COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

NO. SJC-12777

FREDDIE CARRASQUILLO,
and all other similarly situated
defendants in Hampden County,
PETITIONERS-APPELLANTS,

v.

HAMPDEN COUNTY DISTRICT COURTS,
RESPONDENT-APPELLEE.

ON RESERVATION AND REPORT FROM
THE SUPREME JUDICIAL COURT FOR THE COUNTY OF SUFFOLK

BRIEF OF AMICI CURIAE HAMPDEN COUNTY LAWYERS FOR JUSTICE AND THE MASSACHUSETTS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to SJC Rule 1:21, Hampden County Lawyers for Justice ("HCLJ") and the Massachusetts Association of Criminal Defense Lawyers ("MACDL") represent that they are not-for-profit organizations under the laws of the Commonwealth of Massachusetts. HCLJ and MACDL do not issue any stock or have any parent corporation, and no publicly held corporation owns stock in them.

RULE 17(C)(5) DECLARATION

Amici Hampden County Lawyers for Justice, the Massachusetts Association of Criminal Defense Lawyers, and their counsel declare that (a) no party or party's counsel authored the brief in whole or in part, (b) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; (c) no person or entity—other than the amici curiae, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief; and (d) neither amici curiae nor its counsel represents or has represented any of the parties to the present appeal in another proceeding involving similar issues; HCLJ President David Hoose and attorneys for the ACLU of Massachusetts, which is counsel on this brief, represented parties in the consolidated cases in *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004).

INTRODUCTION

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

T.S. Eliot
Little Gidding

A fifteen-year journey has led Hampden County back to the place it began: indigent defendants without counsel. Chronic underfunding has cast the Court, the Commonwealth, and the public defender system into the same plight as the protagonist in Eliot's *Little Gidding.*

In 2004, this Court confronted a crisis emerging from a chronic shortage of lawyers for indigent criminal defendants. The crisis peaked with defendants jailed in pretrial detention, but without lawyers to represent them. Recognizing that a key cause of this problem was "the low rate of attorney compensation authorized" by the Legislature, the Court crafted a response that was not so much a remedy as it was an invitation for the Legislature provide one. *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228, 229 (2004). The Court held that indigent defendants would be entitled to release when incarcerated for more than seven days without counsel, and that indigent defendants would be entitled to dismissal of charges (without prejudice) if deprived of counsel for more than forty-five days. *Id.* at 247-49. This stopgap measure was designed merely to buy time while the three branches

of government worked cooperatively to achieve "a *permanent remedy* for . . . a systemic problem of constitutional dimension." *Id.* at 244 (emphasis added).

But no permanent remedy has emerged. In 2019, indigent defendants in Hampden County still do not receive timely and effective assistance of counsel; bar advocates are scarce due to statutorily-capped compensation rates that are always inadequate and sometimes nonexistent; and this legislative underfunding interferes with the Judicial Department's ability to carry out its core functions.

Because the Legislature has permitted this fifteen-year journey to lead us back to where we started, this Court can, in the poet's words, "know the place for the first time." The Court can now be certain that its due diligence is complete: stopgap due process is not true due process. The Court has always had the authority to cure systemic violations of the right to counsel, including violations caused by impermissible statutory limits on attorney compensation. Likewise, the Court has always had the inherent authority to ensure the proper function of criminal proceedings. It is time to exercise those authorities, including by declaring the statutory rates unconstitutional as applied to Hampden County, and by expressly authorizing compensation rates in excess of what the Legislature has appropriated.

INTEREST OF THE AMICI CURIAE

The Hampden County Lawyers for Justice ("HCLJ") is an organization that serves as the bar advocate program in Hampden County by providing private counsel to indigent defendants through a contract with the Committee for Public Counsel Services ("CPCS").

The Massachusetts Association of Criminal Defense Lawyers ("MACDL") is the Massachusetts affiliate of the National Association of Criminal Defense Lawyers and an incorporated association representing more than 1,000 experienced trial and appellate lawyers who are members of the Massachusetts Bar and who devote a substantial part of their practices to criminal defense. MACDL devotes much of its energy to identifying and attempting to avoid or correct problems in the Commonwealth's criminal justice system.

STATEMENT OF THE CASE AND THE FACTS

The brief of petitioners thoroughly demonstrates a crisis that warrants this Court's attention. There simply are not enough private lawyers willing to represent indigent defendants in Hampden County at the low wages they are currently paid. Although emergency measures are now being tried—including paying attorneys extra money to take "duty days" in Hampden County—they are unsustainable. Thus, unless a long-term solution is imposed, the number of indigent defendants who need

lawyers in Hampden County will exceed the number of available lawyers who presently exist, or will ever exist, to take their cases.

Amici offer the following additional context about this crisis.

I. Low and occasionally nonexistent compensation is fueling a shortage of lawyers to represent indigent criminal defendants.

Before 2004 compensation rates for bar advocates barely changed in almost two decades, see *Lavallee*, 442 Mass. at 245, and since *Lavallee* these rates have stagnated. In 2005, the Commission to Study the Provision of Counsel to Indigent Persons in Massachusetts, tasked by the Legislature to recommend solutions to the *Lavallee* crisis, St. 2004, c. 253, urged that rates for Superior Court cases be increased to $60/hour in FY 2006, $65/hour in FY 2007, and $70/hour in FY 2008. See R1:140-70. District Court rate recommendations were $50/hour in FY 2006, $53/hour in FY 2007, and $55/hour in FY 2008. R1:160. Yet, as summarized in the table below, present rates fall short of the Commission's recommendations for FY 2008. See G. L. c. 211D, § 11(a).

COMPENSATION RATES FOR CPCS PRIVATE COUNSEL DIV.			
Effective Dates	**District Court**	**Superior Court** ***(other than homicide)***	**Homicide**
FY 2004	$30	$39	$54
July 1, 2005 to June 30, 2016	$50	$60	$100
July 1, 2016 to June 30, 2018	$53	$60	$100
July 1, 2018 to present	$53	$68	$100

The real value of these rates has fallen.[1] As HCLJ's vice president Chris Todd has observed, between 2009 and 2018, his professional liability insurance increased 50 percent; rent 40 percent; parking 63 percent; cell phone carrier plan 117 percent; car insurance 93 percent; disability insurance 42 percent; and he was only able to keep health care costs unchanged by bi-annually downgrading his plan. R3:81-82. Compensation rates simply have not kept pace with costs of living, and lawyers increasingly find themselves unable to afford to practice in this area of law.

Taking on criminal cases as a bar advocate also comes with no benefits. There is no healthcare or worker's compensation plan. No pension or retirement fund. No student loan forgiveness, vacation, or overtime. But this work cannot be undertaken without incurring costs, including office expenses and malpractice insurance. R3:18-19. As Attorney Elizabeth Rodriguez-Ross, who practices in Hampden County Superior Court, estimated, "[T]he most that [she] could probably take home . . . would be just shy of $96,000 a year. [Her] expenses are $60,000 a year. That's not enough for a mom with two kids." R3:65. Harsh financial impacts borne by bar advocates lead directly to the Sixth Amendment and art. 12 violations suffered by indigent criminal defendants.

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[1] To have the buying power equivalent to $50 in July 2005, one would have to have $65.65 today. See U.S. Department of Labor, Bureau of Labor Statistics, *CPI Inflation Calculator*, *available at* https://data.bls.gov/cgi-bin/cpicalc.pl.

This problem has been exacerbated by the statutory cap on the number of hours for which a bar advocate can bill. They may not bill more than 1,650 per year, and they may not accept new appointments after billing 1,350 hours. R1:335. And while Petitioners' brief demonstrates that only a few attorneys bill at or near the hours cap, those who do must often work for free in order to provide the effective assistance of counsel. R3:19-20[2], 30[3], 69[4]. For example, MACDL's President, Victoria Kelleher, has gone without pay for eighteen days of a murder trial and a trial for a Sexually Dangerous Person Civil Commitment matter. See Affidavit of Victoria Kelleher, add. 152-57. Due to these limitations on adequate compensation for bar advocates, the continued functioning of the Commonwealth's justice system relies on the willingness of these attorneys to occasionally donate their services.[5]

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[2] Sandell: I probably would estimate somewhere between $2,000 to $5,000 every year is just volunteer-work for Massachusetts.

[3] Elkins: [T]he caps . . . effectively reduce our rates even further. It's not that people stop doing the work. What happens is we do it for free.

[4] Paradis (Juvenile Court): [D]oing cases for free . . . happens all the time.

[5] In the FY2020 budget, Section 211D has been amended to permit CPCS to raise the hours cap to 2,000 under certain circumstances. St. 2019, c. 41, § 68. It is not clear how this will be implemented or if Ms. Kelleher would have qualified.

II. These problems are especially acute in Hampden County.

Compounding the problems caused by inadequate rates in Hampden County is the inefficient administration of the Springfield District Court. HCLJ Program Administrator Sarah Pegus noted that attorneys have been unwilling to take duty days in Springfield versus other District Courts due to "Springfield [being] more difficult and not worth the low rate of pay because of the high caseloads and the slow pace of many of its court sessions." R3:172.

One attorney explained that he no longer practices in that court because the sessions there are "black holes." R3:18. This colorful description refers to the common practice of attorneys having to stay until 4:00pm or 6:30pm waiting for their case to be called. R3:184. Some attorneys report the slow pace is due to the fact that "[t]he newest prosecutors tend to be assigned to [this court]," which makes "resolving even the simplest cases [take] months longer than is necessary." *Id.* Further, "[t]he Clerk's Office is perpetually understaffed for the volume of cases that they handle, which leads to lost files and documents as well as inflexibility for cases that may need to be handled on an emergency or rapid basis." R3:184-85. Attorneys report delays in receiving basic discovery documents, a shortage of interpreters, inefficient time spent on basic motions, and more problems that all add up to make Springfield an undesirable place to practice. Pet. Br. at 17-19.

III. The crisis is threatening to metastasize.

The crisis in Hampden County reflects a broader problem: the Commonwealth simply does not produce the volume of criminal defense attorneys necessary to represent all the poor people it prosecutes.

Statewide, the number of case-taking Superior Court attorneys in CPCS's private counsel division has dropped significantly. R3:191. In FY 2016, there were 664 attorneys, and in FY 2019, there were 519, one hundred of whom did not accept a single case. *Id.* One possible reason for this trend is the relatively narrow gap between the pay rates for District Court and Superior Court cases. R3:7. Just as important, there are signs that the attorneys who remain as bar advocates are devoting fewer hours to appointed cases. See R3:192 (chart showing changes in the billing patterns of HCLJ attorneys).

Other counties appear to be experiencing the consequences of these trends as well. As the Court knows, this case is being argued alongside *Walsh v. Commonwealth,* SJC-12648. There, the Worcester Superior Court arraigned two indigent defendants on September 20, 2018, for breaking and entering and other alleged crimes. Public defenders appeared for the limited purpose of the bail hearing only. Fifteen days elapsed with the defendants being held without bail and without counsel. At a hearing in October 2018, the court appointed counsel over the attorneys' oral and written objections. Each argued that he could not effectively

represent the defendants at a dangerousness hearing because of their existing excessive caseloads.

Amici see additional signs of problems in Franklin and Berkshire Counties. R3:194. In conjunction with preparing this brief, the undersigned attorneys sent a questionnaire to all bar advocate programs and were able to interview representatives from eight programs. *See* Summary of Information from County Bar Advocate Interviews by Morgan Lewis (October 17, 2019), add. 158-68 ("Bar Advocate Interview Summary"). Significant problems reported by four of the programs include marked decline in the number of available attorneys with the reasons cited being low pay, attorneys working pro bono once they are "capped out" in the fourth quarter of the fiscal year, and inability of the program to staff all duty days.

The reasons for these problems are well known to this Court, and they include:

> the absence of necessary funding by the Legislature, the inability of CPCS to qualify adequate numbers of private attorneys to serve as bar advocates because of the low hourly fee mandated by the Legislature, [and] the unavailability of qualified bar advocates because of the limitation on the number of hours they may bill annually.

Bridgeman v. Dist. Attorney for Suffolk Dist., 476 Mass. 298, 325 (2017) (*Bridgeman II*). Simply put, the demand for lawyers to represent indigent defendants increasingly exceeds the supply of lawyers who are able and willing to provide that vital representation.

SUMMARY OF ARGUMENT

I. The Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights require legislatures to appropriate adequate funds to ensure that indigent criminal defendants are not deprived of the right to counsel. Massachusetts has not done so. The compensation rates set in G. L. c. 211D, § 11(a) are driving lawyers away from providing indigent criminal defense and causing the denial of the right to counsel in two principal ways. First, due to the unavailability of counsel, indigent criminal defendants are denied their right to counsel at critical stages in their cases: at arraignment and before the imposition of restrictions on liberty. This denial causes irreparable harm. Second, more than causing harm in individual criminal cases, the low rates deter prospective attorneys from practicing indigent defense counsel thereby threatening the continued viability of the right to counsel systemically. *Infra* at 20-29.

This Court can declare a legislative act unconstitutional and order appropriate remedies to address the violation. The Court should do so here in respect to § 11(a) as applied to Hampden County. *Infra* at 29-31.

II. Even if the Court does not declare § 11(a) unconstitutional, it may still exercise its superintendence powers over the courts and order the expenditure of funds needed to secure the full and effective administration of justice. The recurrent Hampden County counsel crisis indisputably interrupts the capacity of the court to

decide cases and administer justice thereby encroaching on the inherent power of the Judiciary. *Infra* at 31-34.

III. As an exercise of its constitutional and superintendence authorities, the Court should impose three kinds of remedies. First, it should authorize an increase in compensation rates paid to bar advocates in District Court cases to $85 per hour (from $53); in Superior Court cases to $125 per hour (from $68); and for homicide cases to $148 per hour (from $100). Second, the Court should, upon the unavailability of CPCS attorneys, order that judges confer with prosecutors and encourage or require them to dismiss cases with prejudice in order to manage judicial resources (i.e. attorneys) and ensure that each defendant has the effective assistance of counsel. Third, the Court should mandate the improvement of the operations of the Springfield District Court, which could include the following measures affecting: the number of judges; the availability of Spanish-speaking interpreters; the availability of police and CORI reports, which should be on file the day before an arraignment; prosecutorial practices, including reducing the case ratio in the administrative session to one prosecutor for thirty cases and requiring prosecutors—no later than the first pretrial date—to make a reasonable, good faith showing that they can meet their burden of proof. *Infra* at 34-40.

ARGUMENT

I. As applied to Hampden County, the compensation rates prescribed by G. L. c. 211D, § 11(a) violate defendants' right to counsel under the Sixth Amendment and Article 12.

In July 2019, 169 defendants in Hampden County were incarcerated without counsel.[6] Although that number has now been reduced, the stopgap measures enacted through the *Lavallee* protocols do not fix the problem, but instead create a revolving door of defendants.[7] To the extent that these systemic shortages are "caused by the low rate of attorney compensation authorized" by the Legislature, *Lavallee*, 442 Mass. at 229, the constitutionally-prescribed response is not to wait and see what the Legislature *will do*, but instead to adjudicate what the Legislature *has done*. Specifically, the reimbursement rates in § 11(a), as applied to Hampden County, violate the Sixth Amendment and art. 12.

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[6] This number includes the cases assigned to CPCS under protest. R3:195.

[7] The other measures adopted by CPCS are likewise temporary, as they are already negatively impacting the availability of counsel in other counties. Additionally, those attorneys traveling from other counties, enticed to temporarily practice in Hampden due to the emergency duty day payments, have challenges meeting with clients given the travel time and distance. Pet. Br. at 35. Such challenges may lay the foundation for ineffective assistance of counsel claims.

A. The right to counsel requires states to spend money to adequately fund indigent defense.

Providing counsel to indigent defendants costs money, and federal and state constitutions require governments to spend it. The Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and this Court's cases on art. 12 require legislatures to act as is necessary, including by appropriating adequate funds, to ensure the right to counsel for indigent defendants. In *Gideon*, the Supreme Court held that states have an affirmative obligation to provide counsel to the indigent defendants they hale into their courts. 372 U.S. at 344. This is nothing less than a command that states, including Massachusetts, spend the millions of dollars necessary to pay for the defense of the large numbers of poor people they prosecute.

States cannot shirk this command by prosecuting *so many* poor people that providing them with lawyers becomes quite expensive. According to one estimate, near the time *Gideon* was decided, the indigency rate for state felony cases was 43%; by 2006, approximately 80% of people charged with crime were poor.[8] But this trend toward punishing more and more poor people does not make compliance with *Gideon* optional. So long as people experiencing poverty remain entrenched in the

[8] See Paul Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 Yale L.J., 2176, 2181 (2013), add. 123-51.

criminal justice system, *Gideon* requires that expansive public defender and private counsel systems be budgeted into existence to defend them.

In Massachusetts, the right to counsel under art. 12 is at least as robust as its federal counterpart. *Lavallee*, 442 Mass. at 234. As early as 1820, this Court recognized the right to counsel in capital cases. *Grady v. Treasurer of the County. of Worcester*, 352 Mass. 702, 703 (1967). *See also* St. 1820, c.14, § 8 ("if such person shall deny the charge, and put himself or herself upon trial, the court so holden may assign counsel …"). In the almost 200 years since then, this Court has consistently enforced art. 12 to require a more expansive and protective right to counsel than the Sixth Amendment provides. *Deputy Chief Counsel for Pub. Defender Div. of Comm. for Pub. Counsel Servs. v. Acting First Justice of Lowell Div. of Dist. Court Dep't*, 477 Mass. 178, 184 (2017) (*Deputy Chief Counsel*) (explaining history). There is evidence this Court appointed counsel in murder cases as early as 1790. Alan Rogers, *"A Sacred Duty": Court Appointed Attorneys in Massachusetts Capital Cases, 1780-1980*, 41 American J. of Legal History 440, 442-443 (1997), add. 97-122. See also, *Commonwealth v. Hardy*, 2 Mass. (Tyng) 303 (1807) (two attorneys "assigned by the Court as counsel for the prisoner"). Consistent with those protections, this Court has repeatedly recognized that art. 12 requires the expenditure of funds. See, e.g., *id.* (an indigent defender system "[p]lagued by a shortage of resources . . . unable to deliver on its mission to provide

counsel to all indigent defendants."); *Commonwealth v. Porter*, 462 Mass. 724, 728 (2012) ("Encompassed in [the Sixth Amendment and art. 12] guarantee is the right of indigent defendants . . . to have counsel appointed at public expense."); see also, e.g., *Abodeely v. Worcester County*, 352 Mass. 719, 723-24 (1967) (indigent defense counsel cannot be required to work pro bono).

Consistent with this Court's pronouncements, other state supreme courts too have acknowledged that *Gideon* and the right to counsel requires states to expend the funding adequate and necessary to provide indigent defense counsel. See, e.g., *Kuren v. Luzerne County*, 637 Pa. 33, 94 (2016) (the level of funding provided has left the public defender's office unable to comply with *Gideon* thus violating the Sixth Amendment); *Hurrell-Harring v. State*, 15 N.Y.3d 8, 23 (2010) (recognizing a Sixth Amendment claim for government's failure to provide counsel to indigent defendants at all critical stages due in part to inadequate funding); *Simmons v. State Pub. Defender*, 791 N.W.2d 69, 87 (Iowa 2010) (recognizing that a fee cap can undermine the right to counsel) *State v. Young*, 143 N.M. 1, 7 (2007) ("Defense counsels' compensation is inadequate . . . violating defendants' Sixth Amendment right to effective assistance of counsel.").

In *Kuren*, the Pennsylvania Supreme Court considered the county government's motion to dismiss a claim for injunctive relief asserted by the Luzerne County Office of the Public Defender ("OPD") and a class of defendants to whom

the office could not provide representation due to inadequate funding. The complaint alleged that the county's failure to provide adequate funding and resources to OPD had resulted in the systemic, widespread constructive denial of the right to counsel. Identifying that the denial of the right was tied inextricably to the funding system itself, 637 Pa. at 69, the Court held that, under the Sixth Amendment, plaintiffs could bring a claim for injunctive relief to increase OPD's funding so that it could fulfill *Gideon*'s mandate, *id.* at 94.

Similarly, a New York trial court held, in *New York County Lawyers' Ass'n v. New York*, that the state's failure to increase the rates paid to private indigent defense counsel violated the right to counsel because it caused the systemic denial of the right. 196 Misc. 2d 761, 762-63 (N.Y. Sup. Ct. 2003). As a remedy, the court declared the portions of the public defender statutes fixing the rates unconstitutional as applied and entered a permanent injunction raising the compensation rates so that they matched the rates paid to assigned counsel in federal courts until the Legislature addressed the issue. *Id.* at 778.

In short, providing the funding necessary to ensure representation of indigent criminal defendants is nondiscretionary. The Sixth Amendment and art. 12 require state governments to balance the vast sums of money they quite properly spend to establish machinery to try defendants accused of crime with the right of the defendant to counsel.

B. As applied to Hampden County, the compensation rates of § 11(a) cause a systemic denial of counsel.

To fulfill its constitutional obligations, the Commonwealth has an inescapable choice: hale fewer indigent defendants into court or adequately fund its indigent defense systems. As the trial judge in *Young* noted, "the State's failure to pay fair compensation indicates that [it] cannot afford" to bring the case. 143 N.M. at 3. That is the situation in Hampden County, in at least two ways.

First, inadequate pay for bar advocates recurrently causes indigent defendants in Hampden County to languish without counsel—sometimes in jail—at critical stages in their criminal cases, in violation of our constitutions. A fundamental feature of the right to counsel is the assignment of counsel "as soon as feasible after clients' arrest, detention or request for counsel." *ABA Ten Principles of a Public Defense Delivery System*, February 2002, *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf, add. 89. The right to counsel attaches no later than arraignment, the point at which the government has committed itself to prosecute. *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 198 (2008); *Commonwealth v. Torres*, 442 Mass. 554, 570–71 (2004) (right may attach before arraignment). While arraignment in Massachusetts may not in every case be a "critical stage," *Delle Chiaie v. Commonwealth*, 367 Mass. 527, 531 (1975), any absence of counsel establishes the basis in subsequent proceedings to impose upon

the Commonwealth the burden "to show that the lack of counsel at arraignment was harmless beyond a reasonable doubt," *Lavallee*, 442 Mass. at 237; see also Mass. R. Crim. P. 7(c) (providing that an "appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the arraignment").

The injuries arising from these delays in assigning counsel are irreparable. *Lavallee* itself identified "serious concerns" about whether indigent defendants lacking promptly assigned counsel "will ultimately receive the effective assistance of trial counsel." *Id.* at 236. The court also made the key point that the "harm from inaction over a period of time is cumulative." *Id.* A defendant denied the right to counsel at arraignment may miss the opportunity to have witnesses interviewed while the relevant events are still fresh in their memories and to otherwise preserve physical evidence. *Id.* at 235. Trial courts, in some cases, will also "impose probationary conditions . . . without the defendant's consent." *Id.* at 248. The imposition of restrictions on liberty without counsel is a quintessential violation of due process. See *Rothgery*, 554 U.S. at 213. Further, all defendants will have the unresolved charges hanging over them in "without prejudice" status while the Commonwealth, which has the duty to provide counsel, benefits from the accumulating constitutional harms. This stands on its head the Court's ruling that the Commonwealth, not defendants, should bear the burdens of systemic collapse. *See Lavallee*, 442 Mass. at 246.

Second, beyond being incapable of connecting indigent defendants with lawyers who *currently* practice criminal defense, low compensation rates harm defendants by deterring *prospective* criminal defense practitioners. As the Court noted in 2004, the historically low and relatively unchanging rates mandated by § 11(a) are "driving lawyers away from enrollment in the private defender division of CPCS in Hampden County." *Lavallee*, 442 Mass. at 245. Today, because compensation rates have not kept up with the costs of living, the situation is far more dire. HCLJ President David Hoose observed that while panel members leaving service to accept other jobs, such as with the District Attorney's Office, was in the past rare, "[n]ow it happens often." R1:257. The "persistent failure to adequately compensate private attorneys" is a "major contributing factor" to the recurring counsel crisis because it drives people away from criminal defense. R1:256. At present, there are 142 lawyers in HCLJ, the lowest number in the past five years. R3:191.

Just as it prohibits a state's failure to provide an effective lawyer for *one* indigent defendant, the constitution also prohibits a state's failure to provide an adequate defense for *all* indigent defendants. See generally, e.g., *Lavallee*, 442 Mass. at 238; *Simmons*, 791 N.W.2d at 76 (explaining framework for structural challenges for failure to provide right to counsel); *Luckey v. Harris*, 860 F.2d 1012 (11th Cir.

1988) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)) (recognizing class claims for prospective injunctive relief for violations of the right to counsel).

Today, the indigent system is being held together by a patchwork of emergency measures and the goodwill of attorneys, like MACDL President Kelleher, who have donated their services not only to their clients but, in effect, to the Commonwealth. *See* Affidavit of Victoria Kelleher. Once this patchwork is torn, and there are simply not enough criminal defense lawyers *in the entire Commonwealth* to cover all the criminal cases, it may be impossible to mend. As this Court noted in *Abodeely*, it is already only a "very small percentage of lawyers who can be said to be trial lawyers [and] an even smaller percentage of them has developed skills in the practice of criminal prosecution and defence." 352 Mass. at 723. That this small percentage of qualified lawyers is being pushed out of indigent defense due to embarrassingly low compensations rates will have devastating consequences on the right to counsel, and especially in Hampden County. Enrollment at Western New England University School of Law, which historically has produced many of the HCLJ's lawyers, has significantly declined. See Affidavit of David Hoose, R1:257. Simply put, as lawyers leave criminal defense, they are not being replaced.

This type of failure by the Legislature to, at a minimum, peg compensation rates to inflation led the court in *New York County Lawyers' Ass'n* to declare New

York's funding statutes unconstitutional. Like § 11(a), the New York statutes "were enacted without a mechanism for automatic periodic increases," and the NY legislature had not increased the rates in 17 years. 196 Misc.2d at 763-64. In striking down the statute and ordering an increase in rates, the court noted that the state has an obligation to provide reasonable compensation that at least accounts for the dynamics of inflation and the laws of supply and demand. *Id.* at 778.

Here, too, neither *Gideon* nor this Court's cases leave the Legislature free to permit the steady and certain collapse of Hampden County's indigent defense system. "Having chosen to operate" criminal courts in that County, the Commonwealth is "obligated to comply with the dictates of the [constitutional right to counsel]." *Wilbur v. Mount Vernon*, 989 F. Supp. 2d 1122, 1134 (W.D. Wa. 2013) (quoting *Brown v. Plata*, 563 U.S. 493, 511 (2011)). The inadequate compensation rates provided by the Legislature for indigent defense counsel in Hampden County, which is spurring the recurring counsel crisis, violate the Sixth Amendment and art. 12.

C. To remedy systemic violations of the right to counsel, the Court can and should order an increase in compensation rates.

This Court's authority to enforce the state and federal constitutions necessarily includes the ability to declare § 11(a) unconstitutional as applied to Hampden County and to fashion an equitable remedy for that violation.

The Judiciary's power to interpret the constitution necessarily encompasses the power to say when the Legislature has violated a constitutional right and to order appropriate remedies. See, e.g., *Doe v. Police Comm'r of Bos.*, 460 Mass. 342, 351 (2011). This fact is no less true if the constitutional violation results from the inadequacy of funding. *Duncan v. State*, 284 Mich. App. 246, 255 (2009) (rights of indigent defendants must be protected by Judiciary even against legislative failure to comply with constitutional mandates), *vacated and remanded on other grounds*, 486 Mich. 906 (2010). Indeed, inherent in art. 29 and art. 11 of the Massachusetts Declaration of Rights is the power of the Judiciary to secure the rights of every person, including the right to counsel, completely, and without denial; promptly, and without delay; conformably to the laws. See *First Justice of Bristol Div. of Juvenile Court Dep't v. Clerk-Magistrate of Bristol Div. of Juvenile Court Dep't*, 438 Mass. 387, 396 (2003) (*First Justice*). And one of the judiciary's essential functions "is to serve as the ultimate guardians of an indigent defendant's constitutional rights," such as the right to counsel. *Young*, 143 N.M. at 5 (quotation omitted).

Here, this Court should exercise that power by ordering an increase in compensation rates, as detailed more fully below in Part III.A. And "[w]hile it is true that an adverse ruling will have some fiscal impact on the state, this is true in many situations. If the court was constrained any time a ruling had fiscal impact, *Gideon*

itself, which has been characterized as an 'enormous unfunded mandate imposed upon the states,' would have been wrongly decided." *Simmons*, 791 N.W.2d at 86.

II. The Court also can and should remedy the Hampden County counsel crisis as an exercise of its superintendence power.

Even if this Court does not reach the question whether measures going beyond the *Lavallee* protocol are compelled by the constitutional right to counsel, it may impose such remedies as an exercise of this Court's inherent authority of superintendence over the courts. Consistent with the separation of powers declared in art. 30 of the Massachusetts Declaration of Rights, this Court has recognized that "[i]t was certainly never intended that any one department, through the exercise of its acknowledged powers, should be able to prevent another department from fulfilling its responsibilities to the people under the Constitution." *O'Coin's Inc. v. Treas. of Worcester County*, 362 Mass. 507, 511 (1972). In Hampden County, so long as indigent defendants do not regularly and predictably receive assistance of counsel, the Judiciary cannot fulfill its responsibility to see that justice is done. Core judicial functions have ground to a halt, and the time for the exercise of this Court's superintendence powers has arrived.

