



Gideon at 50: Three Reforms to Revive the Right to Counsel

Thomas Giovanni and Roopal Patel

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EXECUTIVE SUMMARY

In 1963, the U.S. Supreme Court ruled in *Gideon v. Wainwright* that criminal defendants have a constitutional right to counsel, even when they cannot afford one.¹

But 50 years later, *Gideon*'s promise remains unrealized.

Despite radical changes to our criminal justice system over the last half century, state and federal governments have not committed the funding necessary for public defenders to keep pace with the rising flood of criminal cases.

Many public defenders lack the staff, time, training, and resources to investigate each case adequately or prepare a robust legal defense. Often, they end up spending only minutes per case due to overwhelming and unrealistic caseloads. As a result, they are simply unable to provide clients with their constitutional right to counsel, effectively making *Gideon* an unfunded mandate at a time when public defenders are needed most.

Today, we live in an era of mass incarceration. The United States leads the world in number of people in prison. After 40 years of the War on Drugs and “tough on crime” policies, there are currently 2.3 million people behind bars — disproportionately people of color.² Nearly half the people in state prison are there for nonviolent crimes,³ and almost half the people in federal prison are there for drug crimes.⁴

According to the American Bar Association (ABA), researchers estimate that anywhere from 60 to 90 percent of criminal defendants need publicly-funded attorneys, depending on the jurisdiction.⁵ Yet most public defenders are unable to meet this demand due, in part, to the deluge of low-level charges and misdemeanor cases.

To make matters worse, prosecutors often bring charges against defendants that are far higher than warranted by the facts of the case,⁶ and defenders often do not have time or resources to assertively negotiate with prosecutors in plea discussions.⁷ Defendants are then left to accept unfair plea deals rather than risk trials that may leave them behind bars for even longer.

As this broken process repeats itself in case after case, the systemic result is harsher outcomes for defendants and more people tangled in our costly criminal justice system. The routine denial of effective legal representation for poor defendants, coupled with the over-criminalization of petty offenses, feed our mass incarceration problem at great social and economic costs.

Reports estimate that taxpayers spend \$79 billion a year on corrections nationwide, with an average of \$31,286 per state prisoner.⁸ Surely, there are better ways to spend this money — on higher education, infrastructure, job creation, or targeted crime prevention programs.

Fortunately, fixes to our criminal defense system are not out of reach. Federal, state, and local governments can implement reforms to help reduce unnecessary incarceration and restore the right to counsel for poor people.

This paper examines how *Gideon*'s unfunded mandate impacts public defenders and our criminal justice system and identifies three common-sense solutions to move the country toward a more functional and fair system of public defense:

- 1. Determine which petty offenses can be safely reclassified into non-jailable civil infractions, or legalized.** Federal and state governments should analyze their criminal statutes and determine which petty offenses can be reclassified or removed without negatively affecting public safety. Reclassification of these offenses would greatly reduce demands on public defenders, law enforcement, prosecutors, courts, jails, and corrections staff and redirect resources toward public safety priorities.
- 2. Increase funding for public defense from likely and unlikely sources.** States should increase funding to public defender offices so that it is proportional to the offices' caseloads. The federal government should also increase grant funding for state and local public defense, especially by encouraging more funding through the Edward Byrne Memorial Justice Assistance Grant Program (Byrne-JAG), a grant program designed to provide broad federal support to state and local criminal justice systems. Additionally, private law firms can mobilize their pro bono resources by sending a rotation of associates to work in public defender offices. These associates can assist clients while gaining valuable trial and litigation skills.
- 3. Increase effectiveness of public defense by funding regular trainings for attorneys and adding social workers.** States should sponsor rigorous and systematic trainings for public defenders to improve legal representation in the face of high caseloads. States should also fund social workers in public defender offices to help clients reintegrate into their communities so that they do not reoffend. Ending the cycle of recidivism reduces the demands on public defenders and the rest of the criminal justice system.

I. ***GIDEON'S UNFUNDDED MANDATE***

Our adversarial system was designed with the belief that truth — guilt or innocence — would be revealed after jurors heard evidence at trial, presented by each side, with a judge overseeing the proceedings to ensure a fair trial. Interpreting the Constitution's criminal law-related protections, the *Gideon* Court sought to make trials a balanced fight between the government and an individual:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁹

As a counterweight against the power of the government — represented by the prosecutor — *Gideon* went on to recognize the necessity of a public defender in keeping this fight balanced:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence... He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.¹⁰

But our criminal justice system has grown dramatically since 1963 — without the funding necessary for public defenders to keep up with growing caseloads and resource demands. In 1963, when *Gideon* was decided, there were approximately 217,000 people in prison.¹¹ Today, the incarcerated population has expanded to approximately 2.3 million people.¹² The United States has only 5 percent of the world's population, but 25 percent of its prison population.¹³ One in four American adults now has been convicted of a crime.¹⁴ We live in an era of mass incarceration.

Most people cycling in and out of the criminal justice system are too poor to afford their own attorney.¹⁵ The court then either provides them with an attorney from a public defense office or pays a private attorney to take the specific case. This paper focuses on public defender offices, which regularly face profound difficulties in providing effective counsel due to lack of funding, resources, and time.

Our poorly funded public defense system exacerbates our nation's mass incarceration problem. Rarely does the accused have adequate legal representation. Rarely is their fight balanced. Rarely do public defenders have the resources they need to keep *Gideon's* promise of providing a constitutional right to effective counsel.

