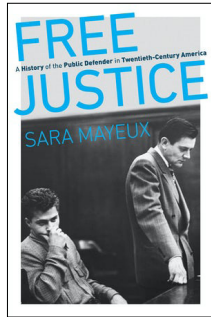


Public Defenders: The Antidote To Communism

BY HON. MARIA E. STRATTON

Sara Mayeux

FREE JUSTICE: A HISTORY OF
THE PUBLIC DEFENDER IN
TWENTIETH-CENTURY AMERICA
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MY CONCEPT OF the attorney-client relationship is based on what I learned as a young public defender. I was taught there are four decisions the client alone must make: whether to plead guilty or not guilty; whether to go to trial; whether to testify at trial; and whether to file an appeal. I was taught I must follow my client’s instructions for each decision. So I was stunned to discover, in Professor Sara Mayeux’s book *Free Justice*, serious proposals raised in past years to abrogate this client-centered approach to the attorney-client relationship in criminal cases.

Mayeux has written a fascinating account of our nation’s tumultuous road to, but ultimate acceptance of, publicly funded defender offices. *Free Justice* is not simply about the birth of public defender offices in early twentieth century America, but how the very idea of state-funded defender organizations overcame great opposition to become a national tradition by the 1960s and 1970s. The book is well-researched, and its sparkling prose and conversational tone make it an easy read, even for non-public defender buffs. Mayeux has brought to life the quirky personalities and philosophies of the bar leaders who pushed for and against the concept of publicly funded defense counsel. She also presents the dramatic stories of defendants — both guilty and not guilty — who exemplify the need for, benefits of, and broken promises attendant to state-funded appointed counsel.

Given this impressive work, recall the old adage, “Don’t judge a book by its cover.” Well, do not judge *Free Justice* by its unappealing cover, a Dorothea Lange black-and-white photograph of counsel and defendant, both looking like they would rather be anywhere else — and not together. Who wants to read a story about public defenders if the result is this miserably disconnected attorney-client duo pictured on the cover? In reality, Mayeux’s book tells a rich history of passionate proponents and defenders, including Wilbur Hollingsworth, chief counsel of the Boston Voluntary Defenders, whom Lange pictured with his client, 16-year-old Richard LaPlante. LaPlante’s acquittal of arson, with Hollingsworth as his “free” lawyer and despite a false confession, illustrates many of the major themes in Mayeux’s book: the idea of

“worthiness” in client selection, questions about funding for defender services, and, more broadly, the very role that public defenders should play in America.

Don’t judge a book by its title, either. “Free Justice” may have been a rallying cry for publicly financed defense counsel, but the slogan does little to convey the complicated issues generated when the United States embraced the concept. And that is the truly delicious part of this book.

Mayeux’s thesis is based on the seemingly crazy notion that after decades of struggle to establish publicly funded defense, we as Americans finally accepted the idea in reaction to the advent of Communism. She makes a strong case for the connection. But in my view, this solid explanation extends only so far. For example, Mayeux does not offer a satisfactory explanation for the chronic and universal underfunding of public defender offices that started from day one and continues to this day.

Mayeux begins *Free Justice* by describing the genesis of the idea of public defense: the proponents of public defender organizations, their opponents, the debate over funding, and the social forces operating in the background. She points out that most of those pushing the idea of public defenders were elite white men. For example, Mayer Goldman, a Manhattan lawyer and social reformer, tried to sell the chieftains of the New York bar, mostly white male Wall Street lawyers, on publicly funded defense by comparing it to publicly funded prosecution. There was also Reginald Heber Smith, a prominent Boston lawyer who wanted local bar associations to incorporate criminal defense into civil legal aid societies where bad lawyers would be “weeded out” and good lawyers would be expertly trained. Author Edward Bellamy, who penned the bestseller *Looking Backward*, was also a proponent of public defenders who would purvey the same “free justice” for rich and poor alike.

I find it ironic that these three privileged men are considered by many to be the pioneering founders of the idea of publicly funded defense. Their interest in the subject seems to be borne of their distaste for and desire to control “bottom feeder” criminal defense attorneys and “ambulance chasing” personal injury counsel, both types of lawyers they viewed as corrupt. No doubt corruption was a problem among some members of the bar, which was largely unregulated at that time. But there is more to the story. Unlike today, white shoe law firms did not foster robust criminal defense practices, and most firms discriminated in hiring based on race, religion, and gender. How interesting that these founders wanted to control a practice area they were “too good” to engage in themselves. Were they genuinely interested in the welfare of the clients or were they out to control criminal defense from afar because it was often practiced by minority and immigrant lawyers shut out of established law firms?

One outlier was Clara Shortridge Foltz, the first female admitted to the California Bar, who endorsed public defenders as a way to raise the quality of criminal defense practice. As a criminal defense practitioner herself, Foltz assessed the situation pragmatically: you get what you pay for. And if the scales of justice were to be balanced, practitioners needed steady and reliable resources and training that only a publicly funded office could provide — and that prosecutors already enjoyed. Foltz went on to start the first public defender's office in Los Angeles County in 1914, despite being roundly criticized for her beliefs.¹

Foltz and her legal colleagues could not have been more different in style, experience, and philosophy, yet all were profoundly invested, for different reasons, in raising the quality of criminal defense. Parity with the prosecution, elimination of the profit motive, better advocacy, and control of the legal profession all combined as good reasons to support publicly funded criminal defense.