When legislative underfunding threatens the continued viability of the judicial branch, the Court is obligated to intervene and do whatever it can to ensure criminal defendants receive a fair trial. *County of Barnstable v. Commonwealth*, 410 Mass. 326, 330 (1996); *O'Coin's*, 362 Mass. at 509-10. While the Court has insisted on

"scrupulous observance" of the separation of powers principle embodied in art. 30, the court has "also recognized that some overlap [between the three branches of government] is inevitable." *Gray v. Commissioner of Revenue*, 422 Mass. 666, 671 (1996). At all times, the "[i]nherent powers of the courts are those 'whose exercise is essential to the function of the judicial department, to the maintenance of its authority, or to its capacity to decide cases.'" *Brach v. Chief Justice of Dist. Court Dep't*, 386 Mass. 528, 535 (1982) (quoting *Sheriff of Middlesex County v. Comm'r of Correction*, 383 Mass. 631, 636, (1981)).

Accordingly, the Court has used its powers to order courtroom equipment, *O'Coin's*, 362 Mass. 507, to order compensation for a defense attorney, *Abodeely*, 352 Mass. at 724-25, and stated that it could order the Commonwealth to pay to provide a courthouse and services, *Barnstable*, 410 Mass. at 335. It cannot be that this Court has authority to order the expenditure of funds when a court needs a tape recorder and three tapes, but not when legislative inaction yields a systemic deprivation to the constitutional right to counsel and prolonged interference with the proper administration of justice. See *State v. Quitman County*, 807 So.2d 401, 410 (Miss. 2001) ("Certainly, if adequate facilities are essential to the administration of justice, so is effective representation."); see also *Maas v. Olive*, 992 So. 2d 196, 202 (Fla. 2008) ("statutory limits for compensation of counsel may not constitutionally

be applied in a manner that would curtail the trial court's inherent authority to ensure adequate representation").

The recurrent Hampden County counsel crisis indisputably interrupts the capacity of the court to decide cases and administer justice. In the face of a shortage of counsel to represent indigent defendants, the judicial engine in Springfield District Court froze, losing its capacity to decide cases. Put another way, chronic funding neglect by the Legislature had once again matured to the point of interference with core judicial functions: the capacity to protect constitutional rights, decide cases, and do justice.

The Judiciary is not helpless in the face of this recurring crisis and the harms "of constitutional dimension" that it is visiting upon indigent defendants. *Lavallee*, 442 Mass. at 244. It is not obligated to await the Legislature's assistance while more constitutional violations occur and core judicial function break down. See *Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court*, 448 Mass. 15, 43 (2006) ("Where the administration of justice is in jeopardy, from whatever source, [and] the judiciary is unable to fulfil its statutory or constitutional mandates, there is no limitation on this court's inherent judicial authority."); see also *O'Coin's*, 362 Mass. at 516 (1972) (quoting *State ex rel. Hills v. Sullivan*, 48 Mont. 320, 329 (1913)) (when the court determines that the assistance necessary for the due and effective exercise of its own functions cannot be had by established methods [legislative

action] occasion arises for the exercise of the inherent power to order the expenditure of funds). Rather, this Court has repeatedly held that "every judge must exercise his inherent powers as necessary to secure the full and effective administration of justice." *O'Coin's*, 362 Mass. at 514.

III. As an exercise of its authority to remedy systemic violations of the right to counsel, and as an exercise of its inherent authority to ensure the proper functioning of the judiciary, this Court should impose a range of solutions for the Hampden County counsel crisis.

Fifteen years of systemic failures to address this Court's call to solve this constitutional crisis and adequately fund counsel for indigent criminal defendants are enough. Counsel for indigent defendants are in short supply because of the unrealistic compensation rates authorized by the Legislature.[9] In the face of legislative inaction and recurring crises, the Court must do more than rely on the stopgap *Lavallee* protocol that provides indigent criminal defendants with only lukewarm due process and too-little-too-late counsel.

[9] The rate paid to federal bar advocates under the Criminal Justice Act ("CJA") was $90 in 2005 and incrementally increased every 1 to 3 years to its current rate of $148. See Guide to Judiciary Policy, Vol. 7: Defender Services § 230.16(A) (May 2019), *available at* https://www.uscourts.gov/sites/default/files/vol07a-ch02.pdf, add. 79-84.

A. The Court Should Authorize Bar Advocates to Invoice the Commonwealth for Fees Above and Beyond the Amount Paid by CPCS

Until the Legislature devises a more permanent solution, the Court should exercise its inherent powers to authorize an immediate increase in compensation rates paid to attorneys in CPCS's private counsel division, and to mandate "automatic periodic increases" capable of tracking the cost of living. See *New York County Lawyers' Ass'n*, 196 Misc. 2d at 763. An initial set of rates might be $85 per hour for District Court, $125 per hour for Superior Court (non-homicide), and $148 per hour for homicide cases. In support of these minimum rates, amici reason as follows:

1. District Court: Increase the hourly rate from $53 to $85. For District Court cases, the Legislature first established a rate of $35 per hour in 1985. Simply to keep up with inflation, this rate should now be $85. See Pet. Br. at 47 n.7, *Walsh v. Commonwealth*, SJC-12648 (Aug. 30, 2019), citing U.S. Department of Labor, Bureau of Labor Statistics, *CPI Inflation Calculator*.

2. Superior Court (non-homicide): Increase the hourly rate from $68 to $125. Superior Court non-homicide cases arise out of serious felony charges, and are more complex than District Court matters. As stated in the May 2014 report of the Massachusetts Bar Association's Commission on Criminal Justice Attorney Compensation, hourly rates for this work must be "sufficiently higher to entice bar

advocates" qualified to handle the more complex and time-intensive serious felony matters. See also Bar Advocate Interview Summary, add. 158-64. The hourly rate for this work is currently $68—a rate that has been increased once, from $60, since 2005. In 2014, the Commission recommended that the Criminal Justice Act ("CJA") rate of $125 per hour be used as a guide for non-murder Superior Court work. Although the CJA rate has since been raised to $148, at a minimum lawyers handling Superior Court matters should be paid the $125 rate that was deemed appropriate in 2014.

3. Homicide: Increase the hourly rate from $100 to $148. The current CJA capital rate, $190, far exceeds the $100 rate authorized for homicide cases in Massachusetts, which has not changed since 2005. Increasing the Massachusetts homicide-case compensation rate to $148 rate, which would be equal to current non-capital CJA rate, would mitigate some of the risk that low rate presently pose to defendants in Massachusetts.

No matter the rates this Court might choose, it is vitally important to immediately require that they exceed the rates presently authorized by statute, and to immediately hold that cost-of-living increases are essential. Otherwise this crisis will emerge again and again.

B. The Court could also strengthen the *Lavallee* protocol by requiring or urging prosecutors to exercise their discretion to dismiss cases with prejudice.

In *Bridgeman II*, faced with a number of cases that exceeded the number of available attorneys, this Court instructed that "the district attorneys *shall* exercise their prosecutorial discretion . . . by moving to vacate and dismiss" cases. 476 Mass. at 300. The Court warned that, unless prosecutors dismissed "large numbers" of such cases, this Court "might . . . implement an appropriate remedy under our general superintendence authority for the constitutional violation suffered by indigent criminal defendants who are denied their right to counsel," and that "remedy will likely be the dismissal without prejudice" of prior convictions. *Id.* at 326 (citing *Lavallee*, 442 Mass. at 246).

Here, too, this Court can require or encourage the dismissal of (perhaps low-level) charges, thereby increasing availability of counsel. See *State ex rel. Missouri Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 598 (Mo. 2012). Amici recommend that judges in Hampden County, upon notice of the unavailability of CPCS attorneys, confer with the District Attorney's Office and CPCS to determine which cases or categories of offenses they will dismiss. And to ensure that defendants do not suffer accumulating constitutional harms from dismissals caused by the denial of counsel at critical stages, cases should be dismissed with prejudice.

Economic realities and budgeting do not negate constitutional mandates. If the Commonwealth is unable to afford the right to counsel, it cannot afford to continue to bring the same volume of criminal cases that it has been.

C. The Court should improve the administration of justice in Hampden County.

Although the egregious underfunding of defense counsel is the root cause of the recurring counsel crisis, modifications to the Springfield District Court's operations will mitigate some of the significant losses of time that exacerbate the burden imposed by low hourly rates and add to the frustrations experienced by attorneys practicing in that district. Under G. L. c. 211, § 3, this Court may and should use its superintendence powers to issue such "orders, directions and rules as may be necessary or desirable for" the administration of the Springfield District Courts.

Amici agree with CPCS that the following modifications to the operations of the Springfield District Court should be made. The Court should monitor and oversee any improvements it implements in order to ensure their effectiveness at improving the efficiency of administrations in the District Court.

1. Judicial Staffing. The number of judges assigned to the Springfield District Court should be doubled so that two arraignment sessions can be held; two pretrial sessions can be run; and four trial sessions can hear cases.

2. Court Resources. The District Court should be provided the resources necessary to have Spanish-speaking interpreters on call in each arraignment session. Likewise, District Court judges should be encouraged not to expend resources, including time, on matters that impose needless burdens on indigent defendants. For example, any time that judges spend urging indigent defendants to pay their assigned counsel fees should be eliminated immediately. Cf. R3:205.

3. The Availability of Police and CORI Reports. The Court should order that police reports be on file with the District Attorney's Office before the close of business on the day before the corresponding arraignment. Likewise, the Court should order the Probation Department to have all CORIs on file with the District Attorney's Office before the close of business on the day before an arraignment is to take place. The District Attorney's Office should be required to appear at the beginning of the arraignment session with a copy of all pertinent police reports and CORIs, as well as extra copies for defense counsel.

4. Continuances. Defense attorneys should be allowed to file motions for a continuance in the administrative session. *Cf.* R3:205.

5. Prosecutorial Practices. The Court should require prosecutors to make a validity showing—a showing that they have a reasonable basis to believe they can meet their burden of proof—no later than that the first pretrial date. Cases should not be scheduled for trial if the Commonwealth cannot demonstrate that it has located

its witnesses and can sustain its burden of proof. Additionally, the District Attorney should be required to reduce the ratio of pretrial assignments from the current ratio, which reportedly can reach one prosecutor per 125 cases. See R1:256. The ratio should not exceed one prosecutor per thirty cases.

CONCLUSION

For the reasons set forth in this brief, HCLJ and MACDL urge the court to move beyond *Lavallee* and invoke its inherent powers to order hourly rate increases for attorneys in CPCS's private counsel division.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 17(C)(9)

I hereby certify that this brief complies with Massachusetts Rules of Appellate Procedure 17 and 20. This brief was prepared in a proportionally spaced font, Times New Roman, 14-point font, and pursuant to Rule 20(A)(3)(F) contains 7,157 words. Compliance with the length limits of Rule 20(a)(3)(E) was ascertained using the Word Count function in Microsoft Word, version 16.0.4849.1000.

/s/ Robert E. McDonnell
Robert E. McDonnell

ADDENDUM

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U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights

Currentness

<Notes of Decisions for this amendment are displayed in three separate documents. Notes of Decisions for subdivisions I through XX are contained in this document. For Notes of Decisions for subdivisions XXI through XXIX, see the second document for Amend. VI. For Notes of Decisions for subdivisions XXX through XXXIII, see the third document for Amend. VI.>

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.

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 116-65.

End of Document

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 11

Art. XI. Remedy by recourse to the laws; obtaining of right and justice freely, completely and promptly

Currentness

ART. XI. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

M.G.L.A. Const. Pt. 1, Art. 11, MA CONST Pt. 1, Art. 11
Current through amendments approved August 1, 2019

End of Document

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 12

Art. XII. Regulation of prosecutions; right of trial by jury in criminal cases

Currentness

ART. XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

M.G.L.A. Const. Pt. 1, Art. 12, MA CONST Pt. 1, Art. 12
Current through amendments approved August 1, 2019

End of Document

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 29

Art. XXIX. Judges of supreme judicial court; tenure of office, salaries

Currentness

ART. XXIX. It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

M.G.L.A. Const. Pt. 1, Art. 29, MA CONST Pt. 1, Art. 29
Current through amendments approved August 1, 2019

End of Document

Massachusetts General Laws Annotated
Constitution or Form of Government for the Commonwealth of Massachusetts [Annotated]
Part the First a Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

M.G.L.A. Const. Pt. 1, Art. 30

Art. XXX. Separation of legislative, executive and judicial departments

Currentness

ART. XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

M.G.L.A. Const. Pt. 1, Art. 30, MA CONST Pt. 1, Art. 30
Current through amendments approved August 1, 2019

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 201. General Provisions (Refs & Annos)

18 U.S.C.A. § 3006A

§ 3006A. Adequate representation of defendants

Effective: May 27, 2010
Currentness

(a) Choice of plan.--Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation in accordance with this section. Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation. Each plan shall provide the following:

(1) Representation shall be provided for any financially eligible person who--

(A) is charged with a felony or a Class A misdemeanor;

(B) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of this title;

(C) is charged with a violation of probation;

(D) is under arrest, when such representation is required by law;

(E) is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release;

(F) is subject to a mental condition hearing under chapter 313 of this title;

(G) is in custody as a material witness;

(H) is entitled to appointment of counsel under the sixth amendment to the Constitution;

(I) faces loss of liberty in a case, and Federal law requires the appointment of counsel; or

(J) is entitled to the appointment of counsel under section 4109 of this title.

(2) Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who--

(A) is charged with a Class B or C misdemeanor, or an infraction for which a sentence to confinement is authorized; or

(B) is seeking relief under section 2241, 2254, or 2255 of title 28.

(3) Private attorneys shall be appointed in a substantial proportion of the cases. Each plan may include, in addition to the provisions for private attorneys, either of the following or both:

(A) Attorneys furnished by a bar association or a legal aid agency,

(B) Attorneys furnished by a defender organization established in accordance with the provisions of subsection (g).

Prior to approving the plan for a district, the judicial council of the circuit shall supplement the plan with provisions for representation on appeal. The district court may modify the plan at any time with the approval of the judicial council of the circuit. It shall modify the plan when directed by the judicial council of the circuit. The district court shall notify the Administrative Office of the United States Courts of any modification of its plan.

(b) Appointment of counsel.--Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan. In every case in which a person entitled to representation under a plan approved under subsection (a) appears without counsel, the United States magistrate judge or the court shall advise the person that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the person waives representation by counsel, the United States magistrate judge or the court, if satisfied after appropriate inquiry that the person is financially unable to obtain counsel, shall appoint counsel to represent him. Such appointment may be made retroactive to include any representation furnished pursuant to the plan prior to appointment. The United States magistrate judge or the court shall appoint separate counsel for persons having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

(c) Duration and substitution of appointments.--A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate judge or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate. If at any stage of the proceedings, including an appeal, the United States magistrate judge or the court finds that the person is financially unable to pay counsel whom he had retained, it may appoint counsel as provided in subsection (b) and authorize payment as provided in subsection (d), as the interests of justice may dictate. The United States magistrate judge or the court may, in the interests of justice, substitute one appointed counsel for another at any stage of the proceedings.

(d) Payment for representation.--

(1) Hourly rate.--Any attorney appointed pursuant to this section or a bar association or legal aid agency or community defender organization which has provided the appointed attorney shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $60 per hour for time expended in court or before a United States magistrate judge and $40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that a higher rate of not in excess of $75 per hour is justified for a circuit or for particular districts within a circuit, for time expended in court or before a United States magistrate judge and for time expended out of court. The Judicial Conference shall develop guidelines for determining the maximum hourly rates for each circuit in accordance with the preceding sentence, with variations by district, where appropriate, taking into account such factors as the minimum range of the prevailing hourly rates for qualified attorneys in the district in which the representation is provided and the recommendations of the judicial councils of the circuits. Not less than 3 years after the effective date of the Criminal Justice Act Revision of 1986, the Judicial Conference is authorized to raise the maximum hourly rates specified in this paragraph up to the aggregate of the overall average percentages of the adjustments in the rates of pay under the General Schedule made pursuant to section 5305 of title 5 on or after such effective date. After the rates are raised under the preceding sentence, such maximum hourly rates may be raised at intervals of not less than 1 year each, up to the aggregate of the overall average percentages of such adjustments made since the last raise was made under this paragraph. Attorneys may be reimbursed for expenses reasonably incurred, including the costs of transcripts authorized by the United States magistrate [1] or the court, and the costs of defending actions alleging malpractice of counsel in furnishing representational services under this section. No reimbursement for expenses in defending against malpractice claims shall be made if a judgment of malpractice is rendered against the counsel furnishing representational services under this section. The United States magistrate [1] or the court shall make determinations relating to reimbursement of expenses under this paragraph.

(2) Maximum amounts.--For representation of a defendant before the United States magistrate judge or the district court, or both, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $7,000 for each attorney in a case in which one or more felonies are charged, and $2,000 for each attorney in a case in which only misdemeanors are charged. For representation of a defendant in an appellate court, the compensation to be paid to an attorney or to a bar association or legal aid agency or community defender organization shall not exceed $5,000 for each attorney in each court. For representation of a petitioner in a non-capital habeas corpus proceeding, the compensation for each attorney shall not exceed the amount applicable to a felony in this paragraph for representation of a defendant before a judicial officer of the district court. For representation of such petitioner in an appellate court, the compensation for each attorney shall not exceed the amount applicable for representation of a defendant in an appellate court. For representation of an offender before the United States Parole Commission in a proceeding under section 4106A of this title, the compensation shall not exceed $1,500 for each attorney in each proceeding; for representation of an offender in an appeal from a determination of such Commission under such section, the compensation shall not exceed $5,000 for each attorney in each court. For any other representation required or authorized by this section, the compensation shall not exceed $1,500 for each attorney in each proceeding. The compensation maximum amounts provided in this paragraph shall increase simultaneously by the same percentage, rounded to the nearest multiple of $100, as the aggregate percentage increases in the maximum hourly compensation rate paid pursuant to paragraph (1) for time expended since the case maximum amounts were last adjusted.

(3) Waiving maximum amounts.--Payment in excess of any maximum amount provided in paragraph (2) of this subsection may be made for extended or complex representation whenever the court in which the representation was rendered, or the United States magistrate judge if the representation was furnished exclusively before him, certifies that the amount of the excess payment is necessary to provide fair compensation and the payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(4) Disclosure of fees.--

(A) In general.--Subject to subparagraphs (B) through (E), the amounts paid under this subsection for services in any case shall be made available to the public by the court upon the court's approval of the payment.

(B) Pre-trial or trial in progress.--If a trial is in pre-trial status or still in progress and after considering the defendant's interests as set forth in subparagraph (D), the court shall--

(i) redact any detailed information on the payment voucher provided by defense counsel to justify the expenses to the court; and

(ii) make public only the amounts approved for payment to defense counsel by dividing those amounts into the following categories:

(I) Arraignment and or plea.

(II) Bail and detention hearings.

(III) Motions.

(IV) Hearings.

(V) Interviews and conferences.

(VI) Obtaining and reviewing records.

(VII) Legal research and brief writing.

(VIII) Travel time.

(IX) Investigative work.

(X) Experts.

(XI) Trial and appeals.

(XII) Other.

(C) Trial completed.--

(i) In general.--If a request for payment is not submitted until after the completion of the trial and subject to consideration of the defendant's interests as set forth in subparagraph (D), the court shall make available to the public an unredacted copy of the expense voucher.

(ii) Protection of the rights of the defendant.--If the court determines that defendant's interests as set forth in subparagraph (D) require a limited disclosure, the court shall disclose amounts as provided in subparagraph (B).

(D) Considerations.--The interests referred to in subparagraphs (B) and (C) are--

(i) to protect any person's 5th amendment right against self-incrimination;

(ii) to protect the defendant's 6th amendment rights to effective assistance of counsel;

(iii) the defendant's attorney-client privilege;

(iv) the work product privilege of the defendant's counsel;

(v) the safety of any person; and

(vi) any other interest that justice may require, except that the amount of the fees shall not be considered a reason justifying any limited disclosure under section 3006A(d)(4) of title 18, United States Code.

(E) Notice.--The court shall provide reasonable notice of disclosure to the counsel of the defendant prior to the approval of the payments in order to allow the counsel to request redaction based on the considerations set forth in subparagraph (D). Upon completion of the trial, the court shall release unredacted copies of the vouchers provided by defense counsel to justify the expenses to the court. If there is an appeal, the court shall not release unredacted copies of the vouchers provided by defense counsel to justify the expenses to the court until such time as the appeals process is completed, unless the court determines that none of the defendant's interests set forth in subparagraph (D) will be compromised.

(F) Effective date.--The amendment made by paragraph (4) shall become effective 60 days after enactment of this Act, will apply only to cases filed on or after the effective date, and shall be in effect for no longer than 24 months after the effective date.

(5) Filing claims.--A separate claim for compensation and reimbursement shall be made to the district court for representation before the United States magistrate judge and the court, and to each appellate court before which the attorney provided representation to the person involved. Each claim shall be supported by a sworn written statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the United States magistrate judge and the court, and the compensation and reimbursement applied for or received in the same case from any other source.

The court shall fix the compensation and reimbursement to be paid to the attorney or to the bar association or legal aid agency or community defender organization which provided the appointed attorney. In cases where representation is furnished exclusively before a United States magistrate judge, the claim shall be submitted to him and he shall fix the compensation and reimbursement to be paid. In cases where representation is furnished other than before the United States magistrate judge, the district court, or an appellate court, claims shall be submitted to the district court which shall fix the compensation and reimbursement to be paid.

(6) New trials.--For purposes of compensation and other payments authorized by this section, an order by a court granting a new trial shall be deemed to initiate a new case.

(7) Proceedings before appellate courts.--If a person for whom counsel is appointed under this section appeals to an appellate court or petitions for a writ of certiorari, he may do so without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

(e) Services other than counsel.--

(1) Upon request.--Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request.--(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $800 and expenses reasonably incurred.

(B) The court, or the United States magistrate judge (if the services were rendered in a case disposed of entirely before the United States magistrate judge), may, in the interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $800.

(3) Maximum amounts.--Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $2,400, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

(4) Disclosure of fees.--The amounts paid under this subsection for services in any case shall be made available to the public.

(5) The dollar amounts provided in paragraphs (2) and (3) shall be adjusted simultaneously by an amount, rounded to the nearest multiple of $100, equal to the percentage of the cumulative adjustments taking effect under section 5303 of title 5 in the rates of pay under the General Schedule since the date the dollar amounts provided in paragraphs (2) and (3), respectively, were last enacted or adjusted by statute.

(f) Receipt of other payments.--Whenever the United States magistrate judge or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section. Except as so authorized or directed, no such person or organization may request or accept any payment or promise of payment for representing a defendant.

(g) Defender organization.--

(1) Qualifications.--A district or a part of a district in which at least two hundred persons annually require the appointment of counsel may establish a defender organization as provided for either under subparagraphs (A) or (B) of paragraph (2) of this subsection or both. Two adjacent districts or parts of districts may aggregate the number of persons required to be represented to establish eligibility for a defender organization to serve both areas. In the event that adjacent districts or parts of districts are located in different circuits, the plan for furnishing representation shall be approved by the judicial council of each circuit.

(2) Types of Defender Organizations.--

(A) Federal Public Defender Organization.--A Federal Public Defender Organization shall consist of one or more full-time salaried attorneys. An organization for a district or part of a district or two adjacent districts or parts of districts shall be supervised by a Federal Public Defender appointed by the court of appeals of the circuit, without regard to the provisions of title 5 governing appointments in the competitive service, after considering recommendations from the district court or courts to be served. Nothing contained herein shall be deemed to authorize more than one Federal Public Defender within a single judicial district. The Federal Public Defender shall be appointed for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty. Upon the expiration of his term, a Federal Public Defender may, by a majority vote of the judges of the court of appeals, continue to perform the duties of his office until his successor is appointed, or until one year after the expiration of such Defender's term, whichever is earlier. The compensation of the Federal Public Defender shall be fixed by the court of appeals of the circuit at a rate not to exceed the compensation received by the United States attorney for the district where representation is furnished or, if two districts or parts of districts are involved, the compensation of the higher paid United States attorney of the districts. The Federal Public Defender may appoint, without regard to the provisions of title 5 governing appointments in the competitive service, full-time attorneys in such number as may be approved by the court of appeals of the circuit and other personnel in such number as may be approved by the Director of the Administrative Office of the United States Courts. Compensation paid to such attorneys and other personnel of the organization shall be fixed by the Federal Public Defender at a rate not to exceed that paid to attorneys and other personnel of similar qualifications and experience in the Office of the United States attorney in the district where representation is furnished or, if two districts or parts of districts are involved, the higher compensation paid to persons of similar qualifications and experience in the districts. Neither the Federal Public Defender nor any attorney so appointed by him may engage in the private practice of law. Each organization shall submit to the Director of the Administrative Office of the United States Courts, at the time and in the form prescribed by him, reports of its activities and financial position and its proposed budget. The Director of the Administrative Office

shall submit, in accordance with section 605 of title 28, a budget for each organization for each fiscal year and shall out of the appropriations therefor make payments to and on behalf of each organization. Payments under this subparagraph to an organization shall be in lieu of payments under subsection (d) or (e).

(B) Community Defender Organization.--A Community Defender Organization shall be a nonprofit defense counsel service established and administered by any group authorized by the plan to provide representation. The organization shall be eligible to furnish attorneys and receive payments under this section if its bylaws are set forth in the plan of the district or districts in which it will serve. Each organization shall submit to the Judicial Conference of the United States an annual report setting forth its activities and financial position and the anticipated caseload and expenses for the next fiscal year. Upon application an organization may, to the extent approved by the Judicial Conference of the United States:

(i) receive an initial grant for expenses necessary to establish the organization; and

(ii) in lieu of payments under subsection (d) or (e), receive periodic sustaining grants to provide representation and other expenses pursuant to this section.

(3) Malpractice and negligence suits.--The Director of the Administrative Office of the United States Courts shall, to the extent the Director considers appropriate, provide representation for and hold harmless, or provide liability insurance for, any person who is an officer or employee of a Federal Public Defender Organization established under this subsection, or a Community Defender Organization established under this subsection which is receiving periodic sustaining grants, for money damages for injury, loss of liberty, loss of property, or personal injury or death arising from malpractice or negligence of any such officer or employee in furnishing representational services under this section while acting within the scope of that person's office or employment.

(h) Rules and reports.--Each district court and court of appeals of a circuit shall submit a report on the appointment of counsel within its jurisdiction to the Administrative Office of the United States Courts in such form and at such times as the Judicial Conference of the United States may specify. The Judicial Conference of the United States may, from time to time, issue rules and regulations governing the operation of plans formulated under this section.

(i) Appropriations.--There are authorized to be appropriated to the United States courts, out of any money in the Treasury not otherwise appropriated, sums necessary to carry out the provisions of this section, including funds for the continuing education and training of persons providing representational services under this section. When so specified in appropriation acts, such appropriations shall remain available until expended. Payments from such appropriations shall be made under the supervision of the Director of the Administrative Office of the United States Courts.

(j) Districts included.--As used in this section, the term “district court” means each district court of the United States created by chapter 5 of title 28, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, and the District Court of Guam.

(k) Applicability in the District of Columbia.--The provisions of this section shall apply in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit. The provisions of this section shall not apply to the Superior Court of the District of Columbia and the District of Columbia Court of Appeals.

CREDIT(S)

(Added Pub.L. 88-455, § 2, Aug. 20, 1964, 78 Stat. 552; amended Pub.L. 90-578, Title III, § 301(a)(1), Oct. 17, 1968, 82 Stat. 1115; Pub.L. 91-447, § 1, Oct. 14, 1970, 84 Stat. 916; Pub.L. 93-412, § 3, Sept. 3, 1974, 88 Stat. 1093; Pub.L. 97-164, Title II, § 206(a), (b), Apr. 2, 1982, 96 Stat. 53; Pub.L. 98-473, Title II, §§ 223(e), 405, 1901, Oct. 12, 1984, 98 Stat. 2028, 2067, 2185; Pub.L. 99-651, Title I, §§ 102, 103, Nov. 14, 1986, 100 Stat. 3642, 3645; Pub.L. 100-182, § 19, Dec. 7, 1987, 101 Stat. 1270; Pub.L. 100-690, Title VII, § 7101(f), Nov. 18, 1988, 102 Stat. 4416; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub.L. 104-132, Title IX, § 903(a), Apr. 24, 1996, 110 Stat. 1318; Pub.L. 105-119, Title III, § 308, Nov. 26, 1997, 111 Stat. 2493; Pub.L. 106-113, Div. B, § 1000(a)(1) [Title III, § 308(a)], Nov. 29, 1999, 113 Stat. 1535, 1501A-37; Pub.L. 106-518, Title II, §§ 210, 211, Nov. 13, 2000, 114 Stat. 2415; Pub.L. 108-447, Div. B, Title III, § 304, Dec. 8, 2004, 118 Stat. 2894; Pub.L. 110-406, §§ 11-12(b), Oct. 13, 2008, 122 Stat. 4293, 4294; Pub.L. 111-174, § 7, May 27, 2010, 124 Stat. 1217.)

Footnotes

1 So in original. Probably should be “United States magistrate judge”.

18 U.S.C.A. § 3006A, 18 USCA § 3006A

Current through P.L. 116-65.

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title I. Courts and Judicial Officers (Ch. 211-222)
Chapter 211. The Supreme Judicial Court (Refs & Annos)

M.G.L.A. 211 § 3

§ 3. Superintendence of inferior courts; power to issue writs and process

Effective: July 1, 2012
Currentness

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

Credits
Amended by St.1956, c. 707, § 1; St.1973, c. 1114, § 44; St.1992, c. 379, § 61; St.2011, c. 93, § 46, eff. July 1, 2012.

