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The Rust on Gideon's Trumpet: A Theoretical Diagnostic of Public Defense in America

A thesis submitted in partial fulfillment of the requirement  
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by

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**The Rust on Gideon's Trumpet:**

A Theoretical Diagnostic of Public Defense in America

Luke Hogg

## **Abstract**

Although there exists a deep literature base around public defense, the vast majority of this literature is purely quantitative and lacks any thorough examination of the impact inequalities in criminal defense can have on our basic societal structure. Through the use of a Rawlsian theoretical framework, this article demonstrates that the impact of economic inequality on criminal justice is problematic, not only for financial and practical reasons as have been offered by previous scholars, but also for the imposition of the rule of law and justice as regularity. In this way, I will demonstrate that these inequalities create very tangible impacts of society, hindering liberty and social cooperation. To do so, I will first outline what Rawls' refers to as the principle of 'justice as fairness' and then demonstrate how advancing the rule of law is the best method by which to achieve justice as regularity. Once the implications of the injustices in our public defense system have been illustrated, I will examine the most significant ways in which income inequality impacts criminal defense before offering a series of possible reforms to address these injustices. In addressing these issues using theory rather than pure empirics, this analysis aims to better inform policymaking by deepening our understanding of the gravity of these issues.

## **Introduction**

In 1994, famed NFL Running Back O.J. Simpson was arrested and charged with the murder of Nicole Brown Simpson and Ron Goldman. Over the course of the trial, Simpson built a crack team of ten lawyers, including Johnny Cochran and Robert Shapiro, costing him an estimated \$50,000 per day.<sup>1</sup> All told, Simpson's acquittal ended up costing him an estimated \$3-5 million. More than twenty years later, though Americans may still debate Simpson's guilt, there is no debating that without the "Dream Team," the outcome of the trial would have been very different.<sup>2</sup> Of course, Simpson is far from the only privileged elite to use wealth to their advantage in the courts. Robert H. Richards, heir to the du Pont family fortune, plead guilty to raping his own daughter and ended up on probation with a suspended sentence. The most recent controversy surrounds Cameron Terrell, a wealthy white college student who was found not guilty of gang murder for acting as a getaway driver for two juveniles after posting his \$500,000 bail in cash and hiring multiple attorneys. It is not for me to say whether these individual cases constitute a breach of justice. Yet, it is impossible to ignore the fact that socioeconomic status often has a distinct impact on an individuals' ability to effectively defend themselves against accusations by the state.

Over the last two and a half centuries, the American criminal justice system has been continuously evolving with an eye towards better protecting the basic liberties of its citizens. Politicians have invoked images of 'justice,' 'equality,' and 'rule of law' *ad nauseam* for decades, reassuring Americans that their judicial system is trustworthy, fair, and impartial.

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<sup>1</sup> Guerassio, Jason. "How O.J. Simpson Paid for the 'Dream Team' of Lawyers on His Murder Trial." *Business Insider*. June 19, 2016.

<sup>2</sup> Ross, Jannell. "Two Decades Later, Black and White Americans Finally Agree on O.J. Simpson's Guilt." *Washington Post*, March 4, 2016.

However, when wealthy individuals like ‘Affluenza Teen’ Ethan Couch receive punishment that seems like a slap on the wrist when compared to established precedent, it quickly becomes clear that, in effect, the sixth amendment does not apply to everyone equally.<sup>3</sup> Every American citizen possesses the same right to a fair trial in theory. In reality, a poor defendant is far less likely to receive a fair and impartial verdict than a rich one. Although poor defendants’ due process rights are upheld to some degree, the fact remains that indigent individuals have a higher probability of being tried unfairly. To paraphrase Orwell, all trials are fair, some trials are just more fair than others.

There already exists an expansive and growing body of literature surrounding criminal defense reform. Among this mass, a report published by the American Bar Association (ABA) Committee on Legal Aid and Indigent Defendants entitled *Securing Reasonable Caseloads: Ethics and Law in Public Defense* has become the authority on public defense and its reform.<sup>4</sup> In this book, Norman Lefstein and the Committee outline the problems facing our public defenders and offer numerous reform proposals based on empirical data collected by the ABA. As the nation’s leading scholar on indigent defense systems at the time, Lefstein was the first to bring together the disparate literature around the subject and present it in a truly comprehensive way. Prior, most all scholarship on indigent defense focused on distinct injustices and their remedies rather than offering a comprehensive examination of the underlaying of the problems facing

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<sup>3</sup> Ethan Couch was the teenager who, in 2018, plead guilty to four counts of manslaughter for driving while intoxicated and subsequently killing four people on the side of the road and giving the passenger permanent brain damage. Though prosecutors sought a 20-year prison sentence for Couch, the judge instead sentenced him to 10 years’ probation and 720 days of jail time once he turned 18. Instrumental in his light sentencing, Couch’s lawyers argued that he suffered from psychological disorders or “affluenza” from being raised wealthy, claiming he was “too rich to tell right from wrong.” : Victor, Daniel. “Ethan Couch, ‘Affluenza Teen’ Who Killed 4 While Driving Drunk, Is Freed.” *New York Times*. April 2, 2018.

<sup>4</sup> Lefstein, Norman, and American Bar Association. Standing Committee on Legal Aid Indigent Defendants, Issuing Body. *Executive Summary and Recommendations : Securing Reasonable Caseloads : Ethics and Law in Public Defense*. 2012.

public defenders.<sup>5</sup> Lefstein thoroughly reviews the existing literature and examines the efficacy of existing state systems, ultimately concluding that the largest hurdle to improving the effectiveness of public defenders is lack of funding. The ABA report presents excellent evidence and provides ample analysis to support their conclusion. Yet, *Securing Reasonable Caseloads* fails to present the true gravity of these injustices.

Lefstein's approach falls into the same problem that most of the literature surrounding this subject does. In an effort to ensure that their arguments are empirically driven and data backed, most scholars of indigent defense tend to ignore the theoretical foundation of their approach. For example, when Lefstein outlines the problems in indigent defense he provides countless statistics, case studies, and other examples to explicate the issues. In doing so, he excellently outlines what the problems are and how they hurt individuals, but he fails to consider the broader implications these problems have for our sociopolitical institutions. As with the large majority of the literature, Lefstein frames his argument around statute and constitutionality, asserting that we ought to reform our system because people are being denied their constitutional right to effective counsel and falsely imprisoned. This is certainly a valid argument; we should care when our neighbor's constitutional rights are being infringed. However, when using such a framework, scholars have consistently overlooked the far greater threat that these injustices in public defense present to the rule of law, leaving a large gap in the literature between the high theory of scholars like Rawls and the data-driven empirical approach of those like Lefstein. This paper is an attempt to bridge this gap, bringing a broader theoretical perspective to an issue that has been discussed almost purely in empirical terms.

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<sup>5</sup> Ibid. 2-5.

It is quite clear to even the most casual of observers that there are regular miscarriages of justice with regards to indigents and their defense. Yet, the question that seems to have been largely ignored up until this point is what kind of miscarriages of justice are present? How are the principles of justice we as a society subscribe to being violated by these injustices? In his groundbreaking book *A Theory of Justice*, John Rawls wrestles with many of these issues of inequality and liberty as they relate to justice. He rightfully argues that in any just society the basic liberties of citizens must include the “freedom from arbitrary arrest and seizure as defined by the rule of law.”<sup>6</sup> To ensure these liberties, justice demands that mechanisms be put in place to ensure that individuals remain free from arbitrary coercion by the state. Of these mechanisms, none is as important as the check that effective defense counsel provides against the power of the state. As such, the best place to explore issues of inequality is examining our right to counsel and the ways in which economic inequality effect the quality of criminal defense.

Analyzing these issues from a theoretical perspective offers unique insights into the broader implications economic inequalities have on public defense. The current body of literature that surrounds public defense in America focuses almost entirely on the practicalities of criminal defense. This quantitatively driven methodology teaches us a great deal about the dangers that injustices in our criminal justice system pose to us as individuals. Yet, such an approach overlooks the ways in which such injustices present dangers to the overall quality of justice. For example, one article in the *Yale Law Review* by George Washington Law Professor Roger Fairfax Jr. that is methodologically based on Lefstein’s approach concludes that we ought reform our indigent defense system because “the stronger our indigent criminal defense system

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<sup>6</sup> Rawls, John. *A Theory of Justice*. Original Edition ed. Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1971.



is, the more cost-effective and efficient our criminal justice system will be.”<sup>7</sup> To Lefstein and the literature that has grown around his work, reform is simply a matter of practicality and fiscal responsibility. Yet, how and why we choose to institute criminal justice has massive repercussions on liberty and social cooperation that is completely ignored under the aforementioned approach. Using theory as a diagnostic for our criminal justice system provides a much better lens by which to examine the impact of injustices in public defense and address failures of the rule of law.