Mayeux then moves into the rise of the Progressive Era, which, along with new social sciences in sociology and criminology, ushered in new notions about crime and criminal justice reform. Progressives saw crime not as an individual failure but as the collective failure of society to care for poor, young, and unruly immigrant and minority defendants. Public defenders would be thrown into the mix as “helpers” who would work alongside other state actors in a cooperative effort to shield the innocent and justly punish the guilty. Truth and justice would be the goal of the public defender, not adversarial advocacy on behalf of a client. In this way, opposing parties would come together to reach the “right” result.

The problem with the Progressive Era reformers is that they defined the “right” result as helping those who admitted their guilt. They turned a system intended to fairly adjudicate an individual's culpability into a way to solve the societal problem of crime. In doing so, the procedural protections of the Bill of Rights were lost in the shuffle of purported do-gooders insisting that the guilty plead guilty.

Indeed, this controversial Progressive Era approach completely undercut the fundamental and elegant precept under our law that a prosecutor must carry the burden of proving guilt beyond a reasonable doubt to a unanimous jury. The approach would have instead turned defense counsel, prosecutors, and bench officers into a team of cooperative social workers, dedicated to finding the objective truth. Such a model ignores notions of loyalty to the client and adversarial fact-finding. If the client is guilty, he or she should plead guilty, whether or not an adversarial trial might result in a failure of proof. The debate concerning the proper function of the prosecution and defense was temporarily dampened by the introduction of “voluntary defenders,” which were privately funded

defense organizations. Although these organizations had enormous success in East Coast cities, as Mayeux notes, they also came with two serious problems.

First, voluntary defenders cherry-picked the clients they wanted to represent — and guilty defendants were not their clients of choice. For some organizations, geography dictated who was represented. With others, it was the distinction between the deserving and the undeserving poor. The “deserving” were generally young men with no criminal history, while the “unworthy” were “habitual criminals” or those who were guilty but would not plead guilty. Race strongly influenced these notions of worthiness — common stereotypes painted African Americans as particularly prone to criminality, while white children were viewed as pure and innocent. So, for example, the Pittsburgh voluntary defenders had a policy: if the client was guilty, he must plead guilty or the association would refuse to represent him. This idea of providing assistance to only the “worthy” client is the antithesis of ensuring a fair system for every charged defendant, regardless of guilt. It also meant that without legal counsel, the “unworthy” were left to fend for themselves, easing the prosecution's burden of proof.

The second problem arose from private funding. Private donors held sway during the first half of the twentieth century. If, for example, donors did not want to fund the defense of certain types of crime, those charged defendants were out of luck. If donors had a financial downturn, so did the organizations. Caprice generated by the power of private donors to designate case types or turn the funding spigots on and off made it impossible for private defender organizations to plan responsibly for expansion and growth. Nonetheless, these private philanthropic organizations seeded the notion of publicly-funded defenders that germinated during the next few decades while Americans worried about the Communist threat.

Mayeux dedicates an entire chapter to the cultural zeitgeist of the Cold War. As the result of anti-Soviet sentiment, Americans in the 1950s and 1960s frequently contrasted themselves with Communist regimes, championing the primacy of individual rights over the totalitarian state. A paradigm shift occurred regarding public defense — the individual defendant was no longer the target of government intervention, but someone to be protected from the government, Mayeux explains. The corporate bar and the American Bar Association stopped decrying public funding of criminal defense as socialism and embraced it as the only way to ensure victory over tyranny. Public defender organizations became symbols of the American way, an antidote to totalitarianism, not a gateway to socialized legal services and socialism. I found this part of *Free Justice* incredibly compelling.

Unwittingly, the public now embraced the primacy of the procedural protections set out in the Bill of Rights that Progressive Era reformers had all but abandoned. The importance of protecting individuals against

1. For more on Foltz, see Barbara Babcock, *Woman Lawyer: The Trials of Clara Foltz*, Palo Alto, CA: Stanford Univ. Press, 2011, and Babcock, “Dedicating the Clara Shortridge Foltz Criminal Justice Center” (Spring/Summer 2003) *CSCHS Newsletter* 8, 13.

overreaching government authority during the Cold War cannot be overstated. This was the issue of the day. Because public defenders were all about the individual fighting the state, they fit the zeitgeist perfectly. But the zeitgeist still needed legal footing, which the Supreme Court supplied with *Gideon v. Wainwright*,² requiring the states to provide legal counsel to criminal felony defendants unable to afford their own.

As Justice Hugo Black patriotically penned in *Gideon*: “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”³ With the pro-democracy gloss on public defense created by American Cold War ideology, *Gideon* was never second-guessed or rolled back by the public or other court decisions, as were other criminal procedure opinions of the Warren Court. The right to appointed counsel meshed perfectly with anti-Communist sentiment.

