper*, 57 Wis.2d 543, 550-557, 205 N.W.2d 1, 6-9 (1973).[3] By refusing to address the

merits of these proposals, and indeed suggesting that no such effort is worthwhile, the opinion of the Court, I fear, will stunt the development of
710 constitutional doctrine in this area. *710

[3] For a review of other decisions attempting to develop guidelines for assessment of ineffective-assistance-of-counsel claims, see Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Crim. L. Rev. 233, 242-248 (1979). Many of these decisions rely heavily on the standards developed by the American Bar Association. See ABA Standards for Criminal Justice 4-1.1 — 4-8.6 (2d ed. 1980).

B

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.[4] In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating
711 prejudice. *711

[4] Cf. *United States* v. *Ellison*, 557 F.2d 128, 131 (CA7 1977). In discussing the related problem of measuring injury caused by joint representation of conflicting interests, we observed:

> "[T]he evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation." *Holloway* v. *Arkansas*, 435 U.S. 475, 490-491 (1978) (emphasis in original).
>
> When defense counsel fails to take certain actions, not because he is "compelled" to do so, but because he is incompetent, it is often equally difficult to ascertain the prejudice consequent upon his omissions.

Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.[5] The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

5 See *United States* v. *Decoster*, 199 U.S.App.D.C. 359, 454-457, 624 F.2d 196, 291-294 (en banc) (Bazelon, J., dissenting), cert. denied, 444 U.S. 944 (1979); Note, 93 Harv. L. Rev., at 767-770.

In *Chapman* v. *California*, 386 U.S. 18, 23 (1967), we acknowledged that certain constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless error." Among these rights is the right to the assistance of counsel at trial. *Id.*, at 23, n. 8; see *Gideon* v. *Wainwright*, 712 372 U.S. 335 (1963).[6] In my view, the right *712 to *effective* assistance of counsel is entailed by the right to counsel, and abridgment of the former is equivalent to abridgment of the latter.[7] I would thus hold that a showing that the performance of a defendant's lawyer departed from constitutionally prescribed standards requires a new trial regardless of whether the defendant suffered demonstrable prejudice thereby.

6 In cases in which the government acted in a way that prevented defense counsel from functioning effectively, we have refused to require the defendant, in order to obtain a new trial, to demonstrate that he was injured. In *Glasser* v. *United States*, 315 U.S. 60, 75-76 (1942), for example, we held:

"To determine the precise degree of prejudice sustained by [a defendant] as a result of the court's appointment of [the same counsel for two codefendants with conflicting interests] is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

As the Court today acknowledges, *United States* v. *Cronic, ante*, at 662, n. 31, whether the government or counsel himself is to blame for the inadequacy of the legal assistance received by a defendant should make no difference in deciding whether the defendant must prove prejudice.

7 See *United States* v. *Yelardy*, 567 F.2d 863, 865, n. 1 (CA6), cert. denied, 439 U.S. 842 (1978); *Beasley* v. *United States*, 491 F.2d 687, 696 (CA6 1974); *Commonwealth* v. *Badger*, 482 Pa. 240, 243-244, 393 A.2d 642, 644 (1978).

II

Even if I were inclined to join the majority's two central holdings, I could not abide the manner in which the majority elaborates upon its rulings. Particularly regrettable are the majority's discussion of the "presumption" of reasonableness to be accorded lawyers' decisions and its attempt to prejudge the merits of claims previously rejected by lower courts using different legal standards.

A

In defining the standard of attorney performance required by the Constitution, the majority appropriately notes that many problems confronting criminal defense attorneys admit of "a range of legitimate" responses. *Ante*, at 689. And the majority properly cautions courts, when reviewing a lawyer's selection amongst a set of options, to avoid the hubris of hindsight. *Ibid*. The majority goes on, however, to suggest that reviewing courts should "indulge a strong presumption that counsel's conduct" was constitutionally acceptable, *ibid.;* see *ante*, at 690, 696, and should "appl[y] a heavy measure of deference to counsel's judgments," *ante*, at 691.

I am not sure what these phrases mean, and I doubt that they will be self-explanatory to lower courts. If they denote nothing more than that a defendant claiming he was denied effective assistance of counsel has the burden of proof, I 713 *713 would agree. See *United States* v. *Cronic, ante*, at 658. But the adjectives "strong" and "heavy" might be read as imposing upon defendants an unusually weighty burden of persuasion. If that is the majority's intent, I must respectfully dissent. The range of acceptable behavior defined by "prevailing professional

norms," *ante*, at 688, seems to me sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy. To afford attorneys more latitude, by "strongly presuming" that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.

The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits and "dampen the ardor" of defense counsel. See *ante*, at 690. I have more confidence than the majority in the ability of state and federal courts expeditiously to dispose of meritless arguments and to ensure that responsible, innovative lawyering is not inhibited. In my view, little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant's challenge to his lawyer's performance will be insubstantial.

B

For many years the lower courts have been debating the meaning of "effective" assistance of counsel. Different courts have developed different standards. On the issue of the level of performance required by the Constitution, some courts have adopted the forgiving "farce-and-mockery" standard,[8] while others have adopted various
714 versions of *714 the "reasonable competence" standard.[9] On the issue of the level of prejudice necessary to compel a new trial, the courts have taken a wide variety of positions, ranging from the stringent "outcome-determinative" test,[10] to the rule that a showing of incompetence on the part of defense counsel automatically requires reversal of the conviction regardless of the injury to the defendant.[11]

8 See, *e. g., State* v. *Pacheco*, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978); *Hoover* v. *State*, 270 Ark. 978, 980, 606 S.W.2d 749, 751 (1980); *Line* v. *State*, 272 Ind. 353, 354-355, 397 N.E.2d 975, 976 (1979).

9 See, *e. g., Trapnell* v. *United States*, 725 F.2d 149, 155 (CA2 1983); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1328-1330 (CA9 1978) (en banc), cert. denied, 440 U.S. 974 (1979).

10 See, *e. g., United States* v. *Decoster*, 199 U.S. App. D.C., at 370, and n. 74, 624 F.2d, at 208, and n. 74 (plurality opinion); *Knight* v. *State*, 394 So.2d 997, 1001 (Fla. 1981).

11 See n. 7, *supra*.

The Court today substantially resolves these disputes. The majority holds that the Constitution is violated when defense counsel's representation falls below the level expected of reasonably competent defense counsel, *ante*, at 687-691, and so affects the trial that there is a "reasonable probability" that, absent counsel's error, the outcome would have been different, *ante*, at 691-696.

Curiously, though, the Court discounts the significance of its rulings, suggesting that its choice of standards matters little and that few if any cases would have been decided differently if the lower courts had always applied the tests announced today. See *ante*, at 696-697. Surely the judges in the state and lower federal courts will be surprised to learn that the distinctions they have so fiercely debated for many years are in fact unimportant.

The majority's comments on this point seem to be prompted principally by a reluctance to acknowledge that today's decision will require a reassessment of many previously rejected ineffective-assistance-of-counsel claims. The majority's unhappiness on this score is understandable, but its efforts to mitigate the perceived problem will be ineffectual. Nothing the

majority says can relieve lower courts that hitherto
715 *715 have been using standards more tolerant of ineffectual advocacy of their obligation to scrutinize all claims, old as well as new, under the principles laid down today.

III

The majority suggests that, "[f]or purposes of describing counsel's duties," a capital sentencing proceeding "need not be distinguished from an ordinary trial." *Ante*, at 687. I cannot agree.

The Court has repeatedly acknowledged that the Constitution requires stricter adherence to procedural safeguards in a capital case than in other cases.

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (footnote omitted).[12]

[12] See also *Zant* v. *Stephens*, 462 U.S. 862, 884-885 (1983); *Eddings* v. *Oklahoma*, 455 U.S. 104, 110-112 (1982); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). The job of amassing that
716 information and presenting it *716 in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts,[13] combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings.[14]

[13] See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y. U. L. Rev. 299, 303 (1983).

[14] As JUSTICE BRENNAN points out, *ante*, at 704, an additional reason for examining especially carefully a Sixth Amendment challenge when it pertains to a capital sentencing proceeding is that the result of finding a constitutional violation in that context is less disruptive than a finding that counsel was incompetent in the liability phase of a trial.

It matters little whether strict scrutiny of a claim that ineffectiveness of counsel resulted in a death sentence is achieved through modification of the Sixth Amendment standards or through especially careful application of those standards. JUSTICE BRENNAN suggests that the necessary adjustment of the level of performance required of counsel in capital sentencing proceedings can be effected simply by construing the phrase, "reasonableness under prevailing professional norms," in a manner that takes into account the nature of the impending penalty. *Ante*, at 704-706. Though I would prefer a more specific iteration of counsel's duties in this special context,[15] I can accept that proposal. However, when instructing lower courts regarding the probability of impact upon the outcome that requires a resentencing, I think the Court would do best explicitly to modify the legal standard itself.[16] In my view, a person on death row, whose counsel's performance fell below constitutionally acceptable levels, should not be compelled to demonstrate a "reasonable

717 probability" *717 that he would have been given a life sentence if his lawyer had been competent, see *ante*, at 694; if the defendant can establish a significant chance that the outcome would have been different, he surely should be entitled to a redetermination of his fate. Cf. *United States* v. *Agurs*, 427 U.S. 97, 121-122 (1976) (MARSHALL, J., dissenting).[17]

[15] See Part I-A, *supra*. For a sensible effort to formulate guidelines for the conduct of defense counsel in capital sentencing proceedings, see Goodpaster, *supra*, at 343-345, 360-362.

[16] For the purposes of this and the succeeding section, I assume, solely for the sake of argument, that some showing of prejudice is necessary to state a violation of the Sixth Amendment. But cf. Part I-B, *supra*.

[17] As I read the opinion of the Court, it does not preclude this kind of adjustment of the legal standard. The majority defines "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Ante*, at 694. In view of the nature of the sanction at issue, and the difficulty of determining how a sentencer would have responded if presented with a different set of facts, it could be argued that a lower estimate of the likelihood that the outcome of a capital sentencing proceeding was influenced by attorney error is sufficient to "undermine confidence" in that outcome than would be true in an ordinary criminal case.

IV

The views expressed in the preceding section oblige me to dissent from the majority's disposition of the case before us.[18] It is undisputed that respondent's trial counsel made virtually no investigation of the possibility of obtaining testimony from respondent's relatives, friends, or former employers pertaining to respondent's character or background. Had counsel done so, he would have found several persons willing and able to testify that, in their experience, respondent was a responsible, nonviolent man, devoted to his family, and active in the affairs of his church. See App. 338-365. Respondent contends that his lawyer could have and should have used that testimony to "humanize" respondent, to counteract the impression conveyed by the trial that he was little more than a cold-blooded killer. Had this evidence been admitted, respondent argues, his chances of obtaining a life sentence would have 718 been significantly better. *718

[18] Adhering to my view that the death penalty is unconstitutional under all circumstances, *Gregg* v. *Georgia*, 428 U.S. 153, 231 (1976) (MARSHALL, J., dissenting), I would vote to vacate respondent's sentence even if he had not presented a substantial Sixth Amendment claim.

Measured against the standards outlined above, respondent's contentions are substantial. Experienced members of the death-penalty bar have long recognized the crucial importance of adducing evidence at a sentencing proceeding that establishes the defendant's social and familial connections. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y. U. L. Rev. 299, 300-303, 334-335 (1983). The State makes a colorable — though in my view not compelling — argument that defense counsel in this case might have made a reasonable "strategic" decision not to present such evidence at the sentencing hearing on the assumption that an unadorned acknowledgment of respondent's responsibility for his crimes would be more likely to appeal to the trial judge, who was reputed to respect persons who accepted responsibility for their actions.[19] But however justifiable such a choice might have been after counsel had fairly assessed the potential strength of the mitigating evidence available to him, counsel's failure to make any significant effort to find out what evidence might be garnered from respondent's relatives and acquaintances surely cannot be described as "reasonable." Counsel's failure to

investigate is particularly suspicious in light of his candid admission that respondent's confessions and conduct in the course of the trial gave him a feeling of "hopelessness" regarding the possibility of saving respondent's life, see App. 383-384, 719 400-401. *719

19 Two considerations undercut the State's explanation of counsel's decision. First, it is not apparent why adducement of evidence pertaining to respondent's character and familial connections would have been inconsistent with respondent's acknowledgment that he was responsible for his behavior. Second, the Florida Supreme Court possesses — and frequently exercises — the power to overturn death sentences it deems unwarranted by the facts of a case. See *State* v. *Dixon*, 283 So.2d 1, 10 (1973). Even if counsel's decision not to try to humanize respondent for the benefit of the trial judge were deemed reasonable, counsel's failure to create a record for the benefit of the State Supreme Court might well be deemed unreasonable.

That the aggravating circumstances implicated by respondent's criminal conduct were substantial, see *ante*, at 700, does not vitiate respondent's constitutional claim; judges and juries in cases involving behavior at least as egregious have shown mercy, particularly when afforded an opportunity to see other facets of the defendant's personality and life.[20] Nor is respondent's contention defeated by the possibility that the material his counsel turned up might not have been sufficient to establish a statutory mitigating circumstance under Florida law; Florida sentencing judges and the Florida Supreme Court sometimes refuse to impose death sentences in cases "in which, even though *statutory* mitigating circumstances do not outweigh statutory aggravating circumstances, the addition of nonstatutory mitigating circumstances tips the scales in favor of life imprisonment." *Barclay* v. *Florida*, 463 U.S. 939, 964 (1983) (STEVENS, J., concurring in judgment) (emphasis in original).

20 See, *e. g.*, Farmer Kinard, The Trial of the Penalty Phase (1976), reprinted in 2 California State Public Defender, California Death Penalty Manual N-33, N-45 (1980).

If counsel had investigated the availability of mitigating evidence, he might well have decided to present some such material at the hearing. If he had done so, there is a significant chance that respondent would have been given a life sentence. In my view, those possibilities, conjoined with the unreasonableness of counsel's failure to investigate, are more than sufficient to establish a violation of the Sixth Amendment and to entitle respondent to a new sentencing proceeding.

I respectfully dissent.

720 *720

No. 10-10
U.S.

Turner v. Rogers

564 U.S. 431 (2011) · 131 S. Ct. 2507 · 180 L. Ed. 2d 452
Decided Jun 20, 2011

No. 10–10.

06-20-2011

Michael D. TURNER, Petitioner, v. Rebecca L. ROGERS et al.

Seth P. Waxman, Washington, DC, for petitioner. Leondra R. Kruger, for United States as amicus curiae, by special leave of the Court supporting reversal. Stephanos Bibas, Philadelphia, PA, for respondents. Derek J. Enderlin, Ross & Enderlin, P.A., Greenville, SC, Kathrine Haggard Hudgins, South Carolina Commission on Indigent Defense, Columbia, SC, Seth P. Waxman, Counsel of Record, Paul R.Q. Wolfson, Catherine M.A. Carroll, Sonya L. Lebsack, Shivaprasad Nagaraj, Wilmer Cutler Pickering, Hale and Dorr LLP, Washington, DC, for Petitioner. Stephanos Bibas, Counsel of Record, James A. Feldman, Nancy Bregstein Gordon, Amy Wax, University of Pennsylvania Law School, Supreme Court Clinic, Philadelphia, PA, Stephen B. Kinnaird, Panteha Abdollahi, D. Scott Carlton, Eric A. Long, Paul, Hastings, Janofsky & Walker LLP, Washington, DC, for Respondents. Leondra R. Kruger, Acting Deputy Solicitor General, Washington, D.C., for United States as Amicus Curiae Supporting Reversal.

Justice BREYER delivered the opinion of the Court.

Seth P. Waxman, Washington, DC, for petitioner.

Leondra R. Kruger, for United States as amicus curiae, by special leave of the Court supporting reversal.

Stephanos Bibas, Philadelphia, PA, for respondents.

Derek J. Enderlin, Ross & Enderlin, P.A., Greenville, SC, Kathrine Haggard Hudgins, South Carolina Commission on Indigent Defense, Columbia, SC, Seth P. Waxman, Counsel of Record, Paul R.Q. Wolfson, Catherine M.A. Carroll, Sonya L. Lebsack, Shivaprasad Nagaraj, Wilmer Cutler Pickering, Hale and Dorr LLP, Washington, DC, for Petitioner.

Stephanos Bibas, Counsel of Record, James A. Feldman, Nancy Bregstein Gordon, Amy Wax, University of Pennsylvania Law School, Supreme Court Clinic, Philadelphia, PA, Stephen B. Kinnaird, Panteha Abdollahi, D. Scott Carlton, Eric A. Long, Paul, Hastings, Janofsky & Walker LLP, Washington, DC, for Respondents.

Leondra R. Kruger, Acting Deputy Solicitor General, Washington, D.C., for United States as Amicus Curiae Supporting Reversal.

Justice BREYER delivered the opinion of the
435 Court.*435 South Carolina's Family Court enforces its child support orders by threatening with incarceration for civil contempt those who are (1) subject to a child support order, (2) able to comply with that order, but (3) fail to do so. We must decide whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an *indigent* person potentially faced with such incarceration. We conclude that where as here the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not

provide counsel to the noncustodial parent (required to provide the support). But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.

I

A

South Carolina family courts enforce their child support orders in part through civil contempt proceedings. Each month the family court clerk reviews outstanding child support orders, identifies those in which the supporting parent has fallen more than five days behind, and sends that
436 parent *436 an order to "show cause" why he should not be held in contempt. S.C. Rule Family Ct. 24 (2011). The "show cause" order and attached affidavit refer to the relevant child support order, identify the amount of the arrearage, and set a date for a court hearing. At the hearing that parent may demonstrate that he is not in contempt, say, by showing that he is not able to
2513 make the required payments. See *2513 *Moseley v. Mosier,* 279 S.C. 348, 351, 306 S.E.2d 624, 626 (1983) ("When the parent is *unable* to make the required payments, he is not in contempt"). If he fails to make the required showing, the court may hold him in civil contempt. And it may require that he be imprisoned unless and until he purges himself of contempt by making the required child support payments (but not for more than one year regardless). See S.C.Code Ann. § 63–3–620 (Supp.2010) (imprisonment for up to one year of "adult who wilfully violates" a court order); *Price v. Turner,* 387 S.C. 142, 145, 691 S.E.2d 470, 472 (2010) (civil contempt order must permit purging of contempt through compliance).

B

In June 2003 a South Carolina family court entered an order, which (as amended) required petitioner, Michael Turner, to pay $51.73 per week to respondent, Rebecca Rogers, to help support their child. (Rogers' father, Larry Price, currently has custody of the child and is also a respondent before this Court.) Over the next three years, Turner repeatedly failed to pay the amount due and was held in contempt on five occasions. The first four times he was sentenced to 90 days' imprisonment, but he ultimately paid the amount due (twice without being jailed, twice after spending two or three days in custody). The fifth time he did not pay but completed a 6–month sentence.

After his release in 2006 Turner remained in arrears. On March 27, 2006, the clerk issued a new "show cause" order. And after an initial postponement due to Turner's failure to appear, Turner's civil contempt hearing took place on
437 January *437 3, 2008. Turner and Rogers were present, each without representation by counsel.

The hearing was brief. The court clerk said that Turner was $5,728.76 behind in his payments. The judge asked Turner if there was "anything you want to say." Turner replied,

> "Well, when I first got out, I got back on dope. I done meth, smoked pot and everything else, and I paid a little bit here and there. And, when I finally did get to working, I broke my back, back in September. I filed for disability and SSI. And, I didn't get straightened out off the dope until I broke my back and laid up for two months. And, now I'm off the dope and everything. I just hope that you give me a chance. I don't know what else to say. I mean, I know I done wrong, and I should have been paying and helping her, and I'm sorry. I mean, dope had a hold to me." App. to Pet. for Cert. 17a.

The judge then said, "[o]kay," and asked Rogers if she had anything to say. *Ibid.* After a brief discussion of federal benefits, the judge stated,

> "If there's nothing else, this will be the Order of the Court. I find the Defendant in willful contempt. I'm [going to] sentence him to twelve months in the Oconee County Detention Center. He may purge himself of the contempt and avoid the sentence by having a zero balance on or before his release. I've also placed a lien on any SSI or other benefits." *Id.,* at 18a.

The judge added that Turner would not receive good-time or work credits, but "[i]f you've got a job, I'll make you eligible for work release."*Ibid.* When Turner asked why he could not receive good-time or work credits, the judge said, " [b]ecause that's my ruling." *Ibid.*

The court made no express finding concerning Turner's ability to pay his arrearage (though
438 Turner's wife had voluntarily *438 submitted a copy of Turner's application for disability benefits, cf. *post,* at 2524, n. 3 (THOMAS, J., dissenting); App. 135a–136a). Nor did the judge ask any
2514 followup *2514 questions or otherwise address the ability-to-pay issue. After the hearing, the judge filled out a prewritten form titled "Order for Contempt of Court," which included the statement:

> "Defendant (was) (was not) gainfully employed and/or (had) (did not have) the ability to make these support payments when due." *Id.,* at 60a, 61a.

But the judge left this statement as is without indicating whether Turner was able to make support payments.

C

While serving his 12–month sentence, Turner, with the help of *pro bono* counsel, appealed. He claimed that the Federal Constitution entitled him to counsel at his contempt hearing. The South Carolina Supreme Court decided Turner's appeal after he had completed his sentence. And it rejected his "right to counsel" claim. The court pointed out that civil contempt differs significantly from criminal contempt. The former does not require all the "constitutional safeguards" applicable in criminal proceedings. 387 S.C., at 145, 691 S.E.2d, at 472. And the right to government-paid counsel, the Supreme Court held, was one of the "safeguards" not required. *Ibid.*

Turner sought certiorari. In light of differences among state courts (and some federal courts) on the applicability of a "right to counsel" in civil contempt proceedings enforcing child support orders, we granted the writ. Compare, *e.g., Pasqua v. Council,* 186 N.J. 127, 141–146, 892 A.2d 663, 671–674 (2006) ; *Black v. Division of Child Support Enforcement,* 686 A.2d 164, 167–168 (Del.1996) ; *Mead v. Batchlor,* 435 Mich. 480, 488–505, 460 N.W.2d 493, 496–504 (1990) ; *Ridgway v. Baker,* 720 F.2d 1409, 1413–1415 (C.A.5 1983) (all finding a federal constitutional
439 right to counsel for indigents *439 facing imprisonment in a child support civil contempt proceeding), with *Rodriguez v. Eighth Judicial Dist. Ct., County of Clark,* 120 Nev. 798, 808–813, 102 P.3d 41, 48–51 (2004) (no right to counsel in civil contempt hearing for nonsupport, except in "rarest of cases"); *Andrews v. Walton,* 428 So.2d 663, 666 (Fla.1983) ("no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support"). Compare also *In re Grand Jury Proceedings,* 468 F.2d 1368, 1369 (C.A.9 1972)*(per curiam)* (general right to counsel in civil contempt proceedings), with *Duval v. Duval,* 114 N.H. 422, 425–427, 322 A.2d 1, 3–4 (1974) (no general right, but counsel may be required on case-by-case basis).

II

Respondents argue that this case is moot. See *Massachusetts v. Mellon,* 262 U.S. 447, 480, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) (Article III judicial power extends only to actual "cases" and "controversies"); *Alvarez v. Smith,* 558 U.S. 87, ——, 130 S.Ct. 576, 580, 175 L.Ed.2d 447 (2009) ("An actual controversy must be extant at all stages of review" (internal quotation marks omitted)). They point out that Turner completed his 12–month prison sentence in 2009. And they add that there are no "collateral consequences" of that particular contempt determination that might keep the dispute alive. Compare *Sibron v. New York,* 392 U.S. 40, 55–56, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (release from prison does not moot a *criminal* case because "collateral consequences" are presumed to continue), with *Spencer v. Kemna,* 523 U.S. 1, 14, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (declining to extend the presumption to parole revocation).

The short, conclusive answer to respondents' mootness claim, however, is that this case is not
2515 moot because it falls *2515 within a special category of disputes that are "capable of repetition" while "evading review." *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911). A dispute falls into that category, and a case based on that dispute remains live, if "(1) the challenged action [is] in
440 its duration too short *440 to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975)*(per curiam).*

Our precedent makes clear that the "challenged action," Turner's imprisonment for up to 12 months, is "in its duration too short to be fully litigated" through the state courts (and arrive here) prior to its "expiration." See, *e.g., First Nat. Bank of Boston v. Bellotti,* 435 U.S. 765, 774, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) (internal quotation marks omitted) (18–month period too short); *Southern Pacific Terminal Co., supra,* at 514–516, 31 S.Ct. 279 (2–year period too short). At the same time, there is a more than "reasonable" likelihood that Turner will again be "subjected to the same action." As we have pointed out, *supra,* at 2510, Turner has frequently failed to make his child support payments. He has been the subject of several civil contempt proceedings. He has been imprisoned on several of those occasions. Within months of his release from the imprisonment here at issue he was again the subject of civil contempt proceedings. And he was again imprisoned, this time for six months. As of December 9, 2010, Turner was $13,814.72 in arrears, and another contempt hearing was scheduled for May 4, 2011. App. 104a; Reply Brief for Petitioner 3, n. 1. These facts bring this case squarely within the special category of cases that are not moot because the underlying dispute is "capable of repetition, yet evading review." See, *e.g., Nebraska Press Assn. v. Stuart,* 427 U.S. 539, 546–547, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (internal quotation marks omitted).

Moreover, the underlying facts make this case unlike *DeFunis v. Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974)*(per curiam),* and *St. Pierre v. United States,* 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 (1943)*(per curiam),* two cases that respondents believe require us to find this case moot regardless. *DeFunis* was moot, but that is because the plaintiff himself was unlikely to again suffer the conduct of which he complained
441 (and others likely to suffer *441 from that conduct could bring their own lawsuits). Here petitioner himself *is* likely to suffer future imprisonment.

St. Pierre was moot because the petitioner (a witness held in contempt and sentenced to five months' imprisonment) had failed to "apply to this Court for a stay" of the federal-court order imposing imprisonment. 319 U.S., at 42–43, 63 S.Ct. 910. And, like the witness in *St. Pierre,* Turner did not seek a stay of the contempt order requiring his imprisonment. But this case, unlike *St. Pierre,* arises out of a state-court proceeding. And respondents give us no reason to believe that

we would have (or that we could have) granted a timely request for a stay had one been made. Cf. 28 U.S.C. § 1257 (granting this Court jurisdiction to review *final* state-court judgments). In *Sibron,* we rejected a similar "mootness" argument for just that reason. 392 U.S., at 53, n. 13, 88 S.Ct. 1889. And we find this case similar in this respect to *Sibron,* not to *St. Pierre* .

III

A

We must decide whether the Due Process Clause 2516 grants an indigent defendant, *2516 such as Turner, a right to state-appointed counsel at a civil contempt proceeding, which may lead to his incarceration. This Court's precedents provide no definitive answer to that question. This Court has long held that the Sixth Amendment grants an indigent defendant the right to state-appointed counsel in a *criminal* case. *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). And we have held that this same rule applies to *criminal contempt* proceedings (other than summary proceedings). *United States v. Dixon,* 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) ; *Cooke v. United States,* 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925).

But the Sixth Amendment does not govern civil cases. Civil contempt differs from criminal contempt in that it seeks only to "coerc[e] the defendant to do" what a court had previously ordered him to do. *Gompers v. Bucks Stove &*

442 *442

Range Co., 221 U.S. 418, 442, 31 S.Ct. 492, 55 L.Ed. 797 (1911). A court may not impose punishment "in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order." *Hicks v. Feiock,* 485 U.S. 624, 638, n. 9, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988). And once a civil contemnor complies with the underlying order, he is purged of the contempt and is free. *Id.,* at 633, 108 S.Ct. 1423 (he "carr[ies] the keys of [his] prison in [his] own pockets" (internal quotation marks omitted)).

Consequently, the Court has made clear (in a case not involving the right to counsel) that, where civil contempt is at issue, the Fourteenth Amendment's Due Process Clause allows a State to provide fewer procedural protections than in a criminal case. *Id.,* at 637–641, 108 S.Ct. 1423 (State may place the burden of proving inability to pay on the defendant).

This Court has decided only a handful of cases that more directly concern a right to counsel in civil matters. And the application of those decisions to the present case is not clear. On the one hand, the Court has held that the Fourteenth Amendment requires the State to pay for representation by counsel in a *civil* "juvenile delinquency" proceeding (which could lead to incarceration). *In re Gault,* 387 U.S. 1, 35–42, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Moreover, in *Vitek v. Jones,* 445 U.S. 480, 496–497, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), a plurality of four Members of this Court would have held that the Fourteenth Amendment requires representation by counsel in a proceeding to transfer a prison inmate to a state hospital for the mentally ill. Further, in *Lassiter v. Department of Social Servs. of Durham Cty.,* 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), a case that focused upon civil proceedings leading to loss of parental rights, the Court wrote that the

> "pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.,* at 25, 101 S.Ct. 2153.

And the Court then drew from these precedents "the presumption that an indigent litigant has a 443 right to appointed *443 counsel only when, if he

loses, he may be deprived of his physical liberty." *Id.,* at 26–27, 101 S.Ct. 2153.

On the other hand, the Court has held that a criminal offender facing revocation of probation and imprisonment does *not* ordinarily have a right to counsel at a probation revocation hearing. *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) ; see also *Middendorf v. Henry,* 425 U.S. 25, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976) (no due process right *2517 to counsel in summary court-martial proceedings). And, at the same time, *Gault, Vitek* , and *Lassiter* are readily distinguishable. The civil juvenile delinquency proceeding at issue in *Gault* was "little different" from, and "comparable in seriousness" to, a criminal prosecution. 387 U.S., at 28, 36, 87 S.Ct. 1428. In *Vitek,* the controlling opinion found *no* right to counsel. 445 U.S., at 499–500, 100 S.Ct. 1254 (Powell, J., concurring in part) (assistance of mental health professionals sufficient). And the Court's statements in *Lassiter* constitute part of its rationale for *denying* a right to counsel in that case. We believe those statements are best read as pointing out that the Court previously had found a right to counsel "*only* " in cases involving incarceration, not that a right to counsel exists in *all* such cases (a position that would have been difficult to reconcile with *Gagnon*).

B

Civil contempt proceedings in child support cases constitute one part of a highly complex system designed to assure a noncustodial parent's regular payment of funds typically necessary for the support of his children. Often the family receives welfare support from a state-administered federal program, and the State then seeks reimbursement from the noncustodial parent. See 42 U.S.C. §§ 608(a)(3) (2006 ed., Supp. III), 656(a)(1) (2006 ed.) ; S.C.Code Ann. §§ 43–5–65(a)(1), (2) (2010 Cum.Supp.). Other times the custodial parent (often the mother, but sometimes the father, a grandparent, or another person with custody) does not receive government benefits and is entitled to receive the support payments herself.*444 The Federal Government has created an elaborate procedural mechanism designed to help both the government and custodial parents to secure the payments to which they are entitled. See generally *Blessing v. Freestone,* 520 U.S. 329, 333, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997) (describing the "interlocking set of cooperative federal-state welfare programs" as they relate to child support enforcement); 45 CFR pt. 303 (2010) (prescribing standards for state child support agencies). These systems often rely upon wage withholding, expedited procedures for modifying and enforcing child support orders, and automated data processing. 42 U.S.C. §§ 666(a), (b), 654(24). But sometimes States will use contempt orders to ensure that the custodial parent receives support payments or the government receives reimbursement. Although some experts have criticized this last-mentioned procedure, and the Federal Government believes that "the routine use of contempt for non-payment of child support is likely to be an ineffective strategy," the Government also tells us that "coercive enforcement remedies, such as contempt, have a role to play." Brief for United States as *Amicus Curiae* 21–22, and n. 8 (citing Dept. of Health and Human Services, National Child Support Enforcement, Strategic Plan: FY 2005–2009, pp. 2, 10). South Carolina, which relies heavily on contempt proceedings, agrees that they are an important tool.

444

We here consider an indigent's right to paid counsel at such a contempt proceeding. It is a civil proceeding. And we consequently determine the "specific dictates of due process" by examining the "distinct factors" that this Court has previously found useful in deciding what specific safeguards the Constitution's Due Process Clause requires in order to make a civil proceeding fundamentally fair. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (considering fairness of an administrative proceeding). As

relevant here those factors include (1) the nature 2518 of "the private interest that will be *2518 affected," (2) the comparative "risk" of an "erroneous deprivation" of that interest with and without 445 "additional or substitute procedural *445 safeguards," and (3) the nature and magnitude of any countervailing interest in not providing "additional or substitute procedural requirement [s]." *Ibid.* See also *Lassiter,* 452 U.S., at 27–31, 101 S.Ct. 2153 (applying the *Mathews* framework).

The "private interest that will be affected" argues strongly for the right to counsel that Turner advocates. That interest consists of an indigent defendant's loss of personal liberty through imprisonment. The interest in securing that freedom, the freedom "from bodily restraint," lies "at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana,* 504 U.S. 71, 80, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). And we have made clear that its threatened loss through legal proceedings demands "due process protection." *Addington v. Texas,* 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979).

Given the importance of the interest at stake, it is obviously important to assure accurate decisionmaking in respect to the key "ability to pay" question. Moreover, the fact that ability to comply marks a dividing line between civil and criminal contempt, *Hicks,* 485 U.S., at 635, n. 7, 108 S.Ct. 1423, reinforces the need for accuracy. That is because an incorrect decision (wrongly classifying the contempt proceeding as civil) can increase the risk of wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding. See, *e.g., Dixon,* 509 U.S., at 696, 113 S.Ct. 2849 (proof beyond a reasonable doubt, protection from double jeopardy); *Codispoti v. Pennsylvania,* 418 U.S. 506, 512–513, 517, 94 S.Ct. 2687, 41 L.Ed.2d 912 (1974) (jury trial where the result is more than six months' imprisonment). And since 70% of child support arrears nationwide are owed by parents with either no reported income or income of $10,000 per year or less, the issue of ability to pay may arise fairly often. See E. Sorensen, L. Sousa, & S. Schaner, Assessing Child Support Arrears in Nine Large States and the Nation 22 (2007) (prepared by The Urban Institute), online at http://aspe.hhs.gov/hsp/07/assessing-CS-debt/report.pdf (as visited June 16, 2011, and available in Clerk of Court's case file); *id.,* at 23 ("research suggests that many obligors who do not have reported quarterly wages have relatively limited 446 resources"); Patterson, *446 Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison, 18 Cornell J. L. & Pub. Pol'y 95, 117 (2008). See also, *e.g., McBride v. McBride,* 334 N.C. 124, 131, n. 4, 431 S.E.2d 14, 19, n. 4 (1993) (surveying North Carolina contempt orders and finding that the "failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent").

On the other hand, the Due Process Clause does not always require the provision of counsel in civil proceedings where incarceration is threatened. See *Gagnon,* 411 U.S. 778, 93 S.Ct. 1756. And in determining whether the Clause requires a right to counsel here, we must take account of opposing interests, as well as consider the probable value of "additional or substitute procedural safeguards." *Mathews, supra,* at 335, 96 S.Ct. 893.

Doing so, we find three related considerations that, when taken together, argue strongly against the Due Process Clause requiring the State to provide indigents with counsel in every proceeding of the kind before us.

First, the critical question likely at issue in these 2519 cases concerns, as we have *2519 said, the defendant's ability to pay. That question is often closely related to the question of the defendant's indigence. But when the right procedures are in place, indigence can be a question that in many—but not all—cases is sufficiently straightforward to

warrant determination *prior* to providing a defendant with counsel, even in a criminal case. Federal law, for example, requires a criminal defendant to provide information showing that he is indigent, and therefore entitled to state-funded counsel, *before* he can receive that assistance. See 18 U.S.C. § 3006A(b).

Second, sometimes, as here, the person opposing the defendant at the hearing is not the government represented by counsel but the custodial parent *un*
447 represented by counsel. *447 See Dept. of Health and Human Services, Office of Child Support Enforcement, Understanding Child Support Debt: A Guide to Exploring Child Support Debt in Your State 5, 6 (2004) (51% of nationwide arrears, and 58% in South Carolina, are not owed to the government). The custodial parent, perhaps a woman with custody of one or more children, may be relatively poor, unemployed, and unable to afford counsel. Yet she may have encouraged the court to enforce its order through contempt. Cf. Tr. Contempt Proceedings (Sept. 14, 2005), App. 44a–45a (Rogers asks court, in light of pattern of nonpayment, to confine Turner). She may be able to provide the court with significant information. Cf. *id.,* at 41a–43a (Rogers describes where Turner lived and worked). And the proceeding is ultimately for her benefit.

A requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would "alter significantly the nature of the proceeding." *Gagnon, supra,* at 787, 93 S.Ct. 1756. Doing so could mean a degree of formality or delay that would unduly slow payment to those immediately in need. And, perhaps more important for present purposes, doing so could make the proceedings *less* fair overall, increasing the risk of a decision that would erroneously deprive a family of the support it is entitled to receive. The needs of such families play an important role in our analysis. Cf. *post,* at 2525 – 2527 (opinion of THOMAS, J.).

Third, as the Solicitor General points out, there is available a set of "substitute procedural safeguards," *Mathews,* 424 U.S., at 335, 96 S.Ct. 893, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty. They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his "ability to pay" is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information;
448 (3) an opportunity at the hearing for *448 the defendant to respond to statements and questions about his financial status, (*e.g.,* those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay. See Tr. of Oral Arg. 26–27; Brief for United States as *Amicus Curiae* 23–25. In presenting these alternatives, the Government draws upon considerable experience in helping to manage statutorily mandated federal-state efforts to enforce child support orders. See *supra,* at 2517. It does not claim that they are the only possible alternatives, and this Court's cases suggest, for example, that sometimes assistance other than purely legal assistance (here, say, that of a neutral social worker) can prove constitutionally sufficient. Cf. *Vitek,* 445 U.S., at 499–500, 100 S.Ct. 1254 (Powell, J., concurring in part) (provision of mental health professional).
2520 But the *2520 Government does claim that these alternatives can assure the "fundamental fairness" of the proceeding even where the State does not pay for counsel for an indigent defendant.

While recognizing the strength of Turner's arguments, we ultimately believe that the three considerations we have just discussed must carry the day. In our view, a categorical right to counsel in proceedings of the kind before us would carry with it disadvantages (in the form of unfairness and delay) that, in terms of ultimate fairness, would deprive it of significant superiority over the alternatives that we have mentioned. We

consequently hold that the Due Process Clause does not *automatically* require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned (adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute, relevant information, and court findings).

