

FOR THE DEFENSE:

Protecting and Expanding the Right to Counsel

The right to a lawyer is enshrined in our Constitution and recited *ad nauseam* on TV procedurals, but throughout the U.S., the right to counsel is an unrealized promise. Nearly 60 years after the Supreme Court decided *Gideon v. Wainwright*, the Sixth Amendment right to counsel is in peril.

Gideon was a landmark decision obligating states to provide counsel for anyone charged with a felony who couldn't afford to hire a lawyer, but the Supreme Court did not mandate a mechanism for how the states should provide the right to counsel. As a result, each state is responsible for determining, among other things, who provides the counsel, how they are paid, and how many cases they are permitted to take on. And many states have devolved this responsibility to counties or judicial districts. The resulting system is fragmented and underfunded; lacks quality control and oversight; and fails to safeguard the rights of the vast majority of people charged with crimes who are represented by public defenders or indigent counsel. While the vast majority of all people in prison rely on public defense, a larger share of Black and Latino people do than white people; as such, Black and Latino people bear the harmful effects of inaccessible or incompetent counsel more than white people.

The right to counsel implicates the legitimacy of our legal system and essential democratic and constitutional principles of liberty, due process, equal protection, and the presumption of innocence. The state of affairs today—where access to counsel may be at the discretion of judges whose interest is in efficient docket management, not vigorous defense; where counsel may not be assigned until days or weeks after someone is put in jail; where many defenders are overburdened and under-resourced—is untenable and presents an urgent call for change.

AV's goal is to expand access to quality and independent counsel to all stages of a criminal case. We are guided by the vision that a fair, just and legitimate criminal justice system depends on full realization of the Sixth Amendment right to counsel which requires: (1) access to a lawyer at all stages of a case; (2) quality representation; and (3) independence of counsel.



**80% OF PEOPLE
ACCUSED OF CRIMES**

*in the United States rely on a
public defender to protect their
constitutional rights.¹*



**73% OF PUBLIC
DEFENDERS OFFICES**

*exceeded recommended
caseload limits.²*



**24% REDUCTION IN LENGTH
OF PRISON SENTENCES**

*from holistic defense services
in one county, compared to
traditional defense services.³*



THE PROBLEMS

Delayed or denied access. The Supreme Court has made clear that people facing criminal charges need lawyers for all critical stages of their cases. People who are arrested and jailed on a bail amount they cannot afford or without bail at all may wait weeks or months before they can consult with a lawyer. Bail decisions are critical stages and people should have counsel when these decisions are made. Black and Brown defendants are more likely to be detained or to receive financial conditions of release. In misdemeanor and municipal courts, counsel is regularly denied through coerced waiver when early pleas sparing the person charged from a jail/prison sentence are offered. The notion that non-custodial sentences (such as probation or fines) do not require the advice of a lawyer is fallacious. Such sentences are an indirect route to jail or prison, undoubtedly implicate the liberty interest, and demand the right to counsel.

Barriers to quality representation as a result of state, local or internal funding, policies, practices, leadership, or culture. Public defenders are widely overburdened and under-resourced. As a result many defenders cannot and do not provide the kind of defense people deserve. Many defenders carry caseload burdens that violate their ethical responsibilities to zealously advocate for their clients.

Ineffective or limiting legal representation due to lack of fiscal, political, or professional independence. In many jurisdictions, judges control appointments and fees (which implicates legal strategy). This impairs the independence of defenders in two ways. First, it challenges their ability to zealously advocate on behalf of individuals. Second, it hinders advocacy for their clients outside the courtroom to pursue strategic litigation to combat inequities and injustice.

THE SOLUTIONS

Early and expanded access to counsel. Access to counsel at the earliest stages of a case— and certainly no later than when bail or pretrial release decision is made—should be the norm. Without access to counsel at this early stage, people are vulnerable to prolonged pretrial detention. Early access may reduce racial disparities in pretrial detention. The right to a court-appointed lawyer should also be protected for people charged with any criminal offense not just ones where a custodial sentence is threatened.

Improve the quality of counsel through innovative practice. The right to counsel must be safeguarded by sustainable and adequate funding that supports meaningful lawyering. This includes efforts to both increase funding for public defense and protects what funding there is from disinvestment. In addition, states should adopt and enforce limits and standards relating to caseloads.

Ensure defender independence and support defenders as changemakers and justice reform leaders. Meaningful counsel means lawyering that controlled and governed by an objective and independent oversight body, not individual judges. Like the “progressive prosecution” movement which is as notable for its media strategy as its systemic impact, defenders can and should use their voices in service of broader change. Public defenders are closely positioned to our most vulnerable communities and could use their insight to uplift racial justice, build policy, and strategize in partnership with communities of color and those directly impacted by the justice system.

1 Bureau of Justice Statistics, U.S. Dept. Of Justice, Defense Counsel In Criminal Cases (Nov. 2000), <https://www.bjs.gov/content/pub/pdf/dccc.pdf>

2 Bureau of Justice Statistics, September 2010, Special Report: Census of Public Defender Offices, 2007, <https://bjs.ojp.gov/content/pub/pdf/clpdo07.pdf>

3 Anderson, James M., Maya Buenaventura, and Paul Heaton, Holistic Representation: An Innovative Approach to Defending Poor Clients Can Reduce Incarceration and Save Taxpayer Dollars — Without Harm to Public Safety. Santa Monica, CA: RAND Corporation, 2019. https://www.rand.org/pubs/research_briefs/RB10050.html