

## Celebrating the Right to Counsel—And Extending It

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I am delighted to participate in this symposium honoring Vice President Mondale. He has been an enthusiastic supporter of the Equal Rights Amendment, a nuclear freeze, ending the Vietnam War, and racial justice, just to name a few of his interests and accomplishments. Walter Mondale is truly the model of a politician who has consistently worked for justice. The contribution I want to focus on today is his fight for recognition of a constitutional right to counsel for persons accused of felonies, emanating from the Sixth Amendment of the U.S. Constitution and applied to the states through the Fourteenth Amendment's Due Process Clause. The extension to state criminal courts was accomplished in *Gideon v. Wainwright*<sup>1</sup> and has now been recognized for fifty years.

It is well known that when Walter Mondale was a young Attorney General in Minnesota and was asked to join a states' brief opposing Clarence Gideon's petition for a right to defense counsel in a Florida felony prosecution, Mondale instead organized a brief *in support* of Gideon.<sup>2</sup> Eventually, more states supported the pro-Gideon brief than supported the other side.<sup>3</sup> Mondale's co-conspirator in this endeavor was Professor Yale Kamisar, whom

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1. 372 U.S. 335 (1963).

2. See Bruce A. Green, *Gideon's Amici: Why do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2340 (2013) (discussing Mondale's amicus brief on the side of the criminally accused, urging the Supreme Court to recognize indigent defendants' Sixth Amendment right to appointed counsel in felony cases); see also Judge Kevin S. Burke, *Happy Anniversary, Clarence Gideon*, MINNPOST (Mar. 3, 2013), <http://www.minnpost.com/community-voices/2013/03/happy-anniversary-clarence-gideon> (stating that rather than supporting Florida or simply ignoring the issue, Mondale organized an effort to gain the support of other states in Gideon's effort to require lawyers for the poor).

3. See *History of Right to Counsel*, NAT'L LEGAL AID & DEFENDER ASS'N, [http://www.nlada.org/About/About\\_HistoryDefender](http://www.nlada.org/About/About_HistoryDefender) (last visited Feb. 12, 2014) ("Twenty-two state attorneys general joined petitioner Clarence Earl Gideon in arguing that Sixth Amendment protection be extended to all defendants charged with felonies in state courts.").

we also honor at this conference.

On the basis of one eyewitness identification, Clarence Gideon had been convicted in Florida's state courts of breaking and entering with intent to commit a misdemeanor, a felony under Florida law.<sup>4</sup> He had proclaimed his innocence and asked for an attorney, but the judge explained that Florida law provided counsel for indigents only in capital cases.<sup>5</sup> Defending himself, Gideon told the jury he was innocent but was ultimately found guilty and sentenced to five years in prison.<sup>6</sup>

The Florida Supreme Court affirmed the conviction, holding there was no right to counsel, so from his prison cell Gideon sent a penciled petition to the U.S. Supreme Court claiming he had been denied his constitutional rights.<sup>7</sup> The Court granted the petition, appointed then-attorney Abe Fortas to represent Gideon before the Supreme Court, and eventually held unanimously that the Sixth Amendment right to counsel applies to the states, overturning *Betts v. Brady*<sup>8</sup> and its contrary holding.<sup>9</sup> Justice Black wrote the decision, emphasizing that there could not be a fair trial without counsel for the accused.<sup>10</sup>

This victory in *Gideon* was of extraordinary importance to constitutional criminal procedure. It is the only "new" constitutional rule that the Supreme Court has held fully retroactive, because its deprivation so risks convicting the innocent.<sup>11</sup> Accordingly, the Court applied the rule even to convictions that were fully final when *Gideon* was announced, thus emptying state prisons of all who had been convicted without the

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4. See *Gideon*, 372 U.S. at 336 ("Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor.").

5. *Id.* at 337.

6. *Id.*

7. *Id.* at n.1.

8. 316 U.S. 455 (1942).

9. See *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

10. *Id.* at 345–46 ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours . . . . This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.").

11. See John H. Blume, *Gideon Exceptionalism*, 122 YALE L.J. 2126, 2131 (2013) ("*Gideon* is the only decision ever cited by the Supreme Court as an example of the kind of watershed rule of criminal procedure that so implicates fundamental fairness as to require retroactive application in habeas corpus."); accord Justin F. Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2490–91 (2013) (stating *Gideon's* legacy justifies onerous limitations on constitutional remediation and justifies the retroactivity doctrine).

assistance of counsel, whether they had requested counsel or not.<sup>12</sup> The states' options were to release or retry following constitutional requirements, and Gideon himself was retried with appointed counsel and was cleared of the burglary.<sup>13</sup> No other new rule of criminal procedure has been similarly applied.

The current Court continues to regard the right to counsel as extraordinary. For example, it repeatedly describes the right to counsel as the one “bedrock” or “watershed” rule of criminal procedure without which an unacceptable risk of an erroneous conviction exists.<sup>14</sup> Because the right to counsel is so intimately tied up with fundamental fairness and with accuracy of results, it is critical to extend it, or some version of it, beyond the felony context and to recognize a right to counsel in other particularly sensitive contexts as well.

We depend upon, and need, an adversary process in this country. Without such a process, courts will not be presented with both sides of legal arguments or both sides of factual controversies to aid their decisions. For an adversary process to work, both sides must be represented by competent counsel. Such a process is much more likely to lead to just and accurate outcomes than one in which all the legal talent is on one side.

I will discuss four very different examples of situations that call for a greater leveling of the playing field by providing counsel for persons in a disadvantaged position who cannot afford counsel on their own. The final example shows, as well, that provision of counsel, while essential and helpful, may not be sufficient to bring about needed reforms. At least that is true in institutions like the military, where a fair and independent adversary process seems unachievable as long as command control of court martial proceedings remains the norm.

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12. See Blume, *supra* note 11, at 2130–31 (describing how *Gideon* transformed criminal justice for thousands of indigent defendants incarcerated when it was decided: “thousands of unrepresented prisoners were released, many of whom could not be retried.”).