The very notion that we, in America, have inequalities in the implementation of criminal justice will undoubtedly be seen as fallacious by some. After all, the personification of Lady Justice found throughout courtrooms and public buildings is presented with shrouded eyes, representing the ancient principle that justice is blind. Our Constitution guarantees this principle. Following the civil rights movement of the 1960’s and 70’s, what Rawls refers to as “basic liberties” were extended to all citizens regardless of race, ethnicity, gender, or socio-economic status. With regard to criminal justice, our Constitution asserts that citizens are guaranteed equal rights to representation, trial by our peers, *habeas corpus*, etc. How then can we say that there are imbalances of justice when our entire modern legal system is based on creating *de jure* equality before the law? The answer lies in the actualization of the rule of law. Put simply, it is not enough to create a *de jure* sense of equality. Rather, the rule of law, and by extension justice, demands that we constantly strive towards actualizing the ideals of equality before the law. Towards this end, I aim to demonstrate that the impact of economic inequality on criminal justice is problematic, not only for financial and practical reasons as have been offered by previous scholars, but also for the imposition of the rule of law and justice as regularity. In this way, I will

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<sup>7</sup> Fairfax Jr., Roger A. "Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda." *The Yale Law Journal* 122, no. 8 (2013): 2316-335.

demonstrate that these inequalities create very tangible impacts of society, hindering liberty and social cooperation. To do so, I will first outline what Rawls' refers to as the principle of 'justice as fairness' and then demonstrate how advancing the rule of law is the best method by which to achieve justice as regularity. Once the implications of the injustices in our public defense system have been illustrated, I will examine the most significant ways in which income inequality impacts criminal defense before offering a series of possible reforms to address these injustices. In addressing these issues using theory rather than pure empirics, this analysis aims to deepen our understanding of the gravity of these issues as "The encouraging lesson of criminal justice reform efforts to date is that education about the realities of the criminal justice system can change minds" and policy.<sup>8</sup>

### **Justice as Regularity and the Rule of Law**

Analyzing these problems within a Rawlsian framework provides us with a particularly appropriate lens for addressing inequalities within the American criminal justice system. For Rawls, any just society must comply with the two principles of liberty and equality. If we use Rawls' method for deriving just principles under the 'veil of ignorance,' it is clear that the American model is far from perfect. Yet, Americans traditionally pride ourselves on the fact that we maintain the right to fair and equal treatment in court. These principles are constitutionally enshrined by the Founding Fathers. Especially when we consider the context in which Rawls was writing, it is understandable that the modern United States somewhat fits the mold of an ideal just society. The challenge for us as members of an existing social institution is to root out the injustices and reform our system to the benefit of the least advantaged.

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<sup>8</sup> Herman, Susan N. Getting There: On Strategies for Implementing Criminal Justice Reform, 23 Berkeley J. Crim. L. (2018).

One of the most important aspects of any just society is what Rawls refers to as “justice as regularity.” Justice as regularity demands that any just legal system must be non-arbitrary such that “similar cases be treated similarly.”<sup>9</sup> This is a necessary aspect of any just society for two primary reasons. First, having a non-arbitrary system of laws that lay out exactly what is within the bounds of social rules is a necessary pre-condition for liberty. If the exercise of power is “uncontrolled or *arbitrary* to the extent that its exercise is not subject to effective or reliable constraints,” then the citizens do not have true liberty.<sup>10</sup> Liberty, as defined by Rawls, is when a person is “free from certain constraints to do it or not to do it and when their doing it or not doing it is protected from interference by other persons.”<sup>11</sup> Even Rawls’ detractors agree that the whole point of social rules, and thus law itself, is to ensure there is a baseline expectation as to what constraints are placed on individuals. Thus, without justice as regularity, individuals are unsure as to what constraints are to be imposed upon them by some coercive agent. If the basis of these constraints “are unsure, so are the boundaries of men’s liberty.”<sup>12</sup> Justice as regularity gives shape to an individual’s activities. Liberty cannot exist in a vacuum. Liberty requires constraints by which to define itself, for without constraints then liberty is meaningless. Insofar as freedom from arbitrary coercion is one of our basic liberties, justice as regularity is required to define the bounds of what is and is not arbitrary.

In addition to being a prerequisite for liberty so defined, justice as regularity is also a necessary aspect of any just system as it is what allows for social cooperation. This fact is based on the principle of commitment problems best outlined in game theoretic terms. In an anarchic state, cooperation among individuals can be incredibly difficult. The classic example of this

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<sup>9</sup> Rawls. *Theory of Justice*. 237.

<sup>10</sup> Lovett, Frank. *Republic of Law*. Cambridge University Press. 2016. 115.

<sup>11</sup> Rawls. *Theory of Justice*. 202.

<sup>12</sup> Rawls. *Theory of Justice*. 235.

problem is the prisoner's dilemma where the best possible outcome for both individuals would be to remain silent. However, when the two are separated and no outside factor ensures commitment to remaining silent, both individuals will shirk their commitment and confess. The only way to ensure cooperation is to affect some outside commitment device that would change the incentives, pushing the Nash equilibrium away from the sub-prime outcome of confessing to the prime outcome where both remain silent. Commitment problems and devices can take many different forms, but the most common method of ensuring commitment is to have an outside mediator ensuring that neither party will shirk their commitment. Justice as regularity serves this purpose for society, whereby the legal system is the third-party mediator.

Imagine a society where power is exercised arbitrarily by a sovereign and there is no sense of justice as regularity or even a commonly accepted set of social rules. In such a society, individuals could never be sure of any commitments they make with one another. For example, without laws enforcing contracts, contracts become meaningless. Without one set of social rules applicable to all of society, any sort of social cooperation would always be in danger of succumbing to the free-rider effect. It necessarily follows that social cooperation in such a system, while not impossible, would be incredibly difficult and always suspect to commitment problems. Justice as regularity creates a system such that cooperation is enforced through laws, allowing social cooperation to flourish since there is always a public coercive agent available to ensure cooperation.

The two implications of justice as regularity, defining liberty and establishing a framework for social cooperation, are requirements for any just society.<sup>13</sup> However, justice as regularity is merely the *ends* we seek to effectuate. The rule of law is the *means* by which a

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<sup>13</sup> Rawls *Theory of Justice*. 242

society must realize justice as regularity. For now, suffice it to say that the rule of law is the principle that “government officials are bound by and abide by the law.”<sup>14</sup> This definition is far from perfect, and I will take it to task presently, but the basic idea that society is ‘ruled by laws, and not by men’ is what rests at the heart of the rule of law. When a society is ruled by law, the arbitrary exercise of power is effectively restrained, allowing justice as regularity to flourish.

In order to understand the relationship between justice as regularity and the rule of law one must understand that Rawls’ presents an ideal theory of justice. According to Rawls, if a people were in an ‘original position’ and under a ‘veil of ignorance’ that eliminates personal bias then they would choose to govern society according to the principles he expounds, including justice as regularity. Rawls’ idealized society unrealistically assumes that “all actors (citizens or societies) are generally willing to comply with whatever principles are chosen” and there exist “reasonably favorable social conditions, wherein citizens and societies are able to abide by principles of political cooperation,” making Rawls’ theories difficult, if not impossible, to apply directly to the real world.<sup>15</sup> Some form of practical bridge is required to get from Rawls’ ideal theory to public policy. The rule of law, as laid out by the positivist approach of Frank Lovett, provides this bridge. The rule of law is the method by which we achieve justice as regularity; rule of law is the means and justice as regularity is the ends. In order for society to receive the benefits of justice as regularity, justice must be regular or impartial. Since the rule of law is simply the degree to which individuals are subject to arbitrary coercion by the state, the rule of law is a rough gauge for the degree to which justice as regularity is being upheld. In advancing the rule of law a society is also advancing the societal ideals of liberty and social cooperation

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<sup>14</sup> Tamanaha, Brian. *The History and Elements of the Rule of Law*. Singapore Journal of Legal Studies. December 2012. 232-247

<sup>15</sup> Wenar, Leif, "John Rawls", *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), Edward N. Zalta (ed.)

defined by justice as regularity. More importantly, when the rule of law is infringed upon, it is often portrayed as an individual injustice because there was only one person who was being arbitrarily coerced. When the link between the rule of law and justice as regularity is understood, individual breaches of the rule of law present a societal rather than an individual danger. Thus, it is important that we promote the rule of law, not merely for its “intrinsic value...in its capacity to mitigate an especially worrisome source of domination,”<sup>16</sup> but because doing so is the only means by which we can further actualize the principles of justice as regularity and receive the full benefit of liberty and social cooperation.

