

5-1-2015

The Public Defender Crisis in America: *Gideon*, the War on Drugs and the Fight for Equality

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Recommended Citation

William Lawrence, *The Public Defender Crisis in America: Gideon, the War on Drugs and the Fight for Equality*, 5 U. Miami Race & Soc. Just. L. Rev. 167 (2015)

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The Public Defender Crisis in America: Gideon, the War on Drugs and the Fight for Equality

William Lawrence*

*“No one should have to buy justice in a land that boasts that justice
is free.”*

-Clara Foltz, 1897¹

The role of the public defender in the United States is one that is often disparaged and widely misunderstood. This note will first attempt to illuminate the evolution of the public defender movement in the United States, detailing its rather quiet ascent to the forefront of the criminal justice system: from the early work of Clara Foltz, to the trial of Clarence Earl Gideon, and beyond. The note will also broach just a few of the many systemic issues faced by the modern day public defender, including the unfortunate perception of inferiority from both the general public and indigent defendants alike. This perception is further accentuated by the vast disparity in resources between the American public defender and the American prosecutor. This resource disparity is due to a plethora of internal and external forces, including the devastating effect of the United States’ War on Drugs. While the creation of certain diversionary programs like drug treatment courts have helped to ameliorate some stress on public defender workloads, it is not a sustainable solution to the existing problems. The note concludes with a comparative

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¹ Stanford University Women’s Legal History, *Women Lawyer: The Trials of Clara Foltz*, <http://wlh.law.stanford.edu/woman-lawyer>.

analysis to the United Kingdom, and several posited solutions to the public defender crisis in the United States.

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I. THE INFANCY OF THE PUBLIC DEFENDER MOVEMENT IN THE UNITED STATES

Contrary to what has become widespread public opinion, the roots of the public defender's office, and more specifically the right to counsel in the United States, began long before the Supreme Court's decision in *Gideon v. Wainwright*.² In fact, one need not look further than the plain text of the Sixth Amendment to the United States Constitution, ratified in 1791, in order to recognize that the guarantee of the assistance of counsel in criminal prosecutions is a right that strikes at the very foundation of our country's constitutional jurisprudence.³

After the passage of the Sixth Amendment the states, too, began embodying this same principle in their own interpretation of the federal constitution. For example, in 1853, the Indiana Supreme Court in *Webb v. Baird* recognized the importance of attorney assistance in criminal prosecutions, particularly when the defendant was indigent.⁴ Nevertheless, the legal theory of the guarantee of counsel has only slowly and haltingly made its way to the forefront of our justice system.

² *Gideon v. Wainwright*, 372 U.S. 335, 336 (1962).

³ U.S. Const. amend. VI.

⁴ *Webb v. Baird*, 6 Ind. 13, 18 (1854), distinguished by *Betts v. Brady*, 316 U.S. 455 (1942).

The work of Clara Foltz, a lawyer and political activist in the late 1890s, was especially significant to the fledgling indigent advocacy movement in the United States.⁵ Foltz, who was the first female lawyer barred in the state of California, advocated zealously for the creation of a public defender's office: a concept which was as novel as it was controversial in the late 1890s—even in the more progressive political climate of the Pacific Northwest.⁶ Foltz was an integral player in the creation of the modern public defender system.⁷ Foltz first formally introduced her newly discovered theories on August 12th, 1893 at the World's Fair in Chicago, Illinois.⁸ In addition, she also presented a proposal, entitled the "The Foltz Public Defender Bill," which outlined the logistical hurdles associated with effective indigent defense that would be overcome under her plan.⁹

Foltz's bill would devote an entire budgetary arm of a state, city, or municipality to employing full-time, salaried lawyers who would work, often exclusively, on the specialized needs of indigent criminal defendants.¹⁰ Such a proposal would radically change the status quo at the time, which was essentially an *ad-hoc* arrangement under which attorneys from the bar were selected randomly and appointed to defend indigent defendants on an as-needed basis. Such a system not only generated discontent within the bar but also created potential conflicts of interest as attorneys, unskilled in the practice of criminal defense, were assigned to complex criminal cases with which they had little familiarity and even fewer resources to exploit.

Foltz envisioned a public defender's office consisting of a group of lawyers, exceptionally qualified and uniquely skilled in the practice of criminal law; these lawyers would have succinctly outlined job responsibilities in order to provide cost effective indigent defense services.¹¹ Additionally, the lawyers who would comprise her proposed office would serve for a pre-defined term and, arguably most importantly, be public officers of the court.¹² Moreover, Foltz's vision and subsequent bill provided for the just compensation of the men and

⁵ BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* 2 (2011).

⁶ *Id.*

⁷ *Id.* at 3.

⁸ *Id.* at 246.

⁹ *Id.* at 289.

¹⁰ See generally Sara Mayeux, *The Case of the Black Gloved Rapist: Defining the Public Defender's Role In California Courts, 1913-1948*, 5 CAL. LEGAL. HIST. 217, 220 (2010).

¹¹ Mortimer Schwartz, *The Battles of Clara Shortridge Foltz*, CALIFORNIA DEFENDER, Vol. 1, Issue 1 (Spring 1985).

¹² *Id.*

women who would make up the public defender's office.¹³ Such an adequate system of compensation and service for a set period of time would hopefully, in large part, eradicate an issue that pervaded the former system which offered court appointed attorneys very little remuneration.¹⁴

II. L.A. COUNTY PUBLIC DEFENDER'S OFFICE: THE FRUIT OF FOLTZ'S LABOR

In 1913, on the heels of Clara Foltz's pioneering work in the field of indigent criminal justice, Los Angeles County opened the nation's first public defender's office.¹⁵ Relatedly, just two years prior, in 1911, Foltz also led a widespread women's suffrage movement in California that ended with the passage of the state's Women's Vote Amendment.¹⁶ I maintain that the interplay between Foltz's involvement in the women's suffrage movement and her simultaneous visions of a California defender's office was both significant and correlative. As a result of Foltz's successful women's suffrage movement, a broader and more diverse voting base emerged. The emergence of this new voting base was arguably the impetus for the passage of Foltz's pioneering public defender legislation in California.