M.G.L.A. 211 § 3, MA ST 211 § 3
Current through Chapter 81 of the 2019 1st Annual Session

End of Document

Massachusetts General Laws Annotated
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title I. Courts and Judicial Officers (Ch. 211-222)
Chapter 211D. Committee for Public Counsel Services (Refs & Annos)

M.G.L.A. 211D § 11

§ 11. Compensation rates; limitation on annual billable hours payable; limitation on new appointments

Effective: July 1, 2018
Currentness

(a) The rates of compensation payable to all counsel, who are appointed or assigned to represent indigents within the private counsel division of the committee in accordance with the provisions of paragraph (b) of section 6, shall, subject to appropriation, be as follows: for homicide cases the rate of compensation shall be $100 per hour; for superior court non-homicide cases, including sexually dangerous person cases, the rate of compensation shall be $68 per hour; for district court cases and children in need of services cases the rate of compensation shall be $53 per hour; for children and family law cases and care and protection cases the rate of compensation shall be $55 per hour; for sex offender registry cases and mental health cases the rate of compensation shall be $53 per hour. These rates of compensation shall be reviewed periodically at public hearings held by the committee at appropriate locations throughout the state, and notice shall be given to all state, county and local bar associations and other interested groups, of such hearings by letter and publication in advance of such hearings. This periodic review shall take place not less than once every 3 years.

(b) The committee shall set an annual cap on billable hours not in excess of 1,650 hours. Counsel appointed or assigned to represent indigents within the private counsel division shall not be paid for any time billed in excess of the annual limit of billable hours. It shall be the responsibility of private counsel to manage their billable hours.

(c) Any counsel who is appointed or assigned to represent indigents within the private counsel division, except any counsel appointed or assigned to represent indigents within the private counsel division in a homicide case, shall be prohibited from accepting any new appointment or assignment to represent indigents after that counsel has billed 1,350 billable hours during any fiscal year.

(d) Notwithstanding the billable hour limitations in subsections (b) and (c), the chief counsel may waive the annual cap on billable hours for private counsel appointed or assigned to the children and family law cases and the care and protection cases if the chief counsel finds that: (i) there is limited availability of qualified counsel in that practice area; (ii) shifting the services to private counsel would result in cost efficiencies; or (iii) shifting the service to private counsel would improve the quality of service; provided, however, that counsel appointed or assigned to such cases within the private counsel division shall not be paid for any time billed in excess of 1,800 billable hours. It shall be the responsibility of private counsel to manage their billable hours.

Credits

Added by St.1983, c. 673, § 2. Amended by St.2005, c. 54, § 2, eff. July 1, 2005; St.2008, c. 182, § 69, eff. July 1, 2008; St.2011, c. 68, § 115, eff. July 1, 2011; St.2015, c. 46, § 119, eff. July 1, 2016; St.2016, c. 133, § 119, eff. July 1, 2016; St.2016, c. 283, § 16, eff. Oct. 6, 2016; St.2018, c. 154, §§ 49, 50, eff. July 1, 2018.

M.G.L.A. 211D § 11, MA ST 211D § 11
Current through Chapter 81 of the 2019 1st Annual Session

End of Document

Sec. 7. *Be it further enacted,* That the said Company is hereby authorized to make insurance against fire, on such terms and conditions as the parties may agree, on any dwelling house or other buildings, as well as any other property, within the United States of America: *Provided,* that no greater sum shall be insured on any one risk of fire, than ten per centum of the amount of the capital stock of said corporation actually paid in.

[Approved by the Governor, June 16th, 1820.]

CHAP. XIV.

An Act to establish the Terms of the Supreme Judicial Court.

Sec. 1. **Be** *it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same,* That from and after the passing of this act, the terms of the Supreme Judicial Court, which by law, are required to be holden by three or more of the Justices thereof, shall be annually holden at the times and places herein provided, viz:

Full Bench.

At Boston, within the County of Suffolk, and for the Counties of Suffolk and Nantucket, on the first Tuesday of March.

At Lenox, within and for the County of Berkshire, on the second Tuesday of September.

At Northampton, within the County of Hampshire, and for the Counties of Hampshire, Franklin and Hampden, on the fourth Tuesday of September.

Times and places for holding Courts.

At Worcester, within and for the County of Worcester, on the first Tuesday, next after the fourth Tuesday of September.

At Cambridge, within and for the County of Middlesex, on the second Tuesday, next after the fourth Tuesday of September.

At Taunton, within the County of Bristol, and at Plymouth, within the County of Plymouth, alter-

nately, beginning at Taunton, for the Counties of Bristol, Plymouth, Barnstable, and Dukes' County, on the third Tuesday, next after the fourth Tuesday of September. Times and places for holding Courts.

At Dedham, within and for the County of Norfolk, on the fourth Tuesday, next after the fourth Tuesday of September.

At Salem, within and for the County of Essex, on the fifth Tuesday, next after the fourth Tuesday of September.

Sec. 2. *Be it further enacted*, That the term of said Court, herein provided to be holden at Lenox, for the County of Berkshire, may be commenced by any one of the Justices thereof, who shall have cognizance and jurisdiction of all causes, matters, and things, which by law are cognizable by the said Court, when holden by one of the Justices thereof, and may proceed to hear and determine, according to law, all such causes, matters and things, until three or more Justices of said Court shall be present during said term: *Provided*, that the term of said Court, which stands adjourned to the first Tuesday of September next, be, and the same is hereby abolished; and all causes, matters and things, pending therein, shall stand continued to, and be heard and determined, at the term herein provided to be holden on the second Tuesday of September. One Judge may commence business. Proviso.

Sec. 3. *Be it further enacted*, That all questions of law, and other matters, now cognizable in the Supreme Judicial Court, at the term thereof, which was to have been holden at Taunton, in the County of Bristol, on the second Tuesday of July next, shall have day in, and be heard and determined by the said Court, to be holden in October next, by virtue of this act. And the said Court shall, at the same term, have jurisdiction of, and shall hear and determine all causes, civil and criminal, arising within the County of Bristol, to the same extent, and in the same manner, as if the said Court were holden for the said county alone, by virtue of former acts of the General Court; and to that end, a Grand Jury shall be summoned by the Clerk, to attend said Court, and the Justice or Justices thereof, may direct venires to be issued for Traverse Juries, returnable on such day of said Court, or of any Term altered.

adjournment thereof, as they shall order. And all writs, processes, recognizances, matters and things, which are or may be returnable to the said Court, at the next term thereof, for said County of Bristol, according to the laws now in force, shall have day in, and be heard and determined at the next term thereof, as established by this act. And all appeals from the Circuit Court of Common Pleas, for said county, which may be claimed and allowed, before the sitting of the said Court, as aforesaid, shall be entered, proceeded upon, and determined at said term, as law and justice shall require.

Courts to be held at Northampton.

SEC. 4. *Be it further enacted*, That it shall be the duty of the several Clerks of the Counties of Franklin and Hampden, to attend the Supreme Judicial Courts, when holden for those counties, at Northampton, within the County of Hampshire, as provided by this act; and to have there a docket of all such causes as may be pending in either of their counties and cognizable by the said Court, at Northampton, together with all files and papers relating to said causes, and such copies as may be required by the Court; or to transmit such docket, files, papers, and copies to the Clerk of said Court, for the County of Hampshire. And all orders, decrees, and judgments of the said Courts, shall be entered in the docket for the county, within which the suit is pending, to which such orders, decrees, or judgments may relate, by the Clerk of the same county, if attending, otherwise by the Clerk of the said County of Hampshire; and such dockets, together with the files and papers aforesaid, shall, after the rising of said Court, be forthwith remitted to the Clerk of the county to which they may pertain, who shall record all the judgments and proceedings of the Courts, relating to suits or other matters, pending in his county, and shall issue executions, and other proper process thereon, in like manner as if the same had been transacted in the county for which he is the Clerk; and all fees payable to the Clerk, for services at said Court, shall be received by the Clerk by whom such services shall be performed.

SEC. 5. *Be it further enacted*, That whenever, by reason of sickness, accident, or any unforeseen cause,

three of the Justices of the said Court, shall not have arrived at the place appointed for holding the same, in due season for the opening thereof, it shall be lawful for any one of the said Justices, to cause the Court to be opened, and to proceed in, and transact all such business as may be proceeded in, and transacted at any term of said Court holden by one Justice thereof. And if from the causes aforesaid, at any term, to be holden by virtue of this act, neither of the Justices shall arrive before sunset of the day on which the Court should open, the Sheriff of the county, wherein the same is to be holden, or in his absence, any Deputy Sheriff of said county, shall, by proclamation, posted up on the door of the Court House, adjourn the Court from day to day, until one of the Justices thereof shall arrive.

Courts may adjourn.

Sec. 6. *Be it further enacted*, That hereafter, the terms of the Supreme Judicial Court, which may, by law, be holden by one or more of the Justices of said Court, shall be holden annually, for the several counties, at the times and places following, viz:

At Dedham, within and for the County of Norfolk, on the third Tuesday of February.

At Concord, within and for the County of Middlesex, on the fourth Monday of March.

At Ipswich, within and for the County of Essex, and at Worcester, within and for the County of Worcester, on the sixth Tuesday, next after the first Tuesday of March.

Times of holding Courts.

At Greenfield, within and for the County of Franklin, and at Taunton, within and for the County of Bristol, on the seventh Tuesday, next after the first Tuesday of March.

At Northampton, within and for the County of Hampshire, on the eighth Tuesday, next after the first Tuesday of March.

At Springfield, within and for the County of Hampden, and at Barnstable, within and for the Counties of Barnstable and Dukes' County, on the ninth Tuesday, next after the first Tuesday of March.

At Lenox, within and for the County of Berkshire, and at Plymouth, within and for the County of Plymouth, on the tenth Tuesday, next after the first Tuesday of March.

Times and places for holding Courts.

At Boston, within and for the County of Suffolk, and for the Counties of Suffolk and Nantucket, on the sixth Tuesday, next after the fourth Tuesday of September.

Sec. 7. *Be it further enacted*, That it shall be lawful, in all writs, processes, records and judicial proceedings, civil and criminal, to express and designate the Tuesday on which any of the terms are to be holden by virtue of this act, by the Tuesday of the month in which the same shall happen.

Designation of days.

Sec. 8. *Be it further enacted*, That whenever any indictment for a capital offence, shall be found at any term of said Court, holden by one Justice thereof, it shall be lawful for the Court to cause the person indicted to be arraigned, and if any person so indicted shall, by plea in common form, confess himself or herself guilty, to award sentence according to law; and if such person shall deny the charge, and put himself or herself upon trial, the Court so holden, may assign counsel, and order and take all measures preparatory for trial, in the same manner as if the same Court were holden by three or more Justices thereof.

Confessions.

Sec. 9. *Be it further enacted*, That whenever the Supreme Judicial Court, at any term thereof, shall be adjourned to any future day, it shall be lawful for the Justices, or any one thereof, to cause the Grand Jurors who where duly returned and sworn at the beginning of the term, to be summoned anew, to attend at the adjournment; and it shall be the duty of the said Grand Jurors to attend accordingly. And all crimes and offences happening before said adjourned session, may be presented by said Grand Jury so assembled, and heard and determined by the Court, in the same manner as they might be at any regular term. And all appeals in civil actions, claimed and allowed in any Court of Common Pleas, for any county, within which the Court may be so holden by adjournment, may be entered, proceeded upon, and determined, at such adjourned term in like manner.

Jury Summons.

Sec. 10. *Be it further enacted*, That all causes of alimony and divorce, may be heard and tried by the said Court, when holden by one Justice thereof, saving the right to the parties to except to the opinion of said

Divorces.

Justice, in any matter of law, in the same manner as is provided in suits at common law. And all acts and laws, heretofore passed, relating to the subjects herein provided for, so far as they are repugnant to, or inconsistent with the provisions of this act, are hereby repealed: *Provided, nevertheless,* that this act shall not take effect in the Counties of Barnstable, Dukes' County, and Plymouth, except in relation to the law term for those counties, until the year one thousand eight hundred and twenty-one; but that the terms of the said Court shall be holden for those counties in the month of October next, in the same manner as if this act had not passed.

[Approved by the Governor, June 16th, 1820.]

CHAP. XV.

An Act relating to the calling of a Convention of Delegates of the People, for the purpose of Revising the Constitution.

Sec. 1. **Be** *it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the same,* That the inhabitants of the several towns, districts, and places within this Commonwealth, qualified to vote for Senators or Representatives in the General Court, shall assemble in regular town meetings, to be notified in the usual manner, on the third Monday in August next, and shall, in open town meeting, give in their votes, by ballot, on this question: "Is it expedient, that Delegates should be chosen, to meet in Convention, for the purpose of revising, or altering the Constitution of Government of this Commonwealth?" And the Selectmen of the said towns and districts, shall, in open town meeting, receive, sort, count, and declare, and the Clerks thereof shall, respectively, record the votes given for and against the measure; and exact returns thereof shall

Qualification of Voters.

Question of Votes.

Acts (2004)

Chapter 253

AN ACT RELATIVE TO PRIVATE ATTORNEYS PROVIDING PUBLIC COUNSEL SERVICES.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to provide compensation to attorneys providing public counsel services, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Item 0321-1510 of section 2 of chapter 149 of the acts of 2004 is hereby amended by striking out the words "and provided further, that the rates of compensation paid for private counsel services from item shall be the same as the rates paid in fiscal year 2004" and inserting in place thereof the following:- and provided further, that the rates of compensation paid for private counsel services shall be $7.50 per hour greater than the amount paid per hour in fiscal year 2004.

SECTION 2. There shall be a commission to study the provision of counsel to indigent persons who are entitled to the assistance of assigned counsel either by constitutional provision, or by statute, or by rule of court. The commission shall be composed of 9 persons, including 3 members to be appointed by the speaker of the house of representatives, 3 by the president of the senate, and 3 by the governor.

The commission shall examine all aspects of the provision of counsel in such cases, including but not limited to (i) the frequency of the assignment of counsel to indigent persons, (ii) the feasibility of changes, consistent with chapter 211D of the General Laws, to control or reduce the frequency of case assignments, (iii) the cost of providing counsel in such cases; (iv) the adequacy of existing procedures for determining and verifying the eligibility of persons who request the assignment of counsel; (v) the adequacy of existing procedures for the assessment and collection of counsel fees from persons who have been determined to be eligible for assigned counsel; (vi) the existing balance, and the adequacy of that balance, in each practice area and county between the provision of legal representation by salaried staff counsel and certified private counsel; (vii) the frequency with which neither salaried staff counsel nor certified private counsel are available to represent a defendant entitled to publicly funded representation; (viii) the impact of the current hourly rate paid to certified private counsel on the availability or non-availability of such counsel

to defendants entitled to publicly funded representation; and (ix) the feasibility and potential benefits of providing representation to indigent persons predominantly through the assignment of salaried staff counsel rather than certified private counsel. The commission shall report its findings and recommendations together with drafts of legislation as may be necessary to carry such recommendations into effect by filing the same with the clerks of the house and senate on or before February 1, 2005.

SECTION 3. Section 1 shall take effect as of August 1, 2004.

Approved August 4, 2004.

Acts (2019)

Chapter 41

AN ACT MAKING APPROPRIATIONS FOR THE FISCAL YEAR 2020 FOR THE MAINTENANCE OF THE DEPARTMENTS, BOARDS, COMMISSIONS, INSTITUTIONS AND CERTAIN ACTIVITIES OF THE COMMONWEALTH, FOR INTEREST, SINKING FUND AND SERIAL BOND REQUIREMENTS AND FOR CERTAIN PERMANENT IMPROVEMENTS

Whereas, The deferred operation of this act would tend to defeat its purpose, which is immediately to make appropriations for the fiscal year beginning July 1, 2019, and to make certain changes in law, each of which is immediately necessary or appropriate to effectuate said appropriations or for other important public purposes, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. To provide for the maintenance of the several departments, boards, commissions and institutions of the commonwealth and other services of the commonwealth, and for certain permanent improvements and to meet certain requirements of law, the sums set forth in this act, for the several purposes and subject to the conditions specified in this act, are hereby appropriated from the

Pages Intentionally Omitted

from calendar year 2014 to the present and assigning whichever year's factor is the highest as determined by the department of elementary and secondary education.

SECTION 67. Notwithstanding section 53 of chapter 118E of the General Laws, for fiscal year 2020, the executive office of health and human services may determine, subject to required federal approval, the extent to which to include within its covered services for adults the federally-optional dental services that were included in its state plan or demonstration program in effect on January 1, 2002; provided, however, that dental services for adults enrolled in MassHealth shall be covered at least to the extent they were covered as of June 30, 2019; and provided further, that notwithstanding any general or special law to the contrary, at least 45 days before restructuring any MassHealth dental benefits, the executive office of health and human services shall file a report with the executive office for administration and finance and the house and senate committees on ways and means detailing the proposed changes and the anticipated fiscal impact of the changes.

SECTION 68. Notwithstanding subsections (b), (c) and (d) of section 11 of chapter 211D of the General Laws, in fiscal year 2020 the committee for public counsel services may waive the annual cap on billable hours for private counsel appointed or assigned to indigent cases if the committee finds that: (i) there is limited availability of qualified counsel in that practice area; (ii) there is limited availability of qualified counsel in a geographic area; or (iii) increasing the limit would improve efficiency and quality of service; provided, however, that counsel appointed or assigned to such cases within the private

counsel division shall not bill more than 2,000 billable hours. It shall be the responsibility of an individual attorney to manage the attorney's billable hours.

Governor returned the following section with recommendation of amendment, see H4019.

~~SECTION 69. Notwithstanding subsection (b) of section 83C of chapter 169 of the acts of 2008, inserted by chapter 188 of the acts of 2016, the department of public utilities shall not approve a long-term contract for offshore wind energy generation that results from a subsequent solicitation and procurement period if the levelized price per megawatt hour, plus associated transmission costs, is greater than or equal to the adjusted levelized price per megawatt hour, plus transmission costs, that resulted from a previous procurement; provided, however, that the department shall adjust such procurement's price for the availability of federal tax credits, inflation and incentives; and provided further, that the adjusted levelized price shall not include mitigation efforts that, where feasible, create and foster employment and economic development in the commonwealth.~~

SECTION 70. Notwithstanding any general or special law to the contrary, in fiscal year 2020 the comptroller shall transfer the unexpended balance of the Local Aid Stabilization Fund established in section 2CCCC of chapter 29 of the General Laws to the Gaming Local Aid Fund established in section 63 of chapter 23K of the General Laws.

SECTION 71. (a) Notwithstanding any general or special law to the contrary, the unexpended balances in items 0699-0015 and 0699-9100 of section 2 shall be deposited into the State Retiree Benefits

Pages Intentionally Omitted

SECTION 111. Except as otherwise specified, this act shall take effect on July 1, 2019.

Approved, July 31, 2019.

Massachusetts General Laws Annotated
Massachusetts Rules of Criminal Procedure (Refs & Annos)

Massachusetts Rules of Criminal Procedure (Mass.R.Crim.P.), Rule 7

Rule 7. Arraignment

Currentness

(a) Time of Arraignment; Probation Interview; Indigency and Bail Reports

(1) *Upon Arrest or Summons*. A defendant who has been arrested and is not released shall be brought for arraignment before a court if then in session, and if not, at its next session. A defendant who receives a summons or who has been arrested but is thereupon released shall be ordered to appear before the court for arraignment on a date certain.

(2) *Arrest of a Juvenile*. Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office.

(3) *Probation Interview*. On the day of the arraignment, the probation department shall interview the defendant; the probation department shall report to the court the pertinent information reasonably necessary to determine the issues of bail and indigency.

(b) Arraignment Procedure.

(1) *Notice; Plea; and Bail*. The court shall:

(A) read the charges to the defendant in open court, except that the reading of the charges in open court may be waived by the defendant if he or she is represented by counsel;

(B) enter the defendant's plea to the charges;

(C) inform the defendant of all warnings and advisories required by law; and,

(D) determine the conditions of the defendant's release, if any.

(2) *Appointment of Counsel*. If the court finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant.

(3) *Provision of Criminal Record; Preservation of Evidence*. The court shall ensure that at or before arraignment, (i) a copy of the defendant's criminal record, if any, as compiled by the Commissioner of Probation is provided to the defense and to the prosecution, and (ii) the parties are afforded an opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E).

(4) *Order Scheduling Pretrial Proceedings*. At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.

(c) Appearance of Counsel.

(1) *Filing*. An appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the arraignment. The appearance may be entered either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, Board of Bar Overseers number, address, and telephone number of the attorney. An attorney appearing on behalf of an organization shall also file with the court proof of the attorney's authorization to represent the organization.

(2) *Effect; Withdrawal*. An appearance shall be in the name of the attorney who files the appearance and shall constitute a representation that the attorney shall represent the defendant for trial or plea or shall prosecute the case, except that, if at the arraignment such a representation cannot be made and no contrary legal restriction applies, (1) the court may permit an appearance to be entered by an attorney to represent the defendant or prosecute the case for such time as the court may order, and (2) the court shall permit an appearance in the name of the prosecuting agency, which shall constitute representations that the agency will prosecute the case, will ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and upon request of the court or a party will identify the prosecutor assigned to the case. If the attorney who files an appearance for the defendant on or before the arraignment wishes to withdraw the appearance, he or she may do so within fourteen days of the arraignment, provided that the attorney who shall represent the defendant at trial files an appearance simultaneously with such withdrawal; thereafter no appearance shall be withdrawn without permission of the court. The appearance of the prosecuting officer shall be withdrawn only with permission of the court.

(3) *Notice*. A copy of all appearances and withdrawals of appearance shall be filed and shall be served upon the adverse party pursuant to Rule 32.

Credits

Amended May 29, 1986, effective July 1, 1986; March 8, 2004, effective September 7, 2004; February 27, 2012, effective June 1, 2012.

Rules Crim. Proc., Rule 7, MA ST RCRP Rule 7
Current with amendments received through August 1, 2019.

End of Document

Guide to Judiciary Policy

Vol. 7: Defender Services
Pt. A: Guidelines for Administering the CJA and Related Statutes

Ch. 2: Appointment and Payment of Counsel

Last revised (Transmittal 07-012) May 21, 2019

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§ 210 Representation under the Criminal Justice Act (CJA)

§ 210.10 District Plans

§ 210.10.10 Overview

(a) Each district court, with the approval of the judicial council of the circuit, is required to have a plan for furnishing representation for any person financially unable to obtain adequate representation. **See:** 18 U.S.C. § 3006A(a).

(b) "Representation under each plan shall include counsel and investigative, expert, and other services necessary for adequate representation." **See:** 18 U.S.C. § 3006A(a).

(c) The CJA, 18 U.S.C. § 3006A(a), mandates that each district plan provide for representation in the circumstances identified in § 210.20 and specify how such representation will be delivered as provided in § 210.10.20.

(d) A Model Plan for Implementation and Administration of the Criminal Justice Act (Model Plan) is included as Appx. 2A.

(e) Each district court should review, and amend as appropriate, the CJA Plan every five years to ensure compliance with the CJA Guidelines and other relevant Judicial Conference policies.

§ 210.10.15 Developing a CJA Plan

(a) All districts must develop, regularly review and update, and adhere to a CJA plan. **See:** § 210.10.10(e), above.

Pages Intentionally Omitted

(c) The Administrative Office of the U.S. Courts' (AO) Defender Services Office should be consulted regarding appointment and payment procedures. If, during the course of the proceedings, a pro se defendant who is financially able to retain counsel elects to do so, the court's appointment of an attorney under 18 U.S.C. § 3006A(c) may be terminated.

§ 220.60 Termination of Appointment

In any case in which appointment of counsel has been made under the CJA and the court subsequently finds that the person is financially able to obtain counsel, such appointment should be terminated using Form CJA 7 (Order Terminating Appointment of Counsel and/or Authorization for Distribution of Available Private Funds).

§ 230 Compensation and Expenses of Appointed Counsel

§ 230.10 Forms for Compensation and Reimbursement of Expenses

Forms for the compensation and reimbursement of expenses to appointed counsel, together with instructions for their use, may be found on the public judiciary website. A copy of all supporting documents that itemize or expand the amounts shown on the face of Form CJA 20 must be attached.

§ 230.13 Time Limits

(a) Vouchers should be submitted no later than 45 days after the final disposition of the case, unless good cause is shown. The clerks of the concerned courts should ensure that attorneys comply with the prescribed limits. Every effort should be made to have counsel submit the claim as soon as possible upon completion of services rendered.

(b) Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.

§ 230.16 Hourly Rates and Effective Dates in Non-Capital Cases

(a) Except in federal capital prosecutions and in death penalty federal habeas corpus proceedings, compensation paid to appointed counsel for time expended in court or out of court or before a U.S. magistrate judge may not exceed the rates in the following table. For information on compensation of counsel in federal capital cases and death penalty federal habeas corpus proceedings, **see:** Guide, Vol. 7A, § 630.

§ 230.16(a) Non-Capital Hourly Rates	
If services were performed between...	**The maximum hourly rate is...**
02/15/2019 to present	$148
03/23/2018 through 02/14/2019	$140
05/05/2017 through 03/22/2018	$132
01/01/2016 through 05/04/2017	$129
01/01/2015 through 12/31/2015	$127
03/01/2014 through 12/31/2014	$126
09/01/2013 through 02/28/2014	$110
01/01/2010 through 08/31/2013	$125
03/11/2009 through 12/31/2009	$110
01/01/2008 through 03/10/2009	$100
05/20/2007 through 12/31/2007	$94
01/01/2006 through 05/19/2007	$92
05/01/2002 through 12/31/2005	$90

(b) For rates applicable to services performed prior to May 1, 2002 for non-capital cases, please contact the AO's Defender Services Office, Legal and Policy Division Duty Day Attorney, at 202-502-3030 or via email at DSO_LPD@ao.uscourts.gov.

§ 230.20 Annual Increase in Hourly Rate Maximums

Under 18 U.S.C. § 3006A(d)(1), the Judicial Conference is authorized to increase annually all hourly rate maximums by an amount not to exceed the federal pay comparability raises given to federal employees. Hourly rate maximums will be adjusted automatically each year according to any federal pay comparability adjustment, contingent upon the availability of sufficient funds. The new rates will apply with respect to services performed on or after the effective date.

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TEN PRINCIPLES

Of a Public Defense Delivery System

February 2002

ABA Standing Committee
On Legal Aid And Indigent Defendants

2001-2002

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TEN PRINCIPLES

Of a Public Defense Delivery System

February 2002

Approved by American Bar Association House of Delegates, February 2002. The American Bar Association recommends that jurisdictions use these Principles to assess promptly the needs of public defense delivery systems and clearly communicate those needs to policy makers.

INTRODUCTION

The *ABA Ten Principles of a Public Defense Delivery System* were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and approved by the ABA House of Delegates in February 2002. The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney. The more extensive ABA policy statement dealing with indigent defense services is contained within the ABA Standards for Criminal Justice, *Providing Defense Services* (3d ed. 1992), which can be viewed on-line (black letter only) and purchased (black letter with commentary) by accessing the ABA Criminal Justice Section homepage at http://www.abanet.org/crimjust/home.html.

ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defendants is grateful to everyone assisting in the development of the *ABA Ten Principles of a Public Defense Delivery System*. Foremost, the Standing Committee acknowledges former member James R. Neuhard, Director of the Michigan State Appellate Defender Office, who was the first to recognize the need for clear and concise guidance on how to design an effective system for providing public defense services. In 2000, Mr. Neuhard and Scott Wallace, Director of Defender Legal Services for the National Legal Aid and Defender Association, jointly produced a paper entitled "The Ten Commandments of Public Defense Delivery Systems," which was later included in the Introduction to Volume I of the U.S. Department of Justice's Compendium of Standards for Indigent Defense Systems. The *ABA Ten Principles of a Public Defense Delivery System* are based on this work of Mr. Neuhard and Mr. Wallace.

Special thanks go to the members of the Standing Committee and its Indigent Defense Advisory Group who reviewed drafts and provided comment. Further, the Standing Committee is grateful to the ABA entities that provided invaluable support for these Principles by co-sponsoring them in the House of Delegates, including: Criminal Justice Section, Government and Public Sector Lawyers Division, Steering Committee on the Unmet Legal Needs of Children, Commission on Racial and Ethnic Diversity in the Profession, Standing Committee on Pro Bono and Public Services. We would also like to thank the ABA Commission on Homelessness and Poverty and the ABA Juvenile Justice Center for their support.

L. Jonathan Ross
Chair, Standing Committee on
Legal Aid and Indigent Defendants

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

Black Letter

1 **The public defense function, including the selection, funding, and payment of defense counsel, is independent.**

2 **Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.**

3 **Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.**

4 **Defense counsel is provided sufficient time and a confidential space within which to meet with the client.**

5 **Defense counsel's workload is controlled to permit the rendering of quality representation.**

6 **Defense counsel's ability, training, and experience match the complexity of the case.**

7 **The same attorney continuously represents the client until completion of the case.**

8 **There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.**

9 **Defense counsel is provided with and required to attend continuing legal education.**

10 **Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.**

ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM

With Commentary

1 The public defense function, including the selection, funding, and payment of defense counsel,[1] is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.[2] To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.[3] Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.[4] The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.[5]

2 Where the caseload is sufficiently high,[6] the public defense delivery system consists of both a defender office[7] and the active participation of the private bar. The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services.[8] The appointment process should never be *ad hoc*,[9] but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction.[10] Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.[11]

3 Clients are screened for eligibility,[12] and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. Counsel should be furnished upon arrest, detention, or request,[13] and usually within 24 hours thereafter.[14]

4 Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date.[15] Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client.[16] To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.[17]

5 Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels.[18] National caseload standards should in no event be exceeded,[19] but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement.[20]

6 **Defense counsel's ability, training, and experience match the complexity of the case.** Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.[21]

7 **The same attorney continuously represents the client until completion of the case.** Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through the trial and sentencing.[22] The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

8 **There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.** There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.[23] Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.[24] Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases,[25] and separately fund expert, investigative, and other litigation support services.[26] No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.[27] This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

9 **Defense counsel is provided with and required to attend continuing legal education.** Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.[28]

10 **Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.** The defender office (both professional and support staff), assigned counsel,or contract defenders should be supervised and periodically evaluated for competence and efficiency.[29]

NOTES

[1] "Counsel" as used herein includes a defender office, a criminal defense attorney in a defender office, a contract attorney, or an attorney in private practice accepting appointments. "Defense" as used herein relates to both the juvenile and adult public defense systems.

