Universal Public Defense

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Abstract

This Article introduces a provocative thought experiment: state-funded counsel as a universal mandate for all people facing criminal charges. Said another way, universal public defense for everyone, even defendants who could otherwise afford representation. The Sixth Amendment currently protects the right to counsel of choice for people who can afford to hire their own lawyer. This is not so for indigent defendants; they have no such constitutionally protected right. This Article invites us to envision a reality where defendants with means are placed on the same footing as those without, and to consider how this new defense model might impact the criminal adjudication system and the actors within it.

First, this Article explains how universal public defense would operate—the parameters, the funding, and the delivery system. Second, it turns to the Progressive Era and reporting from the period to unearth the genealogy of public defense. It was then that reformers first suggested "free defense" for all, regardless of income. Finally, this Article assesses universal public defense by delving into policy debates comparing universally available social programs with targeted programs. Any improvement to public defense—to the quality, funding, and availability—depends on how broadly the impact of mandated universal public defense is felt. This new defense model could alter the way the adjudication system operates—from prosecutor charging decisions, the attorney-client relationship, and sentencing decisions.

These ideas are timely and necessary. The current criminal adjudication system—riddled with inefficiencies, bias and discrimination, and an over reliance on incarceration—is unsustainable and in need of reform. Building on the work of critical legal theorists, this Article invites readers to suspend disbelief and envision an alternate reality. Doing so forces us to grapple with the structural inequalities baked into indigent defense. It can also unlock generative ideas about practical interventions. This Article concludes with a call for other radical thought experiments to help better understand seemingly intractable problems.

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I. INTRODUCTION

It is broadly accepted that indigent defense is in crisis.[1] Over 80% of people facing criminal charges cannot afford counsel and require a state-funded lawyer.[2] There are simply too few lawyers to represent everyone in need and too little funding allocated to adequately support the constitutional right to counsel for indigent defendants.[3] Further, the criminal legal system

[1] *See* Eve B. Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 208-11 (2023) (describing various deficiencies with the structure and operation of indigent defense that impede adequate representation for defendants who rely on appointed counsel).

[2] *See* Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html ("Roughly four out of five criminal defendants are too poor to hire a lawyer and use public defenders or court-appointed lawyers.").

[3] *See* Emily Allen, *Maine's Public Defender Crisis Devolves into a Blame Game*, PORTLAND PRESS HERALD (July 9, 2024), https://www.pressherald.com/2024/07/07/a-judges-decision-to-lower-auburn-mans-bail-turns-public-defense-crisis-into-blame-game/ [https://perma.cc/ZJY9-37ZF] (noting that "hundreds of people, both in and out of jail, wait to be appointed lawyers because the state cannot find enough people to take on the work," and that as of June 2024

disproportionately impacts marginalized people, namely poor people, people of color, and disabled people.[4] Under the current regime, indigent defense providers are ill-equipped to combat this reality, and in fact, they may even exacerbate it.[5] And we have long been conditioned to accept this epistemic injustice.[6]

But what if the defense delivery system was altered in a way that could improve the quality of representation and mitigate some of the criminal legal system's negative impact on marginalized people? Imagine a reality in which trial courts were required to appoint state-funded defense lawyers to every defendant, regardless of income, meaning that public defenders represented all defendants, without exception. Now imagine that the widespread use and reliance on state-funded defense led to an increase in public support and funding, thus improving the quality of defense for all defendants. I refer to this delivery model as universal public defense.

This intervention falls within longstanding policy debates about the comparative advantages of social programs that are universally available

"there were 163 lawyers available to represent indigent clients throughout the state," with only 110 willing to accept trial work); Anita Khandelwal & Girmay Zahilay, *Our Public Defender System Is at the Breaking Point*, Seattle Times (Sept. 15, 2023), https://www.seattletimes.com/opinion/our-public-defender-system-is-at-the-breaking-point/ [https://perma.cc/BA5J-VVCU] (describing "unsustainable caseloads," attorney attrition, and inability to keep up with "current volume of prosecution . . . without a massive influx of defense attorneys who simply don't exist in today's labor market"); Nia Prater, *106 Cases, Three Jobs, One Lawyer: The City's Public Defenders Are Struggling*, N.Y. Mag. (Mar. 7, 2023), https://nymag.com/intelligencer/2023/03/nyc-public-defenders-face-a-funding-crisis.html [https://perma.cc/92UA-HFJF] (describing the "immense strain" under which NY Legal Aid attorneys must work due to "funding crisis," "high turnover of crucial staff," and "immense workloads[,] and chronically low salaries."); Oppel & Patel, *supra* note 2 (noting that in Louisiana, one public defender handled over 190 felony cases at once, which would require five full-time lawyers for adequate representation; in Providence, RI, one lawyer handled 50 new cases a day with some clients receiving one to five minutes of the lawyer's time; and that public defenders in CO, MO, and RI were handling two to three times the recommended caseload).