Los Angeles County's public defender's office was significant in a number of ways. However, perhaps most noteworthy was the fact that the office opened its doors nearly a half-century before the Supreme Court's decision in *Gideon v. Wainwright*.¹⁷ The office accepted its first case in January of 1914 with a staff that, at that time, consisted of only one managing attorney, four deputies, and an office secretary.¹⁸ Nearly one-hundred years later, in 2015, the Los Angeles public defender's office employs more than 1,100 attorneys alone, not to mention hundreds of secretaries, paralegals, and administrative professionals.¹⁹

In the progressive political climate of California, Foltz's public defender's office was graciously welcomed, and just seven years later in 1921 the California Legislature codified their approval by passing a bill

¹³ See generally *id.*

¹⁴ Eric Siegrist, *Criminal Justice and the Indigent Defendant*, 2 USAFA J. LEG. STUD. 219, 220 (1991).

¹⁵ Barbara Babcock, *Inventing The Public Defender*, 43 AM. CRIM. L. REV. 1267, 1274 (2006).

¹⁶ Schwartz, *supra* note 11.

¹⁷ *Gideon*, 372 U.S. at 336; Babcock, *supra* note 15, at 1274.

¹⁸ Alan Simon, *Honoring 100 Years of the Los Angeles Public Defender*, THE LOS ANGELES LAWYER, Nov. 2013, at 68.

¹⁹ Simon, *supra* note 18.

that significantly *expanded* funding for public defender's offices to cover *all* California state courts.²⁰ However, elsewhere in the United States, particularly in small cities and towns, the guarantee of the accused's right to counsel was still very much elusive. In the infamous 1932 Supreme Court case of *Powell v. Alabama* (better known as the "Scottsboro Boys" case) nine African-American youths were sentenced to death for the rape of two white women.²¹ While the Supreme Court reversed several of the convictions due to the trial court's failure to appoint counsel, the Court's decision as it pertained to the relevant Sixth Amendment analysis remained exceptionally narrow; the right to counsel only existed in state courts where the defendants were charged with capital crimes.²²

Additionally, ten years after *Powell*, in *Betts v. Brady* the Court narrowed its previous decision even further.²³ *Betts* established that the Sixth Amendment *only* guaranteed a right to counsel in sufficiently unique circumstances where the defendant was either illiterate or mentally handicapped.²⁴ While California bounded ahead with its dynamic and progressive form of indigent criminal justice, much of the country lagged behind.

However, within the next decade, World War II would ravage the country's conscience and leave behind widespread social and economic struggle.²⁵ It was in this wake, and to a derivative extent, the wake of the simultaneous Civil Rights Movement, when the United States first began to truly realize the importance of government funded advocacy on behalf of indigent criminal defendants.²⁶

III. *GIDEON V. WAINWRIGHT* AND THE PATH TO CONTEMPORARY DEFENDER'S OFFICES

Scholars, historians, and law students alike have lauded the Supreme Court's 1963 decision in *Gideon v. Wainwright* as a monumental breakthrough for the accused's guarantee to a right to counsel. However, as will be discussed *infra*, the promises and guarantees that purportedly flow from the decision in *Gideon* have been largely unfulfilled. The facts surrounding Clarence Earl Gideon's long saga with the law have been

²⁰ Marybeth Herald & Sandra Rierison, "I Mean To Succeed": Clara Foltz and the *Reinvention of Self*, 53. AM. J. LEGAL HIST. 131, 137 (2013).

²¹ *Powell v. Alabama*, 287 U.S. 45 (1932).

²² *Id.* at 59.

²³ *Betts v. Brady*, 316 U.S. 455 (1942).

²⁴ *Betts*, 316 U.S. at 465.

²⁵ Michael Klarman, *Brown, Racial Change and the Civil Rights Movement*, 80 VA. L. REV. 7, 21 (1994).

²⁶ *Id.* at 22.

permanently emblazoned in every first year Constitutional Law student's mind. Nevertheless, given the gravity of the Court's decision and the incredibly powerful impact it has had on contemporary criminal justice, its background is worth briefly reciting for the purposes of this note.

In the early 1960s, Clarence Gideon, a man with an eighth grade education and a penchant for the commission of petty crimes was arrested for breaking and entering an unoccupied poolroom.²⁷ At the outset of his criminal trial, Gideon appeared in front of a Florida circuit court judge and requested the appointment of an attorney.²⁸ The judge denied the request, relying on the long-standing principle established by the United States Supreme Court in *Betts v. Brady*.²⁹ With no other choices, Gideon represented himself throughout his trial.³⁰ Only semi-literate and unskilled in the nuances of the law, Gideon's *pro se* representation was woefully inadequate.³¹ He was found guilty and sentenced to five years in a Florida penitentiary.³²

Once in prison, Gideon filed several petitions for writs of habeas corpus in the Florida Supreme Court.³³ These writs challenged his conviction on the ground that the court's refusal to appoint an attorney was in violation of his Sixth Amendment rights.³⁴ After unsuccessfully petitioning Florida's highest court, Gideon successfully petitioned the United States Supreme Court.³⁵ In 1963, the U.S. Supreme Court agreed to hear his case to decide the issue of whether an accused has a Sixth Amendment right to counsel when in state court.³⁶ In a unanimous opinion, the Court overruled its previous decision in *Betts*, and held that the Sixth Amendment's guarantee of a right to counsel is a fundamental right, extending to all states.³⁷

Justice Black, who unsurprisingly dissented in the Court's earlier *Betts* opinion, authored the unanimous opinion in *Gideon*. Black famously proclaimed: "reason and reflection require us to recognize that in our adversary system of criminal justice, any person who is hauled into court who is too poor to hire a lawyer cannot be assured of a fair trial unless counsel is provided for him."³⁸ The Court's decision in

²⁷ Gideon, 372 U.S. 335, 336 (1963).