A. Disproportionate Funding Leaves Defenders with Few Resources and Little Time

A major reason defenders cannot serve their constitutional function is their lack of resources, especially when compared to prosecutors.

In 2007, according to a 49-state survey conducted by the U.S. Bureau of Justice Statistics (BJS), state prosecutors' office budgets were \$5.8 billion,¹⁶ while state and local public defender office expenditures were only \$2.3 billion.¹⁷ According to recent BJS studies, there are about 25,000 attorneys in state prosecutors' offices and 34,000 support staff, compared to 15,000 attorneys and 10,000 support staff in state and local public defender offices.¹⁸

Further compounding this disparity in funding, 18 states have either completely or primarily shifted the responsibility of funding public defender offices to counties, which have created varied and unpredictable funding mechanisms.¹⁹ As one of the most troubling examples, Louisiana's Orleans Public Defender Office was forced to lay off one-third of its staff in 2012 because a major funding stream — traffic tickets — dried up.²⁰ Defenders in Louisiana are also paid by fees levied on their clients after conviction, setting up a conflict of interest where the public defender's office benefits financially from a client's guilty plea or conviction.²¹ At least 13 other states have similar fee systems.²²

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The federal government offers grants to supplement state and local government spending on public defense. One major grant program run by the U.S. Department of Justice (DOJ) is the Edward Byrne Memorial Justice Assistance Grant Program (Byrne-JAG). States received \$287 million in grants in 2012 and have discretion to allocate these funds to different criminal justice purposes.²³ According to the most recent DOJ data, more than 60 percent of Byrne-JAG funds go to law enforcement. Only a small portion goes toward prosecutors and defenders combined, and even then there is a 7 to 1 disparity in favor of prosecutors. In 2010,

states allocated \$13.8 million to prosecutors, but only \$1.9 million to public defenders — less than 1 percent of the total amount of Byrne-JAG funds.²⁴ Making matters worse, a federal study found that only half of defender offices surveyed were even aware of their eligibility for such grants.²⁵

This patchwork of disparate funding has left most defender offices with insufficient staff and resources to appropriately represent clients, resulting in a system that is out of balance. The ABA recommends that individual public defenders have a maximum of 150 felony cases or 400 misdemeanor cases per year.²⁶ However, the average public defender's caseload exceeds that considerably. For example, in 2008, Miami defenders handled approximately 500 felony cases on average.²⁷ Because public defenders have so many cases per year, they can spend only minutes on each individual case, compromising the level of defense provided. In New Orleans, defenders handled on average 19,000 cases in 2009, which translated into seven minutes per case.²⁸ Minnesota defenders reported devoting an average of 12 minutes per case, not including court time, in 2010.²⁹ With so little time to devote to cases, legal research is compromised, greatly weakening the defender's ability to effectively represent the client.

Defenders' overloaded dockets put them and their clients at a distinct disadvantage. With little time, few resources, or independent investigators, the defender often must rely on the prosecution to obtain the facts of the case through the discovery process, which is slow and incomplete.³⁰ Driven by similar time pressures and believing in their case, the prosecution has little incentive to seek out additional witnesses with information favorable to the defense.³¹

Additionally, according to the ABA and the National Legal Aid and Defender Association, public defense offices often lack adequate training.³² Most public defense trainings programs do not teach defenders how to provide appropriate legal defense in the face of congested caseloads and changing standards. Public defenders are also regularly required to play the role of social worker for their clients since they are often the only point of contact with government services a client will experience. For example, in 2006, BJS reported that 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of local jail inmates had mental health problems.³³ Many clients also have drug addiction issues or are in need of job training. According to BJS data, public defender offices do not have adequate social worker staff.³⁴ With rare exceptions, public defender offices do not have adequate resources to identify and respond to clients' social service needs.

Pulled in different directions with few resources, defenders are unable to provide effective legal defense to their clients. The accused do not get the balanced fight promised by the Constitution. Simply put, inadequate funding debilitates the defender function.

B. Petty Offenses Unnecessarily Deplete Defender Resources

Another impediment to effective public defense is the endless number of clients charged with low-level and petty offenses whom public defenders are responsible for representing. This is the result of “tough on crime” policies that criminalized acts that were previously legal, as well as increasing penalties for many offenses.³⁵ According to a report by the National Association of Criminal Defense Lawyers, there were 10.5 million misdemeanor prosecutions in 2006.³⁶ Again, the vast majority of those accused could not afford their own attorney.³⁷

Currently, nearly half the people in state prison are incarcerated for nonviolent crimes.³⁸ Almost half the people in federal prison are there for drug crimes.³⁹ Only 7.6 percent of federal powder cocaine prosecutions and 1.8 percent of federal crack cocaine prosecutions are for high level trafficking.⁴⁰ This focus on nonviolent, low-level offenses clogs the criminal justice system, offers minimal public safety benefits, and distracts criminal justice resources — including public defenders’ time — from other public safety priorities, such as serious or violent crimes.

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Although representing each client charged with a petty offense may not take up much defender time, the large volume of such cases uses up valuable defender resources on a systemic level. For as long as the case is “open,” public defenders must attend arraignments and other court hearings, file and argue motions, and complete other work to resolve these cases.