[4] *See* Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 Yale L.J. 2176, 2179-82 (2013); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Calif. L. Rev. 125, 127-31 (2017); *see also* Jamelia Morgan, *Disability, Policing, and Punishment: An Intersectional Approach*, 75 Okla. L. Rev. 169, 184-90 (2022) (recognizing that disabled people of color are uniquely vulnerable to contact with the criminal legal system).

[5] *See* L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2634-41 (2013); Joseph J. Avery, Jordan Stark, Yiqiao Zhong, Jonathan D. Avery & Joel Cooper, *Is Your Own Team Against You? Implicit Bias and Interpersonal Regard in Criminal Defense*, 161 J. Soc. Psych. 543 (2020) (studying criminal defense attorneys in forty-three states and finding that attorneys harbor significant implicit bias against Black clients and for white clients in ways that impact the attorney-client relationship).

[6] *See* David Garland, *The Current Crisis of American Criminal Justice: A Structural Analysis*, 6 Ann. Rev. Criminology 43, 46 (2023) (describing general indifference of most middle-class Americans at the carceral state's treatment of mostly Black, Latino, low-income, and politically disempowered people); *see also* Alec Karakatsanis, Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System (2019); Jon B. Gould, *When the Courts Are Indifferent and Legislators Apathetic: Partnering with Prosecutors to Protect Public Defense*, 57 Crim. L. Bull. 4 (2011) (observing that state courts and legislatures are aware of the indigent defense crisis and have the power to address it, but fail to act).

or available based on targeted criteria.[7] The current public defender regime is a targeted program, available to defendants based on their indigency as defined by the relevant jurisdiction. Conversely, universal public defense constitutes a universal program open to all regardless of income, akin to Social Security, unemployment benefits, and Medicare for those sixty-five and older.[8] In general, universal programs tend to be more politically popular because they reach a broader constituency across income and racial groups.[9] On the other hand, targeted programs, such as Supplemental Nutrition Assistance Programs ("SNAP") or Temporary Assistance for Needy Families ("TANF"),[10] tend to be less politically popular given the limited number of select recipients.[11] Further, because political support is often tied to whether the recipients are deemed "deserving," targeted programs benefiting low-income people and/or people of color often receive less political support given negative perceptions about both populations.[12] This Article argues that removing income eligibility from public defense could increase support and funding for state funded defense, which could then lead to better quality defense services for everyone.

Mandating all defendants to receive state-funded defense counsel is a provocative thought experiment. Unlike other interventions aimed at shrinking the criminal legal system, mandated public defense contemplates growing it.[13] Universal public defense would require more funding to hire more public defenders and support staff to meet the increase in demand for services. Even under the current system, there are not enough public

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[7] *See* Robert Greenstein, Targeting vs. Universalism, and Other Factors That Affect Social Programs' Political Strength and Durability (2022), https://www.hamiltonproject.org/wp-content/uploads/2023/01/20220806_ES_THP_SocialPrograms_ExpandedEdition.pdf [https://perma.cc/49K6-KK3A].

[8] *Id.* at 1.

[9] *Id.* at 13.

[10] *See* Admin. for Child. & Fam., Improving Services for Families Through Increased TANF Coordination with SNAP Employment and Training Programs 1-6 (2016), https://acf.gov/sites/default/files/documents/ofa/tanf_snap_issue_brief_final.pdf [https://perma.cc/WD4Y-7XVS] (describing TANF and SNAP as federal assistance programs for low or no-income people).

[11] *See* Theda Skocpol, *Targeting Within Universalism: Politically Viable Policies to Combat Poverty in the United States*, *in* The Urban Underclass 411 (Christopher Jencks & Paul E. Peterson eds., 1991) (discussing the political viability of social programs that are universally provided versus those that are available on a targeted basis).

[12] *See* Khiara M. Bridges, The Poverty of Privacy Rights 48-51 (2017) (discussing the moral construction of poverty, which distinguishes between those who escape moral condemnation for "their failure to contribute to prosper" and those who are morally condemned for their failures); *see also* Martin Gilens, *Race and Poverty in America: Public Misperceptions and the America News Media*, 60 Pub. Op. Q. 515, 515-41 (1996) (observing that media depicts an unflattering and distorted view of poor, Black working age adults relative to other groups, which reflects and informs "Americans' [negative] social perceptions and political attitudes" about poor, Black people).