²⁸ Gideon v. Wainwright, 153 So. 2d 299, 300 (Fla. 1963).

²⁹ *Id.*

³⁰ *Id.*

³¹ Gideon, 372 U.S. 335, 337 (1963).

³² *Id.*

³³ *Id.*

³⁴ See generally, Gideon, 153 So. 2d 299 (1963).

³⁵ See generally, Gideon, 372 U.S. 335 (1963).

³⁶ *Id.*

³⁷ *Id.* at 343.

³⁸ *Id.* at 344.

Gideon v. Wainwright ushered in a new era of progressivism in the arena of criminal justice that immediately impacted both federal and state courts across the country. However, *Gideon* was just merely the start of an uphill battle for equal rights in the justice system.

IV. PUBLIC DEFENDERS AND THE PERCEPTION OF INFERIORITY

Unfortunately, it should come as no surprise to anyone reasonably familiar with the contemporary legal job market in the United States that both prosecutors and public defenders are not afforded the same status as attorneys in other private or specialty areas.³⁹ Moreover, both prosecutors and public defenders are generally compensated significantly less than their private sector equivalents.⁴⁰ As a result, I submit that only a small percentage of the best and brightest law school graduates are attracted to public interest law—particularly positions within public defender offices, where there is the added and misguided stigma of defending potentially guilty criminals.⁴¹ While many young attorneys begin their careers in such offices, they frequently only stay long enough to gather the requisite experience to move on to a higher paying job—generally in the private sector.⁴²

This so-called escalator approach (or “stepping stone” approach) to government work is crippling in a few ways. First, such a high turnover rate plagues the system which neither develops nor maintains a solid core of experienced attorneys who will represent the public defender’s office and provide a consistently high level of representation to indigent defendants. Relatedly, I submit that the idea of the public defender’s office as a “stepping stone” also unfortunately stamps it with a stigma of unwarranted inferiority—a place where young, unseasoned attorneys pay their dues until a more lucrative, prestigious private sector job is made available to them. The rare exception is the individual who dedicates his or her life to working as a public defender. Particularly in the realm of criminal defense law, there is a distinctly bifurcated perception of the public defender compared to the private criminal defense attorney. The latter is seen as more competent, professional, and worthy of respect within the profession.⁴³ As such, the former may be perceived by a layperson (such as an indigent defendant) as merely an “entry level” or

³⁹ RONALD WALDRON ET AL., *THE CRIMINAL JUSTICE SYSTEM* 252-53 (Ronald Waldron ed., 5th ed. 2009).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² STEVEN COX ET AL., *JUVENILE JUSTICE: A GUIDE TO THEORY POLICY & PRACTICE* 216 (Jerry Westby et al. eds., 8th ed. 2013).

⁴³ WALDRON, *supra* note 39, at 252.

“junior” position—regardless of the relative skill or capability of the attorney.

Is this perception of public defender inferiority wholly warranted? Consider the following excerpt from a nationwide survey of public defenders in the United States. An average of 40% of public defenders reported that they had received insufficient training for basic tasks such as interviewing clients, reviewing evidence, and negotiating with prosecutors [discussed further *infra*].⁴⁴ Similar studies have found that, with very few exceptions, the level of competence of “*newly assigned*” public defenders was “much lower” than the applicable skill and knowledge requirements that are necessary for effective job performance.⁴⁵

In light of my proposed theory of the public defender’s office as a “stepping stone,” this study is even *more* troubling. That is to say, without an effective internal training mechanism within the defender’s office to increase the legal proficiency of young attorneys, the opportunity for an indigent defendant to receive constitutionally suitable legal representation is significantly hindered. To be successful, this internal training must necessarily be done by older, wiser, more skilled attorneys who have spent a significant portion of their career within the defender’s office and who understand the subtleties, not to mention the fundamentals, of effective public defender representation. A “stepping stone” or “escalator” approach to the public defender’s office only exacerbates the issue of inadequate on-the-job training, and thus, in the process, continues to perpetuate the social stigma associated with the office.

Finally, the perception of public defender inferiority can also be addressed on a socio-psychological level. At its core, the services provided by the office of the public defender are a form of welfare. On this note, there exists a very American, capitalistic notion of “you get what you pay for.”⁴⁶ Having a public defender appointed to you at no cost may create the unjustified expectation of failure from the perspective of the client. As a result, this expectation of failure, in turn, may generate a form of resentment towards the attorney.⁴⁷ Moreover, the financial exchange that occurs between a client and a *private attorney* creates an improper presumption of legitimacy in and of itself—even if all other signs refute that presumption.⁴⁸ Because there is no financial

⁴⁴ WALDRON, *supra* note 39, at 253.

⁴⁵ *Id.*

⁴⁶ See generally *People v. Matney*, 293 Ill. App. 3d. 139, 143 (1997).

⁴⁷ HOWARD ADABINSKY, *LAW COURTS & JUSTICE IN AMERICA* 231 (Waveland Press, Inc., 7th ed. 2014).

⁴⁸ See generally *id.* at 232.

exchange between an indigent defendant and his appointed public defender the unwarranted presumption of illegitimacy and, thus, inadequacy arises.