13. Bruce A. Courtade, *Gideon at 50*, 92 MICH. B.J. 14, 14 (2013) (describing that on retrial, Panama City criminal defense attorney W. Fred Turner was appointed to represent Gideon, and at the conclusion of the trial, the jury found Gideon not guilty, and he was immediately released from custody).

14. See, e.g., *Whorton v. Bockting*, 549 U.S. 406, 419 (2007) (identifying *Gideon* as “the only case that we have identified as qualifying” as a bedrock or watershed rule).

## I. Giving Up Newborns and Other Children for Adoption

Lawyers need to be brought into the adoption process—lawyers for the parent(s) surrendering the child, that is. When the State is removing a child, it is well-armed with lawyers, social service workers, and expert witnesses, but those forced to surrender their parental rights are not always represented by an advocate for their interests. The situation is similar with respect to “voluntary” adoption proceedings between birthparents and an agency, for example, or more directly between birthparents and a couple who wants to adopt.<sup>15</sup> Frequently the surrendering parents either are represented by an attorney of the adopters’ choosing or are not represented at all.<sup>16</sup>

The Supreme Court has paid some heed to the problem when it comes to a state’s termination of parental rights. In *Lassiter v. Department of Social Services*,<sup>17</sup> the Court implied that the government must sometimes provide counsel for indigent parents at termination hearings.<sup>18</sup> Nonetheless, the holding was not a victory for parents’ rights: the Court held that the government need not automatically provide counsel to parents when the State seeks to terminate their parental rights, and also that it was not required to provide it in the particular case before the Court.<sup>19</sup> The Court acknowledged the connection between provision of an attorney and the accuracy of results,<sup>20</sup> but nonetheless held that provision of an attorney was constitutionally required on this ground only when it appears to the court that provision of counsel would make a determinative difference.<sup>21</sup>

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15. See, e.g., Pamela K. Strom Amlung, *Conflicts of Interest in Independent Adoptions: Pitfalls for the Unwary*, 59 U. CIN. L. REV. 169, 169 (1990) (stating that a “birth mother is typically not represented by counsel”).

16. *Id.* at 169–70 (arguing that, in addition to the lack of representation for surrendering parents, “the attorney representing the adoptive parents is often confronted with the responsibility for advising the birth mother of the consequences of signing the consent form . . . . [T]here is inevitably a potential for a conflict of interest to arise”).

17. 452 U.S. 18 (1981).

18. *Id.* at 30 (“Thus, courts have generally held that the state must appoint counsel for indigent parents at termination proceedings.”).

19. *Id.* at 31 (“[N]either can we say that the Constitution requires the appointment of counsel in every parental terminating proceeding.”).

20. *Id.* at 28 (“[A]ccurate and just results are most likely to be obtained through the equal contest of opposed interests . . . represented by counsel, without whom the contest of interests may become unwholesomely unequal.”).

21. *Id.* at 33 (“True, a lawyer might have done more . . . but . . . the absence of counsel[] . . . did not render the proceedings fundamentally unfair.”).

The case was decided by a 5-4 vote.<sup>22</sup> One of the dissents pointed out that unrepresented defendants might be unable to make a convincing case that an attorney is needed; an attorney may be necessary to show that an attorney is necessary.<sup>23</sup> Another dissent argued that, regardless of expense, counsel should be provided because a priceless deprivation like losing one's children should not be made without due process of law.<sup>24</sup>

The *Lassiter* rule is reminiscent of the approach that existed before *Gideon*. In *Betts*, the case *Gideon* overturned, the Court had ruled that no lawyer was necessary for criminal defendants in state court unless the case was unusually complex or unless the defendant was illiterate or otherwise incompetent.<sup>25</sup> Just as that approach was inadequate for criminal defendants, it is also inadequate for persons facing state proceedings to declare them unfit parents and to terminate their relationship with their children. Following the same concern for correct results and for the rights of disadvantaged parties evidenced in *Gideon*, *Lassiter* should be overturned in favor of a right to counsel for indigent parents whose custody of their children is threatened.

As I have written elsewhere,<sup>26</sup> provision of counsel for indigent parents is even more necessary at the stage when children are *removed* from the home than it is at final termination of parental rights. Counsel should be provided at the removal stage as well as at the later proceeding, when the State seeks to terminate parental rights.<sup>27</sup> Once the child is removed from the home, the likelihood of parents being able to regain custody decreases exponentially.<sup>28</sup> But here, I am advocating more than a consistent policy of providing counsel at parental termination proceedings and extending that right to the prior proceedings to remove the child(ren) from the home. Even when the State is not the moving party and the parents are giving up their child for adoption, through an agency or otherwise, the surrendering parents need to be represented by counsel.

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22. *Id.* at 18.

23. *Id.* at 50–51 (Blackmun, J., dissenting).

24. *Id.* at 59 (Stevens, J., dissenting).

25. *Betts v. Brady*, 316 U.S. 455, 472–73 (1942).

26. Martha A. Field & Valerie A. Sanchez, *Equal Treatment for People with Mental Retardation* 317–21 (2000).

27. *Id.* at 317–20.

28. *Id.* at 318–19 (arguing that “removal can easily become permanent, and that a parent desiring to keep her child should fight hard to resist removal in the first place”).

The argument that counsel be provided relies on the view that giving up a child for adoption is one of the most profound and significant decisions a person can make. Moreover, the surrendering parent is likely to be in very difficult circumstances, especially relative to well-heeled adopting parents. One kind of pressure that may exist behind even a "voluntary" adoption is a threat of state removal of the child and a termination of parental rights.<sup>29</sup> If all indications are that the parents will lose their child anyway, a voluntary adoption may be the path of least resistance.

