America's Public Defender System: A Day Late and a Dollar Short

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Abstract: The right to appointed legal counsel for those accused of felony crimes in America is well known, but the evolution of this right, and contemporary issues in public defense are less well understood. An analysis of case law reveals that the Supreme Court of the United States had certain intentions for an appointed counsel system in the U.S. that have historically not been met. Through analysis of the evolution of case law on this topic, as well as an examination of the systems workings today, informed by multiple public attorneys, specific issues affecting the lives of the accused on a daily basis are revealed. Additional examination of economic theory and budgetary precedent show that despite the fact that the system was set up with good intentions, it was bound from the beginning to suffer under its own weight without systemic change.

In American culture, many people are familiar with the idea that upon arrest, a person has the right to remain silent, that anything that they say can be used against them in a court of law, that one has the right to an attorney, and if they cannot afford an attorney, one will be provided for them.[1] This "Miranda Warning", which originates from the 1966 Supreme Court decision *Miranda v. Arizona*, is commonplace in television and movies. People tend to know less about the mechanics of attorneys being provided for those that cannot afford them. Indigent defendants make up roughly seventy percent of criminal adjudications,[2] and today, each of these defendants are guaranteed an attorney by law. Examining the efficacy of these attorneys, however, reveals myriad issues for both the defendants and attorneys in this system.

This issue intersects law, history, economics and justice, and is very much attached to the judicial history of the United States. Common sense lends itself to the idea that criminal legal proceedings are complicated and traumatic affairs for the accused, and that in almost all cases, the accused should not represent themselves. Until the mid-twentieth century, however, the courts of the United States did not share this view. While the 6th amendment conferred myriad procedural rights to those accused of crimes, such as the right to a speedy trial, and a jury of one's peers, the right to legal representation was left to be inferred later by judges. Through a slow process, the right to counsel became a reality for more and more criminal defendants.

The 6th amendment to the US Constitution states that "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense."[3] The legal community, however, interpreted this right differently than a modern reader might until criminal defendants brought their complaints about lack of representation into the appellate legal system.

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[1] "What Are Your Miranda Rights?," Miranda Warning, accessed December 10, 2021, http://www.mirandawarning.org/whatareyourmirandarights.html.

[2] "Defense Counsel in Criminal Cases - Bureau of Justice ..." (U.S. Department of Justice), accessed December 10, 2021, https://bjs.ojp.gov/content/pub/pdf/dccc.pdf.

[3] "U.S. Const. amend. VI". *Bill of Rights Transcript Text*. The U.S. National Archives and Records Administration. Retrieved 24 August 2012.

This clause of the constitution was initially interpreted as a right that is merely available to a criminal defendant, given that they find and retain counsel on their own. The standard we have today, which was achieved through decades of advocacy, is that the ability to have and instruct counsel is a necessity, rather than just a possibility, and that in order for criminal courts to approach just outcomes, the government is compelled to provide counsel for those who cannot afford counsel on their own. To an unknowing observer, this premise may appear to be common sense, but the judicial system did not come to this conclusion until 1963. In the eventual landmark case on the right to counsel, *Gideon v. Wainwright,* Justice Hugo Black wrote that "reason and reflection require us to recognize that in our adversary system of criminal justice, 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."[4] While Justice Black served society well by putting this principle into law, it's difficult to appreciate it's full significance without a full understanding of the adversarial system of criminal justice in America.

The adversarial legal system has been relied on in the western world for centuries, and is still heavily believed in today. Simply put, the adversarial system places a judge or jury as the finder of fact in a case, and two adversarial parties present facts and rhetoric in a way most favorable to them. In criminal matters, the two adverse parties are the state, who is prosecuting, and the defendant, who has to answer to the charge. The adversarial system is excellent when both sides are represented thoughtfully. The idea of two lawyers, framing facts and circumstances as well as they can, and fellow citizens, in the case of a jury trial, deciding where the truth lies, may appear to be a beautiful system. The system seems beautiful, and will yield

[4] "Facts and Case Summary - Gideon v. Wainwright," United States Courts, accessed December 10, 2021, https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-gideon-v-wainwright.

outrightly bad results, however, when the assumption of the two sides being equally well equipped is not met.