Additionally, there exists a flawed notion that a paying client, more than the non-paying client, can better control the actions of his attorney, and as a result, can better control his or her destiny within the legal system.⁴⁹ This is a particularly important dynamic to consider in light of the fact that the public defender is employed by the *state*, the same sovereign body that is attempting to convict the client.⁵⁰ To an unsophisticated client, this unfortunate juxtaposition of the lawyer who is purportedly there to help him, and the sovereign that is attempting to convict him, may create the perception of a conflict of interest.⁵¹

V. THE ENORMOUS DISCRETIONARY POWER OF THE PROSECUTOR

Making matters worse for the perceived inferiority of the public defender is the unparalleled discretionary power given to prosecutors. Aside from the judge, the prosecutor is arguably the single most powerful actor in the criminal justice system.⁵² Two of the most essential pre-trial junctures of any criminal case are the initial decision to charge and the decision whether to extend a plea bargain.⁵³ The prosecutor, not the public defender, nearly exclusively dictates these two domains.⁵⁴

On a more microscopic level, one can appreciate just how much latitude this gives the prosecutor. For example, within his or her exclusive decision to charge, the prosecutor *also* holds the decision as to *what crime* to charge. That is, if Defendant X is arrested for possession of a half-pound of marijuana, the prosecutor may often have the extraordinarily wide latitude to charge Defendant X with either simple possession (a misdemeanor in most jurisdictions) or alternatively, possession of a half-pound of marijuana with intent to sell (a felony in most jurisdictions). Conversely, the prosecutor may have the discretion to not charge Defendant X at all.⁵⁵

⁴⁹ John Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215, 1284 (1994).

⁵⁰ ADABINSKY, *supra* note 47.

⁵¹ *Id.*

⁵² See generally Angela Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS L. REV. 202 (2007).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See generally Bennett Gershman, *Prosecutorial Decision Making and Discretion in the Charging Function*, 62 HASTINGS L. J. 1259, 1269 (2011).

The decision to charge and the decision to offer a plea are also intricately intertwined in the already tenuously structured power relationship between the prosecutor and the public defender. Similar to how the prosecutor has great discretionary power within his or her already exclusive domain in the decision to charge, so too does that power exist on a more molecular level within the context of plea-bargaining.⁵⁶ We return once again to our hypothetical Defendant X. Just as Defendant X and his public defender were in a negatively leveraged position with regard to the prosecutor's decision to charge, a very similar and equally negatively leveraged situation may arise within the context of plea-bargaining. For instance, if in the search incident to Defendant X's marijuana arrest police had *also* found an unregistered handgun, the defendant would almost certainly face additional charges. A strategic prosecutor may condition a more generous plea bargain as to one offense in exchange for pleading guilty to the other alleged offense. With the looming risk of trial, many defendants will accept plea bargains, even if such a deal is not in their best interests.⁵⁷

As should be readily apparent, the prosecutor, not the public defender, holds the vast majority of the leverage in these pre-trial negotiations. This issue is only worsened when the public defender, who is purportedly representing the indigent defendant's interests, is a young and severely undertrained attorney (discussed *supra*). Additionally, as will be discussed further, *infra*, the decision to accept potentially unfavorable plea bargains is further complicated by the grossly excessive caseloads faced by public defenders across the United States.

VI. PUBLIC FUNDING: PROSECUTORS VS. PUBLIC DEFENDERS

Public defender offices often receive their operating funding from one of two potential sources: state funds or county funds.⁵⁸ Sometimes this funding is received from a combination of both sources.⁵⁹ New York, for example, is one of the few states that operate within a predominantly county-funded public defender system.⁶⁰ On average, New York counties

⁵⁶ Jeffrey Standen, *Plea Bargaining In the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1475 (1993).

⁵⁷ See Gershman, *supra* note 55.

⁵⁸ See generally Mollie Eadie, *Disparity In Financial Resources Between Defense, Prosecution Leads to Unfair Results*, THE SARATOGIAN NEWS (Sept. 18, 2014) <http://www.saratogian.com/general-news/20140918/dispairity-in-financial-resources-between-defense-prosecution-leads-to-unfair-unjust-results>.

⁵⁹ *Id.*

⁶⁰ *Id.*

receive only 17% of their funding from the state.⁶¹ Due to the varying commitment to public defender funding throughout counties in New York and other states with similar funding structures, the quality of legal representation in one county may be drastically lower than in another. An indigent defendant arrested in County A may receive competent representation, while another indigent defendant arrested in neighboring County B may receive grossly inadequate representation due to a lack of funding, excessive caseloads, or a myriad of other reasons – some of which will be discussed *infra*. The lack of uniformity of funding and access to resources within the public defender system creates impossibly complex legal and social ramifications for indigent defendants.⁶²

Making matters worse is the fact that state and local governments commonly spend nearly *three times as much* on prosecution funding than on applicable public defender funding.⁶³ In the frequent cases where no public defender is available, states assign private attorneys who are compensated at hourly rates significantly lower than what is common in traditional attorney-client fee agreements.⁶⁴ These low rates, often topping out at around \$65 an hour, barely begin to cover the costs associated with a private attorney's administrative fees in handling a case, such as copying costs, records requests, and legal research.⁶⁵ Such a system represents an unfortunate regression to the ad-hoc policies of the Pre-Foltzian public defender era. Moreover, at such low rates, the average attorney cannot afford to spend significant time analyzing the interstices of the relevant issues and developing effective legal defenses.⁶⁶

The allocation, or lack thereof, of tax dollars for public defenders represents a larger, more systemic issue than what first meets the eye. In 2007, state prosecutor's offices countrywide outspent their public defender counterparts by more than \$3.5 billion dollars.⁶⁷ In California, the progressive bastion that once championed indigent defendants' rights, prosecution spending is outpacing the equivalent defense funding

⁶¹ *Id.*

⁶² *An Argument for an Independent Federal Defender System to Guarantee the Sixth Amendment Right to Counsel*, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION (Aug. 1, 2013).