But even when there is not pressure from social services agencies, a typical surrendering parent is pressured by circumstance. A common scenario involves a young unmarried woman unable to care for her newborn. The father may have abandoned mother and child or he may simply be unwilling to raise the child, but in either case the mother may be in dire circumstances. Moreover, the adoption decision is made, in many states irrevocably, in the few days after the birth.<sup>30</sup> A person who has just given birth may be in an especially vulnerable position at that time and may even be acting irrationally.<sup>31</sup> It is not appropriate to require a person in such a state to irrevocably sign away her rights on such a fundamental subject as raising her child. A decision made in this manner without an advocate and without knowledgeable advice being provided on the decision should not be accepted as voluntary. And it is important that its involuntariness be recognized from the outset, with a *per se* rule, so that a child will not begin life with pre-adoptive parents only to be returned to birth parents later in life.<sup>32</sup>

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29. See, e.g., Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, *FORDHAM L. REV.* 2285, 2297 (1998) ("The strain of having one's children taken away is extremely distressing for parents in poverty, who are often undereducated and unworldly. This stressful situation weakens parents and, therefore, further exacerbates the imbalance of power that already favors the state in child protection proceedings. The state is clearly in control in neglect proceedings, for not only does it present the case to the court, but its 'adversary,' the parent, is unfamiliar with the intricacies of the legal proceedings. As such, parents are often unable to effectively assert their rights.")

30. See MARTHA A. FIELD, *SURROGATE MOTHERHOOD* 90-93(1991).

31. *Id.* at 90 (discussing how some states attempt to rectify the vulnerable and uncomfortable position of mothers who have just given birth by imposing "a waiting period after the child's birth during which the mother could not surrender the child for adoption").

32. *Id.* at 89 ("[I]t is best that a baby's custody not be changed back and forth, whether she is to live with her natural parent(s) or with an adoptive family. It is in the best interests of the child to have a clear rule from the outset as to who her

Parents who give up older children, of course, also may labor under difficult circumstances. They often act under threat of a removal of the children by the State. Children whose parents have disabilities, for example, may not come to the attention of the social services system until the children are enrolled in school.<sup>33</sup> At that point, the authorities sometimes start to question the parenting of persons with disabilities, especially intellectual disabilities.<sup>34</sup> Parents prevailed upon to give up their children should surely be represented by counsel—counsel that is on their side. Alternatively, a few parents put older children up for adoption because they simply cannot cope, or because they must serve a long jail sentence or undergo medical treatment, or for some other reason.

In short, adoption is unlikely to be a joyful occasion for the surrendering parent(s), although typically it is a joyous occasion for the adopting parents. Surely any surrendering parents who are in a celebratory mood would count as a small minority. In *Gonzales v. Carhart*,<sup>35</sup> Justice Kennedy patronizingly opined about abortion in denying the plaintiffs the procedure of their choice: “some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”<sup>36</sup> Surely this statement is more generally true about giving up a child for adoption. Many surrendering parents come to regret their decision, or at least to regret that they had to make it.

In our class-based adoption system, in which the comparatively well-to-do adopt the children of the poor, it is essential to protect against possible exploitation by making certain that persons who are losing their children know their rights and can assert them. A birthmother should be advised, for example,

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proper custodian is, to prevent her from being transferred back and forth between parties who are feuding over their parental rights.”)

33. See, e.g., Alexis C. Collentine, *Respecting Intellectually Disabled Parents: A Call for Change in State Termination of Parental Rights Statutes*, 34 HOFSTRA L. REV. 535, 543 (2005) (noting that “a common cause of action against delayed parents is educational neglect, or failing to ensure that the child is attending school”).

34. *Id.* (“Mentally delayed parents more often face allegations of neglect . . . .”); see also Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL’Y & L. 112, 160–61 (2007) (“[I]t becomes easy to make an automatic leap from disability to inability to care for a child, in both casework practice and as proof in court.”).

35. 550 U.S. 124 (2007).

36. *Id.* at 159 (internal citations omitted).

that it is only when she relinquishes custody of her child that she may lose all rights and all ability to play a role in her child's life.<sup>37</sup> She also should know that a promise to give up a child for adoption, made before birth, has no binding effect.<sup>38</sup> A right to counsel could greatly help.

To provide counsel, free of charge, to persons who cannot afford lawyers but are giving up their children, would likely have a large and ultimately salutary effect upon the forms adoption takes in this country. First and foremost, it could help prevent the surrendering parents from being coerced. But even when giving up the child is necessary, a lawyer could also help surrendering parents understand their legal position and their rights.

Surrendering parents, especially those who are not being coerced by the State, are likely to be in a strong bargaining position. Healthy newborns are particularly in demand. The surrendering parents cannot bargain for money without violating the baby selling laws,<sup>39</sup> but they are in a position to insist on an adoption arrangement that leaves them some part to play in the child's life. Even if surrendering parents are not seeking such a plan at the moment of adoption, the prudent lawyer would leave it open to them to demand some contact in the future. Such an arrangement would prove much more palatable to many surrendering parents than the traditional total surrender of parental rights and contact with the child.

Nor need the possibility of contact with the surrendering parents be disruptive to children. Full parental rights would reside with the adoptive parents, and their legal status would not be affected by the child's relationship with the parents who gave the child up. Adoption would remain fully final. Depending upon the circumstances, contact could be limited to twice a year, for example, and involve supervised visitation if necessary. Sometimes contact might be by mail only, at least until a certain age. Sometimes more contact, or contact with the whole adoptive

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37. FIELD, *supra* note 29, at 89 ("Once she turned over the baby, however, she would have performed her part of the bargain and the contract would be complete and binding.").

38. *Id.* at 84 ("In an adoption situation, no state in this country binds a mother to give up her child because of a consent to adoption or a contract with prospective adoptive parents that was executed before the child was born.").

39. See *In re Baby M*, 537 A.2d 1227, 1234-35 (N.J. 1988) ("[W]e find the payment of money to a 'surrogate' mother illegal . . . . We find no offense to our present laws where a woman voluntarily and without payment agrees to act as a 'surrogate' mother, provided that she is not subject to a binding agreement to surrender her child.").



family, might be desirable. An adoption contract could stipulate what model of open adoption was contemplated or could leave its contours open.

Having a lawyer for the surrendering couple would undoubtedly accelerate the use of an open adoption model. It would permit birthparents, who often are without fault in having to give up their children, to have some limited role in the life of their child as she is growing up. Such an outcome could better serve the interests of both surrendering parents and surrendered children than the traditional total-surrender model, without significantly reducing adoptive parents' authority. Some possibility for future contact is likely to result when the surrendering parents have their own legal advice and recognize their ability to affect the terms of an adoption arrangement.

