

Public Defenders and Socioeconomic Disparity of Outcomes in the United States Legal System

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Introduction

The past few years have ushered the topic of criminal justice equality into the nation's consciousness. With public displays of police brutality, like the killings of Travon Martin, Eric Gerner, George Floyd, and far too many more, we got a glimpse at the sad reality of modern-day injustice. Many have all but concluded that the outcomes of justice are highly unequal across boundaries of socioeconomic class. This interpretation challenges the work of critics, who have long assumed the 'objectivity' and infallibility of the justice system. Recent events like these shed new light on the justice system's broken state of affairs, which has largely evaded reform since the genesis of the United States. One staple right afforded to criminal defendants is the right to *effective legal counsel*, which, nowadays, takes the form of Public Defenders employed by state or federal governments.

Historical Context Leading to Present Day

To understand how the modern-day system came to be, it's crucial to examine the landmark cases leading up to our current constitutional interpretation of the right to counsel. With the ratification of the Bill of Rights in 1791, the Sixth Amendment established the right "to have the Assistance of Counsel for his defense."¹ With the help of the Communist Party USA and later the NAACP, the 1932 case *Powell v. Alabama* expanded upon these rights when the Supreme Court of the United States overturned death penalty convictions of nine young black men, "The Scottsboro boys," because they had no access to a lawyer until shortly before the trial.^{2 3} Overturning the Alabama Supreme Court's ruling, the Supreme Court ruled 6--3 the following:

¹ United States Constitution, Amendment VI

² Murray, H. T. (1967). The NAACP versus the Communist Party: The Scottsboro Rape Cases, 1931-1932. *Phylon* (1960-), 28(3), 276–287. <https://doi.org/10.2307/273666>

³ Klarman, M. J. (2000). The Racial Origins of Modern Criminal Procedure. *Michigan Law Review*, 99(1), 48–97. <https://doi.org/10.2307/1290325>

In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law.⁴

This marked a *de jur* departure from the common practice of racially motivated sham trials and extrajudicial lynchings at time. In *Johnson v. Zerbst*, the petitioner, Johnson, appealed a felony conviction by claiming that, since he represented himself in court, his Sixth Amendment Right had been violated. In a 6–2 decision, the Supreme Court reaffirmed that counsel was necessary when a defendant didn’t have the means to hire their own within a federal trial.⁵ Even in the aftermath of this case, the recognized right to counsel only extended to federal courts. For instance, in 1942, the Court’s 6–3 ruling in *Betts v. Brady* denied that a lack of counsel in a state court infringed upon the Due Process Clause of the Fourteenth Amendment, adding that the right to an attorney only applied to state trials in ‘special circumstances.’ Justice Hugo Black in his dissent to the majority ruling writes,

A practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty. [...] Denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented.⁶

Here, Black makes the point that denying legal counsel on the basis of poverty is in clear violation of the equal protection guaranteed by the Fourteenth Amendment, since it results in vastly different outcomes: an insightful opinion that remains equally relevant today. Despite, *stare decisis*, the duty to ‘stand by’ previous rulings, this holding was overturned by the landmark case *Gideon v. Wainwright*, where, upon appealing a guilty verdict, the Supreme Court appointed defendant Clarence Gideon the future justice

⁴ Powell v. Alabama, 287 U.S. 45, 49 (1932)

⁵ Johnson v. Zerbst, 304 U.S. 458 (1938)

⁶ Betts v. Brady, 316 U.S. 455 (1942)

nominee Abe Fortas to represent him.⁷ Before the Supreme Court, Fortas asserted that, one, the premise of ‘special circumstances’ was ‘unworkable’ since it took place before trial, where, for example, he argues a layman cannot be expected to determine if a witness testimony should be barred as hearsay evidence, and that, two, the first thing a reputable lawyer does when accused of a crime is hire an attorney, hence, if a lawyer does not feel fit representing themselves in court of law, neither should a layman.⁸ Justice Black, abiding by his previous dissent to the *Betts* ruling, provided the majority 6–3 decision establishing that assistance of counsel is unequivocally essential to a fair trial at both a federal and state level, explaining that “lawyers in criminal courts are necessities, not luxuries.”^{9 10} Following a clarification in 1984 regarding the definition of an *effective* legal counsel, we arrive at the constitutional interpretation of today. Examining whether these guarantees have stood the test of time now requires acknowledging the state of our modern public defender system.