Prior to the 1930's, Americans were tried in state courts for felony offenses without the assistance of counsel if they could not afford it. To say this undermined the legitimacy of the adversarial process is a massive understatement. No felony defendant can ever adequately represent themselves in a court of law, and the fact that this was not acknowledged by the courts for centuries is hard to believe. Although legal aid organizations filled some gaps, the process of criminal defendants attaining the right to counsel did not start to see success until 1932 in the case of *Powell v. Alabama*.

Oyez.com provides an excellent summary of *Powell v. Alabama*: "Nine black youths -- described as, 'young, ignorant, and illiterate' -- were accused of raping two white women. Alabama officials sprinted through the legal proceedings: a total of three trials took one day and all nine were sentenced to death. Alabama law required the appointment of counsel in capital cases, but the attorneys did not consult with their clients and had done little more than appear to represent them at the trial."[5] The facts of this case highlight the need for adequate representation for indigent defendants and the abuses that occur at the hands of unethical prosecutors when representation is not provided. Alabama's state law was not clearly not strong enough to protect the rights of these defendants, who were young uneducated people of color in the south, and this was clear to the Supreme Court. Through the legal theory of Incorporation, the 6th amendment right which was previously discussed, and only applied in federal courts, was applied to all state court proceedings. This marked a big victory for the right to counsel, but only resolved the lack of representation for a small portion of criminal defendants. While the *Powell* case begins to acknowledge that fairness cannot be ensured when the assistance of lawyers is embarrassingly

[5] "Powell v. Alabama." Oyez. Accessed December 8, 2021. https://www.oyez.org/cases/1900-1940/287us45.

poor as it was in this case, the case only resulted in representation being guaranteed to defendants facing the death penalty. Ten years later, the Supreme Court took the opportunity to address the right to counsel again and failed to further advance the cause of justice.

The next push to extend the right to counsel came in the case of Smith Betts, an unemployed farmhand from Maryland. At his indictment for robbery, Betts informed the judge that he would like counsel appointed for him, as he could not afford to hire his own representation. The request for counsel was denied due to the county's policy of only appointing counsel for defendants facing charges of rape or murder.[6] Although the *Powell* case incorporated the counsel guarantee to state courts it did so only for capital charges. Like in so many other areas of American law and public policy, the rules for when appointed counsel was a right of the accused varied from state to state and county to county. There are lots of good reasons for policies to vary by municipality, but one that is so essential to the integrity of judicial outcomes should obviously not vary by territory. Although he eventually was convicted at trial without the assistance of a lawyer, Betts latched on to this idea and brought it to higher courts. He petitioned courts while serving his prison sentence and eventually got some traction.

Through multiple *habeas corpus* appeals from prison, he asserted that the constitution granted the right to be represented by a lawyer, but a Maryland appellate judge rejected his assertion. Betts appealed this decision to the Supreme Court, and with the opportunity to bring representation to criminal defendants across America, the court decided not to. To quote from the opinion by Justice Owen Roberts wrote that "It has been the considered judgment of [the authors of the 6th amendment] that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy. In the light of this evidence we are unable to say that the concept of due process incorporated in the

[6] "Betts v. Brady," Ballotpedia, accessed December 10, 2021, https://ballotpedia.org/Betts_v._Brady.

Fourteenth Amendment obligates the states, whatever may be their own views, to furnish counsel in every such case."[7] In this excerpt, the court seems to tacitly state that the right to counsel is essential to ensuring fair outcomes. It asserts that this was not the intent of the 6th amendment, however, and that if our nation wanted all criminal defendants to be furnished counsel as a matter of policy, it should be implemented by other entities. This 'not our job' mentality is a pattern that plays out in the evolution of many later-inferred constitutional rights, as it did here, but there seemed to be an acknowledgement of what the eventual outcome should be. Practicality is the enemy of virtue when it comes to furnishing counsel for free, as the eventually assembled system faces myriad operational difficulties. In this decision, the court only delayed the pain that would come along with setting up a public defender system.