As an example, of the 354,797 arraignments in New York City in 2011, the top charges were, in order: possession of marijuana, misdemeanor assault, misdemeanor possession of a controlled substance, theft of services, petit larceny, driving without a license, trespass, and misdemeanor possession of a weapon. Theft of services, commonly charged for jumping over a turnstile, accounted for more than 20,000 arraignments.⁴¹

In New Orleans, municipal offenses such as public drunkenness and obstructing a walkway are some of the most common crimes taking up defender time.⁴² In Miami, defenders report that driving without a license is one of the top three misdemeanor offenses they spend their time on.⁴³ Looking beyond purely petty crimes, simple possession of drugs may be the most frequent charge that saps public defense and other criminal justice resources in jurisdictions as different as New York City,⁴⁴ Texas,⁴⁵ and Kentucky.⁴⁶

The deluge of low-level offenses not only takes up defender time, but also the time of prosecutors, courts, and police officers and shifts everyone's attention and resources away from more pressing public safety priorities — like dealing with serious or violent crimes.

C. Without Effective Representation, Defendants Receive Harsher Punishments

The resource strain on defenders is further compounded by the way in which cases are decided in the modern era. The fight between the citizen and the government no longer plays out in a courtroom before a jury of one's peers. As the Supreme Court recently noted, 94 percent of all state convictions and 97 percent of federal convictions are secured through guilty pleas, not trials.⁴⁷

To manage their large caseloads, defenders as well as prosecutors have strong incentives to plead out cases quickly. The sad truth is that the justice system often resembles an assembly line, processing humans as quickly and as cheaply as possible. And at every stage, from factual investigations to the rare cases that go to trial, prosecutors have numerous advantages. Pleas are usually negotiated without the participation of a judge. Prosecutors have near-total discretion in not only what they offer, but also in how long their offer remains open to the defendant.⁴⁸ Prosecutors may use this discretion to pressure defendants into entering plea deals quickly.⁴⁹ One such tool is the “exploding offer,” a plea offer in which charges and their accompanying sentence substantially increase after a short deadline.⁵⁰

Prosecutors also may “overcharge” a defendant, alleging a more serious crime than could be supported by the evidence.⁵¹ The reason for this is simple: Overcharging supplies the prosecutor with greater leverage in plea bargaining. With massive caseloads, public defenders do not have sufficient time to review the evidence, conduct an investigation, or interview their clients to assess whether the offer is fair.⁵² As a result, they usually conclude it is prudent to recommend accepting the plea offer rather than run the risk of more prison time for their clients down the line, regardless of what they may believe about the merits of the case or fairness of the offer.⁵³ Further, defenders — along with clients and prosecutors — are often unaware of the full range of collateral consequences of a specific guilty plea⁵⁴ and perceive the bargain to be better than it actually is. For example, a misdemeanor plea without any jail sentence may seem like a reasonable outcome if one does not realize the plea also comes with a revocation of the defendant’s driver’s license, which means a client can no longer drive to work or visit his or her children.

As documented in study after study,⁵⁵ the imbalance in power between prosecution and defense, coupled with the over-reliance on plea bargains, can lead even innocent people to take pleas simply because they are afraid the prosecutor will follow through with the threat to overcharge them and take them through a lengthy and risky trial.⁵⁶

As this broken process repeats itself case after case, the defendant bears the cost in the form of a potentially unfair sentence based on a few minutes of discussion between the prosecutor and defender. This dynamic further feeds the epidemic of mass incarceration and increases the size of our corrections population.

D. Mass Incarceration Costs the Country

Our mass incarceration problem comes at an enormous cost to our nation and our communities, especially communities of color. African-Americans and Hispanics, who make up less than 30 percent of the country’s population, are nearly 60 percent of the prison population. Whites, with 64 percent of the general population, make up approximately 35 percent of the prison population.⁵⁷

Taxpayers spend more than \$79 billion annually on corrections, with an average of \$31,286 per year to house each inmate in state prison.⁵⁸ In 2010, the Center for Economic and Policy Research (CEPR) extensively reviewed incarceration studies and concluded that half of the nonviolent offenders in prison could be released with minimal effect on public safety.⁵⁹

Some 700,000 prisoners re-enter their communities every year and their conviction records leave them with bleak prospects for reintegration into their communities.⁶⁰ Due to laws regarding the collateral consequences of criminal convictions, guilty pleas — even to sentences that do not involve incarceration — create barriers to a person’s successful re-entry into society, such as exclusion from some student loan programs,⁶¹ restrictions on voting rights,⁶² and unnecessary limits on employment opportunities. Studies have shown that limited employment and educational opportunities contribute to recidivism and more crime, further fueling the cycle.⁶³

The depressed employability of formerly incarcerated people has an effect on the nation’s economy and ability to compete globally. In 2010, CEPR estimated that the negative employment prospects of the formerly incarcerated lowered the overall employment rate by 0.8 to 0.9 percent and the male employment rate by 1.5 to 1.7 percent. The study determined that this exclusion of individuals from the workforce costs the U.S. economy the equivalent of 1.5 to 1.7 million workers, representing a loss of goods and services that reduced the gross domestic product by \$57 to \$65 billion in 2008.⁶⁴ A study from Pew Charitable Trusts showed similar loss in economic productivity.⁶⁵ As employable, potentially tax-paying members of communities are incarcerated — or carry the life-long stigma of a criminal conviction — and unable to find work, the country suffers the loss of these members and their potential contributions.

