The Right to Counsel: An American Perspective and a Global Proposal

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I appear here today not as a fellow academic but rather as one who has pursued a long and very rewarding career as a public defender in the American criminal justice system, in the neighboring but dramatically different states of Massachusetts and New York. I want to speak to you and with you today as one who has participated in and tried to ameliorate the harsh uncertainties of an adversary criminal litigation system in a nation that both prides itself on the zealous protection of personal liberty, and simultaneously has indulged itself in a long, perhaps unprecedented regime of punitive preferences which has spanned most of my forty year professional career.

Let me pause here to say that I have written and spoken, in more analytical terms than I will today, about the failure of the United States to live up to the proud if not haughty words of the Supreme Court in our famous *Gideon* case, that: "The right…to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). At the Office of Indigent Legal Services, where I now work, we emblazon those words at the bottom of our letterhead; not out of pride, but to remind all who read our correspondence that America once committed itself to the attainment of an ideal of equal justice from which it has strayed. My writing includes a paper I wrote for the International Conference on Criminal Legal Aid Systems in Beijing in December, 2012, entitled An Assessment of the Right to Counsel in the United States; an article I composed for the 50th anniversary of the Gideon decision on March 18, 2013 entitled Assessing the First Half-Century of Gideon: Reconciling Courtroom Reality with Constitutional Mandate; and a paper I submitted for a panel discussion at the Kentucky Bar Association in June, 2013 entitled Amplifying Gideon's Trumpet, Revitalizing Gideon's Rule: A Prescription for Action. These papers may be accessed on our website, www.ils.ny.gov by linking to the Director's Page.

Also in connection with the *Gideon* anniversary, I participated in two robust discussion panels which can be seen on the internet. On March 15, 2013, Attorney General Eric Holder convened

a conference entitled *50 Years Later: The Legacy of Gideon v. Wainwright*, at which I participated on a panel moderated by Nina Totenberg of National Public Radio which included former Alabama Supreme Court Chief Justice Sue Bell Cobb and the Supreme Court litigator and civil rights advocate Bryan Stevenson. That event may be seen and heard at http://www.justice.gov/atj/gideon/events.html (last viewed March 30, 2014). At that panel, I proposed the adoption of the American Bar Association's proposal urging the United States Congress "to establish an independent, federally funded Center for Indigent Defense Services for the purpose of assisting state, local, tribal and territorial governments in carrying out their Constitutional obligation to provide effective assistance of counsel for the defense of the indigent accused in criminal, juvenile, and civil commitment proceedings, and to appropriate sufficient funds for the Center to successfully carry out its mission." In addition, and in the interim, I proposed Executive Branch action in the form of a White House Commission, which became on April 4, 2013 a formal proposal submitted by Chief Justice Cobb, Bryan Stevenson, former Vice President Walter Mondale and myself for a **White House Commission on the Fair Administration of Justice for the Indigent Accused.** That proposal has received enthusiastic written support by public defender leaders and top judges in 48 of the 50 American states, the District of Columbia and several territories. It has also received the written endorsement of every national organization that provides active assistance to state and local public defense providers: the American Bar Association, the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, the American Council of Chief Defenders, the National Association for Public Defense, and the Sixth Amendment Center. This proposal remains under review by the Attorney General.

On March 18, 2013, the actual anniversary day, I participated on a never-to-be-forgotten panel at Brandeis University in Massachusetts called *Gideon at 50: The Future of the Right to Counsel*. I say never to be forgotten, because this event proved to be the final public appearance and public utterances of that journalistic and right to counsel giant, Anthony Lewis, the author of *Gideon's Trumpet*, whose wise, compassionate and reflective insights highlighted the event and are available at https://www.brandeis.edu/ethics/events/Gideon.html (last viewed March 30, 2014).

So, in a nutshell, I have been spending a lot of time looking back at America's failures in an effort to help chart a way forward, to recapture an era when our incarceration rates were in the global mainstream and when our minority communities were not so blasted by the toxic combination of violent crime and excessive incarceration. I do want to spend a bit of my time with you today to reflect further on that effort, and frankly to sharpen my learning from your responses to my glimmers of possible insight. Then I want to use my more recent exposure to international perspectives to recite a few important developments that take us beyond our parochial environments toward a more global perspective; and finally use this platform you have given me to put on the table one concrete global proposal.