The Role of a Public Defender

In the aftermath of *Gideon*, the 1960s saw the creation of systems and programs to provision public defenders as legal counsel at a scale never before seen.¹¹ The notion of a ‘public defender’ was ideated by female trailblazer Clara Shortridge Foltz—the first female lawyer on the west coast.¹² Research by Barbra Babcock at Stanford University revealed in a biography that Foltz, in 1893 at the Chicago World’s Fair, put forth this radical idea. She argued that public defenders should serve as a counterpart to the prosecution to balance out the predilection towards guilt. Foltz was quoted as saying:

⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963)

⁸ Jones, T. (2017, July 18). *Celebrating “Fiddlin’ Abe” Fortas*. Memphis Magazine.

<https://memphismagazine.com/features/columns/abe-fortas-supreme-court-memphis/>

⁹ “*Gideon v. Wainwright* :: 372 U.S. 335 (1963), at 344”. Justia US Supreme Court Center. March 18, 1963.

¹⁰ Uelmen, G. F. (1995). 2001: A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel. *Law and Contemporary Problems*, 58(1), 13–29. <https://doi.org/10.2307/1192165>

¹¹ Uelmen, G. F. (1995). 2001: A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel. *Law and Contemporary Problems*, 58(1), 13–29. <https://doi.org/10.2307/1192165>

¹² Britannica, T. Editors of Encyclopaedia (2007). Clara Shortridge Foltz. Encyclopedia Britannica. <https://www.britannica.com/biography/Clara-Shortridge-Foltz>

For the conviction of the accused every weapon is provided and used, even those poisoned by wrong and injustice. But what machinery is provided for the defense of the innocent? None, absolutely none.¹³

So given the increased demand for legal counsel due to the expansion to states, Public Defenders became a critical component of the legal system.

Yet, as the required know-how to navigate law becomes increasingly complex, the demand for effective legal defense has reached an all time high. In September 2013, the US incarceration rate hit a peak of 716 per 100,000—a 500% increase in the last half-century—with approximately 2.3 million persons incarcerated, leading the world in both total incarceration and incarceration rate.¹⁴ With conservative estimates of the price of an attorney ranging 100\$-200\$ per hour in rural areas and 200\$-400\$ per hour in cities, the prospect of obtaining private defense is entirely out-of-reach for most Americans.¹⁵ As it pertains to other costly components of law, including expert witness fees, investigator fees, paralegal fees, travel expenses, court and criminal fees, the final bill can reach high into the thousands.¹⁶ In a country where 40% of Americans cannot come up with \$400 to pay an unexpected expense,¹⁷ affording a several-hundred-dollar-an-hour lawyer is a ludicrous proposition. For these reasons, upwards of 80% of all individuals charged with felonies are unable to obtain private counsel, and resultantly rely on representation by a public defender.¹⁸

Underfunding, Understaffing, Overworking: The Modern Crisis

¹³ Babcock, Barbara. (2006). Inventing the Public Defender. *The American criminal law review*. 43. https://www.researchgate.net/publication/228188342_Inventing_the_Public_Defender

¹⁴ US Department of Justice, Oct. 22, 2020

¹⁵ Harper, S. J. (2013, March 29). Opinion | The Tyranny of the Billable Hour. *The New York Times*. <https://www.nytimes.com/2013/03/29/opinion/the-case-against-the-law-firm-billable-hour.html>

¹⁶ *Profile of the Legal Profession*. The American Bar Association, 2021.