Further, the 2.7 million children who have a parent in prison are at greater risk of psychological problems, poor school performance, or ending up behind bars themselves.⁶⁶ The diversion of fiscal resources to incarceration also takes needed dollars away from other priorities, including aid for early childhood and higher education, infrastructure investment, health care, and intervention programs that stop crime before it starts, such as programs for children at risk for delinquency.⁶⁷

The lack of robust defense for most people in prison simply adds to these costs of the larger broken system. It also increases the risk that innocent people will be convicted and diverts resources from public safety priorities. It diminishes public confidence in our court system and constitutional protections and undermines our standing as a nation committed to human rights.

II. RECOMMENDATIONS

To address these challenges, federal, state, and local governments can implement three common sense reforms to move our country toward a more functional system of public defense:

1. Determine which petty offenses can be safely reclassified into non-jailable civil infractions, or legalized.

Federal and state governments should undertake studies to determine whether certain crimes can be reclassified as non-jailable civil infractions or eliminated altogether without negatively impacting public safety. Many current criminal statutes were enacted during the “tough on crime” movement and unnecessarily over-criminalize and over-punish behavior. Reclassifying these petty offenses can reduce demands on not only public defenders, but also law enforcement, prosecutors, courts, jails, and corrections staff. It will allow redirection of criminal justice resources to public safety priorities.

For example, in 2004, Massachusetts commissioned a study into its public defense system.⁶⁸ In 2009, the state took up some of these recommendations and reclassified driving with a suspended license and operating a vehicle while uninsured into civil, rather than criminal, infractions.⁶⁹ The recent federal effort to create the National Criminal Justice Commission to conduct a nationwide review of the criminal justice system is an even better option.⁷⁰ Lawmakers seeking to reduce spending on public defense — and spending on criminal justice overall — can start with reclassifying low-level offenses.

2. Increase funding for public defense from likely and unlikely sources.

As many of the problems with the public defense system stem from underfunding, adding additional funding streams would be an effective change.

State Funding: States should increase funding to public defender offices to be proportional to the offices’ caseloads. For example, New York courts set caseload limits for defenders at 400 misdemeanor or 150 felony cases per attorney per year in New York City — the standard advocated by the ABA.⁷¹ In 2009, the state legislature then increased public defender funding to achieve these targets.⁷² Other states should follow New York’s example. States could also go a step further by regulating caseloads and appropriating proportional funding in the same legislation.

Federal Funding: The DOJ should encourage increased grant funding for state and local public defense, especially through Byrne-JAG. To equalize this funding, the DOJ should require that the state and local administering agencies in charge of directing these funds include individuals in the decision-making process from different criminal justice backgrounds, including public defense. A more representative body making funding decisions will increase the likelihood that more funds will go toward public defense as well as other priorities. The DOJ should also collect more detailed information from administering agencies on how the dollars are being used to advance stated criminal justice goals.

The DOJ should also increase efforts to notify public defenders directly of their eligibility for grants. The DOJ’s Access to Justice Initiative has already taken important steps, like working with administering agencies and defender associations to increase awareness of defender eligibility for these dollars and adding information to the DOJ website.⁷³ The DOJ should do more to contact chief public defenders directly and

provide them with information on available grants, easy-to-follow instructions on the application processes, and contact information for administering agencies.

Private Resources: Historically, the private bar has done a good deal to support public defense. But it could do more, particularly by helping augment public defender offices' staff. Many law firms in cities such as New York and Atlanta send associates to externships in public service organizations, including public defender offices.⁷⁴ Firms across the country should implement similar six-month or one-year externship programs that include sending associates to public defender offices. Working under the supervision of senior defenders, externs will gain valuable trial and litigation skills not usually available in commercial litigation and fulfill required pro bono hours. In turn, public defense offices will receive more integrated and consistent longer-term assistance. As the legal community faces increased unemployment,⁷⁵ law firms and law schools could also consider providing stipends to fund unemployed, but otherwise qualified, lawyers to serve as additional externs in defender offices.

3. Increase effectiveness of public defense by funding regular trainings for attorneys and adding social workers.

In-Office Training Programs: To meet the challenges of expanding responsibilities, state and federal governments should sponsor regular training programs to come to public defender offices. Rigorous and systematic trainings can help solve specific issues arising in individual offices and help defenders improve legal representation in the face of high caseloads. Trainings can focus on case management, plea negotiation, attorney supervision, and federal grant eligibility. Existing models that could be expanded or duplicated include Gideon's Promise, National Criminal Defense College, or New York State Defenders Association's Defender Institute.⁷⁶ The Brennan Center's Community-Oriented Defender Network also offers trainings focused on providing client-centered legal representation.⁷⁷ The existing trainings are often too expensive for cash-strapped defender offices and are not large or frequent enough to meet the great demand. If states paid for these training programs to come to public defender offices, defenders would be better able to access them.

Social Workers: State and federal governments should create and fund more social worker positions in public defense offices. Social workers reduce the number of clients who re-enter the criminal justice system by directing them to effective assessment and intervention — like mental health services, substance abuse counseling, or job training — thereby increasing the chances that people will reintegrate into their communities and not reoffend. Ending the cycle of recidivism reduces the resource demands on public defenders, as well as on law enforcement, prosecutors, courts, and corrections. Kentucky implemented such a program and found that social workers saved the state \$3.25 in criminal justice costs for every \$1 in social worker salaries.⁷⁸ Social service workers in Rhode Island saved the state \$15 million dollars.⁷⁹

III. CONCLUSION

The 50th anniversary of *Gideon v. Wainwright* presents an ideal opportunity to reassess this country's unrealized promise to provide counsel to those too poor to afford private representation. A true determination of guilt or innocence, or appropriate punishment, is impossible without a robust defense. Until the right to counsel is a reality, underfunded public defense services will continue to contribute to the national crisis of mass incarceration.

