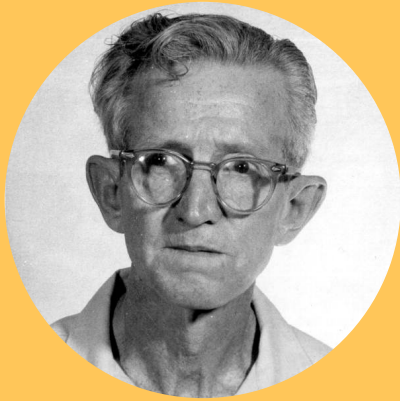




**AMBASSADOR PROGRAM**  
**SESSION 1 :**  
**INDIGENT DEFENSE**

# THE INDIGENT DEFENSE SYSTEM



Clarence Gideon

“[R]eason 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.”

U.S. Supreme Court in *Gideon v. Wainwright* (1963)

Mass incarceration is one of the most urgent civil rights crises of our time. The United States incarcerates more people than any other country in the world. Though the United States makes up 5% of the world’s population, we have 25% of the world’s incarcerated people. Currently, there are approximately 2.3 million people locked in cages in jails and prisons across our nation. A disproportionate number of those are members of our Black and Brown communities.

When we talk about how we got here, causes frequently cited include prejudicial policing, discriminatory laws and initiatives like the war on drugs, and cruel sentencing practices like mandatory minimums. But there’s another cause that is often overlooked: our nation’s failure in the area of indigent defense.

# DEFENSE ATTORNEYS

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Defense attorneys – are especially those who represent the indigent – are crucial to the fight of ending mass incarceration. They are representing individuals whose liberty is at stake in a system that is completely stacked against them.

Defense counsel may accurately be considered **law enforcers**. While representing a lone individual against all the power of the state, counsel must “**police the police**” to determine if there has been an unconstitutional search, a coerced confession, an unlawfully suggestive lineup, or the fabrication of testimony. Defense counsel must attempt to ensure that the prosecutor is adhering to the professional requirement not merely to convict, but to do justice and comply with his obligations to turn over [exculpatory] material to the defense. Perhaps most challenging of all is the need to remind the judge of the constitutional mandate as well as the professional obligation to **protect the rights of the defendant** rather than treat him as a docket number to be quickly processed and sent to jail.\*

When you’re charged with a crime and facing a loss of freedom, merely having an attorney isn’t good enough. You need an attorney who will provide effective, high-quality representation. But most of the people in the United States charged with crimes don’t get this kind of representation.

\*Richard Klein, The Champion, National Association of Criminal Defense Lawyers, June 2012.

The indigent defense system in the United States is overburdened and under-resourced. It fails to provide meaningful representation to the most vulnerable members of our country. The result: millions of people – largely from communities of color – torn apart from their families and imprisoned, deprived of their liberty in an unfairly and unjustly.

## **THE INDIGENT DEFENSE SYSTEM – DEFINED**

The indigent defense system, also known as the public defense system, refers to the structures and processes implemented by policymakers and judges to appoint attorneys to people charged with crimes who are too poor to hire attorneys. If a court finds that a person is “indigent,” it means that the person does not have the financial ability to hire an attorney to defend them.

***"Lawyers in criminal courts are necessities, not luxuries."  
U.S. Supreme Court in Gideon v. Wainwright (1963)***

# **DETERMINING ELIGIBILITY**

Courts across the country have different methods of determining indigency. Typically, they evaluate how much money (income and assets) a person has in comparison to federal poverty guidelines determined by the U.S. Department of Health and Human Services.

For example, in Georgia, a person charged with a felony is “indigent” if the person earns less than 150 percent of federal poverty guidelines. In New Jersey, the standard for “indigence” is 125 percent of federal poverty guidelines.

As you can see, a person in New Jersey who lives alone would qualify as indigent – and receive a free attorney – only if their annual gross income was \$15,950 or less.