449 *449 We do not address civil contempt proceedings where the underlying child support payment is owed to the State, for example, for reimbursement of welfare funds paid to the parent with custody. See *supra,* at 2517. Those proceedings more closely resemble debt-collection proceedings. The government is likely to have counsel or some other competent representative. Cf. *Johnson v. Zerbst,* 304 U.S. 458, 462–463, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) ("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel* " (emphasis added)). And this kind of proceeding is not before us. Neither do we address what due process requires in an unusually complex case where a defendant "can fairly be represented only by a trained advocate." *Gagnon,* 411 U.S., at 788, 93 S.Ct. 1756; see also Reply Brief for Petitioner 18–20 (not claiming that Turner's case is especially complex).

IV

The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. He did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant "finding" section of the contempt order blank. The court nonetheless found Turner in contempt and ordered him incarcerated. Under these circumstances Turner's incarceration violated the Due Process Clause.

We vacate the judgment of the South Carolina Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

450 *It is so ordered.* *450 Justice THOMAS, with whom Justice SCALIA joins, and with whom THE CHIEF JUSTICE and Justice ALITO join as to Parts I–B and II, dissenting.

The Due Process Clause of the Fourteenth Amendment does not provide a right to appointed counsel for indigent defendants facing incarceration in civil contempt proceedings.

2521 Therefore, I would *2521 affirm. Although the Court agrees that appointed counsel was not required in this case, it nevertheless vacates the judgment of the South Carolina Supreme Court on a different ground, which the parties have never raised. Solely at the invitation of the United States as *amicus curiae,* the majority decides that Turner's contempt proceeding violated due process because it did not include "alternative procedural safeguards." *Ante,* at 2520. Consistent with this Court's longstanding practice, I would not reach that question.[1]

[1] I agree with the Court that this case is not moot because the challenged action is likely to recur yet is so brief that it otherwise evades our review. *Ante,* at 2514 – 2516.

I

The only question raised in this case is whether the Due Process Clause of the Fourteenth Amendment creates a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. It does not.

A

Under an original understanding of the Constitution, there is no basis for concluding that the guarantee of due process secures a right to appointed counsel in civil contempt proceedings. It certainly does not do so to the extent that the Due Process Clause requires " 'that our Government must proceed according to the "law of the land"—that is, according to written constitutional and statutory provisions.' " *Hamdi v. Rumsfeld,* 542 U.S. 507, 589, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (THOMAS, J., dissenting) (quoting *In re Winship,* 397 U.S. 358, 451 382, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)*451 (Black, J., dissenting)). No one contends that South Carolina law entitles Turner to appointed counsel. Nor does any federal statute or constitutional provision so provide. Although the Sixth Amendment secures a right to "the Assistance of Counsel," it does not apply here because civil contempt proceedings are not "criminal prosecutions." U.S. Const., Amdt. 6; see *ante,* at 2523. Moreover, as originally understood, the Sixth Amendment guaranteed only the "right to employ counsel, or to use volunteered services of counsel"; it did not require the court to appoint counsel in any circumstance. *Padilla v. Kentucky,* 559 U.S. 356, ——, 130 S.Ct. 1473, 1478, 176 L.Ed.2d 284 (2010) (SCALIA, J., dissenting); see also *United States v. Van Duzee,* 140 U.S. 169, 173, 11 S.Ct. 758, 35 L.Ed. 399 (1891) ; W. Beaney, The Right to Counsel in American Courts 21–22, 28–29 (1955); F. Heller, The Sixth Amendment to the Constitution of the United States 110 (1951).

Appointed counsel is also not required in civil contempt proceedings under a somewhat broader reading of the Due Process Clause, which takes it to approve " '[a] process of law, which is not otherwise forbidden, ... [that] can show the sanction of settled usage.' " *Weiss v. United States,* 510 U.S. 163, 197, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) (SCALIA, J., concurring in part and concurring in judgment) (quoting *Hurtado v. California,* 110 U.S. 516, 528, 4 S.Ct. 111, 28 L.Ed. 232 (1884)). Despite a long history of courts exercising contempt authority, Turner has not identified any evidence that courts appointed counsel in those proceedings. See *Mine Workers v. Bagwell,* 512 U.S. 821, 831, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (describing courts' traditional assumption of "inherent contempt authority"); see also 4 W. Blackstone, Commentaries on the Laws of England 280–285 (1769) (describing the "summary proceedings" used to adjudicate contempt). Indeed, Turner concedes that contempt proceedings without appointed counsel have the 2522 blessing of history. See *2522 Tr. of Oral Arg. 15–16 (admitting that there is no historical support for Turner's rule); see also Brief for Respondents 47–452 48.*452

B

Even under the Court's modern interpretation of the Constitution, the Due Process Clause does not provide a right to appointed counsel for all indigent defendants facing incarceration in civil contempt proceedings. Such a reading would render the Sixth Amendment right to counsel—as it is currently understood—superfluous. Moreover, it appears that even cases applying the Court's modern interpretation of due process have not understood it to categorically require appointed counsel in circumstances outside those otherwise covered by the Sixth Amendment.

1

Under the Court's current jurisprudence, the Sixth Amendment entitles indigent defendants to appointed counsel in felony cases and other criminal cases resulting in a sentence of imprisonment. See *Gideon v. Wainwright,* 372 U.S. 335, 344–345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) ; *Argersinger v. Hamlin,* 407 U.S. 25, 37, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) ; *Scott v. Illinois,* 440 U.S. 367, 373–374, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) ; *Alabama v. Shelton,* 535 U.S. 654, 662, 122 S.Ct. 1764, 152 L.Ed.2d 888 (2002). Turner concedes that, even under these cases, the Sixth Amendment does not entitle him

to appointed counsel. See Reply Brief for Petitioner 12 (acknowledging that "civil contempt is not a 'criminal prosecution' within the meaning of the Sixth Amendment"). He argues instead that "the right to the assistance of counsel for persons facing incarceration arises not only from the Sixth Amendment, but also from the requirement of fundamental fairness under the Due Process Clause of the Fourteenth Amendment." Brief for Petitioner 28. In his view, this Court has relied on due process to "rejec[t] formalistic distinctions between criminal and civil proceedings, instead concluding that incarceration or other confinement triggers the right to counsel." *Id.,* at 33.

But if the Due Process Clause created a right to appointed counsel in all proceedings with the potential for detention, then the Sixth Amendment
453 right to appointed counsel would *453 be unnecessary. Under Turner's theory, every instance in which the Sixth Amendment guarantees a right to appointed counsel is covered also by the Due Process Clause. The Sixth Amendment, however, is the only constitutional provision that even mentions the assistance of counsel; the Due Process Clause says nothing about counsel. Ordinarily, we do not read a general provision to render a specific one superfluous. Cf. *Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general"). The fact that one constitutional provision expressly provides a right to appointed counsel in specific circumstances indicates that the Constitution does not also *sub silentio* provide that right far more broadly in another, more general, provision. Cf. *Albright v. Oliver,* 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (plurality opinion) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims" (internal quotation marks omitted)); *id.,* at 281, 114 S.Ct. 807 (KENNEDY, J., concurring in judgment) ("I agree with the plurality that an allegation of arrest without
2523 probable cause must be *2523 analyzed under the Fourth Amendment without reference to more general considerations of due process"); *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection,* 560 U.S. 702, 2606–07, 130 S.Ct. 2592, 177 L.Ed.2d 184 (2010) (opinion of SCALIA, J.) (applying *Albright* to the Takings Clause).

2

Moreover, contrary to Turner's assertions, the holdings in this Court's due process decisions regarding the right to counsel are actually quite narrow. The Court has never found in the Due Process Clause a categorical right to appointed counsel outside of criminal prosecutions or proceedings "functionally akin to a criminal trial." *Gagnon v.*

454 *454

Scarpelli, 411 U.S. 778, 789, n. 12, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) (discussing *In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)). This is consistent with the conclusion that the Due Process Clause does not expand the right to counsel beyond the boundaries set by the Sixth Amendment.

After countless factors weighed, mores evaluated, and practices surveyed, the Court has not determined that due process principles of fundamental fairness categorically require counsel in any context outside criminal proceedings. See, *e.g., Lassiter v. Department of Social Servs. of Durham Cty.,* 452 U.S. 18, 31–32, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) ; *Wolff v. McDonnell,* 418 U.S. 539, 569–570, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) ; see also *Walters v. National Assn. of Radiation Survivors,* 473 U.S. 305, 307–308, 320–326, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985) ; *Goss v. Lopez,* 419 U.S. 565, 583, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Even when the defendant's

liberty is at stake, the Court has not concluded that fundamental fairness requires that counsel always be appointed if the proceeding is not criminal.[2] See, *e.g., Scarpelli, supra,* at 790, 93 S.Ct. 1756 (probation revocation); *Middendorf v. Henry,* 425 U.S. 25, 48, 96 S.Ct. 1281, 47 L.Ed.2d 556 (1976) (summary court-martial); *Parham v. J. R.,* 442 U.S. 584, 599–600, 606–607, 610, n. 18, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (commitment of minor to mental hospital); *Vitek v. Jones,* 445 U.S. 480, 497–500, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (Powell, J., controlling opinion concurring in part) (transfer of prisoner to mental hospital). Indeed, the only circumstance in which the Court has found that due process categorically requires appointed counsel is juvenile delinquency proceedings, which the Court has described as "functionally akin to a criminal trial." *Scarpelli,supra,* at 789, n. 12, 93 S.Ct. 1756 (discussing *In re Gault,supra*); see *ante,* at 2516 – 2517.

> 2 "Criminal contempt is a crime in the ordinary sense"; therefore, criminal contemners are entitled to "the protections that the Constitution requires of such criminal proceedings," including the right to counsel. *Mine Workers v. Bagwell,* 512 U.S. 821, 826, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994) (citing *Cooke v. United States,* 267 U.S. 517, 537, 45 S.Ct. 390, 69 L.Ed. 767 (1925) ; internal quotation marks omitted).

Despite language in its opinions that suggests it could find otherwise, the Court's consistent judgment has been that *455 fundamental fairness does not categorically require appointed counsel in any context outside of criminal proceedings. The majority is correct, therefore, that the Court's precedent does not require appointed counsel in the absence of a deprivation of liberty.*Id* ., at 2525 – 2526. But a more complete description of this Court's cases is that even when liberty is at stake, the Court has required appointed counsel in a category of cases only where it would have found the Sixth Amendment required it—in criminal prosecutions.*2524 II

The majority agrees that the Constitution does not entitle Turner to appointed counsel. But at the invitation of the Federal Government as *amicus curiae,* the majority holds that his contempt hearing violated the Due Process Clause for an entirely different reason, which the parties have never raised: The family court's procedures "were in adequate to ensure an accurate determination of [Turner's] present ability to pay." Brief for United States as *Amicus Curiae* 19 (capitalization and boldface type deleted); see *ante,* at 2519 – 2520. I would not reach this issue.

There are good reasons not to consider new issues raised for the first and only time in an *amicus* brief. As here, the new issue may be outside the question presented.[3] See Pet. for Cert. i ("Whether ... an indigent defendant has no constitutional right to appointed counsel at a civil contempt proceeding that results in his incarceration"); see also *ante,* at 2513 – 2514 (identifying the conflict among lower courts as regarding *456 "the right to counsel"). As here, the new issue may not have been addressed by, or even presented to, the state court. See 387 S.C. 142, 144, 691 S.E.2d 470, 472 (2010) (describing the only question as whether "the Sixth and Fourteenth Amendments of the United States Constitution guarantee [Turner], as an indigent defendant in family court, the right to appointed counsel"). As here, the parties may not have preserved the issue, leaving the record undeveloped. See Tr. of Oral Arg. 49, 43 ("The record is insufficient" regarding alternative procedures because "[t]hey were raised for the very first time at the merits stage here; so, there's been no development"); Brief for Respondents 63. As here, the parties may not address the new issue in this Court, leaving its boundaries untested. See Brief for Petitioner 27, n. 15 (reiterating that "[t]he particular constitutional violation that Turner challenges in this case is the failure of the family court to *appoint* counsel"); Brief for Respondents

62 (declining to address the Government's argument because it is not "properly before this Court") (capitalization and boldface type deleted). Finally, as here, a party may even oppose the position taken by its allegedly supportive *amicus* . See Tr. of Oral Arg. 7–12, 14–15 (Turner's counsel rejecting the Government's argument that any procedures short of a categorical right to appointed counsel could satisfy due process); Reply Brief for Petitioner 14–15.

[3] Indeed, the new question is not one that would even merit certiorari. See this Court's Rule 10. Because the family court received a form detailing Turner's finances and the judge could not hold Turner in contempt without concluding that he could pay, the due process question that the majority answers reduces to a factbound assessment of the family court's performance. See*ante,* at 2519 – 2520; Reply Brief for Petitioner 14–15 ("[I]n advance of his hearing, Turner supplied to the family court just such a form").

Accordingly, it is the wise and settled general practice of this Court not to consider an issue in the first instance, much less one raised only by an *amicus* . See this Court's Rule 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court"); *Adarand Constructors, Inc. v. Mineta,* 534 U.S. 103, 110, 122 S.Ct. 511, 151 L.Ed.2d 489 (2001) *(per curiam)* ("[T]his is a court of final review and not first view" (internal quotation marks omitted)); *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 60, n. 2, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981) (declining to consider an *amicus* ' argument
457 "since it was not raised by *457 either of the parties here or below" and was outside the grant of certiorari). This is doubly true when we review the
2525 decision of a state court and *2525 triply so when the new issue is a constitutional matter. See *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S.Ct. 670, 84 L.Ed. 849 (1940) ("[I]t is only in exceptional cases, and then only in cases coming from the federal courts, that [this Court] considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below"); *Cardinale v. Louisiana,* 394 U.S. 437, 438, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969) ("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions").

The majority errs in moving beyond the question that was litigated below, decided by the state courts, petitioned to this Court, and argued by the parties here, to resolve a question raised exclusively in the Federal Government's *amicus* brief. In some cases, the Court properly affirms a lower court's judgment on an alternative ground or accepts the persuasive argument of an *amicus* on a question that the parties have raised. See, *e.g., United States v. Tinklenberg,* 563 U.S. ——, ——, 131 S.Ct. 2007, 2016–17, 179L.Ed.2d 1080 (2011). But it transforms a case entirely to vacate a state court's judgment based on an alternative constitutional ground advanced only by an *amicus* and outside the question on which the petitioner sought (and this Court granted) review.

It should come as no surprise that the majority confines its analysis of the Federal Government's new issue to acknowledging the Government's "considerable experience" in the field of child support enforcement and then adopting the Government's suggestions *in toto* . See *ante,* at 2519. Perhaps if the issue had been preserved and briefed by the parties, the majority would have had alternative solutions or procedures to consider. See Tr. of Oral Arg. 43 ("[T]here's been no development. We don't know what other States are doing, the range of options out there"). The Federal Government's interest in States' child
458 support enforcement *458 efforts may give the Government a valuable perspective,[4] but it does not overcome the strong reasons behind the Court's practice of not considering new issues, raised and addressed only by an *amicus,* for the first time in this Court.

4 See, *e.g.,* Deadbeat Parents Punishment Act of 1998, 112 Stat. 618; Child Support Recovery Act of 1992, 106 Stat. 3403; Child Support Enforcement Amendments of 1984, 98 Stat. 1305; Social Services Amendments of 1974, 88 Stat. 2337.

III

For the reasons explained in the previous two sections, I would not engage in the majority's balancing analysis. But there is yet another reason not to undertake the *Mathews v. Eldridge* balancing test here. 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). That test weighs an individual's interest against that of the Government. *Id.,* at 335, 96 S.Ct. 893 (identifying the opposing interest as "the Government's interest"); *Lassiter,* 452 U.S., at 27, 101 S.Ct. 2153 (same). It does not account for the interests of the child and custodial parent, who is usually the child's mother. But their interests are the very reason for the child support obligation and the civil contempt proceedings that enforce it.

When fathers fail in their duty to pay child support, children suffer. See Cancian, Meyer, & Han, Child Support: Responsible Fatherhood and the Quid Pro Quo, 635 Annals Am. Acad. Pol. & Soc. Sci. 140, 153 (2011) (finding that child support plays an important role in reducing child poverty in single-parent homes); cf. Sorensen & Zibman, Getting to Know Poor Fathers Who Do Not Pay Child Support, 75 Soc. Serv. Rev. 420, 2526 423 (2001) (finding *2526 that children whose fathers reside apart from them are 54 percent more likely to live in poverty than their fathers). Nonpayment or inadequate payment can press children and mothers into poverty. M. Garrison, The Goals and Limits of Child Support Policy, in Child Support: The Next Frontier 16 (J. Oldham & M. Melli eds.2000); see also Dept. of Commerce, 459 Census Bureau, *459 T. Grall, Custodial Mothers and Fathers and Their Child Support: 2007, pp. 4–5 (2009) (hereinafter Custodial Mothers and Fathers) (reporting that 27 percent of custodial mothers lived in poverty in 2007).

The interests of children and mothers who depend on child support are notoriously difficult to protect. See, *e.g., Hicks v. Feiock,* 485 U.S. 624, 644, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988) (O'Connor, J., dissenting) ("The failure of enforcement efforts in this area has become a national scandal" (internal quotation marks omitted)). Less than half of all custodial parents receive the full amount of child support ordered; 24 percent of those owed support receive nothing at all. Custodial Mothers and Fathers 7; see also Dept. of Health and Human Services, Office of Child Support Enforcement, FY 2008 Annual Report to Congress, App. III, Table 71 (showing national child support arrears of $105.5 billion in 2008). In South Carolina alone, more than 139,000 noncustodial parents defaulted on their child support obligations during 2008, and at year end parents owed $1.17 billion in total arrears. *Id.,* App. III, Tables 73 and 71.

That some fathers subject to a child support agreement report little or no income "does not mean they do not have the ability to pay any child support." Dept. of Health and Human Services, H. Sorensen, L. Sousa, & S. Schaner, Assessing Child Support Arrears in Nine Large States and the Nation 22 (2007) (prepared by The Urban Institute) (hereinafter Assessing Arrears). Rather, many "deadbeat dads"[5] "opt to work in the underground economy" to "shield their earnings from child support enforcement efforts." Mich. Sup.Ct., Task Force Report: The Underground Economy 10 (2010) (hereinafter Underground Economy). To avoid attempts to garnish their wages or otherwise enforce the support obligation, 460 "deadbeats" quit their jobs, jump from job *460 to job, become self-employed, work under the table, or engage in illegal activity.[6] See Waller & Plotnick, Effective Child Support Policy for Low–Income Families: Evidence from Street Level Research, 20 J. Pol'y Analysis & Mgmt. 89, 104 (2001); Assessing Arrears 22–23.

5 See Deadbeat Parents Punishment Act of 1998, 112 Stat. 618 (referring to parents who "willfully fai[l] to pay a support obligation" as "[d]eadbeat [p]arents").

6 In this case, Turner switched between eight different jobs in three years, which made wage withholding difficult. App. 12a, 18a, 24a, 47a, 53a, 136a–139a. Most recently, Turner sold drugs in 2009 and 2010 but paid not a penny in child support during those years. *Id.,* at 105a–111a; App. to Brief for Respondents 16a, 21a–24a, 29a–32a, 37a–54a.

Because of the difficulties in collecting payment through traditional enforcement mechanisms, many States also use civil contempt proceedings to coerce "deadbeats" into paying what they owe. The States that use civil contempt with the threat of detention find it a "highly effective" tool for collecting child support when nothing else works. Compendium of Responses Collected by the U.S. Dept. of Health and Human Services Office of Child Support Enforcement (Dec. 28, 2010), reprinted in App. to Brief for Sen. DeMint et al. as *Amici Curiae* 7a; see *id.,* at 3a, 9a. For example, 2527 Virginia, which *2527 uses civil contempt as "a last resort," reports that in 2010 "deadbeats" paid approximately $13 million "either before a court hearing to avoid a contempt finding or after a court hearing to purge the contempt finding." *Id.,* at 13a–14a. Other States confirm that the mere threat of imprisonment is often quite effective because most contemners "will pay ... rather than go to jail." *Id.,* at 4a; see also Underground Economy C–2 ("Many judges ... report that the prospect of [detention] often causes obligors to discover previously undisclosed resources that they can use to make child support payments").

This case illustrates the point. After the family court imposed Turner's weekly support obligation in June 2003, he made no payments until the court held him in contempt three months later, whereupon he paid over $1,000 to avoid confinement. App. 17a–18a, 131a. Three more 461 times, Turner *461 refused to pay until the family court held him in contempt—then paid in short order. *Id.,* at 23a–25a, 31a–34a, 125a–126a, 129a–130a.

Although I think that the majority's analytical framework does not account for the interests that children and mothers have in effective and flexible methods to secure payment, I do not pass on the wisdom of the majority's preferred procedures. Nor do I address the wisdom of the State's decision to use certain methods of enforcement. Whether "deadbeat dads" should be threatened with incarceration is a policy judgment for state and federal lawmakers, as is the entire question of government involvement in the area of child support. See Elrod & Dale, Paradigm Shifts and Pendulum Swings in Child Custody, 42 Fam. L.Q. 381, 382 (2008) (observing the "federalization of many areas of family law" (internal quotation marks omitted)). This and other repercussions of the shift away from the nuclear family are ultimately the business of the policymaking branches. See, *e.g.,* D. Popenoe, Family in Decline in America, reprinted in War Over the Family 3, 4 (2005) (discussing "four major social trends" that emerged in the 1960's "to signal a widespread 'flight' " from the "nuclear family"); Krause, Child Support Reassessed, 24 Fam. L.Q. 1, 16 (1990) ("Easy-come, easy-go marriage and casual cohabitation and procreation are on a collision course with the economic and social needs of children"); M. Boumil & J. Friedman, Deadbeat Dads 23–24 (1996) ("Many [children of deadbeat dads] are born out of wedlock .... Others have lost a parent to divorce at such a young age that they have little conscious memory of it").

* * *

I would affirm the judgment of the South Carolina Supreme Court because the Due Process Clause does not provide a right to appointed counsel in civil contempt hearings that may lead to incarceration. As that is the only issue properly before the Court, I respectfully dissent.

STATE OF NEW YORK

3300

2021-2022 Regular Sessions

IN SENATE

January 28, 2021

Introduced by Sens. PARKER, BAILEY, HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Local Government

AN ACT to amend the county law, the real property actions and proceedings law, the vehicle and traffic law, the state finance law and the judiciary law, in relation to enacting the "NY Civil Gideon Act"

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as the "New York Civil Gideon act".

§ 2. The county law is amended by adding a new article 18-C to read as follows:

ARTICLE 18-C

REPRESENTATION OF PERSONS IN CIVIL MATTERS

§ 723. Legislative findings. The legislature hereby finds and declares as follows:

1. Every year, at least eighty percent of the civil legal needs of low income New Yorkers go unmet.

2. These legal needs often concern matters pertaining to the essentials of life including shelter, food, employment, health, and family sustainability.

3. The lack of available civil legal assistance undermines comprehensive assistance for crime victims.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD07514-01-1

4. The lack of civil legal services to resolve a family's legal problems often disrupts the children and young adults' education, frequently with a permanent impact.

5. The lack of civil legal services can worsen chronic health problems often increasing the cost of medical care.

6. The lack of civil legal services can result in homelessness not only affecting the individual families but also destabilizing entire neighborhoods.

7. In light of these trying economic times, the need for civil legal services has increased beyond individuals below the federal poverty guidelines to homeowners and other middle income New Yorkers that provide the foundation for New York's economy.

8. The substantial number of unrepresented litigants in civil legal matters adversely impacts the quality of justice for all parties in the courts of New York state, increases the amount of litigation, and undermines the rule of law.

9. It has been found that when a society is unable to meet their basic human needs it is in an ongoing state of emergency.

10. The unmet need for civil legal assistance in the state is profoundly impacting vulnerable New Yorkers and costing taxpayers millions of dollars by increasing homelessness, failing to prevent domestic violence, and increasing poverty.

11. In order to address this emergency, this legislature finds that a right to counsel in certain civil matters is imperative.

§ 723-a. Civil right to counsel commission. 1. There is hereby established the civil right to counsel commission. The commission shall be composed of eleven members.

2. a. The members of the commission shall be appointed as follows:

(i) one member shall be appointed by the governor and shall be an attorney with expertise in civil legal services;

(ii) one member shall be appointed by the temporary president of the senate;

(iii) one member shall be appointed by the speaker of the assembly;

(iv) one member shall be appointed by the minority leader of the assembly;

(v) one member shall be appointed by the minority leader of the senate;

(vi) two members shall be appointed by the chief judge of the court of appeals;

(vii) one member shall be appointed by the association of counties;

(viii) one member shall be appointed by the mayor of the city of New York and shall be an attorney who has provided civil legal services for at least five years;

(ix) one member shall be appointed by the governor, from a list of no more than two nominees submitted by the chief administrator of the courts, each of whom shall be a judge or justice, or retired judge or justice, who was elected to the supreme, county or family court, or appointed to the criminal court or family court in the city of New York, and has substantial experience presiding as such a judge or justice in trial matters before such court; and

(x) one member shall be appointed by the New York state bar association.

b. All members of the commission shall be residents of the state of New York.

c. The members of the commission shall serve terms of four years. All members shall serve until their successors are appointed. Vacancies on

the commission shall be filled for the remainder of the term in the manner provided for by the original appointment.

d. The members of the commission shall receive no compensation for their services, but shall be allowed their actual and necessary expenses incurred in the performance of their duties.

e. Notwithstanding any inconsistent provisions of law, no officer or employee of the state or any civil division thereof shall be deemed to have forfeited or shall forfeit his or her office or employment by reason of his or her acceptance of membership on the commission.

f. The commission shall meet at least once per year.

g. A majority of the members of the commission shall constitute a quorum.

h. The chief judge of the court of appeals, or his or her designee, shall serve as a non-voting ex-officio member of the commission.

i. Appointment to the commission shall be filed by the chief judge of the court of appeals, who shall convene the first meeting of the commission following the filing of the majority of appointments. At the initial meeting the members shall elect officers.

3. The commission shall submit to the governor, temporary president of the senate, speaker of the assembly and the chief judge of the court of appeals an annual report on or before the anniversary date of the commission's first meeting. Such report shall contain all pertinent data for the prior twelve months on the operation of the commission including the number of assigned counsel in each county, the number of cases assigned, the number of cases resolved, recommendations for additional attorneys, if necessary, the cost of operation and financial assistance to localities. Such report shall also include the proposed budget for the succeeding twelve months including funds for financial assistance to localities.

§ 723-b. Lead agency for civil right to counsel. 1. Representation for persons in civil matters shall be a partnership between the courts and all qualified legal services providers, bar associations and private organizations.

2. The legal services providers shall serve as the lead agency for case assessment and direction under this article and furthermore shall:

a. be the central point of contact for receipt of referrals for legal representation;

b. make determinations of eligibility based on uniform criteria;

c. be responsible for providing representation to the clients or referring the matter to one of the organizations or individual providers with whom the lead legal services agency contracts to provide the service; and

d. to the extent practical, identify and make use of pro bono services in order to maximize available services efficiently and economically.

3. Recognizing that not all indigent parties can be afforded representation, even when they have meritorious cases, the court partner shall, as a corollary to the services provided by the lead legal services agency, be responsible for providing procedures, personnel, training, and case management and administration practices that reflect best practices to ensure unrepresented parties meaningful access to justice and to guard against the involuntary waiver of rights, as well as to encourage fair and expeditious voluntary dispute resolution, consistent with principles of judicial neutrality.

4. The participating legal services agency shall be selected by the judicial council.

a. The judicial council shall be made up of one administrative judge from each judicial district. There shall be at least one legal services agency chosen for each judicial district.

b. The judicial council shall assess the applicants' capacity for success, innovation, and efficiency, including, but not limited to, the likelihood that the agency would deliver quality representation in an effective manner that would meet critical needs in the community and address the needs of the court with regard to access to justice and calendar management, and the unique local unmet needs for representation in the community.

c. Agencies approved pursuant to this section shall initially be authorized for a three-year period, commencing on the effective date of this section and subject to renewal for a period to be determined by the judicial council, in consultation with the participating agency in light of the agency's capacity and success. After the initial three-year period, the judicial council shall distribute any future funds available as the result of the termination or nonrenewal of an agency pursuant to the process set forth in this subdivision.

d. Agencies shall be selected on the basis of whether, in the cases proposed for service, the persons to be assisted are likely to be opposed by a party who is represented by counsel. The judicial council shall also consider the following factors in selecting the agencies:

(i) the likelihood that representation in the proposed case type tends to affect whether a party prevails or otherwise obtains a significantly more favorable outcome in a matter in which they would otherwise frequently have judgment entered against them or suffer the deprivation of the basic human need at issue;

(ii) the likelihood of reducing the risk of erroneous decisions;

(iii) the nature and severity of potential consequences for the unrepresented party regarding the basic human need at stake if representation is not provided;

(iv) whether the provision of legal services may eliminate or reduce the potential need for and cost of public social services regarding the basic human need at stake for the client and others in the client's household;

(v) the unmet need for legal services in the geographic area to be served; and

(vi) the availability and effectiveness of other types of court services, such as self-help.

e. Each applicant shall do the following:

(i) identify the nature of the partnership between the court and the other agencies or other providers that would work within the project;

(ii) describe the referral protocols to be used, the criteria that would be employed in case assessment, why those cases were selected, the manner to address conflicts without violating any attorney-client privilege when adverse parties are seeking representation through the project, and the means for serving potential clients who need language assistance within the court system; and

(iii) describe how the project would be administered, including how the data collection requirements would be met without causing an undue burden on the courts, clients, or the providers, the particular objectives of the project, strategies to evaluate their success in meeting those objectives, and the means by which the project would serve the particular needs of the community, such as by providing representation to limited-English-speaking clients, the elderly and the disabled.

5. To ensure the most effective use of the funding available, the lead legal services agency shall serve as a hub for all referrals, and the point at which decisions are made about which referrals will be served and by whom. Referrals shall emanate from the court, as well as from the other agencies providing services through the program, and shall be directed to the lead legal services agency for review. That agency, or another agency or attorney in the event of conflict, shall collect the information necessary to assess whether the case should be served. In performing that case assessment, the agency shall determine the relative need for representation of the litigant, including all of the following:

a. case complexity;

b. whether the opposing party is represented;

c. the adversarial nature of the proceeding;

d. the availability and effectiveness of other types of services, such as self-help, in light of the potential client and the nature of the case;

e. barriers to access due to language;

f. barriers to access due to disability;

g. barriers to access due to literacy;

h. the merits of the case;

i. the nature and severity of potential consequences for the potential client if representation is not provided; and

j. whether the provision of legal services may eliminate or reduce the need for and cost of public social services for the potential client and others in the potential client's household.

6. The decision and level of representation should be made at the sole discretion of the lead agency, organization, or attorney based on the factors set forth above.

7. If both parties to a dispute are financially eligible for representation, each proposal shall ensure that representation for both sides is evaluated. In these and other cases in which conflict issues arise, the lead legal services agency shall have referral protocols with other agencies and providers, such as a private attorney panel, to address those conflicts.

8. Each lead agency, organization, or attorney shall be responsible for keeping records on the referrals accepted and those not accepted for representation, and the reasons for each, in a manner that does not violate any privileged communications between the agency and the prospective client. Each lead agency, organization or attorney shall be provided with standardized data collection tools to be determined by the commission, and required to track case information for each referral to allow the evaluation to measure the number of cases served, the level of service required, and the outcomes for the clients in each case. In addition to this information on the effect of the representation on the clients, data shall be collected regarding the outcomes for the trial courts. This data shall be compiled in a report to be submitted to the commission on a quarterly basis.

§ 723-c. Assigned counsel for civil matters review panel. 1. There is hereby established the assigned counsel for civil matters review panel.

2. a. The review panel shall be composed of at least sixteen members, to be appointed as follows:

(i) Attorney-in-Chief for the Legal Aid Society or his/her representative;

(ii) Chair of Legal Services NYC or his/her representative;

(iii) Executive Director of Legal Services of the Hudson Valley or his/her representative;

(iv) Executive Director of the Legal Aid Society of Northeastern NY or his/her representative;
(v) Executive Director of the Western NY Law Center or his/her representative;
(vi) President of the Empire Justice Center or his/her representative;
(vii) Executive Director of the New York Lawyers for the Public Interest or his/her representative;
(viii) The President of the New York legal assistance group or his/her representative;
(ix) Executive Director of Lambda Legal or his/her representative;
(x) The immediate past President of the New York State Bar Association or a representative appointed by the association;
(xi) The immediate past President of the Network of Bar Leaders or his/her representative;
(xii) The immediate past President of the Women's Bar Association of the State of New York or his/her representative;
(xiii) The immediate past President of the Metropolitan Black Bar Association or his/her representative;
(xiv) The immediate past President of the New York State Director of the Fund for Modern Courts or his/her representative;
(xv) Executive Director of the Iola Fund of the State of New York or his/her representative; and
(xvi) One representative from the National Coalition for a Civil Right to Counsel.
b. The members of the review panel shall serve terms of four years. All members shall serve until their successors are appointed. Vacancies on the review panel shall be filled for the remainder of the term in the manner provided for by the original appointment.
c. The members of the review panel shall receive no compensation for their services, but shall be allowed their actual and necessary expenses incurred in the performance of their duties.
d. Notwithstanding any inconsistent provisions of law, no officer or employee of the state or any civil division thereof shall be deemed to have forfeited or shall forfeit his or her office or employment by reason of his or her acceptance of membership on the review panel.
e. A majority of the members of the review panel shall constitute a quorum.
f. The members of the review panel may participate in a meeting of such review panel by means of a conference telephone or similar communications equipment allowing all persons participating in the meeting to hear each other at the same time; participation by such means shall constitute presence in person at such meeting.
3. The purpose of the panel is to ensure that quality representation is provided under this article. This includes processing complaints against attorneys assigned under this article, establishing the proper remedy for aggrieved parties, attorney admission as assigned counsel, attorney training, and all other procedures the review panel finds necessary to achieve its goal. Nothing in this article shall prevent any investigation under the New York state unified court system rules of professional conduct or otherwise.
4. The review panel may work together with the civil right to counsel commission to achieve the common goals of this article.
5. a. The chief judge of the court of appeals and the review panel appointees shall convene the review panel and create a plan outlining the procedure and guidelines to govern the panel and assigned counsel program in accordance with the goal of providing quality civil legal

representation. The chief judge of the court of appeals shall consult with the administrative judges of each judicial district to receive guidance on the needs of each district.

b. The guidelines shall include but not be limited to:

(i) meeting requirements of the panel;

(ii) standards of quality representation;

(iii) training necessary to provide civil assigned counsel representation;

(iv) content for the complaint form for a grievance against an agency or attorney assigned as civil assigned counsel;

(v) a grievance procedure; and

(vi) establishing possible remedies for those found to be aggrieved.

§ 723-d. Compensation and reimbursement. 1. All counsel assigned in accordance with a plan of the court, other organization, or a bar association conforming to the requirements of this article whereby the services of private counsel are rotated and coordinated by an administrator shall at the conclusion of the representation receive:

a. for real property proceedings no less than fifty dollars per hour;

b. for cases involving health no less than fifty dollars per hour;

c. for cases involving license revocation or suspension no less than fifty dollars per hour;

d. for cases involving sustenance no less than sixty dollars per hour; and

e. for cases involving children no less than sixty dollars per hour.

2. For the purposes of this section:

a. real property proceedings shall include sections seven hundred eleven, seven hundred thirteen, seven hundred thirteen-a, five hundred one, one thousand ninety-three, thirteen hundred three and article thirteen of the real property actions and proceedings law;

b. cases involving health shall include article forty-nine of the public health law;

c. cases involving license revocation or suspension shall include sections two hundred twenty-seven, two hundred forty-two and two hundred sixty-one of the vehicle and traffic law;

d. cases involving sustenance shall include sections one hundred ninety-six-a, five hundred thirty-eight, six hundred twenty, six hundred twenty-one, six hundred twenty-four, six hundred sixty-three and six hundred eighty-one of the labor law, sections twenty-two and three hundred sixty-five of the social services law and rule three hundred five and article seventy-eight of the civil practice law and rules;

e. cases involving children shall include article four of the family court act.

3. For all representation, compensation and reimbursement shall include reimbursement for reasonably incurred expenses.

4. Compensation for representation in such cases shall be guided by the minimum amounts set forth above. The compensation minimums are set for counsel only, not support or administrative staff work. Work for support or administrative staff should be set by individual counsel, firm, or organization and should be set at a lower rate than compensation for counsel.

5. There shall be no differential in compensation rate for out of court time expended and in court time expended. Rates should be set at the minimum stated above or higher based on the complexity of the case and expertise of the attorney. Such rates shall be subject to the approval of the court of jurisdiction based on the complexity of the

case, expertise of the attorney, the market, and any other factors the court deems just and appropriate.

6. There should be no cap on the amount of compensation or reimbursement received for representation. The amount of compensation and reimbursement is subject to court approval as described above.

7. Compensation and reimbursement for appeal shall be fixed by the appellate court not to be below the rates set forth in this section.

8. In extraordinary circumstances a trial or appellate court may provide for payment of compensation and reimbursement for expenses before the completion of the representation upon application.

§ 3. The opening paragraph of section 722 of the county law, as amended by chapter 7 of the laws of 2007, is amended to read as follows:

The governing body of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county a plan for providing counsel to persons charged with a crime or who are entitled to counsel pursuant to section two hundred sixty-two or section eleven hundred twenty of the family court act, article six-C of the correction law, section four hundred seven of the surrogate's court procedure act or article ten of the mental hygiene law, who are financially unable to obtain counsel. The governing body of each county and the governing body of the city in which a county is wholly contained shall also place in operation throughout the county a plan for providing counsel to financially unable persons in civil proceedings under this section, sections one hundred ninety-six-a, five hundred thirty-eight, six hundred twenty, six hundred twenty-one, six hundred twenty-four, six hundred sixty-three and six hundred eighty-one of the labor law, sections twenty-two and three hundred five of the social services law, where there is a revocation or suspension issued pursuant to sections two hundred twenty-seven, two hundred forty-two and two hundred sixty-one of the vehicle and traffic law, article forty-nine of the public health law, sections seven hundred eleven, seven hundred thirteen, seven hundred thirteen-a, five hundred one, one thousand ninety-three, section thirteen hundred three and article thirteen of the real property actions and proceedings law, rule three hundred five and article seventy-eight of the civil practice law and rules and article four of the family court act. For the purposes of this section the terms "financially unable" and "low income" shall mean an individual who is at or below two hundred percent of the federal poverty guidelines. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:

§ 4. Subdivision 3 of section 1303 of the real property actions and proceedings law, as amended by section 5 of part Q of chapter 73 of the laws of 2016, is amended to read as follows:

3. The notice to any mortgagor required by paragraph (a) of subdivision one of this section shall appear as follows:

Help for Homeowners in Foreclosure

New York State Law requires that we send you this notice about the foreclosure process. Please read it carefully.