Implementing the recommendations offered by this paper will begin to reform this system. Determining which petty crimes can be safely reclassified or legalized, increasing funding and resources for public defense, and increasing the effectiveness of public defense offices are smart, sensible solutions to breathe life into *Gideon*'s noble words.

ENDNOTES

¹ *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

² E. ANN CARSON & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p11.pdf> (“In 2011, blacks and Hispanics were imprisoned at higher rates than whites in all age groups for both male and female inmates.”); TODD D. MINTON, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2011 1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf> (“Whites accounted for 45% of the total, blacks represented 38%, and Hispanics represented 15% of inmates.”); U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, THE BLACK ALONE OR IN COMBINATION POPULATION IN THE UNITED STATES, TABLE 1: POPULATION BY SEX AND AGE, FOR BLACK ALONE OR IN COMBINATION AND WHITE ALONE NOT HISPANIC, available at <http://www.census.gov/population/race/data/ppl-bc11.html>; U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, THE HISPANIC POPULATION IN THE UNITED STATES, TABLE 1: POPULATION BY SEX, AGE, HISPANIC ORIGIN, AND RACE 2011, available at <http://www.census.gov/population/hispanic/data/2011.html> (African Americans and Hispanics, who make up approximately 30 percent of the country’s population, are nearly 60 percent of the prison population. Whites are approximately 64 percent of the general population, but 35 percent of the prison population.).

³ CARSON & SABOL, *supra* note 2, at 9-11.

⁴ *Id.* (“Almost half of sentenced federal prisoners (48%) were held for drug crimes.”).

⁵ MAREA BEEMAN, THE AMERICAN BAR ASS’N., USING DATA TO SUSTAIN AND IMPROVE PUBLIC DEFENSE PROGRAMS 2 (2012), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_sustaining_and_improving_public_defense.authcheckdam.pdf; BUREAU OF JUSTICE ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES 3 n.1(2000), available at <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf> (finding 60-90 percent of all cases use court-appointed counsel); See also Eve Brensike Primus, *Procedural Obstacles to Reviewing Ineffective Assistance of Trial Counsel Claims in State and Federal Postconviction Proceedings*, CRIMINAL JUSTICE, Fall 2009, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_24_3_primus.auth_checkdam.pdf (“With public defenders representing 80 percent of criminal defendants nationwide, the indigent defense crisis is a problem that our criminal justice system can no longer afford to ignore.”); CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES 1(2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf> (finding over 80% of people charged with a felony in state courts are represented by public defenders).

⁶ ANGELA J. DAVIS, ARBITRARY JUSTICE 45-46 (Oxford University Press 2009).

⁷ ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, NAT’L. ASSOC. OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE 31 (Apr. 2009), available at <http://www.opensocietyfoundations.org/reports/minor-crimes-massive-waste>.

⁸ TRACEY KYCKELHAHN, U.S. BUREAU OF JUSTICE STATISTICS, JUSTICE EXPENDITURE AND EMPLOYMENT EXTRACTS, 2008 – FINAL, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&id=4333> (\$79 billion is spent on corrections); CHRISTIAN HENRICHSON AND RUTH DELANEY, VERA INSTITUTE OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (2012), available at http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf (giving cost of housing average state prisoner); BUREAU OF PRISONS, ANNUAL DETERMINATION OF AVERAGE COST OF INCARCERATION, available at <http://www.gpo.gov/fdsys/pkg/FR-2013-03-18/pdf/2013-06139.pdf> (the average yearly cost per federal prisoner was \$28,893 in FY11).

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¹⁰ *Id.* at 344-45 (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

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¹² CARSON & SABOL, *supra* note 2, at 1; MINTON, *supra* note 2 at 1 (2012).

¹³ *California’s Overcrowded Prisons, The Challenges of Realignment*, THE ECONOMIST, May 19 2012, available at <http://www.economist.com/node/21555611>; Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, available at, <http://www.nytimes.com/2008/04/23/us/23prison.html?pagewanted=all>.

¹⁴ MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, THE NATIONAL EMPLOYMENT LAW PROJECT, 65 MILLION NEED NOT APPLY: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), available at http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf.

¹⁵ See *supra* note 5.

¹⁶ STEVEN W. PERRY & DUREN BANKS, U.S. BUREAU OF JUSTICE STATISTICS U.S., PROSECUTORS IN STATE COURTS, 2007 STATISTICAL TABLES 1 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/psc07st.pdf>.

¹⁷ LYNN LANGTON & DONALD J. FAROLE, JR., U.S. BUREAU OF JUSTICE STATISTICS, PUBLIC DEFENDER OFFICES, 2007- STATISTICAL TABLES, Table 1 (Jun. 27, 2010), available at <http://bjs.gov/content/pub/pdo07st.pdf>.

¹⁸ PERRY & BANKS, *supra* note 16, at 2.

¹⁹ NORMAN LEFSTEIN & ROBERT L. SPANGENBERG, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 53-54 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf> ("As numerous statewide indigent defense studies have shown, when counties primarily fund indigent defense, there are certain to be inequities among the locally funded systems. Inevitably, urban counties have far more cases than rural counties and are often overburdened. At the same time, a rural county, with fewer resources, may be financially crippled by the need to fund the defense of a single serious homicide case.").