## II. Post-Conviction Habeas Corpus

One context in which it is simply foolish not to recognize a right to counsel is federal post-conviction relief, that is, federal habeas corpus for state prisoners under 28 U.S.C. §§ 2241–54 and the similar § 2255 motions for federal prisoners. I will focus on habeas corpus, but since habeas corpus and §2255 actions have very similar rules, most points apply to federal prisoners' § 2255 petitions as well.

Since at least 1963, habeas corpus was available without any limitation, providing at least a theoretical possibility of release as long as one was in prison, if the prisoner could show that his incarceration violated the U.S. Constitution.<sup>40</sup> Habeas resulted in much litigation, often orchestrated by jailhouse lawyers, but not many releases.<sup>41</sup> The Supreme Court's reaction against this expansive habeas started in 1976 in *Stone v. Powell*,<sup>42</sup> which essentially removed habeas for search and seizure violations. The cutback accelerated significantly in *Wainwright v. Sykes*<sup>43</sup> and

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40. *Fay v. Noia*, 372 U.S. 391, 402 (1963) (“If the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.”).

41. See PETER W. LOW ET AL., *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 824 (7th ed. 2011) (characterizing current habeas litigation as “both extremely complicated and highly unlikely to grant relief in any particular case”).

42. 428 U.S. 465 (1976) (holding habeas unavailable to address Fourth Amendment claims unless there had been no opportunity to present the claim in the trial court).

43. 433 U.S. 72 (1977).

ensuing cases, which held that on habeas a petitioner must show "cause and prejudice" for not having raised a contention earlier, and which defined the terms "cause and prejudice" very narrowly.<sup>44</sup> The narrowing decisions piled up quickly, but none seemed more devastating to the traditional, indeed hallowed, right of habeas corpus than Congress's Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),<sup>45</sup> which purported to set out the new rules.

AEDPA adopted many of the cutbacks to habeas that the Rehnquist Court had created and often made them even stricter.<sup>46</sup> But the key provision was a statute of limitations for habeas corpus and § 2255 actions, requiring that the action be brought within one year of conviction (with tolling for time spent in state post-conviction relief).<sup>47</sup>

All of these prerequisites to having one's constitutional claims adjudicated on the merits have created a system that can be extremely difficult for a petitioner to navigate. One's claim cannot be heard unless one has an airtight explanation for not having raised it earlier.<sup>48</sup> Even then, it must not be "harmless error," in the sense that there is much untainted evidence attesting to the petitioner's guilt.<sup>49</sup> The only way around those requirements is for the petitioner somehow to show that he is

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44. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (noting that "both cause and prejudice must be shown, at least in a habeas corpus proceeding challenging a state court conviction.").

45. Pub. L. No. 104-132, §§ 101-108, 110 Stat. 1214, 1217-26 (1996) (codified as amended in part at 28 U.S.C. §§ 2244-55 (2006)).

46. See, e.g., 28 U.S.C. § 2244(b)(2) (expanding upon the *Wainwright* holding by barring "a claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application" unless the claim "relies on a new rule of constitutional law" that has been made retroactive by the Supreme Court, or that "(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense").

47. *Id.* at § 2244(d), § 2255(f).

48. See, e.g., *Murray*, 477 U.S. at 492 ("[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim.").

49. Even though this is not the only, or the preferable, way to define harmless error, the Court in habeas cases has looked to the amount of untainted evidence against the petitioner in order to say that there was no prejudice. See Martha A. Field, *Assessing the Harmlessness of Federal Constitutional Error—A Process in Need of a Rationale*, 125 U. PA. L. REV. 15, 17-18 (1976).

“probably . . . innocent.”<sup>50</sup> If the petitioner has raised an issue before and had it adjudicated, the habeas court will presume prior factual findings to be correct and will review only to see if the decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”<sup>51</sup> And even a claim that was raised cannot be heard if it suggests “a new rule;” that is, one that was not dictated by existing precedent at the time of the conviction.<sup>52</sup> A conviction will not necessarily be overturned even if it is found to be wrong; the judge must have acted unreasonably as well as erroneously.<sup>53</sup>

A state prisoner petitioning for habeas corpus must first exhaust all available state remedies, including post-conviction remedies.<sup>54</sup> Every claim he presents to the federal habeas court must have been exhausted.<sup>55</sup> If in error, the petitioner presents an unexhausted claim, he will either forfeit that claim proceeding only with the exhausted ones, or he will need to return to state court to have it heard.<sup>56</sup> But by the time the federal judge rules that she cannot hear a claim because it is not exhausted, the one-year period for federal filing may have expired.<sup>57</sup> The prisoner’s only hope at that point is to persuade the judge in her discretion to grant a stay and abeyance, keeping the federal claim alive while the prisoner repairs to state court.<sup>58</sup>

Another problem is that the petitioner is usually not

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50. See *Murray*, 477 U.S. at 496.

51. 28 U.S.C. § 2254(d)(1).

52. *Teague v. Lane*, 489 U.S. 288, 316 (1989); see also *Butler v. McKellar*, 494 U.S. 407, 412–414 (1990) (citing recent precedent to explain that the Court will not apply new rules to cases that were decided before the rule was announced).

53. See *Williams v. Taylor*, 529 U.S. 362, 365 (2000); see also *Bell v. Cone*, 535 U.S. 685, 699 (2002) (“It is not enough to convince a federal habeas corpus court that [the judge applied the law] incorrectly. Rather, he must show that [the judge applied the law] to the facts of his case in an objectively unreasonable manner.”).

54. 28 U.S.C. § 2254(b)(1).

55. *Id.* at § 2254(c).

56. See *Rose v. Lundy*, 455 U.S. 509, 520 (1982).

57. See *Duncan v. Walker*, 533 U.S. 167, 186 (2001) (“The statute tolls the one-year limitations period during the time the prisoner proceeds in the state courts. But unless the statute also tolls the limitations period during the time the defective petition was pending in federal court, the state prisoner may find, when he seeks to return to federal court, that he has run out of time.”).