Before I became a lawyer, or even attended law school, as a new college graduate in 1968, I attempted to teach young children at a decrepit building that housed Public School 20 in the crime and drug-ridden neighborhood of Hunts Point, in the borough of New York City called The Bronx. In that neighborhood, I learned more about the influence of dire poverty, broken families and the cycle of pervasive violence than any university could ever teach. I was in that community only because my draft board in Boston had rejected my "conscientious objector" application against serving in the U.S. military during the height of the Vietnam War, and teaching offered an alternative to jail or emigration. Along with several of my young colleagues, I forged a close working relationship with a nearby neighborhood center called the Simpson Street Development Association and its dynamic director, attempting to raise public consciousness about the community's need for attention and investment. After three years of teaching, and with the Vietnam ground war winding down, I entered law school. The director, a wonderful and dedicated servant of her community, was shot dead on the sidewalk in front of her office a year later.

From the beginning, I was active in law school clinical educational programs, of which Harvard under the leadership of Dean James Vorenberg and Professor Gary Bellow offered so many. Of particular note were my involvement gathering prisoner affidavits in the lawsuit that successfully challenged dangerous and unhealthy conditions for pre-trial detainees in Boston's Charles Street Jail; as a student-attorney representing state prisoners at their parole revocation hearings; and as a student public defender representing criminal defendants in local trial courts. I also benefited from Professor Derrick Bell's eye-opening course Racism and the Law.

I have been very lucky in my public defender career. I joined the Massachusetts Defenders Committee in 1974, at a time when its former director had been replaced with two vibrant leaders, who in turn lured the great Brownlow M. Speer to become Training Director. I was part of a cadre of Speer-trained public defenders who advocated for society's downtrodden with idealism, swagger and some degree of skill. For ten years, I represented poor clients in the trial and the appellate courts of Massachusetts, in the company of outstanding colleagues and supportive supervisors. I got lucky again in 1984 when I was selected to lead the statewide public defender division of the new Committee for Public Counsel Services, and in 1991 when I was picked to lead the entire unified statewide agency; until I retired in 2010 to come to New York and direct the new Office of Indigent Legal Services, that state's first effort to improve its county-based system of representation for poor people.

In his article *Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 Hastings Law Journal 835 (2004), Dean Norman Lefstein identified two crucial differences between England's generally effective system for poor person representation, and the comparative American failure. The first difference is that, in England, the provision of counsel to the poor "has long been regarded as the duty of the central government," and the second is that "while the right to counsel in the United States has developed through court decisions, legislation has been the vehicle in England." (861).

Each of these differences has had enormous consequences for the uneven and too often deficient quality of representation in the United States, as documented in the plethora of reports with which many of you are all too familiar, and which are cited in my papers. My experience in Massachusetts and New York certainly validates Lefstein's first observation. These bordering states, so often lumped together as part of the progressive or "blue" northeastern metropolis, sharing all things but professional baseball loyalty, are with regard to providing counsel so very different in so many important ways. Since 1984 Massachusetts has had a single independent agency, the Committee for Public Counsel Services, which oversees all indigent representation in any case where the person is legally entitled to the assistance of counsel and cannot afford to pay for it: adult criminal defense, juvenile delinquency, parents and caregivers and children in all manner of state intervention or child welfare proceedings; civil commitments both traditional and sex offense-based; "children in need of supervision", and so on. One agency with one governing board, one Chief Counsel, and one budget: a single point of responsibility for all representation of the indigent who require counsel. Thus Massachusetts has long had a set of uniform statewide standards that govern every aspect of every type of representation for which the law requires the assistance of counsel. In New York, by contrast, representation is provided in adult criminal defense cases and for parents or adult caregivers in Family Court cases by no fewer than 143 providers in 57 counties and the City of New York, which from 1965 to 2011 was overseen by no one, had no standards and no accountability at all. While my office and the independent Board to which it reports have begun to establish performance standards, and while our allocations of limited state funding have certainly resulted in visible improvement, such as providing counsel at arraignment and reducing public defender caseloads in the upstate counties, no one could fairly claim today that New York State meets its responsibility to provide a uniform and effective level of representation throughout the state for adult criminal defendants and parents in family court cases.

Part of this is geography, and part is history. New York has a land area six times that of Massachusetts (and three times that of the Netherlands), and a population three times larger. Moreover, the majority of its twenty million residents live in the New York City metropolitan area, while much of upstate New York is rural. As to history, New York has a dedication to town and village government, which is then layered by a county government and a county legislature, so that the state government is superimposed upon a very complicated understructure. In Massachusetts, the citizenry's thirst for local government plays out in Town Meetings; but all essential state functions have been centralized at the state level. Thus, Massachusetts has about 72 District Courts, at which virtually all criminal arraignments are conducted, and where every person charged with a crime is sure to be represented by counsel upon his or her arraignment, when the vital question of pre-trial release or detention may be at issue: New York has well over 1,300 such courts, many of them located in remote villages and presided over by non-lawyer judges, at which counsel is rarely present for that vital determination of liberty or detention.