About 20 years later the right to counsel arrived at its moment in the sun, as the case of *Gideon v. Wainwright* saw a reversal of the reasoning used in *Betts.* Clarence Earl Gideon, a Florida man who's poor life choices made it unlikely he would ever change the world for the better, ended up offering an argument that persuaded the Supreme Court to grant counsel to all felony defendants in America. The US Courts website says that Gideon was "an unlikely hero. He was a man with an eighth-grade education who ran away from home when he was in middle school. He spent much of his early adult life as a drifter, spending time in and out of prisons for nonviolent crimes."[8] When Gideon was arrested and charged with breaking and entering, he went on to represent himself through an entire jury trial after being denied the opportunity to have counsel appointed for him. Impressively, Gideon represented himself adequately at trial, asserting his affirmative innocence, cross examining witnesses, and even calling his own

[7] "Betts v. Brady," Ballotpedia, accessed December 10, 2021, https://ballotpedia.org/Betts_v._Brady.
[8] "Facts and Case Summary - Gideon v. Wainwright," United States Courts, accessed December 10, 2021, https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-gideon-v-wainwright.

witnesses. Despite Gideon's best efforts, however, he did not prevail in the trial and was sentenced to five years imprisonment. Similarly to Betts, Gideon wrote handwritten appeals from prison that were denied by the appellate courts of Florida. His last chance to persuade a court that he was entitled to a lawyer came in 1963, when his case was heard by the Supreme Court of the United States.

The *Gideon* decision took the reasoned hesitation towards furnishing counsel from the *Betts* case, and reversed it completely. The court in *Gideon* applied the right to counsel to any defendants who are imprisoned or face the possibility of one or more years of imprisonment. This expansion of the right to counsel came with extreme magnitude. Those facing the possibility of death make up an extremely small portion of people arraigned for murder, and a much smaller portion of people arraigned for felonies at large. This expansion took court-appointed counsel from being guaranteed only to those facing the worst penalties and provided to lesser defendants at the discretion of municipalities, to being guaranteed to essentially all facing a substantial prison sentence.

The *Gideon* decision was unanimous, and is viewed today as a 'feel good' moment in our judicial history. The court finally put into law the common sense proposition that adversarial litigation processes cannot be fair with one side not having guaranteed representation. Justice Black wrote that "fair trials before impartial tribunals in whichever defendant stands equal before the law . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."[9] While Justice Black did hold this opinion twenty one years prior in *Betts*, it is worth questioning why the court reversed its own decision.

[9] "Facts and Case Summary - Gideon v. Wainwright," United States Courts, accessed December 10, 2021, https://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-gideon-v-wainwright.

Twenty one years is not a long time in the context of the highest court in our land, and the reason for the change of heart seems to be mostly non-legal. During this period, the constituency of the Supreme Court had almost entirely changed. Only Justices Black and Douglas, who dissented in *Betts*, remained on the court to hear *Gideon*.[10] [11] The facts of *Betts* and *Gideon* were so similar that the change in decision can be isolated to two factors: either the justices became more sympathetic to the accused, or they believed that achieving a standard of fairness was worth the cost that would ensue for all people accused of serious crimes to have representation. The former is certainly possible, as so many of the highest profile Supreme Court decisions do reflect changes in societal opinion, but the latter seems to be the more likely source of the change. Even in *Betts*, reading behind the lines showed an acknowledgement of inherent unfairness, with a reluctance to place a duty on the government. The *Gideon* court took the opportunity to grant rights to the accused, and kicked off a system of guaranteed public defenders across the country. The decision in *Gideon* did not prescribe how the counsel was to be provided, which is another giant hurdle to providing fair trials to those who cannot afford to hire attorneys.

The two approaches to providing counsel to indigent defendants are public defender systems and appointed counsel systems. Both are used in combination today, and it is important to understand what each is and how it is used.

Public defender agencies are government funded and operated agencies that hire attorneys for the purpose of defending indigent defendants in their area's courts. They will attend arraignment sessions very frequently and acquire clients as defendants are arraigned and attest that they cannot hire representation. These attorneys have the duty of creating the fair tribunals

[10] "Betts v. Brady." Oyez. Accessed December 10, 2021. https://www.oyez.org/cases/1940-1955/316us455.
[11] "Gideon v. Wainwright." Oyez. Accessed December 10, 2021. https://www.oyez.org/cases/1962/155.

that *Gideon* aimed to establish, but face many challenges in navigating the criminal justice system, such as an unreasonable high caseload, not enough time to properly address their clients needs, and being chronically underpaid and underappreciated.