[2] National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) [hereinafter "NAC"], Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976) [hereinafter "NSC"], Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992) [hereinafter "ABA"], Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989) [hereinafter "Assigned Counsel"], Standard 2.2; NLADA *Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984) [hereinafter "Contracting"], Guidelines II-1, 2; National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970) [hereinafter "Model Act"], § 10(d); Institute for Judicial Administration/American Bar Association, *Juvenile Justice Standards Relating to Counsel for Private Parties* (1979) [hereinafter "ABA Counsel for Private Parties"], Standard 2.1(D).

[3] NSC, *supra* note 2, Guidelines 2.10-2.13; ABA, *supra* note 2, Standard 5-1.3(b); Assigned Counsel, *supra* note 2, Standards 3.2.1, 2; Contracting, *supra* note 2, Guidelines II-1, II-3, IV-2; Institute for Judicial Administration/ American Bar Association, *Juvenile Justice Standards Relating to Monitoring* (1979) [hereinafter "ABA Monitoring"], Standard 3.2.

[2] Judicial independence is "the most essential character of a free society" (American Bar Association Standing Committee on Judicial Independence, 1997).

[5] ABA, *supra* note 2, Standard 5-4.1

[6] "Sufficiently high" is described in detail in NAC Standard 13.5 and ABA Standard 5-1.2. The phrase generally can be understood to mean that there are enough assigned cases to support a full-time public defender (taking into account distances, caseload diversity, etc.), and the remaining number of cases are enough to support meaningful involvement of the private bar.

[7] NAC, *supra* note 2, Standard 13.5; ABA, *supra* note 2, Standard 5-1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2. "Defender office" means a full-time public defender office and includes a private nonprofit organization operating in the same manner as a full-time public defender office under a contract with a jurisdiction.

[8] ABA, *supra* note 2, Standard 5-1.2(a) and (b); NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[9] NSC, *supra* note 2, Guideline 2.3; ABA, *supra* note 2, Standard 5-2.1.

[10] ABA, *supra* note 2, Standard 5-2.1 and commentary; Assigned Counsel, *supra* note 2, Standard 3.3.1 and commentary n.5 (duties of Assigned Counsel Administrator such as supervision of attorney work cannot ethically be performed by a non-attorney, citing ABA Model Code of Professional Responsibility and Model Rules of Professional Conduct).

[11] NSC, *supra* note 2, Guideline 2.4; Model Act, *supra* note 2, § 10; ABA, *supra* note 2, Standard 5-1.2(c); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (provision of indigent defense services is obligation of state).

[12] For screening approaches, see NSC, *supra* note 2, Guideline 1.6 and ABA, *supra* note 2, Standard 5-7.3.

[13] NAC, *supra* note 2, Standard 13.3; ABA, *supra* note 2, Standard 5-6.1; Model Act, *supra* note 2, § 3; NSC, *supra* note 2, Guidelines 1.2-1.4; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(A).

[14] NSC, *supra* note 2, Guideline 1.3.

[15] American Bar Association Standards for Criminal Justice, *Defense Function* (3rd ed. 1993) [hereinafter "ABA Defense Function"], Standard 4-3.2; *Performance Guidelines for Criminal Defense Representation* (NLADA 1995) [hereinafter "Performance Guidelines"], Guidelines 2.1-4.1; ABA Counsel for Private Parties, *supra* note 2, Standard 4.2.

[16] NSC, *supra* note 2, Guideline 5.10; ABA Defense Function, *supra* note 15, Standards 4-3.1, 4-3.2; Performance Guidelines, *supra* note 15, Guideline 2.2.

[17] ABA Defense Function, *supra* note 15, Standard 4-3.1.

[18] NSC, *supra* note 2, Guideline 5.1, 5.3; ABA, *supra* note 2, Standards 5-5.3; ABA Defense Function, *supra* note 15, Standard 4-1.3(e); NAC, *supra* note 2, Standard 13.12; Contracting, *supra* note 2, Guidelines III-6, III-12; Assigned Counsel, *supra* note 2, Standards 4.1, 4.1.2; ABA Counsel for Private Parties, *supra* note 2, Standard 2.2(B)(iv).

[19] Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals), and other national standards state that caseloads should "reflect" (NSC Guideline 5.1) or "under no circumstances exceed" (Contracting Guideline III-6) these numerical limits. The workload demands of capital cases are unique: the duty to investigate, prepare, and try both the guilt/innocence and mitigation phases today requires an average of almost 1,900 hours, and over 1,200 hours even where a case is resolved by guilty plea. *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (Judicial Conference of the United States, 1998). *See also* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) [hereinafter "Death Penalty"].

[20] ABA, *supra* note 2, Standard 5-5.3; NSC, *supra* note 2, Guideline 5.1; *Standards and Evaluation Design for Appellate Defender Offices* (NLADA 1980) [hereinafter "Appellate"], Standard 1-F.

[21] Performance Guidelines, *supra* note 15, Guidelines 1.2, 1.3(a); Death Penalty, *supra* note 19, Guideline 5.1.

[22] NSC, *supra* note 2, Guidelines 5.11, 5.12; ABA, *supra* note 2, Standard 5-6.2; NAC, *supra* note 2, Standard 13.1; Assigned Counsel, *supra* note 2, Standard 2.6; Contracting, *supra* note 2, Guidelines III-12, III-23; ABA Counsel for Private Parties, *supra* note 2, Standard 2.4(B)(i).

[23] NSC, *supra* note 2, Guideline 3.4; ABA, *supra* note 2, Standards 5-4.1, 5-4.3; Contracting, *supra* note 2, Guideline III-10; Assigned Counsel, *supra* note 2, Standard 4.7.1; Appellate, *supra* note 20 (*Performance*); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(B)(iv). *See* NSC, *supra* note 2, Guideline 4.1 (includes numerical staffing ratios, e.g.: there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys; there must be one investigator for every three attorneys, and at least one investigator in every defender office). *Cf.* NAC, *supra* note 2, Standards 13.7, 13.11 (chief defender salary should be at parity with chief judge; staff attorneys at parity with private bar).

[24] ABA, *supra* note 2, Standard 5-2.4; Assigned Counsel, *supra* note 2, Standard 4.7.3.

[25] NSC, *supra* note 2, Guideline 2.6; ABA, *supra* note 2, Standards 5-3.1, 5-3.2, 5-3.3; Contracting, *supra* note 2, Guidelines III-6, III-12, and *passim*.

[26] ABA, *supra* note 2, Standard 5-3.3(b)(x); Contracting, *supra* note 2, Guidelines III-8, III-9.

[27] ABA Defense Function, *supra* note 15, Standard 4-1.2(d).

[28] NAC, *supra* note 2, Standards 13.15, 13.16; NSC, *supra* note 2, Guidelines 2.4(4), 5.6-5.8; ABA, *supra* note 2, Standards 5-1.5; Model Act, *supra* note 2, § 10(e); Contracting, *supra* note 2, Guideline III-17; Assigned Counsel, *supra* note 2, Standards 4.2, 4.3.1, 4.3.2, 4.4.1; NLADA *Defender Training and Development Standards* (1997); ABA Counsel for Private Parties, *supra* note 2, Standard 2.1(A).

[29] NSC, *supra* note 2, Guidelines 5.4, 5.5; Contracting, *supra* note 2, Guidelines III-16; Assigned Counsel, *supra* note 2, Standard 4.4; ABA Counsel for Private Parties, *supra* note 2, Standards 2.1 (A), 2.2; ABA Monitoring, *supra* note 3, Standards 3.2, 3.3. Examples of performance standards applicable in conducting these reviews include NLADA Performance Guidelines, ABA Defense Function, and NLADA/ABA Death Penalty.

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Defending Liberty
Pursuing Justice

"A Sacred Duty": Court Appointed Attorneys in Massachusetts Capital Cases, 1780-1980

by ALAN ROGERS*

From colonial times Massachusetts courts appointed counsel for every defendant subject to the death penalty. The nascent Massachusetts bench and bar specifically rejected the English argument that "it requires no manner of Skill [for a defendant] to make a plain and honest Defense" in a felony or capital trial. After the American Revolution, a defendant's right to counsel was embedded in the fundamental law of the Commonwealth. Article XII of the Bill of Rights of the Massachusetts Constitution (1780) gave the accused the right "to be fully heard in his defense by himself or his counsel, at his election." Although Article XII stated a defendant's right to counsel, until 1958 the Supreme Judicial Court interpreted the language to mean that only a defendant in a capital trial need be provided with an attorney by the court and from an early date read the provision to include the right to be represented by an attorney able to give effective assistance to a defendant.[1]

For more than a century the procedure by which the court assigned counsel in capital cases remained unchanged. Until 1891 the Supreme Judicial Court heard all capital cases, assigning counsel for the defendant if he pleaded not guilty at his arraignment before the court. Attorney General James Austin boasted in 1834 that court appointed defense lawyers "exert the most unwearied industry in seeking evidence, whenever it can have any possible bearing upon the case." Members of the bar shouldered this responsibility as a service to the community and to the profession. During his concluding remarks in an 1893 murder trial, court-appointed defense attorney John D. Long told the jury that he "was

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1. William Hawkins, *Pleas of the Crown*, II, Chapter 39 (London, 1725). By the mid-eighteenth century all of the American colonies had adopted laws providing for counsel in capital cases, see Anton-Hermann Chroust, *The Rise of the Legal Profession*, 2 vols. (Norman, 1965), I, 42-44. As early as 1805 the SJC praised the efforts of two attorneys appointed to represent William Hardy, charged with murder. Because the appointed attorneys had a "duty to perform both to their client and to their country," it was proper that they examined every question "with some minuteness and with frequent recurrence to the authorities," observed the court. *Commonwealth v Hardy* 2 Mass 302, 309 (1807). Some years later, the SJC refused a request from Robert Rantoul, who had just been admitted to the bar, to represent his friend Francis Knapp, charged with murder in 1830. The court thought "it was proper that a person of more legal experience should be assigned." *Commonwealth v Knapp* 26 Mass 495, 497 (1830). The court made explicit its argument about effective counsel in *Care and Protection of Stephen* 401 Mass. 144, 149 (1987). Justice Abrams noted: "The right to counsel is of little value unless there is an expectation that counsel's assistance will be effective." In 1958 the Supreme Judicial Court adopted Rule 10 requiring that all defendants charged with a crime be advised by the court of their right to counsel and "assign counsel to represent him at every stage of the proceeding . . ." 337 Mass 813.

charged with a sacred duty, not merely to my client, but to the bar and the Commonwealth" to mount the best possible defense.[2]

By the early 20th century, however, numerous commentators sadly noted the passing of the tradition of elite attorneys accepting appointment by the court as counsel for the undefended. Professor Karl Llewellyn, for example, argued in 1933 that the tradition of lawyers acting "as an officer of the judicial institution rather than merely representative of self and client," was a "tradition vanishing." And in 1963 Justice William Brennan acknowledged that it was "an overworked observation" to note that "far too many lawyers . . . look askance at criminal practice, even as an incidental supplement to a regular corporate or business practice." Brennan lamented that a "noble tradition seems to have been forgotten."[3]

However real the basis for such nostalgia about the widespread participation of the bar's elite may have been in other states, within Massachusetts as early as 1891 elite lawyers began a headlong rush to abandon criminal practice. That year, the Supreme Judicial Court's jurisdiction for capital trials was given by the legislature to the Superior Court. After that date, the bar's elite appellate lawyers who previously had been assigned to defend accused murderers were far less likely to be appointed. Because the responsibility for assigning counsel passed to Superior Court judges, lawyers whose practice was chiefly in the trial courts tended to be appointed. A so-called progressive reform passed in 1911 made two additional important changes in the procedure for appointing counsel in capital cases: a person indicted for first degree murder was allowed to petition the court to appoint a particular defense lawyer; and lawyers appointed by the court were to be paid.

Together, these changes not only transformed the procedure by which counsel was appointed in capital cases, but opened it to substantive challenge. First in 1923, and then in a dozen cases thereafter, convicted murderers facing execution argued on appeal to the Supreme Judicial Court that their court appointed attorney had acted incompetently. Echoing these complaints, a special committee of the Boston Bar Association concluded in 1952 that there were widespread "abuses" in the procedure for appointing counsel and "serious question as to the competence and diligence of the defense conducted by counsel appointed by the

2. James Austin, *Annual Report of the Attorney General for the year Ending 1834* (Boston, 1835), 29-30; *Trial of James Albert Trefethen and William H. Smith for the Murder of Deltena J. Davis* (Boston, 1893), 285; Attorney General, Petitioner, 104 Mass 537, 543 (1870). Chief Justice Ruben Chapman said that the court had no authority to allow counsel fees. Compare Long's remark with that made by a court appointed lawyer in recent capital case, *Horton v Zant*, 941 F. 2nd 1449, 1462-1463 (11th Cir. 1991). In his closing argument to the jury, the attorney explained that he was not "a bleeding heart, anti-death penalty," lawyer and that he had "to deal with [the prosecutors] every day. It's important for me to stay in good terms with them."

3. K.N. Llewellyn, "The Bar Specializes—With What Results?," 167 *The Annals* of the American Academy of Political and Social Science, 177, 181 (May 1933); William J. Brennan, Jr., "The Criminal Prosecution: Sporting Event or Quest for Truth?," 1963 *Washington University Law Review*, 279, 280-281.

court." The Bar called for reforms that would cause attorneys appointed by the court to "more fully realize and meet its responsibilities in this class of cases." Rather than define effective assistance, the Supreme Judicial Court chose to handle the problem on a case by case basis.[4]

Although legal scholars have produced an enormous literature about the right to counsel for capital defendants since the Supreme Court's decision in *Gideon v. Wainwright*, little has been written about how state courts appointed attorneys or defined effective counsel before 1963. Specifically, historians concerned with murder and capital punishment have overlooked the importance of the procedures by which the court appointed counsel in capital trials. They also have neglected to examine the particular cases used by the court to set standards for evaluating ineffective counsel. This article will focus on these significant parts of the social and legal history of homicide in Massachusetts by tracing the history of court appointed counsel in capital cases, by analyzing the impetus for changes in the appointment procedure, and by highlighting defendants' challenges to the system. Both the procedure for appointing attorneys, as well as the effectiveness of court appointed lawyers, was transformed by three factors: the increasing stratification of the bench and bar; the legal reforms enacted in the late 19th and early 20th centuries; and the Supreme Judicial Court's reluctance to articulate precise standards by which lawyers performance in a capital case might be measured. Located within this context, I will argue that as capital trials became more complex, the court lowered the standard by which counsel's effectiveness was measured, placing on the defendant the burden of demonstrating an attorney's incompetence and the likelihood that counsel's errors led to the defendant's conviction.[5]

As early as 1805, the Supreme Judicial Court noted casually that it had a responsibility to appoint counsel in a capital case, because the "life of a fellow-being" was at stake. A few years later, Nathan Dane's *General Abridgement,* proudly documented this aspect of Massachusetts criminal procedure by specifically referring to several murder cases tried between 1790 and 1802 in which the court routinely had appointed counsel for the defendant. Dane compared the "value and excellency" of Massachusetts

4. *Mass. Gen. St.*, 1891, chap. 379 and *Acts and Resolves of the Massachusetts General Court*, 1911, chap. 432. "Representation by Counsel Appointed by the Court in Capital Cases," 23 *Bar Bulletin* 169, 173 (1952).

5. *Gideon v Wainwright*, 372 U.S. 335 (1963); for that portion of the literature focusing on the use of inexperienced lawyers in capital cases, see, for example, Jon R. Waltz, "Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases, 59 *Nw. U. Law Review*, 289, 307 (1964), Gary Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 *N.Y.U. L. Review* 299 (1983), Ivan K. Fong, "Note, Ineffective Assistance of Counsel at Capital Sentencing," 39 *Stanford L. Review*, 461 (1987), Ronald J. Tabak, "*Gideon v Wainwright* in Death Penalty Cases," 10 *Pace L. Review*, 407 (1990), Vivian Berger, "The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases," 18 *N.Y.U. Review of Law and Social Change*, 245 (1990-1991), Bruce A. Green, "Lethal Fiction: The Meaning of 'Counsel' in the Sixth Amendment," 78 *Iowa L. Review*, 433 (1993).

procedure with the "severity, or rather cruelty of the English law" denying the accused the right to counsel. In 1820 the court's practice of appointing counsel was enacted into law. During the next seventy-one years the SJC appointed two lawyers—one senior and one junior counsel—for every defendant indicted for murder facing the death penalty. Well over one hundred attorneys "ably and faithfully defended" their clients in court, giving "their best service gratuitously."[6]

The senior lawyers appointed by the Supreme Judicial Court were the elite of the Massachusetts bar. From 1873 to 1883, for example, there were twenty-two capital trials in Suffolk County to which senior counsel were appointed by the court. A collective portrait shows that they were middle-aged college graduates who had nearly twenty years of legal experience at the time they took up their assignment to defend an indicted murderer. Seven of the assigned senior counsel had some criminal experience, either as a defense attorney or as an Assistant District Attorney, but most were appellate lawyers, suggesting they were part of the bar's elite. George Searle, who had been partners with Franklin Pierce and Benjamin F. Butler, and had written about criminal law, was the only lawyer in this group appointed to more than one capital trial during this decade.[7]

The junior counsel assigned to capital cases by the court from 1873 to 1883 were young and inexperienced, but more likely to have graduated from college and law school than their senior partners. Four of the junior counsel who had not attended law school had read the law with a founder of the Boston Bar Association. It seems likely that the court's appointment of these young men marked them as part of an emerging elite, lawyers who would take advantage of the consequences of industrialization and urbanization to rise to the top of their profession as had their senior co-counsel.[8]

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6. *Commonwealth v Hardy*, 2 Mass 302, 308, 313 (1807); Dane, *General Abridgement and Digest of American Laws*, 8 vols (Boston, 1823-1824), VII, 335, 210-218; *Mass. Gen. Sts.* 1820, chap. 14, sec. 8. Until 1852 all murder convictions were punishable by death; after that date, only murder in the first degree was punishable by death. From 1832, the year the Attorney General began to keep systematic records, to 1891 there were about 533 indictments for murder. For a sample of that data comparing 1871-1881 and 1882-1892, see, *Annual Report of the Attorney General for the year ending 1893*, 13; Chief Justice Chapman, *Attorney General, Petitioner*, 104 Mass 537, 543 (1870) for the statement that appointed counsel served without fee.

7. Docket Books for the Supreme Judicial Court, 1873-1883 (Massachusetts Archives) list the names of the court appointed attorneys. My collective analysis is based on biographical data collected from printed sources, including William T. Davis, *History of the Bench and Bar* (Boston, 1894), William T. Davis, *History of the Judiciary of Massachusetts* (Boston, 1900) and Michael E. Hennessy, *Twenty-Five Years of Massachusetts Politics* (Boston, 1917). Searle was born in Salem, Massachusetts in 1826. He graduated from Phillips Andover Academy and then read the law before being admitted to the Suffolk bar in 1847. Searle died in Boston in 1892, Davis, *History of the Bench and Bar*, 240.

8. Davis, *History of the Bench and Bar* and *History of the Judiciary in Massachusetts*. On average junior counsel appointed by the court in capital cases were thirty years of age, with a little less than four years experience. All but three of the eighteen lawyers on whom I have data attended law school.

Because of the rapid growth of Massachusetts society, the Supreme Judicial Court's case load was exceptionally heavy. The amount of civil litigation handled by the Attorney General, for example, more than doubled during the 1870's and 1880's. A special commission was appointed in 1876 by newly elected governor Alexander Rice and charged with making recommendations for reducing the Supreme Judicial Court's work load. Headed by Augustus L. Soule, a forty-nine year old Springfield lawyer elevated to the SJC by Governor Rice in 1877, the commission recommended that the Superior Court be given exclusive jurisdiction to try capital cases. Soule's argument for this change was tactless, politically naive, and, perhaps, offensive to the SJC. He bluntly concluded that Superior Court judges knew more criminal law than did the justices of the SJC and that the appeals process would be fairer because the SJC would not have "already expressed an opinion on the questions in issue."[9]

Attorney General Charles Train savaged the commission's report. He adamantly opposed transferring jurisdiction for capital cases from the SJC to the Superior Court. His report to the legislature made three arguments, concluding with a thinly veiled threat. First, he rejected the commission's claim that Superior Court judges were more familiar with criminal law than the justices who sat on the SJC. "I am not aware," he wrote in his Annual Report, "that members of the [Superior] court are more familiar with the principles of the criminal law than those of the [Supreme Judicial Court]." In fact, he added, the majority of the current members of the Supreme Judicial Court were promoted to that bench from the bench of the Superior Court." Secondly, Train argued that trying murder cases in the Superior Court would "increase the delay in capital trials," because the appeals process would be longer and more cumbersome. "As it stood, exceptions raised during the trial were certified immediately for review by the full court and "disposed of without delay," noted Train. Third, the Attorney General appealed to tradition. For more than two hundred years Massachusetts has required that the "highest crime known to the law be tried in the highest tribunal of the Commonwealth, and with the solemnity due to the magnitude of the crime." Finally, Train threatened to raise a politically divisive issue. "Unless the time has arrived for the abolition of the death penalty and the placing of the crime of murder in the same category with other Crimes," he warned, "I am opposed to the change suggested."[10]

Ten years later, Attorney General Andrew J. Waterman, an attorney with more than thirty years of practice, including eight as a prosecutor in western Massachusetts, revived the idea of withdrawing the SJC's jurisdiction of murder cases. In light of the SJC's growing volume of civil liti-

9. *Annual Report of the Attorney General for the year ending 1892* (Boston, 1893), xiii; Oliver Wendell Holmes, Jr., estimated that the Supreme Judicial Court heard about a thousand cases from 1882, the year of his appointment, to 1900, G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York, 1993), 253. *Report of the Commission to inquire into the Expediency of Revision the Judicial System of the State*, December 1876 (Senate Document No. 50), 17.

10. *Annual Report of the Attorney General for the year ending 1876* (Boston, 1876), 7-8.

gation, Waterman told the legislature, he worried that the court would not be able to fulfill the law's requirement that a person indicted for murder be given a speedy trial. Since the number of judges on the Superior Court had been increased to fourteen, trials in that court "would be much more readily obtained," and the prisoner's rights protected. And, as a sop to those legislators who worried about the quality of Superior Court judges, Waterman proposed requiring three judges to hear a murder trial, a "sufficient guarantee," as he put it, "of an intelligent and sound administration of the law in such cases."[11]

Governor John Q.A. Brackett endorsed Waterman's plan in his 1890 inaugural address. The Joint Committee on the Judiciary quickly agreed on a bill providing that murder cases be tried in the Superior Court before three judges and in 1891 both branches of the legislature easily passed the change in criminal procedure. Governor William E. Russell, one of only three Democrats to hold the governor's office since the Civil War, signed the bill into law, June 6, 1891.[12]

The year following passage of the law transferring jurisdiction of murder cases to the Superior Court, Assistant Attorney General Hosea Knowlton, praised the results. The change, "which was regarded by many as a doubtful, if not dangerous experiment," Knowlton wrote in his *Annual Report* for 1892, has "now been tested and approved." Thirteen capital cases were handled effectively by the Superior Court. Moreover, Knowlton called attention to an unforeseen benefit in trying homicide cases in the lower courts. The new procedure stripped murder of some of its glamour. The "superstitious deference which we have paid to murder . . . investing the accused with a dignity and importance above the level of common criminals," argued Knowlton, "is wholly unnecessary to the protection of the innocent and adds to the difficulty of convicting the guilty."[13] Knowlton's glowing report not only misunderstood the source of murder's grotesque popular appeal, but failed to recognize or analyze other long term changes initiated by the new procedure. First, there was evidence from the outset that murder convictions in the lower courts would prompt more sophisticated and innovative appeals. In fact, for the first time in the Commonwealth's history, a murder conviction—one of a handful tried by the Superior Court during 1892—was reversed on appeal. Second, the new procedure transformed the composition and character of court appointed attorneys. With few exceptions, the lawyers appointed by the court after 1891 were not part of the bar's elite.

Former governor John D. Long, a lawyer with more than thirty years

11. *Annual Report . . . 1887* (Boston, 1887), 14; *Annual Report . . . 1888* (Boston, 1888), 16; *Annual Report . . . 1889* (Boston, 1889), 14.

12. *Address of His Excellency John Q.A. Brackett, January 2, 1890* (Boston, 1890), 15; *Acts and Resolves of 1890,* 571, 577; *Acts and Resolves of 1891,* chap. 379; see also, Alan J. Dimond, "The Transfer of Capital Cases from the Supreme Judicial Court to the Superior Court," Superior Judicial Court Historical Society, *Annual Report,* 1991, argues that the death of three justices from August 1890 to June 1891 accelerated passage of the law.

13. *Annual Report of the Attorney General for the year ending 1892* (Boston, 1893), xiii.

experience and an opponent of capital punishment, was one of only two members of Massachusetts's legal elite to be assigned by the court to defend a person tried for murder in the decade after capital cases were transferred from SJC to the Superior Court. In 1892, Long and junior counsel Marcellus Coggan represented James Trefethen, a young Boston dry goods wholesaler indicted for the murder of Deltena Davis, a twenty-six year old Charlestown shopkeeper. The Commonwealth argued that Davis—"a pure New England girl, wholly unsophisticated in the ways of the world"—was wooed and seduced by Trefethen, but he refused to marry her. According to Davis's mother, Deltena and Trefethen met on the evening of December 23, 1891. Witnesses saw her standing in Everett Square. When Davis failed to return home, her mother alerted the police. Three days later Deltena's body was discovered in the Mystic River. She was five months pregnant at the time of her death. Two police officers testified at the trial that they saw a horse and buggy that looked like Trefethen's in Everett Square and later heading toward the Mystic River. Defense attorney Long argued that the relationship between Davis and Trefethen was not romantic, but strictly business. Long suggested Davis committed suicide. To buttress his claim, he wanted to put on the stand Sara Hubert, a "clairvoyant medium" who would testify that Davis came to her the day prior to her death. During the visit, Davis supposedly said she would commit suicide if the man whose baby she was carrying did not marry her. The prosecution objected to Hubert and the court agreed, barring her testimony as hearsay. The jury found Trefethen guilty of first degree murder.[14]

The primary basis of Long's appeal to the Supreme Judicial Court was the trial court's refusal to permit Hubert's testimony. Long's argument brilliantly distinguished the court's ten year old rule on the inadmissibility of hearsay evidence on which the trial court had relied from Davis's supposed declaration to Hubert. He contended that Davis's statement was made close enough in time to her death and was reasonably linked to the possibility that an unmarried pregnant woman might commit suicide. Therefore, the hearsay evidence should have been admitted by the trial court as a fact tending to show Davis's state of mind at the time of her death. Although the court acknowledged that "this was not the law" and that there was no cases "exactly like the present," Chief Justice Walbridge Field's opinion embraced Long's argument and reversed the court's earlier ruling on the inadmissibility of hearsay. The jury should have had the opportunity to consider whether Davis may have committed suicide. "We are of opinion that the presiding judges erred in refusing to receive this evidence," Field concluded, "and for that reason, the verdict against Trefethen must be set aside."[15]

14. The other elite bar member appointed as defense counsel was William Doherty who represented Angus Gilbert in 1895; Docket Books for the Supreme Judicial Court, 1892-1902 (Massachusetts Archives). *Trial of James Albert Trefethen and William H. Smith for the Murder of Deltena J. Davis* (Boston, 1895), 9, 11-12, 33, 37, 91, 114, 231.

15. *Commonwealth v Trefethen* 157 Mass 180, 189, 194, 195; for the earlier rule on the admissibility of hearsay, *Commonwealth v Felth* 132 Mass 22 (1882).

