Michigan Law Review

Volume 120 | Issue 6

2022

Introduction: Two Perspectives on Sara Mayeux's *Free Justice*

Brooke Simone
University of Michigan Law School

Aditya Vedapudi
University of Michigan Law School

https://doi.org/10.36644/mlr.120.6.intro

INTRODUCTION: TWO PERSPECTIVES ON SARA MAYEUX'S *FREE JUSTICE*

*Brooke Simone & Aditya Vedapudi**

FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA. By *Sara Mayeux*. University of North Carolina Press. 2020. Pp. xi, 271. $26.95.

In putting together this Volume's Annual Survey of Books Related to the Law, we wanted to highlight ideas that, to borrow from Sara Mayeux,[1] "encourage a sense of capacious possibility for imagining the proper balance of power in a modern society" (p. 22). The public defender—its history, its triumphs, its challenges, its very existence—does just that. Mayeux's book, *Free Justice: A History of the Public Defender in Twentieth-Century America*, provides a boundless space for discussion of not only the criminal right to counsel but of American law and society more broadly. We asked two legal scholars—Alexis Hoag and Bennett Capers—to independently examine *Free Justice*; each offers unique insights into our complicated criminal defense system. What follows is an account of the book's core arguments that situates these two Reviews.

Mayeux's book "seeks to explain how and why lawyers came to believe in the public defender as a quintessentially American institution" (p. 4). Through its five chapters, the book artfully traces the evolution of the public defender from its Progressive Era roots to the early 1970s, when the project of mass incarceration was well underway. Mayeux takes her book's title from activist and author Edward Bellamy, who coined the term "free justice" in the 1880s to describe his proposal that " 'poor and rich' [be] 'equalized before the law' " (p. 28). The idea of the public defender gained currency with Bellamy's followers, like Clara Foltz,[2] and eventually with Progressive Era reformers such as Mayer C. Goldman.[3]

---

* Book Review Editors, *Michigan Law Review*, Volume 120.

1. Associate Professor of Law and History, Vanderbilt Law School.

2. Foltz, the first woman admitted to the California bar, proposed public defenders to ensure that indigent defendants had qualified representation and to restore balance to courtrooms, where she thought prosecutors had grown too powerful (p. 29). Many dismissed Foltz's "Defender Bill" as the " 'strange project' of a 'female attorney' " (p. 29).

3. Goldman, a Manhattan lawyer, published a proposal for a New York public defender in the *New York Times* in 1914. In Goldman's proposal, the public defender would be paid by

 doi:10.36644/mlr.120.6.intro

Progressive Era conceptions of crime and legal representation are recounted carefully in *Free Justice*. Mayeux describes the ways in which crime became a "central preoccupation" of reformers who viewed it as a "collective responsibility," seeking to "professionalize" the criminal justice system in a way that would address societal failings that led to crime and create "greater efficiency and precision" regardless of a defendant's wealth (pp. 35–36). This new system would have public defenders that mirrored public prosecutors, with the former exhibiting the same "dignity of office" and duty to the state as the latter (p. 38). Instead of adversarial trials, reformers envisioned a more cooperative system in which public defenders would "work harmoniously" with district attorneys to bring out facts and determine the truth, zealously defending innocent clients but limiting the services they offered to guilty clients to "obtain[] a just and fair punishment" (p. 38).

Such public defender proposals were initially met with staunch resistance from the legal elite.[4] This focus on the elite is a mainstay throughout *Free Justice*. Mayeux describes how "the bar" and "the rich" converged throughout the twentieth century, as the law became a practice dominated by those with "inherited wealth and social status" (p. 86). This elite band of the legal profession "believed themselves uniquely positioned . . . to solve the nation's problems," including "the plight of the indigent" (pp. 86, 88). In places like New York and Philadelphia, powerful corporate lawyers resisted establishing a program of public defense because of its "socialization" of the "independent and self-regulating legal profession" (p. 25).[5]