²⁰ John Simerman, *Public Defender Layoffs Could Gum Up the Works at New Orleans Criminal Court*, THE TIMES-PICAYUNE, Feb. 2, 2012, available at http://www.nola.com/crime/index.ssf/2012/02/public_defender_layoffs_could.html.

²¹ LA. REV. STAT. ANN. § 15:168 (2012).

²² ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CENTER FOR JUSTICE, CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY 12 (2010), available at <http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf>.

²³ U.S. BUREAU OF JUSTICE ASSISTANCE, JUSTICE ASSISTANCE GRANTS PROGRAM DETAILS, available at https://www.bja.gov/ProgramDetails.aspx?Program_ID=59; U.S. BUREAU OF JUSTICE ASSISTANCE, BYRNE JAG FACT SHEET 28 (2013), available at https://www.bja.gov/Publications/JAG_Fact_Sheet.pdf.

²⁴ U.S. BUREAU OF JUSTICE ASSISTANCE, JUSTICE ASSISTANCE GRANT PROGRAM CLOSEOUT REPORT: JANUARY 2010 – MARCH 2012 4 (2012), available at <https://www.bja.gov/Publications/JAG0312CloseoutReport.pdf>.

²⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-560, INDIGENT DEFENSE: DOJ COULD INCREASE AWARENESS OF ELIGIBLE FUNDING AND BETTER DETERMINE THE EXTENT TO WHICH FUNDS HELP SUPPORT THIS PURPOSE 28-29 (May 2012), available at <http://www.gao.gov/assets/600/590736.pdf>.

²⁶ JONATHAN ROSS, AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 n. 19 (2002), available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.a_uthcheckdam.pdf; BUREAU OF JUSTICE STATISTICS, PUBLIC DEFENDER OFFICES NATIONWIDE RECEIVED NEARLY 5.6 MILLION INDIGENT DEFENSE CASES IN 2007 (Sept. 16, 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/press/spdpclpdo07pr.cfm>.

²⁷ See Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y.TIMES, November 8, 2008, available at <http://www.nytimes.com/2008/11/09/us/09defender.html?pagewanted=all>.

²⁸ BORUCHOWITZ ET. AL., *supra* note 7, at 21.

²⁹ See Jessica Mador, *A Public Defender's Day: 12 Minutes Per Client*, MINNESOTA PUBLIC RADIO (November 29, 2010), available at <http://minnesota.publicradio.org/display/web/2010/11/29/public-defenders>.

³⁰ See Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 534-35 (2007) ("Most federal and state jurisdictions do not mandate the disclosure of Brady evidence within a specified time period, nor do they specify any due diligence requirements upon prosecutors." (citations omitted)); *id.* at 544 ("Through the pretense of transparency, prosecutors have the ability to not only withhold Brady evidence—as they may do in any case—but also by suggesting that full disclosure has been made, forestall any further inquiry and, in fact, change the nature of the defense. Indeed, several of the most egregious Brady violations have been reported in cases where prosecutors represented that they allegedly maintained an open file policy and had claimed to disclose everything in the file relating to the case, including Brady evidence."); LEFSTEIN & SPANGENBERG, *supra* note 19, at 78. ("To illustrate the foregoing, consider New York where defense attorneys rarely receive adequate discovery, and even more rarely, receive it in a timely manner.").

³¹ See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1604 (2006) (“Recent attention to the risks of wrongful convictions has brought to light the influence of “tunnel vision,” whereby the belief that a particular suspect has committed the crime might obfuscate an objective evaluation of alternative suspects or theories.” (citation omitted)), available at <http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1232&context=wmlr>.

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³³ DORIS J. JAMES AND LAUREN E. GLAZE, [National Alliance on Mental Illness] MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (Dec. 14, 2006), available at http://www.nami.org/Content/ContentGroups/Press_Room1/2006/Press_September_2006/DOJ_report_mental_illness_in_prison.pdf.

³⁴ LANGTON & FAROLE, JR., *supra* note 17, at 15, Table 12; DONALD J. FAROLE, JR & LYNN LANGTON, U.S. BUREAU OF JUSTICE STATISTICS, COUNTY BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, 11, Table 12 (Sept. 2010), available at <http://bjs.gov/content/pub/pdf/clpdo07.pdf>.

³⁵ Stephen Smith, *Overcoming Overcriminalization*, 102 Nw. J. CRIM. L. & CRIMINOLOGY 537 (2012), available at http://www.law.northwestern.edu/jclc/backissues/v102/n3/1023_537.Smith.pdf.

³⁶ BORUCHOWITZ ET.AL., *supra* note 7, at 11.

³⁷ BEEMAN, *supra* note 5, at 2.

³⁸ CARSON & SABOL, *supra* note 2, at 9-11.

³⁹ *Id.*

⁴⁰ UNITED STATES SENTENCING COMMISSION, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 19 (2007), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

⁴¹ CRIMINAL COURT OF THE CITY OF NEW YORK, ANNUAL REPORT 30 (2011), available at <http://www.nycourts.gov/courts/nyc/criminal/annualreport2011.pdf>.

⁴² Telephone Interview with Derwyn Bunton, New Orleans Public Defender (Feb. 12, 2012). Notes on file with authors.