Massachusetts and New York, of course, are just two of America's 50 states. About half of the states have some form of a state public defender system, and half do not. Some states provide 100% of the funding, many provide far less, and a couple provide no funding at all. (Massachusetts provides 100%, New York about 20%). The 50 states contain about 3,300 counties, many of which like New York's counties bear primary responsibility for the provision and funding of the right to counsel which flows from *Gideon* and subsequent Supreme Court decisions. Thus there exist a hodgepodge of counsel assignment systems, many of which are under local political control, and very few of which are governed by an independent Board. And that brings us to Dean Lefstein's second point, about the severe limitations of purely judicial lawmaking: in the 51 years since the *Gideon* decision, there has never been any Federal political action to implement the judicial decisions concerning the right to counsel. Congress has never enacted a law requiring a good and uniform quality of representation in every state, and the Executive Branch – the President – has never proposed legislation or budget provisions that might accomplish that goal. As I recently stated in a letter to Attorney General Holder: "A right that is guaranteed to all by our Constitution becomes, over time, a hollow rather than a hallowed right, if judicial proclamations of its fundamental nature are not reinforced by legislative and executive action."

With respect to the right to counsel, one can see contradictory strains in the American history. As revealed by Telford Taylor in *The Anatomy of the Nuremberg Trials* (1992), it was the Americans who insisted upon full-blown trials for accused Nazi war criminals, represented by counsel of their choosing, despite the stated preference of our British and Russian allies for on the spot executions. Professor Herbert Wechsler and others noted that this elegant procedural protection and provision of counsel contrasted gratingly with the lack of a right to counsel in American state courts for American citizens charged with any offense short of murder.

Of the many recent books that offer interesting perspectives on the past fifty years of American criminal justice, I would like to speak briefly of three. One, Michelle Alexander's *The New Jim Crow* (2010) was a bestseller. The others, William J. Stuntz's *The Collapse of American Criminal Justice* (2011) and Robert A. Ferguson"s *Inferno* (2014), in my opinion deserve to be.

The core of Alexander's message is that "we have witnessed an evolution in the United States from a racial caste system (slavery), to one based largely on subordination (Jim Crow), to one defined by marginalization (mass incarceration)." (2012 Free Press paperback p. 219).

Alexander recalls a Father's Day message delivered at a church in Chicago by then presidential candidate Barack Obama, who criticized black men for being "missing" from their families and their responsibilities as fathers. The speech was widely and favorably publicized in the mainstream media, but as Alexander recounts: "The media did not ask- and Obama did not tell – where the missing fathers might be found." (p. 179). Nor did *Time* magazine, or *Ebony*, or most mainstream news sources. Here is a sample of Alexander's searing indictment:

“More African American adults are under correctional control today…than were enslaved in 1850, a decade before the Civil War began. The mass incarceration of people of color is a big part of the reason that a black child born today is less likely to be raised by both parents than a black child born during slavery. The absence of black fathers from families across America is not simply a function of laziness, immaturity, or too much time watching Sports Center. Thousands of black men have disappeared into prisons and jails, locked away for drug crimes that are largely ignored when committed by whites.” (p.180).

In his posthumously published book, Stuntz identifies three causes of the dysfunction of the American criminal justice system. “First, the rule of law collapsed.” Mandatory sentencing laws made police and prosecutorial discretion supreme; trial by jury became scarce. Second, “discrimination against both black suspects and black crime victims grew steadily worse[.]” Third, American punishment swung to extremes as though on a pendulum: “In the late 1960s and early 1970s, the United States had one of the most lenient justice systems in the world. By century’s end, that justice system was the harshest in the history of democratic government.” (pp. 2-3). Stuntz dispels the common American myth that our incarceration rates are so high because our crime rates are uniquely high: “If Western nations’ crime rates determine the size of their prison populations, the United States should imprison roughly the same share of its citizenry as do the British or the French, the Portuguese or the Dutch – not four to seven times as many.” (p.50).

Ferguson, who is a professor of literature and criticism as well as law, extends the analysis in at least three worthy directions: he delves more deeply into the historical and philosophical bases for punishment, he addresses forcefully the abhorrent conditions in American prisons, and he grapples with the question why the United States has such a deeply punitive national impulse.