The elite instead developed the idea of voluntary defenders as a private alternative to public defense. For example, the New York bar's "Voluntary Defenders Committee," established in 1917 (p. 50), offered a compromise: providing legal representation to the poor without overhauling the existing criminal justice system, and operating privately to maintain independence and avoid being hampered by political considerations (pp. 60–62). The Voluntary Defenders Committee quickly took over "a significant portion of the

---

the city, serving as a parallel to public prosecutors and ensuring that adversaries in court appeared "on an equal footing" (p. 24). This would help ensure that all defendants—even the indigent—received a full defense by "dignified, capable counsel" instead of relying on the "disreputable," "inexperienced," "half-hearted" legal representation otherwise available to them. (p. 24). At the time, the criminal bar was painted as a "lower stratum" of "egregiously incompetent" scam artists that preyed on immigrants and the indigent, tarnishing the reputation of the profession (pp. 32–33).

4. Mayeux also describes opposition from private defense attorneys who viewed adversarial trials as necessary to reveal truth and who regarded cooperation with the state as "throw[ing] away all of the rights of a defendant" (p. 41).

5. The Midwest and West proved more receptive, with the nation's first public defender office opening in Los Angeles in 1914 (p. 30). By 1930, major public defender offices existed in San Francisco, Oakland, and Chicago—places where lawyers were more "open and inventive" (p. 30). Mayeux concentrates the rest of her book on the East Coast, stating that looking west "would yield a different account" that is "less illuminating" about the "debate[] over whether public defenders should exist at all" (p. 8).

indigent caseload" in Manhattan (pp. 49–50). Elite lawyers in other major cities established similar voluntary defense organizations throughout the next few decades,[6] stalling the momentum of the public defender movement (p. 50).

But as Mayeux reveals, reality was more nuanced than the supporters of defender organizations let on. Voluntary defenders faced pressure from donors and board members (p. 62), their ability to represent clients was constrained by limited resources (p. 63), and, most problematically, client selection hinged on "fuzzy conceptions of 'worthiness' " (p. 63). The distinction between the " 'deserving' and 'undeserving poor' " (p. 64) gave donors and lawyers the authority "to decide whether or why the poor should receive legal assistance," making justice a privilege and not a right (p. 66). In contrast, public defender models, which had continued to evolve, now defined legal assistance as a universal service (p. 66).

While this debate between voluntary and public defenders raged, the courts waded in. Mayeux recounts a series of Supreme Court decisions that inched the criminal legal system toward declaring a right to counsel for criminal defendants (pp. 69–81). She begins with *Moore v. Dempsey*,[7] in which the Court "highlighted defense counsel as an important ingredient . . . of due process" (p. 70), then walks readers through *Powell v. Alabama*,[8] *Johnson v. Zerbst*,[9] *Betts v. Brady*,[10] and *Uveges v. Pennsylvania*,[11] where the Court held that due process "requires counsel for all persons charged with serious crimes[] when necessary for their adequate defense" (p. 79). Before long, the Court found counsel "necessary" in almost every right-to-counsel case it decided (p. 80). The appointment of Earl Warren as chief justice of the Supreme Court only accelerated this trend. In *Griffin v. Illinois*,[12] the Warren Court proclaimed that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has" (p. 81).

As Mayeux describes, this line of cases had important consequences for the debate over public defense. Private donors balked at the idea of funding what began to be viewed as a constitutional right, arguing that "a job of this magnitude should be undertaken by the State" (p. 83). Others began to question whether voluntary defenders "provided 'a sufficient substitute' for the public defender" at all (p. 85). These conversations set the stage for another

---

6. By 1940, voluntary defenders were established in New York, Philadelphia, and Boston, cities home to a large portion of the legal elite (p. 59).

7. 261 U.S. 86 (1923).

8. Pp. 72–74; 287 U.S. 45 (1932) (holding that the Sixth Amendment requires that certain criminal defendants charged with capital felonies have a right to counsel).

9. Pp. 76–76; 304 U.S. 458 (1938) (extending the Sixth Amendment guarantee of counsel to indigent defendants in all federal criminal trials).