Appointed counsel systems serve the same purpose but find attorneys from sources other than a public defender office. Appointed counsel are usually accredited attorneys in a jurisdiction that work in area law firms doing both civil and criminal litigation for paying, private clients. These attorneys are recruited into the appointed counsel rotation, either to supplement their caseload, or to do a service for their community. These attorneys will be assigned a few days to attend arraignment sessions each month and represent individuals being arraigned who are unable to hire representation. They are paid by the government by the hour for the work they do on behalf of court appointed clients, and are reimbursed at a modest rate - a fraction of what they are able to charge to their private paying clients. They are seemingly able to achieve a better lifestyle and greater pay than public defenders, but face the same obstacles as public defenders, just to a lesser degree.

They will alternate with the public defender in being assigned new cases, to manage the workload of public defenders, and in one important instance: conflict of interests. When multiple people are arrested for a single crime, and both need an attorney appointed for them, this triggers a conflict of interests for a public defenders office. If two lawyers in the same office were to represent two people charged in the same crime, the lawyers are engaged in a conflict of interest. This is because the attorney could hypothetically be interested in both his own outcome and his colleagues, which detracts from one attorney's ability to focus solely on their clients best outcome. A concrete example of this comes when multiple defendants are being tried at once, and each would like to frame a particular piece of evidence differently. This special case is one

reason why appointed counsel systems must always exist. Both public defenders and appointed counsel are hardworking legal professionals who take on the difficult task of representing the most vulnerable, and both are prone to imperfect outcomes.

Public defenders and appointed counsel face lots of systemic challenges in their day to day lives that make the job difficult. At a high level, criminal attorneys handle each one of their cases through three overarching steps: understanding the situation, crafting the legal strategy, and executing the legal strategy. In each one of these steps, public defenders and appointed counsel have less freedom and ability to gain the greatest understanding, craft the most personal strategies, and pursue the most complex litigation. In the larger picture of helping people, criminal lawyers are supposed to treat their clients personally and with care, as well as help their client find a way to have a successful life after their interaction with the justice system. Both of these go along with attorneys being able to get to know their clients on a deeper level, which public counsel often have less time to do.

In getting to know their clients and understanding the circumstances that led to their arrest, private attorneys often have the advantage of meeting their clients before their arraignment and possibly even before their arrest. They can use this time to set expectations for their client about their situation, go through what will happen at arraignment, and most importantly, establish a relationship of trust with their client before their first court appearance. Public defenders, on the other hand, meet their clients as they are arraigned. They get a shockingly short time, sometimes shorter than a minute, to get acquainted with their client and inform them of the implication of entering a plea. In the big picture, this is not a significant disadvantage, but having a head start on legal proceedings and establishing a personal

relationship of trust between attorney and client are both less tangible factors that affect outcomes both judicially and in the future life of the accused.

Crafting a legal strategy is the next step for attorneys and clients, and once again, the same obstacles come up for public counsel. At this stage, the lawyer and client will discuss the possible outcomes, after having an understanding of the facts of the arrest and the evidence a defendant is facing. At this stage, the lawyer and client will make one key decision in the handling of the case: to pursue pretrial and trial litigation or to pursue a plea bargain.

Only about six percent of state level prosecutions go to trial,[12] which is a problem of its own, but the problem of interest here is the discrepancy in who ends up receiving the trials that all defendants are constitutionally entitled to. Within the ninety-four percent of state criminal cases being resolved through plea bargain prior to a trial taking place we see a disparity between public and privately represented individuals. In a study of multiple states in the 1980s, it was found that public defendants make up fifty-nine percent of cases that are resolved by a guilty plea, where private defendants make up only forty-one percent. This statistic points out the reality that when developing a strategy, the time constraints placed on public defenders force them to pursue the less time consuming route to resolve their clients' cases. It is easy to imagine, given the discrepancy, that some of the public cases that end up in plea bargains are ones in which trial is at least warranted, let alone the possibility that they would lead to acquittal. The statistical proof that lawyers sacrifice exhaustiveness for time in public counsel cases shows that in the strategy stage of lawyer-client engagement, there are less options available to a defendant.