### ***2020 New Jersey Income Eligibility for Indigent Defense Services***

Household Size	One	Two	Three	Four	Five	Six	Seven	Eight
Annual Gross Income	\$15,950.00	\$21,550.00	\$27,150.00	\$32,750.00	\$38,350.00	\$43,950.00	\$49,550.00	\$55,150.00
Monthly Gross Income	\$1,329.17	\$1,795.83	\$2,262.50	\$2,729.17	\$3,195.83	\$3,662.50	\$4,129.17	\$4,595.83
Weekly Gross Income	\$306.73	\$414.42	\$522.12	\$629.81	\$737.50	\$845.19	\$952.88	\$1,060.58

It’s important to note that most states do not take into account the actual costs of hiring a lawyer when determining whether someone is indigent. As you can imagine, lawyer fees get expensive. It’s hard to fathom how someone who makes \$16,000 per year would have sufficient money to support themselves *and* pay for a qualified attorney to represent them in their criminal case. In other words, the method itself used to determine indigency can deprive people of their vital need for counsel.

If, based on the jurisdiction’s standards, a judge finds that a person is indigent, the judge appoints them an attorney provided by the government to represent them in their case.

***"Approximately 80% of criminal defendants are indigent and thus unable to hire a lawyer. Yet our nation's public defender system is woefully inadequate. "***

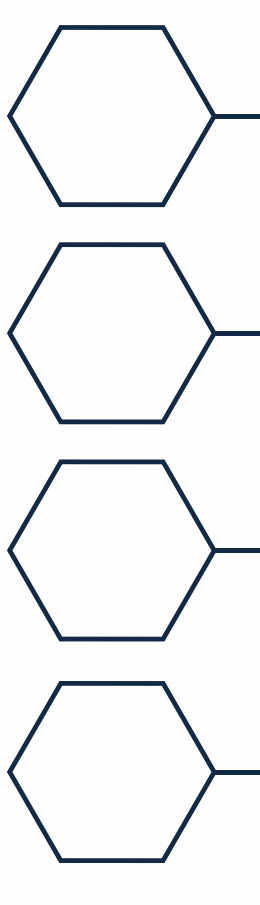
***- Michelle Alexander***

# HISTORY OF THE RIGHT TO COUNSEL:

The right to counsel – is enshrined in the Sixth Amendment of the Constitution:

*In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.*

A public defender is one of the few jobs created by or referenced in the Constitution, and it is a crucial role. Over the years, the scope of Sixth Amendment right to counsel has been further defined by the Supreme Court:

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- 1791** The Sixth Amendment of the U.S. Constitution establishes the right to counsel in criminal cases: if you are charged with a crime and face a potential loss of liberty, you have a constitutional right to have an attorney help you in your defense.
  - 1938** In *Johnson v. Zerbst*, the U.S. Supreme Court ruled that in federal trials, the Sixth Amendment guaranteed the right to counsel to those who could not afford to pay for one.
  - 1963** In *Gideon v. Wainwright*, the U.S. Supreme Court extended the right to counsel to state court trials. The sixth and fourteenth Amendments guarantee counsel to those who can't afford one – at the government's expense.
  - 1972** In *Argersinger v. Hamlin*, the U.S. Supreme Court held that an indigent defendant charged with a misdemeanor in a state prosecution had the right to court-appointed counsel. To guarantee fairness in trials involving potential jail time, no matter how petty the charge, the state is obligated to provide counsel.

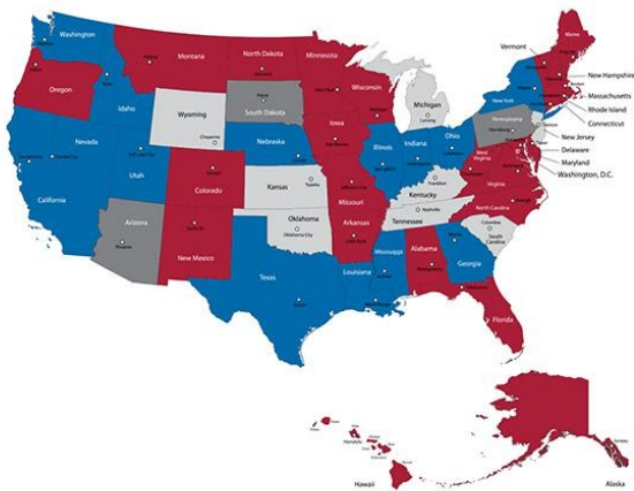
# TYPES OF PUBLIC DEFENSE SYSTEMS

The federal government does not specify how states provide counsel to the indigent. As a result, states and counties have devised their own systems. There are three primary systems for providing representation to those who are unable to afford counsel: public defender, assigned counsel, and contract attorney programs.