10. Pp. 76–78; 316 U.S. 455 (1942) (failing to extend *Johnson* to the states). Mayeux describes *Betts* as "the Supreme Court balk[ing]." P. 77.

11. 335 U.S. 437 (1948).

12. 351 U.S. 12 (1956) (holding that criminal defendants cannot be denied the right to appellate review because of indigency).

Supreme Court case, one that "enshrined an apparent elite consensus" that had since emerged (p. 7): *Gideon v. Wainwright*.[13]

Mayeux then contextualizes *Gideon* as a product of both the legal elite and the Cold War. Amid concerns about voluntary defense sparked by the Supreme Court's decisions, by the 1950s the elite had developed an interest in the public defender.[14] Mayeux points to the Cold War as providing the perfect sociopolitical context for this interest to take hold. Once feared for its communist undertones (pp. 89, 95), the public defender ironically became "touted as a mechanism for extending to everyone the benefits of all-American adversarial justice" in contrast to the Soviet Union's totalitarianism and show trials (p. 89). Public defense was conceptualized not as protecting an individual right for indigent defendants, but as preserving American democracy—a far more palatable rationalization for the public and policymakers alike (pp. 94, 97). By the early 1960s, the public defender was no longer controversial (p. 99), setting the stage for the Supreme Court's unanimous decision in *Gideon* in 1963 holding that the Sixth Amendment guarantees a right to counsel to all criminal defendants.[15]

Free Justice goes on to paint a colorful picture of *Gideon*, describing the Court's strategy in granting certiorari, the facts and arguments, and the attendant revival of the Bill of Rights. It also focuses on Justice Black's penning of the opinion which, notably, provided no guidance for state implementation of the constitutional guarantee to counsel (pp. 99–105, 120–21). Mayeux pulls on a few threads here. One is a juxtaposition between the celebration of the Warren Court's venerable decision and the "crisis" that ensued as a result of the "new responsibilities" it imposed—or, in other words, "the dream of *Gideon* and the social task of implementing it" (pp. 118, 124). The issue she explores more thoroughly is this "permanent crisis" itself as states struggled to bring *Gideon*'s mandate into fruition (chapter 4).

Consensus soon emerged around the need for government support, resulting in a flurry of states establishing public defender offices (pp. 102–03). But increased demand for services,[16] coupled with the lack of organized methods for delivering these services, proved problematic. Thousands of indigent defendants went without counsel (p. 126), and those who did have counsel were represented by public defenders with enormous caseloads (p. 138). Mayeux details how some scholars and organizations spun this deluge as evidence of the requisite representation under *Gideon*, while others compared such rep-

13. 372 U.S. 335 (1965).

14. P. 88. Mayeux explains how elite advocates of the public defender changed their stated rationale over time. During and after the Cold War, they were adamant about not being motivated by a "general concern for the poor," pp. 98, 114, but rather viewed the public defender as "an institutional mechanism for enforcing the Bill of Rights" and protecting democracy, p. 104.

15. *Gideon*, 372 U.S. 335.

16. Demand skyrocketed in the 1970s due to a dramatic increase in policing and arrests. P. 178.

resentation to an "assembly line" that "provid[ed] subpar and impersonal service" (pp. 139, 150). She implicitly endorses this second view, discussing offices that "redefined their duties as triage," which meant five-minute interviews, the encouragement of plea bargaining, and other "perfunctory procedures" (pp. 143–44). In addition, the public defender continued to suffer from a lack of esteem and, importantly, resources (p. 146).

Funding was a significant challenge, implicating government budgets, public defenders' salaries, and lobbying for grants from philanthropic institutions such as the Ford Foundation–funded National Defender Project (NDP).[17] It also raised questions about whether "effective criminal defense required political independence from . . . government," necessitating "institutional separation" (p. 132).