Summons and Complaint

You are in danger of losing your home. If you fail to respond to the summons and complaint in this foreclosure action, you may lose your home. Please read the summons and complaint carefully. You should immediately contact an attorney or your local legal aid office to obtain advice on how to protect yourself.

Sources of Information and Assistance

The State encourages you to become informed about your options in foreclosure. In addition to seeking assistance from an attorney or legal aid office, there are government agencies and non-profit organizations that you may contact for information about possible options, including trying to work with your lender during this process. **You may be entitled to assigned counsel if you are financially unable to obtain representation.**

To locate an entity near you, you may call the toll-free helpline maintained by the New York State Department of Financial Services at (enter number) or visit the Department's website at (enter web address).

Rights and Obligations

YOU ARE NOT REQUIRED TO LEAVE YOUR HOME AT THIS TIME. You have the right to stay in your home during the foreclosure process. You are not required to leave your home unless and until your property is sold at auction pursuant to a judgment of foreclosure and sale.

Regardless of whether you choose to remain in your home, YOU ARE REQUIRED TO TAKE CARE OF YOUR PROPERTY and pay property taxes in accordance with state and local law.

Foreclosure rescue scams

Be careful of people who approach you with offers to "save" your home. There are individuals who watch for notices of foreclosure actions in order to unfairly profit from a homeowner's distress. You should be extremely careful about any such promises and any suggestions that you pay them a fee or sign over your deed. State law requires anyone offering such services for profit to enter into a contract which fully describes the services they will perform and fees they will charge, and which prohibits them from taking any money from you until they have completed all such promised services.

§ 5. Section 722-c of the county law, as amended by section 3 of part J of chapter 62 of the laws of 2003, is amended to read as follows:

§ 722-c. Services other than counsel. Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant or other person described in section two hundred forty-nine or section two hundred sixty-two of the family court act, article six-C of the correction law [~~or~~], section four hundred seven of the surrogate's court procedure act, **section seven hundred twenty-two of this article, sections one hundred ninety-six-a, five hundred thirty-eight, six hundred twenty, six hundred twenty-one, six hundred twenty-four, six hundred sixty-three and six hundred eighty-one of the labor law, sections twenty-two and three hundred five of the social services law, where there is a revocation or suspension issued pursuant to sections two hundred twenty-seven, two hundred forty-two and two hundred sixty-one of the vehicle and traffic law, article forty-nine of the public health law, sections seven hundred eleven, seven hundred thirteen, seven hundred thirteen-a, five hundred one, one thousand ninety-three, thirteen hundred three and article thirteen of the real property actions and proceedings law, rule three hundred five and article seventy-eight of the civil practice law and rules, and article four of the family court act,** is financially unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant or such other person. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. [~~Only in extraordinary circumstances may the court~~

~~provide for compensation in excess of one thousand dollars per investigative, expert or other service provider.~~]

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

§ 6. Section 227 of the vehicle and traffic law is amended by adding a new subdivision 7 to read as follows:

7. A financially unable person who is charged with an offense punishable by a revocation or suspension of his or her drivers' license where the person is dependent on driving for their employment or where there is a lack of public transportation in the person's surrounding area shall have a right to assigned counsel by the court. Assignment of counsel under this section shall be implemented as provided in article eighteen-C of the county law. For the purposes of this section the term "financially unable" shall mean an individual who is at or below two hundred percent of the federal poverty guidelines.

§ 7. Section 261 of the vehicle and traffic law is amended by adding a new subdivision 5 to read as follows:

5. Assignment of counsel. A financially unable person who is charged with an offense punishable by a revocation or suspension of his or her drivers' license where the person is dependent on driving for their employment or where there is a lack of public transportation in the person's surrounding area shall have a right to assigned counsel by the court. Assignment of counsel under this section shall be implemented as provided in article eighteen-C of the county law. For the purposes of this section the term "financially unable" shall mean an individual who is at or below two hundred percent of the federal poverty guidelines.

§ 8. The state finance law is amended by adding a new section 98-d to read as follows:

§ 98-d. Civil Gideon assistance fund. 1. There is hereby established in the joint custody of the comptroller, office of court administration and the commissioner of taxation and finance a special fund to be known as the civil Gideon assistance fund.

2. Such fund shall consist of all moneys appropriated for the purpose of such fund, all other moneys required to be paid into or credited to such fund, and all moneys received by the fund or donated to it.

3. A one-time surcharge of seventy-five dollars shall be added to the biennial attorney fees to be added to this fund, as set forth in section four hundred sixty-eight-a of the judicial law.

(a) The purpose of such fund shall be to: (i) assist counties and, in the case of a county wholly contained within a city, such city, in providing legal representation for persons who are financially unable to afford counsel pursuant to article eighteen-C of the county law; (ii) assist the state, in improving the quality of civil legal services addressing the essentials of life and funding representation provided by assigned counsel paid in accordance with section thirty-five of the judiciary law; (iii) provide support for the operations, duties, responsibilities and expenses for the right to civil representation commission and panel established, respectively, pursuant to this article; and (iv) provide funding for legal representation as described herein.

(b) State funds received by a county or city from such fund shall be used to supplement and not supplant any local funds which such county or city would otherwise have had to expend for the provision of counsel and expert, investigative and other services pursuant to article eighteen-C of the county law. All such state funds received by a county or city

shall be used to improve the quality of services provided pursuant to article eighteen-C of the county law.

(c) As used in this section, "local funds" shall mean all funds appropriated or allocated by a county or, in the case of a county wholly contained within a city, such city, for services and expenses in accordance with article eighteen-C of the county law, other than funds received from: (i) the federal government or the state; or (ii) a private source, where such city or county does not have authority or control over the payment of such funds by such private source.

3. Amounts distributed from such fund shall be limited to amounts deemed appropriate by the office of court administration and shall be distributed proportionately by level of need at the court's discretion.

(a) For all state fiscal years, each county and the city of New York, shall receive ninety percent of the amount paid to such county in the previous fiscal year.

(b) Remaining amounts within such fund, after accounting for annual payments required in this section shall be distributed in accordance with sections eight hundred thirty-two and eight hundred thirty-three of the executive law.

§ 9. Subdivision 5 of section 468-a of the judiciary law is renumbered subdivision 6 and a new subdivision 5 is added to read as follows:

5. A one-time surcharge of seventy-five dollars shall be added to the biennial attorney fees to be allocated to and be deposited into a fund established pursuant to the provisions of article eighteen-C of the county law. Such surcharge shall be assessed to every attorney in the same manner as the biennial fee described in subdivision one of this section.

§ 10. This act shall take effect immediately, and the appointment of members to the civil right to counsel commission and the assigned counsel for civil matters review panel shall be completed within 90 days of such effective date.

AGAINST CIVIL *GIDEON* (AND FOR PRO SE COURT REFORM)

Benjamin H. Barton[*]

INTRODUCTION

"Civil *Gideon*" is a short-hand name for a concept that has been the white whale of American poverty law for the last forty years—a constitutional civil guarantee to a lawyer to match the criminal guarantee from *Gideon v. Wainwright*.[1] This Article argues that the pursuit of civil

* Director of Clinical Programs and Associate Professor of Law, University of Tennessee College of Law. B.A. 1991, Haverford College; J.D. 1996, University of Michigan. The Author gives special thanks to Indya Kincannon, Alex Long, Mae Quinn, Doug Blaze, Charles Wolfram, Jeff Hirsch, Jennifer Hendricks, Brannon Denning, Glenn Reynolds, the participants of the 2009 SEALS Conference, and the Honorable Diana Gribbon Motz.

1. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), guaranteed a right to appointed counsel in federal *and* state felony cases by applying the Sixth Amendment's right to counsel to the states under the due process clause. *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938), created the Sixth Amendment right to a lawyer in federal felony cases. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), extended the right to counsel from *Gideon* and *Zerbst* to misdemeanors if the defendant was

Gideon is an error logistically and jurisprudentially and advocates an alternate route for ameliorating the execrable state of pro se litigation for the poor in this country: pro se court reform.[2]

This Article and the civil *Gideon* advocates agree on one key point. The current treatment of persons too poor to afford counsel in America's civil courts is an embarrassment and is a serious and growing problem. Despite this common ground, three key difficulties led to this Article. First, *Gideon* itself has largely proven a disappointment. Between overworked and underfunded lawyers and a loose standard for ineffective assistance of counsel, there is little in indigent criminal defense that makes one think that a guarantee of civil counsel will work very well. Second, focusing our attention on pro se court reform is a much, much more promising and likely palliative to the legal problems of the poor. Lastly, and most importantly, civil *Gideon* is a deeply conservative and backward looking solution to this problem, while pro se court reform has the potential to do more than just help the poor. It has the potential to radically reshape our justice system in ways that assist everyone. At the end of this Article, I describe a science fiction thought experiment: imagine a world where the courts that deal with the poor are so simple, efficient, transparent, and pleasant that for once the justice system of the poor was the envy of the rich. Pro se court reform actually offers this possibility.

If civil *Gideon* were merely a mildly bad idea, the division among poverty lawyers and community advocates on this issue would be of limited import.[3] The fact that civil *Gideon* is a bad idea *and* saps energy

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to face any time in jail. Note that the civil *Gideon* movement actually encompasses reform efforts through both legislation and litigation. *See* Amaris Elliott-Engel, *Civil Gideon Movement Looks to Expand Right to Publicly Provided Legal Counsel*, LEGAL INTELLIGENCER BLOG, Apr. 15, 2008, http://thelegalintelligencer.wordpress.com/2008/04/15/civil-gideon-movement-looks-to-expand-right-to-publicly-provided-legal-counsel/. This Article focuses its critique on a court-ordered civil *Gideon*. For reasons that will become clear, legislative civil *Gideon* is also inferior to pro se court reform but is less problematic than court-mandated change, because at least it would be a result of the legislative process rather than court ordered.

2. When this Article refers to "pro se court reform," that phrase means a rethinking and overhaul of courts that feature a regularized majority (or at least plurality) of pro se matters. Depending on the jurisdiction and demographics, common pro se courts include specialty courts that handle child support, child custody, domestic abuse/protective orders, landlord-tenant courts, small claims courts, and divorce courts. *See, e.g.*, Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear* Pro Se*: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 423 n.1 (2004) (listing statistics on some majority pro se courts).

3. Poverty advocates fall into three general categories. Many poverty advocates are focusing the bulk of their energy on civil *Gideon*. *See, e.g.*, *infra* note 6; Brennan Center for Justice, Civil Right to Counsel, http://www.brennancenter.org/content/section/ category/civil_right_to_counsel (last visited Sept. 24, 2010); National Coalition for a Civil Right to Counsel, http://www.civilrighttocounsel.org/ (last visited Sept. 24, 2010). Others basically advocate for both approaches. *See, e.g.*, DEBORAH L. RHODE, ACCESS TO JUSTICE 7–10, 14–16 (2004). For example, Professor Russell Engler has written to advocate for both civil *Gideon* and pro se court reform. *See*

and resources from a better, more workable solution, however, necessitates an effort to convince others to join the pro se court reform movement.[4]

Nevertheless, bar associations, academics, and poverty lawyers are working harder on civil *Gideon* than ever. In 2006, the ABA House of Delegates unanimously approved a report calling for a national civil *Gideon* to "provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody."[5] There has likewise been an uptick of favorable scholarly attention, including at least three recent law review symposia pushing for civil *Gideon*.[6] Public interest lawyers have filed recent cases and formed civil *Gideon* working groups.[7]

There are three caveats before the argument begins in earnest. First, while this Article is quite critical of civil *Gideon*, no disrespect whatsoever is meant to its many proponents. As a general rule, any focus on the problems of the poor is welcome, and the civil *Gideon* supporters have their hearts in the right place. Second, part of the argument is a comparison

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Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999) [hereinafter Engler, *And Justice for All*] (advocating pro se court reform); Russell Engler, *Shaping a Context-Based Civil* Gideon *from the Dynamics of Social Change*, 15 TEMP. POL. & CIV. RTS. L. REV. 697, 697 (2006) [hereinafter Engler, *Context-Based Civil Gideon from Social Change*] (advocating for civil *Gideon*). Often pro se assistance or court reform are treated as stopgap measures. *See, e.g.*, Mary Helen McNeal, *Having One Oar or Being Without a Boat: Reflections on the Fordham Recommendations on Limited Legal Assistance*, 67 FORDHAM L. REV. 2617, 2618 (1999). Lastly, some have advocated solely for pro se court reform. *See* Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access To Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 FORDHAM L. REV. 969, 970 (2004). This is the first Article to comprehensively contrast the strengths and weaknesses of both the civil Gideon and the pro se court reform approaches.

4. On a personal note, I may seem a somewhat unusual opponent to civil *Gideon*, as I have spent the bulk of my legal career teaching students and representing the indigent, both as appointed criminal counsel and offering free civil legal services. Nevertheless, the longer I do this work, the more strongly I feel that civil *Gideon* is not the answer.

5. Am. Bar Ass'n, Report to the House of Delegates, Resolution 112A, at 1 (2006), *available at* http://www.abanet.org/legalservices/sclaid/downloads/06A112A.pdf.

6. *2006 Edward V. Sparer Symposium*, *Civil Gideon: Creating a Constitutional Right to Counsel in the Civil Context*, 15 TEMP. POL. & CIV. RTS. L. REV. 501 (containing twelve articles on "civil *Gideon*"); *A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV.167 (2006) (dedicating entire issue to "civil *Gideon*" efforts); Symposium, *A Right to Counsel in Civil Cases: Civil Gideon in Maryland & Beyond*, 37 U. BALT. L. REV. 1 (2007) (containing papers on "civil *Gideon*"); Symposium, 25 TOURO L. REV. 1 (2009) (containing twelve articles and a comment on "civil *Gideon*").

7. For example, a consortium of lawyers led by the Public Justice Center filed a recent case in Maryland arguing for a civil *Gideon* right. *See* Public Justice Center, Civil Gideon, http://www.publicjustice.org/current-focus-area/index.cfm?subpageid=36&gclid=CNHml4PxzZwCFRqdnAod6hPHLA (last visited Sept. 27, 2010). For a broader umbrella organization, see National Coalition for a Civil Right to Counsel, *supra* note 3.

between the lofty rhetoric and great promise of *Gideon* and the sad reality of our current system of indigent defense. This Article does not argue that *Gideon* itself is wrong or should be overturned; rather the focus is on its deeply flawed implementation, not *Gideon* itself.[8] Last, this Article includes some rather distressing facts, figures, and anecdotes concerning public defenders and appointed counsel for the indigent. There are many, many excellent criminal defense lawyers working and representing the poor all over the country, and I have had the pleasure of meeting and working with some of them over my career. So, nothing stated herein should be seen as an indictment of all criminal defense lawyers or public defenders.

It is fair to indict the system as a whole, however. System-wide, the view is beyond disturbing. It is bad enough that any civil *Gideon* advocate should think twice before importing a broken criminal system into our civil courts. As written, *Gideon* is an iconic case that makes an important statement about the nature of the criminal process in the United States. Yet as applied, *Gideon* has hardly guaranteed equal access to the courts for the poor. To the contrary, two factors have made *Gideon*'s promise illusory indeed: the reticence of courts to set funding levels or limit caseloads for *Gideon*'s guaranteed counsel and the galling laxity of the Court's definition of the ineffective assistance of counsel.[9]

In fact, there is an argument to be made that *Gideon* has worked out great for everyone in the system except criminal defendants. The legal profession won because a massive new source of guaranteed business emerged.[10] Judges won because lawyers, in comparison to pro se litigants, make every judge's job easier.[11] Society wins because everyone gets to feel better about guaranteeing defendants a lawyer. The psychological value of

8. This Article does argue, however, that every extension of *Gideon* weakens the original case and leads inevitably to a disintegration of a great case's promise.

9. As a general rule courts have declined to order set funding levels for indigent defense or to cap case loads. *See* Adam M. Gershowitz, *Raise the Roof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 88–89 (2007). *Strickland v. Washington*, 466 U.S. 668, 687 (1984), is the case that set the current lax standard for ineffective assistance of counsel. *Strickland* is discussed at length *infra* notes 163, 165–76 and accompanying text.

10. The big prize was actually the guarantee of misdemeanor counsel in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), because many states already guaranteed counsel in felony cases at the time of *Gideon*. *See* ANTHONY LEWIS, GIDEON'S TRUMPET 144–48 (1964) (noting that twenty-two states joined an *amicus* brief in favor of appointing counsel in felony cases). By contrast, neither the federal government nor the vast majority of states provided counsel for misdemeanor prosecutions that might result in jail time. *See infra* note 211 and accompanying text. *Argersinger* itself actually includes a lengthy discussion of the additional lawyers that would be needed to staff its new guarantee of counsel. *Argersinger*, 407 U.S. at 37 n.7.

11. This statement of Judge Robert Sweet in favor of civil *Gideon* is typical: "[E]very trial judge knows . . . the task of determining the correct legal outcome is rendered almost impossible without effective counsel." Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505 (1998).

Gideon—that everyone can rest easy knowing that lawyers are theoretically ensuring that the system works for rich and poor alike—should not be underestimated.[12] The double bonus is that system-wide the lawyers are so underpaid and overburdened that in most jurisdictions they are unable to put up much of a fight, so society gets the appearance of fairness without a high rate of acquittals or actual trials.

Moreover, *Strickland v. Washington* sets the standards for ineffective assistance of counsel so low[13] that sleeping lawyers have been found effective.[14] So while *Gideon* guarantees a robust right to counsel, *Strickland* and its progeny have powerfully diluted the content of that guarantee.

If civil *Gideon* became a reality, it is extremely unlikely that civil lawyers would be better supported. Courts would likely not require limits on caseloads or increased expenditures on a guaranteed right to civil counsel. Nor would civil plaintiffs be guaranteed a competent lawyer with time to investigate, research, and try their cases. To the contrary, if the absolutely critical rights theoretically protected by *Gideon* can be so watered down, a civil *Gideon* would likely fare much worse.[15] The government's long-term treatment (read: starvation) of civil legal aid societies also does not make civil *Gideon* look particularly promising.[16]

Civil *Gideon* is also very unlikely to occur. The Supreme Court chose not to extend *Gideon* to termination of parental rights cases in *Lassiter v. Department of Social Services*.[17] This was a brutal defeat for civil *Gideon* because a termination of parental rights case presents the closest possible civil analogy to *Gideon* that does not involve imprisonment, but rather a liberty interest (the right to keep one's children) that the Court has

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12. Judges also share this psychological salve. Any judge who regularly hears criminal trials is aware that the system has some serious flaws. Nevertheless, the appearance of a lawyer on each side of the case allows the judge to sit as a neutral arbiter rather than a culpable participant.

13. In *Strickland*, 466 U.S. at 687, the Supreme Court created a two-part test for determining ineffective assistance of counsel: the defendant must demonstrate (1) that counsel's performance fell below the standard of a reasonably competent practitioner; and (2) that the defendant was prejudiced by that sub-standard performance. The holes in this standard are discussed in greater detail *infra* notes 163, 165–76 and accompanying text.

14. For example, a Texas Appellate Court held that a sleeping lawyer's naps might have been a "strategic move" because "the jury might have sympathy for appellant because of" the naps. McFarland v. State, 928 S.W.2d 482, 505 n.20 (Tex. Crim. App. 1996).

15. Some of the worst stories of the betrayal of *Gideon*'s promise come from death penalty defenses. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994). If courts and legislatures have been disinterested in ensuring that capital defenders are well funded and trained, how will landlord/tenant defense fare?

16. Funding for legal aid services has been drastically cut over the past two decades. *See* SUSAN R. MARTYN & LAWRENCE J. FOX, TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY 70–71 (2004).

17. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 33 (1981).

repeatedly credited as powerful, as well as coercive, state action; the State of North Carolina itself sought to take the mother's children. No state or federal court since has recognized a broad civil right to counsel since the loss in *Lassiter*.[18] Moreover, the current fiscal situation makes this an awkward time to ask a court to guarantee an expensive new constitutional right.

There are serious jurisprudential concerns to extending *Gideon*. Among the cases that made up the due process revolution of the 1960s and early 1970s, *Gideon* and its progeny were in the forefront of the "living constitution" cases. As a historical matter, neither the Sixth Amendment nor the Fourteenth Amendment was meant to provide a government-paid lawyer to criminal defendants.[19] The Sixth Amendment's guarantee that a criminal defendant shall "have the assistance of counsel for his defense"[20] only guaranteed the right to *hire* a lawyer, not the right to have the government pay for a lawyer.[21] Likewise, given the extreme rarity of appointed counsel and the trend towards deprofessionalizing the legal profession at the time of the passage of the Fourteenth Amendment,[22] it is highly unlikely that the Due Process Clause was meant to guarantee appointed counsel.[23]

Nonetheless, *Gideon* is a little bit like *Brown v. Board of Education*.[24] It may not have been consistent with the original understanding of the Constitution, but it is hard to argue in retrospect that it was not absolutely the right decision. *Gideon* certainly struck a chord when it held that "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."[25] Nevertheless, every new extension of *Gideon* takes it a step beyond the point where it is "an obvious truth" that constitutional fairness requires a new guarantee of counsel and runs the risk of replacing legislative funding priorities with those of judges. Thus, extending the right to counsel too far could threaten the legitimacy of

18. *See* Jason Boblick, *A Consumer Protection Act?: Infringement of the Consumer Debtor's Due Process Rights Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 40 ARIZ. ST. L.J. 713, 735 & n.167 (2008). There have been sporadic, quite limited applications, see Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 TOURO L. REV. 147, 154 (2009), but nothing like the broad, national right that civil *Gideon* advocates are hoping for.

19. *See infra* notes 204–06 and accompanying text.

20. U.S. CONST. amend. VI.

21. *See infra* notes 204–05 and accompanying text.

22. *See infra* note 206 and accompanying text.

23. Note that since the early-20th Century, the Due Process Clause has generally been read to reflect a contemporary analysis of "fundamental fairness" rather than any original intent. *See infra* notes 208–09 and accompanying text.

24. 347 U.S. 483 (1954).

25. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

Gideon itself. In fact, some recent commentators have argued that the best way to protect and enforce *Gideon* is to roll back its extension to misdemeanor cases in *Argersinger v. Hamlin*.[26] The broadening of *Gideon* to include misdemeanors, juvenile cases, and other, less serious types of offenses alone may have led to *Gideon*'s destruction. Courts may have defended a right limited to felonies more zealously or at least recognized that more work was necessary on those cases than was being provided.

There are also particular reasons to be concerned in an area where judges require the appointment of lawyers. One might question whether the problems of the poor are really best solved by more lawyers or more due process. Stated flatly, there are many reasons for advocates for the poor to worry when courts or bar associations announce an intention to assist the poor. The implementation of *Gideon* alone should offer a hint as to how these things work out in the long run. In *Gideon*, and other due process cases, the Court has often followed up high-minded rhetoric with a shameful lack of substance.[27] At a certain point, courts are no longer to blame, and advocates for the poor must take some responsibility. Like Charlie Brown trying to kick Lucy's football, it may be time to try a different game.

Lastly, there is a cheaper, less constitutionally troubling, and more likely solution: an overhaul of the courts that handle the bulk of the nation's pro se matters would go a long way towards reaching the aims of civil *Gideon*. As it stands now, most courts are not set up to cope with a substantial pro se docket. Clerks are instructed not to give "legal advice" to pro se litigants.[28] In many courts, no one explains to pro se litigants what papers need to be filed, what needs to be argued in court, or even how the process is supposed to operate.[29] In many courts, judges do not consider it their responsibility to ameliorate any of this.[30] Often, very little effort has been made to streamline or simplify either the law or the procedure in the courts where much unrepresented poverty work occurs.[31]

If a systematic effort were made to simplify the law and procedure in courts with large pro se dockets, it could improve outcomes in those courts and do more for the poor than a guarantee of counsel, all at less cost. Too

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26. *See, e.g.*, Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 488 (2007).

27. For a more thorough discussion, see *infra* Part III.

28. Engler, *And Justice for All*, *supra* note 3, at 1992–93.

29. Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 653 (2006) (noting that "a majority of surveyed courts have no formal pro se assistance services").

30. *Cf.* ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM 172–73 (1999) (spending only three paragraphs of an entire book about the process of judging on dealing with pro se litigants).

31. *See* RHODE, *supra* note 3, at 14–16.

often, access to justice only means access to lawyers.[32] Rather than seeing the plight of the poor as an opportunity to fund more lawyers, we should see it as an opportunity to make American law simpler, fairer, and more affordable. If courts with substantial pro se dockets were actually able to reform, the justice system for the poor would, for once, be the envy of the rich.

This fact alone (that better pro se courts would expose how unnecessary lawyers are in many cases) helps explain why pro se reform has been so slow to occur and why it may actually be no more likely than civil *Gideon*. For example, the Tennessee Supreme Court has spearheaded a statewide effort to address the hideous problems that poor Tennesseans who cannot afford counsel face when seeking a divorce.[33] Many of the more aggressive reforms, notably form pleadings that would have made pro se divorces easier, were dead on arrival—the divorce bar was not going to stand for any changes that could threaten its grip on middle- and upper- class divorces. Nevertheless, the flood of pro se cases in some courts is such that reform is happening all over the country somewhat under the radar. A unified push by poverty lawyers and other advocates could transform these courts and, in the process, the lives of the many of the poor.

The Article proceeds as follows. Part I lays out the Supreme Court case law on free, appointed counsel from *Gideon* to *Lassiter*. Part II discusses the status of civil *Gideon* efforts post-*Lassiter*. Part III argues that extending *Gideon* to civil cases presents a number of logistical and constitutional concerns. Part IV concludes that there is a better way to address the needs of the poor—a comprehensive effort to reform those courts that have a large pro se docket.

I. FROM *GIDEON* TO *LASSITER*

In a series of famous 1960s cases, the Warren Court launched a due process revolution in criminal procedure, guaranteeing a series of new rights to criminal defendants. *Gideon v. Wainwright* was among the earliest of these cases, and it remains one of the most enduring and influential.

A. *Pre*-Gideon

The journey to *Gideon* began in 1932 with *Powell v. Alabama*.[34] Interestingly, *Powell* was not a Sixth Amendment right to counsel case; it

32. *Cf.* Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 399 (2004) ("The bar's debates about access to justice have traditionally assumed that the main problem is inadequate access to lawyers and that the solution is to make their services more broadly available.").

33. *See* Letter from Carl A. Pierce, Chairman, Tenn. Supreme Court Task Force to Study Self Represented Litigants Issues in Tenn. to Marcy Easton, President, Tenn. Bar Ass'n (July 30, 2007), *available at* http://www.tba.org/tbatoday/news/2007/prosedivorce_letter_090707.pdf.

34. 287 U.S. 45 (1932).

had to do with Fourteenth Amendment Due Process.[35] *Powell* dealt with the trial of nine black defendants accused (with very little supporting evidence) of raping two white women on a train passing through Alabama. The trial was an obvious sham. It was held only days after the alleged crime before an all white jury. The defendants were not allowed to choose their counsel, and the trial court, on the eve of the trial, appointed two attorneys, who had no time or incentive to investigate or prepare a defense.[36]

The Supreme Court concluded that the "defendants were not accorded the right of counsel in any substantial sense."[37] Nevertheless, the Supreme Court faced two substantial barriers to overturning the case. First, the Alabama Constitution stated a right to assistance of counsel, an Alabama Statute required appointed counsel in capital cases, and the court had actually appointed lawyers to represent the defendants.[38] So the case involved more than just a right to counsel; because counsel was actually appointed, it required a finding of a right to competent counsel.

Second, the Sixth Amendment did not apply to the States at the time,[39] and it was unclear whether the Fourteenth Amendment could guarantee a right to counsel in state courts at all. This was especially so in light of *Hurtado v. California*, in which the Court refused to require a grand jury indictment in the states under the Due Process Clause[40] because "if it had been the purpose of [the Fourteenth] Amendment to perpetuate the institution of the grand jury in the states, it would have embodied, as did the Fifth Amendment, an express declaration to that effect."[41] This reasoning obviously applied to the Sixth Amendment's right to counsel as well.

The Court in *Powell* avoided these problems in two ways. First, it mounted a passionate defense of the critical role of effective criminal defense counsel:

> 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

35. *Id.* at 71.

36. DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 22–23 (rev. ed. 1979).

37. *Powell*, 287 U.S. at 58.

38. *Id.* at 59–60.

39. *See* Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 492–93 (2009).

40. 110 U.S. 516, 521 (1884).

41. *Powell*, 287 U.S. at 66 (discussing *Hurtado v. California*'s treatment of due process).

> 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. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.[42]

Second, despite the far reaching logical ramifications of the above language, the Court limited its holding quite narrowly to the facts at issue: appointment of effective counsel is required "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like."[43]

Six years after *Powell*, the Court held for the first time in *Johnson v. Zerbst* that the Sixth Amendment right to counsel guaranteed appointed counsel in federal courts.[44] The Court quoted at length the language quoted from *Powell* above and noted that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."[45] As a result, after 1938, criminal defendants in the federal system had a right to appointed counsel under the Sixth Amendment.

In 1942, the Court turned to the application of the Sixth Amendment in state courts in *Betts v. Brady*[46] and held that the "Sixth Amendment of the national Constitution applies only to trials in federal courts."[47] The Court did allow that the denial of an appointed lawyer in state court could "constitute a denial of fundamental fairness" on a case-by-case basis, depending on "the totality of the facts."[48]

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42. *Id.* at 68–69.
43. *Id.* at 71.
44. 304 U.S. 458, 463 (1938).
45. *Id.* at 462–63.
46. 316 U.S. 455 (1942).
47. *Id.* at 461.
48. *Id.* at 462.

The Court went through an exhaustive history of the right to counsel in the colonies and states from before the American Revolution up to the current practice in 1942. The Court noted that in the 18th and 19th Centuries the appointment of counsel had been covered, if at all, as a statutory matter in the states, not constitutionally, and that "[t]he contemporary legislation" on appointment of counsel "exhibits great diversity of policy."[49] The Court then concluded:

> This material demonstrates that, in the great majority of the states, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence, we are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case.[50]

B. Gideon

Twenty-three years later in *Gideon v. Wainwright*,[51] the Court overruled *Betts* in felony cases and incorporated the Sixth Amendment into the Due Process Clause.[52] The *Gideon* Court listed the main precedents that had guaranteed a right to counsel in federal courts—*Johnson v. Zerbst* and *Powell v. Alabama*—as support for its decision and argued that *Betts* had been an "abrupt break" with these precedents.[53] Nevertheless, *Gideon*'s own discussion of *Betts* recognized that *Betts* was based upon "'the constitutional, legislative, and judicial history of the States to the present date,'"[54] and even commentators who agree with *Gideon*'s holding have noted that *Betts* more accurately described the history of the appointment of counsel in criminal cases.[55]

The heart of the opinion comes not from precedent but from the Court's eloquent defense of the need for counsel as an irreplaceable aspect of the fundamental fairness guaranteed by the Due Process Clause:

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49. *Id.* at 467–70 & n.20.

50. *Id.* at 471.

51. 372 U.S. 335 (1963).

52. *Id.* at 342, 344–45.

53. *Id.* at 344.

54. *Id.* at 340 (quoting *Betts v. Brady*, 316 U.S. 455, 465 (1942)).

55. *See, e.g.*, David A. Strauss, *On the Origin of Rules (With Apologies to Darwin): A Comment on Antonin Scalia's* The Rule of Law as a Law of Rules, 75 U. CHI. L. REV. 997, 1008–09 (2008) ("None of the pre-*Betts* cases, fairly read, really suggested an across-the-board rule requiring states to appoint counsel in all felony cases.").

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. 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 wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. 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.[56]

This language, and *Gideon*'s holding, was promising to criminal defense and poverty lawyers on a number of levels. First, it stated a very muscular interest in the fairness of court proceedings that involved the indigent. Second, it overruled a relatively new, twenty-one-year-old precedent. Third, it did so despite the fact that *Betts* was basically correct on the lack of a longstanding right to appointed counsel at common law or in the states.[57] Lastly, the long, florid section quoted above includes no supporting citations, an unusual move for the Court. The willingness to use "reason and reflection" in this manner suggested that the Court would now scrutinize the criminal justice system much more closely, even if it meant discarding controlling precedent.

C. *Post*-Gideon

The language and holding of *Gideon* had obvious implications for civil cases, and calls for *Gideon*'s application to unrepresented indigent litigants in civil cases began almost immediately. For example, in *Sandoval v. Rattikin*, an indigent Texas litigant argued that the Fourteenth Amendment required appointment of counsel in a property dispute (technically a

56. *Gideon*, 372 U.S. at 344. The Court followed this language with a long quote of "the moving words of Mr. Justice Sutherland in *Powell v. Alabama*" quoted above. *Id.*

57. *See supra* note 55 and accompanying text.

trespass-to-try-title action).[58] The Texas appellate court disagreed and the Supreme Court denied certiorari.[59] Likewise, a 1967 Yale Law Journal Note argued for "The Indigent's Right to Counsel in Civil Cases."[60]

While no court openly embraced a right to appointed civil counsel during this period, *Gideon* itself was extended in a series of cases that offered hope. In the cases described below, the Court extended *Gideon* beyond felonies to misdemeanors and to quasi-criminal cases that were not strictly Sixth Amendment criminal cases.

In *Argersinger v. Hamlin*, the Court held that the Sixth Amendment right to appointed counsel applied beyond felonies to any misdemeanor prosecution that resulted in jail time, regardless of how short that sentence might be.[61] Since the liberty interests involved in some civil cases (notably deportation or termination of parental rights cases) were arguably at least as strong (and possibly stronger), *Argersinger* seemed a natural step towards civil *Gideon*.

Likewise, a series of non-Sixth Amendment cases stretched *Gideon* in ways that suggested that a civil right to counsel might fit. *In re Gault* extended *Gideon* to juvenile proceedings, even though juvenile proceedings were not strictly criminal in nature.[62] *Gault* held that the nature of the right at stake—the juvenile defendant's liberty itself—was the key question in determining a right to appointed counsel under a due process analysis, rather than whether a Sixth Amendment right was implicated.[63]

Taken together, *Gault* and *Argersinger* seemed quite helpful to civil *Gideon*. *Gault* made clear that the due process driven right to counsel extended beyond Sixth Amendment cases and that the critical question was the nature of the right at stake. *Argersinger* set a relatively low bar for the seriousness needed: even the threat of a day in jail was sufficient to trigger a constitutional requirement for appointed counsel.

The subsequent cases were more of a mixed bag; none squarely foreclosed or required civil *Gideon*. The 1980 case of *Vitek v. Jones*

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58. Sandoval v. Rattikin, 395 S.W.2d 889, 891, 893–94 (Tex. Civ. App. 1965), *cert. denied*, 385 U.S. 901 (1966).

59. *Id.* at 894; 385 U.S. 901 (1966).

60. Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967). Other similar works include Thomas Sutton Knox, Comment, *Current Prospects for an Indigent's Right to Appointed Counsel and a Free Transcript in Civil Litigation*, 7 PAC. L.J. 149 (1976); Jeffrey M. Mandell, Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J.L. REFORM 554 (1976); Alan J. Stein, Note, *The Indigent's "Right" to Counsel in Civil Cases*, 43 FORDHAM L. REV. 989 (1975); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966).

61. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

62. *In re* Gault, 387 U.S. 1, 40–41 (1967) (extending the right to counsel to juvenile proceedings if confinement is possible).

63. *Id.* at 41.

extended the right to counsel to prisoners who were being involuntarily transferred from prison to a state mental hospital.[64] *Vitek* held that prisoners have a due process right not to be transferred without a hearing and an appointed lawyer, despite the fact that the transfer hearing was civil and not criminal in nature; this was based on the liberty interest at stake and the potential stigma of being found mentally ill.[65] Note that *Vitek* is another case where the liberty interest was not confinement: when the transferred prisoner's sentence was finished, a civil commitment proceeding was necessary to hold him longer in the mental hospital.[66]

The Court also refused to extend *Gideon* in several cases before *Lassiter*. Notably, in both *Gagnon v. Scarpelli* and *Morrissey v. Brewer*, the Court held that, while counsel might be required in some proceedings to revoke parole or find a violation of probation, counsel was not uniformly necessary in those types of cases.[67] These holdings basically applied the case-by-case analysis that had been applied in the time period between *Betts* and *Gideon* to this new area.[68] The Court declined to extend *Gideon* to these proceedings because parolees and probationers have a lessened liberty interest, and revocation of probation or parole cases are generally less formal and often do not involve a lawyer on the government's side.[69] Nevertheless, *Gagnon* and *Morrissey* sat uneasily with *Gault* and *Argersinger* because all of the cases involved potential imprisonment as the liberty interest, but in the parole and probation cases, no lawyer was required. To further this disparity, the Court also refused to extend *Argersinger* and *Gideon* to misdemeanor prosecutions that did not result in imprisonment in *Scott v. Illinois*.[70]

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64. Vitek v. Jones, 445 U.S. 480, 497 (1980).

65. *Id.* at 487–88.

66. *Id.* at 483–84. It is true, however, that the type of confinement was changed.

67. Gagnon v. Scarpelli, 411 U.S. 778, 789–91 (1973) (holding that counsel need not be provided in all probation revocation hearings but should be in appropriate cases); Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (failing to reach the question of whether counsel must be provided in parole revocation hearings). Later courts applied *Gagnon*'s holding on counsel to the *Morrissey* situation, settling that question in both revocation of parole and violation of probation cases. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 26 (1981).

68. *See Gagnon*, 411 U.S. at 788–90 ("In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in *Betts v. Brady* was later rejected in favor of a *per se* rule in *Gideon v. Wainwright*.") (internal and external citations omitted).

69. *See id.* at 786–88.

70. Scott v. Illinois, 440 U.S. 367, 373 (1979) (holding that the "central premise of *Argersinger*" was "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment"). There were two more pre-*Lassiter* cases that refused to extend *Gideon*. In *Goss v. Lopez*, 419 U.S. 565, 583 (1975), the Court refused to extend *Gideon* to school disciplinary hearings, because those proceedings are brief, informal, and educational in nature. In *Parham v. J.R.*, 442 U.S. 584, 604–09 (1979) the Court refused to extend *Gideon* to voluntary commitment proceedings involving a minor because of the parent's role as well as the medical and informal nature of those proceedings.

The pre-*Lassiter* cases were thus a bit of a mess. It was certainly clear that the right to appointed counsel stretched beyond the Sixth Amendment's guarantee of counsel in criminal cases because *Gault* and *Vitek* extended the right to civil proceedings. There were a series of cases that seemed to suggest that the key protected liberty interest was freedom from imprisonment, no matter how short the imprisonment: *Gault* and *Argersinger* appointed counsel because of potential imprisonment, and *Scott v. Illinois* denied counsel where imprisonment was not at issue.