Trefethen was tried a second time in September, 1893. Long asserted that a "simple, natural case of suicide has been bloated into a charge of murder," despite the fact that the government had not produced "one scintilla of evidence to show homicide." Although the prosecution introduced witnesses who cast doubt on Hubert's claim that Davis had visited her, the jury quickly found Trefethen not guilty.[16]

Long's signal success was unmatched by other court appointed attorneys who appealed their clients' murder convictions before the Supreme Judicial Court in the decade after original jurisdiction for capital crimes was transferred to the Superior Court. Not surprisingly, the lawyers appointed by Superior Court judges were chosen from the local bar, attorneys who had rarely appeared before the SJC. The mere fact that the SJC did not find reversible error in any of the ten murder convictions that were appealed from 1893 to 1903, cannot, of course, be interpreted as indicating a lack of skill or commitment on the part of the attorneys appointed by the court. But some appeals were poorly drafted and the SJC—particularly Justice Oliver Wendell Holmes—were quick to point out their shortcomings. In *Commonwealth v Robertson* (1894), for example, Justice Marcus Knowlton brushed aside an old fashioned defense motion dealing with the form of the murder indictment by noting that "the tendency of modern jurisprudence . . . is such as to justify, if not to require, a departure from the old rule of pleading, in a matter which, is practically, so nearly one of mere form." Holmes similarly instructed an Essex County attorney. A motion to quash an indictment for attempted murder "argued largely on the strength on some cases as to what constitutes an 'administering' of poison, have no application," he noted brusquely. Holmes's impatience burst to the surface again when John Chance's court appointed attorney argued that before his client could be tried for murder the prosecutor was obligated to prove that Chance was able to run, as the murderer was seen running from the scene of the crime. Holmes barked: "Most men can run. That was enough until the jury had some ground for believing that Chance did not fall under that rule." Finally, in an appeal of a murder conviction Holmes heard during his last term on the SJC, he rejected an attorney's clumsily argued claim that there was not sufficient evidence to sustain a jury's verdict of guilty of murder in the first degree. It is up to the jury to say whether the evidence was strong enough to justify such a verdict. "Courts do not attempt to measure the intensity of evidence," Justice Holmes instructed the young attorney. "They stop with the decision that some evidence has been produced."[17]

By 1902 when Holmes left the SJC for the United States Supreme Court, the practice of trying capital cases in the Superior Court with attorneys appointed from the local bar had been in effect for ten years and a

16. *Trial of Trefethen*, 287, 292, 393.

17. *Commonwealth v Robertson*, 162 Mass 90, 96 (1894); *Commonwealth v Kennedy*, 170 Mass 18, 20, 21 (1897); *Commonwealth v Change*, 174 Mass 245 (1899); *Commonwealth v Best*, 180 Mass 492, 497 (1902).

sea change in attitude had taken place. The elite members of the Massachusetts bar no longer voluntarily participated in the criminal justice system. In fact, Joseph B. Warner, who founded one of Boston's most successful firms in 1874, scoffed at the "chivalrous idea" that lawyers had a duty to take criminal cases. In a speech to the American Bar Association in 1896, Warner rationalized the elite's new aloofness. The practice of law, he said, had become "so specialized that the lawyer is wholly unprepared to go outside a given range of work" and to serve without pay as a court appointed attorney was "wholly inconsistent with the position the profession has taken about its fees." Warner acknowledged that "the court may in theory assign any lawyer to the defense of a criminal," but he quickly added, "this certainly cannot be said to impose an obligation with which the lawyer in ordinary practice concerns himself."[18]

Two parallel developments not only lessened the immediate impact of the legal elite's abandonment of the criminal justice system, but, surprisingly, nearly led to the abolition of the death penalty. One, the court became more cautious about the death penalty; and, two, the number of indictments for murder during the last decades of the 19th century declined. In 1893, Attorney General Knowlton called the legislature's attention to a "marked inclination [by the court] to rule doubtful points in a capital trial, however important, in favor of the accused." Knowlton's opinion may have been something more than a prosecutor's familiar lament. In fact, during the course of the 19th century, murder trials became longer and more complex, increasingly dominated by experts and a defense strategy designed to raise as many exceptions as possible. At the same time, the court embraced a flexible rule for determining insanity, and routinely treated women, minors, alcoholics and the mentally retarded as exceptional. All the while, from 1882 to 1902, the number of murder indictments steadily declined, even as the population increased, and trials at which the death penalty was imposed rarely numbered more than one per year. Together, these unforeseen changes in the criminal justice system led the Attorney General and a substantial number of the Massachusetts House of Representatives to conclude that "the infliction of the death penalty is not in accord with the present advance of civilization."[19]

Nothing came of the legislature's foray into the debate about capital punishment, although Massachusetts in this period was a leader in enacting other social and political reforms. But other than cheering the formation of a private voluntary group to provide legal services to the urban

18. Joseph B. Warner, "The Responsibilities of the Lawyer," *ABA Reports* (1896), 329.

19. It seems likely that the SJC's unprecedented reversal in *Trefethen* encouraged others who were convicted in the Superior Court to appeal. *Annual Report of the Attorney General for the year ending 1899* (Boston, 1900), xv-xvi and *Annual Report of the Attorney General for the year ending 1900* (Boston, 1901), xviii-xix; White, *Holmes*, 157-161 for an analysis of Holmes' *Common Law* argument that the morality of the criminal law was directed at acts, not persons. In fact, the trend was the other way, as White notes. For the close vote in the Massachusetts House on capital punishment (103 to105), see, *House Documents Nos. 1268*, 1900.

poor and streamlining the forms used for criminal indictments, nothing was done by the legislature about reforming the way in which homicides were handled despite an alarming rise in murders. During the first decade of the 20th century the number of murder indictments more than doubled, jumping from 14 recorded in 1900 to 33 in 1910. In 1917 the number of indictments for murder reach 56, a high not topped until the so-called "crime wave" of the mid-1920's. In the face of this gruesome reality, the Massachusetts bench and bar gave up control over the process of appointment attorneys to represent defendants facing the death penalty.[20]

In 1911 the legislature enacted a statute requiring the defendant to begin the process of assigning a defense attorney in a capital case. At a hearing on the bill held by the Joint Judiciary Committee, Nathan Tufts, a member of the House soon to be elected district attorney of Middlesex County, told the committee that both Superior Court judges and trial lawyers were overwhelmed by the rising number of criminal cases. Finding an available attorney was increasingly difficult and contributed to slowing the judicial process. To speed up the system, the law allowed attorneys to initiate contact either when a defendant was indicted or while he was in jail awaiting trial. The defendant then asked the court to appoint the lawyer named in his petition. For the first time in the Commonwealth's history the lawyer formally appointed by the court was to be paid. In short, the 1911 law destroyed a 19th century ideal of justice, buried the sense of duty to the law, to the state, and to the bar that for more than 200 years had led Massachusetts lawyers to freely serve a defendant facing the death penalty.[21]

Certainly there was truth to the legislature's belief that criminal cases were increasing, but there were other factors that played a part in the breakdown of lawyers traditional professional obligation to defend accused murderers. The 1911 law implicitly recognized the existence of a sharp dichotomy within the Massachusetts bar, a split between elite corporate and appellate lawyers who had eschewed criminal defense work in

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20. Michael Grossberg, "Altruism and Professionalism: Boston and the Rise of Organized Legal Aid, 1900-1925," *Boston Bar Journal* (May-June 1978), 2-28, 11-24; see, *Acts and Resolves passed by the General Court of Massachusetts in the year 1899* (Boston, 1899), Chapter 409, for the streamlined indictment forms adopted in 1899 and for the changes in the rule of criminal discovery stimulated by the new form of indictment, see, Alan Rogers, "Murder in Massachusetts: The Criminal Discovery Rule from *Snelling* to Rule 14," *American Journal of Legal History* (1996); *Annual Report of the Attorney General for the year ending 1900* (Boston, 1901), ix; ibid., (Boston, 1911), viii; ibid., (Boston, 1918), viii.

21. *Acts and Resolves, 1911*, chapter 432; Massachusetts Legislative Papers, chapter 432 (Massachusetts Archives); at least three members of the Judiciary Committee were on record favoring changes to insure a defendant's right to a speedy trial – F.W. Hurd, David Ahearn and ex-governor J.Q.A. Brackett, who had introduced the bill transferring jurisdiction for capital crimes from the SJC to the Superior Court. For a comparison of the pace at which manslaughter cases moved through the Superior Court, see, Sam Bass Warner, *Crime and Criminal Statistics in Boston* (Cambridge, 1934), 22. Attorneys appointed by the court were to be paid by the county in which the indictment was found.

1891 and those lawyers who made their living in the criminal courts. While Harvard-trained lawyers packed the firms established to meet the needs of corporations, graduates from Boston's newer law schools scrambled to represent less affluent clients. Neither group was well prepared to try criminal cases, but admission to the bar was open and easy, and the increasingly Irish-American dominated legislature fought to keep it that way. Until 1897 there were no formal rules for admission to the Massachusetts bar. After that date, candidates were required to be certified by a Board of Bar Examiners. The exam the Board administered during the first three decades of the 20th century was so perfunctory that the number of lawyers in Boston easily increased by four times. Finally, in 1934, the Supreme Judicial Court held that admission to the bar was a judicial, not a legislative, function. The court's new rules for admission to the bar required that candidates complete at least two years of college and law school. The idea of continuing legal education did not become a regular part of the bar's activities until 1953, when the Boston Bar Association added a Committee on Criminal Law to its list of permanent committees. In short, the bar's educational demands were far from rigorous and did not keep pace with the complexity of law practice, especially in a capital case.[22]

The division between corporate lawyers and those who practiced in the lower courts was also manifested in the organized bar. The elite dominated the Boston Bar Association. Fewer than half of all lawyers practicing in Boston at the turn of the century and only a handful of the Irish-Americans who made up about 20% of the bar were members of the Bar Association. While the bar became more diverse after the turn of the century, the Association remained a bastion of the old guard well into the 1930's. This disparity between the composition of the bar and the Bar Association manifested a deep antagonism. One Irish lawyer-politician, for example, publicly stated that the Bar Association's effort to discipline so-called unscrupulous lawyers who worked in the criminal courts was merely another phase of the larger struggle between the "blue bloods" and the "new bloods." Not surprisingly, therefore, lawyers who worked in the criminal courts did not embrace the ideal of service espoused—but not practiced—by the elite. Rather, court appointed attorneys demanded to be paid for defending an accused murderer. But while court appointed lawyers from the bottom of the professional hierarchy were paid a pittance to represent indigent clients facing capital punishment, a few Massachusetts lawyers were collecting large fees by specializing in high profile murder cases. General Charles Bartlett, for example, reportedly was paid $12,000 to defend Chester Jordan, who was tried in 1909 for killing his wife. Basing criminal justice on a defendant's ability to pay,

22. Douglas Jones, Alan Rogers, *Discovering the Public Interest: A History of the Boston Bar Association* (Canoga Park, Calif., 1993), 52, 78-79, 96-97, 98.

signalled the beginning of the end of the ideal that procedure alone ensured equality before the law, opened the judicial system to the same economic forces dividing American society, and revealed the flaw in the court's assumption that all lawyers were equally qualified to defend someone on trial for their life.[23]

Twelve years after the new procedure for appointing attorneys went into effect, Paul Descalakis appealed his first degree murder conviction to the Supreme Judicial Court claiming that he had not been competently represented by his court appointed attorney. In 1919, Descalakis was one of about a dozen lodgers living in a boarding house located in Boston's South End. The house was owned and managed by Alice Arseneault. Descalakis and Arseneault became intimate, but sometime around Christmas they quarreled. On the morning after Christmas, Descalakis told another boarder that Arseneault "got drunk last night and she can't get up this morning." Later, he said that she had moved to Providence, Rhode Island. A week after Arseneault disappeared, Descalakis sold the boarding house and then vanished. He travelled under various aliases, moving frequently until settling in Canada in the spring of 1920. About the same time, workmen cleaning the basement of the South End boarding house in which Descalakis had lived, discovered the body of Alice Arseneault. The medical examiner reported that her throat had been cut from ear to ear.[24]

The Boston police pursued Descalakis, arresting him in Montreal after a chase that lasted more than an hour. Warned by Captain Ainsley Armstrong that any statement me might make "can be used either for or against you in court," Descalakis told the police that Arseneault had given him the boarding house without signing any papers or giving him the deed. He sold the house and fled, Descalakis told police, because someone told him that Arseneault had been murdered and he feared he would become a suspect. Descalakis was charged with murder.[25]

Trial began on June 7, 1922, in the Suffolk Superior Court. On Descalakis's petition, the court had appointed John W. Schenck defense counsel. Assistant District Attorney Henry P. Fielding, who had been with the prosecutor's office since 1911, spoke for the Commonwealth. The Boston *Globe* noted that Judge Patrick Keating grew noticeably annoyed when an "unusually large number of prospective jurors were excused because of being opposed to capital punishment." Late in the day, as the process of selecting a jury droned on, Descalakis's wife—"a slim woman dressed in brown"—created a stir when she came into the courtroom.[26]

23. *Ibid.*, 64, 83-85, 87; Jordan's sister was married to Charles Livermore, a successful cotton broker. According to the Boston *Globe*, April 27, 1909, she sold several properties to raise the money to pay Bartlett.

24. *Commonwealth v Descalakis*, A Transcript of the Trial held in Suffolk Superior Court, June 7, 1922 to June 15, 1922 (Archives of the Supreme Judicial Court of Massachusetts), 5.

25. *Ibid.*, 16-17.

26. Boston *Globe*, June 7, 1922.

District Attorney Fielding's opening statement sketched out the state's circumstantial case against Descalakis. In rapid order, a dozen prosecution witnesses fleshed out Fielding's argument. Several boarders who lived in the house in the winter of 1919-1920, told the court that Arseneault and Descalakis were often together, publicly showing affection for one another. Their romance came to an abrupt end, however, when Arseneault shunned Descalakis for another man. Descalakis was said to have threatened both Arseneault and her new lover. On the morning after Christmas, one boarded testified, he and Descalakis had breakfast together while Arseneault lay motionless on a couch in the same room. Later that day, Descalakis told a friend that Arseneault had gone to Providence.[27]

Fielding's other witnesses added incriminating details about Descalakis's behavior after Arseneault's supposed abrupt departure from Boston. A tailor said that Descalakis brought two suits to be cleaned that were covered with ashes and a clerk testified that he refused to honor a bill of sale for a piano because the signature on the sale's slip did not match Arseneault's signature on the original lease agreement. A handwriting expert corroborated the clerk's suspicion that Arseneault's signature had been forged. Next, Descalakis's wife—a woman he had married while living in Montreal—coldly told the court that her husband received letters using names other than Descalakis. Finally, the woman to whom Descalakis sold the boarding house made two startling statements: Descalakis was so eager to sell that he accepted far less than the market price for the house he claimed to own; and, three or four days after he hurriedly left the house, the new owner found woman's clothing that was "saturated with blood."[28]

Descalakis's court appointed attorney, John Schenck, called few witnesses, but he vigorously cross examined each of the prosecution's witnesses. Schenck asked a boarder how he knew that Descalakis was intimate with Arseneault, or that he was subsequently jealous about her relationship with another man. The witness admitted that he had no specific knowledge, but he gave a rambling, incoherent account of his ability to interpret facial expressions and gestures. From the medical examiner, Schenck won two points: the doctor had discovered no blood stains in the house or on the stairs leading to the cellar where Arseneault's body was discovered; and that it would have been extremely difficult for one slightly built man to carry the body of a woman nearly six feet tall and weighing 170 to 180 pounds down a flight of stairs. Schenck objected loudly that the district attorney was leading a witness to say that she had seen a diamond ring among Arseneault's possessions, a ring Fielding suggested matched the one worn by the woman Descalakis married in Montreal. The court upheld defense counsel's objection. In his closing argument,

27. Descalakis Transcript, 4-5.

28. *Ibid.*, 24, 34, 36-38.

Schenck insisted that the state had not proved its case, that it had failed to introduce evidence showing how, when, where, or by whom Arseneault was murdered.[29]

One June 15, 1922, a jury found Descalakis guilty of first degree murder. Schenck filed a motion for a new trial, which was denied at a hearing before Judge Keating about a week later. The Supreme Judicial Court overruled the defense's exceptions to the trial court's rulings on January 9, 1923. Descalakis was sentenced to death a week later. As he was taken from the courtroom, he shouted, "You take my life for nothing. I lose my life for nothing. I did not kill that woman." Governor Channing Cox, a progressive Republican serving his second term, delayed execution of the death sentence until July to allow Schenck to prepare a motion for a new trial on the ground of newly discovered evidence. The motion was denied by the trial court and in April by the SJC.[30]

At this point Descalakis's legal fight to avoid the death penalty took two bizarre twists. He dismissed his court appointed attorney, John Schenck. In his place, Descalakis hired John Patrick Feeney, who immediately filed a motion for a new trial based largely on two grounds: that Schenck had acted incompetently and that on April 28, 1923, a *nolle prosequi* of that part of the indictment charging murder in the first degree had been filed and entered. Racism and corruption were lurking just beneath the surface formalities of these defense motions.

A hearing was held on Descalakis's motion for a new trial. Feeney began by attacking Schenck, one of a handful of African-American lawyers practicing in Massachusetts in the 1920's. Born in Medford, Massachusetts to parents who migrated from South Carolina, Schenck had read the law while working as a statehouse messenger. He was 53 years old when Descalakis's trial began in 1922 and had been admitted to the bar just eight years earlier. His home and officer were located in the Roxbury neighborhood of Boston, far from the white professional world.[31]

Descalakis testified at the hearing that he first met Schenck in the Charles Street jail when Schenck approached him, saying that the court had sent him "to take some story from you." He was confused by Schenck's remark, Descalakis stated. Apparently sensing that, Schenck said: "You know I am a lawyer." "I don't know what he mean he is a lawyer," Descalakis recalled, "I think it funny because I never saw in my life colored people like this." When Schenck visited him a second time, Descalakis said he told the lawyer, "You don't have any right to talk to

29. *Ibid.*, 5, 9-16, 24, 34, 38, 60-61, 92.

30. 243 Mass 519 (1922); Boston *Globe*, January 16, 1923; 244 Mass 568 (1923).

31. United States Census Tracts for 1920; *Polk's City Directory*, 1913, 1922; Supreme Judicial Court Docket Book, 1914 (Massachusetts Archives). In 1923 Schenck was appointed Assistant United States Attorney for Massachusetts, a position in which he served until 1932, when he returned to private practice. Schenck died in 1962.

me, you are a colored man." Schenck answered, according to Descalakis, "What is the difference?" Descalakis said he told Schenck: "I want an American lawyer." When he asked why he petitioned the court to appoint Schenck, Descalakis claimed that he tried to get another lawyer, but Schenck prevented him.[32]

Descalakis had other complaints about Schenck that he shared with the court. He told Judge Keating that Schenck ignored his request to accompany the jury to the scene of the crime. And, Descalakis insisted that during the trial he told his defense counsel that he wanted to take the stand in his own behalf, but that Schenck told him, "No don't do that." Finally, Descalakis testified that Schenck failed to explain what the judge meant when he said at the conclusion of his trial, that the defendant could address the jury.[33]

After Descalakis waived his attorney-client privilege, Schenck took the stand. He was questioned by district attorney Fielding in a desultory manner and subjected to a withering cross examination by Feeney. Both attorneys were eager to establish if and when Schenck told Descalakis that he might take the stand. Initially, Schenck's answers were evasive, but prodded repeatedly by Feeney, Schenck said that he and the defendant had discussed the question and that he told Descalakis he could choose to testify on his own behalf. Feeney demanded to know exactly what Schenck said to Descalakis. Schenck equivocated, saying that "in substance" he told Descalakis that "it was entirely within his province" to take the stand. Feeney shot back: "Don't you know that [Descalakis] can't understand the words, 'entirely within your province,' don't you know that?" Schenck hastily added, "I have not said that those were the exact words; I can't remember the words."[34]

Feeney wouldn't let go. After a couple of questions from Fielding, Feeney returned to the attack, asking Schenck precisely when he talked to Descalakis about taking the stand. Schenck replied that after the government had presented its case he and the defendant discussed the question. "Well, Mr. witness," Feeney said, making no effort to conceal his contempt, "as a trial lawyer do you say that was the time to determine whether a man should take the stand or not?" Schenck was silent.[35]

At the conclusion of the hearing, Descalakis filed an amended motion, adding that Schenck "did not properly protect the rights of the defendant," because during the trial he failed to exclude immaterial evidence or to ask the court to instruct the jury about that issue. Judge Keating denied the motion for a new trial, although following a conference with district attorney Fielding and Feeney, he did tentatively agree to

32. Descalakis Transcript, 93-95.

33. *Ibid.*, 92.

34. *Ibid.*, 94-97.

35. *Ibid.*, 102; the Commonwealth put Schenck's associate Jordan Williams on the stand. Williams testified that he did not recall Descalakis asking to go on the stand, 103.

a procedure to *nol pros.* that part of the indictment charging Descalakis with first degree murder. Fielding submitted a form agreeing to this arrangement and Descalakis signed a letter of consent, pleading guilty to second degree murder. But on second though, Judge Keating returned the signed papers, stating that the precedent upon which he had earlier relied differed from Descalakis's case. Descalakis requested a ruling of law, which Judge Keating denied.[36]

In June 1923, the Supreme Judicial Court heard Descalakis's appeal. For the first time in the Commonwealth's history, the issue of an attorney's competence was before the court, along with the extent of the district attorney's power to *nol pros.* The latter issue had been before the court many times, but no more spectacularly than in the spring of 1922, when two district attorneys—Nathan Tufts and Joseph Pelletier—were removed from office by the SJC for, among other reasons, accepting bribes to drop criminal charges. Perhaps because Fielding had worked closely with Pelletier for more than twelve years, the agreement reached between the district attorney and Feeney was scrutinized carefully by the court. While acknowledging that the power of a prosecutor to enter a *nolle prosequi* "is extensive within its sphere," Chief Justice Arthur Rugg blasted district attorney Fielding's attempt to change an indictment after sentence has been pronounced. "It is indubitable on this record," declared Rugg, "that the indictment against this defendant had gone to final judgment long before the incident here under review took place."[37]

Establishing precise standards of conduct for attorneys proved more difficult than rooting out the hint of corrupt politics from the criminal justice system. "Much stress has been put on the alleged incompetence or negligence of the counsel assigned by the court," noted Rugg, who was appointed to the Supreme Judicial Court in 1906, but remember, "it is difficult to reproduce on a printed page the atmosphere of a trial" and that attorney's "methods differ." Some attorneys allow immaterial and irrelevant evidence to go into the record without objection in the hope it may be to their client's advantage and some fail to object to improper arguments by opposing counsel of the same reason. "There are divergent theories as to the wisdom of insistent conformity to every technical rule of evidence," added Rugg. Far more important than method, was "experience, capacity, industry, alertness, faithfulness, learning and character." Besides, concluded Rugg, "perfection cannot be demanded even if a standard of perfection could be formulated."[38]

Having articulated some very general characteristics of a good trial lawyer, Rugg turned his attention to the specific accusations made against Schenck. The fact that he failed to object to an improper remark by the

36. Descalakis Transcript, 182; *Commonwealth v Descalakis*, 246 mass 12, 17-18.

37. *Attorney General v Pelletier*, 240 Mass, 264, 310-311; *Commonwealth v Descalakis*, 246 Mass 12, 20-21.

38. *Commonwealth v Descalakis*, 246 Mass 12, 26-27.

district attorney cannot be labeled "negligence or incompetence." Nor was Schenck acting incompetently because he didn't ask Descalakis if he wanted to accompany the jury to view the scene of the crime. Likewise, Schenck may not be blamed because Descalakis didn't make an unsworn statement to the jury. The trial record shows that the judge understood Descalakis chose to waive that right. In these particulars and in general, Rugg concluded that Descalakis's court appointed counsel had "conducted a faithful and proper defense."[39]

Although he exonerated Schenck, Chief Justice Rugg's opinion in *Descalakis* avoided establishing a standard of competency by which an attorney's performance in a capital case might be measured. He drew attention to the subtleties and complexities of a trial and to the qualities that a good attorney should manifest. But, he stopped far short of defining, or even outlining, what behavior would signal that a defendant had not been faithfully and properly defended. Rugg's formulation was sentimental, a nostalgic reflection of a 19th century legal world where elite lawyers voluntarily participated in the criminal justice system. His decision left the court without guidance and the defendant without recourse, a combination that caused the performance of court appointed attorneys to decline over the next several decades.

In 1952, a special committee of the Boston Bar Association reported with alarm that "there was reason for serious question as to the competence and diligence of the defense conducted by counsel appointed by the court" in recent capital cases. Among other first degree murder trials in which the defense was conducted poorly by a court appointed attorney, the committee pointed to *Commonwealth v Cox* (1951) as an especially egregious example.

Fifty-nine year old Marshall Cox was indicted for the murder of his wife, Helen, in March 1948. Married in 1933, the couple lived near Concord center since 1941. The Cox's had many friends, an active social life and took park in church activities. They both read a great deal and Helen played the piano. Marshall Cox graduated from Harvard College in 1911 and was awarded a masters degree in chemistry the following year. He taught chemistry at Tufts College from 1912 to 1929, when he resigned to launch a small candy manufacturing business. A few years later, he became owner and manager of the Stow Country Club. A heavy snow storm in 1948 caused the roof of the clubhouse to collapse and Cox worried that the cost of repairs would jeopardize he and his wife's financial future. This fear, together with Helen's often expressed dread about growing old, led Cox to murder his wife. On the morning of February 21, 1948, he asked Helen to play a Mozart piece. While she sat at the piano, Cox struck her from behind on the head with a hammer. As she lay on the floor, he hit her a number of times with a hammer, repeatedly plunged an

39. *Ibid.*, 27, 29-31, 32, 26.

ice pick into her heart and twisted a wire around her neck.[40]

After this brutal attack, Cox telephoned his broker and gave instructions to sell all the securities in his account. He then called the police, gave his name and address and said, "I have some bad news for you. I have just killed my wife. Will the police please come down?" Within a few minutes a police officer arrived. When Cox answered the door he was covered with blood. He told the officer, "I have just done a most terrible thing. I just killed my wife." At Concord police headquarters, Cox made a detailed statement admitting guilt. He said that he conceived the idea of murdering his wife while he lay in bed the prior evening. "It seemed like kindness," he said. Cox added, that he thought he "did a good job . . . and the state would take his life and that they would both meet in the next world."[41]

While he was in jail, the court appointed Francis W. Juggins to represent Cox. On March 3, he was indicted for first degree murder. Ten days later, the court assigned two psychiatrists to examine the defendant and upon their recommendation Cox was admitted to Bridgewater State Hospital for observation. In a letter to the court, the medical director of the department of corrections reported that there was a history of "considerable nervous instability" in Cox's family and that he manifested a "morbid state of mind, was depressed, and found it difficult to get started in the morning." Dr. Warren Stearns concluded that Cox was "insane and in need of care in a hospital for mental disease." He was committed to the hospital on April 23, 1948. Early in 1950, Dr. Stearns informed the court that Cox had recovered and was ready to stand trial.[42]

When attorney Juggins began his defense of Cox in April 1950, he had been practicing law since 1932, when he left Harvard Law School after completing his first year. He spent very little time with Cox before the trial. Juggins and Cox spoke briefly in the Concord jail, for a few minutes at Bridgewater, and for about 30 minutes on the eve of the trial. Juggins' preparation for trial was equally hasty and completely misguided. First, he argued that according to law, Dr. Stearns should be called as a witness for the prosecution and that his uncontradicted testimony "required a directed verdict of not guilty by reason of insanity." Second, Juggins insisted it was "improper" for assistant district attorney Lyman Sprague to cross examine the only witness called by the defense—a psychiatrist who had examined Cox. Both of these assertions were incorrect, contrary to the law and to established criminal procedure. Nevertheless, Juggins asked the jury to find Cox not guilty by reason of insanity. "No

40. Commonwealth v Cox, Stenographic Record, Superior Court, Middlesex County, Motion for a New Trial, Hearing before Justice Hurley, July 14, 1950, 3 vols., (Archives of the Supreme Judicial Court of Massachusetts), I, 8-11.

41. Ibid., I, 14-15.

42. "Report to Department of Mental Health on Marshall Cox, March 12, 1948," in Commonwealth v Cox, Stenographic Record, "Summary of the Record," 5-7.

person in their right mind could have done such a thing." Juggins told the jury in his brief closing remarks.[43]

District Attorney Sprague argued that Cox was legally responsible for the premeditated murder of his wife, an act committed "with extreme atrocity and cruelty." He told the jury that it was their responsibility to determine the importance of the psychiatrist's testimony, adding that none of the doctors who examined Cox stated that he could not distinguish between right and wrong, the legal test of criminal responsibility. Sprague also read to the jury a letter written by Cox a short time after he was admitted to Bridgewater. Referring to the mental anxiety that caused him to murder his wife, Cox lightheartedly told his sister that he "'snapped out of it' almost immediately." The district attorney asked the jury to find Cox guilty of first degree murder.[44]

After deliberating less than three hours, the jury returned with a verdict of guilty. Judge Joseph Hurley asked Cox if he had anything to say as to why the penalty of death should not be imposed. Cox made a long, coherent argument, exposing Juggins' shoddy performance. First, Cox pointed out that there was plenty of evidence other than the psychiatrist's testimony to support his claim of insanity. He noted that his family's history was riddled in insanity, but "nothing of that kind was brought out." Second, Cox insisted that his own mental health record was slighted by his court appointed attorney. Third, Cox argued that a "normal person" would have lied or fled after committing the murder, but "I didn't do anything like that. I wasn't normal." Maybe now after hearing me, Cox said in conclusion, some jurors might say, "I don't think he got a very good deal at this trial." He added: "This verdict does not redown to the glory of Massachusetts."[45]

Three months after Judge Hurley sentenced Cox to "suffer the punishment of death by the passage of a current of electricity through your body," Cox and his court appointed attorney appeared again before Judge Hurley. Juggins had filed just a single motion for a new trial on the grounds that the "verdict was against the law, the evidence and the weight of the evidence." He did not prepare a bill of exceptions, nor object to the district attorney's absurd syllogism: since most men were sane there was a rational probability that the defendant was sane and, therefore, Cox was criminally responsible for the murder of his wife. In fact, Juggins's appeal was based on the same wrong-headed argument he had made at the trial. He insisted that the testimony of the psychiatrists must be accepted without question. Again, he seemed unprepared, his argument often incoherent

43. Commonwealth v Cox, Stenographic Record, III, 255-257; the two statutes misinterpreted by Juggins may be found in *Massachusetts General Laws* (Ter. Ed.). chap. 123, sec. 100A and *General Laws* (Ter. Ed.) chap. 125, sec. 48; Commonwealth v Cox, Stenographic Record, II, 185, 181-182 for Juggins's remarks.