The fundamental concept behind instituting ‘a government of laws, not men’ is based on the simple principle that citizens should be free from arbitrary vagaries of other individuals. To live under the rule of law implies a certain level of consistency in the law. This notion of the law being above men is itself based upon fear of tyranny and distrust of anyone considered to be above the law. The American Revolution is an excellent example of a people asserting the rule of law above the arbitrary rule of man. When expressing their grievances to King George III in the Declaration of Independence, the authors of the revolution cite breaches of the rule of law as reasons for revolution. In addition to lacking parliamentary representation, the American colonists felt arbitrarily coerced by the British Crown who had “sent hither swarms of officers to harass our people” and then “protecting them, by a mock trial from punishment for any murders which they should commit.”<sup>17</sup> Merely the latest in a long series of British subversions of the rule of law, the Founding Fathers understood that they were subject to the arbitrary coercion of the Crown. They understood that they were being ruled by a man, not by laws.

“[King George] has affected to render the Military independent of and superior to the Civil power. He has combined with others to

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<sup>16</sup> Lovett. *Republic of Law*. 203.

<sup>17</sup> *Declaration of Independence. S.doc.410. Washington: [s.n.], 1919.*

subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation: depriving us in many cases, of the benefits of Trial by Jury: transporting us beyond Seas to be tried for pretended offences...abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies.”<sup>18</sup>

The American Revolution was not just about the right to representation but was also about the abridgement of the rule of law and the colonist’s basic liberties. At the time of the Declaration’s writing, the American colonists lack of representation meant that they had no say in the actions of the British crown. Without representation, the colonists were left with no course of redress against breaches of justice by their government. Lacking any mechanism by which to check arbitrary coercion by the Parliament and Crown, the colonists lacked many of the basic tenets of the rule of law. In this way justice as regularity could not have been allowed to flourish under the Crown since the imposition of justice is based on the whims of a government in which the citizens being coerced have no redress for arbitrary coercion. In order to secure their basic liberties, the colonists chose to revolt against the Crown in order to establish their own principles by which to order society that more adequately protects the rights of its citizens from arbitrary coercion.

If justice as regularity is achieved through the rule of law, it is crucial for us to define clearly what the rule of law means. For this, we turn to Lovett’s positivist approach, defining the rule of law as “the *successful* restriction or limitation of the use of coercive force by all persons, groups, or organizations in society to the method of convention.”<sup>19</sup> There are several important conditions wrapped up in Lovett’s definition. First the use of coercive force must be restricted to

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<sup>18</sup> Ibid.

<sup>19</sup> Lovett. *Republic of Law*. 106.

what he terms a ‘public coercive agent.’ Agents with the capacity to forcibly coerce others must be public, meaning that it must be generally known that such an agent has the capacity to sustain their coercion. The most common method of achieving this in the modern world is the creation of nation-states that maintain a generally known monopoly on the use of coercive force through laws and courts. Moreover, the use of coercive force must be *successfully* restricted. It is not enough to simply say that the use of coercive force is restricted when individuals are being treated arbitrarily. The felt experience of those being subjected to coercive force is essential to the rule of law. Laws to not create the rule of law, it is the effective and non-arbitrary imposition of those social rules or laws that we can call the rule of law.

Many notable scholars on the subject of the rule of law assert that the rule of law is “the mere formal requirement that every use of coercive force be given official legal authorization.”<sup>20</sup> Under such a conception, any act of coercion that is ‘legally authorized’ is permissible, even if exercised by a private individual or group. However, this view has been mostly rejected on the grounds that merely requiring that acts of coercive force by any person or group to be legally authorized is a trivial burden to meet and allows for all sorts of despotic governance. Others have argued in favor of an idea of rule of law based on ‘legal validity’ underscored by Hart’s rule of recognition.<sup>21</sup> Under this conception, a rule is legally valid only when “it is common knowledge that a public coercive agent has an effective intention to support that rule.”<sup>22</sup> The view of rule of law as legal validity, though far better than that of legal authorization, is still far too broad insufficient to be of much practical use. To prove this, Lovett turns to the example of the Reichstag’s Enabling Act of 1933 which granted the Nazi party cabinet the authority to decree

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<sup>20</sup> Ibid. 108.

<sup>21</sup> Shapiro, Scott. *What is the Rule of Recognition?* Yale Law School Public Law & Legal Theory Research Paper Series Research Paper No. 181

<sup>22</sup> Lovett. *Republic of Law*. 83.



laws in direct affront to the German Constitution, completely bypassing the Reichstag. No longer bound by the legislature or even the Constitution, every act of the Nazi regime was subsequently granted formal legal validity. Under the broad definition espoused by Hart, we could say that the Nazi regime never violated the rule of law after 1933. Intuitively, this seems unacceptable and it is because when one defines the rule of law as either that which is legally authorized *or* that which is legally valid, the rule of law “would be far too easy to achieve and would fail to make a practical difference...if, for all practical purposes, states cannot help but respect it.”<sup>23</sup>

Lovett’s approach provides us with a superior alternative to these views. The rule of law is important because it grants groups who lack coercive power a greater degree of ‘freedom from domination.’ In effect, coercive power should be constrained such that individuals are free from arbitrary power being exercised over them. As outlined by the principle of justice as regularity, for the use of coercive power to be non-arbitrary, it must be *effectively and reliably constrained*. For power to be constrained it must simply conform to some set of rules, standards, and norms that define the bounds of acceptable use of power. For those constraints to be reliable, there must be a reasonable expectation that power is, and will continue to be, constrained by generally known rules. Most importantly, for those constraints to be effective, coercive power must actually be constrained by the rules in practice.<sup>24</sup> Notice here that what distinguishes Lovett’s interpretation of the rule of law is that there is an emphasis on “the actual felt experience of those persons potentially exposed to the use or threat of violence or physical restraint.”<sup>25</sup> Unless the coercive actions of public coercive agents are successfully restrained to the enforcement and prosecution of rules, individuals are significantly less free from domination.

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<sup>23</sup> Lovett. *Republic of Law*. 113.

<sup>24</sup> Lovett. *Republic of Law*. 115.

<sup>25</sup> Lovett. *Republic of Law*. 110.

Perhaps the most distinguishing aspect of Lovett's interpretation is his assertion that the rule of law does not necessarily require legal equality.<sup>26</sup> According to Lovett, "The historical durability of some highly particularized legal regimes, such as European feudalism and the Indian caste system,"<sup>27</sup> seems to suggest that legal equality is not necessarily a precondition for establishing effective and reliable constraints on coercive power. While this may be true in some broad theoretical sense, in practice, it would be nearly impossible to have the rule of law without legal equality. There has been a "demonstrated relationship between decentralized enforcement and legal equality: *if* one wants to have a decentralized legal system that is effective and reliable, *then* one must design a broadly egalitarian legal code."<sup>28</sup> Since there has been a general trend towards decentralization in global governance, most modern cultures consider legal equality to be an essential pillar of the rule of law because the relationship between the two is so strong as to be a dependent relationship. While the rule of law may not require legal equality in a strictly theoretical sense, the practicalities of realizing the rule of law mean that is effectively a requirement for establishing the rule of law.

On account of the fact that the United States has a decentralized legal system, it is crucial that we maintain equality before the law to ensure effective compliance of ordinary citizens. More importantly, there must be some form of equality before the law in order for there to be any sense of what is or is not arbitrary. In order for a society to receive the benefits of justice as regularity, there must be a sense of equality by which to determine what is irregular. Lovett gives examples of centralized governments can effectively limit coercive power without legal equality. Such systems may perhaps have the rule of law in some degree. However, it is difficult to say

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<sup>26</sup> Hadfield, Gillian and Barry Weingast. "Microfoundations of the Rule of Law." *Annual Review of Political Science* 17.

<sup>27</sup> Lovett. *Republic of Law*. 134.

<sup>28</sup> Lovett. *Republic of Law*. 135.

that criminal justice in Feudal Europe was totally non-arbitrary simply by nature of it being a centralized legal system. When power is centralized, the probability of that power being exercised arbitrarily increases. As the saying goes, absolute power corrupts absolutely. As Lovett notes, empirically, the way societies have combatted such threats of arbitrary action by a centralized authority is by trending towards decentralization and legal equality.

The necessity of equality before the law becomes a bit clearer if we choose to view Lovett's arguments from a more practical perspective. If what matters for actualizing the rule of law is the felt experience of citizens, then there need to be accountability measures to prevent officials from arbitrarily using state coercive power. When there is no sense of equality before the law, it becomes much more difficult to determine when power is being used arbitrarily. Equality before the law provides consistency and ensures that similar cases are treated similarly. When a legal system lacks consistency, similar cases wouldn't necessarily be treated similarly. Imagine a system that lacks equality before the law; where two individuals are charged with the same crime and receive drastically different sentences. In such a system, it would be seemingly impossible to determine whether or not the person who received the harsher sentence was treated arbitrarily. How could one determine whether the convict deserved more punitive treatment? If similar cases are not necessarily treated similarly, then precedent becomes effectively useless, meaning such a society would lack any real baseline by which to determine what is or is not arbitrary use of coercive power. Therefore, any society that seeks to achieve justice as regularity must also seek to actualize equality before the law as a means to uphold the rule of law.