58. See *Rhines v. Weber*, 544 U.S. 269, 277 (2005) (“Because granting a stay effectively excuses a petitioner’s failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner’s failure to exhaust his claims first in state court.”).

permitted to come to federal court more than once, so there is a danger in the petitioner not presenting all of his claims at the same time. Second or successive motions for habeas must be certified by a panel of the court of appeals to contain either newly-discovered evidence that would be sufficient to establish that no reasonable factfinder would have found the petitioner guilty, or a new and previously unavailable rule of constitutional law that the Supreme Court has already made retroactive.<sup>59</sup> Even if the motions get by the court of appeals panel, the district judge must dismiss the claims if they do not meet those requirements.<sup>60</sup> In short, the opportunities for a second habeas petition are almost nonexistent.

These are only a few of the tangle of rules that impede access to federal habeas corpus. Suffice it to say that the system has changed radically since the 1960s and 1970s and that much sophistication is required to have one's petition heard on the merits today. Prisoners are not equipped to handle the procedural complexities on their own; when they try, they manage to forfeit even the best of claims. If there is to be post-conviction relief at all (and many believe that is constitutionally required even for state prisoners), petitioners need counsel to assist them.

Strangely, the habeas statute does have a provision protecting against accidental forfeiture of rights, but it is the State, and not the prisoner, who is protected. Section 2254(b)(3) provides, "[a] State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."<sup>61</sup> It is understandable that prosecuting attorneys would be tripped up by the complications of the new habeas requirements. But it is deeply cynical to subject indigent and often uneducated prisoners to these same requirements as a precondition to presenting their constitutional claims for release.

### III. Immigration

The United States is a nation of immigrants, but not all immigrants are welcomed with open arms. Instead, a robust system of immigration law enforcement has developed to apprehend, detain, and ultimately deport illegal immigrants or

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59. 28 U.S.C. § 2244(b)(3)(A), § 2255(h) (2006).

60. *Id.* § 2244(b)(4).

61. *Id.* at § 2254(b)(3).

noncitizens breaking the law. While this development is not new, the process is much more frequently employed than it used to be. The American Bar Association notes that “[i]n recent years, the grounds for removal have expanded, the available relief from removal has been restricted, and the use of detention . . . has skyrocketed.”<sup>62</sup>

Detention and deportation of immigrants, like criminal punishment, is an extreme sanction, and also, like criminal punishment, is based upon allegations of wrongdoing. Nonetheless, because immigration proceedings are considered administrative and not criminal, the Sixth Amendment right to counsel does not necessarily apply to them.<sup>63</sup> This is unfortunate, not only because these proceedings carry a “particularly severe penalty,”<sup>64</sup> but also because sympathetic presentation of the equities of the particular case and accuracy of factfinding are essential to just results. The current system is inequitable on its face and unjustified by pragmatic reasons.

The Immigration and Nationality Act (INA) provides for a right to hire counsel,<sup>65</sup> a right that exists in all of the problem categories discussed in this essay. In our unequal economy, however, many people are unable to take advantage of such a right. Immigration provides an apt example. Currently, more than half of the individuals who face immigration proceedings are without representation, and this proportion rises to eighty-four

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62. AM. BAR. ASS'N, RIGHT TO COUNSEL RESOLUTION 3 (2006), available at [http://www.americanbar.org/content/dam/aba/migrated/intlaw/policy/humanrights/immigration2\\_06107A.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/intlaw/policy/humanrights/immigration2_06107A.authcheckdam.pdf). Although, on preliminary reports, 2013 deportation numbers are down eleven percent from 2012, this likely results from high-profile political concerns rather than a clear move away from immigration enforcement. Stephen Dinan, *Report: Deportations Plummet in 2013, Lowest Since 2007*, WASH. TIMES (Oct. 30, 2013), <http://www.washingtontimes.com/news/2013/oct/30/deportations-plummet-2013-lowest-2007/?page=all> (reporting that 364,700 illegal immigrants were deported in 2013 compared to nearly 410,000 in 2012).

63. Note, *Representation by Counsel in Administrative Proceedings*, 58 COLUM. L. REV. 395, 406 (1958) (“The [S]ixth [A]mendment does not require the appointment of counsel in civil actions, nor has such a requirement been inferred from the due process clauses. Arguably, an administrative proceeding in which one of the parties is an organ or agency of government is not of a pure civil nature. It is not, however, penal.”).

64. *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (internal quotation marks omitted).

65. 8 U.S.C. § 1362 (2006) (providing that an individual is entitled to “the privilege of being represented (at no expense to the Government) by such counsel . . . as he shall choose”).

percent of those in detention.<sup>66</sup> While detained, noncitizens are unable to earn money with which to hire an attorney, and, regardless, would face further logistical hurdles in doing so.<sup>67</sup> It is practically impossible for most individuals caught up in the immigration system to retain counsel at their own expense.

The lack of representation has profound consequences. Immigration law is a maze of complexity, difficult to navigate even for a lawyer and even for persons who speak English; for non-English speakers, the likelihood of understanding one's rights and potential legal options is even lower. When one considers that many individuals facing deportation are likely to have little education or money, it is difficult to avoid the conclusion that they will be unable to represent themselves effectively.

It is not surprising that a 2004 Department of Justice report found that pro se immigrants succeeded in their appeals only ten percent of the time; when represented pro bono, success rates rose to forty percent.<sup>68</sup> Predictably, representation in immigration proceedings measurably improves one's chances of avoiding deportation and staying with one's family.

Many academics have argued that, administrative or not, immigration proceedings implicate constitutional due process rights.<sup>69</sup> Although the INA requires that counsel in immigration proceedings appear at no expense to the government, a broader constitutional ruling overturning this INA provision is not unimaginable.<sup>70</sup> Indeed, *Padilla v. Kentucky* recently found that

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66. COMM'N OF IMMIGRATION, AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM 5-8 (2010) [hereinafter REFORMING], available at [http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba\\_complete\\_full\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/aba_complete_full_report.authcheckdam.pdf). The report also notes that generally, "[r]epresented noncitizens tend to fare better than those who navigate the process without assistance." *Id.* at 5-9.