Vitek, *Gagnon*, and *Morrissey*, however, undercut grouping the cases according to a threat of imprisonment: *Gagnon* and *Morrissey* involved the threat of imprisonment (and revocation hearings often involve much longer prison terms than misdemeanor prosecutions), but refused automatic appointment of counsel,[71] while *Vitek* allowed appointment despite the fact that no additional imprisonment was at issue (although serving the time in a mental hospital was certainly a different type of imprisonment). Thus, while there were cases that suggested that imprisonment was the key distinction, other cases suggested that courts should weigh the import of the liberty interest at stake and then decide whether fundamental fairness required appointment of a lawyer.

D. Lassiter

With these cases in mind, the Court turned to the idea of civil *Gideon* in the 1981 case of *Lassiter v. Department of Social Services*.[72] *Lassiter* dealt with the state of North Carolina's termination of parental rights case against Abby Gail Lassiter.[73]

In many ways, a case eliminating a mother's parental rights to her infant child would be the optimal civil *Gideon* case—but *Lassiter* was no Mrs. Cleaver. Outside of imprisonment, the right to parent one's children is perhaps the strongest constitutional liberty interest. *Lassiter* itself stated the interest in quite stringent terms:

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to the companionship, care, custody, and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection. Here the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation. A parent's interest

71. *Compare Morrissey*, 408 U.S. at 472–73 (concerning two petitioners who faced as much as six or seven additional years of imprisonment upon their parole revocation), *with* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (protecting the right to counsel for misdemeanor defendants who face any threat of imprisonment, even for one day).

72. Lassister v. Dep't of Soc. Servs., 452 U.S. 18 (1981).

73. *Id.* at 20–22.

> in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.[74]

Moreover, termination of parental rights involves the government itself permanently terminating the parental relationship in a formal legal proceeding. Thus, *Lassiter* presented a legal structure almost identical to *Gideon*: the State sought to deprive the petitioner of a critical liberty interest in a formal proceeding brought by the state's lawyers. If there was going to be a type of civil case where, like *Gideon*, it would be an "obvious truth" that the petitioner could not "be assured a fair trial unless counsel is provided for [her],"[75] this was it. In this regard, the petitioner in *Lassiter* had a strong argument that termination of parental rights proceedings were akin to the juvenile proceedings in *Gault* or the transfer proceedings in *Vitek*. Termination proceedings are not criminal proceedings, the petitioner argued, but the liberty deprivation was so great that a quasi-criminal level of protection was appropriate.[76]

Nevertheless, *Lassiter* is one of those cases where a brief read through of the facts makes the decision itself anti-climactic. The majority opinion includes an embarrassing plethora of details (many of which are clearly irrelevant to the legal issue at hand) to make it clear to any reader that Abby Lassiter was not a fit parent for her son and that an appointed lawyer would have made no difference whatsoever.[77]

The facts are meant to demonstrate that Abby Lassiter was a terribly unfit mother and a dangerous criminal. Abby Lassiter's infant son William came to the attention of the Department of Social Services (DSS) because of a complaint from Duke Pediatrics that Abby Lassiter had not followed up with the pediatric clinic for her son's medical problems and that "they were having difficulty in locating Ms. Lassiter."[78] In response to that complaint, a social worker took William from Abby Lassiter's care and brought him to the hospital herself. William was then admitted and treated for "breathing difficulties [and] malnutrition and [because] there was a great deal of scarring that indicated that he had a severe infection that had gone untreated."[79] In late-spring 1975, a Durham County District Court found that Abby Lassiter had not provided William with proper medical care, adjudicated him a neglected child, and transferred him to the custody

74. *Id*. at 27 (citation and internal quotation marks omitted).

75. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

76. *Cf*. *Lassiter*, 452 U.S. at 37 (Blackmun, J., dissenting) ("Where an individual's liberty interest assumes sufficiently weighty constitutional significance, and the State by a formal and adversarial proceeding seeks to curtail that interest, the right to counsel may be necessary to ensure fundamental fairness.").

77. *Id*. at 22–24 (majority opinion). All of the facts in the next few paragraphs come from *Lassiter* itself.

78. *Id*. at 22.

79. *Id*. at 22 (alterations in original) (internal quotation marks omitted).

of the Department of Social Services.

The Court painted Abby Lassiter as almost aggressively disinterested in her child, noting that "except for one 'prearranged' visit and a chance meeting on the street, Ms. Lassiter had not seen William after he had come into the State's custody, and that neither Ms. Lassiter nor her mother had 'made any contact with the Department of Social Services regarding that child.'"[80] The Court also stated that Abby Lassiter did not contest or even attend the hearing originally removing William from her custody.

Of course, the Court explained that Abby Lassiter might have been busy during this period since she and her mother were accused of first-degree murder in the spring of 1976. The details of Abby Lassiter's criminal charges are clearly not relevant to her due process rights in a termination of parental rights proceeding, but in footnote one in the very first paragraph of the opinion, the Court gratuitously included a lurid description of the crime from Abby Lassiter's criminal appeal:

> "Defendant's mother told [the deceased] to 'come on.' They began to struggle and deceased fell or was knocked to the floor. Defendant's mother was beating deceased with a broom. While deceased was still on the floor and being beaten with the broom, defendant entered the apartment. She went into the kitchen and got a butcher knife. She took the knife and began stabbing the deceased who was still prostrate. The body of deceased had seven stab wounds . . . ." *State v. Lassiter*, No. 7614SC1054 (June 1, 1977).[81]

Abby Lassiter was sentenced to 25–40 years of imprisonment.

The Court's version of the facts also establishes that not only did Abby Lassiter fail to request a lawyer's assistance in the termination proceedings, but she was also positively disinterested in the proceedings. According to the Court, Abby Lassiter's mother paid to have a lawyer for her criminal appeal, but Abby Lassiter did not mention the termination to that lawyer or hire another lawyer.[82] Moreover, she was brought to the termination hearing at "the behest of the Department of Social Services' attorney . . . ."[83] At that hearing, the issue of appointed legal representation was raised "at the judge's [insistence]," rather than by Abby Lassiter.[84] The

80. *Id*. at 22.

81. *Id*. at 20 n.1 (alterations in original).

82. *Id*. at 21–22. The Court notes that Abby Lassiter did not mention the termination proceedings "to *any other person except*, she said, to 'someone' in the prison[]." *Id*. at 21 (emphasis added). The details in this sentence alone well establish the Court's disdain for Abby Lassiter. It is not enough to point out that Abby Lassiter failed to talk to anyone about the proceedings except "someone" at the prison; the Court adds the "she said" to suggest that even that contact should be doubted as unsubstantiated testimony.

83. *Id*. at 21.

84. *Id*.

trial court concluded that Abby Lassiter "'had ample opportunity to seek and obtain counsel prior to the hearing of this matter, and [that] her failure to do so is without just cause' . . . ."[85] Later, the Court held that in "deciding whether due process requires the appointment of counsel" a reviewing court "need not ignore a parent's plain demonstration" of disinterest in such proceedings, specifically referencing that "Ms. Lassiter had not even bothered to speak to her retained lawyer after being notified of the termination hearing . . . ."[86] The words "had not even bothered" well state the Court's feelings on Abby Lassiter's case.

Last, the Court presented a number of facts that devastated Abby Lassiter's main argument against termination of parental rights: that her mother (William's grandmother) should be given custody. The Court stated that the grandmother had actually reported Abby Lassiter to DSS. The Court quoted testimony establishing that the grandmother had indicated "'on a number of occasions that she was not able to take responsibility for the child,'" that "'people in the community and from [the grandmother]'s church'" also felt that she could not handle the responsibility, and that William "'ha[d] not seen his grandmother since [a] chance meeting in July of '76 and that was the only time.'"[87]

Worst of all, the Court made much of the grandmother's role in the murder that led to Abby Lassiter's incarceration. The Court included the fact that the grandmother was also indicted for first-degree murder.[88] The Court pointed out that Abby Lassiter's post-conviction challenge of her murder trial was partially based upon a claim that the grandmother actually committed the crime and had said, "And I did it, I hope she dies."[89] Nor did the Court let these facts pass without comment. During the due process analysis, the Court openly mocked Abby Lassiter's custody argument: "Ms. Lassiter's argument here that her mother should have been given custody of William is hardly consistent with her argument in the collateral attack on her murder conviction that she was innocent because her mother was guilty."[90]

So, in sum, the Court's description of the case involved a convicted murderer and her accomplice seeking custody of a child neither of them had seen or shown any interest in for years. After reading these facts, it is obvious that there was virtually no chance that the Supreme Court would require a retrial of this case with a lawyer. Its description of the case leaves the reader with only one question: what took the state so long?

85. *Id.* at 22 (alterations in original).
86. *Id.* at 33.
87. *Id.* at 22.
88. *Id.* at 20 n.1.
89. *Id.* (internal quotation marks omitted).
90. *Id.* at 33 n.8.

Nevertheless, to deny Abby Lassiter's appeal, the Court still needed to place this case within its post-*Gideon* precedents. As noted above, this was not going to be easy. *Lassiter* chose to draw a bright line at imprisonment: "The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation."[91] The Court distinguished *Gagnon* and *Morissey* by noting that parolees and probationers only have a "conditional liberty" interest and "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."[92]

With this generalization in mind, the Court created a "presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."[93] This presumption serves as a weight "against . . . all the other elements in the due process decision."[94] The creation of such a presumption basically doomed Abby Lassiter's appeal and has stood as a powerful barrier to any recognition of a civil *Gideon* ever since.

The "other elements in the due process decision," as considered in *Lassiter*, constitute the three-part test from *Mathews v. Eldridge*: (1) "the private interests at stake," (2) "the government's interest," and (3) "the risk that the procedures used will lead to erroneous decisions."[95] A court "must balance these elements against each other, and then set their net weight in the scales against the presumption that there is a right to appointed counsel only where the indigent . . . may lose his personal freedom."[96]

The Court then applied the test to the termination of parental rights. On the first prong, the Court found that a parent has a very strong interest in maintaining his or her parental rights. On the second prong, the state shares the parental interest in what is best for the child and the importance of an accurate decision. The state's interests diverge from the parent's, however, because it wants to proceed "as economically as possible" and "wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause."[97] On the last prong, the Court listed the various procedural protections provided beyond the appointment of a lawyer (written notice, a hearing, etc.) but also considered the possibility of a complicated termination case involving expert or medical testimony.[98]

When the Court turned to balancing these factors, the actual

91. *Id.* at 25.

92. *Id.* at 26. The phrase "conditional liberty" actually derives from the parole revocation case of *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

93. *Lassiter*, 452 U.S. at 26–27.

94. *Id.* at 27.

95. *Id.* (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

96. *Id.*

97. *Id.* at 27–28.

98. *Id.* at 28–31.

circumstances of Abby Lassiter led inevitably to a finding that on balance a lawyer was not necessary in her case and, therefore, not necessary in every termination of parental rights case: the case involved no particularly complicated law or facts; no experts testified; and Abby Lassiter had a chance to present her case and cross-examine witnesses.[99] Moreover, the Court used the many unfortunate facts outlined above against the concept of civil *Gideon*. Abby Lassiter was serving a lengthy prison sentence and was obviously not fit to care for her son. According to her own post-conviction arguments, Abby Lassiter's mother was likely an accomplice in the murder, and she had repeatedly said she did not want the child.[100] Neither Abby Lassiter nor her mother had shown any interest in the child. Nor had Abby Lassiter shown much interest in even attending the proceeding.[101] In a contest where "fundamental fairness" was at issue, the Court stacked the deck strongly against Abby Lassiter and civil *Gideon*.

The denial of appointed counsel in termination of parental rights proceedings basically signaled the death knell for civil *Gideon* going forward.[102] If the presumption against appointed counsel in non-imprisonment cases is strong enough to defeat a due process claim dealing with the state taking a citizen's children, it is hard to imagine a different scenario where appointment would be required. This is especially so where the Court admitted that the "'potential costs of appointed counsel in termination proceedings'" are "'*de minimis* compared to the costs [of appointment] in all criminal actions'"[103] and still refused to require appointed counsel in each case.[104]

II. POST-*LASSITER* CIVIL *GIDEON*

Based upon *Lassiter*, one would expect civil *Gideon* to hibernate for a time, and this was indeed the case. From *Lassiter* until the mid-90s, little happened on the civil *Gideon* front.[105] Interestingly, it was a judge who helped relaunch civil *Gideon*. On December 2, 1997, Federal District Court Judge Robert Sweet gave a speech in favor of what he termed a "civil

99. *Id*. at 32–33.

100. *Id*. at 33 & n.8.

101. *Id*. at 31–33.

102. *See* Bruce A. Boyer, *Justice, Access to the Courts, and the Right to Free Counsel for Indigent Parents: The Continuing Scourge of* Lassiter v. Department of Social Services of Durham, 36 LOY. U. CHI. L.J. 363, 367–72 (2005).

103. *Lassiter*, 452 U.S. at 28 (quoting Respondent's brief).

104. On this score, compare *Gideon*, 372 U.S. 335, 345 (1963), where the practice of most states in appointing felony counsel was critical to the Court's decision, with *Lassiter*, 452 U.S. at 34, which uses the fact that thirty-three states appoint counsel in Abby Lassiter's circumstances as support for the fairness of its decision.

105. *See* Davis, *supra* note 18, at 153–54 ("Until recently, the *Lassiter* decision had a chilling effect on domestic litigation and advocacy supporting a right to counsel in civil cases . . . .").

Gideon." The speech was reprinted in the *Yale Law and Policy Review*.[106]

From this publication forward, there has been a tremendous rekindling of interest in civil *Gideon*. For example, just since 2006, there were three civil *Gideon* law review symposium issues.[107] Likewise, the ABA[108] and multiple state bar associations have declared support for the concept.[109] There are a number of national and local groups advocating for civil *Gideon* in courts and legislatures.[110]

Civil *Gideon*'s supporters have taken a number of different tacks. The most basic is to choose an area of civil law and argue that "fundamental fairness" requires appointed counsel. For example, Professor Russell Engler has argued for civil *Gideon* in the context of some private custody cases.[111] Professor Raymond Brescia does the same for eviction proceedings.[112] Professor Stephen Loffredo and Attorney Don Friedman

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106. *See* Sweet, *supra* note 11, at 503. A Westlaw search in the JLR database for the term "civil *Gideon*" finds 132 articles, with only three mentions pre-dating Sweet's article. In fact, from this search it appears that from *Lassiter* until 1997, only one law review article was written about civil *Gideon*. *See* Earl Johnson, Jr., *The Right to Counsel in Civil Cases: An International Perspective*, 19 LOY. L.A. L. REV. 341 (1985).

107. *Supra* note 6. There was also a recent civil *Gideon* conference co-sponsored by the ABA and the Massachusetts Bar Association. *See* Kelsey Sadoff, *Civil Gideon Symposium Mobilizes Legal Community Behind Equal Justice in Law*, MASS. LAWYERS JOURNAL, Nov. 2007, *available at* http://www.massbar.org/for-attorneys/publications/lawyers-journal/2007/november/civil-gideon-symposium-mobilizes-legal-community-behind-equal-justice-in-law.

For some non-symposium treatments of civil *Gideon*, see generally Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Other Industrial Democracies*, 24 FORDHAM INT'L L.J. S83 (2000); Earl Johnson, Jr., *Will* Gideon's *Trumpet Sound a New Melody? The Globalization of Constitutional Values and Its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. SOC. JUST. 201 (2003); Rachel Kleinman, *Housing* Gideon*: The Right to Counsel in Eviction Cases*, 31 FORDHAM URB. L.J. 1507 (2004); Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, 32 HUM. RTS. 8 (2005); John Nethercut, *"This Issue Will Not Go Away": Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REV. 481 (2004); Deborah Perluss, *Washington's Constitutional Right to Counsel in Civil Cases: Access to Justice v. Fundamental Interest*, 2 SEATTLE J. FOR SOC. JUST. 571 (2004).

108. *See* Am. Bar Ass'n, *supra* note 5, at 1 (resolution unanimously approved by the ABA House of Delegates). "To shorthand it, we need a civil *Gideon*, that is, an expanded constitutional right to counsel in civil matters." *Id*. at 7.

109. Marie A. Failinger, *A Home of its Own: The Role of Poverty Law in Furthering Law Schools' Missions*, 34 FORDHAM URB. L.J. 1173, 1173 n.4 (2007) ("The Civil *Gideon* movement is a new national movement in over thirty states . . . ."); *see also* Thomas M. Burke, *A Civil Gideon? Let the Debate Begin*, 65 J. MO. B., Jan–Feb. 2009, http://www.mobar.org/e5e5dfcc-f687-44a2-93ec-5b7f90d549c5.aspx; Diane S. Diel, *Speaking for the Justice System*, 81 WIS. LAW., Dec. 2008, http://www.wisbar.org/AM/Template.cfm?Section=Search&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=76235; Montana State Bar, *State Bar Signs on to Letter to Obama, Mccain*, 34 MONT. LAW. 11 (2008); Scott Russell, *Minnesota's Legal Safety Net: Many Hands Intertwined*, 66 BENCH & B. MINN., Mar. 2009, http://www.mnbar.org/benchandbar/2009/mar09/legal_aid.html.

110. *See, e.g.*, National Coalition for a Civil Right to Counsel, *supra* note 3.

111. Engler, *Context-Based Civil Gideon from Social Change*, *supra* note 3, at 712.

112. Raymond H. Brescia, *Sheltering Counsel: Towards a Right to a Lawyer in Eviction Proceedings*, 25 TOURO L. REV. 187, 204, 210 (2009). *See also* Andrew Scherer, *Why People Who*

push for a qualified right to counsel in welfare proceedings.[113] And Professor Jaya Ramji-Nogales and her co-authors advocate a civil *Gideon* for asylum proceedings.[114] The problem with each of these approaches is reconciling *Lassiter*'s presumption and the provision of counsel outside of imprisonment cases. Further, depending on how you measure the equities, none of these areas surpasses a government termination of a citizen's right to parent her children.

An alternate strategy is to advocate for the reversal of *Lassiter*.[115] *Gideon* itself offers some helpful parallels. For civil *Gideon* proponents, *Lassiter* is just a reprise of *Betts v. Brady*. Just as *Gideon* wisely reversed *Betts* twenty-one years later, *Lassiter* is likewise ripe for reversal.[116] Laura Abel, the deputy director of the Brennan Center, has added some other potential parallels. First, academics and some judges were openly scornful of both *Betts* and *Lassiter*.[117] Second, like *Lassiter*, *Betts* called for a case-by-case determination of when the due process clause (and the Sixth Amendment) required the appointment of a lawyer. In *Gideon*, this process was deemed unwieldy and unworkable, and Abel argues the same is true of *Lassiter*'s case-by-case analysis.[118] Lastly, Abel is hopeful that, like the twenty-three states that filed a brief in support of *Gideon*, a coalition of states might be found to support the overturn of *Lassiter*.[119]

A further parallel is ABA and state bar support for civil *Gideon*. While the ABA was not closely involved with *Gideon*, its support for the extension of *Gideon* to misdemeanors was critical to the holding in *Argersinger*. *Argersinger* includes a lengthy quote from the ABA in support of appointing lawyers in misdemeanor cases.[120] *Argersinger* also cites ABA authority for the proposition that there are sufficient existing lawyers and law students to meet the new constitutional requirement[121] and that some misdemeanors should be reclassified as non-crimes to lessen the

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Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 699, 702 (2006).

113. Stephen Loffredo & Don Friedman, Gideon *Meets* Goldberg*: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 TOURO L. REV. 273, 329 (2009).

114. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 384 (2007).

115. *See* Laura K. Abel, *A Right to Counsel in Civil Cases: Lessons from* Gideon v. Wainwright, 15 TEMP. POL. & CIV. RTS. L. REV. 527, 530–35 (2006) (arguing that *Lassiter*, like *Betts v. Brady* before it, should be overturned); Sweet, *supra* note 11, at 506 ("The time has come to reverse *Lassiter* and provide counsel in civil litigation just as the Supreme Court in *Gideon* in 1963 reversed its holding in *Betts v. Brady* twenty-one years earlier and found for a right to counsel in all criminal proceedings.").

116. Abel, *supra* note 115, at 531.

117. *Id.* at 531–32.

118. *Id.* at 532–33.

119. *Id.* at 534–35.

120. Argersinger v. Hamlin, 407 U.S. 25, 39 (1972).

121. *Id.* at 37 n.7.

need for appointed counsel.[122] Chief Justice Warren Burger's *Argersinger* concurrence noted that the ruling "should cause no surprise to the legal profession" because the ABA had advocated for it in 1968.[123] Burger goes on to quote at length (and with approval) from two different ABA reports pushing for appointed lawyers in misdemeanor cases. Given the persuasive power of the ABA in *Argersinger*, the power of ABA support for civil *Gideon* is worth noting.

The fundamental problem, however, is that *Lassiter* was a case that arrived too long after the due process revolution of the 1960s and early 1970s. By 1981, the Court was in retrenchment mode. While membership on the Court has turned over somewhat, it is quite unlikely that the current Court would even take a civil *Gideon* case, let alone reverse *Lassiter*. Similarly, this Court's sensitivity to ABA guidance or academic opprobrium (especially in comparison to the *Gideon* Court) is limited.

There have also been efforts to try to find a beachhead for civil *Gideon* in state constitutional law. Professor Mary Helen McNeal has made the case under Montana constitutional law, for example.[124] At one point, it looked like Maryland might be the first state to recognize a broad civil *Gideon* right. In 2004, three Justices on the Maryland Supreme Court wrote a concurring opinion in *Frase v. Barnhart* that noted the Maryland Constitution's due process and law of the land clauses, quoted heavily from the *Lassiter* dissents, and asserted a civil *Gideon* right in that state.[125]

Nevertheless, two years later in *Touzeau v. Deffinbaugh*, those same three Justices found themselves on the losing end of a 4-3 decision that closed the door on a civil *Gideon* right in Maryland.[126] While there have been a smattering of state legislative successes, no state court has found any sort of broad civil *Gideon* right.[127]

The last group of civil *Gideon* advocates argues that treaty obligations and international law support a civil right to counsel. There is a growing international trend in favor of a right to civil counsel:

> Indeed, the right to counsel in civil matters is well established as a general principle of law in the international community. The European Court of Human Rights has construed the European Convention for the Protection of Human Rights and

122. *Id*. at 38 n.9.

123. *Id*. at 43 (Burger, C.J., concurring).

124. *See generally* Mary Helen McNeal, *Toward a "Civil Gideon" Under the Montana Constitution: Parental Rights as the Starting Point*, 66 MONT. L. REV. 81 (2005) (proposing situations where Montana courts should be required to provide counsel to indigent parties, specifically parental rights cases).

125. Frase v. Barnhart, 840 A.2d 114, 131–39 (Md. 2003) (Cathell, J., concurring).

126. Touzeau v. Deffinbaugh, 907 A.2d 807, 820–21 (Md. 2006)*; see also* Stephen J. Cullen & Kelly A. Powers, *The Last Huzzah for Civil Gideon*, 41 MD. B.J., Nov./Dec. 2008, at 24.

127. *See* Boblick, *supra* note 18, at 735 & n.167.

> Fundamental Freedoms to require a right to civil counsel. The Inter-American Court of Human Rights has also recognized the right. Nations from Ireland to Madagascar provide broad rights to counsel in civil matters, while others, such as South Africa, provide a right to counsel in certain matters involving fundamental rights, such as housing. Finally, the Human Rights Committee of the United Nations has addressed the right to counsel in civil matters, as have the Committee on the Elimination of All Forms of Racial Discrimination and other United Nations bodies.[128]

Moreover, the United States has signed several treaties—the International Covenant on Civil and Political Rights, the Charter of the Organization of American States, and the International Convention on the Elimination of All Forms of Racial Discrimination—that require some form of civil representation for the poor.[129]

These arguments seem somewhat compelling, although international law advocates have long advocated for treaties to remake American law, and in most cases, it proves to be rather less than hoped for. In particular, relying on treaties to overturn Supreme Court precedent or order large-scale new rights for poor people has not proven especially successful over the years.[130]

III. THE PROBLEMS WITH CIVIL *GIDEON*—THE PROBLEMS WITH *GIDEON* ITSELF

Some advocates for civil *Gideon* have recognized that various aspects of the original *Gideon* would probably not be worth transporting to the civil arena. Civil *Gideon* proponent Laura Abel admits that, "There have been successes and failures in implementing *Gideon*."[131] Many civil *Gideon* proponents, however, have attached themselves to the concept and language of *Gideon* without recognizing its significant shortcomings. This makes sense because *Gideon* is an iconic, powerful, and beautifully written case that expresses a vision of American justice that is attractive to all. Renowned author Anthony Lewis' *Gideon's Trumpet* is perhaps the best non-fiction book about a legal case ever written.[132]

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128. Davis, *supra* note 18, at 150–51.

129. *See* Sarah Paoletti, *Deriving Support from International Law for the Right to Counsel in Civil Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 651 (2006) (discussing provisions of international treaties and norms which may be used to develop arguments in support of the right to counsel in civil proceedings).

130. *See* Joel R. Paul, *The Rule of Law is Not for Everyone*, 24 BERKELEY J. INT'L L. 1046, 1060 (2006) (reviewing Philippe Sands's 2005 book *Lawless World*) (noting the example of segregation and arguing that, "Despite the Constitution's Supremacy Clause, the United States has found treaty obligations to be inconvenient and often has refused to honor them.").

131. Abel, *supra* note 115, at 538.

132. LEWIS, *supra* note 10. When I graduated from college, my Aunt gave me *Gideon's*

Nevertheless, the reality of criminal defense for the indigent hardly matches the rhetoric.[133] There is every reason to believe that if civil *Gideon* became a reality, the situation on the civil side would be substantially worse.

As Stephen Bright, director of the Southern Center for Human Rights, has said, "No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel."[134] *Gideon* has foundered on two fronts. The first is the grossly inadequate funding of indigent criminal defense (leading to crippling per lawyer caseloads and assembly line justice). The second is a pathetically narrow definition of ineffective assistance of counsel. Taken together, every indigent defendant is guaranteed a warm body with a J.D., but we are far from *Gideon*'s "noble ideal" of "impartial tribunals in which every defendant stands equal before the law."[135]

A. *Funding, Caseload, and the Inevitable Results*

The funding for indigent defense has been described as a "crisis,"[136] a "disgrace,"[137] "underfunded,"[138] "broken,"[139] and "unconscionable."[140] Professor Deborah Rhode has done some exceptional work on documenting the funding differentials: "The United States spends about a hundred billion dollars annually on criminal justice, but only about 2% to 3% goes to indigent defense. Over half is allocated to the police, and poor defendants receive only an eighth of the resources per case available to prosecutors."[141]

Trumpet in a naked attempt to convince me to go to law school. I read the book and enrolled a year later.

133. A significant portion of my teaching load includes working as appointed criminal defense counsel for indigent clients. In that work, I have seen much, much fine lawyering, often from appointed private counsel or public defenders. The Knox County Public Defenders Office is, in my opinion, one of the best of its kind in the country and does admirable work within their resource constraints.

134. Stephen B. Bright, Gideon*'s Reality: After Four Decades, Where Are We?*, 18 CRIM. JUST. 5, 5 (2003)*; see also* RHODE, *supra* note 3, at ch. 6.

135. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

136. NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM, SPEED AND SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS (2008), *available at* http://www.mynlada.org/michigan/michigan_report.pdf.

137. Barbara E. Bergman, *Verbatim*, CHAMPION, Sept.–Oct. 2005, http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/7d20323277e57454852570b3006f1bab?OpenDocument.

138. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 329 (1995).

139. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, AM. BAR ASS'N, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, REPORT ON THE AMERICAN BAR ASSOCIATION'S HEARING ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS (2004).

140. Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281, 339 (1991).

141. RHODE, *supra* note 3, at 123.

The news from the individual states is likewise grim. Professors Mary Sue Backus and Paul Marcus have an exhaustive article that lists individual statistics and stories of funding problems in a diverse list of states: Georgia, Virginia, Louisiana, Pennsylvania, North Dakota, Kentucky, Ohio, Minnesota, Missouri, California, Mississippi, Arizona, and Massachusetts.[142]

In Knoxville, Tennessee, Mark Stephens, the county public defender, has repeatedly fought for higher funding, including refusing to take some appointments and attempting to withdraw from defending misdemeanors altogether.[143] As support, Stephens noted that one staff member alone had sixty cases set for trial, with another thirty-seven new cases pending appointment in that same courtroom. A staff of eighteen public defenders handles more than 10,000 misdemeanor charges each year and another 3,000 or more felony charges.[144] Nevertheless, the local judges ordered Stephens to continue taking misdemeanors.[145]

Stephen Bright has also used the example of McDuffie County, Georgia.[146] The county commission decided that it had been spending too much on indigent defense, so the commissioners decided to solicit bids. They specified no qualifications and their only goal was to cut costs. They awarded the contract to the lowest bidder at a 40% discount off of the old cost. For the first three years of the contract, the new lawyer tried only one felony case to a jury while entering 213 guilty pleas in felony cases and filing only *three motions in the three years*.[147]

The funding problems lead inevitably to crippling caseloads. Professor Erica Hashimoto offers multiple examples of excessive caseloads:

> In 2003, public defenders statewide in Minnesota handled more than 900 cases per attorney per year. In 2001, a trial staff of fifty-two lawyers at the public defender office in Hamilton County, Ohio, which encompasses much of the Cincinnati metropolitan area, handled 34,644 cases, an average of 666 cases per attorney. In Maryland in 2002, the public defender office, which had not increased in size in five years, reported that it would have to hire 300 attorneys just to

142. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1035–36, 1048–53 (2006).

143. Jamie Satterfield, *Public Defender Battles Load*, KNOXVILLE NEWS SENT. (Tenn.), July 19, 2007, http://www.knoxnews.com/news/2007/jul/19/public-defender-battles-load/?print=1.

144. Jamie Satterfield, *Overworked Attorneys Must Keep Caseloads*, KNOXVILLE NEWS SENT. (Tenn.), Feb. 26, 2009, http://knoxnews.com/news/2009/feb/26/overworked-attorneys-must-keep-caseloads/?print=1.

145. *Id.*

146. Stephen B. Bright, *Glimpses at a Dream Yet to Be Realized*, CHAMPION, Mar. 1998, http://www.nacdl.org/public.nsf/698c98dd101a846085256eb400500c01/cbdef098140b243c85256c5c0073d65d?OpenDocument.

147. *Id.*

> meet national caseload standards. In 1996, staff attorneys at the Office of the Public Defender in Orange County, California maintained caseloads of 610 cases. In 2004 in Kentucky, public defenders handled an average 489 cases per lawyer.[148]

These caseloads make it very unlikely that any individual client will receive a vigorous defense. As one public defender noted, it is not really very complicated math: "When caseloads are so high that a public defender can only spend 3.8 hours per case, including serious felony cases, [we] cannot ensure reliability."[149]

Studies of appointed counsel have found that the caseload and funding incentives have played out predictability. For instance, an infamous study of appointed counsel in New York City found that defense attorneys visited crime scenes and interviewed witnesses in only 21% of homicides and in a shocking 4.2% of non-homicide felonies.[150] Defense counsel appointed experts in only 17% of the homicides and in just 2% of all felony cases.[151] More recent studies suggest these figures are fairly typical.[152]

Likewise, systems that rely upon individual appointed defense counsel (as opposed to a permanent staff of public defenders) face significant structural problems. Any system that relies upon appointed counsel faces the danger that judges will appoint the lawyers that make their lives and the lives of prosecutors easiest: less competent or more compliant lawyers who will look to plead as many cases as possible.[153] In systems where budget pressures are severe or there are caps on fees, lawyers face natural pressures to do less (or as little as possible) on their cases, because any work beyond a fee cap is basically done for free.[154]

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148. Hashimoto, *supra* note 26, at 471–72.

149. Backus & Marcus, *supra* note 142, at 1058.

150. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 762 (1987).

151. *See* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1603 (2005).

152. *See id*. *See generally* THE SPANGENBERG GROUP, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA (2004) (noting a nine-month study detailing the excessive caseloads of public defenders who are grossly underfunded), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf; CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE (Ga.) pt. 1 (2003) (concluding that additional work was needed to ensure that the state had a "constitutionally-sufficient, fair criminal justice system"), *available at* http://www.georgiacourts.org/aoc/press/idc/idchearings/idcreport.doc.

153. In a classic 1973 article, Judge David L. Bazelon stated a taxonomy of ineffective counsel, including "'sweetheart' lawyers," who depend on judges for continuing appointments and oblige by moving cases along. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 7–16 (1973).

154. William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1730–31 (2003) (reviewing CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell, Robert F. Cochran, Jr. & Angela C. Carmella eds., 2001)).

In systems where public defenders or appointed counsel carry a large caseload, the interests of defense lawyers suddenly align powerfully with prosecutors and judges: their primary interest becomes the pursuit of efficient docket control. Game theory suggests that players in iterated games have greater incentives to cooperate than one-time players.[155] In the game of criminal defense, the judge, the criminal defense lawyers, and the prosecutors are the regular players; the indigent defendants come and go.

Beyond the systematic evidence are a series of jaw-dropping anecdotes. Consider just a few of those gathered by Backus and Marcus:

> In a case of mistaken identity, Henry Earl Clark of Dallas was charged with a drug offense in Tyler, Texas. After his arrest, it took six weeks in jail before he was assigned a lawyer, as he was too poor to afford one on his own. It took seven more weeks after the appointment of the lawyer, until the case was dismissed, for it to become obvious that the police had arrested the wrong man. . . . During this time, he lost his job and his car, which was auctioned. After Clark was released, he spent several months in a homeless shelter.
>
> . . . Sixteen-year-old Denise Lockett was retarded and pregnant. Her baby died when she delivered it in a toilet in her home in a South Georgia housing project. Although an autopsy found no indication that the baby's death had been caused by any intentional act, the prosecutor charged Lockett with first-degree murder. Her appointed lawyer had a contract to handle all the county's criminal cases, about 300 cases in a year, for a flat fee. He performed this work on top of that required by his private practice with paying clients. The lawyer conducted no investigation of the facts, introduced no evidence of his client's mental retardation or of the autopsy findings, and told her to plead guilty to manslaughter. She was sentenced to twenty years in prison. . . .
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> . . . .
>
> A defendant in Missoula, Montana, was jailed for nearly six months leading up to his trial. During the months before his trial, the defendant met with his court-appointed attorney just two times. That attorney did nothing to investigate the defendant's allegations that police obtained evidence against him during an illegal search. A second court-appointed lawyer subsequently had the case dismissed.[156]

155. ROBERT AXELROD, THE EVOLUTION OF COOPERATION 68–69 (1984); ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 16–18 (4th ed. 2007).

156. Backus & Marcus, *supra* note 142, at 1031–33 (citations omitted).

As Professor William Stuntz has stated, "The result is that a typical indigent defendant receives not an advocate able and willing to make the best case for him, but an overworked bureaucrat whose only realistic option is to plead the case out as quickly as possible."[157] As a result, dedicated former criminal defense lawyers suggest loosening the Sixth Amendment to recognize the necessity of indigent defense "triage"[158] or that misdemeanor defense be abandoned altogether.[159]

Lawyers have challenged both the funding levels for indigent defense and the large caseloads pubic defenders carry, but courts have generally demurred. Even in the cases where additional funding was awarded, the gains proved short lived.[160] Courts have avoided the issue through abstention doctrine, separation of powers concerns, and a general distaste for overturning legislative budget decisions.[161] An unwritten factor is undoubtedly how well an underfunded and overburdened system fits the judicial interest in rapidly processing huge dockets. More, better-paid lawyers with fewer cases would likely change a system where 90% of convictions result from guilty pleas.[162]

B. *Ineffective Assistance of Counsel*

Despite all of these systemic problems, robust appellate review of ineffective assistance of counsel claims could at least offer some relief to defendants shuffled through the plea machine. Instead, *Strickland v. Washington*[163] makes proving ineffective assistance of counsel quite difficult and guarantees that only the most serious and obvious cases of incompetence will result in relief.

Gideon was decided in 1963, but it was not until 1984 that the Court got around to defining ineffective assistance of counsel. The reticence to tackle this issue and the fact that *Gideon* guaranteed a lawyer, but gave no substance to the quality of that guarantee, are part of a pattern with ineffective assistance: courts want to presume lawyers effective and move on. This is partially because some or many of the defendants claiming ineffective assistance are likely guilty, but the bigger part is every court's hesitance to call a fellow lawyer ineffective. For example, one of the earliest pre-*Strickland* standards for ineffective assistance was whether the

157. Stuntz, *supra* note 154, at 1731.

158. John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 VAL. U. L. REV. 925, 926 (2005); *see* John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1220–21 (1994).

159. Hashimoto, *supra* note 26, at 496.

160. Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1735–36 (2005).

161. Gershowitz, supra note 9, at 89.

162. George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 273 (2003).

163. 466 U.S. 668 (1984).

lawyer was so bad that he made the case a "farce and a mockery of justice."[164]

In *Strickland*, the Court announced a two-prong test for ineffective assistance of counsel: a defendant must show that his lawyer's representation was deficient (the performance prong), and that the deficient performance affected the outcome (the prejudice prong). The performance prong requires a showing that "counsel's representation fell below an objective standard of reasonableness."[165] The prejudice prong requires a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[166] The Court made clear that if either prong fails, an ineffective assistance claim fails and that courts can consider either prong first.[167] The combination of these two prongs and the Court's invitation to skip the performance prong to jump right to the prejudice prong means that, while the farce and mockery standard is technically dead, its spirit lives on.

The Court's description of its standard for effectiveness leaves little doubt that it does not want to see attorney performance second-guessed or held ineffective with any great regularity. Consider the extremely loose "reasonably competent attorney" standard.[168] The Court flatly refused to classify any lawyer activity (other than a lawyer with an actual conflict of interest) as per se ineffective or unreasonable.[169] Instead, the Court noted that lawyering is an "art," that lawyer behavior cannot be classified, and that there are not "mechanical rules" in the area, and as a result, it cannot offer any specific guidance to lower courts about what particular behavior might be ineffective.[170]

Even after stating this extremely flexible standard, the Court watered it down further by repeatedly emphasizing how deferential reviewing courts should be to lawyers. At points, it appears the Court is struggling to find different ways of expressing its deference. Consider the following:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was

164. Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945). The case also includes a lengthy diatribe against habeus corpus actions and assumes that most prisoner complaints against their lawyers are an "exercise of . . . imagination." *Id*. at 669–70.

165. *Strickland*, 466 U.S. at 688.

166. *Id*. at 694.

167. *Id*. at 697.

168. *Id*. at 687.

169. *Id*. at 688–89, 692.

170. *Id*. at 688, 693, 696.