Another post-*Gideon* crisis was the "despoti[sm] and irrational[ity]" of local courts (p. 19). Defense lawyers fraternized with prosecutors, and judges eager to lock away defendants even refused to accept public defenders into their courtrooms (pp. 153–55). More often than not, those who suffered as a result were poor, Black defendants (p. 174). Legal elites turned a blind eye to this reality, eschewing any mention of race in bar-association discussions and celebrating certain (read: white) offices as "exemplary" while ignoring that the most marginalized populations went underserved.[18] But as time went on, racial inequalities could no longer be ignored. Some defense lawyers "began to reimagine the public defender anew . . . as a potential resource within marginalized communities" (p. 19), which included attention to diversifying staff (p. 161) and, later, community-based alternatives to the state public defender.[19]

Race was not the only imbalance; geography was too.[20] Mayeux canvasses examples in the Deep South to demonstrate this disparity: Atlanta was unable to secure local matching funds required by the NDP to receive a grant (pp. 164–66), while the Mississippi State Bar excluded out-of-state lawyers from practicing so as to shut out progressive organizations from coordinating criminal defense and civil rights representation in Jackson (pp. 166–68). She notes an "othering" of the Deep South—or "Southern exceptionalism"—(pp. 167–68, 172) that allowed Northerners to naively maintain "faith that democracy and moderation could be trusted to prevail elsewhere" (p. 168) and

17. *See, e.g.*, pp. 125–29 (discussing the Massachusetts Voluntary Defenders Committee); pp. 131–35 (discussing Philadelphia's Defender Association); pp. 111–13 (discussing the NDP).

18. Pp. 159, 161. To illustrate these underserved communities, Mayeux tells a story of the Roxbury neighborhood of Boston, whose primarily Black residents either did not know of the Massachusetts Defender Committee, distrusted its attorneys, or found them "not socially sensitive." P. 159. She also mentions polling showing that Black Americans largely viewed the government as unhelpful. P. 160.

19. P. 175. Mayeux describes the creation of the Roxbury Defenders Committee "as a response to defendants' feelings of alienation." P. 175. It was led by two Black attorneys, supervised by its own Community Board, and provided holistic support to the community. Pp. 175–76.

20. Of course, the two are largely related. *See, e.g.*, p. 168.

perpetuated NDP's disproportionate funding of projects in Northeastern cities (pp. 162–63).

Notwithstanding these many problems in *Gideon*'s implementation, Mayeux argues that Justice Black's decision did in fact transform our criminal legal system. Ten years after *Gideon*, nearly two-thirds of Americans lived in an area with an organized defender (pp. 155–56). At that point, according to Mayeux, only practical—rather than conceptual—challenges remained (p. 179).

Free Justice tracks the shifting conception of the public defender throughout its tumultuous trajectory: from "utopian scheme" (p. 179), to the target of elites' "civic preoccupation[]" with "what to do about poor people" (p. 117), then the "universalistic exemplar of liberal democracy" (p. 19), and finally "one part of a complex picture" of "law and society . . . inseparably blended" (p. 179). In her epilogue, Mayeux leaves us with both the grim reality of "defendants with uneven access to expert, well-funded defense counsel" as well as hope of potential reforms, such as holistic defense, integration with racial-justice efforts, and possible federal funding (pp. 186–87). As she notes, "the public defender . . . has never had a fixed meaning," and its evolution continues today (p. 23).

Many of the theoretical struggles and practical challenges of the public defender described by Mayeux remain, albeit in new iterations. The two Reviews of *Free Justice* that follow reflect on these struggles, each from a different perspective on the criminal legal system. Professor Alexis Hoag, a former federal defender and attorney at the NAACP Legal Defense and Education Fund, brings a critical race theory lens to tell a history of the public defender that Mayeux does not, one shaped by racism and white supremacy.[21] Professor Bennett Capers, a former federal prosecutor, draws parallels between the creation of the public defender and the origins of the public prosecutor and encourages us to center the voices of criminal defendants.[22] Together, the two Reviews build on Mayeux's illuminating book, make us think critically about America's legal system, present new questions for inquiry, and indeed "encourage a sense of capacious possibility" (p. 22).

21. Alexis J. Hoag, *The Color of Justice*, 120 MICH. L. REV. 977 (2022).

22. Bennett Capers, *Free-ing Criminal Justice*, 120 MICH. L. REV. 999 (2022).