¹⁷ Nova, A. (2019, July 20). Many Americans who can't afford a \$400 emergency blame debt. *CNBC*. <https://www.cnbc.com/2019/07/20/heres-why-so-many-americans-cant-handle-a-400-unexpected-expense.html>

¹⁸ *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*. (n.d.). *News.northwestern.edu*. <https://news.northwestern.edu/stories/2015/06/opinion-guardian-van-brunt-public-defenders>

Public defenders are the hardest working component of the modern legal system. Almost universally across the US, public defender systems face exorbitant case loads, a lack of adequate funding, and a shortage of willing labor.¹⁹ A 2007 report by the Bureau of Justice Statistics found that state and county-based public defenders, representing 71% of the nations 15,026 public defenders, recieved 4 million cases and spent nearly 1.5 billion in operating expenditures, compared to a state and county-based prosecutor expenditure of 4 billion. Due to these asymmetrical budgets, about three quarters (71%) of county-based public defender offices exceeded the maximum recommended limit of cases per attorney. And, 40% of all county based public defender offices had no investigators on staff, with a median of 7 litigating defenders employed.²⁰ There is also disparity across state lines; for example, Florida public defenders faced an average yearly caseload of 500 felonies and 2,225 misdemeanors in 2009.²¹ Unfortunately, this results in fractional amounts of effort per client, lengthy delays, and forced plea deals. Since they have a median of less than thirty minutes per client to plan a defense strategy, defenders almost always counsel clients, culpable or not, to take plea bargains and, as a result, only two percent of their cases go to trial.²² Misdemeanors account for the majority of cases received by county-based public defenders, of which the majority are non-violent drug charges.²³ The previous decades' War on Drugs implemented inhumane sentencing, such as mandatory minimums even for non-violent offenders.²⁴ The confluence of these factors firmly establishes that our criminal justice system is in crisis. The United States' skyrocketing jail and prison populations are increasingly discriminating along socioeconomic lines. The 80% of individuals requiring legal services under the Sixth

¹⁹ Owens, S., Accetta, E., Charles, J., & Shoemaker, S. (2014). *Indigent Defense Services in the United States, FY 2008-2012 -Updated*. <https://bjs.ojp.gov/content/pub/pdf/idsus0812.pdf>

²⁰ Farole Jr, PhD, D. J., & Langton, L. (2007). County-based and Local Public Defender Offices. In <https://bjs.ojp.gov/content/pub/pdf/clpdo07.pdf>. U.S. Department of Justice Office Bureau of Justice Statistics.

²¹ Owens, Stephen, et al. (2014).

²² Owens, Stephen, et al. (2014).

²³ Farole Jr, PhD, D. J., & Langton, L. (2007).

²⁴ Social Consequences of the War on Drugs: The Legacy of Failed Policy | Office of Justice Programs. (n.d.). www.ojp.gov.

<https://www.ojp.gov/ncjrs/virtual-library/abstracts/social-consequences-war-drugs-legacy-failed-policy>

Amendment face a form of systemic discrimination for not affording costly legal counsel. Furthermore, the rampant use of ‘continuances’ and other case delays result in lengthy time spent in jail, regardless of innocence or guilt. In Cook County Chicago, defendants can expect to spend an average of 56 days in jail awaiting a court date for drug charges.²⁵ For individuals seeking public defense, for whom money is already likely tight, bail—the cash amount required to be released from jail in between arrest and trial—is a non-option. Due to the lengthy delays in defense, detainees are systematically discouraged from fighting for their innocence (even in cases where it’s abundantly clear), since awaiting a trial date means lengthy time spent in jail—often more than that of a plea deal sentence.