> unreasonable. . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.[171]

One might think the language above would be sufficient to protect against reviewing courts looking very carefully at these claims, but the Court kept coming back to presumptions of effectiveness and deference. Closely following the passage above, the Court reiterated "that counsel is strongly presumed to have rendered adequate assistance."[172] One page later, the Court added that reviewing courts should apply "a heavy measure of deference to counsel's judgments."[173] Lastly, the Court reminds us of the "strong presumption of reliability."[174]

Nevertheless, the Court virtually guarantees that even the extremely deferential review it outlines above will rarely occur. This is because the Court requires a defendant to prove prejudice by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[175] In practice, this has meant that a defendant must prove either innocence or the loss of an important substantive or procedural right. This is quite a stringent standard, and many ineffective assistance claims fail on the prejudice prong.

This works out nicely for courts that want to avoid labeling an attorney's representation ineffective. The Court went out of its way to make this point:

> In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.[176]

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171. *Id.* at 689 (internal citations omitted).
172. *Id.* at 690.
173. *Id.* at 691.
174. *Id.* at 696.
175. *Id.* at 694.
176. *Id.* at 697.

Thus, even the prejudice prong is stacked to ensure that courts will not have to address the attorney behavior at issue.

There is also a procedural protection barring many ineffective assistance claims: those claims are generally brought in what's called "collateral proceedings," instead of on direct appeal.[177] This means that the first time that most ineffective assistance claims are raised is in a federal habeus corpus or state collateral attack on a criminal conviction. These sorts of actions arise only after a criminal defendant has exhausted her direct appeals, which means that they occur years and years after the original trial.[178] Thus, for anyone serving a sentence of fewer than four to five years, an ineffective assistance claim is unlikely. This practice insulates all of that defense work from review.

Not surprisingly, ineffective assistance claims are extremely hard to win, and courts have proven deferential indeed. One example is the series of sleeping lawyer cases where the defendants have lost. As one judge famously opined, "The Constitution says that everyone's entitled to an attorney of their choice. But the Constitution does not say that the lawyer has to be awake."[179] Likewise, a Texas Appellate Court held that a sleeping lawyer's naps might have been a "strategic move" because "the jury might have sympathy for appellant because of" the naps.[180] In analyzing these cases, some courts have used a three-part analysis: did counsel sleep often, was counsel unconscious or just resting, and did counsel miss a key part of the trial while asleep?[181] Consider the following from Stephen Bright:

> Calvin Burdine and Carl Johnson were represented at their capital trials in Houston by the same court-appointed attorney, who slept during parts of their trials. In Burdine's case, the clerk of the court testified that "defense counsel was asleep on several occasions on several days over the course of the proceedings." The lawyer's file on the case contained only three pages of notes. Nevertheless, the Texas Court of Criminal Appeals found that a sleeping attorney was

177. *See* Massaro v. U.S., 538 U.S. 500, 504–05 (2003).

178. *See* Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 693–94 (2007).

179. Bruce Shapiro, *Sleeping Lawyer Syndrome*, THE NATION, Apr. 7, 1997, at 27 (quoting Judge Doug Shaver).

180. McFarland v. State, 928 S.W.2d 482, 505 n.20 (Tex. Crim. App. 1996).

181. *See* Burdine v. Johnson, 262 F.3d 336, 341 (5th Cir. 2001); Tippins v. Walker, 77 F.3d 682, 687–89 (2d Cir. l996). Similarly, reviewing courts have deferentially reviewed allegations of lawyers who were drunk or high at the time of trial and denied some for a lack of prejudice. Ira Mickenberg, *Drunk, Sleeping, and Incompetent Lawyers: Is It Possible to Keep Innocent People off Death Row?*, 29 U. DAYTON L. REV. 319, 323–24 (2004) and Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 426, 455–56 (1996) have good overviews of these cases.

sufficient "counsel" under the Sixth Amendment.

> Both the Texas Court of Criminal Appeals and the United States Court of Appeals for the Fifth Circuit held that Carl Johnson was not denied his Sixth Amendment right to counsel even though the lawyer slept through much of the trial and, as one observer noted, "the ineptitude of the lawyer . . . jumps off the printed page." Neither court published its opinion. Carl Johnson was executed on September 19, 1995.[182]

Thus, ineffective assistance of counsel claims have hardly proven an effective protection against the individual woes of an underfunded, overburdened system of indigent defense.

C. *The Corrosive Effects of the Betrayal of* Gideon

The combination of low funding, high case loads, and little appellate oversight of lawyer quality has naturally resulted in a system that is plea-driven and "depends less on adversarial process and more on practices akin to those found in administrative and inquisitorial settings."[183] This perversion of the "noble ideal" of *Gideon* is more than merely ironic. It is positively corrosive to the rule of law.

Start from the point of view of the indigent defendants who make up approximately 80% of the criminal justice caseload.[184] From the indigent client's perspective, his or her lawyer is too often seen as part of the system rather than as the shining knight envisioned by *Gideon*. Consider the following from Professors Stephen Schulhofer and David Friedman:

> Indigents commonly mistrust the public defender assigned to them and view him as part of the same court bureaucracy that is "processing" and convicting them. The lack of trust is a major obstacle to establishing an effective attorney-client relationship. The problem was captured in a sad exchange between a social science researcher and a prisoner: "Did you have a lawyer when you went to court?" "No. I had a public

182. Bright, *supra* note 146. Please note that there are actually two more reasons why substandard criminal lawyering is virtually unchecked and unpunished: prosecutions of lawyers under any state's rules of professional conduct are rare, and in most states, a criminal defendant must prove actual innocence to sue a defense lawyer for malpractice. I talk about all of this at length in BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS (forthcoming Cambridge University Press 2011) (manuscript at ch. 7, on file with author).

183. Brown, *supra* note 151, at 1587.

184. *See* STEVEN K. SMITH & CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, INDIGENT DEFENSE 1, 4 (1996) (noting that data from the nation's seventy-five largest counties indicate that about 80% of felony defendants relied on either public defenders or assigned counsel for legal representation).

defender."[185]

This fundamental distrust does more than destroy the lawyer-client relationship; it makes a mockery of the promises made by *Gideon* and any arresting officer's offer of an appointed lawyer to an arrestee who cannot afford one.

Consider the effect on the entire criminal defense bar to have the bulk of clients "triaged" and to know that almost any level of representation will be ruled effective on appeal. Both sides of the shame of *Gideon* have a powerful downward pull on the quality of representation (as lowered standards and expectations are met) and on the quality of justice as a whole. As each player in the system gets used to cutting corners, pretty soon a system designed as a square has become a circle.

Likewise, consider the psychological weight that incompetent lawyering imposes on all of the players in the system. Start with the judges and consider Judge David Bazelon's classic phrase for some criminal defense lawyers, "walking violations of the [S]ixth [A]mendment," as well as his description of the judicial struggle over how to handle these situations.[186]

Even the Supreme Court has expressed discomfort with the "assembly line justice" that America's criminal justice system now embodies. There is a long section in *Argersinger v. Hamlin* where the Court decries the state of misdemeanor prosecution circa 1972:

> [T]he volume of misdemeanor cases, far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result. The Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 128 (1967), states:
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> "For example, until legislation last year increased the number of judges, the District of Columbia Court of General Sessions had four judges to process the preliminary stages of more than 1,500 felony cases, 7,500 serious misdemeanor cases, and 38,000 petty offenses and an equal number of traffic offenses per year. An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudiciation. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at

185. Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 86 (1993).

186. Bazelon, *supra* note 153, at 2, 15–16.

> trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure. . . ."
>
> . . . .
>
> "'Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.
>
> "'Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills.'"
>
> . . ."The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush." . . . .
>
> There is evidence of the prejudice which results to misdemeanor defendants from this "assembly-line justice."[187]

There are a couple of poignant aspects to the above quote. It is sad to think of how little *Argersinger* itself did to ameliorate the problems listed above. If anything, things are worse now than before.[188] Moreover, it is amazing that in 1972 (during the closing stages of the due process revolution), the Court would write so eloquently about the death of the trial and the birth of the rushed, overcrowded assembly line of justice that has marked American justice from then until now.

Criminal defense lawyers also cannot help but notice the structural difficulties with the system or the regular appearance of substandard practitioners.[189] Likewise, prosecutors struggle with their role in a system that offers some defendants so little.[190] In sum, no thoughtful participant or

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187. Argersinger v. Hamlin, 407 U.S. 25, 34–36 (1972) (citation omitted).

188. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK FOR CRIMINAL JUSTICE STATISTICS 2003 at 405 tbl.5.8 (noting criminal cases per federal judge rose from 63 in 1982 to 104 in 2003).

189. *See* Penny J. White, *Mourning and Celebrating* Gideon's *Fortieth*, 72 UMKC L. REV. 515, 515–17 (2003).

190. *Compare* Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 72–73 (1991) (arguing for aggressive and regular prosecutorial reporting of substandard defense work), *with* Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put that Lawyer's Client in Jail?*, 69 FORDHAM L. REV. 997, 1004 (2000) (arguing that such a system would prove unworkable in practice).

observer in the American justice system can fail to notice the grave gap between the rhetoric and the reality. Hypocrisy of this kind does more than disappoint; it devours a system from the inside out and mocks the meat on which it feeds.[191]

It is also worth noting the critical role that underfunded criminal defense programs play in silencing indigent criminal defendants. Professor Alexandra Natapoff has noted the debilitating, silencing effect the entire criminal justice system has upon indigent criminal defendants.[192] Assigning these defendants lawyers who have no time or energy to actually know or even hear the defendant makes the alienating experience of criminal prosecution even worse: the one person who should care enough to listen to the defendant's full story has no time to do so. Psychological studies have shown that when a litigant does not feel "heard" in a legal process, they perceive the entire process as fundamentally unfair.[193]

D. *Do We Really Want to Transplant* Gideon*'s Baggage to Civil Settings?*

Let me start by saying that if the criminal justice system is a travesty, the great bulk of the current pro se civil justice system is even worse. Nevertheless, unlike civil *Gideon*, there are signs that efforts to ameliorate pro se civil representation are occurring and accelerating. More importantly, real court reform would prove much, much more egalitarian or workable than a civil *Gideon* system.

In fact, the corrosive effects of *Gideon* would likely be greatly amplified in the civil setting. First, note that the problems of crippling caseloads and woeful funding occur in the context of serious crimes. In fact, many of the most powerful examples of *Gideon*'s failures come in death penalty cases.[194] If reviewing courts and legislatures cannot see the worth in adequately funding capital defense, what hope is there for adequate funding for defense of a termination of parental rights proceeding, let alone a landlord-tenant action?

Similarly, consider the annual battles over legal aid funding as a precursor. Advocates for the poor have long complained about legal aid's woeful funding.[195] Given the choke back in legal aid funding and the

191. *See* WILLIAM SHAKESPEARE, OTHELLO act 3, sc. 3 ("It is the green-eyed monster which doth mock [t]he meat it feeds on.").

192. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1452–54 (2005).

193. *See, e.g.*, Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 37–43 (2009).

194. *See generally* Stephen Bright, *Introduction & Keynote Speakers*, 58 MD. L. REV. 1333 (1999) (introduction for Symposium entitled *Gideon—A Generation Later*).

195. Van O'Steen, Bates v. State Bar of Arizona*: The Personal Account of a Party and the Consumer Benefits of Lawyer Advertising*, 37 ARIZ. ST. L.J. 245, 246 (2005); Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737,

addition of restrictions on that funding,[196] the hopes for warm legislative support of civil *Gideon* are unfounded.

There is also the possibility that creating a civil *Gideon* would export the debilitating disrespect for the rule of law that has followed along with *Gideon*. It is not hard to imagine the same pro se courts that are choked with litigants today staffed by one or two government paid lawyers (at the lowest salary possible) taking on sixty eviction cases a day, with the same results as *Gideon*'s criminal defense: little individual attention, investigation, or advocacy. In short, civil *Gideon* would likely look like criminal *Gideon* on steroids—overwhelmed lawyers, frustrated clients, and no justice.

Civil *Gideon* would also likely spark a civil *Strickland*—as a constitutional guarantee of counsel would necessarily implicate some minimum standard for lawyer competence. This standard would likely be the same or even lower than *Strickland*, with the inevitable effect that extremely poor lawyering in civil courts would be acceptable as "effective." *Gideon*'s shortcomings would only be exacerbated in a civil transplant.

E. *The Jurisprudential Difficulties with Civil* Gideon

Along with the many logistical concerns listed above, there are significant jurisprudential reasons for avoiding an expansion of *Gideon* to civil cases. *Gideon* is part of a pantheon of cases that are considered unassailable and obviously correct,[197] and this Article does not dispute the correctness of *Gideon* in principle. Nevertheless, because *Gideon* itself was not a foreseen application of either the Sixth Amendment or the Due Process Clause, it should be expanded carefully. While it may be true that *Gideon* was based upon the "obvious truth" that indigent felony defendants need representation for a fair trial, it is not necessarily true that all further applications are. The trick is to tease out which are and which are not.

Gideon is a classic living constitution case. This is because neither the Framers of the Sixth Amendment nor the Fourteenth Amendment expected that these amendments would guarantee a free lawyer to indigent defendants. A defendant's right to have a lawyer if he could afford one was well established at the time of the passage of the Bill of Rights in both federal and state trials, and it is that right that the original Sixth Amendment protects.[198] This is so because there certainly was not a right

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756 (2002).

196. *See* REBEKAH DILLER & EMILY SAVNER, BRENNAN CTR. FOR JUSTICE, A CALL TO END FEDERAL RESTRICTIONS ON LEGAL AID FOR THE POOR i (2009), *available at* http://brennan.3cdn.net/7e05061cc505311545_75m6ivw3x.pdf.

197. *See, e.g.*, James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 FORDHAM L. REV. 1559, 1559 (2009) (listing *Brown* and *Gideon* among the "great social change cases").

198. Note that the original Virginia Constitution did not contain a right to counsel guarantee.

to appointed counsel at the time of the passage of the Bill of Rights.[199] If the Framers had known that the Sixth Amendment might guarantee a government-supplied lawyer to criminal defendants, ratification debates would have likely mentioned it, and the right to counsel would have been much more controversial.

Instead, the right to counsel was the subject of little debate[200] and gave federal constitutional standing to a rule that was already in effect in the colonies and at American common law. The Sixth Amendment right to assistance of counsel was a clear rejection of English common law, which allowed defense lawyers in misdemeanor prosecutions but not in the more serious cases of treason or a felony.[201] Since most felonies at common law were punishable by death, this meant that British defendants were allowed counsel in less serious cases but not in potential death penalty cases.[202]

Although England adhered to the rule until 1836, the rule was rejected by the American colonies. Twelve of the thirteen colonies lawfully recognized the right of appearance of counsel in all criminal prosecutions, with the exception of one or two instances in which it was limited to more serious crimes.[203] Thus, there was little controversy or discussion over the right to counsel. When the framers drafted the Sixth Amendment, the inclusion of the right to counsel formalized a right that was already well established in the states.

Nevertheless, there was not universal or even regular appointment of counsel in felony cases at that time, and the appointments that occurred were as a result of a statute and not of any constitutional mandate. *Betts v. Brady* may have been dead wrong as a matter of policy, justice, or fairness, but it was spot on with its history. *Betts* carefully canvassed state constitutional and statutory law at the time of the passage of the Sixth Amendment and concluded that the state constitutions only protected the right to be represented by counsel, not a right to free appointed counsel.[204] Moreover, if a free lawyer was provided, it was generally by statute and limited to death penalty cases.[205]

Nor does the current version.

199. *See* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 24 (1955); JAMES T. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 20–21 (2002).

200. Tomkovicz, *supra* note 199, at 19–20 (discussing the passing with little discussion of the Six Amendment right to counsel with the rest of the Bill of Rights).

201. DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 39–40 (1992).

202. This was justified because judges were seen as neutral and able to protect the rights of the accused and also as an expedience in prosecuting particularly serious crimes. *See id.*

203. *Powell v. Alabama*, 287 U.S. 45, 60–66 (1932), offers an excellent overview of the various colonial treatments of the right to counsel.

204. Betts v. Brady, 316 U.S. 455, 465–66 (1942).

205. Here is the passage from *Betts* that lays all this out. Connecticut was the outlier in apparently granting counsel in all criminal trials:

Likewise, at the time of the passage of the Fourteenth Amendment, there was not a well-established right to appointed counsel. The mid-19th Century was, in fact, a time of court deprofessionalization where in many states there were virtually no requirements for admission to the bar and pro se practice was quite common.[206]

So, based on any original understanding of the Sixth or Fourteenth Amendments, *Gideon* is clearly a living constitution case. In fact, *Gideon* itself inspired an early use of that phrase in an article by Professor Charles A. Reich entitled *Mr. Justice Black and the Living Constitution*.[207]

Nevertheless, the Court has made clear that the Due Process Clause is "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights" and is to be tested against notions of "fundamental fairness" and not a rigid application of the framers' intent.[208] So, *Gideon* was certainly on firm ground in reading the Due Process Clause according to contemporary standards of fundamental

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> Connecticut had no statute, although it was the custom of the courts to assign counsel in all criminal cases. Swift, "System of Laws, Connecticut," 1796, Vol. II, p. 392. In Delaware Penn's Laws of 1719, c. XXII, and in Pennsylvania the Act of May 31, 1718, § III (Mitchell and Flanders' Statutes at Large of Penna., 1682-1801, Vol. III, p. 201) provided for appointment only in case of "felonies of death." Georgia has never had any law on the subject. Maryland had no such law at the time of the adoption of the Bill of Rights. An Act of 1777 in Massachusetts gave the right to have counsel appointed in cases of treason or misprision of treason. Laws of the Commonwealth of Massachusetts from Nov. 28, 1780 to Feb. 28, 1807, c. LXXI, Vol. II, Appendix, p. 1049. By an Act of Feb. 8, 1791, New Hampshire required appointment in all cases where the punishment was death. Metcalf's Laws of New Hampshire, 1916, Vol. 5, pp. 596, 599. An Act of New Jersey of March 6, 1795, § 2, required appointment in the case of any person tried upon an indictment. Acts of the General Assembly of the Session of 1794, c. DXXXII, p. 1012. New York apparently had no statute on the subject. See Act. Feb. 20, 1787, Laws of New York, Sessions 1st to 20th (1798), Vol. I, pp. 356-7. An Act of 1777 of North Carolina made no provision for appointment, but accorded defendants the right to have counsel. Laws of North Carolina, 1789, pp. 40, 56. Rhode Island had no statute until 1798 when one was passed in the words of the Sixth Amendment. Laws 1798, p. 80. South Carolina, by Act of August 20, 1731, limited appointment to capital cases. Grimke's So. Car. Pub. Laws, 1682-1790, p. 130. Virginia, by Act of Oct. 1786, enacted with respect to one charged with treason or felony that "the court shall allow him counsel . . . if he desire it." Hening's Statutes of Virginia, 1785-1788, Vol. 12, p. 343.

Id. at 467 n.20.

206. *See* Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1243 & n.284 (2003).

207. Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 679 (1963).

208. This language comes from *Betts* itself. *Betts*, 316 U.S. at 462.

fairness.[209] Further, *Gideon*'s appeal to the "obvious truth" that a felony defendant could not navigate a trial without appointed counsel also fit the Court's flexible approach to due process.

The key problem with expanding *Gideon* is that every step beyond the "obvious truth" of felony defense and the general consensus among the states that *Betts* should be overruled weakens the force of *Gideon*. If we start from the premise that *Gideon* was unquestionably correct, we still have to craft criteria for expansion. Without such criteria, the Court risks replacing legislatively crafted funding priorities with judicial priorities. When there is a demonstrable shift in pubic opinion and an obvious miscarriage of justice, as in *Gideon*, the Court is on firm ground.

As the Court strays from firm ground, however, messy problems arise. The guarantee of appointed misdemeanor counsel in *Argersinger* is an excellent example. The Court rejected the opportunity to limit the right to appointed counsel to more serious cases in the same manner that it had limited the right to a jury trial—to non-petty offenses.[210] Instead, the *Argersinger* Court held that before an indigent defendant can be convicted and spend a single day in jail, she must have had the service of an appointed lawyer.

Argersinger is problematic in a number of regards. First, unlike the circumstances of *Gideon*, appointed misdemeanor counsel was not common in the federal or state court systems, and there was not a groundswell of support from the states or elsewhere for such a holding.[211] In *Gideon*, the federal courts had long guaranteed counsel for felonies, and many states did as well. *Argersinger* is silent on this point, but the briefs suggest that neither the federal court practice nor federal statutes extended the right to appointed counsel as far as *Argersinger* did and that only a handful of states assigned attorneys in similar circumstances.[212]

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209. Nevertheless, in this regard, *Betts* was also relatively persuasive. The case includes an exhaustive canvas of the contemporary state statutory and constitutional treatment of the appointment of counsel and concluded that "in the great majority of the States, it has been the considered judgment of the people, their representatives and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy." *Id*. at 467–71. One notable difference between *Betts* and *Gideon* is a shift in the states. The last paragraph of *Gideon* powerfully demonstrates this fact: "Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree." Gideon v. Wainwright, 372 U.S. 335, 345 (1963).

210. Argersinger v. Hamlin, 407 U.S. 25, 29–31. *Duncan v. Louisiana*, 391 U.S. 145, 159, 161–62 (1968), limited the right to a jury trial to non-petty offenses.

211. Unlike *Gideon*, less than a handful of states filed amicus briefs in *Argersinger*. The state of Utah, for example, argued for the petty/non-petty distinction. *See* Brief for the State of Utah as Amicus Curiae at *3–4, Argersinger v. Hamlin, 407 U.S. 25 (1972) (No. 70-5015), *available at* 1971 WL 126422.

212. *See* Brief for the United States as Amicus Curiae at *6, *29–30, Argersinger v. Hamlin, 407 U.S. 25 (1972) (No. 70-5015), *available at* 1971 WL 126425.

Second, *Argersinger* privileged the right to appointed counsel—which was not an original right in the Sixth Amendment—above the right to a jury, which historically was considered to be the single most important Sixth Amendment right.[213] Thomas Jefferson, among other framers, considered the right to a jury of paramount importance: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making them."[214] This created an anomalous result within the due process revolution of the 1960s: the procedural right most valued by the framers (the jury trial) was treated worse than a right not even recognized at the time of the framing (a right to appointed counsel in virtually all criminal trials).[215]

Third, assigning counsel even when a defendant faces one day in jail sets a relatively low barrier for the liberty interest involved and creates future line-drawing problems. The best argument against *Lassiter* is that many parents would spend much more than a day in jail to avoid losing their parental rights. If the Constitution requires an appointed lawyer in one case, it seems perverse to deny it in the other.

Lastly, and most importantly, there is an excellent argument to be made that the inglorious fate of *Gideon* was sealed with *Argersinger*. It was not impossible to predict that misdemeanor representation might overwhelm the system for appointing lawyers or that the inevitably high caseloads might result in substandard lawyering. To the contrary, both the *Argersinger* majority and the concurrence that rejected a mandate for appointed counsel discussed that exact issue.[216]

The above arguments against *Argersinger* are even more potent for civil *Gideon*. In *Lassiter*, no state had found a broad based constitutional right to civil representation for the indigent. While most states did so in termination of parental rights cases as a matter of statute, none of those states pushed in favor of such a constitutional right in *Lassiter*, while six

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213. BARTON, *supra* at note 182 (manuscript at ch. 3).

214. Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), *in* 5 THE FOUNDERS' CONSTITUTION 364 (Philip B. Kurland & Ralph Lerner eds., 1987). Similarly, John Adams wrote that juries should have "as compleat a Controul, as decisive a Negative, in every Judgment of a Court of Judicature" as the legislature has to veto executive action. John Adams, *Adams' Diary Notes on the Right of Juries (Feb. 12, 1771)*, *in* 1 LEGAL PAPERS OF JOHN ADAMS 288, 229 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

215. In fact, the petty crime exception to the right to a jury trial is one of the very few areas of the 1960s due process revolution where individual rights went backwards. Both in federal and state law, the petty crime exception was not firmly established at six months of potential imprisonment before *Duncan v. Louisiana*, 391 U.S. at 148–56. Afterwards, the exception became much more regularized and national. AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 289–90 (1998).

216. *Argersinger*, 407 U.S. at 37 & n.7; *id*. at 58–62 (Powell, J., concurring).

states joined a brief arguing the opposite.[217] Civil *Gideon* proponents have wisely begun to lobby states to support a right to appointed civil counsel,[218] but under the current fiscal circumstances, that effort appears rather quixotic. It is worth noting a recent success on that front, however. In the teeth of potential state bankruptcy, California's legislature recently passed a limited civil *Gideon* right in its state courts.[219]

There are also reasons to be concerned about the role of judges choosing when the state should pay for appointed lawyers. I have argued elsewhere that there is a powerful lawyer-judge bias, i.e., judges will frequently privilege the legal profession in their decisions, constitutional or otherwise.[220] For civil *Gideon*, the interests of judges and lawyers do not necessarily square with the indigent, let alone the public at large. In civil *Gideon* (as elsewhere), lawyers have an incentive to prefer more employment to less. Thus, we see the ABA and a number of state bars pushing for a right to appointed civil counsel.[221] Likewise, judges are generally hostile to pro se litigation, and the more represented parties there are, the easier most judges' jobs will be.[222]

Exactly how the preferences of indigent litigants are considered, however, is harder to see. Obviously, all else being equal, any litigant would prefer a fairer court procedure. When the cost of a civil *Gideon* is factored in, however, it becomes a harder question. For example, it would not be irrational for poor litigants to prefer that any money spent on their problems go to direct assistance, rather than a free lawyer. For example, if an indigent person facing eviction had a choice, she would often choose help with finding a new apartment or a few more weeks in her apartment over a free, but overburdened and underpaid, lawyer. Moreover, if it is true that pro se court reform can make the system fairer at a lower cost, indigent litigants might prefer that option.

In this regard, the civil *Gideon* movement is reminiscent of the Court's differential treatment between procedural due process rights and substantive due process rights. When faced with an aggrieved poor person, the Court has either offered extra levels of process or turned its back.[223]

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217. *See* Brief for the State of North Carolina et al. as Amicus Curiae, at *2, Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (No. 79-6423), *available at* 1980 WL 340039.

218. *See* Meredith Hobbs, *Litigators Push for Civil Gideon*, FULTON COUNTY DAILY REP., Dec. 8, 2008, *available at* http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202426606743&slreturn=1&hbxlogin=1 (noting that civil Gideon advocates are lobbying state and local governments as well as pursuing litigation strategies).

219. *See* Tamara Audi, *'Civil Gideon' Trumpets Legal Discord*, WALL ST. J., Oct. 27, 2009, at A3, *available at* http://online.wsj.com/article/SB125659997034609181.html.

220. *See* BARTON, *supra* note 182 (manuscript at ch. 7).

221. *See supra* notes 5, 108–09, 120 and accompanying text.

222. *See* Jonathan D. Glater, *Amateur Hour in Court*, N.Y. TIMES, Apr. 10, 2009, at B1 (describing judicial difficulties with a surge in pro se litigation).

223. *Compare* Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that procedural due

Nevertheless, process can never replace substance. So, the Court has held that the government must provide a hearing before a welfare recipient can lose her benefits.[224] Nevertheless, there is no absolute right to welfare benefits or any other government assistance.[225] It says a lot about the mindset of judges that the high water mark for constitutional rights for the poor is the right to a hearing, rather than a right to basic sustenance or shelter. That said, from an indigent person's point of view, which would you rather have: a hearing or a right to the benefit itself?

In sum, it is fair to be suspicious of courts and bar associations when they come to help the poor. Experience teaches that the most the poor can hope for is more lawyers or more process, with little of substance to show for it. Moreover, it is not clear that spending on poverty programs is not a zero sum game. If that is the case, the choice of process over substance was doubly destructive: paying for the layers of due process that now "protect" the poor from losing various benefits may actually lower the absolute amount of those benefits. If the same were true of paying for a civil *Gideon*, the appointment of free civil lawyers would be particularly ironic.

IV. PRO SE REFORM

Even if the above argument is wrong on the merits and as a matter of policy, why is it that the answer to this sort of challenge is always more lawyers? Why not a change in the nature of the courts? Keep in mind that the question of a remedy is different from the question of a constitutional violation. Even if the civil *Gideon* proponents are spot on that forcing indigent civil litigants to proceed pro se is a violation of fundamental fairness and due process, they are not necessarily correct that a free lawyer is the appropriate response. A court could just as easily order fundamental changes in court procedures as a remedy. Below, I lay out the argument for the superiority of pro se court reform as a solution to an undeniable problem.

First, a word of definition is necessary. When this Article refers to pro se court reform, that phrase means the reform of courts that feature a regularized majority (or at least plurality) of pro se matters. These courts are targeted because they are the most likely to be open to reform out of necessity. Further, if all of these courts were reformed, it would make a massive difference in the lives of people too poor to hire their own lawyers.

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process requires a hearing before the termination of a welfare recipient's benefits), *with* Dandridge v. Williams, 397 U.S. 471, 484, 486 (1970) (finding no right to welfare benefits), *and* Lindsey v. Normet, 405 U.S. 56, 74 (1972) (finding no right to basic shelter).

224. *See Goldberg*, 397 U.S. at 264.

225. *Lindsey*, 405 U.S. at 74 (1972) (finding no right to basic shelter); *Dandridge*, 397 U.S. at 484, 486 (1970) (finding no right to welfare benefits); *see also Goldberg*, 397 U.S. at 262.

A. *It Is Already Starting to Happen*

Aside from the arguments listed above against civil *Gideon*, there remains a very prosaic reason to prefer pro se court reform to civil *Gideon:* pro se reform may actually happen. Civil *Gideon* has gained traction with bar associations, legal academics, and many advocates for the poor. Nevertheless, it has gained little traction among the constituencies that matter—the judges and justices who might require it constitutionally and the state and federal legislatures who could pass legislation granting it.[226] Under the current fiscal situations of the state and federal governments, legislative action appears remote indeed.[227] Similarly, courts that were already reticent to order the appointment of free lawyers in civil cases will be even more hesitant.

By comparison, the pro se court reform train is warmed up and leaving the station. This is largely by necessity. Whether courts want to avoid it or not, waves of pro se litigants are now the norm in many lower courts across the country, and court reform—while difficult—is often the only solution.

The first and best signs of progress are publications, conferences, and discussions among state court judges.[228] In 2005, the American Judicature Society (AJS) published a guide entitled *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*.[229] It includes a long list of common sense things that judges are allowed to do to help pro se litigants, including making reasonable accommodations, being courteous, avoiding legal jargon and procedural snafus, explaining the process, avoiding over-familiarity with lawyers in the courtroom, and training court staff so they provide patient, helpful service to self-represented litigants.[230] It also includes a long section on "Proposed Best Practices for Cases Involving Self-Represented Litigants."[231] This report follows up on 1998's *Meeting the Challenge of Pro Se Litigation*.[232] AJS has also published a set of core

226. *See supra* notes 28–31 and accompanying text.

227. *But see* Audi, *supra* note 219.

228. Note that the analogous civil *Gideon* conferences and discussions are held by litigators and academics—not judges. *See, e.g.*, BrennanCenter.org, *Civil* Gideon *Symposium to Open ABA's Equal Justice Conference* (Oct. 21, 2005), http://www.brennancenter.org/content/elert/civil_gideon_symposium_to_open_aba_s_equal_justice_conference_request_for_p/.

229. CYNTHIA GRAY, REACHING OUT OR OVERREACHING: JUDICIAL ETHICS AND SELF-REPRESENTED LITIGANTS (2005).

230. *Id*. at 1–2. This list of activities is so basic as to be humorous to a poverty lawyer, but sadly, many or most courts addressing pro se litigants fail to follow these simple steps. The guide reminds me of the *Simpsons* episode where Homer has to take a court-mandated parenting class and the instructor tells the class to "put your garbage in a garbage can, people. I can't stress that enough. Don't just throw it out the window." Homer responds, "Garbage in garbage can . . . hmm, makes sense." *The Simpsons: Home Sweet Home-Diddily-Dum-Doodily* (20th Century Fox television broadcast Oct. 1, 1995).

231. GRAY, *supra* note 229, at 51–57.

232. JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION (1998).

materials that gathers the best and most innovative approaches to pro se reform being used nationally.[233]

In 2002, the National Center for State Courts released *The Self-Help Friendly Court: Designed from the Ground Up to Work for People Without Lawyers*.[234] The preface is written by the chief justice of the California Supreme Court and references California's recent efforts, including a 900-page self-help website visited by more than 100,000 people a month.[235] While these guides are not perfect or particularly visionary, if pro se courts around the country adopted their suggested reforms, it would make a huge difference in the lives of the indigent and would make the courts fairer and more efficient.

The California website is just one of many governmental or non-profit sites that aim to ease the pro se experience. SelfHelpSupport.org is a website set up for courts, community groups, poverty lawyers, and academics interested in forwarding the cause of pro se reform.[236] Lawhelp.org is a Probono.net website that is aimed at pro se litigants themselves and forwards the litigants on to each state's legal aid website, some of which are stronger than others.[237] Nevertheless, it is a free site aimed at helping pro se litigants.

There are a number of individual courts that are trying quite innovative approaches. For example, Judge Lois Bloom and Professor Helen Herschkoff describe the creation of a special federal magistrate position in the Eastern District of New York assigned to hear significant categories of pro se matters, making it the first federal district to assign a single magistrate in this manner.[238] Professor Ronald Staudt and Attorney Paula Hannaford have gathered a number of innovative court processes into one National Center for State Courts supported research project.[239] San

233. SELF REPRESENTED LITIGATION NETWORK, CORE MATERIALS ON SELF-REPRESENTED LITIGATION INNOVATION 29 (2006), *available at* http://www.ajs.org/prose/ south%20central%20 notebook%20contents/tab%208/core%20materials.pdf.

234. RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (2002), *available at* http://www.ncsconline.org/WC/ Publications/Res_ProSe_SelfHelpCtPub.pdf. AJS actually has a whole website dedicated to the topic. AJS Pro Se Home Page, www.ajs.org/prose/home.asp (last visited Sept. 25, 2010). *See generally* Richard Zorza, *Self-Represented Litigation and the Access to Justice Revolution in the State Courts: Cross Pollinating Perspectives Toward a Dialogue for Innovation in the Courts and the Administrative System*, 29 J. NAT'L ASS'N. ADMIN. L. JUDICIARY 63 (2009) (discussing the hybridization of many current court reform innovations).

235. ZORZA, *supra* note 234, at 7–8. The article refers to a website dedicated to those seeking information about their legal rights. California Courts Self-Help Center Home Page, http://www.courtinfo.ca.gov/selfhelp/ (last visited Sept. 25, 2010).

236. SelfHelpSupport.org Home Page, www.selfhelpsupport.org (last visited Sept. 25, 2010).

237. LawHelp.org Home Page, http://lawhelp.org (last visited Sept. 25, 2010).

238. *See* Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 476–77 (2002).

239. *See* Ronald W. Staudt & Paula L. Hannaford, *Access to Justice for the Self-Represented*

Antonio and other cities have established specialized pro se courts adopting many of the suggestions for court structure listed above.[240]

There has been significant scholarly interest in the topic as well. Russell Engler has written two tremendous articles on pro se reform: the first advocates a mass shift in the roles of clerks, judges, and mediators to meet the new prominence of pro se, and the second explores the judicial ethical challenges (and opportunities) involved in such a shift.[241] Professor Russell Pearce has argued that judges in pro se courts should replace the traditional role of neutral arbiter with active questioning aimed at ensuring that procedural and substantive justice prevails.[242] Naturally, there have been critics and opponents,[243] but the discussion itself, as well as the very real progress being made in multiple jurisdictions, is heartening.

B. *The Tip of the Spear*

A main conceptual problem with civil *Gideon* is that it is a deeply conservative and backward looking solution: it starts with the assumption that nothing in the current structure or process of the court should change and that the only way to address the disadvantages the poor face is to appoint more free lawyers. By contrast, pro se court reform starts with a fundamental change in court attitude (from passive neutrality to assistance and notice of the unrepresented). *The Self-Help Friendly Court* is a helpful document in this regard, as it tries to work forward from the problem itself—making court processes fair for unrepresented litigants—to

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Litigant: An Interdisciplinary Investigation by Designers and Lawyers, 52 SYRACUSE L. REV. 1017, 1021 (2002).

240. *See, e.g.*, Anita Davis, *A Pro Se Program That Is Also "Pro" Judges, Lawyers, and the Public*, 63 TEX. B.J. 896, 896 (2000).

241. Engler, *And Justice for All*, *supra* note 3, at 1988; Russell Engler, *Ethics in Transition: Unrepresented Litigants and the Changing Judicial Role*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 367, 368–69 (2008). It is important to note that Engler considers pro se court reform as only part of the solution and has advocated for a hybrid approach that combines court reform, aid to unrepresented litigants, and a context-based approach to mandatory appointment. *See* Russell Engler, *Toward a Context-Based Civil Right to Counsel Through "Access to Justice" Initiatives*, 40 CLEARINGHOUSE REV. 196, 197 (2006).

For two other terrific articles discussing changes necessary to make pro se litigation work, see generally Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659 (2006) and Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAM. CT. REV. 36 (2002).

242. Pearce, *supra* note 3, at 970.

243. *See, e.g.*, Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1538 (2005) (arguing that pro se assistance has gone too far); Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 692 (2007) (arguing that pro se accommodation is part of a larger trend of judicial over-reaching and activism).

solutions, rather than backwards from ways to ameliorate the existing system.[244] While the solutions suggested are still relatively modest, the authors ask the exact right question: if we started from scratch with the problem of pro se litigants, what would we do?

When one considers that question, the relatively modest nature of the reforms thus far is actually quite promising. Many pro se assistance projects actually involve very little change in the courts or clerks offices themselves. Instead, they involve better preparing pro se litigants to appear by themselves in a traditional courtroom.[245] Even the projects described above involve very, very incremental change: creating a special court for pro se litigants, allowing clerks to give limited advice, or treating pro se litigants respectfully. As such, a great deal of reform can be accomplished for relatively little expense: retraining all court personnel (especially judges and clerks) to make special efforts to improve the experience of pro se litigants alone would make a very big difference.

The next level of reform is likewise relatively inexpensive, but it requires more thought and effort. Court processes and forms should all be revamped to assist pro se litigants. This requires the creation of form pleadings and greater transparency and clarity in court processes so that pro se litigants can easily navigate the paperwork and court experience.

There is even a further type of reform possible, and it is where the real promise of pro se court reform lies. If any thought or effort is put into combining technology with the needs of pro se courts and litigants, something truly revolutionary might emerge. Colin Rule, director of online dispute resolution at eBay/PayPal, has written a book outlining the simple, but amazingly effective, eBay online dispute resolution system.[246] A comparison between the online procedures versus what the typical pro se litigant faces in court is staggering.[247] If pro se courts could ever be convinced to let technology loose, the results would be exceptional: a simple, transparent court system aimed at assisting litigants in a considerate and efficient manner. Ask any poverty lawyer if any of those adjectives describe the courts where he or she practices, and the answer will very likely be an emphatic no.

