

The New York Times

March 9, 2013

# The Right to Counsel: Badly Battered at 50

By LINCOLN CAPLAN

A half-century ago, the Supreme Court ruled that anyone too poor to hire a lawyer must be provided one free in any criminal case involving a felony charge. The holding in [Gideon v. Wainwright](#) enlarged the Constitution's safeguards of liberty and equality, finding the right to counsel "fundamental." The goal was "fair trials before impartial tribunals in which every defendant stands equal before the law."

This principle has been expanded to cover other circumstances as well: [misdemeanor](#) cases where the defendant could be jailed, a defendant's [first appeal from a conviction](#) and proceedings against a [juvenile for delinquency](#).

While the constitutional commitment is generally met in federal courts, it is a different story in state courts, which handle about 95 percent of America's criminal cases. This matters because, by well-informed estimates, at least 80 percent of state criminal defendants cannot afford to pay for lawyers and have to depend on court-appointed counsel.

Even the best-run state programs lack enough money to provide competent lawyers for all indigent defendants who need them. Florida set up public defender offices when Gideon was decided, and the Miami office was a standout. But as demand has outpaced financing, caseloads for Miami defenders have grown to 500 felonies a year, though the American Bar Association [guidelines](#) say caseloads should not exceed 150 felonies.

Only 24 states have statewide public defender systems. Others flout their constitutional obligations by pushing the problem onto cash-strapped counties or local judicial districts.

Lack of financing isn't the only problem, either. Contempt for poor defendants is too often the norm. In Kentucky, 68 percent of poor people accused of misdemeanors appear in court hearings without lawyers. In 21 counties in Florida in 2010, 70 percent of misdemeanor defendants pleaded guilty or no contest — at arraignments that averaged less than three minutes.

The Supreme Court has [said](#) that poor people are entitled to counsel "within a reasonable time" after a case is initiated. But

defendants, after their arrest, can [spend weeks or even months](#) in jail without a lawyer's help. In a [Mississippi case](#), a woman charged with shoplifting sat in jail for 11 months before a lawyer was appointed.

The powerlessness of poor defendants is becoming even more evident under harsh sentencing schemes created in the past few decades. They give prosecutors, who have huge discretion, a strong threat to use, and have led to almost 94 percent of all state criminal cases being settled in plea bargains — often because of weak defense lawyers who fail to push back.

The competency of lawyers is, of course, most critical in death penalty cases. In dozens of states, capital cases are routinely handled by poorly paid, inexperienced lawyers. And yet, only very rarely are inmates ever granted a new trial because of incompetent counsel.

In a Georgia death penalty case last year, the United States Court of Appeals for the 11th Circuit [ruled](#) that even though the main defense lawyer drank a quart of vodka each night of the trial, there was no need for a retrial. The lawyer was himself preparing to be criminally prosecuted for stealing client funds, and presented very little evidence about the defendant's intellectual disability. But the court said the defendant had a fair trial because proof that he killed a sheriff's deputy outweighed any weakness in his legal representation.

In an infamous 1996 Texas death-penalty case, the Texas Court of Criminal Appeals [upheld](#) a defendant's death sentence even though his lead counsel slept during the trial.

The Supreme Court has made it possible for courts to uphold such indefensible lawyering. In 1984, in [Strickland v. Washington](#), the court said that for a defendant to be entitled to a new trial, he must show both that his lawyer's advice was deficient and that the deficiency deprived him of a fair trial — a very high hurdle. And the court's majority defined competency as requiring only that the lawyer's judgment be “reasonable under prevailing professional norms.”

Justice Thurgood Marshall, writing in dissent, said the result of this empty standard “is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.” That is exactly what has happened in the past three decades. In fact, incompetent counsel for poor defendants is so widespread that under this standard the prevailing professional norm has been reduced to mediocrity.

After 50 years, the promise of *Gideon v. Wainwright* is mocked more often than fulfilled. In a forthcoming issue of *The Yale Law Journal*, Stephen Bright, president of the [Southern Center for Human Rights](#) in Georgia, and Sia Sanneh, a lawyer with the [Equal](#)

**Justice Initiative** in Alabama, **recommend** that all states have statewide public defender systems that train and supervise their lawyers, limit their workloads and have specialized teams in, for example, death-penalty cases.

There is no shortage of lawyers to do this work. What stands in the way is an undemocratic, deep-seated lack of political will.