67. See Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 116 (2008) (noting "the remote location of detention facilities, transfers, restrictive detention policies, and the inability to earn money").

68. EXEC. OFFICE FOR IMMIGRATION REVIEW, DEPT OF JUSTICE, THE BIA PRO BONO PROJECT IS SUCCESSFUL, Attachment E (2004), available at <http://www.justice.gov/eoir/reports/BIAProBonoProjectEvaluation.pdf>.

69. See, e.g., Kaufman, *supra* note 67; Matt Adams, *Advancing the "Right" to Counsel in Removal Proceedings*, 9 SEATTLE J. SOC. JUST. 169, 169 (2010).

70. See Adams, *supra* note 69, at 176 ("[T]here remains a notable absence of case law exploring the right to assigned counsel based on the Constitution. The right to assigned counsel in other criminal and civil proceedings was almost uniformly the result of constitutional challenges, not the result of Congress's largesse."). Congress may occasionally be more generous than Adams credits it; the Senate's immigration reform bill would provide free lawyers to "particularly

the severity of deportation justified invoking the Sixth Amendment's right to effective counsel when an attorney fails to advise a client of the immigration consequences of a guilty plea.<sup>71</sup>

Currently, a great many persons are being deported: 368,644 noncitizens were deported in 2013.<sup>72</sup> By comparison, the U.S. Navy counts just under 324,000 active duty personnel.<sup>73</sup> There is a thirty percent difference in successful immigration appeals between represented and unrepresented noncitizens;<sup>74</sup> thirty percent of the number of people deported in 2013 is about 110,000, while the IRS had 97,742 employees in 2012.<sup>75</sup> Immigration law touches, and irrevocably upends, a remarkable number of lives each year. Noncitizens need representation in order to receive a fair hearing, and justice requires that they be provided counsel at immigration proceedings.

#### IV. Sexual Assault and Rape in the Military

Like the adoption topic discussed above, this topic applies particularly to women, but it by no means applies only to women. It is estimated that 53% of unwanted sexual contact in the military involve male victims.<sup>76</sup> Although this is a numerical majority, rape in the military falls much more severely upon

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vulnerable" immigrants in deportation proceedings. See Mark Noferi, *Deportation Without Representation*, SLATE (May 15, 2013, 12:04 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/05/the\\_immigration\\_bill\\_should\\_include\\_the\\_right\\_to\\_a\\_lawyer.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/the_immigration_bill_should_include_the_right_to_a_lawyer.html).

71. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) ("We now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less."). *Padilla's* holding overcame the Supreme Court of Kentucky's distinction between direct and collateral consequences of a guilty plea for Sixth Amendment purposes for the first time. This solicitude for deportation as an exceptionally significant life event may well signal a willingness to extend other constitutional rights.

72. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ERO ANNUAL REPORT: FY 2013 ICE IMMIGRATION REMOVALS 1 (2013).

73. *Status of the Navy*, U.S. NAVY, [http://www.navy.mil/navydata/nav\\_legacy.asp?id=146](http://www.navy.mil/navydata/nav_legacy.asp?id=146) (last visited Apr. 2, 2014).

74. EXEC. OFFICE FOR IMMIGRATION REVIEW, *supra* note 68.

75. *Employment and Trends—September 2012*, U.S. OFFICE OF PERSONNEL MANAGEMENT, <http://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/employment-trends-data/2012/september/table-15/> (last visited Apr. 2, 2014).

76. James Dao, *In Debate Over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES, June 24, 2013, at A12, available at <http://www.nytimes.com/2013/06/24/us/in-debate-over-military-sexual-assault-men-are-overlooked-victims.html?pagewanted=all>.

women when their relatively low numbers are taken into account. One study found that 79% of enlisted women reported sexual harassment during military service, 54% reported unwanted sexual contact, and 30% had experienced at least one attempted or completed rape.<sup>77</sup>

After years of controversy, Congress has finally taken action. The recently passed National Defense Authorization Act for Fiscal Year 2014<sup>78</sup> (NDAA) includes numerous reforms of the military's handling of sexual assault claims, including the extension of a right to counsel, provided free of charge, to any person filing a sexual assault complaint.<sup>79</sup> This uncharacteristic reform coming from today's do-nothing Congress can be explained in large part because it seems impolitic to oppose this "women's issue," especially given the current epidemic of increasing sexual assault and rape in the ranks.<sup>80</sup>

Two women on the Senate Armed Services Committee are the force behind the changes. They are Senator Claire McCaskill of Missouri and Senator Kirsten Gillibrand of New York, both Democrats.<sup>81</sup> The NDAA reforms—including the elimination of sexual assault statutes of limitations, restrictions on commanders' power to overturn jury verdicts and amend sentences, and various provisions enhancing victims' welfare throughout the court-martial process—were supported by the Senators but fall short of both Senators' proposed bills. Senator Gillibrand supports reforms suggested by Senator McCaskill but wants to go further in

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77. See Anne G. Sadler et al., *Factors Associated with Women's Risk of Rape in the Military Environment*, 43 AM. J. INDUS. MED. 262, 266 (2003). Repeated rape is also a problem: thirty-seven percent of women who had encountered rape had experienced it more than once, while fourteen percent reported being gang-raped. *Id.*

78. H.R. 3304, 113th Cong. (2013) (enacted).

79. *Id.* § 1716.

80. The Department of Defense reported in the summer of 2013 that an estimated 26,000 service members were sexually assaulted in 2012, up from 19,000 in 2010. 1 U.S. DEPT OF DEF. SEXUAL ASSAULT PREVENTION & RESPONSE, DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2012 at 12 (2013) [hereinafter SAPR REPORT], available at [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf).