[13] *See* Amna A. Akbar, *Non-Reformist Reforms and Struggles over Life, Death, and Democracy*, 132 Yale L.J. 2497, 2538 (2023) (noting that prison abolitionists seek to reduce "the scale and power of the carceral state").

defenders to adequately represent every indigent person facing criminal charges.[14] For every defendant, regardless of income, to receive a public defender, federal and state governments would need to dramatically increase the resources allocated to public defense.[15]

How might this new defense delivery system impact the criminal adjudication system and the behavior of the actors within it? How might changing client eligibility requirements impact what motivates people to become public defenders and the nature of client counseling? What about prosecutorial charging decisions and sentencing? What impact would universal public defense have on our understanding of the constitutional right to counsel? With less than 20% of defendants currently employing private counsel, can universal public defense have a *universal* impact? This Article explores these questions.

There are practical barriers to universal public defense. The Court has interpreted the Sixth Amendment right to counsel to protect the right to counsel *of choice* for those who can afford representation.[16] Meaning, the state cannot force defense counsel on a defendant with the means and desire to hire a private defense attorney. But this Article is not an argument for overturning legal precedent. This speculative reality invites critical engagement with how economic and social forces impact the quality, availability, and delivery of public defense. It also forces us to grapple with the structural inequalities baked into indigent defense. Such engagement can help generate practical interventions that could improve the delivery and quality of public defense. The ideas in this Article embrace legal theorist Robin West's invitation to produce "big, ambitious scholarship that is unabashedly non-normative and non-pragmatic."[17] Universal mandated public defense

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[14] *See* AMER. BAR ASS'N, THE NEW MEXICO PROJECT: AN ANALYSIS OF THE NEW MEXICO PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 5 (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-moss-adams-nm-proj.pdf [https://perma.cc/EQ83-DLLE] (finding that "New Mexico faces a critical shortage of public defen[ders]" and would need to hire 67% more attorneys "to meet the standard of reasonably effective assistance of counsel" under the constitutional guarantee); AMER. BAR ASS'N, THE OREGON PROJECT: AN ANALYSIS OF THE OREGON PUBLIC DEFENSE SYSTEM AND ATTORNEY WORKLOAD STANDARDS 5 (2022), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-or-proj-rept.pdf [https://perma.cc/2Y9V-P734] (finding that Oregon has only one-third of the public defenders it needs to adequately represent indigent defendants and that under current staffing, attorneys would need to work more than twenty-six hours a day during the calendar year to catch up).

[15] Eve B. Primus, *Defense Counsel and Public Defense*, *in* REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 123-24 (E. Luna ed., 2017) (describing "funding for public defense" as "grossly insufficient for providing adequate legal representation").

[16] United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) (citing Wheat v. United States, 486 U.S. 153, 159 (1988)) ("[A]n element of [the Sixth Amendment] is the right of a defendant who does not require appointed counsel to choose who will represent him.").

[17] Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 1, 17 (2016).

does not aim to solve the indigent defense crisis nor mass incarceration; it "aims instead" "to understand . . . injustice."[18]

Other criminal law scholars have criticized the way jurisdictions deliver indigent defense services, and some have suggested modifying or changing delivery systems in concrete ways.[19] This Article moves away from what is practical and enters the realm of imagination. It advances the work of criminal law scholars who have suggested radical interventions, regardless of their enforceability.[20] The goal of such work, as is the goal of this Article, is to challenge our understanding of the current regime, open different channels of thinking, and explore new possibilities. Practical implementation is not a chief concern. It is in this tradition that I propose a system of mandated universal public defense.

This Article also builds on the work of critical legal theorists who have dared to imagine alternate realities and the law's role in them.[21] In *Space Traders*, critical race theorist Derrick Bell examines white America's response to an offer from space aliens to trade the entire Black population in exchange for ridding the nation of its economic and environmental problems.[22] The invitation spurs heated debate among politicians, business leaders, and the public as they weigh the enticing offer against moral concerns about expelling Black people from America and into an unknown future.[23] Spoiler alert: white America makes the trade.[24] Similarly, this Article creates a speculative legal future, interrogates its implications, and explores the ramifications.

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[18] *Id.*

[19] *See* Maybell Romero, *Lowball Rural Defense*, 99 Wash. U. L. Rev. 1081, 1117-19 (2021) (exposing the negative impacts of privatized public defense in rural communities); Primus, *supra* note 1, at 212 (arguing that states need to end contract and assigned counsel models and "move toward state-structured public defender models"); Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 Iowa L. Rev. 113, 138-48 (2021) (analyzing different public defender management structures and observing the benefits of executive management).