- **Public Defender Programs:** A public defender program is a public or private nonprofit organization that is designated to provide representation to the indigent in a particular jurisdiction. It's the defense equivalent of a prosecutor's office. Public defender offices have full- or part-time, salaried attorneys and staff who specialize in indigent defense services.
- **Assigned Counsel Programs:** An assigned counsel program relies upon private attorneys to represent indigent individuals. There are two types of assigned counsel programs. In an ad hoc system, a judge appoints a private attorney on a case-by-case basis. In a coordinated assigned counsel system, also called a managed assigned counsel system, an administrator oversees the appointment of counsel and develops standards and guidelines for the program.
- **Contract Attorney Programs:** A contract attorney program consists of agreements made between government authorities and private attorneys, bar associations, and private law firms to provide representation. The contracts can involve a fixed price for all cases over a time period, or a fixed fee-per-case for a specific number of cases.

In 2013, the U.S. Department of Justice's Bureau of Justice Statistics found that 28 states and the District of Columbia provided indigent defense services through state-administered programs. Other states had programs administered at a county or local level, with funding coming from a combination of county and state funds.

### Indigent Defense Funding Nationwide



#### Sources of Indigent Defense Funding

- Full State Funding (25)
- State Funding ≥ 50% (8)
- No State Funding (3)
- State Funding ≤ 50% (14)

Though there are advantages and disadvantages that come with all three of the systems, studies overwhelmingly show that public defender programs result in the best outcomes for indigent individuals.

Citing several studies, a 2020 report by the Texas Indigent Defense Commission found that representation by public defender programs instead of private assigned counsel resulted in:

- 3% lower likelihood of conviction
- 22% lower likelihood of prison
- 26% shorter sentence lengths
- \$200 million potential prison savings

Source: Texas Indigent Defense Commission

Other advantages of public defender systems are that they carry more predictable costs (because staff are salaried), better training and supervision over attorneys, and increased oversight and monitoring of attorney performance and caseloads.



# PROBLEMS WITH THE INDIGENT DEFENSE SYSTEM:

There are a wide range of problems associated with the criminal justice system generally, and the indigent defense system within it is no exception. Below are a few of the major problems associated with the indigent defense system, many of which are tied to inadequate funding and resources.

## High Caseloads:

Defense attorneys with excessive caseloads cannot provide effective assistance to their clients. Too frequently, public defenders have too many cases. In many areas, public defenders have over 100 clients at one time. A report released in 2019 by the Brennan Center for Justice at New York University School of Law found that only 27% of county-based public defender offices, and 21% of state-based ones, have enough attorneys to adequately handle their caseloads.

Attorneys are expected to zealously defend their clients. But with an excessive caseload, they don't have time to sufficiently meet and interview clients, research and file motions, investigate cases, or negotiate favorable plea offers. In other words, the clients are receiving far less than the high-quality services they deserve given that their freedom is at stake.

### **A New York Times profile on a public defender in Louisiana laid out the realities of excessive caseloads:**

- On April 27, 2017 Jack Talaska, a lawyer for the poor in Lafayette, Louisiana had 194 felony cases.
- High-level felonies carry sentences of 10 years or more and should each get 70 hours of legal attention, according to a workload study; mid-level felonies require 41 hours each; clients facing life without parole require 201 hours each.
- For Mr. Talaska's caseload, that's more than two years of full-time work. He needed to do the work of five full-time lawyers to adequately represent all of his clients.

The sheer volume of cases can mean that many clients sit in jail for weeks or months before meeting their lawyer. Large caseloads can also create an incentive for public defenders to push their clients to plead guilty rather than going to trial since trials are more time-consuming and resource-intensive.