81. A number of bills have also been proposed by members of the House of Representatives, particularly Representative Jackie Speier, but the competing bills in the Senate have driven the issue into the public eye. See Darren Samuelsohn & Anna Palmer, *Kirsten Gillibrand and Military Sexual Assault: 5 Things to Watch*, POLITICO (June 13, 2013, 2:46 PM), <http://www.politico.com/story/2013/06/kirsten-gillibrand-military-sexual-assault-92749.html>.



reducing the influence of military commanders.<sup>82</sup>

The culture of the military, and whether to support or bypass it, is at the heart of the controversy between the two Senators. The military now admits women in large numbers and allows them to be given the same responsibilities as other soldiers, but these are fairly recent developments. Women now compose nearly fifteen percent of the military but are extremely underrepresented in the top ranks.<sup>83</sup>

With gender integration have come more frequent problems of harassment, sexual assault, and even rape. One in three women in the military is sexually assaulted (as compared to one in six in the civilian world).<sup>84</sup> The “vast majority” involve service member on service member, with female junior enlistees the typical victims, and older, higher-ranking males the typical perpetrators.<sup>85</sup> Approximately one in thirteen reported assaults get to court-martial.<sup>86</sup> Most who are convicted get a fine, and some are let off lightly with a lesser included offense.<sup>87</sup> Repeat offenders are thought to commit ninety percent of the assaults.<sup>88</sup>

On this issue, the prevalent policy in the command unit is “don’t ask, don’t tell.” Like a family, the unit should not air its problems in the outside world; any problems should be taken care of within. Complaining victims cause trouble. Soldiers who report rape or sexual assault may thereby end their careers. It is not unusual for complaining soldiers to be dismissed from the military for a “personality disorder.”<sup>89</sup>

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82. Stacy Kaper, *Gillibrand, McCaskill Duel for Votes on Sex Assault Bill*, NATIONAL JOURNAL (Nov. 19, 2013), <http://www.nationaljournal.com/daily/gillibrand-mccaskill-duel-for-votes-on-sex-assault-bill-20131119>.

83. *By the Numbers: Women in the U.S. Military*, CNN (Jan. 24, 2013, 5:27 PM), <http://www.cnn.com/2013/01/24/us/military-women-glance>. Women make up approximately seven percent of the top ranks, or “69 of 976 generals and admirals.”*Id.*

84. Molly O’Toole, *Military Sexual Assault Epidemic Continues to Claim Victims as Defense Department Fails Females*, HUFFINGTON POST (May 20, 2013, 6:10 PM), [http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department\\_n\\_1834196.html](http://www.huffingtonpost.com/2012/10/06/military-sexual-assault-defense-department_n_1834196.html).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. David S. Martin, *Rape Victims Say Military Labels them ‘Crazy,’* CNN (Apr. 14, 2012, 12:29 PM), <http://www.cnn.com/2012/04/14/health/military-sexual-assaults-personality-disorder/> (“CNN has interviewed women in all branches of the armed forces, including the Coast Guard, who tell stories that follow a similar

The NDAA does prohibit explicit retaliation against reporting victims, but the existing procedural system still does not accord with basic notions of an adversary process and is not calculated to produce just results. To review only a few of its inequities for persons who complain of sexual assault or rape: the commanding officer of the accused has the ultimate decision whether to bring charges;<sup>90</sup> he can delay the decision for many months if he wishes;<sup>91</sup> part of the assessment can involve the value of the officer to the military—it will cut in his favor if he is an excellent football player or a popular or efficient officer, for example, even though those factors have nothing to do with the charges;<sup>92</sup> if the commander does proceed, he selects the pool from which the court-martial panels, the functional analogues to juries, are selected. Panels often contain no women.<sup>93</sup> No wonder almost ninety percent of sexual assaults in the military go unreported.<sup>94</sup> They are unlikely to result in punishment to the accused.

Senator Claire McCaskill has proposed several small changes to the current policy beyond those now embodied in the NDAA.<sup>95</sup> She would place the authority in senior officers, not unit commanders, as is currently done, and would prohibit the

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pattern—a sexual assault, a command dismissive of the allegations and a psychiatric discharge.”).

90. O’Toole, *supra* note 84 (“Under the [Uniform Code of Military Justice], the accused’s commander is responsible for reviewing the initial report and determining whether there is sufficient evidence to take action.”).

91. *FAQ 19, Sexual Harassment / Assault Response and Prevention*, U.S. ARMY, <http://www.sexualassault.army.mil/faqs.cfm> (last visited Feb. 13, 2014) (“The delayed action policy means that a Commander may delay action, but does not require delaying action.”).

92. *See* O’Toole, *supra* note 84 (“[C]ommanding officers are authorized to take into account factors unrelated to the case, such as the value of the accused to the unit.”). Although the NDAA addresses this issue, it only mandates that the Secretary of Defense produce a proposed amendment to eliminate these factors from consideration in sexual assault cases within 180 days. H.R. 3304, 113th Cong. § 1708 (2013) (enacted). Legislating the initiation of a review process is quite different from legislating reform.

93. *See* *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988) (“Congress has not required that court-martial panels be unrepresentative of the military population.”). Given the relatively small number of women in the military, and especially in higher ranks, *see supra* note 83 and accompanying text, this lack of representation is unsurprising.

94. SAPR REPORT, *supra* note 80, at 97.

95. Although the NDAA includes many reforms, both Senators McCaskill and Gillibrand continue to further their more comprehensive proposals. *See* Meredith Clark, *What’s Next in the Fight to Stop Military Sexual Assault*, MSNBC (Dec. 13, 2013, 3:00 PM), <http://www.msnbc.com/melissa-harris-perry/stopping-military-sexual-assault-round-2>.

consideration of a defendant's value as a soldier in acquittal.<sup>96</sup> But most of the changes proposed by Senator McCaskill have been supported by the military and the Department of Defense and adopted in the NDAA. They do indeed ameliorate the current situation.