Since justice as regularity benefits society by defining liberty and establishing a framework for social cooperation, and since the rule of law is the means by which we achieve justice as regularity, it naturally follows that the aim of the rule of law is to maximize freedom

from domination. As Lovett puts it; “social justice requires organizing the basic structure of society so as to minimize domination, so far as this is feasible.”<sup>29</sup> Moreover, it is precisely because the rule of law is intended towards actualizing justice as regularity that there is such an emphasis on the actual felt experience of individuals. If we define the rule of law in more practical terms, it is simply the extent to which individuals or groups are free from be subjected to coercive force by any other public or private agent except as punishment for breaking some law.<sup>30</sup> From this perspective, another important characteristic of the rule of law becomes much clearer.

If we measure the rule of law by the extent to which people are free from arbitrary coercion, then it naturally follows that the rule of law can exist in varying degrees. Neither the rule of law nor justice as regularity are binary. We do not need to perfectly recreate Rawls’ idealized society to say that we have justice as regularity to some degree. Similarly, we do not need to eliminate every single extra-judicial use of coercive force to say that we have the rule of law to some degree. In fact, these burdens would be practically impossible to meet. What these principles require of us is that we do everything in our power to “limit [any] injustices in the least unjust way.”<sup>31</sup> For criminal justice and the rule of law, this means that we ought to establish institutions that minimize the probability that any individual might be arbitrarily subjected to public coercion. In America, as with much of the modern world, these institutions generally take the shape of adversarial courts of justice.

### **Criminal Defense in America: Defense as check against arbitrary power**

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<sup>29</sup> Lovett. *Republic of Law*. 116.

<sup>30</sup> Law here just refers to any legally valid social rule that is enforced by a public coercive agent and is well known

<sup>31</sup> Rawls. *Theory of Justice*. 242.

In the American criminal justice system, the ultimate goal of any prosecutor is to make sure the guilty end up behind bars. We've established an adversarial system whereby the prosecutor is an agent of the state whose only job is to prove guilt. Law enforcement and prosecutors are immeasurably important to our society, ensuring guilty individuals are prosecuted and punished accordingly. However, as countless stories can attest to, prosecutors are fallible. Innocent people sometimes go to prison. This makes criminal justice a particularly dichotomous and sometimes tedious subsection of the rule of law. The rule of law demands that those individuals who refuse to abide by the rules be punished. Without an enforcement mechanism, rules are meaningless.<sup>32</sup> However, it also demands that innocent individuals remain free from coercion. The mechanism by which we determine guilt or innocence is the crucial check against arbitrary coercion.<sup>33</sup> In our adversarial judicial system, the most important method we use as a check against arbitrary coercion by the state is ensuring the right to effective counsel. In theory, we determine guilt or innocence by having two relatively equally qualified individuals advocate for and against the accused and then allowing an unbiased third party issue a ruling. However, as I will show, often times these established checks against arbitrary coercion are ineffective, damaging the rule of law and in so doing harm justice as regularity.

Rawls and Lovett, among others, have both pointed out that one criterion of the rule of law is that the law must be commonly understood. Ever since ancient times, societies have written down their social rules in an effort to aid understanding. It is much more difficult to plead ignorance when the law is written and readily accessible. More importantly, written legal codes more clearly define the boundaries of the law than an oral tradition can. As societies have grown increasingly more complex, so too have their legal codes. As legal systems grow more complex,

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<sup>32</sup> Lovett. *Republic of Law*. 42-46.

<sup>33</sup> Lovett. *Republic of Law*. 87.

at some point it is no longer practical to expect every individual to be fully versed in all aspects of criminal code and procedure. Citizens are expected to understand and live within the bounds of the law only to the extent to which it effects their lives. Everyone must understand some general rules like ‘don’t murder,’ but it’s impractical to expect everyone to fully understand the tax code or import duty regulations, for example. Instead, as societies grow they often choose to create a specialized class of people who are trained to fully understand those aspects of the law that the everyday person may be unaware of: lawyers.

Since individuals cannot be expected to understand the entirety of the legal code, it follows that it is impractical to expect all citizens to effectively defend themselves against accusations of the state. Understanding the ins-and-outs of criminal procedure in the American system requires years of study and experience and admission by the state. When legal codes grow more complex, it becomes much less likely that the average individual has the capacity to act as an effective check against potential arbitrary coercion by the state. Without procedural understanding, individuals are apt to be railroaded by the state in ignorance. If we think about the law as setting the boundaries for how both state and non-state actors are supposed to behave, then we must also recognize the need for mutual accountability. The state holds its citizens accountable through law enforcement and criminal courts, but how are the citizens to hold the state accountable for breaches of justice? When the legal code becomes too complex for the average citizen to fully understand, the best method of creating accountability measures is to create a professional class of defense attorneys to counterbalance the public prosecutorial attorneys.

Until the turn of the 18<sup>th</sup> century, with some exceptions, criminal justice was almost entirely neighbor against neighbor. In the tradition of English common law that would become

the basis for American law, until around 1690 trial was used “as an opportunity for the accused to speak,” lacking most of the trappings of the modern court like evidentiary rules and cross-examination.<sup>34</sup> Rather than having a prosecutorial wing of the state, citizens who felt as if they had been wronged would bring criminal charges against their peers, so trial was simply the time for the defendant to respond to their accuser. Although this system was rather efficient, it was far from just.<sup>35</sup> Individuals of lower social standing were often wholly incapable of providing an effective defense. Lacking both financial means and social prestige, London’s poor could easily be imprisoned, transported, or even executed based solely on the word of a prestigious socialite. As Barristers like Sir William Garrow grew to realize, a criminal justice system based on ‘your word against mine’ poses little-to-no effective check against the arbitrary coercion of the less well-off members of society. It was from this understanding that Garrow and others sought to reform the English trial system. Rather than viewing the courtroom as a place for the defendant to simply respond to accusing evidence in person, the reformers saw “instead an occasion for defense counsel to test the prosecution case.”<sup>36</sup> As the state began to take on more prosecutorial power of its own, Garrow and his compatriots saw a new importance for defense attorneys as the crucially needed check against arbitrary coercion by the courts. Instead of passively aiding the defendant, defense attorneys began to take on more control over an individuals’ defense. This led to a gradual shift where the accused began speaking less while their attorney spoke more, eventually leading to the modern common law system where a defendant has a constitutional right to *not* speak in their own trial. What the reforms of the 18<sup>th</sup> century criminal justice system demonstrate in stark detail is that the state cannot be expected to hold itself accountable. An

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<sup>34</sup> Langbein, John H. *The Origins of Adversary Criminal Trial*. Oxford: Oxford University Press, 2005.

<sup>35</sup> Some courts could hear as many as 40 trials in one day

<sup>36</sup> Ibid.

adversarial legal system with complicated laws requires some form of professional defense mechanism to act as a check against arbitrary coercion by the state. Similarly, such a check must be effective at preventing arbitrary coercion, or else it is practically meaningless.

It was during this same period that America came to appreciate the power of defense attorneys, constitutionally enshrining the right to “have the assistance of counsel for his defense;” presuming you could afford it. It wasn’t until much later that we recognized the importance of a universal right to counsel. In 1963, a landmark case was brought by a Florida inmate to the Supreme Court where Clarence Wainwright asserted that the Constitution guarantees anyone accused of a crime the right to effective counsel.<sup>37</sup> Wainwright had been accused of breaking and entering and requested that the court provide him with an attorney because he could not afford his own. The Florida judge handling the case denied him public defense because, at the time, Florida law only provided counsel for indigent<sup>38</sup> defenders accused of capital offenses. As a consequence, Gideon was forced to advocate *in propria persona* in open court and was subsequently convicted. From prison, Gideon filed a petition for writ of *habeas corpus* asking the Florida Supreme Court for his release. This petition was denied, forcing Gideon to file a handwritten petition to the U.S. Supreme Court to resolve the question of whether he had a right to counsel. In the unanimous decision, Justice Black asserted that all citizens hold the fundamental right to counsel under the Sixth Amendment and that this right must be applied to the states under the Due Process Clause of the Fourteenth Amendment.

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<sup>37</sup> Gideon v. Wainwright, 372 U.S. 335 (1963)

<sup>38</sup> The term ‘indigent’ is one that resists a simple definition. In a general sense, an indigent is one who is poor and needy; one who relies on the generosity of others for their livelihood. In our legal code, an indigent is one who lacks the means to provide for their own defense and must be appointed defense by the state as per *Gideon*. As with funding, states were directed to create their own tests by which to determine indigency following *Gideon* since no federal definition has ever been implemented. Thus, what constitutes an ‘indigent’ person varies from state to state, but typically includes those individuals who are currently receiving state or federal public assistance and anyone whose median household income sits below the federal poverty line.