The modern-day state of the criminal justice system is evidently pitted against the legal affairs of the socioeconomically disadvantaged. Individuals who cannot pay the high price of private defense are left neglected by the underfunding and understaffing of public defense in contrast to the prosecution. Worse yet, these socioeconomic disparities become inherently racial when taking holistic factors into account. Black Americans face disproportionately high arrest rates compared to their white counterparts. According to the Washington Post, black men are imprisoned at *six times* the rate of white men, and the Bureau of Justice statistics estimated that black men have a 1 in 3 chance of going to prison in their lifetimes.²⁶ Moreover, statistically impoverished, black-majority counties often face worse shortages and less funding for public defenders than similar white counties.²⁷ Since, in some states, notably Louisiana, public defender funding is based on taxes, poorer counties have access to *even worse* legal defense.²⁸ For this reason, the issue of disparity of outcomes with public defenders cannot be

²⁵ Chicago Appleseed Fund for Justice. (2013, October). Pre-Trial Delay & Length of Stay in Cook County Jail. Chicago Appleseed Fund for Justice.

<http://www.chicagoappleseed.org/wp-content/uploads/2012/06/CAFFJ-Pre-Trial-Delay-and-Length-of-Stay-Final.pdf>

²⁶ Guo, Jeff. “America Has Locked up so Many Black People It Has Warped Our Sense of Reality.” *The Washington Post*, 26 Feb. 2016, www.washingtonpost.com/news/wonk/wp/2016/02/26/america-has-locked-up-so-many-black-people-it-has-warped-our-sense-of-reality/.

²⁷ Farole Jr, PhD, D. J., & Langton, L. (2007).

²⁸ Owens, Stephen, et al. (2014).

considered solely a form of socioeconomic discrimination, but rather a confluence of factors that draws upon and reinforces a racial divide.

The Case for Reform

A cursory glance at the modern state of affairs is sufficient to conclude that the system, in its present form, is fundamentally broken. Beyond this, a number of legal scholars have concluded that the public defender system is in violation of the case law established by *Gideon, Johnson, Powell, and more* combined with the constitutional interpretation of the Sixth and Fourteenth Amendments. In a June 2000 publication of Harvard Law Review, unsigned student writing asserts that:

In *Gideon v. Wainwright*, the Supreme Court declared it an “obvious truth” that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” [...] Nonetheless, nearly four decades after *Gideon*, the states have largely, and often outrageously, failed to meet the Court’s constitutional command.²⁹

It seems clear to most that the situation is in dire need of reform. In recent years, the topic of criminal justice has been a point of contention on multiple ends. And, with respect to public defenders, some attempts at legislating change have been made. Now-Vice-President Kamala Harris introduced a 2019 bill during her time as California’s senator attempting to establish a 250 million dollar grant program and improve financial transparency for public defenders.³⁰ Critics were quick to call out hypocrisy because of her previous work as a prosecutor, yet, despite its modest attempts at reform, the bill died in committee with very little media attention.³¹

²⁹ *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*. (2000). Harvard Law Review, 113(8), 2062–2079. <https://doi.org/10.2307/1342319>

³⁰ News, A. B. C. (n.d.). Sen. Kamala Harris launches bill to help public defenders. ABC News. <https://abcnews.go.com/Politics/sen-kamala-harris-launches-bill-public-defenders/story?id=62894597>

³¹ GovTrack.us. (2022). S. 1377 — 116th Congress: EQUAL Defense Act of 2019. Retrieved from <https://www.govtrack.us/congress/bills/116/s1377>

During the resurgence of Black Lives Matter in May 2020, some focus was shifted to the topic of public defenders under the context of holistic police brutality and criminal justice reform.³² Yet, the prominent and impassioned movement unfortunately devolved into culture war contention before change could be legislated, with right wing dissenters manufacturing outrage at the prospect of compromise over criminal justice reform. Yet, the Black Lives Matter movement has succeeded in penetrating the nation's consciousness, so change is not an impossibility. As tensions rise with these issues coming to a fore, only time will tell if the United States can restore the rights guaranteed by due process of the law. This crisis can no longer be described a 'legal' issue, as it has risen to become a humanitarian issue: a hallmark of modern-day systemic inequalities in the United States.

³² Jun 08, J. Y. M., & 2020 | 7:06pm. (2020, June 9). Public Defenders Make a Stand for Black Lives. The Santa Barbara Independent. <https://www.independent.com/2020/06/08/public-defenders-make-a-stand-for-black-lives/>