⁶³ *Five Problems Facing Public Defense on the 40th Anniversary of Gideon v. Wainwright*, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_5_problems.

⁶⁴ Levintova, et. al., *Why You're In Deep Trouble If You Can't Afford A Lawyer*, MOTHERJONES (Jul. 1, 2013) <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts>.

⁶⁵ *Id.*

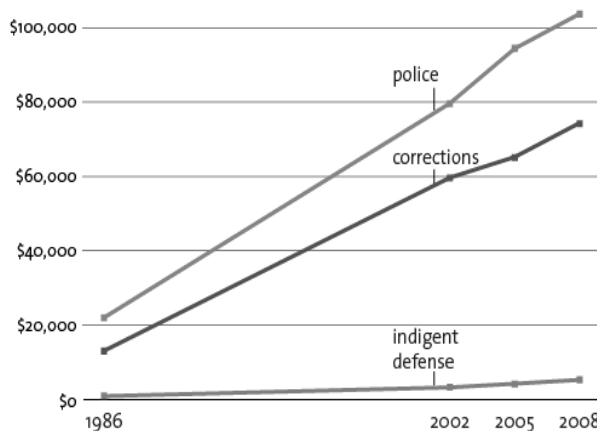
⁶⁶ *Id.*

⁶⁷ Levintova, *supra* note 64.

to a tune of \$300 million dollars.⁶⁸ This trend also continued on a nationwide scale in 2008, with prosecution and corrections spending outpacing public defense spending at a rate of 14 to 1.⁶⁹ The following charts are illustrative of the dire straits of public defender funding:

Scales of Justice

National spending on public defense, corrections, and police, in millions

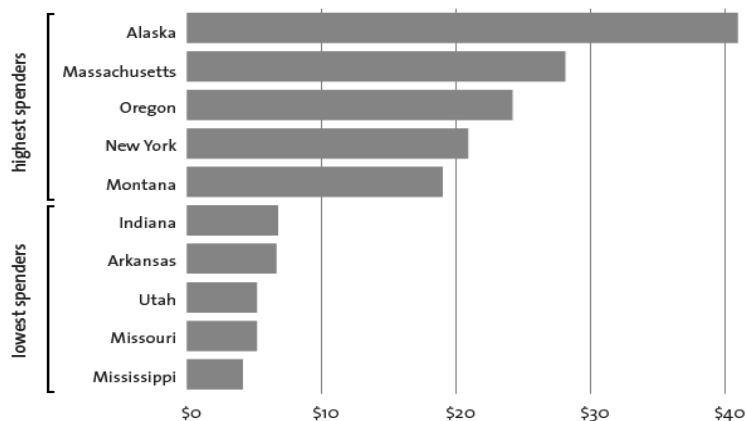


Source: Justice Policy Institute

Mother Jones 70

The Price of Justice

Per capita spending on public defense, 2008



Source: National Legal Aid & Defender Association

Mother Jones 71

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Levintova, *supra* note 64 (reproduced from website); Justice Policy Institute.

VII. THE UNITED STATES' PUNITIVE POLICY & THE WAR ON DRUGS

I maintain that a large part of what plagues public defender offices today is the United States' punitive policy vis-à-vis the War on Drugs. The United States is home to a \$50 billion dollar a year illegal drug industry.⁷² This industry is primarily domestic and thus, those who are ensnared by the War on Drugs are subject to an already taxed American judicial system.⁷³ In 1988, widely considered to be the beginning of the "zero tolerance" drug movement, there were over 1 million drug related arrests in the United States.⁷⁴ Naturally, this number has only risen since then. Moreover, within the last decade, the United States has surpassed Russia to become the nation with the largest percentage of its population in jails or prisons.⁷⁵ This fact is staggering, considering that America's War on Drugs has only become a larger and more expensive proposition over time.⁷⁶

The rise of the War on Drugs in the 1980's and 1990's was fueled in part by the idea that America's moral fabric was deteriorating.⁷⁷ Rising levels of drug crime allegedly evidenced this fact.⁷⁸ As a result, legislators on both the federal and state levels enacted "zero tolerance" policies aimed at drug offenders.⁷⁹ The trickle-down effect of the War on Drugs eventually came to rest at the doors of public defenders offices across the country. As state governments ramped up spending on policing and prosecuting crime, the natural back-end effect was to decrease fiscal support to indigent defender services. In New York, for example, the Legal Aid Society represented 200,000 indigent defendants in the 1995 calendar year.⁸⁰ Just four years later, in 1999, they

⁷¹ Levintova, *supra* note 64 (reproduced from website); National Legal Aid & Defender Association.

⁷² Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993).

⁷³ Andre Cummings, *All Eyes on Me: America's War on Drugs and the Prison Industrial Complex*, J. OF GENDER RACE & JUSTICE, 417, 418 (2012).

⁷⁴ Finkelman, *supra* note 72, at 1396.

⁷⁵ Adam Liptak, *U.S. Prison Population Dwarfs That of Other Nations*, NY TIMES (April 23, 2008), <http://www.nytimes.com/2008/04/23/world/americas/23iht-23prison.12253738.html>.

⁷⁶ Corey Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435, 438 (2010).

⁷⁷ James Ostrowski, *A Symposium on Drug Criminalization: The Moral & Practical Case for Drug Legalization*, 18 HOFSTRA L. REV. 607, 610 (1990).

⁷⁸ Charles Ogletree, *Keeping Gideon's Promise*, 29 N.Y.U. REV. L. & SOC. CHANGE 203, 214 (2004).

⁷⁹ *Id.*

⁸⁰ Jane Fritisch & David Rohde, *Two-Tier Justice: High Volume Law for New York City's Poor, a Lawyer With 1,600 Clients*, N.Y. TIMES (Apr. 9, 2001).

represented the same number of indigent defendants, but with \$20 million dollars less in funding.⁸¹ This meant fewer attorneys, fewer investigators, fewer social workers, fewer administrative staff members, less pay for the remaining Legal Aid workers, and unfathomably large caseloads.