Subsequent decisions like *Argersinger v. Hamlin* and *Strickland v. Washington* extended this right to all criminal accusations and to ensure effective counsel.<sup>3940</sup>

Though the Supreme Court has asserted the right to effective counsel, the vast majority of the responsibility for regulating and funding the right to counsel is left up to the state and local governments. Subsequently, the degree of financial support and effectiveness of different methods of public defense have often varied considerably from area to area. In 2013, the Bureau of Justice Statistics (BJS) published the first National Survey of Indigent Defense Systems (NSIDS) providing data driven analysis of public defense across all 50 states.<sup>41</sup> Excluding *Governmental Conflict Offices*, this study defines four different methods of public defense in America: governmental public defender offices, nongovernmental public defense offices, contract systems, and assigned or appointed counsel systems. Governmental public defender offices hire attorneys as full-time state employees whose sole responsibility is to provide indigent defenders for the municipality that funds the office. In nongovernmental public defense offices and contract systems, the state provides representation by contracting cases out to nonprofit institutions and for-profit firms, respectively. Appointed counsel systems maintain a record of private attorneys in the area that are familiar with criminal defense and appoints them to individual cases as the need arises. Although which system a locality chooses to implement is dependent on a number of factors, generally, more heavily urbanized areas tend to have governmental public defender offices due to their high indigent caseloads. Conversely, rural municipalities are far more likely to appoint cases to private attorneys.

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<sup>39</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)

<sup>40</sup> *Strickland v. Washington*, 466 U.S. 668 (1984)

<sup>41</sup> Strong, Suzanne. "State-Administered Indigent Defense Systems, 2013." *U.S. Department of Justice Bureau of Justice Statistics*. Revised May 3, 2017.

The methods utilized by states to fund public defense vary almost as widely as the institutions themselves. Criminal courts are funded by either the state, or the county, or some combination of the two. This is rarely enough to properly fund the courts, forcing states to “rely on filing fees, cost recovery, and/or court costs assessments from civil litigants and criminal defendants to help fund indigent defense.”<sup>42</sup> In recent years, several states have slashed criminal court funding across the board, especially targeting public defense. Analysis of a report by the National Center for State Courts on state funding following the financial crisis of 2008 demonstrated that 80% of the states had significantly cut funding in subsequent years.<sup>43</sup> These cuts forced several states to implement austerity measures including hiring freezes and salary reductions. Though funding for courts has risen along with the post-recession economy, they have yet to return to sufficient levels, eliciting vexation from both prosecutors and defense attorneys.

### **Failures of Public Defense**

With budgets shrinking and caseloads increasing, it comes as little surprise that, as Yale Law Professor John Langbein expertly pointed out in 1992: “There is an astonishing discrepancy between what the constitutional texts promise and what the criminal justice system delivers.”<sup>44</sup> Around 80 percent of all people accused of crimes are considered indigent and unable to afford their own attorney.<sup>45</sup> In theory, this should not be a major issue for the criminal justice system. With thousands of new attorneys passing the Bar every year and an apparent oversaturation of

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<sup>42</sup>Spangenberg, Robert L., and Marea L. Beeman. "Indigent Defense Systems in the United States." *Law and Contemporary Problems* 58, no. 1 (1995): 31-49.

<sup>43</sup> Greenberg, Michael D., and Geoffrey McGovern. *An Early Assessment of the Civil Justice System After the Financial Crisis: Something Wicked This Way Comes?* RAND Corporation, 2012. 5-12.

<sup>44</sup> Langbein, John. "On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial." *Harvard Journal of Law and Public Policy* 15, no. 1 (1992): 119.

<sup>45</sup> Alexander, Michelle. *The New Jim Crow*. New Press. 2012. 85.

the legal market, it seems counterintuitive that anyone in America should lack effective counsel. However, this is the reality of our criminal justice system. Even the American Bar Association concluded in a 2004 report on indigent defense that “All too often, defendants plead guilty even if they are innocent, without really understanding their legal rights or what is occurring...The fundamental right to a lawyer that Americans assume applies to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.”<sup>46</sup>

No criminal justice system is perfect. Inevitably someone will make a mistake leading to an innocent person being convicted or vice versa. So long as such cases are rare outliers, we might still assert that justice as regularity has been actualized. Unfortunately, that is not the case in America. One need only peruse through the 2,382 names of exonerated individuals compiled by the National Registry of Exonerations (NRE) since 1989 to see that false convictions are far from rare occurrences. Most of the time the names on the NRE belong to indigents. Individuals who, if they had been able to pay for a private attorney, might never have been convicted in the first place.

As with most public issues, the problems of indigent defense are primarily money problems. Public defenders and court appointed attorneys hold themselves to a high ethical standard. When you pass the bar, you agree to tirelessly fight for justice on behalf of your client, but with public defense being consistently underfunded and understaffed, it becomes a matter of practicality that attorneys are forced to work expeditiously rather than thoroughly. One extreme example comes from Lafayette, La. Where Jack Talasaka works as a public defender. According to the New York Times, on April 27, 2017, Talasaka 113 clients who had been formally

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<sup>46</sup> Hartney, Christopher and Fabiana Silva. *And Justice for Some: Differential Treatment of Youth of Color in the Justice System*. American Bar Association. 2004.

charged.<sup>47</sup> An American Bar Association study of Louisiana caseloads determined that each felony should receive between 21 and 70 hours of attention by the public defender's office with capital cases requiring over 200 hours per case.<sup>48</sup> That's nearly 100,000 hours of work for one attorney not including any cases he might receive after April 27. Simply put, Jack Talasaka is doing the work of five attorneys. This means that every client that Talasaka is asked to defend will inevitably receive less attention than they are due. Though Louisiana is often touted as the worst-case example of public defense gone wrong, public defenders' offices across the country commonly encounter the same struggles as Jack Talasaka.

Perhaps more alarming is the surprising amount of institutional pressure placed on public defenders to resolve cases expeditiously. Judges often pressure public defenders to cut costs at the expense of the defendant. In many cases, public defenders are pleading cases in front of the same judge that appointed them. More significantly, public defenders often argue in the same court rooms repeatedly, building a professional relationship with particular judges. A study by the RAND Corporation consisting of random indigent murder defendants in Philadelphia found that judges often have unaddressed conflicts of interest that can damage the effectiveness of public defense.<sup>49</sup> These conflicts of interest can take several forms. First and foremost, when we consider that the vast majority of judges in the U.S. are elected, most judges are under pressure to return the favor by assigning lawyers who supported them politically to better cases. The RAND study even cites one lawyer asserting that "the homicide appointment system is largely a

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<sup>47</sup> Oppel Jr. Richard and Jugal Patel. "One Lawyer, 192 Felony Cases, and No Time." *The New York Times*. January 31, 2019.

<sup>48</sup> The American Bar Association Standing Committee on Legal Aid and Indigent Defendants. *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards*. February 2017. 21.

<sup>49</sup> Anderson, James and Paul Heaton. "How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes." *RAND for the National Institute of Justice*. 2011. 24.

patronage system,” with the most lucrative and interesting cases going to political friends of the judge.<sup>50</sup>

Secondarily, with most states funding public defense through the overall courts budget, judges have a pecuniary interest to limit how much time and money is spent on each indigent case. With budgets for courts, and public defenders in particular, decreasing across the board, limiting the amount of time and resources public defenders spend on each case saves money and increases the efficiency of already crammed court dockets. However, cutting costs regularly comes at the expense of the accused. Pressuring public defenders to quickly dispatch every case that they are appointed to increases the chances of ineffective defense and serves to further the divide between the effectiveness of private and public counsel. This is often an unspoken pressure that judges place on public defenders. Often, attorneys “who file fewer pre-trial motions, ask fewer questions during *voir dire*, raise fewer objections, and present fewer witnesses” are more likely to be appointed to cases, regardless of the quality of their defense.<sup>51</sup> These incentives effectively create a race to the bottom for judges looking to expedite their caseloads. One example of such a race to the bottom comes from Galveston, Texas where a public defender named Drew Willey is suing the County Court Judge Jack Ewing.<sup>5253</sup> Willey claims that Ewing pulled Willey from several active cases as punishment for not working fast enough. Willey was “the only attorney to routinely ask for a paid investigator,” as well as repeatedly exceeding the three-hour maximum work time for cases resulting in a guilty plea.<sup>54</sup> Though Judge Ewing asserts that he pulled Willey from the cases because he was overburdened,

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<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Oppel, Richard. “His Clients Weren’t Complaining. But the Judge Said This Lawyer Worked Too Hard.” *New York Times*. March 29, 2018.

<sup>53</sup> Willey v. Ewing, 3:18cv81 (5<sup>th</sup> Circuit 2018)

<sup>54</sup> Oppel. “His Clients Weren’t Complaining...” 2018.

the fact that Ewing repeatedly complained about Willey ‘overworking cases’ underscores the fact that judges are pressuring public defenders to work quickly and some may even be willing to punish those attorneys who take their time.