Interestingly, that is where the pro se court innovation concept truly departs into science fiction: imagine a world where there are special courts that are set up for the poor that operate so well that they are the envy of the wealthy, who are still using a lawyer-driven model that persists from 17th

244. *See* ZORZA, *supra* note 234, at 11.

245. *See* Stephan Landsman, *The Growing Challenge of Pro Se Litigation*, 13 LEWIS & CLARK L. REV. 439, 455–56 (2009) ("Probably the most popular option for addressing the pro se challenge is expansion of programs designed to teach the self-represented how to manage their own cases.").

246. *See* COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS (2002).

247. *See id.* at 102–04.

Century England. The really crazy thing is that it is not only possible—if advocates for the poor could convince legislatures and courts that this approach would alleviate the pro se crisis, make more use of precious judicial resources, save money, and (as a bonus) produce better, fairer outcomes—but it also may be probable.

V. CONCLUSION

Unfortunately, that very possibility is exactly what may stand in the way. Lawyers and bar associations have powerful incentives to see pro se litigants flail in court. First, it convinces anyone who can even marginally afford a lawyer to try to get one before coming to court. Second, it makes civil *Gideon* look like a great solution. As usual, the solution to the struggle of the poor in America's courts is more lawyers. Lastly, it keeps the paying customers from drifting away on simple cases that they could possibly handle pro se like wills, divorces, or bankruptcies. If poor people could cheaply and easily get a divorce, it could take quite a toll on the paid divorce practice in this country.

Nevertheless, the seeds have been sown. Unlike civil *Gideon*, which is an inherently conservative and backward-looking solution to a very real problem, pro se court reform has already begun and seems likely to accelerate. Now is the time for poverty lawyers and other advocates to throw their weight behind these efforts to help change the lives of the poor. Transforming the nature of American justice in the process is just the bonus package.

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Civil Gideon and NYC's Universal Access: Why Comprehensive Public Benefits Advocacy Is Essential to Preventing Evictions and Creating Stability

Jack Newton
Legal Services NYC

Paula Arboleda
Legal Services NYC

Michael Connors
Legal Services NYC

Vianca Figueroa
Legal Services NYC

CIVIL *GIDEON* AND NYC'S UNIVERSAL ACCESS: WHY COMPREHENSIVE PUBLIC BENEFITS ADVOCACY IS ESSENTIAL TO PREVENTING EVICTIONS AND CREATING STABILITY

Jack Newton, Paula Arboleda, Michael Connors & Vianca Figueroa†

† The authors work in the Public Benefits Unit at Bronx Legal Services, which is part of Legal Services NYC ("LSNYC"). The views and perspectives shared in this article are not necessarily those of LSNYC, Bronx Legal Services, nor any of our funders. The Public Benefits Unit is funded, in part, by grants from The New York Bar Foundation and the Venable Foundation.

INTRODUCTION

Advocates who work in direct civil legal services agencies, like Legal Services NYC, understand that we work in the law firm equivalent of an emergency room. People seek our services to maintain or obtain essential services, to stop their foreclosures, to prevent eviction from their homes, to end their deportations, or to obtain orders of protection, among other time- and safety-sensitive issues. At the same time that we are providing critical interventions for our clients' most pressing legal needs, we have to juggle our different responsibilities, such as ensuring we meet our grant deliverables, and applying (or reapplying) for critical funding we need to maintain a consistent level of services. We, of course, have front row seats to the lack of access to justice that low-income and marginalized communities face when they don't have adequate counsel, and many of us had given up on the promise or hope of a "Civil *Gideon*."[1] But then something remarkable happened.

In 2017, our City Council, in partnership with the tenant organizer-led Right to Counsel NYC Coalition, a progressive mayor, and a revitalized local Department of Social Services that was committed to providing meaningful assistance to low-income communities, worked together to

[1] Named after the landmark U.S. Supreme Court case that found defendants had a constitutional right to counsel in criminal cases, Civil *Gideon* is a movement and idea that the right to counsel must extend to certain civil cases that protect or preserve basic needs, including eviction proceedings. *See infra* notes 127-30 and accompanying text.

pass a law guaranteeing a right to counsel to people facing eviction for households at or below 200% of the federal poverty level.[2] This legislation, which the city commonly refers to as "Universal Access to Counsel," or "UAC," is being phased in across our city as we reach the mandate of covering the entire city by the end of July 2022.[3] The city is contracting the anti-eviction defense work out to different legal services agencies, including Legal Services NYC ("LSNYC"). The New York City Department of Social Services ("DSS") has established an Office of Civil Justice ("OCJ"), which administers the UAC grant and oversees its implementation. Over two years into the UAC phase-in, we have learned a great deal about how to structure, staff, and fund a successful program, but we are also more than two years away from the final implementation of the program when, presumably, the New York City Council will finalize and baseline the UAC funding.[4]

We are trying to take a step back from our usual day jobs juggling in the emergency room to recommend a thoughtful way to staff and fund a successful UAC program. Thus far, the UAC funding has been insufficient to cover the personnel costs for the public benefits paralegals who play a central role in preventing evictions as well as in stabilizing families and individuals facing eviction. Without adequate funding, UAC will have problems with sustainability and advocate burnout. Even worse, without a sufficient ratio of housing attorneys to public benefits paralegals, UAC may fail to meet the needs of low-income communities facing eviction.

In this article, we explain the critical role that public benefits advocates already play in the immediate anti-eviction work and highlight the role that such advocates can and *should* play in promoting longer-term stability for the clients we serve—if we have sufficient funding to hire them. We will demonstrate that "winning" an eviction case may not be the equivalent of providing stability. We look at the current homelessness crisis in New York City ("NYC") and identify some of its leading causes. By examining some of the underlying drivers of homelessness, we see

[2] N.Y.C. ADMIN. CODE §§ 26-1301 to -1302 (2019). As the editors of the N.Y.C. Administrative Code have noted, two sections of the Code are designated as Section 26-1301. This citation refers to the two sections titled *Definitions* and *Provision of Legal Services*.

[3] *Id.* § 26-1302.

[4] *Id.* § 26-1302(c) ("Beginning October 1, 2022 and no later than each October 1 thereafter, the coordinator shall publish a summary of any changes to such estimates for expenditures."). Some of the funding has been baselined already to some degree, but we are still in a period of expansion and growth. The final baselined budget will not occur until 2022. We believe that one of the key elements of funding that must be increased is the UAC per-case reimbursement rate.

how UAC can interrupt the cycle of housing instability if funding is adequate to allow legal providers to hire enough paralegals to provide comprehensive public benefits assistance. In particular, we take a look at four different subpopulations that are disproportionately homeless and affected by recursive episodes of housing instability: (1) people with disabilities or serious illnesses, (2) survivors of domestic violence or intimate partner violence ("DV"), (3) noncitizens, and (4) people aged sixty and over. We identify the different ways that public benefits paralegals can intervene in ways that go beyond the critical function of just stopping the eviction and address some of the underlying stressors. By decreasing out-of-pocket expenses, maximizing benefits, and ensuring better access to benefits, our UAC model will reduce Housing Court and shelter entry recidivism.

We want to be clear that we have much to celebrate: our City Council, Mayor, and DSS have taken the extraordinary step of providing counsel to low-income New Yorkers to stop their evictions and keep them in their homes. Having legal counsel in eviction proceedings is absolutely the key to UAC. But we know we can do better—and we know that doing better involves minimal cost, costs that the UAC funding already should be covering no matter what may happen.

I. UNDERSTANDING THE HOMELESSNESS EPIDEMIC IN NYC

A. Homelessness Crisis in NYC

With some 60,000 people in shelter every night,[5] NYC is in the midst of a homelessness crisis. There is no single reason for homelessness; it is a complicated social problem with many underlying and proximate causes. Nevertheless, UAC can unquestionably play a significant role in reversing or reducing homelessness, but a program that minimally funds one aspect of eviction prevention (housing attorneys representing people in eviction cases) will ultimately be insufficient to erode the epidemic of housing instability and homelessness among low-income NYC residents.

Nonprofit direct legal services work is primarily crisis-driven. The same is true of the anti-eviction housing work that this article will primarily discuss: the clients we see are already in Housing Court and facing eviction. Providing expert emergency assistance and intervention remains our primary goal, which is why we are focusing on people who are homeless or are on the brink of homelessness. However, this article will also refer to people who are experiencing "housing instability," which we de-

[5] *DHS Homeless Shelter Census*, NYC OPEN DATA, https://perma.cc/4ZEX-NVNA (last visited Dec. 30, 2019).

fine as individuals or families with a rent burden that exceeds thirty percent of their household income after expenses[6] and/or people who are "doubled up" or otherwise overcrowded.[7] Housing *instability* is not necessarily cured by stopping the eviction because obtaining benefits to cover the arrears may not address other underlying issues that contribute to housing instability.

1. Massive Scope of Homelessness and Housing Instability in NYC

Statistics paint a cold picture, but one that we must examine to understand the breadth and underlying causes of the epidemic of homelessness and housing instability faced by low-income people in NYC. In 2018, the U.S Department of Housing and Urban Development estimated that fourteen percent of the entire nation's homeless population lived in NYC.[8]

The number of people living in NYC shelters[9] has hovered around 60,000 each night since late 2014, and more than 20,000 of the people staying in our shelters every night are children.[10] The Coalition for the Homeless, an advocacy group in Manhattan that compiles and analyzes data from DSS, estimates that 133,284 different individuals spent at least one night in the NYC shelter system from July 1, 2017, through June 30, 2018.[11] As of June 2019, the average number of days people stay in the NYC shelter system is 447, or just shy of fifteen months.[12]

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[6] Using a similar definition, New York State Assemblyman Andrew Hevesi and State Senator Liz Krueger have introduced legislation to provide more robust shelter subsidies. The two representatives claim that 80,000 families are on the brink of homelessness across New York State. LIZ KRUEGER, INTRODUCER'S MEMORANDUM IN SUPPORT, S. 242-2375, 1st Sess., at 1 (N.Y. 2019). The four subpopulations we focus on frequently spend more than fifty percent of their incomes on rent.

[7] "Doubled-up" refers to individuals or families residing in the dwelling of another person or family, especially when the doubled-up family is not the leaseholder. The number of doubled-up people in NYC has reached epidemic levels, particularly for school-aged children. *See* INST. FOR CHILDREN, POVERTY & HOMELESSNESS, THE INVISIBLE MAJORITY: DOUBLED-UP STUDENTS IN NEW YORK CITY PUBLIC SCHOOLS (2015), https://perma.cc/5QLW-PX65.

[8] *See* U.S. DEP'T OF HOUS. & URBAN DEV., THE 2018 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 10, 18 (2018), https://perma.cc/2KPG-QFSA.

[9] We are only referring to adults and families with children in NYC's Department of Homeless Services ("DHS") and Human Resources Administration ("HRA") shelters. None of these statistics include runaway and homeless youth shelters, nor do they include people who are homeless and live on the street.

[10] COAL. FOR THE HOMELESS, NEW YORK CITY HOMELESS MUNICIPAL SHELTER POPULATION, 1983-PRESENT 12-14 (2019), https://perma.cc/RTF9-ZXKV.

[11] *Basic Facts About Homelessness: New York City*, COAL. FOR THE HOMELESS, https://perma.cc/JB7U-V36C (last visited Dec. 30, 2019).

[12] COAL. FOR THE HOMELESS, *supra* note 10, at 14.

NYC's Independent Budget Office examined homelessness data over a ten-year period from 2002 to 2012. During that time, over twenty percent of people who entered shelter cited domestic violence as the reason for seeking shelter, and around thirty percent of people entered shelter because they were evicted.[13] By early 2016, Crain's New York Business examined raw data from NYC and concluded that domestic violence had surpassed eviction as the leading cause and reason cited for shelter entry.[14] In October 2019, NYC Comptroller Scott Stringer released a report highlighting that domestic violence is now the most commonly cited reason for shelter entry, accounting for more than forty percent of all shelter entries in the fiscal year that ended June 30, 2018.[15]

Although the Bronx is the fourth most populous of the five boroughs of NYC,[16] it consistently has the highest number of people entering shelter.[17] Indeed, five of the top ten community districts in NYC with the highest rates of entry into shelter are located in the Bronx, and these ten community districts account for almost fifty percent of all families entering shelter.[18]

The Vera Institute reviewed homelessness data for families with children entering the shelter system and concluded that certain factors made shelter entry more likely. Specifically, Vera identified that seventy-seven percent of people in shelter included families who rely "heavily" on public assistance benefits in addition to work income.[19] Vera also highlighted DV and eviction as among the most prevalent proximate causes of shelter entry.[20] According to Steven Banks, the commissioner of DSS, twenty-

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[13] N.Y.C. INDEP. BUDGET OFFICE, THE RISING NUMBER OF HOMELESS FAMILIES IN NYC, 2002-2012: A LOOK AT WHY FAMILIES WERE GRANTED SHELTER, THE HOUSING THEY HAD LIVED IN & WHERE THEY CAME FROM 8-10 (2014), https://perma.cc/Z72M-S76H.

[14] Gerald Schifman & Rosa Goldensohn, *Domestic Violence Emerges as Economic Scourge and Primary Driver of Homelessness*, CRAIN'S N.Y. BUS. (Oct. 26, 2016, 12:00 AM), https://perma.cc/KR7C-S3NH.

[15] OFFICE OF THE N.Y.C. COMPTROLLER, HOUSING SURVIVORS 4 (2019), https://perma.cc/S4GG-F598.

[16] *QuickFacts,* U.S. CENSUS BUREAU, https://perma.cc/53P5-ZALS (last updated July 1, 2019).

[17] N.Y.C. INDEP. BUDGET OFFICE, *supra* note 13, at 1.

[18] NANCY SMITH ET AL., VERA INST. OF JUSTICE, UNDERSTANDING FAMILY HOMELESSNESS IN NEW YORK CITY § I, at 3 (2005), https://perma.cc/9XK9-RAYL.

[19] *Id.* at iv.

[20] *Id.*; *see* OFFICE OF CIVIL JUSTICE, N.Y.C. HUMAN RES. ADMIN., UNIVERSAL ACCESS TO LEGAL SERVICES: A REPORT ON YEAR ONE OF IMPLEMENTATION IN NEW YORK CITY 17 (2018), https://perma.cc/JH78-MQTP (finding that 11,424—or fifty percent—of the households who obtained counsel via UAC were in receipt of ongoing public benefits at the time when legal services were rendered).

three percent of shelter applicants in a six-month time period in 2013 reported that their public assistance case had closed or been reduced in the prior twelve months.[21]

Homelessness and housing instability[22] cause long-term injuries,[23] affecting education, health outcomes, and employment.[24] One out of ten students in NYC public schools lived in temporary housing in the 2016-2017 school year, which means that there were "more homeless students in New York City than the population of Albany."[25] Over twelve percent of NYC public school students will experience homelessness before their

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[21] Steven Banks, Comm'r of the N.Y.C. Human Res. Admin., Testimony at the New York State Senate Hearing Task Force on Social Service Delivery in New York City 9 (Oct. 7, 2015), https://perma.cc/M52C-YFBA.

[22] We do not discuss the financial costs of homelessness, nor do we highlight how rent subsidies and affordable housing result in cost savings to the taxpayer compared to housing families and individuals in our shelter system. The data unmistakably, unequivocally point to these conclusions. For example, in 2018, the average daily cost was $117.43 (or $3,522 per month) for adult-only shelters and $187.46 (or $5,623 per month) for family shelters. *See New York City (NYC) Department of Homeless Services (DHS) Financial & Service Indicators*, BARUCH COLL., https://perma.cc/L4FY-USE8 (last visited Dec. 30, 2019). Instead, we focus on the life consequences for people who are housing unstable or homeless.

[23] Matthew Desmond & Rachel Tolbert Kimbro, *Eviction's Fallout: Housing, Hardship, and Health*, 94 SOC. FORCES 295, 296-97, 316-19 (2015); Benard P. Dreyer, *A Shelter Is Not a Home: The Crisis of Family Homelessness in the United States*, PEDIATRICS, Nov. 2018, at 1-2.

[24] *See, e.g.*, John W. Ayers et al., *Novel Surveillance of Psychological Distress During the Great Recession*, 142 J. AFFECTIVE DISORDERS, Dec. 15, 2012, at 1 (mental health); Sarah Burgard et al., *Housing Instability and Health: Findings from the Michigan Recession and Recovery Study*, 75 SOC. SCI. & MED. 2215 (2012) (mental health); Thomas B. Cook & Mark S. Davis, *Assessing Legal Strains and Risk of Suicide Using Archived Court Data*, 42 SUICIDE & LIFE-THREATENING BEHAV. 495 (2012) (mental health); Margot B. Kushel et al., *Housing Instability and Food Insecurity as Barriers to Health Care Among Low-Income Americans*., 21 J. GEN. INTERNAL MED. 71 (2006) (health); Christine Ma et al., *Associations Between Housing Instability and Food Insecurity with Health Care Access in Low-Income Children*, 8 AMBULATORY PEDIATRICS 50 (2008) (health); Kristen W. Reid et al., *Association Between the Level of Housing Instability, Economic Standing and Health Care Access: A Meta-Regression*, 19 J. HEALTH CARE FOR POOR & UNDERSERVED 1212 (2008) (health); Sharon A. Salit et al., *Hospitalization Costs Associated with Homelessness in New York City*, 338 NEW ENGLAND J. MED. 1734 (1998) (health); Megan Sandel et al., *Unstable Housing and Caregiver and Child Health in Renter Families*, PEDIATRICS, Feb. 2018, at 1 (health); DANIEL FLAMING ET AL., ECON. ROUNDTABLE, WHERE WE SLEEP: COSTS OF HOUSING AND HOMELESSNESS IN LOS ANGELES (2009), https://perma.cc/G932-WEST (health and employment); INST. FOR CHILDREN, POVERTY & HOMELESSNESS, THE HIGH STAKES OF LOW WAGES: EMPLOYMENT AMONG NEW YORK CITY'S HOMELESS PARENTS (2013), https://perma.cc/3G8L-5Z78 (employment); *see also* Zachary Glendening & Marybeth Shinn, *Risk Models for Returns to Housing Instability Among Families Experiencing Homelessness*, 19 CITYSCAPE 309 (2017) (education and health); DW Gibson, *New York Spends $1.2 Billion a Year on Homelessness*, N.Y. MAG. (Mar. 20, 2017), https://perma.cc/T84S-TAPK (employment).

[25] Eliza Shapiro, *Homelessness in New York Public Schools Is at a Record High: 114,659 Students*, N.Y. TIMES (Oct. 15, 2018), https://perma.cc/VN7U-ZPMM.

fifth grade school year—and more than ten percent of these students started kindergarten in District 10 in the Bronx.[26] Young people who have been or are homeless are at increased risk for social and behavioral problems.[27]

2. Leading Drivers of Homelessness and Housing Instability in NYC

Various factors contribute to the high and rising rates of homelessness and housing instability in New York City. The National Law Center on Homelessness and Poverty reports that the leading causes of homelessness[28] in America are extremely low incomes and a lack of affordable housing.[29] In New York City, these factors, along with surges in population, lead to crowding.[30]

The Office of the New York City Comptroller has identified crowding trends as a precursor to rising homelessness.[31] Crowding is often identified within low-income families, and seventy percent of households that experience it are occupied by an immigrant head of household.[32] The U.S. Census Bureau has estimated that New York City's population increased by 2.7% since April 2010, which is an estimated increase of 223,615 residents,[33] and New York City's crowding rate is more than two-and-a-half times the national average.[34] Crowding may reflect an upward trend in local housing market rates.[35] The crowding phenomenon is usually attributed to displaced residents who find temporary housing among their

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[26] KATHRYN HILL & ZITSI MIRAKHUR, THE RESEARCH ALL. FOR N.Y.C. SCH., HOMELESSNESS IN NEW YORK CITY ELEMENTARY SCHOOLS: STUDENT EXPERIENCES & EDUCATOR PERSPECTIVES 5 (2019), https://perma.cc/BG3C-57WE.

[27] *See* Janette E. Herbers et al., *Trauma, Adversity, and Parent-Child Relationships Among Young Children Experiencing Homelessness*, 42 J. ABNORMAL CHILD PSYCHOL. 1167 (2014); INST. FOR CHILDREN, POVERTY & HOMELESSNESS, HOUSED WITHOUT STABILITY: THE CONTINUING CHALLENGES FACED BY FORMERLY HOMELESS STUDENTS (2019), https://perma.cc/AE5Z-CMN6.

[28] Homelessness here includes people that are street homeless or reside in homeless shelters.

[29] NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES 3 (2015), https://perma.cc/ZA2J-4FG4.

[30] Severe crowding is defined as housing units with more than 1.5 persons per room. OFFICE OF THE N.Y.C. COMPTROLLER, HIDDEN HOUSEHOLDS 2 (2015), https://perma.cc/8GW7-ZY78.

[31] *Id.* at 3, 11.

[32] *Id.* at 10.

[33] *Current Estimates of New York City's Population for July 2018*, N.Y.C. DEP'T OF CITY PLANNING, https://perma.cc/3RE6-UL9R (last visited Dec. 30, 2019).

[34] OFFICE OF THE N.Y.C. COMPTROLLER, *supra* note 30, at 5.

[35] *Id.* at 3; *see* LUCY BLOCK & BENJAMIN DULCHIN, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., HOW IS AFFORDABLE HOUSING THREATENED IN YOUR NEIGHBORHOOD? 2019 (2019),

collateral contacts until they exhaust their support networks and enter the shelter system.[36]

As overcrowding climbed, the number of homeless residents increased in lockstep.[37] Between 1994 and 2014, the NYC shelter populations increased by 115%.[38] Before 2005, New York City's leading efforts to combat homelessness relied on federally-funded subsidy programs such as Section 8 to move the homeless into stable, permanent housing, and between 1999 and 2005, one third of all available Section 8 vouchers assisted homeless families to move out of shelter.[39]

At the same time, between 2000 and 2012, NYC median rents rose by 75%, well ahead of the national median rent increase of 44%.[40] This period included a loss of 400,000 affordable housing units that rented for less than $1,000 monthly.[41] While rents continued to rise at approximately 3.9% annually, wages increased only 1.8% per annum between 2010 and 2017.[42]

Against this backdrop, in June 2004, Mayor Michael Bloomberg announced a plan to go into effect the following year that aimed to reduce New York City's homeless population by two-thirds over the next five years.[43] In 2005, Bloomberg removed homeless families from priority consideration to receive federally-funded vouchers through Section 8, eroding housing stability by eliminating the option of having a subsidy pegged to their actual incomes. Deputy Mayor Linda Gibbs, who served during the Bloomberg Administration, explained the reasoning behind the decision in a 2013 interview with the *New Yorker*. According to Gibbs, NYC "discontinued Section 8 priority because of its dwindling availability, and because we discovered that the chance of getting Section 8 was

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https://perma.cc/Q9S6-EASZ; *see generally* Jamie L. Davenport, *The Effect of Supply and Demand Factors on the Affordability of Rental Housing*, 11 PARK PLACE ECONOMIST 44 (2003).

[36] Rachel Holliday Smith, *Overcrowding, a Precursor to Homelessness, Is Increasing Citywide: Report*, DNAINFO (June 1, 2017, 8:29 AM), https://perma.cc/C8WL-K7RH.

[37] N.Y.C. DEP'T OF HOMELESS SERVS., TURNING THE TIDE ON HOMELESSNESS IN NEW YORK CITY 7-8 (2019), https://perma.cc/5A6A-K33L.

[38] *Id.* at v.

[39] GISELLE ROUTHIER, COAL. FOR THE HOMELESS, RECOVERING FROM THE LOST DECADE: PERMANENT RENT SUPPLEMENTS A POTENT TOOL FOR REDUCING HOMELESSNESS 2 (2017), https://perma.cc/78VQ-8FQF.

[40] OFFICE OF THE N.Y.C. COMPTROLLER, THE GROWING GAP: NEW YORK CITY'S HOUSING AFFORDABILITY CHALLENGE 1, 4-5 (2014), https://perma.cc/N7DF-WHV3.

[41] *Id.* at 1.

[42] STREETEASY, THE WIDENING GAP: RENTS AND WAGES IN NEW YORK CITY 1 (2017), https://perma.cc/S3ZU-R6AN.

[43] Press Release, Office of the Mayor of New York City, Mayor Michael R. Bloomberg Announces Citywide Campaign To End Chronic Homelessness (June 23, 2004), https://perma.cc/7LUD-FGZL.

operating as a perverse incentive, drawing people to seek shelter who otherwise would not have done so."[44]

Instead of prioritizing placement of homeless families in permanent housing or using Section 8, Bloomberg instituted the Housing Stability Plus program ("HSP"), which was usually tied to the receipt of cash public assistance benefits. Unlike Section 8, it was a temporary subsidy that would cease payments after five years.[45] When HSP was first introduced, the subsidy decreased year over year while the household's share increased year over year.[46] The program dissolved within three years, and a new subsidy called Advantage[47] replaced it.[48]

In changing course, the Bloomberg administration ignored the data: shelter-entry recidivism within five years of exiting shelter with a Section 8 voucher was only 12.5%.[49] Comparatively, 63.3% of Advantage program recipients who were formerly homeless returned to shelters.[50] By 2009, the number of NYC homeless families was 9% higher than in June 2004 and was 229% higher than the plan's intended outcome.[51]

Bloomberg's nearly ten-year-long plan to reduce homelessness has become known as the "Lost Decade."[52] Between 2004 and 2014, NYC administrators made policy decisions amidst economic changes that hurt housing stability for low-income New Yorkers.[53] Consequently, the period between 2005 and 2014 saw a nearly seventy percent increase in people residing in homeless shelters.[54]

A household is considered "rent burdened" if they pay more than thirty percent of their household income toward rent and "severely rent

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[44] Ian Frazer, *Hidden City*, NEW YORKER (Oct. 28, 2013), https://perma.cc/7P2W-PW9G.

[45] *See* FAMILY INDEP. ADMIN., N.Y.C. HUMAN RES. ADMIN., POLICY BULLETIN 05-24-ELI, INTRODUCTION OF THE HOUSING STABILITY PLUS PROGRAM (2005); FAMILY INDEP. ADMIN., N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE 05-43-ELI, HOUSING STABILITY PLUS PROGRAM (2005); FAMILY INDEP. ADMIN., N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE 07-04-ELI, HOUSING STABILITY PLUS PROGRAM (2007).

[46] *See* sources cited *supra* note 45.

[47] FAMILY INDEP. ADMIN., N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE 07-28-ELI, NEW RENTAL ASSISTANCE PROGRAMS FOR SHELTER RESIDENTS (2007).

[48] Kenny Schaeffer, *Bloomberg's Housing Policies a Failure*, METRO. COUNCIL ON HOUSING (Mar. 2012), https://perma.cc/GH9L-CNHN.

[49] ROUTHIER, *supra* note 39, at 4.

[50] *Id.*

[51] PATRICK MARKEE, COAL. FOR THE HOMELESS, FIVE YEARS LATER: THE FAILURE OF MAYOR BLOOMBERG'S FIVE-YEAR HOMELESS PLAN AND THE NEED TO REFORM NEW YORK CITY'S APPROACH TO HOMELESSNESS (2009), https://perma.cc/L4RZ-5X2P.

[52] See executive summary in ROUTHIER, *supra* note 39.

[53] N.Y.C. DEP'T OF HOMELESS SERVS., *supra* note 37, at iii-v.

[54] See executive summary in ROUTHIER, *supra* note 39.

burdened" if they pay more than fifty percent.[55] By 2016, households with income between $10,000 and $20,000 per year paid seventy-four percent of their income towards rent.[56] Put another way, the NYC minimum wage would need to be $35.21 for a wage earner to avoid spending more than thirty percent of their income on rent for a two-bedroom apartment at market rate.[57] Currently, New York State minimum wage is $11.80 an hour and NYC minimum wage is $15 per hour.[58]

3. Lack of Housing Stability Among Different Sub-Populations: A Closer Look

The fundamental drivers of homelessness and housing instability are, of course, having inadequate income and resources to pay rent coupled with a lack of affordable housing.[59] No amount of funding for UAC would address these issues. What we can do, however, is provide comprehensive public benefits assistance to the subpopulations we have identified that have greater housing instability. The populations, many of which overlap, are households who have one or more people: (a) with a serious illness or disability, (b) who are survivors of intimate partner or domestic violence, (c) who are noncitizens, and/or (d) who have people aged sixty and over. Research and studies, along with the lived experience of legal services advocates, highlight how these four groups grapple with housing instability at higher rates. Fortunately, as we discuss later in this article, public benefits advocates have considerable tools at our disposal to arrest and correct many of these underlying issues, but only if the City Council appropriates enough funding so that legal providers can hire an adequate number of public benefits advocates.

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[55] OFFICE OF THE N.Y.C. COMPTROLLER, NYC FOR ALL: THE HOUSING WE NEED 7 (2018), https://perma.cc/UG8P-V93Z.

[56] *Id.* at 2.

[57] NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 172 (2019), https://perma.cc/H59N-AXHZ.

[58] *New York State's Minimum Wage,* N.Y. STATE GOV'T, https://perma.cc/2W7M-VNRE (last visited Dec. 31, 2019).

[59] *See, e.g.*, MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY *passim* (2016); Matthew Desmond et al., *Forced Relocation and Residential Instability Among Urban Renters*, 89 SOC. SERV. REV. 227 (2015); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, PROTECT TENANTS, PREVENT HOMELESSNESS (2018), https://perma.cc/C8SU-83CK; NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES (2017), https://perma.cc/X3RN-Z9RK; *see also* JEAN CALTERONE WILLIAMS, A ROOF OVER MY HEAD *passim* (2d ed. 2016); OFFICE OF THE N.Y.C. COMPTROLLER, *supra* note 55.

a. Disability/Serious Illness

A 2009 study of chronically homeless adults in NYC revealed what advocates have known for years: eighty-four percent report mental health, substance use, or serious medical issues, only a small percentage receive public assistance, and less than half have health insurance.[60] The National Coalition for the Homeless goes even further, concluding that "[p]oor health is closely associated with homelessness" and that "serious illness or disability can start a downward spiral into homelessness, beginning with a lost job, depletion of savings to pay for care, and eventual eviction."[61]

From a practitioner's perspective, easily over thirty-three percent of our eviction cases include households containing someone who is disabled or has a serious illness.[62] Some of these households may receive benefits from the Social Security Administration, but most of our clients subsist on other public assistance benefits[63] and have unstable, low-paying jobs.[64] The 2018 report issued by DSS's Office of Civil Justice provides additional evidence: of the 7,924 households in the Bronx who received assistance from UAC in fiscal year 2018, almost half had household incomes below fifty percent of the federal poverty level.[65]

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[60] Aaron J. Levitt et al., *Health and Social Characteristics of Homeless Adults in Manhattan Who Were Chronically or Not Chronically Unsheltered*, 60 PSYCHIATRIC SERVS. 978, 980 (2009).

[61] NAT'L COAL. FOR THE HOMELESS, HEALTH CARE AND HOMELESSNESS (2006), https://perma.cc/JVA9-WQZP.

[62] From January 2018 through December 2019, Bronx Legal Services provided assistance on over 5,600 housing cases and over 3,600 public benefits cases (excluding unemployment insurance benefits ("UIB") and any ongoing financial benefit from the Social Security Administration, such as supplemental security income ("SSI"), social security disability insurance ("SSDI"), or social security retirement income ("SSRI")). Among the public benefits cases, over one-third of the cases included someone in the household who identifies as disabled or seriously ill and/or has income that comes from one or more of the following sources: SSI, SSDI, worker's compensation, or state disability insurance.

[63] *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 17 (showing that 11,424 households that received legal assistance through the Universal Access program also received ongoing public benefits).

[64] *See* OFFICE OF THE N.Y.C. COMPTROLLER *supra* note 55, at 6 (listing the top fifteen occupations of NYC's low- and very low-income workers).

[65] OFFICE OF CIVIL JUSTICE, *supra* note 20, at 16.

b. Domestic/Intimate Partner Violence

The direct connection between DV and housing instability is fairly apparent and thoroughly documented: DV survivors leave abusive partners and seek alternate forms of shelter.[66] Leaving a violent household for shelter is an extraordinarily difficult choice to make, particularly when you have children, but what about the people who stay?

In a 2016 report, fifty-five percent of Bronx DV survivors cited an inability to pay rent as among their greatest barriers to leaving their abusive partners.[67] For survivors who flee abuse, the resulting housing instability that they face after leaving goes largely unrecorded. Unable to access resources, DV survivors return to their abusive partners because living in the actual or perceived substandard conditions of the NYC shelter system, especially with children, seems worse than the abuse they left.

Most of our clients who report DV continue to live with their abusive partners or otherwise do not vacate their apartments. These families and individuals end up in Housing Court multiple times. Abusive partners limit survivors from attending necessary public assistance appointments to keep their cases open, forbid the survivor from receiving public assistance at all, or compel the survivor to receive assistance but forbid the survivor from revealing the identity or presence of the abusive partner in the household.

c. Noncitizens

With over one-third of our residents born outside of the United States,[68] NYC has thrived over the decades because of our diverse population. Unfortunately, noncitizens in our city are also disproportionately affected by housing instability. The Pratt Center for Community Development reports that eighty-two percent of noncitizens who earn less than half of the area median income pay more than thirty percent of their income to rent, and a stunning fifty percent must spend over half of their income each month just on rent.[69]

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[66] *See, e.g.*, Charlene K. Baker et al., *Domestic Violence, Housing Instability, and Homelessness: A Review of Housing Policies and Program Practices for Meeting the Needs of Survivors*, 15 AGGRESSION & VIOLENT BEHAV. 430 (2010).

[67] BRONX DOMESTIC VIOLENCE ROUNDTABLE & BRONX LEGAL SERVS., "MORE PEOPLE TO LISTEN": LEGAL AND SOCIAL SERVICE NEEDS OF BRONX COMMUNITIES AFFECTED BY INTIMATE PARTNER VIOLENCE 38 (2016), https://perma.cc/GA88-5D87.

[68] *See, e.g.*, N.Y.C. DEP'T OF CITY PLANNING, THE NEWEST NEW YORKERS: CHARACTERISTICS OF THE CITY'S FOREIGN-BORN POPULATION 2 (2013), https://perma.cc/25L5-69EU.

[69] PRATT CTR. FOR CMTY. DEV., CONFRONTING THE HOUSING SQUEEZE: CHALLENGES FACING IMMIGRANT TENANTS, AND WHAT NEW YORK CAN DO 2-3 (2008), https://perma.cc/4GMR-KMZP.

In today's political climate, xenophobic rhetoric and policies hostile to noncitizens are driving people into the shadows, causing financial strains that exacerbate housing instability.[70] The policy change that has the most direct connection to harming housing stability for noncitizens are the changes to the so-called "public charge" rule that the Trump administration proposed in October 2018.[71] The U.S. Department of Homeland Security ("DHS") published the final public charge rules changes in August 2019, and those new rules were scheduled to go into effect on October 15, 2019. As this article went to publication, many lawsuits are pending in federal courts challenging the legality of the new public charge rule.[72] Regardless, the mere proposal of the rule itself has affected noncitizens.[73]

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[70] *See, e.g.*, Anthony Advincula, *Immigrants Avoiding Medical, Other Benefits in Fear of New Public Charge Rule*, INQUIRER (Aug. 29, 2019, 12:21 AM), https://perma.cc/B2AS-EM3V; Helena Bottemiller Evich, *Immigrants, Fearing Trump Crackdown, Drop out of Nutrition Programs*, POLITICO (Sept. 3, 2018, 8:17 AM), https://perma.cc/EMT3-EFCM; Chloe Reichel, *The Potential Health Effects of the 'Public Charge' Immigration Rule*, JOURNALIST'S RESOURCE (Aug. 26, 2019), https://perma.cc/34QQ-L6BK; CLASP, PUBLIC CHARGE: A THREAT TO CHILDREN'S HEALTH & WELL-BEING (2018), https://perma.cc/D4JB-36PM; NAT'L HOUS. LAW PROJECT & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, TRUMP ADMINISTRATION'S PROPOSED "PUBLIC CHARGE" RULE (2018), https://perma.cc/V5VY-VMTS; *Impact of Public Charge on New York State Health Centers and Patients*, CMTY. HEALTH CARE ASS'N OF N.Y. STATE, https://perma.cc/R7U6-XGP7 (last visited Dec. 31, 2019).

[71] Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, and 248).

[72] *See* Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212, 213, 214, 245, and 248). The U.S. Supreme Court recently lifted the nationwide injunction issued by the Southern District of New York, which leaves only Illinois with a current stay in effect to delay DHS's implementation of the new public charge rules. Cook Cty. v. McAleenan, 2019 WL 5110267 (N.D. Ill. Oct. 14, 2019), *appeal docketed*, No. 19-3169 (7th Cir. 2019) (granting preliminary injunction preventing DHS from implementing new public charge rules in Illinois), *stay granted sub nom.* Wolf v. Cook Cty., 589 U.S. ___ (2020) (lifting the Illinois injunction); New York v. Dep't of Homeland Sec., 2019 WL 5100372 (S.D.N.Y. Oct. 11, 2019), *aff'd*, New York v. U.S. Dep't of Homeland Sec., No. 19 Civ. 7777 (GBD), 2019 WL 6498250 (2d Cir. Dec. 2, 2019), *rev'd sub nom.* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (lifting the nationwide injunction pending final resolution of case); Make the Rd. N.Y. v. Cuccinelli, No. 19 Civ. 7993 (GBD), 2019 WL 5589072 (S.D.N.Y. Oct. 11, 2019), *aff'd*, 2019 WL 6498283 (2d Cir. Dec. 2, 2019), *rev'd sub nom.* Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (same); *see* Casa De Maryland, Inc. v. Trump, No. PWG-19-2715, 2019 WL 5190689 (D. Md. Oct. 14, 2019); City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs., No. 19-CV-04717-PJH, 2019 WL 5100718 (N.D. Cal. Oct. 11, 2019), *modified*, 944 F.3d 773 (9th Cir. 2019); *see also Final Rule on Public Charge Ground of Inadmissibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://perma.cc/5BAB-5VZX (last updated Oct. 16, 2019).

[73] *See* sources cited *supra* note 70.

The public charge doctrine,[74] which has existed since the late 1800s, disfavors the receipt of public assistance benefits as the primary source of support for noncitizens.[75] The Trump administration proposed significant changes to the doctrine that would sweep hundreds of thousands of people potentially into the crosshairs of our immigration system if they receive public benefits.[76] While the rule has not yet gone into effect, we are already seeing the consequences: our clients are terrified to apply for or receive public benefits to subsist, much less to stop an eviction.[77]

DSS agrees, explaining that noncitizen NYC residents are being forced "to choose between public benefits support and potential future immigration consequences."[78] Attributing the decline to the news surrounding public charge rule changes, DSS reports that in just a few months' time and still *before* the rule changes have gone into effect, about 25,000 noncitizens have stopped receiving SNAP (food stamp) benefits.[79]

We can also look to history to see what may lie ahead for low-income noncitizens. The so-called welfare reform of the 1990s dramatically

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[74] *See* INA § 212(a)(4), 8 U.S.C. § 1182(a)(4) (2018).