To further put the current indigent defender crisis in perspective, consider that in 2010 there were over 7.1 million people imprisoned in the United States, mostly for drug offenses.⁸² By contrast, in 1964, shortly after the Supreme Court decided *Gideon v. Wainwright* there were only 200,000 people in state and federal prisons.⁸³ It is exceedingly obvious that this trend should not, and cannot, continue at its current pace if the United States wants to seriously commit itself to upholding its constitutional guarantees by providing effective indigent representation.

Brooklyn, New York has pioneered progressive indigent defender treatment. Specifically, Brooklyn offers a potentially much less punitive approach to habitual drug offenders with the creation of the Brooklyn Treatment Court.⁸⁴ Defendants who have been arrested for felony or misdemeanor charges where drug addiction is a component of their offense may be eligible for the drug treatment diversion program.⁸⁵ Successful completion of the drug treatment program may result in a defendant's charges being reduced or even dismissed.⁸⁶ Such a therapeutic approach, and not the status quo of punitive drug crime policy, seems almost counter intuitive in our contemporary "tough on drugs" political climate. Moreover, clients who are diverted into the drug treatment program and are later re-arrested are nevertheless given multiple attempts to re-enter treatment and complete it successfully.⁸⁷ Such an approach embraces the model of drug addiction as an ongoing disease, instead of a sign of transient misbehavior.

While the increased usage of drug courts in the United States as a therapeutic tool would certainly help curb stress on the system by cutting

<http://www.nytimes.com/2001/04/09/nyregion/for-the-poor-a-lawyer-with-1600-clients.html>.

⁸¹ *Id.*

⁸² *Prison Population Declined For First Time In Four Decades*, BUREAU OF JUSTICE STATISTICS (Dec. 15, 2011) <http://www.bjs.gov/content/pub/press/p10cpus10pr.cfm>.

⁸³ Robin Steinberg, *Heading Gideon's Call in Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH & LEE L. REV. 961, 966 (2013).

⁸⁴ Chuck Gomez, *Brooklyn Treatment Court: A Second Chance For Drug Offenders*, HUFFINGTON POST (Apr. 22, 2013) http://www.huffingtonpost.com/chuck-gomez/brooklyn-treatment-court_b_3053615.html.

⁸⁵ *Drug Treatment Courts*, NY STATE UNIFIED COURT SYSTEM, https://www.nycourts.gov/courts/problem_solving/drugcourts/overview.shtml.

⁸⁶ *Id.*

⁸⁷ *Id.*

down on excessive adversarial work for public defenders, it does not do much to *immediately* ameliorate heavy caseloads. Additionally, drug courts only aim to cover individuals who are deemed “treatable.”⁸⁸ That is, an indigent defendant who is arrested for a drug offense may not qualify for diversion treatment if he or she is deemed to be in the business of transporting or selling narcotics but is not truly “addicted” in a traditional medical sense. In this regard, the ongoing War on Drugs and the stress that it creates within public defender’s offices still remains an issue. Nevertheless, drug courts represent an empirical example of how therapeutic forms of treatment, at a systemic level, can potentially help cut down on the ever-growing *prison population* in the United States. As a result, I maintain that such an effect will, at least in the long term, necessarily reduce public defender caseloads as more indigent defenders are funneled into therapeutic, non-adversarial, pre-trial diversion programs.

Relatedly, the American Council of Chief Defenders, in conjunction with a U.S. Department of Defense survey, recommend that public defender caseloads should not exceed pre-determined levels of: 150 felonies, 400 non-traffic misdemeanors, 200 juvenile cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney, per year.⁸⁹ Excessive caseloads can affect the performance of even the most skilled attorneys. Young, inexperienced public defenders are even more susceptible to the adverse effects of overly burdensome caseloads. Without the proper attention to detail—which often includes a significant number of hours to perform legal and investigatory research—an indigent defendant may unjustifiably languish in jail. Effectively regulating public defender caseloads is a simple safeguard against such blatant injustices. Unfortunately, due in large part to the War on Drugs, defender caseloads are much higher than the figures cited in the recommended guidelines.⁹⁰

One of the most damning indictments of the broken indigent defense system in the United States is the recent Florida Supreme Court decision of *In Re Public Defender of the Eleventh Judicial Circuit*.⁹¹ In a 5 to 2 decision, the Court held that Miami-Dade County public defenders *could* withdraw from felony cases due to their excessive workloads, which

⁸⁸ West Huddleston, *Drug Courts are the Most Sensible Proven Alternative to Incarceration: So What’s the Problem?*, L.A. DAILY J. (Oct. 22, 2009) <http://www.nadcp.org>.

⁸⁹ American Council of Chief Defenders, *Statement On Caseloads and Workloads*, Aug. 24, 2007, at 1, available at <http://www.nlada.org/DMS/Documents>.

⁹⁰ *Id.*

⁹¹ *Pub. Defender, Eleventh Judicial Circuit v. State*, 115 So. 3d 261 (Fla. 2013).

hindered the effective representation of their clients.⁹² In many instances, Miami-Dade public defenders had as many as 50 cases set for trial a week.⁹³ Such an exorbitant number of cases left helpless attorneys absolutely no room for effective representation, even on a marginal level. The Court found that overloaded defenders were unable to interview clients, conduct investigations, take depositions, prepare mitigation, or counsel clients about pleas offered at arraignment.⁹⁴ The challenge becomes even more insurmountable when one considers the amazing disparity of resources between the public defender and the prosecutor (as discussed *infra*).