Judges must often toe the line between efficiency and effectiveness when it comes to indigent defense. On the one hand, it would be impractical and horribly expensive to have every indigent defendant’s case examined to the Nth degree by the public defenders. Similarly, we ought not restrict public defenders from doing their jobs and representing their client to the fullest extent of their abilities. Defense attorneys may be the most important check that we have against potential arbitrary coercion by the state. So, to further the principles of justice as regularity, judges and prosecutors should refrain from becoming exasperated at public defenders. When attorneys exceed the recommended amount of time for a case, it is most often because the case deserves extra attention. These attorneys deserve to be praised for going the extra mile in defense of their client rather than reprimanded and pressured by the state.

Public defenders and prosecutors often turn to plea deals to quickly resolve as many cases as possible. Such deals often reduce sentences for accused individuals who are willing to forgo their right to trial and plead guilty. “If a person is willing to plead guilty and take a final conviction and get a short sentence as part of a plea bargain, all the parties are going to agree to that because that means that case moves off the docket and that the next child abuse case, or robbery case or whatever can be dealt with,” said Shannon Edmonds, a prosecutor’s legislative liaison through the Texas District and County Attorneys Association.<sup>55</sup> If we presume the person in question is guilty, then plea deals are simply a tool to limit punishment for the defendant and to expedite the court’s caseload. Unfortunately, this is not always the case.

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<sup>55</sup> Marfin, Catherine. “Built with rehabilitation in mind, Texas state jails are now viewed by lawmakers as a “complete failure.” Texas Tribune. February 14, 2019.

With budget cuts and rising caseloads across the country, public defenders and appointed counselors are turning to plea deals more commonly than ever before. It's little wonder why 90 to 95% of all criminal charges result in a plea agreement.<sup>56</sup> For one, plea agreements are cheaper and more efficient, reducing the time that both sides must spend on that particular case when there are 100 more waiting to be handled. Similarly, plea agreements cut out the trial process all together, giving the prosecutor more control over the outcome of the case.<sup>57</sup> Certainly, plea deals should have a place in our criminal justice system as a strategic option for defendants. However, plea deals become incredibly dangerous to the fairness of our justice system when they are used for the sake of efficiency rather than strategy.

Even more striking than statistics, Eli Hager of the Marshall Project paints a stark picture of Cajun country courts when he details the practice of 'mass pleas.'

"Fifteen poor, black men shuffle into a courtroom in southern Louisiana's Cajun country, dressed in orange jumpsuits and shackled at the wrists, waist, and ankles. As they file into the jury box — which today is serving as the "plea box" — their chains jingle against the floor. Here in the 16th Judicial District, at the St. Martinville courthouse, it is "felony plea day," with Judge Gregory Aucoin presiding. Many of these defendants have not discussed their cases with their public defender yet and will have about 30 seconds to speak with him this morning. Then the judge, with a cigar dangling from his mouth, will ask, "Are you satisfied with the advice your attorney has given you in this matter?" "Yes sir." "Yes sir." "Yes sir," they will all say, down the row. "Okay, I accept your plea agreement." And just like that, with no time for arguments to be heard in each of their separate cases, they will have all pleaded guilty together and will be headed to prison for years, sometimes decades."<sup>58</sup>

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<sup>56</sup> Devers, Lindsey. "Plea and Charge Bargaining: Research Summary." U.S. Department of Justice Bureau of Justice Assistance. January 24, 2011.

<sup>57</sup> Lynch, Tim. "The Devil's Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice." *Cato Institute*. July 2011.

<sup>58</sup> Hager, Eli. "When There's Only One Public Defender in Town." *The Marshall Project*. September 9, 2016.

‘Mass pleas’ as Hagar describes them are not uncommon in Louisiana, Michigan, Utah, Pennsylvania, and Missouri, all state plagued by problems with public defense. These sorts of proceedings are typically reserved for misdemeanors and other minor offenses while felonies traditionally receive more consideration. Even so, it is shocking to consider that 95 of every 100 individuals whose crimes are prosecuted in America resolves it through a plea agreement. Even if we were to assume that each of those 95 individuals was guilty, it is still difficult to reconcile that their prosecution and punishment was done with little to no input from a judge and absolutely no input from a jury of their peers.

### **Effective Counsel**

In 1984, the Burger Court handed down the latest in a series of cases seeking to define the newly acquired right to counsel. *Strickland v. Washington* centered around the death sentence of convicted murderer David Leroy Washington whose public counsel in his initial murder trial had neglected to contact character witnesses and never sought a psychiatric evaluation. Washington’s lawyers argued that he could not be executed because his public counsel failed to provide an effective defense, particularly during the sentencing phase.<sup>59</sup> Justice Sandra Day O’Connor led the seven-two majority that reversed the decision of the Eleventh Circuit, upholding Washington’s sentence. As in previous cases centered around the death penalty, the court took the opportunity of *Strickland* to expound upon the meaning of ‘effective counsel.’ The majority opinion outlined ineffectiveness of counsel based on an “objective standard of reasonableness” according to the industry standard of the time.<sup>60</sup> In order for a conviction to be overturned because of ineffectiveness of counsel “a defendant would have to demonstrate not

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<sup>59</sup> *Strickland v. Washington*, 466 U.S. 668 (1984)

<sup>60</sup> *Ibid.*



only that counsel performed poorly but also that such poor representation so adversely affected the defense that the defendant was effectively denied a fair trial.”<sup>61</sup> This two-pronged test has since been the baseline test for ineffective counsel.

Justice Thurgood Marshall offered a famous dissent of the two-pronged test. At the very beginning of his dissent, Marshall asserts that the accepted test is “so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts.”<sup>62</sup> The majority opinion was mostly predicated on the notion that defense attorneys should be given fairly wide latitude to make tactical decisions for their client. Even Marshall agrees that defense attorneys need a certain degree of latitude to make decisions, but the test established by the majority opinion gives attorneys nearly infinite latitude. Marshall correctly argued that the majority was creating a nearly impossible burden for defendants as “it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent.”<sup>63</sup> The court’s decision effectively gave the benefit of the doubt to defense attorneys, setting the bar for proving ineffectiveness impossibly high.

Marshall’s opinion that the established test would become so broad as to become useless seems to have been correct. An analysis of claims of ineffective counsel among post-conviction appeals for 225 exonerated cases by the Innocence Project found that courts rejected 81% of claims and declared another 6% ‘harmless’.<sup>64</sup> The most striking example given in the study is of Josiah Sutton, a Texas man whose court-appointed attorney claimed that independent DNA

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<sup>61</sup> Schultz, David, and John R. Vile. *The Encyclopedia of Civil Liberties in America*, Routledge, 2004. 904.

<sup>62</sup> *Strickland v. Washington*.

<sup>63</sup> *Ibid.*

<sup>64</sup> West, Emily. “Court Findings of Ineffective Assistance of Counsel Claims in Post-Conviction Appeals Among the First 255 DNA Exoneration Cases.” *Innocence Project*. September 2010.

testing was needed for Sutton’s defense. After the family managed to raise the \$650, the attorney “simply failed to obtain the testing—and kept the money.”<sup>65</sup> Although Sutton was exonerated in 2004 through new DNA evidence, the court dismissed Sutton’s claim of ineffective assistance on the grounds that Sutton failed to demonstrate how the testing might have changed the outcome of the initial trial. Sutton’s case, although extreme, exemplifies the flaws in O’Connor’s two-part test. Sutton’s attorney failed to provide independent DNA testing - the very tool by which he gained his exoneration after 25 years - and the defense still failed to prove ineffective assistance. What Marshall calls ‘debilitating ambiguity’ in the majority opinion has created a system absent any effective check against public attorneys providing inadequate defense. Sutton’s case demonstrates unequivocally that “defendants are unlikely to succeed on legitimate claims of ineffective assistance, even in cases where the court agrees that counsel's performance was deficient, because defendants must raise a claim of innocence or a defense that is sufficient to persuade a judge that the defendant was likely to succeed at trial.”<sup>66</sup>

Though attorneys should be provided a reasonable amount of latitude in determining how to defend a client, it is more important that there be proper oversight. If we are to suppose that the right to counsel is our primary check against arbitrary coercion by the state, then it is just as important that every individual receive meaningful assistance. When an individual receives an ineffective defense by their state-appointed attorney, then the most important check against arbitrary coercion has been ineffective. The purpose of *Strickland* was to provide a bright line definition by which to determine if a person has been unduly coerced because of their ineffective counsel. However, *Strickland* provides an inadequate framework by which to ensure individuals

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<sup>65</sup> Ibid. 7.