As an attorney executes the agreed upon strategy, the difference between privately paid and publicly appointed attorneys continues to play out. As an example, the hiring of a

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[12] Beth Schwartzapfel, Abbie VanSickle, and Annaliese Griffin, "The System: The Truth About Trials," The Marshall Project (The Marshall Project, November 4, 2020), https://www.themarshallproject.org/2020/11/04/the-truth-about-trials.

psychiatrist to prepare a report for trial on the mental state of a defendant poses more challenges for an indigent defendant than it does for one with money. A privately retained lawyer can contact a psychiatrist for his client and have their work commence immediately. On the other hand an indigent defendant in the federal court system and their lawyer essentially need to go through a miniature trial to earn the authorization and funding to hire such an expert.

Under the Criminal Justice Act, indigent defendants in the federal court system have a hefty, but clear set of standards to access professional services outside of their attorney. For example, with the hiring of a psychiatrist, counsel will need to request a hearing for whether the use of a psychiatrist is necessary for an adequate defense.[13] With experts hired with public funds, there is also bound to be more scrutiny on the person hired, restrictions on the purpose of the report, and criticism on the reasonableness of the fees charged. The additional work that is required for public defenders and defendants to put on complex trial exhibits is yet another systemic disadvantage they face.

Much of society believes that the criminal justice system should rehabilitate the people that come through it. There are several reasons to believe this, whether they be economic, moral, or sociological. However, America's criminal justice system devotes less effort to rehabilitation than the systems seen around the world. While this is an expansive topic that will be the subject of reform over the coming decades, it is important that public counsel take the first step in rehabilitating defendants. When about eighty percent of criminal defendants are represented by public counsel, and public counsel are overworked, one of the first things to be sacrificed is personal treatment of clients.

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[13] "Chapter 3, § 320: Authorization of Investigative, Expert, and Other Services." United States Courts. Accessed December 10, 2021. https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-320-authorization-investigative-expert#a320_10.

When defendants meet their lawyers, and in most cases are not asked about themselves. When time is of the essence, attorneys are not able to get to know their clients and what underlying issues have gotten them in trouble with the law. They instead focus on a legal strategy that minimizes the punishment for the defendant and optimizes their own time. Understanding the underlying issues in a defendant's life is relevant to the sentencing stage of legal proceedings, when a judge has discretion in the type of penalty imposed on a defendant. For example, drug courts are gaining popularity across America that provide involved treatment for defendants having alcohol or drug dependency issues. These courts follow a less adversarial procedure, use specialized sanctions and incentives, and have seen success in many cases. For an attorney, it may not be immediately apparent whether or not someone arrested for a property crime is struggling with drug dependency. When an attorney has less ability to get to know their client on a personal level, it is less likely that this drug dependency is going to be discovered, and thus less likely that this individual will receive more helpful treatment through a drug court program. With programs like drug courts receiving more acknowledgement and funding across the country, it is aggravating that those with less careful representation will not get to take advantage of them. Counsel can assist their clients in many ways, and in many cases, public counsel is less equipped and possibly likely to pursue the highest quality outcomes.

The final relevant Supreme Court opinion on the right to counsel touches on what constitutes assistance of counsel, and when assistance of counsel is not present. David Washington, a murder defendant in Florida, recieved a death sentence after his attorney made no attempt to request a psychiatric evaluation or effort to seek out character witnesses. Washington appealed his sentence asserting that his counsel had provided ineffective assistance. The Supreme Court agreed that the counsel that Washington was guaranteed under *Gideon* must be

effective, and put in place a two part test for lawyers suspected of shirking their duties. The Supreme Court held that: "(1) counsel's performance must be deficient; and (2) the deficient performance must have prejudiced the defense so as to deprive the defendant of a fair trial."[14] This standard is clear, and its assurance increases the benefit that indigent defendants receive. The standard is, however, one that defendants have a difficult time proving on appeal. They must definitively prove that their lawyer behaved in a way that is deficient in a way that departs from professional standards, such as not following up with a witness that they were aware of. The idea of deficient performance does not include things like not spending enough time crafting a defense, or other qualitative claims of the like. The decision also states the requirement that the deficiency in question must have been so relevant to the proceedings that it precluded the defendant from receiving a fair trial. Ancillary issues of deficient performance do not entitle a defendant to a claim of ineffective assistance of counsel. The *Strickland* decision only stands to prevent blatant malpractice by publicly appointed attorneys. In fact, some appellate lawyers spend their entire career arguing *Strickland* appeals, and these cases are rarely successful. The implicit disadvantages of public counsel are still present after *Strickland* and the Supreme Court is not likely to solve any of them.