[20] *See* Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. Rev. 1493, 1532-34 (2021) (contemplating extending the constitutional right to counsel of choice to indigent defendants and exploring the potential impact on Black defendants who opt for racially congruent representation); Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. Rev. 762, 767 (2016) (proposing that prosecutors be "more single mindedly focused on maximizing punishment[,]" and arguing that that would increase prosecutor accountability and decrease abuses of power); Kate Levine, *Police Suspects*, 116 Colum. L. Rev. 1197, 1234-50 (2016) (cataloging the special protections afforded police officers subject to criminal investigations, rather than end those protections, Levine argues to extend them to non-law enforcement suspects); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 Iowa L. Rev. 219, 242-63 (2004) (suggesting that the government increase resources for public defenders to match the resources allocated to prosecutors).

[21] *See* I. Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. Rev. 1 (2019) (envisioning the future of law enforcement when racial minorities are expected to comprise the majority of the United States' population).

[22] Derrick Bell, *The Space Traders*, *in* Faces at the Bottom of the Well: The Permanence of Racism 158, 158-94 (1992).

[23] *Id.* at 164-70, 174-78, 180-85, 186-87.

[24] *Id.* at 192-94.

When the United States Supreme Court held that the Sixth Amendment required states to provide defense counsel to indigent defendants, it was meant to end a two-tiered, class-based justice system.[25] In *Gideon v. Wainwright*, the Court explained that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[26] Despite the Court's promise of fairness and equality, the decision did not provide guidance to jurisdictions on how to fund nor administer public defense.[27] The federal government's failure to account for funding has resulted in chronic underfunding and significant disparities in representation among and within states.[28] The lack of defense funding stands in contrast to the billions of dollars of funding the federal government administers to local law enforcement agencies.[29]

In the wake of *Gideon*, state and local governments were left to figure out how to afford and deliver free legal services to hundreds of thousands of indigent defendants.[30] This coincided with a sharp increase in criminal prosecutions, placing a strain on the entire adjudication system, including on the appointment of counsel.[31] Vast regional differences in indigent defense funding sources,[32] combined with different defense delivery models,[33] resulted in

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[25] Gideon v. Wainwright, 372 U.S. 335, 340-41 (1963) (relying on the Sixth and Fourteenth Amendments to find that states are required to provide defense counsel to indigent defendants facing felony charges).

[26] *Id.* at 344.

[27] *See* Sara Mayeux, Free Justice: A History of the Public Defender in Twentieth-Century America 120 (2020) (observing that "the Supreme Court provided little follow-up guidance about . . . implementation" after *Gideon*); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 69-70 (1997) (noting that the Court did not address funding for indigent defense in *Gideon*).

[28] *See* Bryan Furst, Brennan Ctr. for Just., A Fair Fight: Achieving Indigent Defense Resource Parity 9 (2019), https://www.brennancenter.org/our-work/research-reports/fair-fight [https://perma.cc/U8A5-YR2H] (noting that "[t]he federal government plays a miniscule role in funding indigent defense at the state level, despite historically playing a far larger role in funding state and local law enforcement."); Nicholas M. Pace, Malia N. Brink, Cynthia G. Lee & Stephen F. Hanlon, National Public Defense Workload Study 31 (2023), https://www.rand.org/pubs/research_reports/RRA2559-1.html [https://perma.cc/R9Z6-E859] (observing that "[i]n many states, public defense is primarily a local responsibility in terms of funding streams . . ."); *see also* Sixth Amend. Ctr., *State of the Sixth: Funding*, https://6ac.org/state-of-the-sixth/ [https://perma.cc/A7LP-JFAA] (last visited Mar. 1, 2025) (cataloging indigent defense funding by state, showing that some states are primarily state-funded, like Oregon, and others are locally funded, like Pennsylvania, resulting in funding disparities).

[29] *See National Police Funding Database: Federal Grant Programs*, LDF Thurgood Marshall Inst., https://policefundingdatabase.org/explore-the-database/federal-grant-programs [https://perma.cc/3PG8-V62V] (last visited May 18, 2025) (cataloging various grants the federal government gives to local law enforcement agencies).

[30] *See* Mayeux, *supra* note 27, at 120.

[31] *See* Michelle Alexander, The New Jim Crow, 84-86 (2010).

[32] Furst, *supra* note 28, at 6-7 (describing disparity of defense services based on source of funding for indigent defense).