On average, 95% of criminal cases end in plea bargaining, with excessive caseloads contributing to this trend. Many clients plead guilty without fully or properly understanding the consequences. It is not uncommon for attorneys to meet their clients for the first time at their plea hearings. Often referred to as the “meet ‘em and plead ‘em” system of justice, clients have little more than a brief conversation in the courtroom with their busy public defender before pleading guilty.

## **Lack of Resources, Training & Oversight:**

A lack of funding also leads to insufficient resources, training, and oversight in the indigent defense system. Access to resources – investigators, experts, technology, research platforms, etc. – is a critical aspect of preparation of a thorough and complete defense. The availability of resources for the defense ought to be comparable to what is available for the prosecution. Prosecutors have police departments, government crime labs, and forensic experts to help with investigations, whereas defense attorneys often have neither investigative nor expert assistance available. Too often, cases are resolved without the defense engaging in any investigation.

Oversight is also an issue. Public defender programs are often so leanly staffed that there is no meaningful supervision or oversight of their performance. In assigned counsel and contract attorney programs, there is often no method of oversight of performance at all – there is just an administrator who coordinates appointments. Without enforceable standards for defense attorneys, there is no mechanism to ensure that indigent defendants are receiving the quality of service they deserve.

# Lack of Independence:

Indigent defense should be independent from political pressure and influence from those who fund the program. The American Bar Association's principles of public defense calls for defense lawyers to be independent from the judiciary. However, judges in many locations decide which lawyers to appoint on cases – giving preference to those with whom they have personal relationships or to those who contributed to their election or re-election campaigns.

A Texas Tribune article discussed the structural flaw in the indigent defense system created by the unchecked power of judges: “[J]udges in most Texas counties decide which lawyers get cases, how much they are paid and whether their motions – say, to reduce bail or test DNA – have merit. . . Lawyers trying to work a case properly – by devoting more time or requesting an investigator – face a quandary: **Why make the effort if a judge can retaliate by appointing them to fewer cases or cutting their pay?**”

Harris County (Houston), Texas illustrates the intersection between a lack of independence and high caseloads. In 2019, Harris County had about 70,000 indigent cases. Judges are tasked with the full power and responsibility of appointing lawyers to cases. Without oversight over the appointment system, the result was that 74% of indigent cases were given to attorneys who exceeded the state recommended caseload limit. Some lawyers made in excess of \$300,000 annually for indigent defense appointments alone. When judges have power over appointments, lawyers who are perceived as being too dedicated in their defense can be excluded from appointments, and lawyers who are more willing to quickly push clients through the system can be beneficiaries of more appointments.

In addition to judges, independence issues can also arise when elected legislative or executive officials have too much control over the indigent defense system. When an official has the power to fire a public defender, or the power to approve contracts related to funding, it can create an incentive for the public defender to make the official, rather than the client, happy. The indigent defense system should be sufficiently independent of the judiciary, legislature, and executive departments to ensure that defenders represent their clients without being pressured into providing anything less than a zealous defense.