When I have more time, I tell myself, I will read these books more carefully with an eye to their comparative assessments of common issues: for example, I found it refreshing that Alexander places particular blame on civil rights leaders for their inattention to the phenomenon of discriminatory incarceration, while Stuntz critiques the Warren Court and the American Law Institute for their shortcomings: neither hesitates to criticize the left as well as the right. Stuntz and Ferguson each describe the dominance of prosecutorial discretion and the diminution of judicial authority in bleak detail; while Alexander and Ferguson both compare the mass incarceration of African Americans to the slavery abolished by the 13th Amendment. All three authors, in fact, place heavy emphasis upon the disproportionate impact of mass incarceration upon black Americans, particularly with respect to those who are arrested and imprisoned for drug offenses.

I cannot leave this topic without observing that there are early signs of a return swing of the punitive pendulum. Progressives, conservatives and libertarians are finding more common ground, as the human and fiscal consequences of the government’s prosecutorial power has exacted a higher and higher toll. See, for example, *G.O.P. Moving to Ease Its Stance on Sentencing* (Jeremy W. Peters, *New York Times,* March 13, 2014), and *Toughness on Crime Gives*

Way to Fairness (Kevin Johnson, *USA Today,* March 31, 2014). For the first time in many years, there is a developing bipartisan consensus that we should back away from the punishment extremes to which we have fallen, at least in cases where serious physical violence is not involved. This rollback effort faces formidable obstacles, however, as the vast American incarceration empire is now a significant economic force in many rural communities, with its well-financed lobbyists working effectively to protect and preserve its status, as Professor Ferguson reminds us.

Turning to a more global perspective, one is fairly amazed at the extent of the progress made in recent years in the development of the rule of law, the protection of human rights, and the state-funded provision of counsel for the legal protection of individuals against whom the state wishes to impose its authority. The European Union has been at the forefront of these salutary developments. For example, in November, 2013 the European Commission presented five proposals with the intention "to guarantee fair trial rights for all citizens, wherever they are in the European Union." (Commission Press Release, November 27, 2013). These proposals designed to strengthen the presumption of innocence, to implement special safeguards for children suspected or accused of a crime, to provide legal representation at the early stages of criminal proceedings particularly where people are deprived of liberty, to provide procedural safeguards and counsel for vulnerable people, and to assert common factors that should govern when one has a right to legal representation. The Commission emphasized that this was a continuation of its three previous Directives on 1) the right to interpretation and translation 2) the right to information in criminal proceedings, and 3) the right to access to a lawyer and the right to communicate, when deprived of liberty, with third persons and consular authorities. In the press release, the European Union's Justice Commissioner declared that:

"We are building a true European continent of justice….Today's proposals will make sure that citizens have proper access to legal aid when they are most vulnerable, that child suspects have special safeguards, and that the core principle of 'innocent until proven guilty' is made effective across the EU."

The EU is not alone, but rather is part of an active worldwide movement. On December 20, 2012, the United Nations General Assembly adopted the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, which has been described as "the world's first international instrument dedicated to the provision of legal aid." *UN General Assembly Enacts Global Standards on Access to Legal Aid* (Zaza Namoradze, Open Society Justice Initiative, December 20, 2012). In the United States, the UN action was hailed for its declaration that legal aid is "an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law"; and also because of its close alignment with the American Bar Association's *Ten Principles of a Public Defense Delivery System* (2002). In at least one respect, the stage at which counsel is provided, the UN guidelines exceed current practice in most American states, by requiring that preliminary representation be provided before arraignment, and, under Guideline 43, "especially before being interviewed by the authorities." See David

Carroll, *The United Nations takes the Ten Principles international* (The Sixth Amendment Center, January 11, 2013).

My colleague Maha Jweied at the US Department of Justice's Access to Justice Initiative has informed me that in March, 2013, the Organization of American States' Committee on Juridical and Political Affairs held a meeting on best practices concerning public defenders and access to justice, with the cooperation of her office; and the OAS plans to issue a report on best practices among its member states in the near future. The Access to Justice Office conducted a conference in January 2013 to discuss best public defense practices in light of the UN General Assembly Standards. The Office has strongly supported the right to effective counsel, both in the United States and globally.

Perhaps of greatest note is the International Conference on Access to Legal Aid in Criminal Justice Systems, to be held in Johannesburg on June 24-26, 2014. This conference, which is being sponsored by the Government of the Republic of South Africa and Legal Aid South Africa, together with the International Legal Foundation, the United Nations Development Programme and the United Nations Office on Drugs and Crime. The purpose of the conference is "to address the global challenge of ensuring access to quality criminal legal aid services for the poor[,]" in accordance with the UN Principles and Guidelines that were established in 2012.