[75] The application and interpretation of the public charge doctrine has largely been based on long-standing guidance published in 1999, referred to as the "1999 Field Guidance." Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (May 26, 1999).

[76] The exact number of noncitizens who would be affected is a matter of speculation. However, in its initial proposed rule from October 2017, DHS does explain that "approximately 20 percent of noncitizens who were lawful permanent residents at admission to the U.S., as well as noncitizens who were not lawful permanent residents at admission, received non-cash benefits, and approximately 2 percent of these populations receive cash benefits." Inadmissibility on Public Charge Grounds, 83 Fed. Reg. at 51,162. Additionally, DHS believes that the number of applicants subject to the public charge rules changes for adjustment of status in the 2016 fiscal year would have been 382,769 people. *Id.* at 51240 & n.708.

[77] Recognizing that the effect of public charge extends beyond just the noncitizen individuals, NYC estimates that 304,000 NYC residents "could be discouraged from participation in crucial public benefits programs simply because they are non-citizens or live with a noncitizen." N.Y.C. DEP'T OF SOC. SERVS., EXPANDING PUBLIC CHARGE INADMISSIBILITY: THE IMPACT ON IMMIGRANTS, HOUSEHOLDS, AND THE CITY OF NEW YORK 2 (2018), https://perma.cc/FQN7-SP5C. Another 75,000 NYC residents, including young people granted Deferred Action for Childhood Arrival, might forego public benefits out of fear, and as many as 400,000 NYC residents could be found inadmissible or unable to adjust their status due to other changes in the public charge doctrine, even when they do not and cannot receive public benefits. *Id.*; *see* Emily Baumgaertner, *Spooked by Trump Proposals, Immigrants Abandon Public Nutrition Service*s, N.Y. TIMES (Mar. 6, 2018), https://perma.cc/XM38-4W3X.

[78] N.Y.C. DEP'T OF SOC. SERVS., *supra* note 77, at 3.

[79] N.Y.C. DEP'T OF SOC. SERVS., FACT SHEET: SNAP ENROLLMENT TRENDS IN NEW YORK CITY 2 (2019), https://perma.cc/4XBC-PZWW; *see also* FISCAL POLICY INST., "ONLY WEALTHY IMMIGRANTS NEED APPLY": HOW A TRUMP RULE'S CHILLING EFFECT WILL HARM NEW YORK (2018), https://perma.cc/FYE9-T87U.

changed eligibility rules for noncitizens seeking federal public benefits.[80] When those changes were announced, noncitizen participation rates in subsistence public benefits plummeted—even in households that included both citizens and noncitizens—and housing, health, and nutrition outcomes declined.[81]

d. People Aged Sixty and Over

Older adults are experiencing housing instability in record numbers, leading to homelessness and forced entry into institutions.[82] Unfortunately, although seniors have experienced declines in poverty nationally, the poverty rate among older adults increased in NYC from 1990 to 2016.[83]

Over sixty-three percent of Bronx residents over the age of sixty are foreign-born,[84] and almost sixty percent of Bronx households speak a language other than English at home.[85] Of the 1.4 million people who live in the Bronx, fifteen percent are over age sixty and more than thirty percent live alone.[86] Their financial situation is dire: 29.94% of Bronx seniors live below 125% of the federal poverty level, and a staggering 46.76% live below 200% of the federal poverty level.[87] Some 34% of seniors in the

[80] Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") in 1996. Pub. L. No. 104-193, 110 Stat. 2105 (1996). PRWORA grafted immigration status requirements onto eligibility rules for federally funded public benefits. Eligibility for certain public benefits is limited to U.S. citizens and certain other "qualified aliens," some of whom have to have "qualified alien" status for a minimum period of five years. *See*, *e.g.*, 8 U.S.C. §§ 1611-15.

[81] *See* MICHAEL E. FIX & WENDY ZIMMERMANN, URBAN INST., ALL UNDER ONE ROOF: MIXED-STATUS FAMILIES IN AN ERA OF REFORM 4-7 (1999), https://perma.cc/D7ZH-9HJV; MICHAEL E. FIX & JEFFREY S. PASSEL, URBAN INST., TRENDS IN NONCITIZENS' AND CITIZENS' USE OF PUBLIC BENEFITS FOLLOWING WELFARE REFORM 1994–97, at 1-3 (1999), https://perma.cc/9G26-EPPE; RANDY CAPPS ET AL., URBAN INST., THE HEALTH AND WELL-BEING OF YOUNG CHILDREN OF IMMIGRANTS, at ix (2014) https://perma.cc/LNQ9-5PPJ.

[82] JENNIFER GOLDBERG ET AL., JUSTICE IN AGING, HOW TO PREVENT AND END HOMELESSNESS AMONG OLDER ADULTS 1-4 (2016), https://perma.cc/QC5Y-W9TD; *see* Toni Kamins, *The Distressing Math of NYC's Future Senior-Housing Need*, CITY LIMITS (Apr. 24, 2019), https://perma.cc/MGL8-7UVC.

[83] N.Y.C. DEP'T FOR THE AGING, ANNUAL PLAN SUMMARY 8 (2018), https://perma.cc/Y6ZQ-BWYQ.

[84] N.Y.C. DEP'T FOR THE AGING, PROFILE OF OLDER NEW YORKERS 15 (2017), https://perma.cc/FJ2W-BL38.

[85] U.S. CENSUS BUREAU, *supra* note 16.

[86] N.Y.C. DEP'T FOR THE AGING, *supra* note 84, at 15.

[87] *Id.* at 19.

Bronx receive SNAP benefits,[88] and 31% have self-care and mobility impairments—the highest percentage of any borough in NYC.[89] Older Americans who do not own their residence face even higher levels of housing instability, and the Bronx has the lowest rate of home ownership of any borough.[90] The average Medicare recipient paid $5,503 out-of-pocket in 2013.[91] For Medicare beneficiaries with incomes at or below the federal poverty level, four in ten spend more than twenty percent of their income on premiums and out-of-pocket medical expenses.[92]

B. Current Funding for Public Benefits Work

Public benefits teams at legal services agencies rarely receive any dedicated funding.[93] The minimal funding that public benefits teams do

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[88] *Id.* at 15. The Trump administration has announced changes in determining eligibility for SNAP benefits. *See* Revision of Categorical Eligibility in the Supplemental Nutrition Assistance Program (SNAP), 84 Fed. Reg. 35,570 (Jul. 24, 2019) (to be codified at 7 C.F.R. pt. 273). These changes threaten subsistence nutrition benefits for hundreds of thousands of people and are likely to disproportionately affect SNAP benefits for older Americans. *Id.* at 35,576 ("[I]t has been determined that there is a potential for civil rights impact to result if the proposed action is implemented because more elderly individuals may not otherwise meet the SNAP eligibility requirements.").

[89] N.Y.C. DEP'T FOR THE AGING, *supra* note 84, at 15, 31, 47, 63, 79; *see* N.Y.C. DEP'T FOR THE AGING, SERVICES SNAPSHOT (2018), https://perma.cc/83QG-T9TZ.

[90] Twenty-two percent of Bronx residences are owner-occupied, compared to forty-four percent in Queens, thirty percent in Brooklyn, and seventy percent in Staten Island. U.S. CENSUS BUREAU, *supra* note 16; *see* NYU FURMAN CENTER, STATE OF NEW YORK CITY'S HOUSING AND NEIGHBORHOODS IN 2015, at 48 (2015), https://perma.cc/Q4U6-T8GK.

[91] Louise Norris, *How Much Does the Average Medicare Recipient Pay Out of Pocket for Medical Expenses?*, MEDICARERESOURCES.ORG (May 2, 2019), https://perma.cc/C873-G5GY; *see* Jennifer Molinsky & Whitney Airgood-Obrycki, *Older Adults Increasingly Face Housing Affordability Challenges*, JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIVERSITY (Sept. 21, 2018), https://perma.cc/GG3S-249Y.

[92] CATHY SCHOEN ET AL., THE COMMONWEALTH FUND, MEDICARE BENEFICIARIES' HIGH OUT-OF-POCKET COSTS: COST BURDENS BY INCOME AND HEALTH STATUS 4 (2017), https://perma.cc/46ZD-CKJH.

[93] For example, LSNYC is the largest provider of free civil legal services in the nation, with an annual budget of $100 million. Less than one percent of our grants are specifically tied to assisting clients increase, retain, or obtain cash public assistance, SNAP, and other subsistence benefits run by DSS. NYC's budget also underscores the lack of funding that is specifically for legal services organizations to advocate for state or city welfare benefits. With a budget now in excess of $92 billion, NYC gave grants to legal services organizations last year to help on a wide variety of critical civil legal issues: immigration, employment, family/domestic violence, foreclosure, homelessness prevention, prisoners' rights, child welfare, elder law, and other needs. *See* CITY COUNCIL OF THE CITY OF NEW YORK, FISCAL YEAR 2020 ADOPTED EXPENSE BUDGET ADJUSTMENT SUMMARY/SCHEDULE C (2019), https://perma.cc/HR6R-RPR8; OFFICE OF CIVIL JUSTICE, N.Y.C. HUMAN RES. ADMIN., ANNUAL REPORT (2018), https://perma.cc/A2KG-4DYY; *see also* ALAN W. HOUSEMAN & ELISA MINOFF, PUBLIC WELFARE FOUND., THE ANTI-POVERTY EFFECTS OF CIVIL LEGAL AID

receive is invariably from a foundation or private donor for a specific reason, such as helping seniors with health benefits, and is not from government grants, which tend to be more stable and fund projects over multiple years.

Why isn't there funding for public benefits work? It isn't due to lack of need. The overwhelming percentage of our clients rely in whole or in part on public benefits at some point in their lives, and it's also a common thread between and among the different work that civil legal services agencies provide—from foreclosure to family law to immigration.[94] We have reached the conclusion that the lack of dedicated funding for public benefits work is for two main reasons: (1) welfare benefits are demonized and so are the people who receive them[95] and (2) government funders do not want to fund legal services agencies who will use the funding to appeal and challenge their systems.[96]

Bronx Legal Services has the largest single Public Benefits Unit in the state. Our work is generously supported, in part, by the New York Bar Foundation and the Venable Foundation. Without this funding, we would doubtlessly face shortfalls in our budget. However, like most legal services organizations, the majority of the funding for our public benefits works comes from flexible funding streams that are general programmatic grants that are in short supply. These funding sources include New York State's Interest on Lawyers' Account (IOLA),[97] NYS Civil Legal Services funding,[98] and Legal Services Corporation funding.[99]

28-31 (2014), https://perma.cc/2TV9-QSED (describing the importance of public benefits advocacy in civil legal services work, despite the lack of recognition and grants).

[94] For the 2017-2018 state fiscal year, LSNYC handled over 24,000 individual cases, including 5,618 "income maintenance" cases, which include cash welfare, SNAP, WIC, and different Social Security Administration benefits like SSI. *See* LEGAL SERVICES NYC, OVERVIEW OF ACHIEVEMENTS, 2017-2018, at 2 (2018), https://perma.cc/V8SK-DJ7W. Over ninety percent of our clients receive public benefits of some kind in the household.

[95] To get some perspective, the average amount of monthly cash welfare benefits received in NYC in May 2019 was a paltry $382.08. N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, TEMPORARY AND DISABILITY ASSISTANCE STATISTICS 23 (2019), https://perma.cc/YF7G-WJ8L. Additionally, sixty-three percent of people who receive cash welfare benefits only receive assistance for twelve months or less. *Time Spent in Government Programs*, U.S. CENSUS BUREAU, https://perma.cc/84PJ-L962 (last visited Jan. 1, 2020).

[96] We are not suggesting that DSS shares this view, but OCJ administers the UAC grants, among many other grants, for legal services providers. *Legal Assistance*, N.Y.C. HUMAN RES. ADMIN., https://perma.cc/U5PJ-XJDF (last visited Jan. 1, 2020).

[97] *IOLA Fund*, N.Y. STATE GOV'T, https://perma.cc/W6VJ-FPC5 (last visited Jan. 1, 2020).

[98] *Justice for All - Strategic Action Plan*, N.Y. STATE UNIFIED COURT SYS., https://perma.cc/SGG4-R85T (last visited Jan. 1, 2020).

[99] *LSC Funding*, LEGAL SERVS. CORP., https://perma.cc/T4CK-DLRM (last visited Jan. 1, 2020).

II. UNIVERSAL ACCESS TO COUNSEL IN HOUSING COURT: HISTORY & IMPLEMENTATION

A. Organizers Unite: Legislation Behind UAC

In March 2014, a piece of local legislation called Intro 214 was introduced to the NYC Council that intended to guarantee legal representation to all low-income tenants in NYC facing eviction in Housing Court and New York City Housing Authority ("NYCHA") administrative proceedings.[100] This landmark legislation did not happen in a vacuum.

For decades, tenant organizers built movements around tenant power and access to justice.[101] Community Action for Safe Apartments ("CASA"), an organizer-driven agency in the Bronx, spent years shining a light on the injustices faced by tenants in Housing Court. In 2014, when NYC Council Members Mark Levine and Vanessa Gibson pushed Intro 214 ahead, tenant organizers galvanized.[102] Recognizing that this legislation needed to be grounded in a movement, a group of veteran tenant organizers created the Right to Counsel NYC Coalition ("RTC Coalition").[103]

Two years later, the RTC Coalition had laid the groundwork[104] to build support for a right to counsel in eviction cases, creating "a veto-proof majority of the City Council, as well as the support of key stakeholders that included the City Bar, Chief Judge of the New York Courts, City Comptroller, and Borough Presidents."[105] The RTC Coalition had done extensive outreach and education, collected signatures, and used all kinds of media to build tenant power and rally around a right to counsel.[106] After more than three years of hearings and negotiations, on August 11,

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[100] New York, N.Y., Ordinance 0214-2014 (Aug. 11, 2017) (codified at N.Y.C. ADMIN. CODE §§ 26-1301 to -1305).

[101] *See generally* Michael McKee, *A History of Tenant Organizing*, *in* TENANTS & LANDLORDS: NOT A LOVE STORY, loc. 56-149 (Emily Jane Goodman & Edward Acton, eds., 2019) (ebook).

[102] *See, e.g.*, Luca Marzorati, *Council Members Push for Housing Counsel, Citing Garner*, POLITICO (Dec. 5, 2014), https://perma.cc/SP2Q-C7T7; RIGHT TO COUNSEL NYC COALITION, HOUSING JUSTICE: WHAT THE EXPERTS ARE SAYING (2014), https://perma.cc/V3WY-E3SY.

[103] RIGHT TO COUNSEL NYC, LESSONS LEARNED FROM NYC'S RIGHT TO COUNSEL CAMPAIGN (2017), https://perma.cc/PA2F-7CRR.

[104] *See, e.g.*, David Cruz, *Comptroller Stringer, Outside Bronx Housing Court, Backs Right to Counsel Bill*, NORWOOD NEWS (Feb. 4, 2015), https://perma.cc/G8LE-2D72.

[105] RIGHT TO COUNSEL NYC, *supra* note 103, at 2.

[106] *See*, *e.g.*, Steven Wishnia, *NYC Council Kicks Off Hearings on Free Counsel for Poor Tenants*, GOTHAMIST (Sep. 27, 2016, 1:01 PM), https://perma.cc/7CHH-R22B.

2017, this bill was signed into law by Mayor Bill de Blasio, adding Chapter 13 to Title 26 of the Administrative Code of the City of New York, commonly known as Universal Access to Counsel.[107]

The new law requires that the Office of Civil Justice ("OCJ"), which was created in June 2015 as part of DSS with the objective of overseeing and monitoring city-supported civil legal services,[108] establish a program that provides full representation to all tenants in housing court who have a gross household income below 200% of the federal poverty guidelines. Tenants with gross household income above the 200% limit are not guaranteed full representation, but the law establishes that they do qualify for a one-time, individualized legal consultation in connection with their eviction proceedings. The law establishes a deadline of July 2022 for OCJ to fully implement the program.[109]

The poverty levels for the forty-eight contiguous states and the District of Columbia in 2020 are as follows:[110]

Family Size	100%	200%
1	$12,760	$25,520
2	$17,240	$34,480
3	$21,720	$43,440
4	$26,200	$52,400
5	$30,680	$61,360
6	$35,160	$70,320

[107] Press Release, Office of the Mayor of New York City, Mayor de Blasio Signs Legislation to Provide Low-Income New Yorkers with Access to Counsel for Wrongful Evictions (Aug. 11, 2017), https://perma.cc/NA3H-DT4G; *see* Amanda Tukaj, *City Council Passes 'Right to Counsel' for Low-Income Tenants in Housing Court*, GOTHAM GAZETTE (July 21, 2017), https://perma.cc/A2RW-969Z. The organizers who led the movement and worked tirelessly for change call this legislation "right to counsel," to stress that tenants' having counsel in an eviction case is a fundamental need that should not face erosion or elimination when the political winds change. We know how critical it is to have counsel in eviction proceedings so that tenants have an equal voice in those cases. However, OCJ and the City Council usually refer to it as UAC and the name of the grant is also UAC, which is why we primarily use "UAC" in this article.

[108] OFFICE OF CIVIL JUSTICE, N.Y.C. HUMAN RES. ADMIN., 2017 ANNUAL REPORT AND STRATEGIC PLAN 1 (2017), https://perma.cc/VKL2-AZF9.

[109] N.Y.C. ADMIN. CODE § 26-1302 (2019).

[110] The 2019 poverty guidelines are in effect as of January 15, 2020. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., U.S. FEDERAL POVERTY GUIDELINES USED TO DETERMINE FINANCIAL ELIGIBILITY FOR CERTAIN FEDERAL PROGRAMS (2020), https://perma.cc/9C47-KD2W; Annual Update of the HHS Poverty Guidelines, 85 Fed. Reg. 3060 (Jan. 17, 2020).

7	$39,640	$79,280
8	$44,120	$88,240
Each Additional Family Member	+$4,480	+$8,960

B. Implementation

In order to meet its obligation under the new law, OCJ has contracted with twenty non-profit civil legal services providers throughout the five boroughs of NYC.[111] Through these organizations, OCJ has been phasing in Universal Access by designating particular ZIP codes in which tenants will be guaranteed access to counsel in eviction proceedings. Currently in its second year of implementation, Universal Access applies to twenty-five ZIP codes throughout New York City:[112]

Bronx	Brooklyn	Manhattan	Queens	Staten Island
10457[113]	11216	10025	11373	10302
10462	11221	10026	11385	10303
10467	11225	10027	11433	10310
10468	11226	10029	11434	10314
10453	11207	10031 & 10034	11691	

These ZIP codes were selected based on shelter entry rates, volume of eviction proceedings, the existence of rent-regulated housing, and existing service areas of legal services organizations.[114]

To fund the first phase of the implementation, OCJ increased its budget by $15 million, pushing its total investment in tenant legal services to $77 million in fiscal year ("FY") 2018.[115] That number will grow to an

[111] *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 8.

[112] *See Universal Access to Legal Services*, N.Y.C. HUMAN RES. ADMIN., https://perma.cc/6ZTW-2NDC (last visited Feb. 11, 2020).

[113] ZIP code 10457 in the Bronx had the largest number of households and individuals served of any other ZIP code in NYC. *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 28-36.

[114] *See* OFFICE OF CIVIL JUSTICE, *supra* note 108, at 52.

[115] *See* OFFICE OF CIVIL JUSTICE, *supra* note 108, at 1, 53.

estimated $93 million in FY[116] 2019 before reaching an estimated $155 million by the end of the rollout in FY 2022.[117]

C. UAC as Implemented Is a Partial Solution

UAC has produced real change for low-income tenants facing eviction. While around one percent of tenants were represented in New York City Housing Courts in 2013,[118] almost fifty-six percent of tenants living in the target ZIP codes received representation during their eviction proceedings from April 1, 2018, to June 30, 2018.[119] OCJ reports that in FY 2018, eighty-four percent of households represented by one of the OCJ legal services providers were able to remain in their homes.[120] Evictions dropped by twenty-seven percent from 2013 to 2017,[121] and ninety percent of Bronx tenants represented by a UAC provider stayed in their homes at the conclusion of the case.[122]

D. What Eviction Prevention Work Looks Like

The number of Housing Court cases in New York City each year is staggering. There were 234,423 Notices of Petition filed in NYC Housing Courts in 2018 and another 101,041 filed in the first six months of 2019.[123]

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[116] NYC's fiscal year runs from July 1 to June 30. *New York City Budget Cycle*, N.Y.C. MAYOR'S OFFICE OF MGMT. & BUDGET, https://perma.cc/4SM5-Y33W (last visited Jan. 1, 2020).

[117] *See* OFFICE OF CIVIL JUSTICE, *supra* note 108, at 53.

[118] *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 4.

[119] *Id.* Furthermore, from April to June 2018, thirty percent of tenants in Housing Court had counsel, and an additional four percent of tenants received legal advice or assistance via OCJ's legal programs. *Id.*

[120] *Id.* at 2.

[121] *See id.* at 7-8.

[122] *See id.* at 20.

[123] There are thirteen terms per year. In 2019, terms one through six cover January 2, 2019, through June 16, 2019. *See generally* CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 1-3 (2018), https://perma.cc/UM5M-Z4AF; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 4-6 (2018), https://perma.cc/E9EZ-WAGF; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 7-9 (2018), https://perma.cc/9P3Z-B8VA; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 10-13 (2018), https://perma.cc/EW67-VAJH; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 1-3 (2019), https://perma.cc/46NZ-QKUB; CIVIL COURT OF THE CITY OF N.Y., CASELOAD ACTIVITY REPORT FOR TERMS 4-6 (2019), https://perma.cc/NA9V-F4WB (total number of Notices of Petition Filed in NYC for 2018 established by adding together total number of Notices of Petition Filed for NYC from 2018 Caseload Activity Reports for terms 1-13; total number of Notices of Petition Filed in first six months of 2019 established by adding together total number of Notices of Petition Filed for NYC from 2019 Caseload Activity Reports for terms 1-6).

In an effort to efficiently capture eligible tenants during the rollout, all covered eviction proceedings are assigned to a specific courtroom and judge in each Housing Court.[124] Attorneys from contracted organizations and sometimes DSS staff are on site, prepared to meet with tenants on the day of their first court appearance and evaluate them for eligibility. With only minutes to meet with a new client and evaluate the merits of their case, it is standard practice to adjourn Housing Court cases to the next available court date, which can be days to weeks away.[125] Cases may be adjourned multiple times to allow the landlord and tenant to reach a settlement through their attorneys. When the parties cannot settle the matter, the case is sent to a trial before a different Housing Court judge than the one who was hearing the matter for purposes of settling the case.[126]

What happens between these court dates may vary widely between organizations and even between each individual attorney. Assuming the case is based on nonpayment of rent,[127] there is a very high likelihood that this time is spent evaluating the client for an emergency rental assistance grant, which is intended to satisfy the outstanding arrears at issue in a particular eviction proceeding and thus end the eviction case. The extent to which a tenant receives assistance in this process will also vary between organizations and attorneys.

E. UAC as a Civil Gideon*?*

For years, advocates, bar associations, academics, jurists and others have fought for the right to counsel that exists for people in criminal proceedings to be extended to people in certain essential civil proceedings.[128]

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[124] *See Universal Access to Legal Services*, *supra* note 112; NYU FURMAN CTR., IMPLEMENTING NEW YORK CITY'S UNIVERSAL ACCESS TO COUNSEL PROGRAM: LESSONS FOR OTHER JURISDICTIONS 7-8 (2018), https://perma.cc/5CWD-CG3U.

[125] *See* NYU FURMAN CTR., *supra* note 124, at 13-16; *see also* Shuai Hao, *In the Bronx, the City's Busiest Housing Court Struggles to Serve Tenants and Landlords*, INK.NYC (Oct. 20, 2018), https://perma.cc/5GC7-RSUT.

[126] *See* N.Y.C. BAR ASS'N & N.Y.C. CIVIL COURT, A TENANT'S GUIDE TO THE NEW YORK CITY HOUSING COURT 11 (2006), https://perma.cc/VP9K-WC55; *see generally New York City Housing Court*: *Resolution Part,* N.Y. STATE UNIFIED COURT SYS., https://perma.cc/SC7X-A8S3 (last visited Jan. 1, 2020).

[127] In 2017, 87.6% of the eviction cases filed in the Housing Court in New York City were based on nonpayment of rent and 12.4% were holdover proceedings. OFFICE OF CIVIL JUSTICE, *supra* note 108, at 18-19. Holdover proceedings are eviction proceedings based on something other than outstanding rent, such as violation of the terms of the lease or remaining in possession of the apartment after the end of the landlord tenant relationship.

[128] *See* Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel is Most Needed*, 37 FORDHAM URB. L.J. 37, 38-44 (2010); *see also* Tonya L. Brito et al., *What We Know and Need to Know About Civil* Gideon, 67 S.C. L. REV. 223 (2016); Earl Johnson Jr., *50 Years of* Gideon*, 47 Years Working Toward a "Civil* Gideon*,"* 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 47 (2013); Robert J. Derocher,

The movement has largely become known as "Civil *Gideon*."[129] The fundamental difficulties that lower income people face in accessing justice without counsel may only be remediated by providing adequate, free representation. We have highlighted the inequity when the proceedings involve litigants that usually have their own counsel (such as landlords) or a government actor that has institutional processes in place to represent the government's interests. We have even done the gum-shoe detective work to prove that an investment in adequate counsel for low-income people ends up saving the government money.[130]

In 2017, on the shoulders of countless advocates who have demanded Civil *Gideon* over decades and at the peak of NYC's homelessness crisis, organizers seized the moment and achieved what had seemed like an unattainable pipe dream: the NYC Council passed legislation creating a right to counsel for all low-income people facing eviction in NYC.[131]

Bronx Legal Services is part of Legal Services NYC ("LSNYC"), one of only two legal providers in NYC that has UAC contracts in every NYC borough. With our reach into all five boroughs, we have a unique perspective on lessons learned thus far about how to implement a successful UAC program for low-income people facing eviction.

To date, UAC funding has not been adequate to cover the actual costs of providing representation to low-income people facing eviction. With the limited funding given, providers have (rightfully) prioritized hiring housing attorneys, leaving no funds available to cover the personnel costs

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Access to Justice: Is Civil Gideon *a Piece of the Puzzle?*, B. LEADER MAG., July-Aug. 2008, https://perma.cc/87CD-CQY3; Douglas Grant, *Liberals Abandoned Civil Legal Aid. Now They Need to Bring it Back.*, SLATE (Oct. 12, 2018, 4:33 PM), https://perma.cc/KXM2-F5ZS; Lucas Guttentag & Ahilan Arulanantham, *Extending the Promise of* Gideon*: Immigration, Deportation, and the Right to Counsel*, HUM. RTS. MAG., Oct. 1, 2013, https://perma.cc/R5MD-2JA5; Nina Schuyler, *The Civil* Gideon *Movement: Justice for All?*, S.F. ATT'Y, Summer 2008, at 14; Editorial, *Better Access to Legal Representation is Crucial – Even in Civil Cases*, L.A. TIMES (Apr. 20, 2019, 3:05 AM), https://perma.cc/4KZN-4FHK.

[129] While *Gideon* only applied to criminal cases, *see* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that defendants in criminal state court proceedings have a right to counsel grounded in our federal constitution), the Supreme Court expanded *Gideon* in very limited circumstances to other quasi-criminal proceedings, *see, e.g.*, *In re* Gault, 387 U.S. 1 (1967) (holding that juveniles in delinquency cases have a right to counsel because they have a "liberty interest" at stake). *See also* sources cited *supra* notes 100-109 and accompanying text.

[130] *See, e.g.*, Darryl Bloodworth, *Civil Legal Aid Breaks the Cycle of Poverty, Benefits Taxpayers*, ORLANDO SENTINEL (Sep. 18, 2015), https://perma.cc/JZ3F-XXM7; *see also* PERMANENT COMM'N ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 7-8 (2018), https://perma.cc/7TSN-KWPF.

[131] The legislation defines "income-eligible" as households with gross incomes that are equal to or less than 200% of the federal poverty level. N.Y.C. ADMIN. CODE § 26-1301 (2019); *see also supra* note 1 and accompanying text.

of the paralegal advocates,[132] whose work both directly prevents the evictions and helps create longer-term stability. LSNYC and other providers have largely shouldered those additional costs, but in order for UAC to be a sustainable model, the funding needs to include adequate monies to staff UAC with benefits paralegals. This is analogous to the funding provided to comply with *Gideon*'s right-to-counsel promise in criminal cases: the government can't provide just enough funding to cover the personnel costs of the defense attorneys; it must also cover other costs, such as paralegals, investigators, process servers, training/trainers, office managers, paper clips, staplers, copy machines, rent, etc.[133] The same should be true of any successful "civil *Gideon*" UAC model.

We should already have learned these lessons. We have seen public defenders across the country work under impossible conditions, with extraordinary caseloads and inadequate staffing.[134] When New York recognized that the promise of *Gideon* could not be meaningfully kept when public defenders are overworked and under-supported, the state took the extraordinary step of creating case caps for public defenders in NYC. Steven Banks, who is now the Commissioner of NYC DSS but at the time was the Attorney-in-Chief of The Legal Aid Society, praised the case caps because defendants would now "be represented by a lawyer with an ap-

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[132] *See* Transcript of Public Hearing Before Office of Civil Justice on OCJ's Universal Access to Legal Counsel Program 35 (Nov. 15, 2018), https://perma.cc/Y2JN-PC7W (statement of Jeanette Cepeda, union member with Legal Services Staff Association and housing staff attorney at Brooklyn Legal Services); *see generally* Joint Testimony of Unionized Legal Services Workers on the NYC Office of Civil Justice's Programs to Provide Universal Access to Legal Services for Tenants Facing Eviction (Nov. 15, 2018), https://perma.cc/FYE8-AVHA.

[133] *See, e.g., Model Contract for Public Defense Services (Black Letter)*, National Legal Aid & Defender Association, https://perma.cc/QMN8-6TDF (last visited Jan. 1, 2020) (discussing the need for adequate support staff at Section VII.F); *see also* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance after* Gideon v. Wainwright, 122 YALE L.J. 2150, 2160-71 (2013); AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 10-11 (2004), https://perma.cc/7FJS-C22C; U.S. DEP'T. OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES 16-18 (2000), https://perma.cc/G3RK-EJEL.

[134] *See* John H. Blume & Sheri Lynn Johnson, Gideon *Exceptionalism?*, 122 YALE L.J. 2126, 2141-44 (2013); Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676, 2680-85 (2013); Margaret A. Costello, *Fulfilling the Unfulfilled Promise of* Gideon*: Litigation as a Viable Strategic Tool*, 99 IOWA L. REV. 1951, 1956-57 (2014); AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 133, at 10-11; *see generally* Eyal Press, *Keeping* Gideon*'s Promise*, NATION (Mar. 16, 2006), https://perma.cc/RTQ3-TWVB; Nikita Mary Singareddy, *Failing* Gideon*: An Indigent Defense System in Crisis*, GENERATION PROGRESS (Aug. 11, 2015), https://perma.cc/FT4G-8EVD.

propriate caseload who can provide the highest quality of representation."[135] Public defenders have lauded the implementation of case caps while also pointing out that funding must be increased to help with other costs of public defense, such as investigators.[136]

Civil legal service providers have seen public defenders stretched too thin, with burgeoning caseloads and inadequate support. We should understand that these same issues will plague any version of Civil *Gideon*, including UAC, that myopically discounts the minimum staffing providers require. We need OCJ, which is part of DSS and under now-Commissioner Banks, to recognize that funding for the ground-breaking UAC legislation needs to be sufficient to, in Commissioner Banks' words, "provide the highest quality of representation" that our clients deserve. That necessarily includes funding for public benefits advocates.[137]

F. Public Benefits Resolve Most Nonpayment Cases in Housing Court

Around eighty-five percent of residential NYC Housing Court eviction cases are nonpayment of rent cases.[138] The Bronx, with the fourth-highest population[139] among the five NYC boroughs, consistently has the most eviction cases filed as well as the highest number of evictions.[140] Of the residential eviction cases borough in the Bronx, over ninety percent are nonpayment cases.[141]

The attorneys from LSNYC and other providers who represent tenants facing eviction are the lynchpin of UAC's success. These attorneys represent tenants in Housing Court, raise defenses, ensure repairs, vacate judgments, challenge illegal rents, fight illegal evictions, and more. Without UAC funding for adequate numbers of housing attorneys, there can be no justice and no mention of Civil *Gideon*.

However, in most cases, a public benefits paralegal obtains the monies that end the nonpayment case. Among other things, public benefits paralegals obtain rent arrears grants[142] ("one-shot deals") and obtain or

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[135] John Eligon, *State Law to Cap Public Defenders' Caseloads, but Only in the City*, N.Y. TIMES (Apr. 5, 2009), https://perma.cc/Y44X-6BPM.

[136] *See*, *e.g.*, MELISSA LABRIOLA ET AL., CTR. FOR COURT INNOVATION, INDIGENT REFORMS IN BROOKLYN, NEW YORK: AN ANALYSIS OF MANDATORY CASE CAPS AND ATTORNEY WORKLOAD, at v, ix (2015), https://perma.cc/D7CV-3BDW.

[137] *See* Latonia Haney Keith, *Poverty, the Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 88 (2017) (discussing different roles paralegals and other advocates could and should play in improving access to justice).

[138] *See* OFFICE OF CIVIL JUSTICE, *supra* note 20, at 6.

[139] *See QuickFacts*, *supra* note 16.

[140] *See* OFFICE OF CIVIL JUSTICE, *supra* note 93, at 21.

[141] *See* OFFICE OF CIVIL JUSTICE, *supra* note 93, at 21-22.

[142] *See*, *e.g.*, N.Y. SOC. SERV. LAW §§ 106, 303, 350-j (McKinney 2019), N.Y. COMP. CODES R. & REGS. tit. 18 §§ 352.3, 352.7, 370.3, 372, 397, 423.2 (2019).

apply for rent subsidies such as the Family Homelessness and Eviction Prevention Supplement from HRA.[143] Despite never stepping foot in Housing Court, public benefits paralegals play a direct, measurable role in resolving the eviction cases by obtaining public assistance grants to pay the arrears from DSS.

But what if we did more than end the housing case? What if we had enough funding to provide comprehensive benefits assistance and representation to families and individuals struggling with underlying housing stability issues? We can and we must, and it will cost only as much as the additional funding we already need and already should be receiving to hire public benefits paralegals or advocates to do the bread-and-butter anti-eviction work.

G. Our Proposed Model

Our model looks at anti-eviction work within the context of larger trends facing low-income Bronx residents: punitive and complex safety net systems, stagnant wages, lack of affordable housing, and displacement through gentrification. We know that integrated models of service delivery like medical-legal partnerships[144] provide opportunities for legal service providers to think holistically about the multitude of civil legal issues that low income clients face.

Eviction is one of these civil legal issues, but it is often a symptom of other issues just below the surface, such as unemployment or inability to access benefits due to immigration status, medical costs, or domestic violence. Quality, comprehensive public benefits advocacy can stabilize people over a longer period of time when the advocate has the opportunity and training to assess and intervene on the full spectrum of public benefits issues: food insecurity, issues with public health insurance coverage, obtaining personal care services at home for disabled household members, waivers of public assistance rules for survivors of DV, eliminating Medicare premiums, ensuring all members of the household are receiving maximum benefits, and more. Housing attorneys do not have the time or training to address these different public benefits issues, and the UAC grants have not been sufficient to date to cover the personnel costs of public benefits paralegals—whether "comprehensive" or otherwise. Our proposed model is simple: UAC must include sufficient funding to hire an adequate number of public benefits paralegals so that we can provide the

[143] *See generally* N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE NO. 17-26-ELI, INTRODUCTION TO THE FAMILY HOMELESSNESS AND EVICTION PREVENTION SUPPLEMENT (FHEPS) (2017), https://perma.cc/76FL-KU9R.

[144] *The Need*, NAT'L CTR. FOR MED.-LEGAL P'SHIP, https://perma.cc/A4MG-LPL6 (last visited Jan. 2, 2020).

comprehensive, holistic public benefits advocacy that both meets the immediate need of obtaining arrears to stop the eviction and addresses a wide array of economic and health issues that cause housing instability.

This comprehensive public benefits anti-eviction model grows out of our Public Benefits Unit, where we have typically partnered with our Housing Unit to resolve the immediate housing crisis faced by low-income Bronx residents. While anti-eviction cases allow our clients to remain housed, they do not address the systemic benefits and health-related challenges that continue to leave some of the most vulnerable households at risk of future homelessness. Specifically, we provide enhanced intervention and assessment to the four subpopulations outlined earlier in this article who are disproportionately homeless and have higher levels of housing instability, households which include (1) someone with a disability or serious illness; (2) survivors of DV; (3) noncitizens; and/or (4) someone aged sixty or over. Having identified these vulnerable populations, our model allows us to interrupt the cycle of housing insecurity by providing targeted interventions designed to maximize their public benefits, minimize their out-of-pocket expenses, including health care, and ensure access to benefits by, for example, obtaining reasonable accommodations for clients with disabilities. And the great news, from a fiscal standpoint, is that our model is cost-efficient and does not require a significant increase in the number of paralegal advocates that UAC should already be funding.

In addition to preventing recidivism and reducing the risk of homelessness, our model also increases access to legal representation for low-income and vulnerable people, some of whom would not otherwise seek legal assistance.[145] The number of people in our four subgroups seeking our assistance through UAC has skyrocketed, leading us to conclude that these four sub-populations may not seek legal assistance unless or until they are faced with eviction.[146]

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[145] *See, e.g.*, Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263 (2016) (discussing how, despite facing more legal issues than higher-income people, low-income people are generally less likely to obtain legal assistance for their problems).