<sup>66</sup> Conway, Erin. “Ineffective Assistance of Counsel: How Illinois Has Used the Prejudice Prong of Strickland to Lower the Floor on Performance When Defendants Plead Guilty.” 105 Nw. U. L. Rev. 1707 (2011)

are actually receiving meaningful assistance. Since the definition of ineffective counsel outlined by the majority opinion has been shown to be so broad as to be practically meaningless, it is impossible to say that the current system constitutes an effective check against ineffective counsel and the potential for arbitrary coercion that creates.

According to the Rawlsian framework, addressing the issues surrounding effective counsel ought to be our top priority. According to Rawls and Lovett, what matters most when considering issues of the rule of law is the real, felt experience of everyday individuals as they come into contact with the system. When an individual files an appeal of ineffective counsel, or even simply feels as if their counselor was ineffective, such actions clearly indicate that they feel unduly coerced. This is one of the deepest roots of the problems facing the rule of law; ineffective counsel severely impedes the rule of law. More importantly, without effective mechanisms by which to test claims of ineffective counsel, the quality of public defense drops, and individuals are more likely to be arbitrarily coerced. If we are to fix our broken criminal justice system, we ought to start by returning to *Strickland* and creating an effective test for ineffective counsel.

### **Reforms**

If we aim to reform our broken public defender system to further the cause of justice as regularity, it is important that we address the political feasibility of reforms. Detailed national polling by Gallup demonstrates that public discontentment with the criminal justice system has markedly increased in recent years. In an article analyzing the recent polling data, Jeffrey Jones noted a statistically significant decrease in the American people's trust of the judiciary amongst an already negatively trending dataset. In 2015, only 53% of respondents "expressed a 'great

deal' or 'fair amount' of trust" in the judiciary, down from 61% in 2013 and 78% for 2009.<sup>67</sup>

Further analysis of the updated Gallup poll demonstrates the significance of the overall negative trend even though trust in the judiciary has rebounded to an average of 63% since 2015.<sup>68</sup> The negative trend in Gallup's polling demonstrates quite clearly that the American public has been growing increasingly discontent with the status quo, creating an ideal climate for significant reform.

Though calls for reform have grown louder in recent decades, there remains a general lack of top-down political will to push major changes. Conversely, the polling around the 2018 elections demonstrated large popular support for criminal justice reform. Colorado, Florida, Louisiana, and Washington all passed referendum ballot measures aimed at further protecting the rights of the accused.<sup>69</sup> Yet, most voters seem to agree that the latest round of reforms is far from sufficient. A study by the Pretrial Justice Institute in 2017 measured popular support for criminal justice reform.<sup>70</sup> They first graded states based on the quality of pretrial services, comparing popular support for reform to quality of services. They found that popular support for reform was highest in states that received a lower rating. For example, 90% of registered Texas voters were dissatisfied with the current system with 55% wanting major reforms.<sup>71</sup> More importantly, although the percentage of voters who were dissatisfied was markedly higher in states with lower grades, the proportion of voters supporting major reforms was remarkably consistent with an average 53% support nationwide.

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<sup>67</sup> Jones, Jeffrey. "Trust in U.S. Judicial Branch Sinks to New Low of 53%." *Gallup*. September 28, 2015.

<sup>68</sup> The years 1997-2018 had a multiple R value of -0.708 and a p-value of 0.0001. The data used to check and update Jones' findings can be found at <https://news.gallup.com/poll/5392/trust-government.aspx>

<sup>69</sup> Gotoff, Daniel and Celinda Lake. "Voters Want Criminal Justice Reform. Are Politicians Listening?". *The Marshall Project*. 2019.

<sup>70</sup> Burdeen, Cherise. "The State of Pretrial Justice in America." *Pretrial Justice Institute*. November 2017.

<sup>71</sup> Texas received a D, the second lowest grading above failing

The method by which reform is achieved is often just as important for improving the institution as the content of the reform itself. In analyzing the “toolbox of strategies for criminal justice reform,” Dr. Susan Herman of the Brooklyn Law School highlights the important distinction between legislative reform and reforming executive or judicial policy.<sup>72</sup> Legislatures have often imposed their will on the courts, most significantly through their control of the judicial budget. Yet, the most common way that our criminal justice system is reformed is from within. The methodology of the courts in America is constantly evolving with the ebb and flow of overruling precedent. Reformers must either utilize popular support to push a legislative agenda or convince the superior courts of the virtue of their argument if they hope to achieve their goals.

One of the more significant criminal justice reforms would require just such judicial action. In order to better ensure that the right to an attorney is an effective check against arbitrary coercion, the courts ought to revisit the decision of *Strickland v. Washington*. It is clear that Marshall’s fears have become reality: the majority interpretation of effective counsel has become so broad as to be meaningless. The two-pronged test established by *Strickland* has become a practically unmeetable burden. The invocation of an ‘objective standard of reasonableness’ based on the industry standard is relatively unproblematic. What is impossibly burdensome is the requirement that the defendant show that the outcome of their proceedings would have been different had they received different counsel. The current system is entirely subjective. There is no definitive method by which to determine whether the ineffectiveness of counsel would have altered the outcome of the trial. The guidelines set by *Strickland* were designed to further define *Gideon* and the right to an attorney, setting a baseline of acceptability for defense attorneys as a

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<sup>72</sup> Susan N. Herman, Getting There: On Strategies for Implementing Criminal Justice Reform, 23 Berkeley J. Crim. L. (2018).

means to ensure that every citizen's right to an attorney is actualized. Unfortunately, due to the practically unmeetable burden of the two-pronged test, *Strickland* has become completely ineffective at preventing citizens from being arbitrarily coerced. In order to establish a more effective method of preventing ineffective assistance of counsel, it is crucial that the courts revisit the standards *Strickland* set.

As with any issue of public policy, there are several competing notions of how we ought to reform the ineffective counsel test. Marshall himself insisted that the second requirement of the two-pronged test be expanded to include the procedure of the trial rather than just the outcome. He attacks the fundamental underpinnings of the majority decision, arguing that the purpose of effective counsel is not merely to reduce the likelihood that an innocent individual will be convicted. Marshall recognized that defense attorneys are the only real check an average individual has against being arbitrarily coerced due to unfair procedure. In his own words, Marshall disagreed with the majority that believed that "the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney."<sup>73</sup> Instead, Marshall takes a rather Rawlsian position that the ends cannot justify the means. To Marshall, it matters less whether or not the defendant is actually guilty than whether or not the process by which they were convicted was fair. Defense counsel exists, not to ensure that the guilty are convicted, not even necessarily to act as an advocate for justice, but to vigorously advocate for their client's best interest. An attorney's job is to act as a check against potential overreach by the state. When the outcome of the trial is the standard by which we determine effectiveness, then we are ignoring perhaps the most crucial consideration.

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<sup>73</sup> *Strickland v. Washington*, 466 U.S. 668 (1984)

In his dissent, Marshall argues for an alteration of the majority two-pronged test, dropping the second prong. In determining ineffective assistance of counsel, the courts should also consider the procedural aspects of the trial in question and not just the outcome. Doing so would expand the definition significantly enough to allow for more fair adjudication of ineffective counsel claims while simultaneously protecting the strategic latitude of defense attorneys. Changing the guidelines laid out by *Strickland* would increase defense counsel's effectiveness as a check against procedural injustices by creating a more robust accountability measure for attorneys who shirk their responsibility to their client. By lowering the burden placed on the defendant, Marshall's interpretation raises the baseline for an effective defense, more adequately ensuring that an individual's due process rights are being upheld. Reforming our interpretation of ineffective counsel is one of the most significant ways the courts might begin to further actualize justice as regularity in our criminal justice system.

In addressing the issues brought forward by *Strickland*, it is important that we consider the ways in which such a strict definition impairs the actualization of the rule of law for the 95% of defendants who never make it to trial. In 2011, the Northwestern Law Review published an article examining how ineffective counsel impacts the plea deal process.<sup>74</sup> Its author, Erin Conway, emphasizes that the internal pressure to handle cases quickly significantly increases the probability of receiving ineffective counsel. The nearly insurmountable burden placed on defendants is further complicated by the fact that the *Strickland* guidelines, as lenient as they are, are practically inapplicable outside a courtroom. Since plea deals are a legitimate strategic move for attorneys seeking to minimize their client's punishment, it is incredibly difficult to meet the outcome requirement of the two-pronged test. Since there is no trial with a guilty plea, the court

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<sup>74</sup> Conway, Erin A. Ineffective Assistance of Counsel: How Illinois Has Used the Prejudice Prong of *Strickland* to Lower the Floor on Performance When Defendants Plead Guilty, 105 Nw. U. L. Rev. 1707 (2011)

is left to determine ineffectiveness based solely on the advice to enter a plea agreement. Thus, due to the fact that it is ultimately the defendant's decision whether or not to accept a plea, it is nearly impossible to prove ineffective assistance of counsel after entering a guilty plea. This has a dramatic impact on justice as regularity, seeing as indigent defendants are more likely to enter a guilty plea and are also far more likely to experience ineffective assistance of counsel. If our goal is to actualize the rule of law we assert in theory, then it is crucial that any attempts to reform *Strickland* be also extended to the plea-bargaining process to act as a more effective check against undue coercion. In creating a baseline level of effectiveness beyond just the trial, extending *Strickland* would provide a more meaningful check against undue coercion for the majority of indigent defendants.