⁴³ Telephone Interview with Carlos Martinez of Miami Dade County Public Defender (Feb. 13, 2012). Notes on file with authors.

⁴⁴ CRIMINAL COURT ANNUAL REPORT, *supra* note 41, at 31.

⁴⁵ Misdemeanor marijuana possession is the second most common case public defenders face. Interview with Wesley Shackelford, Deputy Director/Special Counsel, Texas Indigent Defense Commission, to authors (Dec. 17, 2012). Email on file with authors.

⁴⁶ Felony possession of drugs is the most common case public defenders face. Interview with Ray Ibarra, Campbell County, Kentucky, Assistant Public Advocate (Dec. 17, 2012). Email on file with authors.

⁴⁷ *Missouri v. Frye*, 132 U.S. 1399, 1407 (2012).

⁴⁸ DAVIS, *supra* note 6, at 45–46; Gershman, *supra* note 30, at 448 (describing the American prosecutor “as the most pervasive and dominant force in criminal justice”).

⁴⁹ Richard A. Oppel Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES, Sept. 25 2011, available at <http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?pagewanted=all&r=1&>.

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⁵² See JUSTICE POLICY INSTITUTE, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE (2011), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf

⁵³ BORUCHOWITZ ET.AL., *supra* note 7, at 31.

⁵⁴ See *id.* at 34 (The increasing number of collateral consequences “places the client at greater risk of unforeseen harm if the defender is too overburdened by his caseload to properly advise the client of the impact of the decision to plead guilty or proceed to trial.”).

⁵⁵ See, e.g., Ellen Yaroshefsky, *Ethics and Plea Bargaining: What’s Discovery Got to Do With It?*, 23 CRIMINAL JUSTICE 30, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_yaroshefsky_authcheckdam.pdf (“In the context of guilty pleas, the most significant reform is a change in discovery practices to prevent innocent people from entering guilty pleas and to prevent defendants from being placed in circumstances that give rise to inaccurate and otherwise faulty guilty pleas—such as in the federal system pleading to a higher level of culpability for the role in the offense or a higher level for the amount of loss in a money-laundering case.”); *Frontline: The Problem with Pleas* (PBS broadcast Oct. 31, 2011), <http://www.pbs.org/wgbh/pages/frontline/criminal-justice/the-problem-with-pleas/>.

⁵⁶ DAVIS, *supra* note 6, at 58.

⁵⁷ U.S. CENSUS BUREAU, THE BLACK ALONE OR IN COMBINATION POPULATION IN THE UNITED STATES, *supra* note 2, at Table 1. U.S. CENSUS BUREAU, THE HISPANIC POPULATION IN THE UNITED STATES, *supra* note 2, at Table 1. (Whites are approximately 64 percent of the general population); CARSON & SABOL, *supra* note 2, at App. Table 6, (Whites are 35 percent of the prison population).

⁵⁸ See *supra* note 8.

⁵⁹ JOHN SCHMITT, ET AL, THE HIGH BUDGETARY COST OF INCARCERATION, CENTER FOR ECONOMIC AND POLICY RESEARCH 1 (Jun. 2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf>.

⁶⁰ WILLIAM J. SABOL & HEATHER C. WEST, U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2008 3 (Jun. 30, 2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

⁶¹ 20 U.S.C.A. § 1091(r)(1).

⁶² *Criminal Disenfranchisement Laws Across the United States*, BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/sites/default/files/legacy/RTV%20Map%207.5.12.pdf>.

⁶³ THE PEW CENTER ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 30 (Apr. 2011), available at http://www.pewstates.org/uploadedFiles/PCS_Assets/2011/Pew_State_of_Recidivism.pdf (“Supervision can improve public safety and individual outcomes while maximizing the use of scarce correctional dollars by focusing on high-risk offenders and incorporating critical community-based mental health and substance abuse services, education and employment assistance.” (emphasis added)); RE-ENTRY POLICY COUNCIL, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, ELEMENTS OF EFFECTIVE HEALTH AND SOCIAL SERVICE SYSTEMS, POLICY STATEMENT 31: WORKFORCE DEVELOPMENT SYSTEMS, <http://www.reentrypolicy.org/Report/PartIII/PolicyStatement31> (“People re-entering the community after being in prison or jail are more likely to succeed when they find work and earn a wage on which they can live.”); RE-ENTRY POLICY COUNCIL, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, ELEMENTS OF EFFECTIVE HEALTH AND SOCIAL SERVICE SYSTEMS, PRISON AND JAIL, <http://www.reentrypolicy.org/Report/PartII/ChapterII-B/PolicyStatement15/ResearchHighlight15-3> (“Research indicates that prison educational and vocational programs can improve behavior, reduce recidivism, and increase employment prospects upon release.”).

⁶⁴ John Schmitt & Kris Warner, Center for Economic and Policy Research, *Ex-offenders and the Labor Market* (Nov. 2010).

⁶⁵ THE PEW CHARITABLE TRUSTS, COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 1 (2010) (finding that serving time in either prison or jail reduces hourly wages for men by approximately 11 percent, annual employment by 9 weeks and annual earnings by 40 percent), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf.

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⁶⁷ See, e.g., HENRICHSON & DELANEY, *supra* note 8; NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MISPLACED PRIORITIES: OVER INCARCERATE, UNDER EDUCATE 13 (April 2011), available at http://naacp.3cdn.net/01d6f368edbe135234_bq0m68x5h.pdf; NEW YORK STATE BAR ASS'N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS 48, 62 (2006) available at http://www.nysba.org/AM/Template.cfm?Section=Substantive_Reports&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=11415.