As a corollary to this issue, the American Bar Association's Model Rules of Professional Conduct highlights the minimum thresholds for attorney standards. ABA Rule 1.1 mandates a lawyer's required level of competence: "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁹⁵ An alarming reality is that public defenders in many high-volume cities cannot live up to their minimum competence requirements, as stipulated by the American Bar Association, as well as the bars of their respective states. What then is the solution to this ever-growing issue?

VIII. POSSIBLE SOLUTIONS

One of the most obvious, yet elusive, solutions to help cure the problem of public defender versus prosecutor disparity is to equalize pay in all jurisdictions across the country. A decision to uniformly increase public defender salaries in order to better align with their adversarial counterparts would go a long way in helping the current crisis. First, increased salaries would help attract more qualified law school graduates to public defender offices. Secondly, increased salaries would not only boost short-term morale but also contribute greatly towards the retention of experienced attorneys who would have otherwise been more inclined to venture elsewhere in search of higher pay after only short public defender's office tenures. As a result, any talent gap between the public defender and the equivalently situated prosecutor would necessarily begin to close.

⁹² *Id.* at 282.

⁹³ *Id.* at 274.

⁹⁴ *Id.*

⁹⁵ Model Rules of Prof'l. Conduct R. 1.1 (1983).

To illustrate the feasibility of such a scenario, consider a somewhat recent initiative in Albemarle County, Virginia—home of Charlottesville and the University of Virginia. Until recently, an experienced prosecutor in Albemarle County was paid an annual salary of \$97,404.⁹⁶ An equivalently experienced Public Defender was paid \$66,327.⁹⁷ Now, however, the county has committed an amount of local tax revenue to supplement public defender pay. Albemarle County is just the second of 25 offices in Virginia to boost public defender salaries through local tax initiatives.⁹⁸ While Albemarle County represents just the enlightened minority of districts that realize the vital contributions of public defenders that warrant equal pay, it is a positive sign for future change. If relatively small to modestly sized counties are able to successfully pass tax initiatives dedicating more funds to equal financial treatment, certainly this trend should be sustainable elsewhere in the United States.

Additionally, I would propose that state and local governments that are unable to pass such tax initiatives for increased *salaries* instead offer partial *student loan* forgiveness for newly hired public defenders. As discussed *infra*, taking a job at the public defender's office is often a daunting prospect for newly barred attorneys. With mounting student debt, potential societal stigma, and negligible starting salaries with only pre-determined room for salary increases, many law school graduates are understandably disenchanted by the idea of committing to the public defender's office.

However, just as Albemarle County was able to pass tax initiatives for raising salaries, so can state and local governments for the purpose of funding debt forgiveness programs for young attorneys—namely public defenders in high-need jurisdictions. Such an inducement may be highly attractive to skilled young attorneys looking to gain invaluable experience litigating cases right out of law school. A more generously structured federal loan forgiveness program, targeted *specifically* toward public defenders could potentially increase both the size and quality of the public defender applicant pool.⁹⁹ In return for full or partial student loan relief, lawyers would commit a significant tenure of years to the office in an attempt to curb the “stepping stone” approach. While some

⁹⁶ See Ron Cooper, *Local Public Defenders Poised To Win Pay Equity After Nearly A Decade of Wrangling*, C-VILLE WEEKLY CHARLOTTESVILLE NEWS (Mar. 28, 2014) <http://www.c-ville.com/local-public-defenders-poised-to-win-pay-equity-after-nearly-a-decade-of-wrangling/#.VRMGDFagQqQ>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ The current federally funded loan forgiveness program puts both the public defender and state attorney on equal footing. See *Public Service Loan Forgiveness*, FINAID, <http://www.finaid.org/loans/publicservice.phtml> (last visited April 10, 2015).

may argue that the difference between this and a true salary increase is imperceptible, it is important to note that such a program offers its own basis of merit by not upsetting the delicate bureaucratic policies that often control government salaries. Such a loan forgiveness initiative can potentially be introduced under a less controversial back-door public policy rationale, rather than a bona-fide, across the board salary increase.

Aside from tinkering with the financial incentives at play, there are more fundamental solutions to relieve the crisis faced by public defenders. Cutting back on, or the outright decriminalization of, many misdemeanor drug crimes would help tremendously. Additionally, a less punitive approach to many *other* kinds of misdemeanors would significantly alleviate stress on the system. A recent study by the Vera Institute of Justice, entitled “Incarceration’s Front Door: The Misuse of Jails in America” found that the majority of individuals who make up the United States jail and prison population are incarcerated for minor violations.¹⁰⁰ These infractions include such petty offenses as evading subway fees, minor drug possession, and driving with suspended licenses.¹⁰¹

The Institute of Justice’s study found that while violent crime has fallen by nearly 50% since 1983, and property crime has fallen more than 40%, more people than ever are in jail on any given day in the United States.¹⁰² With many Americans still reeling from the recent recession, crimes normally punished by a small fine are unable to be paid, which results in jail time for many. This unfortunate fact coincides neatly with the increasingly punitive nature of the American justice system.¹⁰³ Judges are less likely, in many instances, to grant bail amidst a culture of statutorily created zero tolerance policies and mandatory minimum sentencing guidelines.¹⁰⁴ Thus, naturally, as discussed *supra*, prosecutors are more likely to bring charges or to refuse to negotiate for fair plea bargains. As a result, the public defender is entangled in between the two, often in a lose-lose situation. A commitment by state legislatures to scale back on zero-tolerance drug crimes, or moreover abolish “mandatory minimum” sentences for first-time non-violent offenders in non-drug offenses, would significantly reduce the burden on public defenders.

¹⁰⁰ Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted, a Report Says*, N.Y. TIMES (Feb. 11, 2015) http://www.nytimes.com/2015/02/11/us/jails-have-become-warehouses-for-the-poor-ill-and-addicted-a-report-says.html?_r=0.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Kenneth Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks”*, 6 J. GENDER RACE & JUST. 381, 390 (2002).