As the right to counsel evolved into fully fledged systems for the appointment of counsel, socially minded lawyers across the country like Attorney Jim Krasnoo dedicated their time and energy into providing quality representation to those who cannot afford it. Attorney Krasnoo has been a criminal litigator since the 1970s, and continues to represent indigent defendants to the present day, now in his eighties. In his early career, establishing his private practice was important to him. Judges in Massachusetts, however, noticed his litigation skill and desire to help people, and targeted Jim to join the Bar Advocate Program, Massachusetts' appointed counsel

[14] "Strickland v. Washington." Oyez. Accessed December 10, 2021. https://www.oyez.org/cases/1983/82-1554.

system. “They knew I was reluctant, so they had a judge who knew me personally ask” Jim said. Reluctance to step into the appointed counsel system is understandable, as those practicing criminal law are acutely aware of the challenges that go along with it. With convincing, Jim began to take Bar Advocate cases along with the cases he brought into his own law firm. Over time, Jim became not only one of the top criminal defense attorneys in Massachusetts, but one of the most well recognized attorneys in the state for his commitment to public defense.

Jim’s Bar Advocate work started with a focus on Lawrence, MA, an underserved community of color with a far from perfect court system. Over time, and through his care in hundreds of jury trials, Krasnoo was eventually elected president of the Lawrence Bar Association. The LBA, a collection of lawyers, many of which spend a significant portion of their time on Bar Advocate work, have constantly recognized Jim’s leadership. Jim has not only helped hundreds of criminal defendants, he has also personally mentored most of the Bar Advocate attorneys in Lawrence and other cities over an entire generation.

In 2014, Krasnoo was recognized for fifty years of outstanding service by the LBA, and had plenty to say as a reflection on the prior fifty years. He remarked “[Once] someone had asked me at a cocktail party . . . ‘Why do you want to represent the maggots of the world when you could be out making a lot more money?’ and I looked at him and I said ‘because they are human beings.’”[15] This idea comes as a shock to many both inside and outside of the legal profession, but there are a select few public counsel lawyers that are willing to forgo their most financially lucrative career opportunities to help people. The problem, however, is that public counsel that hold these values and live up to them over an entire career are few and far between. Jim has been held up in Massachusetts for decades for his virtue, selflessness, and passion for

[15] Paul Klehm and James Krasnoo, “Jim Krasnoo Tribute for 50 Years of Service,” Youtube, October 26, 2014, https://www.youtube.com/watch?v=4tVQzn6sWMw&ab_channel=DanRyan.

helping others. There are other archetypal public counsel attorneys that do not live up to this high standard, however.

Public counsel that do not live up to the virtuous ideal of the caring public defender tend to fall into two camps: the struggling and the expedient. The struggling public counsel recognizes the duties of the work they do. They recognize that they are responsible for defending the rights of someone who is at a financial disadvantage, is being prosecuted by their government, and oftentimes, faces additional socioeconomic challenges. They do their best to do right by their clients, and are sometimes able to. At the end of the day, however, they are still stuck in a system where they are not equipped to succeed. They connect with their clients on a personal level, but after seeing the cycle of clients losing hope and going to prison, they become emotionally wounded. Over time, attorneys who opted to join this challenged system to make a difference leave for other opportunities, or become expedient public defenders.

Expedient public defenders are very common in the court system. They have seen the system churn through defendants, and see themselves as helpless to change a broken system. To this end, they sacrifice much of the care that lawyers should give. In their view, the outcomes of individual defendants will not improve with the more effort they put in, so they choose to give less effort than they should. They fail the goal of the system in all ways. Deliberately favoring plea agreements to get cases off their plate is the main way they shirk their responsibilities. When plea agreements are systemically favored by expedient defenders, it degrades the rights of the accused, as prosecutors will obtain convictions with weaker evidence when they know a plea deal is imminent. As Attorney Krasnoo put it in his acceptance speech "My job is to protect the individual rights that are given to every human being under the constitution."[16] It is unfortunate

[16] Paul Klehm and James Krasnoo, "Jim Krasnoo Tribute for 50 Years of Service," Youtube, October 26, 2014, https://www.youtube.com/watch?v=4tVQzn6sWMw&ab_channel=DanRyan.

that expedient public defenders view their job as merely keeping cases within the well worn guardrails of the system and collecting a paycheck.