Yet a critical question loomed: would *Gideon* be implemented? Six months after the decision, U. S. Attorney General Robert F. Kennedy publicly hinted he did not think it would happen, given Southern defiance to *Brown v. Board of Education*⁴ and the bar’s general malaise in leading any charge for integration. Indeed, in the same year *Gideon* was decided, the ABA was still fostering segregation. In 1965, Anthony Lewis wrote *Gideon’s Trumpet*,⁵ a bestseller glorifying the opinion and the public’s reaction to it. But the decision did not instruct the country on how — or how fast — the right to counsel should be implemented. And there was no *Gideon II*, like *Brown II*,⁶ which mandated desegregation “with all deliberate speed.”

Consequently, Mayeux chronicles jurisdiction after jurisdiction, during the 1960s, thumbing their collective noses at *Gideon* and taking brazen steps to avoid its mandate. Some of this recalcitrance was strictly economic; counsel costs money. Some was unfamiliarity with how defense counsel would improve the administration of criminal justice or an unwillingness to hold the prosecution to its burden of proof. And some, make no mistake, was race-based: the criminal justice system in most jurisdictions was used as a tool to control minority and immigrant populations. Then as now, many minorities and immigrants were arrested and charged with offenses overlooked in white communities. Many young minority men, then as now, were stereotyped as criminals and stopped and arrested more often than similarly situated white men.

Although the Supreme Court and the public may have thought the idea of public defense for indigent defendants was a badge of honor, celebrating the American way of life, many local courts and city councils were not so

2. (1963) 372 U.S. 335.

3. *Id.* 344.

4. (1954) 347 U.S. 483.

5. New York: Vintage Books, 1989 ed. (1964).

6. *Brown v. Board of Education of Topeka* (1955) 349 U.S. 294, 301.

aligned. The uneven implementation of *Gideon* resulted in an overwhelming workload for public defenders, who were paid a pittance compared to prosecutors and not given the resources to provide competent representation.

The War on Drugs, declared in the 1970s, worsened these problems. Mayeux paints a vivid picture of ballooning caseloads due to the increased funding of law enforcement to prosecute individuals involved in drug possession and trafficking. Yet no parallel increase funded the defense of these additional cases. States and the federal government (which opened its first three federal public defender offices in 1971) were aware that more drug prosecutions necessitated more funding for the defense. Yet it was not forthcoming. Why? My hypothesis is that the War on Drugs turned public defense from a patriotic, American, anti-Communist symbol into a scorned obstacle to a drug-free and crime-free society. In other words, voting to fund public defenders became a partisan issue: it was equated to being soft on crime, the worst epithet one could level against a politician in the 1970s, 80s and 90s. Legislators feared their vote to adequately fund public defense could be used against them in future elections. So defense counsel represented their clients without adequate funding while juggling overwhelming caseloads. Legal representation did not seem that much better than it was before *Gideon*.

Mayeux fittingly concludes the book with a chapter entitled “Local Injustice” that beautifully frames her ultimate question: Is it possible to create and guarantee “equal justice” within a larger society infiltrated by interlocking forms of social, political, and economic inequality? Here Mayeux’s crisp writing sums up the problem, one that transcends inadequate funding and overworked lawyers:

Too much policing, perhaps, of the wrong kind.
Too many lawyers of the wrong kind, white lawyers in Massachusetts who did not really know their place in the communities they served and white lawyers in Mississippi who knew it all too well.

One can read this passage two ways: either Mayeux is indicting public defenders for not being sufficiently sensitive to the issues of the communities they serve, or she is indicting us for expecting public defenders to correct a system that is stacked against their clients in ways that transcend their immediate criminal case. Mayeux segues into a discussion of how some public defender offices have tried to become more relevant to the communities they serve by hiring more diverse staff, offering social services, and engaging in additional types of civil advocacy on their behalf.⁷

I do not abide Mayeux’s argument that public defenders are insensitive or naïve about how societal racism

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7. Funding for defense services is still problematic, as the Ninth Circuit recently pointed out in *Rogers v. Dzurenda* (2022) 25 F.4th 1171, 1196–97.

impacts their clients. In my experience, sometimes the only persons in the courtroom consciously living that reality are the defendants *and* their public defenders. That said, I do not subscribe to the notion, as hinted at by Mayeux, that public defender offices should also don the mantle of social worker. The primary task of the optimal public defender's office is to train and retain excellent trial lawyers whose skills outstrip those of opposing counsel so the client can obtain every advantage. And, of course, this primary task can be accomplished, no matter how sensitive an attorney is, only with adequate funding to wring out of the criminal case all there is to get.

Mayeux's book is food for thought for everyone practicing in the criminal justice arena. The much-hyped

promise of *Gideon's* imprimatur on the right to counsel led us all to expect Herculean societal changes. Yet despite the best courtroom efforts of even well-funded, skilled public defenders, many of their clients still can't breathe. That recognition by all of us would go a long way toward balancing the scales of justice. ★

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