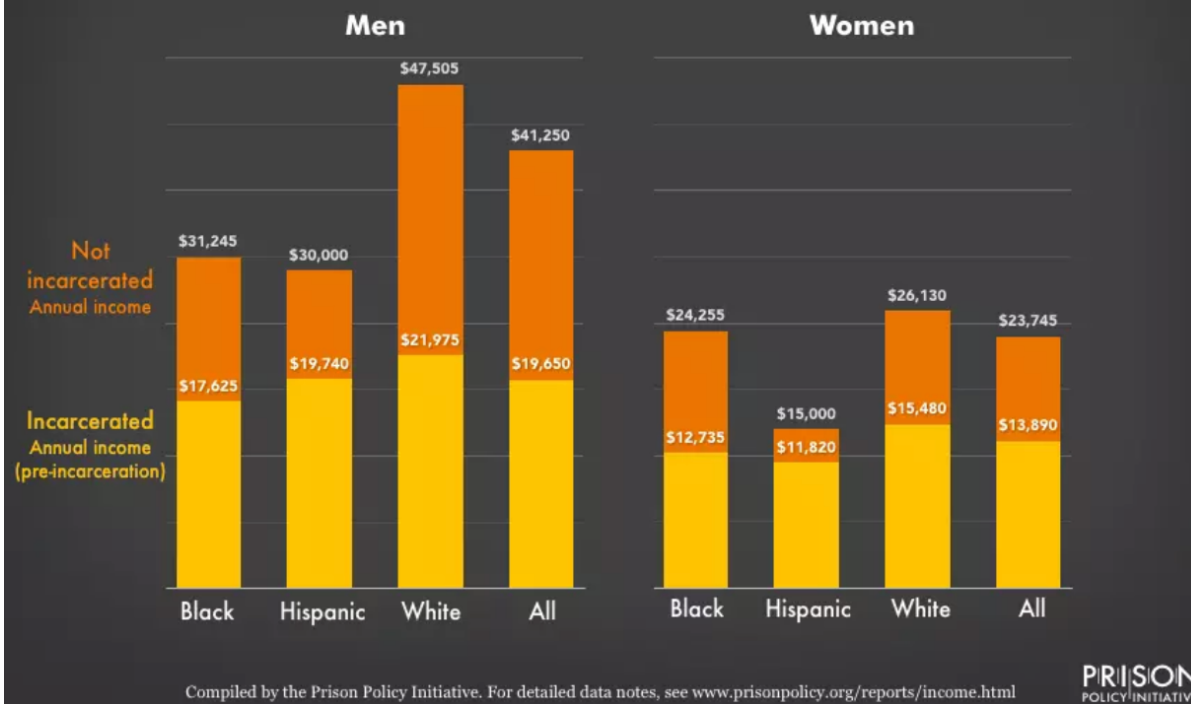
## **THE IMPORTANCE OF INDIGENT DEFENSE:**

Having a robust indigent defense system that provides effective representation to those accused of crimes is critical to the legitimacy of our “justice” system. Public defenders are the first line of defense against abuses of power by the police, prosecution or judiciary. They are the protectors of some of the most vulnerable members of our community.

It is well known that the criminal legal system disproportionately impacts communities of color. The Prison Policy Initiative’s analysis of the 2020 Census revealed that most of the people in prison are poor and the poorest are women and people of color.

## Most people in prison are poor, and the poorest are women and people of color

Median annual pre-incarceration incomes for people in state prisons ages 27-42, compared to incomes of same-age non-incarcerated people, by race/ethnicity and gender (in 2014 dollars)



These are the people most impacted by the indigent defense system. These are the people who pay the price if they are represented by an attorney who is not competent, not trained, or not well-resourced. These are the people who suffer the consequences of an indigent defense system that involves high caseloads, no oversight, and influence from judges and officials.

An inadequate indigent defense system carries with it a greater risk of convicting innocent persons and higher likelihood of a miscarriage of justice. In order for the criminal legal system to have integrity, there must be a strong public defense program, and the current system falls far short of what is required.

# FOR FURTHER LEARNING:

## Movies/Videos

- Gideon's Army - documentary by HBO, 1 hour 35 minutes (2013) - available on Tubi, Amazon, YouTube, iTunes
- "[Defending Gideon](#)" - documentary by the Constitution Project - 30 minutes
- Vice News, [America's Public Defense System Is In Crisis](#), 2020 - 12 minutes
- NowThis, [How Bad Lawyers Get Rich Off People in Houston Jails](#), 2021 - 8 minutes

## Books

- [Gideon's Promise: A Public Defender Movement to Transform Criminal Justice](#) - by Jonathan Rapping (2020).
- [Chasing Gideon: The Elusive Quest for Poor People's Justice](#) - by Karen Houppert (2013)

## Articles

- [How Judicial Conflicts of Interest are Denying Poor Texas Their Right to an Effective Lawyer](#) - by Neena Satija, Texas Tribune (2019)
- [One Lawyer, 194 Felony Cases, and No Time](#) - by Richard Oppel Jr. and Jugal K. Patel, the New York Times (2019)
- [When the Money Runs Out for Public Defense, What Happens Next?](#) - a three-part series by Oliver Laughland, The Marshall Project & The Guardian (2016)

## Podcasts

- [Serial](#), Season 3 - 9 episodes (2018)