⁶⁸ REPORT OF THE COMMISSION TO STUDY THE PROVISION OF COUNSEL TO INDIGENT PERSONS IN MASSACHUSETTS 10 (2005), available at <http://www.publiccounsel.net/administration/pdf/Rogers%20Commission%20Report.pdf>; THE SPANGENBERG PROJECT, THE CENTER FOR JUSTICE, LAW AND SOCIETY AT GEORGE MASON UNIVERSITY, AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING 12 (Sept. 2010), available at <http://charlestonlaw.edu/charlestonSchoolOfLaw/files/2d/2de9ccce-7e53-4fe2-b2f5-d30b6117ea0b.pdf>.

⁶⁹ MASS. GEN. LAWS Ch. 277, §70(c); 2010 REPORT TO THE LEGISLATURE ON THE COMMITTEE FOR PUBLIC COUNSEL SERVICES 7-8 (2010), available at <http://www.publiccounsel.net/new/PDF/2010%20Report%20to%20Legislature.pdf>; see also JOEL M. SCHUMM, AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, NATIONAL INDIGENT DEFENSE REFORM: THE SOLUTION IS MULTIFACETED 15-16 (2012), available at http://www.americanbar.org/content/dam/aba/publications/books/lsc_laid_def_national_indigent_defense_reform.authcheckdam.pdf.

⁷⁰ S. 306, 102th Cong. (2011), <http://www.gpo.gov/fdsys/pkg/BILLS-112s306is/pdf/BILLS-112s306is.pdf>.

⁷¹ N.Y. Ct. Rules, §127.7(a). The rules also state that the limits “shall apply as an average per staff attorney within the organization, so that the organization may assign individual staff attorneys cases in excess of the limits to promote the effective representation of clients.” Relatedly, the current litigation pending, *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2010), is a challenge to the state funding mechanism and does not affect this reform. The reform targeted New York City’s public defense system, which is largely separately funded.

⁷² This funding came in the form of separate legislation. “As a part of the 2010-11 enacted State budget (A.9706C, Part E), operations of the Indigent Legal Service Fund (ILSF) have been significantly restructured. The new law sets out a transitional distribution structure from the Fund over the next four years beginning March 2011. New York City will receive annual payments of \$40 million.” *Local Government and School Accountability: Required Reporting Indigent Legal Services Fund*, OFFICE OF THE NEW YORK STATE COMPTROLLER, <http://www.osc.state.ny.us/localgov/finreporting/ilsf/ilsf.htm> (last visited Mar. 28, 2013).

⁷³ ACCESS TO JUSTICE INITIATIVE, U.S. DEP’T OF JUSTICE, THREE YEAR ANNIVERSARY ACCOMPLISHMENTS (March 2013), available at <http://www.justice.gov/atj/accomplishments.pdf>.

⁷⁴ For example, Skadden, Arps, Slate, Meagher, & Flom offers four-month externships to six New York-based associates each year. White & Case offers a three-month pro bono externship, during which associates have the opportunity to work with the Legal Aid Society’s Criminal Defense Project. See *Pro Bono*, SKADDEN, ARPS, SLATE, MEAGHER, & FLOM, LLP & AFFILIATES, <http://www.skadden.com/citizenship/activities>; *Social Responsibility Review 2011*, WHITE & CASE LLP, <http://srreview2011.whitecase.com/awards.htm>; *Law Firms Offering Public Interest Externships or Rotations: Opportunities for Full-Time Associates*, HARVARD LAW SCHOOL (2008), <http://www.law.harvard.edu/academics/clinical/documents/law-firms-offering-public-interest-externships-or-rotations.pdf>.

⁷⁵ In 2011, only 86 percent of law school graduates found employment, the lowest percentage in nearly 20 years. Ethan Bronner, *Law Schools’ Applications Fall as Costs Rise and Jobs Are Cut*, N.Y. TIMES, Jan. 30, 2013, available at <http://www.nytimes.com/2013/01/31/education/law-schools-applications-fall-as-costs-rise-and-jobs-are-cut.html>.

⁷⁶ *Our Solution*, GIDEON’S PROMISE, <http://Gideonspromise.org/our-solution/> (last visited Apr. 3, 2013); NATIONAL CRIMINAL DEFENSE COLLEGE, <http://www.ncdc.net> (last visited Apr. 3, 2013); NEW YORK STATE DEFENDERS ASSOCIATION, <http://www.nysda.org/index-5.html> (last visited Apr. 3, 2013).

⁷⁷ *Community-Oriented Defender Network*, BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/analysis/community-oriented-defender-network> (last visited Apr. 3, 2013).

⁷⁸ KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY, FISCAL YEAR 2012 ANNUAL LITIGATION REPORT 10 (2012), available at <http://dpa.ky.gov/NR/rdonlyres/A4E59688-A807-4914-BAC3-3FB616475BD6/0/2012AnnualReportDraftFINAL090612REDUCED.pdf>.

⁷⁹ Dawn Jenkins & Jennifer G. Winthrow, *Restoring Hope: Using Social Workers with Public Defenders*, THE ADVOCATE, 4 (Nov. 2007), available at <http://apps.dpa.ky.gov/library/advocate/pdf/2007/adv112007.pdf>.

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