Although a large share of judicial reforms come from the judiciary itself, these changes are largely piecemeal and usually happen gradually over time. Luckily, national judicial reforms also often come from the legislature, annulling previous practices with the stroke of a pen. Just this past December, Congress passed the First Step Act aimed at increasing rehabilitation services for inmates and easing the transition back into the workforce. The First Step Act was axiomatic of the way criminal justice reform most often makes its way through the legislature. Following significant public outcry over the necessity of prison reform, Congressional leadership worked up legislation largely based on the model that Texas provided during the Perry administration.<sup>75</sup> Though pressure from the prison industry to reduce overpopulation was an important factor, the Texas program aimed at reducing recidivism was primarily a grass-roots movement against the notoriously 'tough-on-crime' state government. The First Step Act demonstrates how bottom-up reform movements can be successful modes of political change.

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<sup>75</sup> Wiley, Hannah. "Trump Administration Looks To Texas As It Pushes A Criminal Justice Reform Bill". *The Texas Tribune*. December 3, 2018.



Herman expertly underlines this point when she asserts “The encouraging lesson of criminal justice reform efforts to date is that education about the realities of the criminal justice system can change minds. The true art of politics is knowing when to lead and when to follow public opinion.”<sup>76</sup> Luckily, public opinion is currently on the side of reform.

The largest issue in criminal justice that must be addressed legislatively is that of overwhelming caseloads for public defenders. Underfunded and overworked public defenders are far less likely to be able to vigorously defend their clients, meaning an overworked public defender cannot be thought of as an effective check against arbitrary coercion. The simple solution to this problem would be to hire more attorneys, but with court budgets continually being squeezed by the states, we must assume that funding increases will not be forthcoming. In order to provide more effective counsel for all indigent defendants, the legislature ought to consider imposing caseload limits and setting a parity standard for public defense. If these two reforms were to be implemented, the quality of indigent defense in America would be enhanced and would advance the principle of justice as regularity.

Though debates continue over how high the limits for public defenders should be, caseload restrictions are one of the most generally advocated criminal justice reforms. Their argument is significantly benefitted by the examples set by Arizona, Florida, Massachusetts, Missouri, Oregon, and Washington who have all successfully implemented binding statewide workload limits. In doing so, places like Seattle have become recognized as having some of the highest quality public defense in the country.<sup>77</sup> Yet, in order to receive the benefits of caseload limits enjoyed by places like Seattle, it may not be necessary to institute umbrella restrictions.

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<sup>76</sup> Herman, Susan. “Getting There: On Strategies for Implementing Criminal Justice Reform.” 23 *Berkeley J. Crim. L.* (2018). 41.

<sup>77</sup> Boruchowitz, Robert. “Caseload limits a win for public defenders, clients — and justice.” *Seattle Times*. July 18, 2012.

Rather, simply granting public defenders the authority to refuse appointments due to caseload has been shown to substantially reduce workloads in Arkansas and Iowa.<sup>78</sup> By giving public defenders the ability to self-regulate their workload, localities have substantially reduced the burden on overworked attorneys without having to sacrifice efficiency or substantially increase funding. Seeing as instituting umbrella restrictions like those found in Washington and Massachusetts has typically come at a fairly high cost, it is much more practical to pursue reforms directed at allowing public defenders to self-regulate.

Another significant step that the legislature should consider taking is to mandate that municipalities “Provide counsel with parity of resources with the prosecution and include counsel as an equal partner in the justice system.”<sup>79</sup> Due to the fact that prosecutorial systems and public defender systems have different responsibilities and revenue streams, there does not necessarily need to be funding equality. Since prosecutors typically take on the majority of the investigatory responsibility after the case has been handed over by law enforcement, it is understandable that prosecutorial systems might require a larger budget than their contrasting public defender system. Yet, when public defense budgets are cut while prosecutorial budgets are increased, there comes an imbalance in the scales of justice.<sup>80</sup> If public defenders are to be considered an ‘equal partner,’ then it is essential that they are not hindered in their duty because of an unfair distribution of state resources. Though instituting a national parity standard would certainly carry some fiscal impact, the brunt of this impact could easily be taken by restructuring the existing budgeting for the judicial system.

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<sup>78</sup> Farole Jr., Donald. A National Assessment of Public Defender Office Caseloads. *Bureau of Justice Statistics Annual Report*. 2010.

<sup>79</sup> Fabelo, Tony. *What Policymakers Need To Know To Improve Public Defense Systems*. Harvard University’s John F. Kennedy School of Government Executive Session on Public Defense. December 2001.

<sup>80</sup> Mann, Phyllis. “Understanding the comparison of budgets for prosecutors and budgets for public defense.” *National Legal Aid and Defender Association*. 2011.

The final area of concern that needs to be addressed is the injustices found in the plea-bargaining process. With 95% of all criminal accusations being handled through plea deals, it is essential that this aspect of our criminal justice system be properly managed. The most logical place to start would be with outlawing so-called 'mass-plea' hearings. Defendants in such hearings have practically no time to discuss their case with defense counsel and are largely uninformed about their rights, meaning the quality of their defense is radically diminished so as to be practically ineffectual as a check against state coercion. Though certain cases will always merit more attention than others, justice demands that every case be defended in the best interest of the defendant. It is inconceivable to think that only meeting with your attorney for a maximum of a few minutes before pleading would be in any defendant's best interest. Mass pleas only serve as a detriment to the liberties of the less privileged by trading due process for efficiency and so should be abolished.

Beyond mass plea hearings, the current administration of the plea-bargaining process provides the greatest potential for breaches of the rule of law. Prosecutors are given near total control over plea deals in their jurisdiction. This means that the quality of the plea-bargaining process varies from locality to locality, making it incredibly difficult to discern anomalies among plea agreements that may be indicative of arbitrary action. Judges are granted some authority over the contents and process of plea agreements before their courts, but have traditionally neglected that advisory role, relying on prosecutors to police themselves.<sup>81</sup> Instead of having the fox watch the hen house, judges ought to take a more active role in overseeing the plea-bargaining process. Rather than only looking at the final product of a deal, judges should be ensuring that every procedural aspect of their court is as regular and fair as possible, especially

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<sup>81</sup> White, Welsh S. "A Proposal for Reform of the Plea Bargaining Process." *University of Pennsylvania Law Review* 119, no. 3 (1971): 439-65.

those agreements reached by attorneys behind closed doors. By encouraging judges to institute more oversight over the plea-bargaining process, the probability of arbitrary action by the prosecutor would be diminished. Furthermore, proper oversight would greatly advance the principle of justice as regularity by safeguarding the consistency of pre-trial arrangements for indigent defendants.

### **Conclusion**

As we continue forward as a nation during turbulent times, it is important that we remind ourselves of the heart of Rawls' theory. Every citizen should have equal claim to basic liberties and rights, including the right against arbitrary imprisonment. In America, these rights are constitutionally enshrined and, in theory, protected by the legitimate use of coercive force by the state. Yet, as I have shown, ones' socioeconomic status can have a distinct impact upon the realization of your rights. In the criminal justice system, the most tangible expression of the principles of justice, those who lack the resources to pay for their defense are supposed to be treated equally to those who can afford private counsel. Effective counsel is the most important check against potential overreach by the state. So much so that our Supreme Court has consistently upheld that the Sixth Amendment mandates that every defendant must be provided counsel because without it they would have practically no hope of successfully defending themselves against the state's accusations. Unfortunately, the federalist structure of our judiciary grants localities remarkably wide latitude, leading to injustices in administration and harming the effectiveness of public defense. In order to further advance the rule of law and justice as regularity, it is crucial that we address injustices in our system.

The political climate is ripe for criminal justice reform. Generally, Americans are dissatisfied with the status quo and urging lawmakers to act and advance the rule of law. Action can, and should, come from several dimensions. The courts themselves ought to revisit the two-pronged test for ineffective assistance of counsel outlined by *Strickland*. Holding defense counsel accountable for their actions would greatly increase the quality of indigent defense by setting a realistic baseline of acceptable practice. Similarly, creating a national parity standard for public defense funding would serve to narrow the resource gap between the two sides, enabling defense attorneys to serve as a more effective check against arbitrary state coercion. The legislature should also consider revising the rules structuring plea agreements, banning mass plea hearings and providing real and effective oversight of prosecutors. Any one of these reforms taken independently would lead us to greater actualization of justice as regularity and the rule of law but taken as a unit would present a dramatic improvement in the quality of justice in America.

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