Krasnoo, now late in his career, maintains the same passion for his work as he has always had, while offering concerns for the future and ideas to improve the system. In his LBA award speech, he said "I don't intend to give up this work, there's always someone who needs to be helped. I've always believed that I can in some small way make a difference to help him or her, and I intend to try to do that as long as I can."[17] This attitude is immensely respectable, and although these are values he has lived up to his entire career, he is only one person, and cannot fix the system on his own. He has his own views on how the public counsel system will evolve with the coming generation of lawyers. One thing Jim is particularly concerned about is the availability of high quality lawyers for complex indigent defense matters going forward.

In a recent conversation, Jim expressed concerns about the so called 'murder list' having too few people in Massachusetts. The murder list - not a list of people to murder - is a list of attorneys qualified to represent indigent defendants accused of murder. Jim is concerned that the murder list has shrunk over the past several years, and this trend is likely to continue. He remarked that the murder list is composed of mostly older lawyers like himself, which is a natural result of the fact that attorneys must be very experienced to gain a spot on the murder list. The problem comes, however, when the older attorneys on the list retire or pass away, as has been happening recently. Jim is concerned because the list is losing members faster than they can be replaced. When asked about why he thinks this is happening, he offered one main thought: that there were not many attorneys ready to replace those leaving the murder list because once an attorney becomes qualified enough to join the list, they stop taking Bar Advocate work. This

[17] Paul Klehm and James Krasnoo, "Jim Krasnoo Tribute for 50 Years of Service," Youtube, October 26, 2014, https://www.youtube.com/watch?v=4tVQzn6sWMw&ab_channel=DanRyan.

reflects a disconnect between the Bar Advocate system's ability to attract lawyers and the amount of lawyers needed for the system to run smoothly.

In the career of a litigation attorney, they will need to take steps at the beginning of their career to be trained, and to build their courtroom skills before they are able to attract clients on their own. Joining prosecutors offices or representing indigent defendants are two common ways attorneys gain experience. Krasnoo says that after about two and a half years, the benefits of being a Bar Advocate sharply decline, as you have learned the ways of a courtroom, and are now equipped for more lucrative opportunities. The failure of the Bar Advocate system to attract talent into their mid and late careers is the reason the murder list is dwindling, and at some point, something must change. The reality is that higher pay is the most likely factor to keep attorneys on board in public counsel systems. Digging deeper into Massachusetts' system, for example, reveals that Bar Advocate attorneys are paid by the Committee for Public Counsel Services (CPCS). CPCS is responsible for paying attorneys like Krasnoo, and has to fight for scarce government resources to do so.

For fiscal year 2022, a CPCS budget increase was approved by the Massachusetts legislature for the purpose of increasing pay rates for Bar Advocate attorneys. In a statement about the budget increase, attorney Ellie Hertzberg said "The low rates have caused many excellent, experienced Bar Advocates to stop doing the work. And that does not benefit anyone in Massachusetts. A system should be put in place to increase the rates paid to Bar Advocates now and provide for increases in the future to provide a service that benefits everyone."[18] While this seems like a sensible matter of policy to those who are educated on the issue, it is useful to

[18] "My Advocacy for Justice in the FY22 Senate Budget as the Senate Chair of the Judiciary Committee," State Senator Jamie Eldridge (State Senator Jamie Eldridge, May 4, 2021), https://www.senatoreldridge.com/blogposts/my-advocacy-for-justice-in-the-fy22-senate-budget-as-the-senate-chair-of-the-judiciary-committee.

look to the discipline of economics for an explanation of why CPCS getting substantial budget increases is not likely.

According to public choice, a subfield of economics that examines government decision making, it is best to look at agencies like CPCS as interest groups. They aim to gain government resources to accomplish their goals, and need to use the political influence of their own constituencies to make this happen. One compelling theory is that of George Stigler. Stigler proposed a revolutionary idea in his 1971 paper *The Theory of Economic Regulation*. The paper explores what kinds of interest groups are able to influence the allocation of government resources, and eventually concludes that the most successful interest groups are those that have significant economic power that is held by few constituent members.[19] Dairy farmers are a good example of Stigler's theory, as they have been a powerful lobby in America for decades, while being economically powerful and made up of few members. Groups like the CPCS, unfortunately, are on the opposite end of the spectrum. Public defender agencies do not have much, if any, economic power, and this power is not concentrated in a few members. To put it in simpler terms, everyone hypothetically benefits from the existence of public defenders, but do not care about them very much. Krasnoo and others gave reasons why more money is necessary to sustain the system, and Stigler's theory provides a foundational explanation of why more money is not likely to flow into the system.