IX. A COMPARATIVE ANALYSIS: THE UNITED KINGDOM

Considering that the United States' legal system is derived from England's longstanding common law history, it is surprising how the two countries diverge when it comes to indigent defense practices. Unlike in the United States, funding for indigent defense in England comes exclusively from the central government.¹⁰⁵ Similarly, while judge-made law has been the vehicle serving as the impetus for indigent defense rights in the United States, England has tightly circumscribed Parliamentary legislation that covers this right.¹⁰⁶

In 1903, England passed the "Poor Prisoners' Defense Act" with the aim to assist individuals who could not afford representation in England's Magistrates' Courts.¹⁰⁷ The Act was successfully backed with an incredible amount of government funding, second in contribution only to England's national healthcare fund.¹⁰⁸ Throughout the next century, however, the number of criminal cases began increasing and stress on the English indigent defense system began mounting – much like it did during the United States' "War on Drugs" period, which started in the 1980s.¹⁰⁹ However, unlike the United States, which cut funding to defense programs during this period, England increased its central funding of indigent defense programs.¹¹⁰ In the 1980s, multiple programs were introduced to alleviate the stress on the existing defender system.¹¹¹ These programs, funded by the national government, assured that all defendants in Magistrates' Courts were given readily accessible legal representation through "duty solicitors."¹¹² Current spending on legal aid in the United Kingdom is over 2.6 billion pounds (over \$3.8 billion).¹¹³

More recently, in 1999, Parliament passed the "Access to Justice Act" which obviated the need for the pre-existing "means test" requirement in order to receive defense assistance.¹¹⁴ As a result, very few individuals, rich or poor, retain private attorneys for criminal

¹⁰⁵ Gary Slapper & David Kelly, *The English Legal System* 518 (5th ed. 2001).

¹⁰⁶ *Id.*

¹⁰⁷ Catherine Elliott & Frances Quinn, *English Legal System*, pp. 183-201 (4th ed. 2002).

¹⁰⁸ *Id.*

¹⁰⁹ Norman Lefstein, *In Search of Gideon's Promise: Lessons from England And The Need For Federal Help*, 55 HASTINGS L.J. 835, 862 (2004).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Lee Bridges, *The Right to Representation and Legal Aid*, *The Criminal Justice Process*, 138-42 (Mike McConville & Geoffrey Wilson eds., 2002).

¹¹³ David Barrett, *Britain Has Largest Legal Aid Budget in Europe, Says Report*, TELEGRAPH (Oct, 9, 2014) <http://www.telegraph.co.uk/news/uknews/law-and-order/11149868/Britain-has-largest-legal-aid-budget-in-Europe-says-report.html>.

¹¹⁴ *Id.*

matters.¹¹⁵ The extremely high quality of public defense legal work as well as ample public funding helps make defendants' choices easy.¹¹⁶ This operates in stark contrast to the United States' system. In fact, evidence shows that after the passage of the Access to Justice Act, more English citizens retained private *physicians* (in lieu of England's National Healthcare) than defendants retained private *attorneys*.¹¹⁷

As a by-product of this insight into England's public defender system, it is also worthwhile to note that the United Kingdom has a much more progressive attitude regarding most illegal drugs than the United States. For example, in 2001, England's Labour Government reclassified cannabis/marijuana as a "Class C" drug, which removed the threat of arrest and prosecution for being in possession of the drug.¹¹⁸ To put this in perspective: in 2012, police officers in the United States made 1 marijuana/cannabis arrest *every 42 seconds*.¹¹⁹ This figure is staggering, and demonstrates just how much of a burden a punitive drug policy is on the judicial and public defense system. Moreover, of all drug arrests in the United States in 2011, more than 50% were for marijuana/cannabis.¹²⁰ If the United States takes a strong stance regarding the re-classification of marijuana's illegal status, an enormous burden would be alleviated from the system, even without any other changes to the public defender funding structure.

X. CONCLUSION

The United States has changed immensely since the work of Clara Foltz in the late 1800's and the subsequent Supreme Court decision of *Gideon v. Wainwright* in 1963. Unfortunately, this change has often been regressive, leaving the promises of *Gideon* and the visions of Foltz largely unfulfilled. As discussed *supra*, public defender offices nationwide are more overworked, underpaid, and underprepared today than they have ever been in our nation's history. Moreover, zero tolerance laws and "mandatory minimum" sentencing structures are only

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Lefstein, *supra* note 109, at 868 (citing to an interview with Derek Hill, Head of Public Legal Services, Lord Chancellor's Department).

¹¹⁸ Allen Travis, *Cannabis Laws Eased in Drug Policy Shakeup*, GUARDIAN (Oct. 23, 2001) <http://www.theguardian.com/uk/2001/oct/24/drugsandalcohol.whitehall> (note: England has re-classified Marijuana to a "B" drug, however the potential penalties are still less severe than those in the United States).

¹¹⁹ Matt Ferner, *One Marijuana Arrest Occurs Every 42 Seconds In U.S.: FBI Report*, HUFFINGTON POST (Oct. 29, 2012) http://www.huffingtonpost.com/2012/10/29/one-marijuana-arrest-occu_n_2041236.html.

¹²⁰ *Id.*

exacerbating the existing crisis. If the United States aims to live up to its own constitutional guarantees of indigent criminal representation, it must devote more resources to public defender offices—including significant state and federal funding to combat the growing numbers of defendants who are in need of representation. Conversely, if the United States is not able, or is not willing, to commit more funding to this cause, it is imperative to take a more progressive stance on prosecuting victimless crimes, such as minor drug infractions. Doing this will, at least in part, alleviate the tremendous stress on the indigent defense system and enable public defender offices across the country to better provide the accused with their constitutional guarantees to effective representation and a fair trial.