44. Commonwealth v Cox, Stenographic Record, II, 190-1981, 199.

45. *Ibid.*, III, 251, 258-259, 260, 263, 281.

and sometimes ludicrous. He contended, for example, that it was the "duty of the District Attorney's office to present evidence both favorable as well as unfavorable to the defendant," that he was "disappointed at the type of Jury that passed on the case," and concluded by candidly admitting that his argument for a new trial was "in my mind. I have not had an opportunity to look that the details, but I guess there is nothing I could add." Judge Hurley denied the motion and Cox appealed the ruling to the Supreme Judicial Court.[46]

Speaking for the majority, Justice Raymond Wilkins, who was appointed to the court by Republican governor Leverett Saltonstall in 1944, once again explained that Juggins's argument had no merit and that the trial court had not erred in denying Cox's motion for a new trial. But the court was shocked and took the rare step of undertaking a review of the facts as well as the law to determine if "there was a miscarriage of justice." The evidence discloses "an extraordinary affair," noted Wilkins in marking out questionable arguments made by Juggins and by the prosecution. Without elaboration, the court ordered a new trial.[47]

Because the issue of Juggins's competency was not specifically before the court, Justice Wilkins merely provided a remedy for Cox, leaving unanswered the general question of the competency of court appointed attorneys. The Bar Association's special committee on court appointed counsel in capital cases decried the lack of specific standards. Its criticism of the court was based on interviews it conducted with every man in Charlestown prison who had been represented by court appointed counsel from 1941 to 1951. While most attorneys met their professional obligations "with skill and devotion," the committee noted, abuses were "not sporadic, but prevalent and perhaps increasing." To meet this crisis, the committee recommended two major changes in the way counsel was assigned: the bar association would play an active role, by assisting the judge in determining if an attorney were qualified to be assigned by the court; and "other criteria of a satisfactory appointment" would be weighed more heavily than the right of the accused to petition the court to appoint a particular attorney. These reforms, it was believed, would ensure that court appointed lawyers in capital cases were "fully qualified by training, experience, reputation and character" and that an attorney had not "solicited such employment."[48]

However useful these rule changes might have been, the Supreme Judicial Court remained opposed to procedural reform or to articulating firm guidelines by which to measure a trial counsel's conduct against the constitutional guarantee of Article XII of the Declaration of Rights. During the next three decades, the court clung to its pragmatic approach.

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46. Commonwealth v Cox, Motion for a New Trial, July 14, 1950, I 2-12.

47. *Commonwealth v Cox*, 327 Mass 609, 614-615.

48. "Representation by Counsel Appointed by the Court in Capital Cases," *Bar Bulletin* (June 1952), 170-175.

While open to specific arguments about the effectiveness of assigned counsel, the court refused to adopt "an ideal model of how counsel should . . . conduct himself." As we shall see, the standard that took shape created a very difficult barrier to raising claims of ineffective assistance of counsel on appeal.[49]

During the 1950's the Supreme Judicial Court began to spell out the narrow circumstances in which it would find a defendant's right to due process had been violated by inadequate representation. In *McNeil*, a capital case heard on appeal by the SJC in 1952, Justice Henry Lummus rejected the defendant's claim that he should have been provided with an attorney before he was brought into court. McNeil argued that because he was "not advised . . . of his right to the assistance of counsel," his confession made to police after his arrest should not have been admitted as evidence. The court held that there was nothing in Massachusetts law, or in any decision of the Supreme Court of the United States "holding that a State owes a constitutional duty to provide counsel for one accused of murder prior to his being brought into court."[50]

In 1957 the court found that Sylvio Drolet could not challenge his conviction merely because his attorney left the courtroom after making his closing argument to the jury. Drolet's attorney was absent during the arguments of counsel for Drolet's codefendant and of the district attorney. He also failed to appear the following day when the judge charged the jury, when the jury returned a guilty verdict, and when the judge imposed sentence. "The defendant was a mature man and not entirely unfamiliar with court procedure," said Chief Justice Wilkins, and no error in the proceeding was made while Drolet's counsel was absent from the courtroom.[51]

Shortly before the United States Supreme Court's decision in *Gideon v Wainwright* (1963), the Supreme Judicial Court established a new rule of criminal procedure requiring, among other changes, the assignment of counsel to represent the accused "at every state of the proceeding." But on the question of effective counsel, the court remained wedded to its more conservative prior rulings. In *Commonwealth v Lussier* (1971), for example, the SJC rejected the defendant's argument that his court appointed counsel was ineffective because of his failure to object to the introduction of Lussier's confession and by his disclosure to the jury that Lussier plead guilty to murder in the District Court. Before focussing on Lussier's specific argument, Justice Jacob Spiegel referred to a lengthy general discus-

49. *Commonwealth v Saferian*, 366 Mass 89, 99 (1974).

50. *Commonwealth v McNeil*, 328 Mass 436, 438 (1952).

51. *Drolet v Commonwealth*, 335 mass 382, 384 (1957). Wilkins sat on the SJC for twenty-six years (1944-1970), twelve years as an Associate Justice and fourteen years as Chief Justice. In 1958 Wilkins joined with nine other state supreme court chief justices protesting that the United States Supreme Court was "adopting the role of policy maker and failing to exercise proper judicial restraint." 361 Mass 912, 914 (1972).

sion of the "standard of representation to which a criminal defendant is entitled."[52]

Justice Spiegel, the first Jew to sit on the SJC, defined the term "effective assistance" by what it did not mean: it did not relate to the quality of representation except in the broadest sense; it did not mean an errorless defense; it did not mean that trial tactics, or the failure to offer or object to evidence, might be challenged by hindsight; it did not mean that hypothetical comparisons with other lawyers might be made to argue that a different result might have been obtained. Indeed, "effective" meant little more than staving off disaster, according to the court. To make his point, Justice Spiegel quoted *Scott v United States*:

> Only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court, can a charge of inadequate legal representation prevail.[53]

On the positive side of the ledger, the court listed the qualities an effective court appointed lawyer should manifest as essential to due process. The characteristics of an attorney ready to do battle include: undivided loyalty to client, skill and energy, and commitment to the moral and ethical standards of the profession. Lest this very short list become a yardstick used by a defendant to measure the worth of his lawyers, the court hastened to add, that even if an attorney manifested these qualities the defendant might still land in jail.[54]

Returning to the particulars of *Lussier*, Justice Spiegel's opinion quickly brushed aside the defendant's claims that his counsel waged an inadequate battle. Indeed, in light of the overwhelming evidence inculpating Lussier, the attorney did the very best he could "to create some plausible reason for the jury to find the defendant not guilty." Finally, Lussier's motion for a new trial had been denied by the trial judge, who saw and heard the evidence of live witnesses. If an attorney is incompetent and the trial unfair, "it an be detected far more readily by the trial judge than by appellate judges reading between the lines of a stale transcript," wrote Chief Justice Joseph Tauro in *Commonwealth v Geraway*.[55]

In *Commonwealth v Saferian*, the court's barrier to demonstrating ineffective counsel was made nearly insurmountable. John Saferian was convicted by a jury of armed robbery in February, 1967. At the arraign-

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52. Rule 10, "Assignment of Counsel in Noncapital Felony Cases," 337 Mass 813; *Commonwealth v Lussier*, 333 Mass 83 (1955), for Lussier's original appeal; for the argument that defendant's counsel was ineffective, see, *Commonwealth v Lussier*, 359 Mass 393 (1971).

53. *Commonwealth v Bernier*, 359 Mass 13, 17-19; *Commonwealth v Lussier*, 359 Mass 393, 395; *Scott v United States*, 334 F. 2d 72, 73, (6th Cir.). (1970). The first use of the so-called "farce and mockery" test was in *Diggs v Welch*, 148 F. 2nd 667 (D.C. Cir.) (1945).

54. *Commonwealth v Bernier*, 359 Mass 13, 18-19.

55. *Commonwealth v Lussier*, 359 Mass 393, 396-398; *Commonwealth v Geraway*, 364 Mass 168, 184 (1969).

ment, Saferian's court appointed counsel, a veteran criminal lawyer with more than 40 years experience, advised the defendant to plead not guilty and to waive commitment for observation of his mental condition. Counsel did not consult with the defendant during the next six weeks before the trial. However, at a hearing on a motion to suppress evidence, counsel for the defense played an active part. Using a "bludgeoning frontal attack" that was often "undirected or unfocused," counsel cross examined witnesses for the prosecution at length in the hope that "falsehood or faults of observation would emerge." But the witnesses held firm and the trial judge denied the motion.[56]

When the motion to suppress failed, counsel advised Saferian to change his plea to guilty; but he refused. During the trial, Saferian's court appointed attorney used the same tactic he had employed during the hearing. Counsel persisted with extended, but futile cross examination of the Commonwealth's witnesses. Saferian persistently and annoyingly demanded that his counsel pursue particular lines of interrogation and grew increasingly hostile toward him when the defense deteriorated. There were numerous heated conversations between the defendant and counsel as the trial went on. At one point, Saferian addressed the court, complaining that his counsel had failed to explore fully a question about the police lineup in which Saferian had been identified. But counsel's additional questions on this topic yielded nothing.[57]

The defense presented no witnesses and the defendant did not take the stand, because he had a long criminal record. Counsel's closing argument to the jury reminded them of the Commonwealth's burden, questioned the accuracy of the eye-witnesses' identification of Saferian, showed some inconsistencies in the testimony of the police and asked for leniency. He did not ask for a directed verdict. Finally, he made a suggestion to the judge for an addition to the charge. The jury found Saferian guilty of armed robbery and he was sentenced to the Massachusetts Correctional Institution for 10 to12 years.[58]

Against this background, the Supreme Judicial Court assessed Saferian's claim of ineffective counsel made on appeal in 1974. The court took a balanced view toward the work of Saferian's counsel. On the one hand, "counsel did not go over the facts with the defendant, or seek to interview the prospective witnesses, or ask the prosecutor for material, or make routine pre-trial motions apart from the motion to suppress. He relied on cross-examination and argument." On the other hand, "the case was relatively simple and the evidence straightforward." And, the trial judge reported that counsel had done everything that could be done; "'he gave his client . . . effective assistance.'"[59]

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56. *Commonwealth v Saferian*, 366 Mass 89, 94 (1974).

57. *Ibid.*, 95.

58. *Ibid.*, 95-96, 90.

59. *Ibid.*, 97-98, quoting trial Judge Collins.

Rather than repeating earlier general statements about the quality or character of a defense attorney, Justice Benjamin Kaplan, who came to the court after nearly three decades at Harvard Law School, articulated a two-step analysis that would apply in adjudicating claims of ineffective assistance of counsel in the future. The first step focused on what an attorney actually did at trial. It entailed "a discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel—behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer." If such an inadequacy was found, then the second step required a determination of whether counsel's action had "likely deprived the defendant of an otherwise available, substantial ground of defense." The burden of demonstrating both the initial inadequacy and the resulting damage was placed on the defendant.[60]

The court applied its two-pronged test in rejecting the appeal of Daniel Moran, convicted of murder in the first degree. On the morning of January 4, 1980, Moran walked into a Somerville social club, where Salvatore Sperlinga was seated at a table. Moran fired three shots at Sperlinga, hitting him twice and sending him to the floor. The defendant then walked over the Sperlinga and at point blank range fired a bullet into the victim's head. A jury convicted Moran of murder in the first degree and the judge sentenced him to life imprisonment.[61]

On appeal, Moran argued that the court appointed attorney he had requested was ineffective because he failed to impeach a key prosecution witness. They court strongly disagreed. After reviewing the test laid down in *Saferian*, Justice Joseph R. Nolan bluntly stated: "We do not 'second guess' competent lawyers working hard for defendants who turn on them when the jury happens to find their clients guilty." The trial counsel's failure to introduce evidence concerning the chief prosecution witness's criminal record, did not amount to denial of effective assistance of counsel.[62]

By forcing defendants to fit the mold of the two stage process set out in *Saferian*, three consequences followed. One, as a string of cases after 1974 made clear, it was very difficult for a successful claim of ineffective counsel to be raised. Two, no guidance was provided for the future benefit of trial judges, defense counsel, or defendants as to what effective assistance actually required. Third, Richard Bachman, an assistant attorney general for Massachusetts, argued that judges were reluctant to reverse convictions on grounds of inadequate court appointed counsel, because

60. *Ibid.*, 96. The court's new right to counsel rule was summarized for the bar by Justice Edward F. Hennessey, "Constitutional Rights of the Accused," 60 *Massachusetts Law Quarterly* 19 (1975).

61. *Commonwealth v Moran*, 388 Mass 655, 656.

62. *Ibid.*, 661-662.

they believed most criminal defendants were guilty anyway. "Despite the Court's statement that a surface impression of guilt does not end the inquiry as to whether there was adequate assistance of counsel," Bachman wrote in 1974, "the Court seems to excuse counsel's glaring deficiencies on the basis that guilt was obvious."[63]

The narrowness of the court's *Saferian* rule is readily apparent when it is compared with other standards used to evaluate claims of ineffective counsel. In *United States v DeCoster I*, for example, Chief Judge, David Bazelon, United States Court of Appeals for the District of Columbia, rejected previous standards, forging a revised standard to govern appellate review of ineffective assistance claims. Judge Bazelon proposed a three stage standard. The first stage set forth explicit guidelines, incorporating the American Bar Association Standards Relating to the Defense Function for the conduct of defense counsel. Once a substantial violation of any of these requirements was shown, the second stage required a determination of whether any prejudice to the accused's defense resulted. At this stage, the burden is placed on the prosecution to prove beyond a reasonable doubt that the constitutionally defective assistance did not prejudice the defendant. To require the defendant to show prejudice, as did the Massachusetts court, makes the defendant "establish the likelihood of his innocence," argued Judge Bazelon. More *DeCoster* decisions followed, rejecting the use of specific guidelines.[64]

In *Strickland v. Washington* (1984), the Supreme Court flatly rejected Judge Bazelon's argument, adopting instead a standard similar to that articulated by the Massachusetts Supreme Judicial Court in *Saferian*. The Court's *Strickland* test has two components: a convicted defendant must show, first, "that counsel's representation fell below an objective standard of reasonableness," and second, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." Justice Thurgood Marshall dissented, objecting that the "performance standard adopted by the Court 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 Six Amendment is interpreted and applied by different courts."[65]

63. See, for example, *Commonwealth v Adams*, 374 Mass 722 (1978), *Commonwealth v Key*, 381 Mass 19 (1980), *Commonwealth v Appleby*, 389 Mass 359 (1983). *Commonwealth v Tuitt*, 393 Mass 801 (1983), *Commonwealth v Mamay*, 407 Mass 412 (1990); Richard Bachman, "Criminal Law and Procedure," *1974 Annual Survey of Massachusetts Law* (Boston, 1974), 38.

64. *U.S. v DeCoster*, 487 F.2nd 1197, 1203-1204 (D.C. Cir.) (1973); David L. Bazelon, "The Defective Assistance of Counsel," 42 *University of Cincinnati Law Review*, 1; *ABA*, Standards Relating to the Administration of Criminal Justice, The Defense Function (1971). For a review of the three DeCoster decisions, see, Note, "Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. DeCoster," 93 *Harvard Law Review* 752, 758-766.

65. *Strickland v Washington*, 466 U.S. 668, 694, 707 (1984). Among others, the Attorney General of Massachusetts, filed an amicus curiae brief urging the Court to reverse the lower court's finding that Strickland had not been given reasonably effective assistance of counsel. For an attack on the Court's decision, see, Berger, "The Chiropractor as Brain Surgeon," *N.Y.U. Review of Law and Social Change*, 245 (1990-1991).

A glimpse at where the reasonable performance standard might lead in a capital case was provided in a recent Massachusetts felony trial. A Massachusetts trial court judge stretched the reasonable performance standard to rationalize egregious errors by defense counsel. Judge James Donohue ruled that Roger Moreau, who was advised by his counsel to make a statement to the police, and then, on the basis of that statement to plead guilty to armed burglary, had not been denied effective counsel. Applying what he believed to be the reasonable performance standard, Judge Donohue, argued that because attorney John Fitzgerald was told by the police that they

> had a strong case against Moreau, the initial advice to give a statement was not necessarily beyond the realm of reasonable attorney conduct. After the statement had been given, it was not unreasonable for Fitzgerald to recommend that Moreau plead guilty.

The Massachusetts Appeals Court noted that "circumstances favoring a confession to police are rare," and ordered an evidentiary hearing to determine the strength of the Commonwealth's case at the time of the defendant's statement.[66]

Both the belief driving the requirement that effective counsel should be provided to a defendant accused of a capital crime and the procedure by which attorneys were appointed by the court were transformed from 1780 to 1980. As Massachusetts society changed, growing more complex, more stratified and individualistic, and more violent, the initiative for maintaining "justice in mercy" shifted from the state to the bar, to the court, and, finally, to the defendant. At every stage of this historical process, court appointed counsel represented defendants in capital cases, attempting to maintain "strict adherence to forms and the most perfect technical accuracy," as well as being aware of the "subtleties and refinements that may legally interrupt the current of justice." It was this standard set by Attorney General James T. Austin in 1834 to which John Long referred in 1893 as his "sacred duty" to achieve. In the 20th century two legal changes destroyed the heart of the old standard: the democratization of the procedure for appointing counsel in 1911 and the Supreme Judicial Court's insistence from 1923 to the present on eschewing a standard of quality in favor of raising the standard for demonstrating ineffectiveness. Implicit in this new standard is the assumption that a compelling case for the defendant's guilt ameliorates the shortcomings of the defendant's court appointed attorney. A reinstatement of capital punishment in Massachusetts will severely test this presumption.

66. *Commonwealth v Moreau*, 30 Mass. App. Ct. 677, 682.

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Poor People Lose: *Gideon* and the Critique of Rights

ABSTRACT. A low income person is more likely to be prosecuted and imprisoned post-*Gideon* than pre-*Gideon*. Poor people lose in American criminal justice not because they have ineffective lawyers but because they are selectively targeted by police, prosecutors, and law makers. The critique of rights suggests that rights are indeterminate and regressive. *Gideon* demonstrates this critique: it has not improved the situation of most poor people, and in some ways has worsened their plight. *Gideon* provides a degree of legitimacy for the status quo. Even full enforcement of *Gideon* would not significantly improve the loser status of low-income people in American criminal justice.

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ESSAY CONTENTS

INTRODUCTION

Gideon v. Wainwright[1] is widely regarded as a milestone in American criminal justice. When it was decided in 1963, it was seen as a major step forward in assuring fairness to poor people and racial minorities. Yet, fifty years later, low-income and African-American people in the criminal justice system are considerably worse off. It would be preferable to be a poor black charged with a crime in 1962 than now, if one's objective is to avoid prison or serve as little time as possible.

The "critique of rights," as articulated by critical legal theorists, posits that "nothing whatever follows from a court's adoption of some legal rule"[2] and that "winning a legal victory can actually impede further progressive change."[3] My thesis is that *Gideon* demonstrates the critique of rights. Arguably, *Gideon* has not improved the situation of accused persons, and may even have worsened their plight.

The reason that prisons are filled with poor people, and that rich people rarely go to prison, is not because the rich have better lawyers than the poor. It is because prison is for the poor, and not the rich. In criminal cases poor people lose most of the time, not because indigent defense is inadequately funded, although it is, and not because defense attorneys for poor people are ineffective, although some are. Poor people lose, most of the time, because in American criminal justice, poor people are losers. Prison is designed for them. This is the real crisis of indigent defense. *Gideon* obscures this reality, and in this sense stands in the way of the political mobilization that will be required to transform criminal justice.

I know that, for some readers, these claims are counterintuitive, and I ask these readers' indulgence for the time it takes to read this Essay, in which I will attempt to prove my claims. It is also important to emphasize that I am not making a "but-for" claim of causation. *Gideon* is not responsible for the exponential increase in incarceration or the vast rise in racial disparities in criminal justice. As I explain later, however, *Gideon* bears some responsibility for legitimating these developments and diffusing political resistance to them. It invests the criminal justice system with a veneer of impartiality and

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1. 327 U.S. 335 (1963).
2. Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 32 (1993). Tushnet refers to this component of the critique of rights as the "indeterminacy thesis."
3. *Id.* at 26.

respectability that it does not deserve. *Gideon* created the false consciousness that criminal justice would get better. It actually got worse. Even full enforcement of *Gideon* would not significantly improve the wretchedness of American criminal justice.

In *Lafler v. Cooper*[4] and *Missouri v. Frye*,[5] the Supreme Court extended the right to counsel to the plea bargaining stage of prosecution. Some people are having a *Gideon* moment[6]: the Court's rulings seem like important victories for indigent accused persons because, as Justice Kennedy observed in *Lafler*, "criminal justice today is for the most part a system of pleas, not a system of trials."[7] It seems cynical and defeatist to recall Mark Tushnet's observation that "nothing whatever follows from a court's adoption of some legal rule."[8] But one goal of this Essay is to disrupt the "cruel optimism" that *Gideon* discourse creates.

This Essay proceeds as follows. The first Part develops the claim that the poor—especially poor African Americans—are "losers" in American criminal justice and that providing them with more, or better, defense attorneys would not substantially alter their subordination. Part II describes the critique of rights, and Part III applies it to *Gideon*. Part IV compares the critique of rights to other comments on rights discourse in criminal procedure. The Essay concludes with some recommendations on what advocates for poor people might do that would help them more than discoursing about rights.

I. HOW POOR PEOPLE LOSE IN AMERICAN CRIMINAL JUSTICE

Indigent persons are much more likely to go to prison today than in the era when *Gideon* was decided. In 1960, the U.S. imprisonment rate was approximately 126 per 100,000 population.[9] By, 2008, the rate had quadrupled,

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4. 132 S. Ct. 1376 (2012).

5. 132 S. Ct. 1399 (2012).

6. *See* Adam Liptak, *Justices' Ruling Expands Rights of Accused in Plea Bargains*, N.Y. TIMES, Mar. 21, 2012, http://www.nytimes.com/2012/03/22/us/supreme-court-says-defendants-have-right-to-good-lawyers.html.

7. 132 S. Ct. at 1388.

8. Tushnet, *supra* note 2, at 32.

9. Margaret Werner Cahalan, *Historical Corrections Statistics in the United States, 1850-1984*, BUREAU OF JUST. STAT. 30 (1986), https://www.ncjrs.gov/pdffiles1/pr/102529.pdf.

to 504 per 100,000.[10]

African-American defendants are even worse off. In 1960, three years before *Gideon*, the black incarceration rate was approximately 660 per 100,000.[11] By 1970, it had fallen some, to slightly under 600 per 100,000.[12] In 2010, the rate of incarceration among black males was an astronomical 3,074 per 100,000.[13]

For men hoping to avoid prison, being both poor and black is a lethal combination. More than two-thirds of black males who do not have college degrees will be incarcerated at some point in their lives.[14] Black male high school dropouts are more likely to be imprisoned than employed.[15]

What is it about being poor and African American that substantially increases the risk of incarceration? The answer, rather obviously, has much to do with class and race and, less obviously, little to do with the quality of the indigent defense system. This Essay employs data about both race and class to demonstrate this claim, but at the start I want to note that it is impossible to disaggregate the effects of race and class. The answer to the questions, "Are poor defendants treated unfairly because many of them are black, are black defendants treated unfairly because many of them are poor, or is there some other dynamic at work?" is "yes."[16] Indeed, the *Gideon* decision itself was

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10. William J. Sabol, Heather C. West & Matthew Cooper, *Prisoners in 2008*, BUREAU OF JUST. STAT. 6 (2009), http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf.

11. *See* Margaret Cahalan, *Trends in Incarceration in the United States Since 1880: A Summary of Reported Rates and the Distribution of Offenses*, 25 CRIME & DELINQUENCY 9, 40 tbl.11 (1979) (reporting that there were 125,000 black adult inmates in the U.S. in 1960); *Race for the United States, Regions, Divisions, and States: 1960*, U.S. CENSUS BUREAU (2002), http://www.census.gov/population/www/documentation/twps0056/tabA-08.pdf (stating that the U.S. black population in 1960 was 18,871,831).

12. *See* Cahalan, *supra* note 11, at 40 tbl.11 (reporting that 134,000 black adult inmates in the U.S. in 1970); *Race for the United States, Regions, Divisions, and States: 1970*, U.S. CENSUS BUREAU (2002), http://www.census.gov/population/www/documentation/twps0056/tabA-05.pdf (stating that the U.S. black population in 1970 was 22,580,289).

13. Paul Guerino, Paige M. Harrison & William J. Sabol, *Prisoners in 2010*, BUREAU OF JUST. STAT. 27 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf.

14. Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, DAEDALUS, Summer 2010, at 8, 16.

15. *Id.* at 12.

16. For a discussion of the problems and benefits of analyzing modalities of subordination, see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 166-67; and Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment:*

explicitly a class intervention, but implicitly, like other Warren court criminal procedure cases, a racial justice intervention as well.[17]

Approximately two decades after *Gideon*, two trends began in criminal justice, the effects of which were to overwhelm any benefits that *Gideon* provided to low-income accused persons. First, the United States experienced the most pronounced increase in incarceration in the history of the world.[18] Second, there was a corresponding exponential increase in racial disparities in incarceration.

This dramatic expansion of incarceration was accomplished on the backs of poor people. The Bureau of Justice Statistics reports that the "generally accepted indigency rate" for state felony cases near the time when *Gideon* was decided was 43%.[19] Today approximately 80% of people charged with crime are poor.[20]

Other data further illustrate the correlation between poverty and incarceration. In 1997, more than half of state prisoners earned less than $1,000 in the month before their arrest.[21] This would result in an annual income of less than $12,000, well below the $25,654 median per capita income in 1997.[22] The same year, 35% of state inmates were unemployed in the month before their arrest, compared to the national unemployment rate of 4.9%.[23]

Approximately 70% of state prisoners have not graduated from high

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Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988) [hereinafter Crenshaw, *Race, Reform and Retrenchment*].

17. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 97 (1980); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 763-66 (1991); Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 838-52 (1994); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997) ("Warren-era constitutional criminal procedure began as a kind of antidiscrimination law.").

18. *See* Adam Gopnik, *The Caging of America: Why Do We Lock Up So Many People?*, NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik ("Mass incarceration on a scale almost unexampled in human history is a fundamental fact of our country today . . . .").

19. Stuntz, *supra* note 17, at 7 n.7.

20. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1034 (2006).

21. Caroline Wolf Harlow, *Education and Correctional Populations,* BUREAU OF JUST. STAT. 1, 10 & tbl.14 (2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf.

22. *Per Capita Personal Income by State*, BUREAU OF BUS. & ECON. RES., http://bber.unm.edu/econ/us-pci.htm (last visited Mar. 29, 2013).

23. Harlow, *supra* note 21, at 1, 10.

school.[24] Only 13% of incarcerated adults have any post-high school education, compared with almost 50% of the non-incarcerated population.[25]

College graduation, on the other hand, serves to insulate Americans from incarceration. Only 0.1% of bachelor's degree holders are incarcerated, compared to 6.3% of high school dropouts.[26] Put another way, high school dropouts are sixty-three times more likely to be locked up than college graduates.

The post-*Gideon* expansion of the prison population was also accomplished on the backs of black people. There have been always been racial disparities in American criminal justice, but from the 1920s through the 1970s they were "only" about two-to-one.[27] Now the black/white incarceration disparity is seven-to-one.[28] There are more African Americans under correctional supervision than there were slaves in 1850.[29] As Michelle Alexander states, "If mass incarceration is considered as a system of social control—specifically, racial control—then the system is a fantastic success."[30]

In summary, poor people and blacks have never fared as well as the nonpoor and the nonblack in American criminal justice. Since the 1970s, however, the disparities have gotten much worse. Something happened that dramatically increased incarceration and dramatically raised the percentage of the incarcerated who are poor and black. What happened is usually attributed to two main causes: the war on drugs and the law-and-order or so-called tough-on-crime policies of American leaders since the Nixon Administration.[31]

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24. *Id.* at 1.

25. *Id.* at 1-2 & tbl.1.

26. Andrew Sum, Ishwar Khatiwada & Joseph McLaughlin, *The Consequences of Dropping Out of High School: Joblessness and Jailing for High School Dropouts and the High Cost for Taxpayers* 10 (Ctr. for Labor Mkt. Studies Publ'ns, Paper No. 23, 2009), http://hdl.handle.net/2047/d20000596.

27. Pamela E. Oliver & Marino A. Bruce, Tracking the Causes and Consequences of Racial Disparities in Imprisonment 2-3 (2001) (unpublished project proposal to the National Science Foundation), http://www.ssc.wisc.edu/~oliver/RACIAL/Reports/nsfAug01narrative.pdf.

28. Heather C. West, *Prison Inmates at Midyear 2009—Statistical Tables*, BUREAU OF JUST. STAT. 21 tbl.18 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf.

29. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 271 n.7 (2010).

30. *Id.* at 225.

31. *See id.* at 271 n.7; *see also* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 136 (2011) (describing the period between Reconstruction and the Great Depression, and

Thus far I have made the case that prisons are populated by people who are disproportionately poor and African American. My next step is to demonstrate that this is not a coincidence, in order to further support the claim that the poor are losers in American criminal justice.