One reason for the military to have supported the reforms, apart from the embarrassment of increasing tales of sexual assault, is that a more radical set of reforms that the military would like to resist has been put forward by Senator Gillibrand.<sup>97</sup> Senator Gillibrand would remove responsibility for prosecution from the chain of command and place authority in independent military prosecutors.<sup>98</sup> These would be lawyers and presumably would be more objective, and more governed by law, than military commanders. She would require that all charges of sexual crimes be referred to these prosecutors, who would face a ninety-day deadline for initiating proceedings.<sup>99</sup> The issue between the proposals is whether the Gillibrand approach will undermine the command structure in a harmful way.<sup>100</sup> Senator McCaskill and the military claim that Senator Gillibrand's proposed reforms would undermine military cohesion.<sup>101</sup> They say a sentence is more meaningful if imposed within the chain of command, and

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96. See Laura Bassett, *Key Military Sexual Assault Reforms Dropped from Defense Bill*, HUFFINGTON POST (Dec. 10, 2013, 12:10 PM), [http://www.huffingtonpost.com/2013/12/10/military-sexual-assault\\_n\\_4419029.html](http://www.huffingtonpost.com/2013/12/10/military-sexual-assault_n_4419029.html). Some progress has been made in involving more senior commanders in the adjudication of sexual assault cases. See Memorandum from Leon Panetta, Sec'y of Def., to Sec'ys of the Military Dep'ts. (Apr. 20, 2012), available at [http://www.dod.gov/dodgc/images/withhold\\_authority.pdf](http://www.dod.gov/dodgc/images/withhold_authority.pdf) (withholding initial disposition authority from lower commanders in certain sexual assault cases).

97. Sahil Kapur, *McCaskill, Gillibrand Clash on How to Stop Rape in Military*, TALKING POINTS MEMO (Jul. 30, 2013, 10:00 AM), <http://talkingpointsmemo.com/dc/mccaskill-gillibrand-clash-on-how-to-stop-rape-in-military> ("[Senator Gillibrand's] competing plan would remove sexual assault . . . from the chain of command, over the objections of the defense establishment.").

98. *Id.*

99. See Michael R. Crittenden, *Military Sexual-Assault Rules Advance*, WALL ST. J. (Dec. 9, 2013, 8:12 PM), <http://online.wsj.com/news/articles/SB10001424052702303330204579248773997820190>.

100. *Id.* ("Opponents have argued that moving sexual assault cases out of the chain of command is a bad idea because it would prevent unit commanders from taking an active role in preventing and punishing sexual assaults.").

101. Kapur, *supra* note 97; see also Claire McCaskill, *Sexual Assaults in the Military—The Policy Matters*, HUFFINGTON POST (Nov. 18, 2013, 2:05 PM) [http://www.huffingtonpost.com/claire-mccaskill/sexual-assaults-in-the-mi\\_b\\_4297449.html?](http://www.huffingtonpost.com/claire-mccaskill/sexual-assaults-in-the-mi_b_4297449.html?)

that it might even be dangerous for a person to report an offense without having the commander's support.<sup>102</sup> Senator McCaskill also points out that sometimes commanders bring charges when prosecutors would not; she counts ninety-three such occasions in the past two years, some of which resulted in conviction.<sup>103</sup>

At its root, Senator Gillibrand's approach *does* seek to undermine the command structure, or at least its corrupting influence over the administration of justice. While it may augment cohesion to be vindicated by one's chain of command, this vindication is often withheld entirely. Claiming that reporting offenses may be dangerous without the support of one's commander, moreover, misses the point: the commander who does not support a legitimate report is unlikely to pursue court-martial himself. And finally, appealing to ninety-three cases where commanders brought charges when prosecutors would not is unconvincing, as it ignores the more than 2500 reported sexual assaults that were not brought to trial in 2012 alone.<sup>104</sup> Vigorous prosecution of sexual assault and rape cases is lacking throughout the justice system, civil as well as military, but surely the proper response is not to place the decision in the hands of an interested party—instead, it is to ensure that there is a legitimate chance for neutral prosecutors to enforce the law. Senator Gillibrand's reforms bring this ideal closer to reality.

Senator Gillibrand's proposal is widely supported by many women's groups, by Harry Reid, by Ted Cruz, and others.<sup>105</sup> She hoped to substitute her reforms for those of Senator McCaskill and was promised a floor vote this spring. However, in March of 2014, Senator McCaskill actually "led the charge" to block Senator Gillibrand's bill from advancing in the Senate.<sup>106</sup> Even though many of Senator McCaskill's proposals have already been enacted and represent a significant achievement, the more far-reaching approach of Senator Gillibrand is needed in order to strengthen the adversary process and promote just outcomes.

Even though the NDAA now provides a long-overdue right to counsel in sexual assault cases, that right cannot be effective

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102. Kapur, *supra* note 97.

103. McCaskill, *supra* note 101.

104. McCaskill, *supra* note 101; Bassett, *supra* note 96 ("The Pentagon estimates that out of the 26,000 incidences of unwanted sexual contact that occurred in the military in 2012, only 3,000 were reported, and only 300 led to prosecutions.").

105. Kapur, *supra* note 97.

106. Helene Cooper, *Senate Rejects Blocking Military Commanders from Sex Assault Cases*, N.Y. TIMES, Mar. 7, 2014, at A11.

without a meaningful judicial process surrounding it. It is not enough to receive legal consultation when a commanding officer can quash or indefinitely delay any court-martial. Without a legitimately functioning system of justice, the default power dynamic in the military is maintained. Women, who remain the numerical and cultural minority, will continue to be disadvantaged until there is a neutral arbiter to moderate disputes. Under the NDAA and Senator McCaskill's proposed reforms, the status quo retains control over a choke point in military justice. Only by disrupting command control can there be a just and adversarial process made effective by the newly enacted right to counsel for victims of sexual assault and rape. That is why Senator Gillibrand's reforms remain necessary.

### **Conclusion**

*Gideon* was a beginning in the quest for equal justice, and even in the criminal context its full promise has not been achieved. The four examples I have discussed demonstrate that the right to appointed counsel needs to be extended beyond state felony prosecutions to other situations as well. Otherwise, this nation will fall far short in its aim of providing equal access to justice. Providing counsel to indigents is costly, of course, and so is providing an effective adversarial system. The accelerating interest in law schools in pro bono work and the growth of a pro bono bar of lawyers may help. But in our country, where we spend so much and have so much, we can afford to provide some basic protections for those in especially difficult situations, even though they lack the funds to pay. The integrity of our processes demands such reform, and so does justice to those who are caught up in them.