Another theory from public choice that helps to explain the chronic underfunding of public defender agencies is the idea that politicians align themselves with interest groups based on the goal of maximizing votes. In this theory, politicians will advocate for interest groups that have voter and donor influence in their district. Nationwide issues, such as infrastructure, gain

[19] Richard Epstein et al., "Interest Group Politics Still Thrives-but Industry Often Comes Second," ProMarket, August 2, 2021, https://promarket.org/2021/07/22/george-stigler-theory-economic-regulation-interest-group-politics-industry/.

political support in this theory when a politician can direct the benefit of the policy to their constituents. In this theory, the idea of public defense agencies gaining more funding is also heavily disadvantaged. Since public defenders are not a service anyone hopes or imagines that they will use in their lifetime, it is not at the top of their mind when voting or speaking about political topics. This weak preference for public defenders informs how politicians vote on the public defender agency budgets, which has many downstream effects. Economic theories may not serve to correctly explain every problem in the public defender system, but the fact that these economic theories match up with the complaints that public defenders have in their day to day work is significant.

Once illuminated, the issues that plague the public defender system can be seen as a vicious cycle. The cycle starts with the fact that people don't devote much of their political energy toward the improvement of the public defender system. This informs politicians that it would be optimal for them to allocate tax dollars to other causes which will gain them more votes. This, in turn, sets the pay for public defenders and bar advocate attorneys too low to attract and retain experienced attorneys. This leads to poor outcomes for publicly represented defendants, as the lawyers will be of a lower quality than they otherwise might. The poor results will show observant voters that the system is failing and does not deserve political resources, and the cycle starts again. Add to this the overly punitive attitudes that have been present in America over the past half century, and a court system that is strapped for resources at all times, and it becomes clear that this system is in no position to succeed. Virtuous individuals like Jim Krasnoo and other public counsel who do their best to advocate for and touch the lives of their clients each and every day do exist. They can only help the people that they come into contact with, however, and the structural issues will remain after they move on from law practice.

This picture of the public defender system is very bleak, but improvement is definitely possible. One of the steps in the vicious cycle changing for the better could make all the difference for the public defender system, and the most likely opportunity would come in the form of changing voter preferences. There is a slowly growing movement in America to rethink our criminal justice system, as our system achieves worse results and has worse optics than the systems of other developed countries. If this strain of thinking continues to grow, small pieces of progress like the First Step Act from 2018 which eased penalties in the federal justice system, will become larger and broader in scope, and eventually take focus on the public defender system. This change will lead politicians to fund the public defense agencies more adequately, which will allow talented lawyers to stay in the system. With more quality lawyers advocating in the system, better judicial outcomes will ensue. Once better outcomes are achieved, voters will see that success in indigent defense is possible with adequate resources, and the vicious cycle will be reversed. There are many convincing arguments to be made in favor of increasing funding for public defender agencies, they are just not being made on a large enough stage yet. There will be a lot of difficult obstacles to create a wave of public awareness about this issue, but the energy for reform is already growing.

In the twentieth century, individuals changed the legal system for the better by asserting that the 6th amendment of the constitution guaranteed them the right to legal representation regardless of their ability to pay. The individuals that made this change were not powerful, but used passion and argumentation to change the minds of judges, and Americans today owe them a debt of gratitude. Since *Gideon* and *Strickland*, there have been few legal decisions to note that have strengthened the constitutional right to counsel. The constitutional right to counsel is now established, and the next step is to create a system where the constitutional right to counsel leads

to high quality representation for those who are appointed attorneys by the court. The fight is no longer in the realm of constitutional law, it is now in the realm of politics. To continue to move the right to counsel forward as it was in the twentieth century, people in the twenty-first century need to realize that the current circumstances require different solutions, and that changing the minds of the masses is more important than changing the minds of powerful judges.

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