Very importantly, the first conference topic will focus upon "the scope of legal aid as defined in the *Principles and Guidelines* and on the obligation of States to establish nationwide criminal legal aid systems that meet the needs of all persons who qualify for legal aid." (conference Concept Note section 8, Conference Topics, paragraph one. Emphasis supplied).

Examples abound of international discussions that further the rule of law and advance the understanding that the provision of counsel is essential not only to the preservation of individual liberty, but also to the development of stable and honorable societies. My former public defender colleague, now associate justice of the Massachusetts Supreme Judicial Court, Robert Cordy, has been involved with access to justice and right to counsel issues in Gambia, Siberia, Turkey and Uzbekistan. Justice Cordy identifies these efforts to strengthen the rule of law as being critical to the achievement of political stability and economic opportunity.

In my own experience, I have presented an annual lecture on the right to counsel to Mexican judges and law enforcement personnel at the Fletcher School of Diplomacy at Tufts University in recent years. Two summers ago, my colleague Jennifer Smith of the International Legal Foundation arranged a meeting with New York's Chief Judge Jonathan Lippman and leaders of public defender programs operating in Afghanistan, Nepal and the West Bank. This vibrant conversation was conducted in various languages; and yet we all spoke the same language as we discussed the challenges inherent in providing appropriate legal protection to individuals charged by our respective governments with having committed crimes in violation of that government's laws. There is no nation, we saw that day, in which this vital duty is an easy one to discharge.

When I participated in the International Conference on Criminal Legal Aid Systems in Beijing in December, 2012, I was in the company of public defenders and criminal defense practitioners from Australia, Canada, China, France, Japan, the Netherlands, South Korea, the United Kingdom and the United States. Each of us presented papers and exchanged our perspectives based upon our experience. It was a particularly poignant weekend for me, as the 221st anniversary of the American Bill of Rights and China's focus on amending its laws to provide procedural rights somewhat akin to those contained in that historic document contrasted most uncomfortably with the status of the United States as the world's incarceration leader, and the breaking news of the massacre of teachers and schoolchildren in Newtown, Connecticut by a man armed with a high-powered weapon. But overall, there emerged from that conference a consensus of first, how challenging it is for a nation to build a counsel assignment system that is sufficiently independent and professional to vigorously protect the legal rights of the accused; and second, how much more difficult it is to sustain that accomplishment against incessant challenges based upon concerns about cost and public safety.

These common experiences and common challenges among public defense providers – which were apparent in my experiences in Beijing, in New York, and which emerge whenever criminal legal aid lawyers meet -- lead me to make a proposal today. **My proposal is that the global movement toward recognizing a right to counsel as an essential component of a fair criminal justice system in every nation should include a provision for a global association of criminal legal aid leaders, at least one from each nation; and a regular, perhaps annual meeting at which those leaders may present and share, among other issues, 1) their best client-protective practices and the most serious obstacles they face in carrying out those best practices; 2) how to enforce compliance by other criminal justice system actors with established constitutional and statutory mandates; 3) how to reliably obtain the level of funding that is needed to carry out the responsibility of providing high quality representation for every client; and 4) how to manage one's office or agency efficiently and productively.** As national legal aid systems continue to be established, to mature and to confront similar kinds of management, fiscal and political challenges, it makes good sense to institute at the outset a global forum in which criminal legal aid leaders from every nation may educate and support one another. I hope that this proposal might be considered at the Johannesburg Conference in June.

What is vibrant and exciting about all this global activity in support of individual rights, the rule of law and the necessity of legal aid is the symbiosis it has inculcated and may inspire among countries. Nations that are just beginning to develop legal aid systems for their citizens are paying heed to the rights that have been established and the structures that have been created in nations with more experience. Likewise, the more mature rule of law nations can benefit, if they will, from the more vibrant aspects of the newer approach. For example, support for the right to counsel <u>before</u> one in custody may be subjected to police interrogation seems strongest in Eastern Europe, is a work in progress in Western Europe, and is an unrealized goal in much of the United States. Its inclusion in the UN Principles and Guidelines is an important

global advance. Similarly, the need for a national approach, as is true in the United States of our highly-regarded Federal Defender system but not for the vast majority of clients represented by state and county public defenders, is a bracing reminder that we can do better, and learn from the experience of other nations as well as they learn from ours.

Thank you very much for your invitation and your attention to my remarks.

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