Mass incarceration's process of control—the social and legal apparatus by which poor people become losers in criminal justice—can be broken into five steps.

(1) The spaces that poor people, especially poor African Americans, live in receive more law enforcement in the form of police stops and arrests.[32]

(2) The criminal law deliberately ignores the social conditions that breed some forms of law-breaking.[33] Deprivations associated with poverty are usually not "defenses" to criminal liability, although they may be factors considered in sentencing.

(3) African Americans, who are disproportionately poor, are the target of explicit and implicit bias by key actors in the criminal justice system, including police, prosecutors,[34] and judges.[35]

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noting that "racial bias, though real and powerful, was . . . weaker than one might imagine" and that "nothing comparable to the massive racial tilt in today's drug prisoner population existed in the Gilded Age North").

32. *See* Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445 (2006); Tracey Meares, *Place and Crime*, 73 CHI.-KENT L. REV. 669 (1998). For an argument that the African-American community actually benefits from more law enforcement, see RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997), and for a critique of this argument, see Paul Butler, *(Color) Blind Faith: The Tragedy of* Race, Crime, and the Law, 111 HARV. L. REV. 1270 (1998) (reviewing KENNEDY, *supra*).

33. *See* BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQUALITY 9, 9-10 (1985); *see also* Jones v. City of Los Angeles, 444 F.3d 1118, 1120 (9th Cir. 2006) (holding unconstitutional under the Eighth Amendment a Los Angeles ordinance criminalizing "sitting, lying, or sleeping on public streets and sidewalks at all times and in all places"), *vacated because of settlement*, 505 F.3d 1006 (2007); United States v. Alexander, 471 F.2d 923, 957-65 (D.C. Cir. 1973) (Bazelon, C.J., dissenting) (arguing that a "rotten social background" defense and corresponding jury instruction may be appropriate in some cases).

34. *See* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 3-42 (1997).

(4) Once any person is arrested, she becomes part of a crime control system of criminal justice, in which guilt is presumed.[36] Prosecutors, using the legal apparatus of expansive criminal liability, recidivist statutes, and mandatory minimums,[37] coerce guilty pleas by threatening defendants with vastly disproportionate punishment if they go to trial.[38]

(5) Repeat the cycle. A criminal caste is created. Two-thirds of freed prisoners are rearrested, and half return to prison, within three years of

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35. Prosecutors are more likely to charge black suspects than whites, even controlling for factors like prior criminal record. *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 806 (2012). While African Americans do not disproportionately use or sell drugs, they are over one-third of those arrested for drug crimes. HUMAN RIGHTS WATCH, DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 4 (2009); HUMAN RIGHTS WATCH, TARGETING BLACKS: DRUG ENFORCEMENT AND RACE IN THE UNITED STATES 3, 41-44 (2008). Research on implicit bias suggests that blacks are more likely to be suspected of crime, convicted, and punished for longer than others. For a summary of this research, see Smith & Levinson, *supra*, at 800-01; see also ALEXANDER, *supra* note 29, at 103-05 (surveying research on racial bias and criticizing the Supreme Court for "adopting rules that would *maximize*—not minimize—the amount of racial discrimination that would likely occur").

36. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 11 (1964).

37. The Supreme Court has blessed this practice. In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), Paul Hayes was charged with uttering a forged instrument in the amount of $88.30. The maximum sentence for the offense was ten years, and the prosecutor offered to recommend a five-year sentence in exchange for a guilty plea. The prosecutor also indicated that if there was no guilty plea, he would charge Mr. Hayes under a recidivist statute that would require a life sentence if Mr. Hayes was convicted. Mr. Hayes turned down the plea, the prosecutor won his conviction, and Mr. Hayes received a life sentence. *Id.* at 358-59. The Supreme Court found no constitutional violation, although it stated that "the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse." *Id.* at 365. For a powerful critique of prosecutorial abuse of discretion in the plea-bargaining process, see Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came To Devour Those He Is Sworn To Protect*, 51 WASHBURN L.J. 513 (2012).

38. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 18 (1978) ("The modern public prosecutor commands the vast resources of the state for gathering and generating accusing evidence. We allowed him this power in large part because the criminal trial interposed the safeguard of adjudication against the danger that he might bring those resources to bear against an innocent citizen—whether on account of honest error, arbitrariness, or worse. But the plea bargaining system has largely dissolved that safeguard.").

their release.[39]

This description is not intended to be novel, or especially provocative. Other observers of American criminal justice have made similar points about the process by which being poor and African American increases the risk of incarceration. Richard S. Frase, for example, writes that

> poverty and lack of opportunity are associated with higher crime rates; crime leads to arrest, a criminal record, and usually a jail or prison sentence; past crimes lengthen those sentences; offenders released from prison or jail confront family and neighborhood dysfunction, increased risks of unemployment, and other crime-producing disadvantages; this make them likelier to commit new crimes, and the cycle repeats itself.[40]

Michelle Alexander notes:

> It is simply taken for granted that, in cities like Baltimore and Chicago, the vast majority of young black men are currently under the control of the criminal justice system or branded criminals for life. This extraordinary circumstance—unheard of in the rest of the world—is treated here in America as a basic fact of life, as normal as separate water fountains were just a half century ago.[41]

What if every person accused of a crime had an excellent lawyer? Proponents of *Gideon* suggest it would be an important step in making criminal justice more equitable. For example, David Cole writes that the "story of the enforcement of the right to counsel suggests that our failure to make good on *Gideon*'s promise is no mere mistake. Rather, it is the single most important mechanism by which the courts and society ensure a double standard in constitutional rights protection in the criminal law."[42]

In reality, full enforcement of *Gideon* probably would not significantly impact the "double standard." If mass incarceration and racial disparities were caused by poor defense attorneys, it would make sense to think of *Gideon* as the

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39. Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, BUREAU OF JUST. STAT. 7 tbl.8 (2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf.

40. Richard S. Frase, *What Explains Persistent Racial Disproportionality in Minnesota's Prison and Jail Populations?*, 38 CRIME & JUST. 201, 263 (2009).

41. ALEXANDER, *supra* note 29, at 176.

42. DAVID COLE, NO EQUAL JUSTICE 65 (1999).

appropriate solution. But, as the five-step process described above demonstrates, defenders are not the cause.

I want to be careful not to discount the difference that an excellent defense attorney can make, and how much this matters for individual clients. At the same time, I don't want to overclaim, as I believe Professor Cole does, that full enforcement of *Gideon* would bring anything remotely resembling equality to American criminal justice.

Empirical evidence of whether attorney ability makes a difference in trial outcomes is inconclusive. An important study by James M. Anderson and Paul Heaton suggests that public defenders in Philadelphia, compared to appointed counsel, "reduce their clients' murder conviction rate by 19%. They reduce the probability that their clients receive a life sentence by 62%. Public defenders reduce overall time served in prison by 24%."[43] Another study by David Abrams and Albert Yoon suggests that "going from the tenth to ninetieth percentile of public defender ability decreases the defendant's expected sentence length by 5.8 months. . . . Clearly, the public defender to whom a defendant is assigned . . . has a significant impact on how much time the defendant will serve."[44] But another empirical study found that "the skill level of the defense attorney plays *no role* in determining the outcome of a criminal trial in everyday cases with non-celebrity defendants."[45]

There is indirect evidence from courts that the scale of punishment of the poor would not be reduced by more effective lawyers. In *Strickland v. Washington*, the Supreme Court established a two-pronged test to determine ineffective assistance of counsel.[46] First, the counsel's representation must fall below an "objective standard of reasonableness."[47] Second, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[48]

In practice the tests rarely leads to a finding of ineffectiveness. I do not want to suggest that the *Strickland* test is the appropriate measure of effective

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43. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes,* 122 YALE L.J. 154, 159 (2012).

44. David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment To Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1166-67 (2007).

45. Jennifer Bennett Shinall, Note, *Slipping Away from Justice: The Effect of Attorney Skill on Trial Outcomes*, 63 VAND. L. REV. 267, 291 (2010).

46. 466 U.S. 668 (1984).

47. *Id.* at 688.

48. *Id.* at 694.

assistance.[49] I do want to suggest, however, that courts are probably correctly applying the test. As stated above, the most favorable empirical evidence suggests that more able defenders reduce average sentences by 24%. For individual defendants, this reduction is very important. But even with a 24% reduction in every sentence, American criminal justice would remain the harshest and most punitive in the world. The poor, and especially poor people of color, are its primary victims.

II. THE CRITIQUE OF RIGHTS[50]

Robin West has described the critique of rights as "one of the most vibrant, important, counterintuitive, challenging set of ideas that emerged from the legal academy over the course of the last quarter of the twentieth century."[51] Many of these ideas were articulated as part of the critical legal studies movement that began in the 1980s.[52] In a seminal 1984 article, Mark Tushnet described rights as unstable, indeterminate, overly abstract, and politically harmful to the Left.[53] The critique of rights was intended as an "act of creative destruction that may help us build societies that transcend the failures of

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49. According to the National Right to Counsel Committee, a blue-ribbon panel that evaluated the indigent counsel system, "Since *Strickland* was decided, commentators have been virtually unanimous in their criticisms of the opinion." NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 40-41 (2009), http://www.constitutionproject.org/pdf/139.pdf. The critiques of *Strickland* have focused on the difficulty defendants have in proving that their cases would have come out differently had their lawyers performed better. Courts usually hold that they would not have.

50. For seminal texts making the critique of rights, see Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002); and Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

51. Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 715 (2011).

52. For a longer description and intellectual history of the critique of rights, see Kennedy, *supra* note 50.

53. Tushnet, *supra* note 50, at 1363-64. Tushnet's critique was contextual, i.e., based on how rights function in the United States. He observed: "[T]here is nothing odd about saying that rights in Poland are a good thing, while rights in the United States are not. They are, after all, different cultures." *Id.* at 1382.

capitalism."[54]

The critique of rights has evolved to many sets of critiques.[55] One description on a website curated by a group of legal theorists who teach or have taught at Harvard Law School summarizes five basic elements:

> (1) The discourse of rights is less useful in securing progressive social change than liberal theorists and politicians assume.
>
> (2) Legal rights are in fact indeterminate and incoherent.
>
> (3) The use of rights discourse stunts human imagination and mystifies people about how law really works.
>
> (4) At least as prevailing in American law, the discourse of rights reflects and produces a kind of isolated individualism that hinders social solidarity and genuine human connection.
>
> (5) Rights discourse can actually impede progressive movement for genuine democracy and justice.[56]

Most of the critiques make the claim that rights are indeterminate. The proposition is that "the law is not a fixed and determined system, but rather an unruly miscellany of various, multifaceted, contradictory practices, altering from time to time and from context to context as different facets of law are privileged or suppressed."[57] Robin West describes the indeterminacy thesis as meaning that "the articulation of an interest as a 'right' by no means creates an unmoveable bulwark against change, interference, or recalibration of the protection of the various interests . . . toward which it so desperately strives."[58]

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54. *Id.* at 1363 (footnote omitted).

55. *See, e.g.*, West, *supra* note 51, at 716 (describing a "three-prong rights critique . . . that U.S. constitutional rights politically insulate and valorize subordination, legitimate and thus perpetuate greater injustices than they address, and socially alienate us from community").

56. *Critical Perspectives on Rights*, BRIDGE, http://cyber.law.harvard.edu/bridge/CriticalTheory/rights.htm (last visited Jan. 27, 2013).

57. Robert Gordon, *Some Critical Theories of Law and Their Critics*, *in* THE POLITICS OF LAW 641, 655 (David Kairys ed., 3d ed. 1998).

58. ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 126 (2011).

Rights are indeterminate because they are too abstract to be useful in deciding particular cases, or because they conflict with other rights. When social progress occurs after a right is declared, it is because of the social and political context in which the right is declared rather than the right itself.

Most critiques also claim that rights are regressive. Winning a "right" in a court case either has no connection to advancing a political goal, or actually impedes political goals.[59] Gary Peller, for example, faults rights discourse for constituting "a narrative of legitimation, a language for concluding that particular social practices are fair because they are objective and unbiased."[60] Rights impede progressive change because they divert attention and resources away from material deprivations, and, according to some theorists, because rights are individual, rather than about the welfare of groups.[61]

Some critical race theorists "acknowledg[e] and affirm[ ] . . . that rights may be unstable and indeterminate" but still provide a limited defense of them.[62] Patricia Williams, for example, maintains that "rights rhetoric has been and continues to be an effective form of discourse for blacks."[63] In this view rights build solidarity among rights holders,[64] give voice to the previously voiceless,[65] and stigmatize subordination.[66] Likewise, Kimberlé Crenshaw is persuaded that "there simply is no self-evident interpretation of civil rights inherent in the terms themselves,"[67] but she finds the critique of rights "incomplete" because it fails "to appreciate fully the transformative significance of the civil rights movement in mobilizing Black Americans and generating new demands."[68]

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59. Tushnet, *supra* note 2, at 23.

60. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 775. *See generally* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

61. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 275-76 (1990).

62. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 409 (1987) (footnote omitted).

63. *Id.* at 410.

64. *Id.* at 414.

65. *Id.* at 425-26.

66. *See* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 305 (1987) ("Rights do, at times, give pause to those who would otherwise oppress us.").

67. Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 16, at 1344.

68. *Id.* at 1356.

A law review article called *The Right to Counsel in Criminal Cases, A National Crisis* begins with a series of stories in which criminal defendants were either denied lawyers or had bad lawyers.[69] This part of the article is titled "How Can This Be Happening?"[70] The critique of rights explains how. Using the five elements just described, this Part attempts to demonstrate that *Gideon* exemplifies the reasons for skepticism elucidated by the critique of rights.

A. The Liberal Overinvestment in Rights

Gideon was decided during the 1960s, a period during which, according to Mark Tushnet, the Supreme Court took a "brief, perhaps aberrational, and sometimes overstated role . . . in advancing progressive goals."[71] Perhaps that was why it seemed, at the time, like a victory for the poor and minorities. *Gideon* was one of those classic Warren Court opinions that provided hope not just about criminal justice, but about economic and racial justice as well.[72]

That hope is long gone. If *Gideon* was supposed to make the criminal justice system fairer for poor people and minorities, it has been a spectacular failure. The National Right to Counsel Committee, a panel that was created in 2004 to conduct a comprehensive survey of the state of indigent defense, reported:

> The right to counsel is now accepted as a fundamental precept of American justice. . . . Yet, today, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the

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69. Backus & Marcus, *supra* note 20, at 1031.

70. *Id.* at 1031.

71. Tushnet, *supra* note 2, at 34.

72. *See* Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1153 (1998) ("Law enforcement was a key instrument of racial repression, in both the North and the South, before the 1960's civil rights revolution. Modern criminal procedure reflects the Supreme Court's admirable contribution to eradicating this incidence of American apartheid."); *cf.* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000) (describing the process by which egregious civil rights violations motivated by race have historically led the Supreme Court to refine constitutional criminal procedure).

Gideon decision and the Supreme Court's soaring rhetoric.[73]

Nancy Leong notes that *Gideon* has been "widely and accurately hailed as a milestone in protecting the rights of individual defendants."[74] This assertion is correct, as far as it goes. *Gideon* did protect the "rights" of defendants; it turns out, however, that protecting defendants' rights is quite different from protecting defendants. Fifty years after *Gideon*, poor people have both the right to counsel and the most massive level of incarceration in the world.[75] As stated earlier in this Essay, since *Gideon*, rates of incarceration (which, in the United States, applies mainly to the poor) and racial disparities have multiplied.[76] The right to have a lawyer, at trial or even during the plea bargaining stage, has little impact on either of those central problems.

What poor people, and black people, need from criminal justice is to be stopped less, arrested less, prosecuted less, incarcerated less. Considering other needs that poor people have—food and shelter—Mark Tushnet has stated, "[D]emanding that those needs be satisfied—whether or not satisfying them can today persuasively be characterized as enforcing a right—strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced."[77]

On its face, the grant that *Gideon* provides poor people seems more than symbolic: it requires states to *pay* for poor people to have lawyers. But the implementation of *Gideon* suggests that the difference between symbolic and material rights might be more apparent than real. Indigent defense has been grossly underfunded, where it is provided at all. Moreover, even if the defender community were victorious in getting what it wanted out of *Gideon*—and the experience of the last fifty years suggests that it will not be—American criminal justice would still overpunish black and poor people. That is the unfairness that the liberal investment in *Gideon* was supposed to contravene. A lawyer is supposed to be a means to an end, not an end in herself. One problem with *Gideon* is that it makes the lawyer the end. Robert Gordon noted that "[f]ormal rights without practical enforceable content are easily substituted for real

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73. NAT'L RIGHT TO COUNSEL COMM., *supra* note 49, at 2.

74. Nancy Leong, Gideon*'s Law-Protective Function*, 122 YALE L.J. 2460, 2462.

75. *See* Gopnik, *supra* note 18 (stating that "[n]o other country even approaches" the U.S. incarceration rate).

76. *See supra* notes 9-10 and accompanying text.

77. Tushnet, *supra* note 50, at 1394.

benefits."[78] In this sense *Gideon* and poor criminal defendants are friends without benefits.

B. The Indeterminacy of Rights

On every anniversary of *Gideon*, liberals bemoan the state of indigent defense. At its core, their claim is that *Gideon* has not been sufficiently enforced. Indeed, many people would agree that the right to counsel has been violated in cases where

> defense counsel slept during portions of the trial, where counsel used heroin and cocaine throughout the trial, where counsel allowed his client to wear the same sweatshirt and shoes in court that the perpetrator was alleged to have worn on the day of the crime, where counsel stated prior to trial that he was not prepared on the law or the facts of the case, and where counsel appointed in a capital case could not name a single Supreme Court decision on the death penalty.[79]

As a practical matter, however, the right to counsel means whatever five or more members of the Supreme Court say it does (or what the social understanding of the right is[80]). In those cases, the Court found that the Sixth Amendment was not abridged.[81]

I was part of a team of lawyers that litigated a right-to-counsel case in Georgia. We alleged that, in capital cases, one county appointed counsel on the basis of a low-bidding system. The attorney who agreed to take the case for the least amount of money was the attorney that was appointed, without regard to her competency to represent a defendant in a death penalty case. The trial judge rejected our Sixth Amendment claim. I think we were right, and the trial judge was wrong. I understand, however, that there is no way of applying the Sixth Amendment's words "in every prosecution, the accused shall enjoy the

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78. Gordon, *supra* note 57, at 657.

79. COLE, *supra* note 42, at 78-79 (footnotes omitted).

80. Though rights are analytically indeterminate, they may be culturally determined. For example, a "colored only" sign on a public schoolhouse door could be said to be unconstitutional, based on a cultural consensus about the Fourteenth Amendment, even if that understanding doesn't necessarily follow from the text of the Amendment, and even if the Supreme Court were to declare legally segregated public schools to be constitutional.

81. COLE, *supra* note 42, at 78-79.

right . . . to have the Assistance of Counsel for his defence"[82] to those facts and obtaining an answer that is objectively right or wrong.

On one level the *Gideon* right is not abstract at all. It has a clear formal content: a person cannot be sentenced to prison unless she is represented by someone who is a member of the bar (or she waives this right). The problem is that the right can be respected without accomplishing anything, as in the above-described cases. In order to make the formal right meaningful, it must be supplemented by some sort of standard-like provisions. But doing so introduces a high level of abstraction that does not decide actual cases.

For example, a *New York Times* article about the *Frye* and *Lafler* decisions that extended *Gideon* to the plea bargaining stage of the criminal process noted that "legal scholars . . . used words like 'huge' and 'bold' to describe" the decisions and quoted one legal scholar as saying, "I can't think of another decision that's had any bigger impact than these two are going to have over the next few years."[83] But the article goes on to state that "legal experts seem to agree . . . that it was difficult to gauge what concrete effect the rulings would have on everyday legal practice."[84] The *Times* quotes another legal scholar as predicting that the cases would lead to a "flurry" of court filings, "but [that] very few of them will succeed. . . . Courts are very good at tossing these cases out."[85]

Under one formulation, the critique of rights means that "rights cannot provide answers to real cases because they are cast at high levels of abstraction without clear application to particular problems."[86] In this light, the first recommendation of the National Right to Counsel Committee—that "[s]tates should adhere to their obligation to guarantee fair criminal and juvenile proceedings in compliance with constitutional requirements"—seems naïve.[87] Most states would say they are already in compliance with the Constitution. Yet commissions and panels in Georgia, Virginia, Louisiana, and Pennsylvania have opined that these states are not in compliance with *Gideon*.[88] Even the

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82. U.S. CONST. amend. VI.

83. Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES, Mar. 22, 2012, http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html (quoting Professor Ronald F. Wright).

84. *Id.*

85. *Id.* (quoting Professor Stephanos Bibas).

86. *Critical Perspectives on Rights*, *supra* note 56.

87. NAT'L RIGHT TO COUNSEL COMM., *supra* note 49, at 183.

88. Backus & Marcus, *supra* note 20, at 1035-36.

U.S. Department of Justice has acknowledged that "indigent defense in the United States today is in a chronic state of crisis."[89] All of this sets up an extended, and furious, battle about what *Gideon* requires. The indigent defense community and the Supreme Court will agree sometimes, as in *Frye* and *Lafler*, and disagree other times, as in *Pennsylvania v. Finley*,[90] where the Court held that a defendant has no right to counsel in habeas corpus proceedings, and *Gagnon v. Scarpelli*,[91] where the Court held that a defendant has no absolute right to counsel at parole or probation revocation proceedings. Ultimately there are no "right" or "wrong" answers—an answer is "right" if it persuades a court. The vagaries of the Supreme Court's interpretation of the quality of lawyering that poor people are entitled to seem a risky foundation on which to position a social justice movement.

C. Rights Discourse and Mystification

American criminal justice is brutal, which is why the United States has the highest rate of incarceration in the world. This is what "law" does. The law allows the police to forcibly stop someone for running away from them in a high-crime neighborhood, even if the police have no other reason to suspect them of a crime.[92] The law allows life imprisonment for a first-time drug offense.[93] The law allows prosecutors to threaten someone with a life sentence for a minor crime unless he pleads guilty.[94]

Yet we celebrate *Gideon* as the "law." That makes the law seem much more benign than it really is. *Gideon*'s announcement of a right to counsel appeared to give the poor an agency in criminal justice that they actually do not have. And its brutality would remain visited mainly on the poor. As Richard Delgado observed in 1985, when the prison population was less than half the size it is now:

> [O]f more than one million offenders entangled in the correctional system, the vast majority are members of the poorest class. Unless we

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89. OFFICE OF JUSTICE PROGRAMS & BUREAU OF JUSTICE ASSISTANCE, IMPROVING CRIMINAL JUSTICE SYSTEMS THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS, at ix (1999).

90. 481 U.S. 551 (1987).

91. 411 U.S. 778 (1973).

92. Illinois v. Wardlow, 528 U.S. 119 (2000).

93. Harmelin v. Michigan, 501 U.S. 957 (1991).

94. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

> are prepared to argue that offenders are poor because they are criminal, we should be open to the possibility that many turn to crime because of their poverty—that poverty is, for many, a determinant of criminal behavior.[95]

Imagine that many people charged with crimes are legally guilty, i.e., even if these defendants have excellent defense counsel, the prosecution still can prove beyond a reasonable doubt that they did what they are charged with doing. *Gideon* encourages us to think of this state of affairs as "fair." Consistent with Peter Gabel's and Jay Feinman's description of contract law, *Gideon* "mask[s] the extent to which the social order makes it difficult to achieve true autonomy and solidarity" and "denies the oppressive nature of the existing hierarchies."[96] The progressive investment in *Gideon* and the movement building around the case makes it seem as though the "poverty and crime" conversation is about the right to a lawyer in a criminal case, and not about the kind of conduct that gets defined as crime, the racialized exercise of police discretion, or why punishment is the state's central intervention for African-American men.

D. Isolated Individualism

Gideon is a narrative about individual rights rather than a plea for class-based or race-based relief. This is consistent with Wendy Brown's observation that "rights discourse . . . . converts social problems into matters of individualized, dehistoricized injury and entitlement."[97] The *Gideon* narrative even comes with a creation myth—*Gideon's Trumpet*, the book and movie[98]—that focuses on the plucky Clarence Earl Gideon, who wrote his petition for cert on prison stationery, and once the Supreme Court awarded him his free lawyer, won his case with the jury deliberating for less than an hour!

Mark Tushnet describes the "broad version" of the critique of rights as requiring the "undermining [of] the individualism that vindicating legal rights

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95. Delgado, *supra* note 33, at 10 (footnote omitted).

96. Peter Gabel & Jay Feinman, *Contract Law as Ideology*, *in* THE POLITICS OF LAW, *supra* note 57, at 497, 498.

97. WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 124 (1995).

98. ANTHONY LEWIS, GIDEON'S TRUMPET (1964); GIDEON'S TRUMPET (Hallmark Hall of Fame Productions 1980).

reinforces."[99] *Gideon* instructs us that we should respond to the problem that eighty percent of people charged with crimes in the U.S. are poor by trying to get a lawyer for a poor person charged with a crime.[100] This will not solve the problem. Then, of all the actors in the criminal justice system against whom defendants might have a gripe, *Gideon* tells us it should be against the lawyers who represent them.[101] *Gideon* diffuses solidarity among the 2.3 million people in the United States who are incarcerated. It changes the subject from mass incarceration and racial subordination to private entitlement.

E. Rights Discourse as an Impediment to Progressive Social Movements

Gideon diverts attention from economic and racial critiques of the criminal justice system. For example, this Essay appears in a Symposium issue of *The Yale Law Journal* that observes the fiftieth anniversary of *Gideon*. *The Yale Law Journal* has not devoted an entire issue to mass incarceration or racial disparities in criminal justice. To the extent that some essays in the symposium make racial critiques of American criminal justice, their authors, like me, must situate those critiques within a discussion of *Gideon* and explain why the critiques are still salient in light of *Gideon*.[102] I do not think those tasks are difficult, as this Essay hopefully demonstrates, but they do take time and attention from the main problems—mass incarceration and racial disparities. To the extent that scholarship makes any difference, the poor would be better served by my learned coauthors and our able student editors focused explicitly on ending those problems, as opposed to devoting hundreds of pages and work hours analyzing why *Gideon* has not worked, or how it might work better. It's rather like a conference of esteemed scientists convening to discuss why holy water does not cure cancer. Something interesting might come out of it, but

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99. Tushnet, *supra* note 2, at 27.

100. *See supra* note 20.

101. U.S. District Judge Jed Rakoff makes a related point about the Supreme Court's decisions in *Frye* and *Lafler*. He notes that "most of the unfairness that occurs during the plea-bargaining process is, in my experience, not the result of defense counsel's ineffectiveness. Instead, it is the result of overconfidence on the part of the prosecutors . . . ." Jed. S. Rakoff, Frye *and* Lafler*: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25, 26 (2012), http://yalelawjournal.org/2012/06/18/rakoff.html.

102. *See, e.g.*, Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236 (2013); David Patton, *Federal Public Defense in An Age of Inquisition*, 122 YALE L.J. 2578 (2013).

the public interest might be more efficiently served by focusing on an actual cure.

In addition to its diversion function, *Gideon* also provides a legitimation of the status quo. As discussed in Part I, the poor—especially the poor and black—are incarcerated at exponentially greater levels now than when *Gideon* was decided. If more poor people are represented by lawyers because of *Gideon*, arguably their trials or plea bargains are fairer than before *Gideon*, when they did not have lawyers. Thus, the poor have simultaneously received a fairer process and more punishment. *Gideon* makes it more work—and thus more difficult—to make economic and racial critiques of criminal justice. This is not to say people cannot and do not make those claims, but rather that *Gideon* makes their arguments less persuasive. It creates a formal equality between the rich and the poor because now they both have lawyers. The vast overrepresentation of the poor in America's prisons appears more like a narrative about personal responsibility than an indictment of criminal justice. In the words of one commentator, "Procedural fairness not only produces faith in the outcome of individual trials; it reinforces faith in the legal system as a whole."[103]

If prosecutors had brought most of their cases against the poor during the pre-*Gideon* era when most indigent defendants did not have lawyers, prosecutors would have looked like bullies. Since *Gideon*, the percentage of prosecutions against the poor has increased from 43% to 80%.[104] American prosecutors have so much discretion, and there are so many criminal laws, that they can bring a case against virtually whomever they choose.[105] Prosecutors

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103. Michael O'Donnell, *Crime and Punishment: On William Stuntz*, NATION, Jan. 10, 2012, http://www.thenation.com/article/165569/crime-and-punishment-william-stuntz.

104. *See* Stuntz, *supra* note 17, at 7 n.7.

105. *See* Morrison v. Olson, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting) ("With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group . . . ." (quoting Attorney General [and future Supreme Court Justice] Robert H. Jackson, The Federal Prosecutor, Address at the Second Annual Conference of United States Attorneys (Apr. 1, 1940), *in* 31 J. CRIM. L. & CRIMINOLOGY 3, 5 (1940))).

have mostly chosen the poor, but now, because of *Gideon*, they look like less like bullies.

The critique of rights posits that "rights discourse contributes to passivity, alienation, and a sense of inevitability about the way things are."[106] *Gideon* encourages the view that fairness for poor people is an issue of criminal procedure, not criminal law.[107] When it establishes a procedural right, and the poor and racial minorities still complain, mass incarceration and racial disparities start to seem inevitable. When the problem is lack of a right, one keeps going to court until a court declares the right. When the problem is material deprivation suffered on the basis of race and class, where, exactly, does one go for the fix? The Conclusion of this Essay recommends some places.