[146] *See, e.g.*, Camille Carey & Robert A. Solomon, *Impossible Choices: Balancing Safety and Security in Domestic Violence Representation*, 21 CLINICAL L. REV. 201 (2014) (examining barriers DV survivors face in seeking help); Joseph A. Rosenberg, *Poverty, Guardianship, and the Vulnerable Elderly: Human Narrative and Statistical Patterns in a Snapshot of Adult Guardianship Cases in New York City*, 16 GEO. J. ON POVERTY L. & POL'Y 315 (2009) (studying the lack of access to legal and social services that seniors can face, from the lens of seniors who end up in guardianship proceedings); DENNY CHAN & VANESSA BARRINGTON, JUSTICE IN AGING, HOW CAN LEGAL SERVICES BETTER MEET THE NEEDS OF LOW-INCOME LGBT SENIORS? (2016), https://perma.cc/YZ7N-B7VP (discussing unmet legal needs and reluctance to obtain legal help among LGBT seniors); DAYNA BOWEN MATTHEW, CTR. FOR HEALTH POLICY AT BROOKINGS, THE LAW AS HEALER: HOW PAYING FOR MEDICAL-LEGAL

H. Looking at Current Measures of Success

The current UAC model primarily measures success by evaluating the number of evictions prevented.[147] Some preliminary findings show that tenants are less likely to be evicted if they have access to an attorney and there are significant declines in evictions in UAC ZIP codes when compared to non-UAC ZIP codes.[148] We agree that the number of people who are able to stay in their homes at the conclusion of their Housing Court cases is the most critical metric, but only examining success through this lens ignores other impacts and achievements that potentially lessen housing instability. If one family faces three separate non-payment housing court proceedings within a year, under the current UAC model, we have been successful three different times if we prevent the eviction even though it's the same family. We should be counting each service as success, but we need to *reframe* success in eviction prevention to include additional legal interventions. We can quantify or track public benefits-related assistance that increase access to housing stability for our most vulnerable populations to keep them out of Housing Court, reduce the likelihood that DV survivors will return to unsafe situations, and improve health outcomes, among other things.[149] Examples of our model's intervention are probably the best demonstration of how we can redefine success.[150]

PARTNERSHIPS SAVES LIVES AND MONEY (2017) (underscoring that people with physical and mental disabilities seek civil legal services help even less often than low-income people generally); N.Y.C. DEP'T OF HEALTH & MENTAL HYGIENE, THE HEALTH OF IMMIGRANTS IN NEW YORK CITY (2006), https://perma.cc/D9WZ-KLEB (highlighting the worse health outcomes among noncitizens due to reticence to obtain help or have Medicaid); *see generally* Greene, *supra* note 145, at 1267, 1295 (examining barriers to civil legal services based on race and past experiences, including "past interactions . . . [with] public benefits hearings that were not actually criminal in nature, but felt criminal and punitive"); AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 14 (2016) (highlighting the vast unmet need of people who need civil legal services, identifying that "[i]ndividuals of all income levels often do not recognize when they have a legal need."); LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017) (overviewing different gaps in justice facing low-income people across the nation).

147 N.Y.C. ADMIN. CODE § 26-1304(a)(3)(i)-(iii) (2019).

148 OKSANA MIRONOVA, CMTY. SERV. SOC'Y, NYC RIGHT TO COUNSEL: FIRST YEAR RESULTS AND POTENTIAL FOR EXPANSION (2019), https://perma.cc/L94Q-GWXA.

149 Requiring UAC providers to submit even more data for each case we handle under this grant would pose serious hardships. UAC funding must increase so that we can afford to hire the concomitant increase in staffing we would need to track, enter, and report on various data points.

150 We have slightly altered some facts and details to preserve our clients' identities.

1. Case Study: Ms. R

During the early rollout of UAC, Bronx Legal Services represented Ms. R, a disabled tenant in her late forties facing eviction due to non-payment of rent. The client had stage four breast cancer, was undergoing chemotherapy, and had severe mobility impairments. During the course of our representation, Ms. R faced several other legal issues that required expert intervention and collaboration between her housing attorney and public benefits paralegal, in addition to preventing her eviction.

The utility company shut off the client's electricity without warning, which left her unable to use medical equipment to alleviate her breathing difficulties and impaired access to life-saving medications that required refrigeration. The housing attorney and public benefits paralegal used a multi-prong approach to intervene with the utility company and the landlord to restore services as quickly as possible.

The public benefits advocate also requested a reasonable accommodation with DSS because the client was homebound and could not travel to an office to apply or renew vital public benefits such as SNAP and Medicaid. When she faced a delay in getting an expedited SNAP approval, we advocated with DSS and she received $192 of SNAP benefits shortly thereafter. We also requested an administrative hearing and pursued informal advocacy to challenge the illegal termination of her participation in a program that pays her Medicare Part B premium of $134 per month. The client's only source of income was Social Security Disability Insurance benefits of $822 a month, so to have an additional $134 deducted from her check every month was a financial hardship and exacerbated her overall situation. Lastly, we helped her apply for and obtain a rental subsidy that paid her rental arrears and seventy percent of her monthly rental share on an ongoing basis. This subsidy allowed her to remain in her apartment and resolved her non-payment Housing Court case.

Under the UAC model, Ms. R's case is a success because she was not evicted. Under our comprehensive public benefits anti-eviction model, our intervention in a variety of legal areas allowed Ms. R to increase household income through SNAP, reduce health care expenses through the Medicare Part B premium payment programs, and reestablish access to life-saving medication and equipment by restoring utility service, in addition to obtaining a rental subsidy that allows her to afford her rent and remain housed.[151] UAC as an entry point was critical for this

[151] Ms. R has not been to Housing Court since this case was resolved, and she reports that recent medical care she has received has greatly improved her health.

client. Despite the numerous civil legal needs she was facing, she did not seek legal services until she was served with eviction papers.

2. Case Study: Ms. S

As part of UAC, Bronx Legal Services represented Ms. S in a nonpayment proceeding. A public benefits paralegal evaluated her case and identified that Ms. S's household was within the income limit to qualify for cash public assistance benefits. Our benefits advocate also identified that, having already met other eligibility requirements, once a public assistance case was active, Ms. S would also be eligible for a rent subsidy,[152] which would pay her arrears and a portion of her rent going forward. Ms. S was advised to apply for public assistance at her local job center.

Ms. S is a noncitizen and a survivor of domestic violence. She lives with her three U.S. citizen children, each of whom was entitled to receive cash public assistance benefits, although Ms. S herself was not eligible. Ms. S does not have a Social Security number, but she has the right to apply for cash public assistance on behalf of her children since she is their legally responsible relative. Despite her right to apply for public assistance for her children, Ms. S was fearful of applying for benefits because of her immigration status and was worried she would be deported if she applied for benefits.

Ms. S had applied for benefits in the past, but she stopped the process when DSS told her that she must cooperate with DSS to sue the father of her children for child support. She had been abused by him for years and did not want to invite him back into her life. As a result, she had walked away from the public benefits application process months ago, which contributed to her housing instability as the rent arrears mounted. Fortunately, the public benefits paralegal who was working with Ms. S was able to advise her that she would not be subject to the public charge doctrine and that she was eligible for a DV waiver,[153] which would prevent DSS from suing her abuser for child support due to the potential for harm to her.

Ms. S then applied for a cash public assistance case, which she needed to qualify for the rent subsidy. DSS turned Ms. S away from the welfare center, telling Ms. S that she could not apply for benefits because she did not have a Social Security number.

Our Public Benefits Unit has worked on several cases similar to Ms. S's, which has allowed our advocates to identify systemic issues. The paralegal advocate immediately recognized the erroneous information given to Ms. S and intervened by referring our client to our in-house social

[152] The rent subsidy is the Family Homelessness Eviction Prevention Supplement, or "FHEPS." *See* N.Y.C. HUMAN RES. ADMIN., *supra* note 143.

[153] *See* sources cited *infra* note 167.

worker. Our social worker accompanied Ms. S to the welfare center. During this second visit made by our client to DSS, the agency processed Ms. S's public assistance application; however, a center worker incorrectly denied our client the right to apply for a DV waiver, saying that "DV waivers don't exist." The DV waiver was critical to exempting Ms. S from the child support enforcement requirement that would subject Ms. S to contact with her abuser.

After various communications to HRA's legal team and a successful Fair Hearing win, Ms. S's public assistance case became active, allowing her to obtain the rental subsidy to stop the eviction. Ms. S was also granted a DV waiver that allowed her to safely apply for public assistance without involving her abuser in the process to do so.

By the time the housing attorney appeared in Housing Court to discontinue the eviction case against our client, Ms. S's monthly income had increased by 850% and the majority of her rent going forward would be covered by the subsidy. Additionally, her SNAP benefits increased and her children started to receive WIC benefits.[154] Ms. S's case demonstrates that non-attorney advocates, specifically those well-versed in public benefits rules and eligibility, contribute to significant improvements that can stabilize clients in their home well after a housing attorney discontinues a court case.

III. RECOMMENDATIONS

We need to invest in housing stability, not just eviction prevention, especially for populations that are the most vulnerable to repeat episodes of housing instability and homelessness. Ms. R and Ms. S are just two of the many clients we encounter with complex public benefit needs who require both anti-eviction defense work and extensive legal advocacy across different issues. Through UAC, legal service providers like Bronx Legal Services are helping more people every year, and we need to marshal our limited resources to provide comprehensive assistance to our clients—especially given the complex nature of our public benefits systems and the legal systems generally. Unrepresented clients in civil matters suffer much worse outcomes than those with legal representation.[155] "[Eighty-six percent] of the civil legal problems reported by low income Americans in the past year received inadequate or no legal help"; "[seventy-one percent] of low-income households experienced at least one

[154] *See* 42 U.S.C. § 1786 (2018) (seeking to assist Women, Infants, & Children ("WIC") via a federally-funded nutrition assistance program for children, pregnant women, and new mothers, which covers certain foods that may be lacking in the diets of the affected populations).

[155] Engler, *supra* note 128, at 48-66.

civil legal problem, including problems with domestic violence, veterans' benefits, disability access, housing conditions, and health care."[156] We have taken the first step by enacting UAC legislation, but without adequate funding and a shift in service delivery, we will not be able to disrupt housing instability and prevent homelessness.

Funding for UAC must keep pace with the actual costs that organizations bear to implement and expand this program. The failure to provide adequate funding threatens the sustainability of UAC in both the short and long term, and places an enormous amount of financial strain on legal services organizations that must prioritize hiring housing attorneys over any other personnel with our limited funding in order to meet the grant requirements and ZIP code expansions. LSNYC has almost entirely covered the cost of non-attorney staff such as paralegals, who play a critical role in obtaining arrears grants and subsidies, provide valuable interventions with government agencies, and engage in effective legal advocacy that extends beyond the housing crisis.[157] Public benefits can help stabilize families and individuals, especially our four most vulnerable populations: older adults, individuals with disabilities or a chronic health condition, noncitizens, and survivors of domestic or intimate partner violence.

A. A Critical Moment to Support Low-Income Noncitizens

Rhetoric against immigrants from our federal government has created a climate of fear. Low-income noncitizens are even further marginalized, afraid to access public benefits.[158] Legal service providers must seize this moment and improve noncitizen access to comprehensive legal services. Incorporating non-attorneys and paralegals into the UAC initiative is critical to assist households with noncitizens in accessing public benefits.

If limits to public benefits are enforced on noncitizens, the income deficits that already exist will reach unprecedented levels and inevitably increase homelessness rates for noncitizens. Both citizens and noncitizens will be displaced as a result from terminating benefits as many noncitizen households are mixed with members that are citizens.[159]

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[156] LEGAL SERVS. CORP., *supra* note 146, at 6.

[157] Joint Testimony of Unionized Legal Services Workers on the NYC Office of Civil Justice's Programs to Provide Universal Access to Legal Services for Tenants Facing Eviction, *supra* note 132.

[158] *See* sources cited *supra* note 70.

[159] Rebekah Entralgo, *HUD Admits New Rule on Undocumented Immigrants Could Displace Thousands of Kids Who Are Citizens*, THINKPROGRESS (May 10, 2019, 11:06 AM), https://perma.cc/5KT2-PACL.

B. Expanding the Definition of Success

Public benefits advocates can assist clients with legal issues in legal settings despite not being attorneys.[160] They are trained as problem solvers, often provide representation in administrative hearings to our most vulnerable clients, and can do so in a more cost-effective manner.[161] In our model, public benefits paralegal advocates play a vital role in promoting housing stability for individuals who face eviction because the model relies on a comprehensive screening of clients to meet unidentified and unmet legal needs and screen them for eligibility for other public benefits. Our model focuses on building paralegal advocates' capacity to assess and identify the barriers and legal problems that clients face which jeopardize their housing stability. In partnership with housing attorneys and other public benefits experts, public benefits advocates are able to engage both in informal advocacy and representation through administrative hearings in order to achieve greater outcomes for their clients that extend beyond the anti-eviction benefits work that has traditionally defined intervention.

We recognize that typical government funding for legal services programs requires the collection and reporting of different data that is usually designed to prove that the services provided are not just for the public good but also offer tax savings, reduce recidivism, and/or help to reduce strain on our court systems. Our model is particularly well-suited to measure success by tracking and quantifying outcomes for all households across a variety of benefits programs and by measuring our impact differently.[162] As explained in more detail below, we can quantify the increase in household income and the decrease in household expenses; we can look at the number of administrative appeals filed and won; we can document the number of DV-related waivers of public assistance rules we have obtained; we can track the public benefits we have helped obtain for noncitizens; and we can count the number of times we have provided advice about the public charge rules to noncitizen clients, among other things. By looking at more than just "this eviction averted," we can see the broader impact UAC can and should have on low-income communities.

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[160] Peter Chapman, *The Legal Empowerment Movement and Its Implications*, 87 FORDHAM L. REV. ONLINE 183, 183-85 (2018).

[161] LEGAL SERVS. STAFF ASS'N FOR LOCAL 2320 & LEGAL SERVS. NYC, COLLECTIVE BARGAINING AGREEMENT 115, 126, 130 (2018), https://perma.cc/8TZA-DKLG. While both are grossly underpaid, paralegal salaries are considerably lower than attorneys' salaries at legal services agencies. For example, at LSNYC, a paralegal with 35 years of experience earns the same salary as an attorney with three years of experience.

[162] Again, having additional reporting requirements necessitates more funding to hire the staff required for data entry, collection, and analysis.

1. Examine Existing Data Through Different Lenses

Rather than just measuring whether clients "win" their eviction case, we can identify and measure the amount of benefits that we helped clients receive to prevent the eviction in the first place, such as the amount of a rent arrears grant or rent subsidy we obtained. Furthermore, we can quantify the number of evictions that our benefits assistance has prevented, and we can identify the number of Housing Court cases that we have avoided (i.e. before the landlord files for eviction) through early interventions.

2. Fair Hearings to Appeal Reductions or Cessation of Benefits

Paralegals may represent appellants at welfare Fair Hearings, which are formal administrative hearings to challenge denials and reductions. Fair Hearings are critical for benefits recipients because they are essentially the only accessible forum to challenge welfare decisions, as very few cases are appealed to the court system.[163] *Pro se* appellants face many challenges before an administrative law judge ("ALJ") that make it difficult to obtain a full and fair hearing.[164] ALJs do not receive much training or guidance on how to elicit narratives from *pro se* appellants, making it more challenging for benefits recipients to have their case fully heard.[165] However, appellants who are represented at Fair Hearings have more favorable outcomes than those that attend *pro se*.[166] Favorable Fair Hearing trends may offer more of a predictor of housing stability, and can be more specifically reviewed for the increase or continuation of individual benefits.

Current UAC funding is not sufficient to cover the personnel costs of public benefits advocates generally, much less advocates who handle welfare Fair Hearings as part of their work. Having advocates who represent people at welfare Fair Hearings requires additional funding for a variety of different reasons, including the additional time and supervision needed to train and hire benefits advocates who can conduct Fair Hearings. Furthermore, all Fair Hearings in NYC take place in Brooklyn.[167] Thus, whenever someone in our Bronx Legal Services Public Benefits

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[163] Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 30 J. NAT'L ASS'N ADMIN. L. JUDICIARY 601, 618 (2010).

[164] Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. NAT'L ASS'N ADMIN. L. JUDICIARY 447, 449-57 (2007).

[165] *Id.* at 454, 478.

[166] Emily S. Taylor Poppe & Jeffrey J. Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 PEPP. L. REV. 881, 885, 942 (2016).

[167] *Request a Fair Hearing*, N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, https://perma.cc/4TFM-JPP4 (last visited Jan. 2, 2020).

Unit represents someone at one of these hearings, it takes several hours of time away from the office.

3. Measuring Our Impact for Survivors of Domestic Violence Who Face Eviction

New York State's Office of Temporary and Disability Assistance ("OTDA") recognizes that as many as fifty percent of cisgender women who receive public assistance benefits may be survivors of DV.[168] In 2016, 9,987 people[169] were granted DV waivers under the "Family Violence Option."[170] But in December 2015, there were almost 300,000 people in receipt of public assistance.[171] Survivors of domestic violence need advocates and information so that they can access public assistance benefits and waivers.[172]

These waivers grant DV survivors a reprieve from welfare rules, such as suing abusive partners for child support or requiring DV survivors to work, which can increase the likelihood of danger to the survivor or survivor's children.[173] We can quantify how many DV waivers our UAC clients receive.

4. Measuring Our Impact on Enhancing Stability for People Living with Disabilities/Serious Illness

For households with a member who is disabled or has a serious illness, we can calculate reductions in out-of-pocket costs for health-related

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[168] N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, ADMINISTRATIVE DIRECTIVE 03 ADM 2, DESK REFERENCE FOR DV SCREENING UNDER THE FAMILY VIOLENCE OPTION 2 (2003) ("[U]p to 80% of women receiving [temporary cash assistance] may be survivors of or attempting to escape violent relationships."); *see* Stephanie Holcomb et al., *Implementation of the Family Violence Option 20 Years Later: A Review of State Welfare Rules for Domestic Violence Survivors*, 16 J. POL'Y PRAC. 415 (2017); Taryn Lindhorst et al., *Screening for Domestic Violence in Public Welfare Offices: An Analysis of Case Manager and Client Interactions*, 14 VIOLENCE AGAINST WOMEN 5 (2008); DON FRIEDMAN, EMPIRE JUSTICE CTR., POVERTY AND VIOLENCE: DOES NEW YORK'S FAMILY VIOLENCE OPTION MAKE A DIFFERENCE? 1 (2019), https://perma.cc/74MN-RHP8.

[169] N.Y. STATE OFFICE FOR THE PREVENTION OF DOMESTIC VIOLENCE, NEW YORK STATE DOMESTIC VIOLENCE DASHBOARD 2016, at 4 (2017), https://perma.cc/6VWZ-UXHG.

[170] N.Y. SOC. SERV. LAW §§ 349-a, 459-a (McKinney 2019); N.Y. COMP. CODES R. & REGS. tit. 18, §§ 347.5, 351.2, 357, 369.2 (2019). N.Y.C. HUMAN RES. ADMIN., POLICY DIRECTIVE #19-08-ELI, DOMESTIC VIOLENCE PROGRAM (2019).

[171] N.Y. STATE OFFICE OF TEMP. & DISABILITY ASSISTANCE, TEMPORARY AND DISABILITY ASSISTANCE STATISTICS 5 (2015), https://perma.cc/TL69-LCKR.

[172] *See* FRIEDMAN, *supra* note 168, at 23-26.

[173] *See generally* Jack Newton et al., *Public Assistance and Housing: Navigating Difficult Benefits Systems*, *in* LAWYER'S MANUAL ON DOMESTIC VIOLENCE: REPRESENTING THE VICTIM 343-68 (Mary Rothwell Davis et al. eds., 6th ed. 2015).

expenses, including copays, insurance premiums and more, which can reduce housing instability by increasing available income in the household.[174] A study by the Center for Outcomes Research and Education indicates that affordable housing reduces health care expenses.[175] If public benefits advocates assist tenants in keeping more money in their pockets through access to Medicare Savings Program, Medicaid, Medicare or other health-related benefits, then tenants can use more of their income for their rent. Additionally, we can review the numbers of annual requests for reasonable accommodations that households with a disabled member make for assistance accessing public benefits through DSS, community-based organizations, and other possible social services providers.

We can also measure the increased income in households where we help enroll eligible members of the household as consumer directed personal assistance program ("CDPAP")[176] aides. Finally, we can calculate the savings to households that we enroll in the City's Disability Rent Increase Exemption (DRIE) program,[177] which freezes households' rent-regulated rents so that the household no longer has to pay the annual rent increases. Instead, rent increases are covered as tax credits to the landlords but do not come out of clients' pockets.

5. Looking at Successful Interventions to Improve Housing Stability for Noncitizens

For noncitizens, we can measure the number of noncitizen clients we helped obtain Medicaid, SNAP, cash public assistance, and WIC benefits, and we can determine the amount of increased household benefits we obtained by getting HRA to include eligible noncitizens in the household.

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[174] *See, e.g.*, Heidi L. Allen et al., *Can Medicaid Expansion Prevent Housing Evictions?*, 38 HEALTH AFF. 1451 (2019); Matthew Desmond & Carl Gershenson, *Who Gets Evicted? Assessing Individual, Neighborhood, and Network Factors*, 62 SOC. SCI. RES. 362, 364 (2016); NAT'L COAL. FOR THE HOMELESS, HEALTH CARE AND HOMELESSNESS (2009), https://perma.cc/FBV6-35UX ("Homelessness and health care are intimately interwoven."). The converse is also true, that housing instability and food insecurity are associated with increased acute care. Kushel et al., *supra* note 24; Ruthanne Marcus et al., *Longitudinal Determinants of Housing Stability Among People Living with HIV/AIDS Experiencing Homelessness*, 108 AM. J. PUB. HEALTH 552 (2018).

[175] *Study Finds Affordable Housing Reduces Health Care Costs*, NAT'L LOW INCOME HOUS. COAL. (Mar. 7, 2016), https://perma.cc/VS9J-RK3S.

[176] N.Y. COMP. CODES R. & REGS. tit. 18 § 505.28 (2019). CDPAP offers individuals the option of choosing who can provide them with personal care services, allowing people to hire certain trusted family members or friends as aides. The aides receive an hourly wage.

[177] Rules of the City of New York tit. 19 § 52-01 (2019) (relating to the senior citizen and disability rent increase exemption programs).

6. Examining Data to Measure Improved Housing Stability for Older Adults

For older adults aged sixty and over, we can measure and quantify all of the outcomes described above—all of which can happen to people of any age. In addition, we can calculate the savings to households we helped enroll in the City's Senior Citizen Rent Increase Exemption program, which operates the same way as DRIE mentioned earlier.

CONCLUSION: KEEPING *GIDEON*'S PROMISE

Legal service providers in NYC are at an extraordinary time: experiencing unprecedented growth that allows us to expand our services to tens of thousands more people each year. We applaud our City Council, Mayor, DSS, and the tireless work of organizers like the Right to Counsel NYC Coalition for pioneering first-in-nation legislation creating a right to counsel in eviction cases.

Paralegals who handle cases are the unsung heroes of the civil legal services world. These fearless advocates represent clients at administrative hearings on city, state, and local levels. They obtain arrears to stop evictions, and they assess every client for a variety of different legal and social needs. As we have outlined in this article, public benefits advocates can play a critical role in reducing household expenses, maximizing household income, and improving access to benefits. Paralegals are also cost-effective compared to attorneys, although we do not contend that anyone who works in civil legal services has a salary that comes anywhere near approximating the value of our work.

The UAC-funded housing attorneys representing tenants in Housing Court have already dramatically lowered evictions, saving thousands of people from entering our shelter system. To create a longer-term, successful anti-eviction model, we need to be sure that funding is sufficient to meet the needs of the communities we are serving. Under any iteration of UAC, we must have the funding necessary to cover, at minimum, both housing attorneys and public benefits paralegals. We have come so far, and we cannot afford to be penny-wise and pound-foolish.

Civil *Gideon* and Confidence in a Just Society

The Honorable Robert W. Sweet†

What needs doing to help the courts maintain the confidence of the society and to perform the task of insuring that we are a just society operating under a rule of law? For me the answer is easy to state, but until now, difficult to achieve. In short, we need a civil *Gideon*[1]—that is, an expanded constitutional right to counsel in civil matters. Lawyers, and lawyers for all, are essential to the functioning of an effective justice system, whether it be to advise or to represent.

I. LEGISLATIVE AND PRIVATE STEPS TO PROVIDE COUNSEL

Of course, our profession knows this and has acted to address the issue through the Legal Aid Society and other like organizations.

One of the most exciting efforts in this direction are the Skadden Fellowships, which permit young lawyers to use their talents to improve the society. I'm very proud that two of my clerks have become Skadden Fellows and that children and welfare recipients are going to be much the better for it. But more is required.

II. THE GAP BETWEEN DEMAND AND SUPPLY

Our present best efforts to grant access to the justice system pall in the light of the enormity of the problem. With 36.5 million people at the poverty level in 1996[2] and 77.45 million with incomes below $50,000 in 1993,[3] legal services are realistically beyond the reach of many.

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† United States district judge, Southern District of New York. The following is taken from Judge Sweet's December 2, 1997 Arps Lecture. Judge Sweet spoke about the systemic problems caused by inadequate representation that he witnesses in his courtroom. In response he proposed a "Civil *Gideon*." Taking as his model the constitutional right to counsel for criminal defendants, Judge Sweet believes the government should provide lawyers when litigants who cannot afford counsel present valid legal claims, particularly in areas such as family and housing law.

The full text of Judge Sweet's speech is available on the Web at <http://www/abcny.org/arpslec.html>.

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

2. *See* DANIEL H. WEINBERG, 1996 INCOME, POVERTY, AND HEALTH INSURANCE ESTIMATES (1997).

3. *See* UNITED STATES CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 478 cht. 740 (115th ed. 1995).

Judge Patricia Wald of the D.C. Circuit recently noted that two out of five Americans cannot afford needed legal assistance to enforce their rights.[4]

If that isn't bad enough, Congress in the Omnibus Consolidated Rescissions and Appropriation Act of 1996 barred any organization receiving funds through the Legal Services Corporation from litigating any issues under the Welfare Reform Act. The same device was also employed in connection with class action litigation. The very tools by which, in my view, the society can repair any breaches of due process or other constitutional impairment suffered by the disadvantaged have thus been barred by the Congress, probably in an unconstitutional fashion.

Some may argue that an expanded right to counsel in civil litigation is not desired by the American people. However, a national study has demonstrated that seventy-one percent of Americans favor using tax dollars to make lawyers available to anyone who needs one. Indeed, seventy-nine percent of Americans currently believe, obviously quite erroneously, that the Constitution guarantees poor people the appointment of free lawyers in civil cases.[5]

Although we like to believe we are not only the most powerful nation in the world but also the most advanced in terms of governance and human rights, the reality is that Great Britain has had a common law right to counsel for five centuries.[6] France and Germany have provided counsel for the indigent since the 1870s.[7] Switzerland has had a constitutional right for almost fifty years.[8] Austria, Spain and Greece have statutory rights to counsel.[9] The European Court of Human Rights in 1979 interpreted the European Convention on Human Rights to require member governments to provide counsel for the poor in civil cases.[10] Indeed, I believe there is a constitutional requirement to meet what appears to be an almost universal right among developed nations. Such representation will

4. *See* Patricia M. Wald, *Becoming a Player: A Credo for Young Lawyers in the 1990s*, 51 MD. L. REV. 422, 427 (1992).

5. *See* ASSOCIATION OF TRIAL LAWYERS OF AMERICA 1991-92, DESK REFERENCE SUPPLEMENT: COMMEMORATING THE 200TH ANNIVERSARY OF THE SIGNING OF THE BILL OF RIGHTS (1991).

6. See Earl Johnson, Jr., *Toward Equal Justice: Where the United States Lands Two Decades After*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 205 (1994); F. Johnson Schwartz, *Beyond* Payne*: The Case for a Legally Enforceable Right to Representation in Civil Cases for Indigent California Litigants, Part One: The Legal Arguments*, 11 LOY. L. REV. 249, 258 (1978).

7. *See* Johnson, *supra* note 6, at 209.

8. *See id.* at 206.

9. *See id.* at 208.

10. *See* Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) (1979) (holding that the failure to provide legal aid to indigent women in a separation proceeding violates the European constitution).

guarantee the diversity of interests that are essential to a fully developed justice system.

III. EXPANDED DUE PROCESS RIGHT TO COUNSEL

The link between the right to counsel and procedural due process has already been recognized. In *Gideon*, the Court held that the due process clause of the Fourteenth Amendment mandated application to the States of the right to appointed counsel in criminal matters. The due process right, however, was not tethered solely to the Sixth Amendment hook. The Supreme Court in *In re Gault* held that in "proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed,"[11] the juvenile has a right to appointed counsel even though commitment proceedings may be styled as civil and not criminal.

The Supreme Court addressed the issue again in 1981 in *Lassiter v. Department of Social Services*.[12] In a 5-4 decision, the Court held that the right to counsel in a state-initiated proceeding to terminate parental rights must be evaluated by trial courts on a case-by-case basis according to the due process analysis set forth in *Mathews v. Eldridge*,[13] and that in Ms. Lassiter's case the net of the *Mathews* factors did not overcome what the majority called a presumption against granting appointed counsel in non-liberty interest cases.

I am going to pass on Justice Blackmun's dissent concerning this presumption and on the majority's case-by-case conclusion. I think the most rewarding focus is on the *Mathews* three-factor procedural due process calculus applied by the Court which balances (1) the private interests at stake, (2) the government's interest, and (3) the risk that the procedures used will lead to erroneous decisions.

To place the last first, then, analysis of the risk of erroneous decision dictates appointed counsel whenever *in forma pauperis* status exists. As every trial judge knows, the task of determining the correct legal outcome is rendered almost impossible without effective counsel. Courts have neither the time nor the capacity to be both litigants and impartial judges on any issue of genuine complexity. As recognized by the *Lassiter* dissent, "By intimidation, inarticulateness or confusion, a [litigant] can lose forever"[14] the right she sought to protect.

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11. 387 U.S. 1, 41 (1967).
12. 452 U.S. 18 (1981).
13. 424 U.S. 319 (1976).
14. *Lassiter*, 452 U.S. at 47 (Blackmun, Brennan, and Marhall, JJ., dissenting).

As far as the second factor is concerned, society's paramount interest must be in a just determination of a person's fundamental rights and privileges. While there will undoubtedly be a cost to providing counsel to impoverished litigants, erosion of faith in the judicial system would exact an even higher price. To put it simply, denial of representation constitutes denial of access to real justice.

As for the money to finance such a constitutional right, it must come from the public fisc as it does for the representation of criminals, security for the aged, and protection for the poor and the infirm. I also believe it would be appropriate to tax for-profit legal services for the direct benefit of not-for-profit legal services.

Finally, *Mathews* mandates as a third factor consideration of the private interest at stake. As my brother the Honorable Jack Weinstein has said:

> Accessibility to the courts on equal terms is essential to equality before the law. If we cannot provide this foundational protection through the courts, most of the rest of our promises of liberty and justice of all remain a mockery for the poor and oppressed.[15]

Because of the vital interest held by the government in a just outcome, and the extremely high risk of injustice where adequate counsel is not available, I propose that a right to counsel should arise whenever access to the justice system is warranted. Lest pragmatists abandon ship at this point, let me point out that the Supreme Court has already established a mechanism in the criminal context which could be adapted to the civil context to screen frivolous civil claims. By this I mean the *Anders* brief, by which appellate criminal attorneys faced with groundless appeals direct the court's attention to "anything in the record that might arguably support the appeal,"[16] and request to withdraw.

To seek to limit this proposed right to counsel to particular causes would simply serve to defeat the right. A right to property or economic justice, to custody, or to housing, for example, is as significant in real terms as a right to a constitutional guaranty. Without representation, a litigant does not truly have access to our legal system, and it is the system, even more than the litigant, that will be the worse for the lack.

The time has come to reverse *Lassiter* and provide counsel in civil litigation just as the Supreme Court in *Gideon* in 1963 reversed its holding in *Betts v. Brady*[17] twenty-one years earlier and found for a right to counsel in all criminal proceedings.

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15. Jack B. Weinstein, *The Poor's Right to Equal Access to the Courts*, 13 CONN. L. REV. 651, 655 (1981).

16. Anders v. California, 386 U.S. 738, 744 (1966).

17. 316 U.S. 455 (1942).

Presenter Biographies

The Honorable Stewart D. Aaron was sworn in as a United States Magistrate Judge in the United States District Court for the Southern District of New York on December 1, 2017. In addition to his service on various Court committees, he currently serves nationally as a member of the U.S. Judicial Conference Committee on Information Technology. Before joining the Court, he was a partner at Arnold & Porter LLP, where he was the Managing Partner of the New York Office (2012-2015) and the Administrative Partner of the New York Office (2005-2012). Judge Aaron was the 58th President of the New York County Lawyers Association from 2011 to 2013, and from 2001 to 2004 chaired NYCLA's Committee on the Federal Courts, which honored him with the David Y. Hinshaw Award in 2016. He also served as President of the New York American Inn of Court from 2018 to 2020. Judge Aaron graduated *summa cum laude* from Syracuse University College of Law, and received his Bachelor of Science degree from Cornell University.

Marissa Balonon-Rosen is a staff attorney with The Bronx Defenders Criminal Defense Practice in New York. Immediately after law school, she worked for two years representing indigent adults and juveniles as an attorney with the New Hampshire Public Defender. Prior to law school, Marissa was piano faculty at the San Francisco Community Music Center, taught music to homeless youth in the Tenderloin neighborhood and founded a music program at a juvenile detention center outside of Rochester, NY.

Jonathan Coppola is a law clerk in the chambers of the Hon. Lee G. Dunst. He was an Associate at Hogan Lovells before beginning his clerkship. While he was studying at Fordham University School of Law, he served as a Clinic Member for the Fordham Law Presidential Succession Clinic and externed with the U.S. Attorney's Office, N.Y. County District Attorney's Office, the Hon. Eric Vitaliano and the Richmond County District Attorney's Office. He is an honors graduate of Fordham University and Fordham University School of Law.

Peter Dizozza is a litigator with the Law Office of Jerald Werlin with prior employment at the Office of the New York City Comptroller and a limited practice through Cinema VII Artist Services. He is a Cinema VII artist. Recent credits include the score for "Out of the Forest," a musical about leaving and returning to Forest Hills, Queens, and Float, based on his album, The Ocean Floaters, produced at Theater for the New City in the East Village and revised with an international cast for performance during the 2015 Ubud Writers and Readers Festival in Bali, Indonesia. The New Yorker described his songs as "whimsical and politically charged." He is a former Chair of the City Bar's Entertainment Committee and a proud member of The Lambs®.

Raina Duggirala is currently clerking for the Hon. Stewart D. Aaron in the United States District Court for the Southern District of New York. Prior to clerking, she practiced as a litigation associate at a large firm, focusing her practice on white collar, capital markets, and commercial litigation. After she finishes her clerkship in December 2022, she will be joining Arnold & Porter Kaye Scholer LLP as a litigation associate. Raina graduated from Fordham University School of Law in 2020, where she was a board member of the Brendan Moore Trial Advocacy Center and

a member of the Intellectual Property, Media, and Entertainment Law Journal, she was a research assistant for both Professor Daniel J. Capra and the Center on National Security at Fordham Law, and she interned for the Hon. Gary S. Katzmann in the United States Court of International Trade. Prior to law school, Raina wrote and recorded a full-length studio album.

Henry A. Freedman retired in 2014 after serving as Executive Director of the National Center for Law and Economic Justice since 1971. Before becoming Executive Director, he had been in private practice in New York City and taught at Catholic University Law School in Washington, DC. He has also taught at Columbia and New York University Law Schools, and Columbia and Fordham Schools of Social Work. He has chaired the Committee on Legal Assistance of the Association of the Bar of the City of New York. He successfully argued *Califano v. Westcott* before the United States Supreme Court in 1979. Mr. Freedman has received the New York State Bar Association's Public Interest Law Award (1998), the William Nelson Cromwell Medal of the New York County Lawyers' Association (2001), and an honorary Doctor of Laws degree from Amherst College in 2008. In retirement has served as a voluntary hearing officer for the 9/11 Victims Compensation Fund and has secured asylum or similar relief in seven Immigration Court cases. He is a graduate of Amherst College and Yale Law School.

Peter Guirguis is a Partner in Mintz & Gold. He advises clients in a wide range of disputes and investigations involving commercial contracts, complex financial instruments, mergers and acquisitions, financial reporting, corporate control and governance, data use and privacy, executive compensation and employment, bankruptcy, trusts and estates, real estate construction and financing. Clients and colleagues rely on Peter for his practical advice and negotiation skills. Peter represents diverse clients, from individuals to major financial institutions, insurers, manufacturers and retailers, and numerous software and technology companies. Many of his matters involve a combination of intellectual property issues along with employment, corporate control, or management matters. He has also enforced copyrights and trademarks for major manufacturers, retailers, and media companies. Peter also advises individuals and entities in a wide variety of investigatory, regulatory and enforcement matters. He has conducted internal investigations and participated in civil, criminal and regulatory proceedings relating to a wide variety of regulatory issues including investigations and civil actions by the DOJ, SEC, FTC, FCC, EPA, DEC, DEP, state attorney general offices, and investigations by foreign regulatory authorities. His matters are also often international in nature and he is familiar with discovery and court procedures in federal and state courts around the country as well as arbitral forums in the United States and abroad. Peter served as a law clerk to the Honorable Judge Kevin T. Duffy in the United States District Court for the Southern District of New York.

Maggie Maurone is a career law clerk in the Hon. Stewart D. Aaron's chambers. Prior to becoming a law clerk, Maggie was a Litigation Associate at Arnold & Porter LLP and served as a Captain in the U.S. Air Force. She is a graduate of the U.S. Air Force Academy (Distinguished Graduate), University of Texas, Austin (M.A. in Economics) and Columbia Law School.

Ali Rawaf is an extern in the Hon. Stewart D. Aaron's chambers and a student at Brooklyn Law School. He is the recipient of a Dean's Merit Scholarship and Academic Achievement Scholarship. Prior to attending law school, Ali worked in production at 60 Minutes, CBS News for nine years, most recently as an Associate Producer. He is an honors graduate of the University of Texas, Austin.

Christopher Tumulty is a Partner in Fox Rothschild LLP. Chris helps clients in the real estate and construction industries resolve a broad range of legal challenges, including litigation. He serves as outside counsel for condominium and cooperative apartment boards, leveraging significant industry knowledge to provide trusted advice on all aspects of building management, transactions, dispute resolution and governance. Chris is part of a team of attorneys at the firm who provide advice on Condominiums, Cooperatives and Planned Unit Communities. An accomplished litigator, Chris is also part of the firm's Real Estate Litigation group, and protects clients' interests in commercial disputes in state and federal courts and is well versed in guiding clients through domestic and international arbitration and mediation. Prior to joining Fox Rothschild, Chris was a partner in the litigation department of a New York-based law firm. Before that, he was an associate in a boutique firm in New York. While earning his law degree, Chris was the articles editor of the Pace International Law Review and President of the Gaelic Law Society.

Chryssa Valletta is Employment & Product Counsel at Trusted Health, a healthcare staffing and software company. Before joining Trusted Health, Chryssa served as Employment Counsel at VIPKid, an educational technology platform, and was Counsel and Partner in several law firms. She is a graduate of the University of Scranton and Columbia Law School.