In applying the critique of rights to *Gideon*, I do not want to discount the important concerns raised by some critical race theorists. The critical race response to the critique of rights exhibits a discordant duality about rights that in some ways accords with this Essay's analysis of *Gideon*. As described in Part II, critical race theorists posit that rights are unstable and incoherent but still might be good for people of color. This Essay suggests that *Gideon* is profoundly limited and limiting, and yet a force for certain sources of good (for example, *Gideon* authorizes the office of the public defender in Philadelphia that, compared to appointed counsel, gets shorter sentences for its clients[108]). Even more significantly, *Gideon* may save the lives of defendants in capital cases, who, occasionally, get better lawyers than they would in a world without *Gideon*.

IV. OTHER COMMENTS ON RIGHTS DISCOURSE IN CRIMINAL PROCEDURE

Other scholars have also noted the limits of criminal procedural rights to establish racial or social justice. I note three influential analyses of criminal procedure that accord in some ways with this Essay's application of the critique of rights to *Gideon* (and in other ways diverge). Professors Louis Michael Seidman, Michael Klarman, and William Stuntz have each observed the failure

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106. *Critical Perspectives on Rights*, *supra* note 56.

107. Stuntz, *supra* note 17, at 72 ("Why has constitutional law focused so heavily on criminal procedure, and why has it so strenuously avoided anything to do with substantive criminal law . . . ?").

108. *See* Anderson & Heaton, *supra* note 43.

of criminal rights discourse, in specific contexts, to improve fairness in criminal justice.

In Brown *and* Miranda,[109] Professor Seidman examined the meaning of two of the most famous Supreme Court decisions: *Brown v. Board of Education*[110] and *Miranda v. Arizona*.[111] Seidman argues that, contrary to conventional understanding, "the decisions did not mandate a vast restructuring of power relationships. Rather, the decisions have served to justify and legitimate arrangements that would otherwise be severely threatened by constitutional rhetoric."[112] He believes that both decisions "served to stabilize and legitimate the status quo by creating the illusion of closure and cohesion."[113]

For *Miranda*, specifically, Seidman posits that there is "a good deal of evidence that *Miranda*, like *Brown*, traded the promise of substantial reform implicit in prior doctrine for a political symbol."[114] He acknowledges "some truth"[115] to the claim that the decision, which requires that the police advise suspects in custody of their privilege against self-incrimination, empowers individuals who are subject to police questioning. But Seidman notes that the Court had, in a series of cases decided prior to *Miranda*, already held that the people subject to interrogation while in custody had the right to counsel.[116] *Miranda*'s real purpose was to articulate a mechanism for waiver of the right.[117] Citing data that suggests that *Miranda* did not decrease the number of defendants who confess, Seidman questions whether, for criminal suspects, "*Miranda* is serving any useful purpose."[118]

While Seidman does not explicitly invoke the critique of rights, his analysis is consistent with its view that rights discourse does not necessarily lead to social change, and that it may impede social justice. In *Miranda*, he states, "the Court tamed the contradictions that would otherwise continually threaten the

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109. Louis Michael Seidman, Brown *and* Miranda, 80 CALIF. L. REV. 673 (1992).

110. 347 U.S. 483 (1954).

111. 384 U.S. 436 (1966).

112. Seidman, *supra* note 109, at 680.

113. *Id.* at 719.

114. *Id*. at 746.

115. *Id*. at 743.

116. *Id*. at 744 ("*Escobedo*, *Massiah*, and *Culombe* had already created all the rights any defendant needed.").

117. *Id*.

118. *Id*. at 744 & n.236.

legitimacy of punishment in a liberal democracy."[119] He adds that

> *Brown* and *Miranda* created a world where we need no longer be concerned about inequality because the races are now definitionally equal and a world where we need no longer be concerned about official coercion because defendants have definitionally consented to their treatment. . . . *Brown* and *Miranda* let us blame the victim in a way we never could under the old regime.[120]

The two decisions diffuse the dissent that might be expected by the existence of a permanent racially defined underclass because they provide an "amusement-park version of social change."[121]

In *The Racial Origins of Modern Criminal Procedure*,[122] Professor Michael Klarman links the development of constitutional criminal procedure to an effort by the Supreme Court to advance racial justice in the South in the era before World War II. He examines four landmark cases in which the Supreme Court held that convictions obtained in mob-dominated trials violated the Fourteenth Amendment right to due process of law, established a right to counsel in capital cases, invalidated a conviction because blacks had been intentionally excluded from the jury, and declared that the right to due process made confessions based on torture inadmissible.[123]

According to Klarman, "none of these rulings had a very significant direct impact on Jim Crow justice. For example, few blacks sat on southern juries as a result of *Norris v. Alabama*, and black defendants continued to be tortured into confessing, notwithstanding *Brown v. Mississippi*."[124] Klarman diverges from the critique of rights, however, in his hopeful analysis of the indirect effects of the cases. He advances the possibility that these cases were "more important for their intangible effects: convincing blacks that the racial status quo was not impervious to change; educating them about their rights providing a rallying

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119. *Id*. at 747.

120. *Id*. at 752.

121. *Id*. at 753.

122. Klarman, *supra* note 72.

123. *Id*. at 50. The cases are *Moore v. Dempsey*, 261 U.S. 86 (1923), which forbade mob trials; *Powell v. Alabama*, 287 U.S. 45 (1932), which required the provision of counsel in capital cases; *Norris v. Alabama*, 294 U.S. 587 (1935), which reversed the verdict of an intentionally racially exclusive jury; and *Brown v. Mississippi*, 297 U.S. 278 (1936), which made confessions obtained by torture inadmissible.

124. Klarman, *supra* note 72, at 49.

point around which to organize a protest movement; and perhaps even instructing oblivious whites as to the egregious nature of Jim Crow conditions."[125]

Finally, Professor William Stuntz noticed certain "perverse"[126] effects of criminal procedure: as rights have expanded, things have gotten worse for accused persons. Specifically, "underfunding, overcriminalization, and oversentencing have increased as criminal procedure has expanded."[127] The problem is that actors in the criminal justice system can respond to judicial declarations of rights "in ways other than obeying them."[128] States reacted to Warren Court criminal procedure holdings by making the substantive criminal law more punitive, to compensate for the rights provided to accused persons. The result was that criminal cases were focused on procedure. Stuntz believes that this caused American criminal justice to "unravel."[129] Rather than focus on procedural rights, the Warren Court should have used "the federal Bill of Rights . . . to advance some coherent vision of fair and equal criminal justice."[130] Stuntz's critique is not so much a critique of rights as a critique of the Court's reliance on procedural rights specifically. [131]

One lesson we might garner from these three commentators is that procedural rights may be especially prone to legitimate the status quo, because "fair" process masks unjust substantive outcomes and makes those outcomes seem more legitimate. In contrast, a right to a minimum wage, while it may legitimate unequal distribution of wealth, substantively improves the condition of the least well-off in material ways.

CONCLUSION: CRITICAL TACTICS

According to David Cole, "the most troubling lesson of the more than

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125. *Id*. at 88.

126. Stuntz, *supra* note 17, at 3.

127. *Id*.

128. *Id.*

129. STUNTZ, *supra* note 31, at 1.

130. *Id*. at 227-28.

131. *But see* Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1442-43 (2012) (reviewing STUNTZ, *supra* note 31) (noting that "the Critical Legal Studies movement . . . could have embraced Stuntz's rights critique as a diagnosis of a brilliant false consciousness-raising mechanism of legitimation in the service of hierarchy").

thirty-five years since *Gideon v. Wainwright* is that neither the Supreme Court nor the public appears to have any interest in making the constitutional right announced in *Gideon* a reality."[132] This should not have come as a surprise. The real surprise is the continued investment in rights discourse.

Duncan Kennedy observes that "critique is always motivated."[133] My motivation in applying the critique of rights to *Gideon* is to cause people who want to reform, or transform, American criminal justice to recalibrate their methods.

First, I want to be especially clear on one point. People should still become criminal defense attorneys. The most important good that defense attorneys do is helping individual clients. Reducing potential sentences by six months, as one study suggests that effective defense counsel can, makes an enormous difference in the lives of incarcerated people and their families.[134] Effective defense attorneys can also increase the cost of prosecution, and, in theory, this has the potential to reduce mass incarceration on a macro level. Excellent defense attorneys might disrupt one or more steps of the five-step process described in Part II by which the criminal law establishes control over poor people. For example, disproportionate stops and arrests of poor African Americans might be inhibited by aggressive litigation.

Thus, defense attorneys should continue to fight for the resources that they need to effectively represent their clients.[135] But everyone should understand, first, that those resources are not likely to result from raising *Gideon*-based claims in court, and second, that *Gideon* has not, and will not, change the fact that in American criminal justice, poor people are losers.

The idea of abandoning rights discourse is not as radical as it sounds; rather, it is consistent with the disillusionment, especially on the Left, about the value of going to courts to resolve claims of racial or economic injustice. Professors Cummings and Eagly have described "a new orthodoxy that is deeply skeptical of the usefulness of legal strategies to promote social change."[136]

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132. COLE, *supra* note 42, at 64.

133. Kennedy, *supra* note 50, at 218.

134. *See* Abrams & Yoon, *supra* note 44, at 166-67.

135. Abbe Smith, *Defense Lawyering in a Time of Mass Incarceration*, 70 WASH. & LEE L. REV. 1363 (2013).

136. Scott L. Cummings & Ingrid V. Eagly, *After Public Interest Law*, 100 NW. U. L. REV. 1251, 1255 (2006) (reviewing JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005)).

So what should people do? I am less certain about what methods will transform criminal justice than I am certain that *Gideon* discourse will not. I do not view that uncertainty as a flaw in my thesis.[137] If people believe that holy water cures cancer, it is a contribution to demonstrate that it does not, even if one does not himself have an actual cure to offer. Thus, rather than profess absolute remedies to mass incarceration and racial disparities, I can offer a few tentative suggestions on how criminal reformers can, in hip-hop parlance, "act like they know" that rights discourse does not work.[138]

Mark Tushnet notes that proceeding with an awareness of the critique of rights allows progressives "to improve the accuracy of the calculation of the possible benefit of investing in legal action rather than in something else—street demonstrations, public opinion campaigns, or whatever."[139] In the criminal justice context, the goal is to prevent poor people and African Americans from being losers in criminal justice, or at least from losing as badly as they do now. Advocates for the poor, for racial minorities, and for criminal defendants should abandon rights discourse and rather focus on reducing the number of poor people overall, and African Americans specifically, who are incarcerated.

The two apparatuses that bear the most responsibility for the massive increase in incarceration and racial disparities since *Gideon* are the "war on drugs" and the "tough-on-crime" movement. Legalizing or decriminalizing drugs would do some work toward reducing both incarceration overall, and the racial disparities (or, for the latter, at least bring them closer to the two-to-one disparity that existed before the war on drugs, as opposed to the seven-to-one disparity that now exists).[140]

The 2.3 million people who are locked up in the United States, and their families and friends, have the potential to form a huge social movement against mass incarceration. The critique of rights suggests that historians or political

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137. *See* Allegra M. McLeod, *Confronting Criminal Law's Violence: The Possibilities of Unfinished Alternatives*, 8 UNBOUND: HARV. J. LEGAL LEFT (forthcoming 2013) (calling for "an openness to unfinished alternatives—a willingness to engage in partial, in process, incomplete reformist efforts that seek to displace conventional criminal law administration as a primary mechanism for social order maintenance").

138. The Urban Dictionary defines "act like you know" as "recognize, stop playing, or stop playing crazy." *Act Like You Know*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=Act%20like%20you%20know (last visited Mar. 29, 2013).

139. Tushnet, *supra* note 2, at 25.

140. *See supra* notes 27–28 and accompanying text.

scientists are better consultants than lawyers in fashioning the best methods for achieving this goal. One animating question might be: What was responsible for social justice advances, like emancipation, that resulted in material gains for African Americans and the poor?

Michelle Alexander has proposed that as many criminal defendants as possible go to trial in an effort to "crash the justice system."[141] The idea is to create chaos in the criminal justice system to make ending mass incarceration a priority for politicians and to force a public conversation about it. In other work I have recommended jury nullification as a way of reducing the number of people who are incarcerated for nonviolent, victimless crime.[142]

Some efforts are already underway. In New York, there have been public demonstrations and civil disobedience to reduce excessive law enforcement in minority communities, especially the police practice of "stop, question, and frisk."[143] A group called Critical Resistance is one of the leaders of the prison abolition project to reduce the reliance on incarceration.[144] All of Us or None is an organization of formerly incarcerated people working to end discrimination against people with conviction histories.[145] These efforts provide limited optimism that if criminal justice reformers focus on reducing incarceration rather than increasing rights, the poor can lose less.

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141. Michelle Alexander, Editorial, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 10, 2012, http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html.

142. *See* PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE (2009); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

143. *See* Matthew Deluca & Jose Martinez, *NYPD's Stop and Frisk Tactics Protested in Harlem; Princeton Prof. Cornel West Among Those Arrested*, N.Y DAILY NEWS, Oct. 21, 2011, http://www.nydailynews.com/new-york/nypd-stop-frisk-tactics-protested-harlem-princeton-prof-cornel-west-arrested-article-1.965480.

144. CRITICAL RESISTANCE, http://criticalresistance.org (last visited Apr. 3, 2013).

145. *All of Us or None*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, http://www.prisonerswithchildren.org/our-projects/allofus-or-none (last visited Apr. 3, 2013).

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12777

CARRASQUILLO ET AL. V. HAMPDEN COUNTY DISTRICT COURTS

AFFIDAVIT OF VICTORIA KELLEHER

I, Victoria Kelleher, hereby state under the pains and penalties of perjury as follows:

1. I am an attorney in private practice in Boston, Massachusetts. I maintain the Law Offices of Victoria Kelleher at One Marina Park Drive, Suite 1410, Boston, MA 02210.

2. I have been a practicing attorney in Massachusetts since December 1997.

3. I concentrate on criminal defense work in both federal and state courts. My state court experience includes the defense of criminal defendants in the Superior Court criminal sessions in several counties, as well as criminal sessions in the Boston Municipal Court and several District Courts.

4. I am a member of Suffolk Lawyers for Justice ("SLJ"), which contracts with the Committee for Public Counsel Services ("CPCS") as the Bar Advocate Program to provide legal representation to indigent criminal defendants in Suffolk Superior Court and in the District Courts throughout the county. SLJ oversees a

panel of more than 400 private attorneys qualified to serve as counsel to indigent clients. I am one of two supervising SLJ attorneys for the Suffolk Superior Court, and I am the supervising SLJ attorney for the Charlestown District Court. SLJ's staff and board work closely with supervising attorneys from CPCS to train bar advocates and to monitor their performance.

5. I am currently the president of the Massachusetts Association of Criminal Defense Lawyers ("MACDL"). MACDL is the pre-eminent association of criminal defense lawyers in Massachusetts, and is associated with the National Association of Criminal Defense Lawyer. MACDL works:

- To provide support for criminal defense lawyers in the practice of their craft, including, but not limited to, a strike force, amicus briefs, and other services which will improve the quality of representation of the accused;
- To protect the individual rights of the citizens of the Commonwealth as guaranteed by the Declaration of Rights of the Massachusetts Constitution and the United States Constitution, including, most particularly, the right to counsel;
- To promote the exchange of experience, legal precedent, and research among criminal defense lawyers throughout the Commonwealth;
- To enlighten the public about the legitimate role of criminal defense lawyers in society;
- To maintain the integrity and independence of criminal defense lawyers;
- To preserve the adversary system of justice;
- To coordinate efforts with national and local bar associations that are concerned with criminal justice.

6. I am currently aware that Chapter 211D, §11(b) requires CPCS to "set an annual cap on billable hours not in excess of 1,650 hours" subject to some recently enacted exceptions. The statute also prohibits payment "for any time billed in excess of the annual limit." Chapter 211D, §11(c) prohibits bar advocates—except in homicide cases—from "accepting any new appointment or assignment to represent indigents after that counsel has billed 1,350 billable hours during any fiscal year." The fiscal year begins on July 1 and concludes on June 30 of the following year.

7. Before fiscal year 2019, *i.e.*, July 1, 2018 through June 30, 2019, I had never hit or surpassed the §11(b) annual cap of 1,650 hours.

8. During FY 2019, I tried three homicide cases, assigned to me in 2015, 2016, and 2017 as a bar advocate. The fact that these three cases came to trial in the same fiscal year was out of my control.

9. In February 2019, I had completed two of these homicide trials along with assigned work for criminal defendants in other non-homicide matters during the fiscal year (also assigned to me as a bar advocate).

10. At this point, the Superior Court set the matter of *Commonwealth v. Anildo Correia*, Docket No. 1583CR290, to begin trial on March 18, 2019. The Commonwealth had charged Mr. Correia with first-degree murder and lesser

included offenses. Mr. Correia's case was assigned to me in 2015 and he was held without bail pending trial.

11. On the first day of trial, my accumulated bar advocate hours exceeded the 1,650-hour cap. The case continued through the following 18 court days to its conclusion on Wednesday, April 10. The jury rejected the murder one charge and returned with a verdict of voluntary manslaughter.

12. I received no payment from CPCS for any time worked from Tuesday, March 20 through Wednesday, April 10. The work on those days included trial, travel, client meetings at the Plymouth County Correctional Facility, and preparation before and after every day of trial. The hourly rate for assigned counsel on murder cases is $100/hour, a rate that has remained unchanged since 2006. With a total of 310 unpaid hours, the total amount due for trial time alone is $30,100. A substantial amount of post-trial work—including the sentencing hearing, the preparation of a detailed sentencing memorandum, and frequent communications and meetings with family members, an expert and my client—all took place within FY 2019. CPCS did not pay me for any of this work, an estimated additional amount due of $5,000.

13. I am informed and believe that a fellow member of MACDL and SLJ spoke to Anthony Benedetti, Chief Counsel for CPCS, about the possibility of my

obtaining a waiver for the work performed in the Correia case. Mr. Benedetti indicated that Chapter 211D did not authorize him to grant a waiver.

14. CPCS referred my request for a waiver to Vanessa Velez, who supervises private counsel billing. I described the situation to Ms. Velez and the work I had performed. Ms. Velez was sympathetic to my situation, but told me she had no authority to make any payments in light of the statutory limit on hours.

15. To make matters even worse from a financial perspective, I was scheduled to try a CPCS-assigned Sexually Dangerous Person ("SDP") Civil Commitment matter, Unified Session Docket No. 1584CV6302, before the end of FY 2019. The court had issued the trial date two years earlier in 2017. As a practical matter, SDP trials are essentially impossible to move because of the case backlog. I did speak to the clerk to see if the court could continue the matter until a date after June 30, 2019, but there were no openings for a full year. I proceeded to try this SDP matter without any payment or reimbursement. The trial began on May 14, 2019 and ended on May 20, 2109, when the jury reported they were deadlocked and the Court declared a mistrial. The hourly rate for assigned counsel on Superior Court cases, including SDP cases, is $68/hour, and I worked approximately 135 unpaid hours. The work on those days included motion preparation, expert preparation, travel, client meetings at Nemansket Correctional

Center in Bridgewater, trial and preparation before and after every day of trial. The total amount due for this trial is approximately $9,180.

Signed under the pains and penalties of perjury this 17 day of October, 2019.

Victoria Kelleher, BBO #637908

DB1/ 107819345

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. SJC-12777

CARRASQUILLO ET AL. V. HAMPDEN COUNTY DISTRICT COURTS

Summary of Information from County Bar Advocate Interviews
By Morgan Lewis (October 17, 2019)

In conjunction with preparing this amicus brief, the undersigned attorneys solicited information from bar advocate programs across the Commonwealth. Counsel sent a questionnaire to each program, see Exhibit A to this summary, and followed up with telephone interviews. Eight bar advocate programs responded, and four did not. (Because the Hampden County Lawyers for Justice ("HCLJ") are an amicus, and because David Hoose, HCLJ's president, Christopher Todd, HCLJ's vice president, and Sarah Pegus, HCLJ's administrator submitted affidavits in support of CPCS in this case,[1] no interview with HCLJ took place.)

Administrators for four of the eight programs that responded – Bristol, Franklin, Middlesex, and Worcester – reported serious problems meeting the need for bar advocates in their Superior and District Courts. Interviews with these

[1] See R1:253-59, R3:183-186, and R3:171-74, respectively.

administrators are summarized below. Amici believe that this summary of information provides additional context to the Court concerning the central question posed to the prospective amici: whether the *Lavallee* protocol would provide an appropriate remedy to the counsel shortage in Hampden County and, if not, what other or additional remedies are available.

Bristol County

The Bristol County Bar Advocates, Inc. ("BCBA") serves nine District Courts and one Superior Court. BCBA currently has 151 bar advocates, with four more in training. A few years ago, BCBA averaged 175-180 qualified attorneys. Attrition is primarily due to low pay, especially in the Superior Court. Non-homicide Superior Court cases are complex, and the rate differential over the District Court rate is not worth the added time required per case. In FY 2019, 30% of Bristol's bar advocates "capped out," and assignments became difficult to meet in March, with particular impacts felt in the Superior Court, where there are fewer attorneys qualified to take Superior Court cases. A material number of bar advocates end up working without pay on cases in the fourth quarter. In this fiscal year, FY 2020, a crisis occurred on the Fourth of July weekend and fifteen attorneys needed to take cases during or on the day after the holiday. Two days later, no attorneys were available for duty day, and the court was understandably upset. Immediately after Labor Day, another crisis occurred. One duty attorney ended up with twenty-three new assignments in one

session. Another ended up with twenty-one new assignments in one session. Two Bristol program attorneys have taken assignments in Hampden County as a result of the $424 emergency duty-day payment, despite the distance between Bristol and Hampden Counties.

Franklin County[2]

The Franklin County Bar Association Advocates, Inc. ("FCBAA") serves two District Courts and one Superior Court. As of September 23, 2019, FCBAA had only eighteen bar advocates requesting duty days, compared to twenty-seven bar advocates requesting duty days only two years prior.[3] Low pay and lack of benefits is a significant factor in the decline of participation. Some program members have retired, and some have been lost to higher paying state jobs that include benefits. Franklin is the most rural and poorest county in the Commonwealth, and it is also situated on I-91, which unfortunately is a drug corridor. Duty days are scheduled four months out. Previously, FCBAA members would staff three or four days in each six-month period, but the burden now is much heavier. Many FCBAA bar advocates

[2] See Affidavit of Susan M. Tombs, R3:187-189. Ms. Tombs is the Supervising Attorney for the Franklin County Bar Association Advocates, Inc.

[3] Ms. Tombs notes that the FCBAA's bar advocate panel overall, including bar advocates who staff duty days, and those that accept assignments in the District, Superior, or Juvenile Courts, numbered approximately forty attorneys in 2015 and approximately thirty attorneys as of August 10, 2019. Tombs Aff. ¶ 3, R3:187.

now have caseloads of fifty to seventy cases per attorney.[4] It is difficult to track duty days when no bar advocate has been available because judges will pressure other bar advocates who happen to be in the courthouse to take on more cases. Several FCBAA bar advocates have taken on Hampden County cases to take advantage of the $424 emergency duty-day payment. This is likely to cause significant staffing problems in the Franklin County criminal sessions, particularly in the last quarter of FY 2020. FCBAA bar advocates in this county have been running up against the cap every May and June, and, in some instances, bar advocates who are over the cap have been asked by the court to take on additional work.

Middlesex County

Middlesex Defense Attorneys, Inc. ("MDA") has 250 bar advocates to cover eleven District Courts and four Juvenile Courts, plus the Superior Courts. This is down from around 350 MDA bar advocates in 2005 – a decrease of about one hundred attorneys in fourteen years. Applications to work as bar advocates have been declining, while attrition continues. Much of the attrition is attributed to the low pay, with attorneys leaving for higher paying jobs or state jobs that include benefits and a pension. MDA bar advocates report that the incremental difference in pay between District and Superior Court does not make up for the increased

[4] Prior to the crisis, FCBAA recommended that bar advocates have no more than 40 open cases at a time. Tombs Aff. ¶ 11, R3:188.

complexity of the cases in the Superior Court. Duty days in Middlesex County are scheduled six months out, and staffing ranges from between one and four attorneys, depending on the court. At current staffing levels, MDA is experiencing increasing duty day vacancies. Both Worcester County and Hampden County frequently seek staffing help from MDA. A number of MDA bar advocates have taken duty days in Hampden County because of the $424 emergency rate. MDA is concerned about the impact the cap hour limits will have in the last quarter of FY2020, as scheduling new assignments in May and June has become increasingly difficult every year.

Worcester County[5]

Bar Advocates of Worcester County, Inc. ("BAWC") serves ten District Courts, in addition to the Superior Court. As of October 11, 2019, there were about 167 bar advocates in BAWC.[6] BAWC reports frequent situations when no attorney is available to represent an indigent defendant. The problem arises more often in Superior Court, but it also occurs in District Courts. Some defendants have to wait a week for counsel to be assigned. When this happens, the defendant is incarcerated during the interim. No interviews take place, no evidence is preserved, and no advice is given to the indigent defendant. A material number of bar advocates in the BAWC

[5] See also Affidavit of Richard Farrell, *Walsh v. Commonwealth*, SJC-12648, R.A. 414-434. Mr. Farrell is the Supervising Attorney for the Bar Advocates of Worcester County, Inc.

[6] As of January 17, 2019, this number was around 171. Farrell Aff. ¶ 3, *Walsh* R.A. 415.

cap out between March and June each year. Each year, some trials go forward without the bar advocate receiving any compensation, though sometimes cases set for trial receive a continuance to a date after June 30. More often than not, the no-more-assignments cap of 1,350 hours triggers staffing problems, particularly in Superior Court, in the fourth quarter of the fiscal year. Overall, however, the staffing problems in Worcester County became much worse year-to-year when the overall cap limit dropped from 1,800 hours to 1,650 hours. Despite its own staffing issues, BAWC receives requests from Hampden County to take assignments. Aside from the distance between the two counties, there are logistical difficulties. For example, the Ludlow jail closes to visitors four hours every day. A Worcester-based attorney may have difficulty meeting with a client confined in Ludlow within the three-days-of-assignment rule set by CPCS.

Respectfully submitted,

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Dated: October 17, 2019

DB1/ 108179381

Exhibit A

Exemplar Questionnaire

1. How many district courts are in your program?

2. How does the process work to assign counsel to indigent defendants?
    a. Is the process the same in each district court?
    b. Is the process based on bar advocates staffing "duty days?"
    c. How many attorneys staff each duty day?
    d. Are there multiple sessions with duty days?
    e. If you staff duty day, are you assigned to every indigent defendant who appears in that session?
    f. Are there other factors in the assignment process?
    g. Or other methods of assignment?

3. In the past year, have there been times when indigent defendants appear at a hearing and no attorney is available for assignment? Assuming the answer is "yes,"
    a. How many times has that happened?
    b. How many defendants have been on the unassigned list at any time?
    c. How many days has it taken to obtain counsel?
    d. Are the full-time public defenders filling the gap when there is a shortage of bar advocates?
    e. Are there times of year when the shortage tends to occur?
        - In May and June when bar advocates are starting to max out on their statutory hours limit?
        - In December around the holidays?
        - Any other times?

4. Are there times in the past 5 years when a shortage of counsel willing to take assignments has occurred in your program?
    a. When?
    b. What were the causes?
    c. How did the shortage get resolved?

5. Do any attorneys in your Bar Advocate Program take assignments in other counties?
    a. If so, what are the circumstances?
    b. What are the problems with out-of-county assignments, if any?
    c. Do attorneys from other counties take assignments in your county? If so, what are the circumstances? Are there any problems with this?

6. Do you know if the full-time public defenders in your county are at or near their CPCS caseload limit?
    a. Does the Public Counsel Division let you know that?
    b. Does the Bar Advocates Program take any special steps if this occurs?

7. What is retention like in your program?
    a. How many attorneys are currently active in your program?
    b. What is their average length of participation?
    c. If an attorney stops taking cases, what are the reasons?
    d. Do you lose attorneys to
        - The DA's office?
        - Other forms of public service?
        - Private practice, but unwilling to take further assignments?
        - Other?

8. Are the problems, if any, in your county's Superior Court the same as in the District Courts?
    a. If different, how so?

9. If there is a supply shortage in your Program, what might cure it?
    a. Increase in Pay?
    b. Change in hours limits?
    c. Modification in how courts operate their criminal sessions?
    d. Other?

10. If the rate of pay for Bar Advocates were to increase:
    a. What should the new rate be?
    b. Should other changes be made in the rate-setting system?
    c. Have you surveyed your members about this?

11. Disposition of criminal cases in your county:
    a. How long does it take to process and dispose of a criminal case from start to finish?
    b. Does the length of time vary by the type of alleged crime?
    c. How many lawyer hours does it take?

12. Are there attorneys in your Program who would have useful information we could present to the SJC?

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

NO. SJC-12777

CARRASQUILLO ET AL. V. HAMPDEN COUNTY DISTRICT COURTS

CERTIFICATE OF SERVICE

I, Robert E. McDonnell, hereby certify that on October 17, 2019, I caused the attached Brief of Amici Curae Hampden County Lawyers For Justice And The Massachusetts Association Of Criminal Defense Lawyers In Support Of Petitioners-Appellants and the addendum thereto to be served on behalf of amici curae Massachusetts Association of Criminal Defense Lawyers and the Hampden County Lawyers for Justice by electronic means in accordance with SJC Rule 1:25.7(b) to:

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