[33] *Id.* at 5-6 (identifying different indigent defense delivery models and their impact on quality of representation).

a patchwork system where indigent defendants routinely receive inadequate representation.[34] As Paul Butler succinctly concluded, it is a system where "poor people lose."[35] Given law enforcement's disproportionate focus on racially marginalized people, it is also a system where an overwhelming number of poor people of color lose.[36]

Mandated universal public defense could equalize the playing field between rich and poor defendants in the way the Court's decision in *Gideon* tried but failed to accomplish.[37] The program could result in a well-funded public defense system where all defendants, regardless of income, receive the same high-quality representation. The success of universal public defense depends on the extent to which people with power and privilege rely on state-funded defense. If privileged people recognize universal defense as a societal good, whether because they rely on it or people with whom they are connected rely on it, they may support it politically. Increased political support could then lead to increased funding.[38] If so, all of society, including indigent defendants, stands to benefit from a universal model.[39] However, if indigent defendants continue to be the primary beneficiaries, the proposal starts to look a lot like the existing regime with all its corresponding inequalities.[40]

Universal public defense is not as outlandish as it sounds. Before indigent defense existed as we know it, Progressive Era reformers advocated for state-funded defense counsel for everyone, even for defendants who could afford to hire an attorney.[41] At the time, it made intuitive sense. The prosecutor and judge were public officials, why should the system allow defendants to pay for defense counsel?[42] Progressive Era academic Maurice Parmelee criticized the "[criminal adjudication] system of *public* prosecution coupled with *private* defense" for failing to "maintain the balance between social and individual rights and plac[ing] rich and poor upon a very unequal standing

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[34] *See* PACE ET AL., *supra* note 28, at 32.

[35] Paul D. Butler, *Poor People Lose:* Gideon *and the Critique of Rights*, 122 YALE L.J. 2176, 2176 (2013).

[36] *See id.* at 2187.

[37] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (recognizing that defendants with money can and do hire lawyers and that the Constitution demands the state furnish defense counsel for indigent defendants so that "every defendant stands equal before the law").

[38] *See* GREENSTEIN, *supra* note 7, at 13 (describing increased support and funding for Medicaid).

[39] *See supra* section II.B (discussing interest convergence and increased funding allocated to universal public defense).

[40] *See infra* section IV.A.2 (describing risk of universal public defense failing to garner widespread support and funding combined with an increase in caseloads for public defenders).

[41] *See infra* section III.C (discussing Progressive Era reformers who championed free justice for all and the eradication of private attorneys for hire).

[42] *See How to Secure Free and Speedy Justice and Stop Lynching*, NEW NATION, July 2, 1892, at 420 (pointing out that all other features of the criminal court system are state-funded except defense counsel).

before the law."[43] There was a belief that money had a corrupting influence on justice: those who could afford defense counsel could obtain an acquittal, regardless of culpability, whereas defendants without money were likely to be convicted.[44] Then, as now, the majority of criminal defendants were poor and unable to hire a private attorney to defend them.[45]

This Article turns to periodicals and other reports from the Progressive Era, showing that arguments in support of universal public defense occurred alongside proposals for state-funded indigent defense.[46] As we know, the latter proposal won out. In 1932, the United States Supreme Court recognized state-funded defense counsel as part of the Sixth Amendment guarantee for indigent defendants facing capital charges,[47] and in 1963, for indigent defendants facing felony charges and possible incarceration.[48] Examining the genealogy of public defense helps to unpack the economic and social forces that continue to animate discussions around improving the quality of defense services. It reminds us that money, power, and privilege have consistently factored into the way defendants experience the criminal adjudication system. Universal public defense attempts to remove those forces to create an equal experience for all defendants.

To help assess universal public defense, this Article engages debates over targeted versus universal social programs[49] and explores two other universal programs: universal healthcare ("UHC") and universal free meals in public schools ("UFM"). Like universal defense, these programs do not target recipients based on income, instead, they are universally provided and intended to address inequality between those with means and those without. Research shows that society tends to have a more positive perception of universal programs, relative to income targeted programs.[50] Successful universal programs tend to be the ones with a broad constituency across income

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[43] Maurice Parmelee, *Public Defense in Criminal Trials*, 1 J. Am. Inst. Crim. L. & Criminology 735, 736 (1911).

[44] *See* Clara Shortridge Foltz, *Public Defenders*, Chi. Legal News, Aug. 12, 1893, at 432.

[45] *See* Oppel & Patel, *supra* note 2 (finding that in 2019, 80% of defendants are indigent); Parmelee, *supra* note 43, at 738 (observing that defendants in the early 1900s are "poor [and] . . . frequently . . . unable to procure the assistance of counsel.").

[46] *See* A. Mabel Barrow, *Public Defender*, 14 J. Am. Inst. Crim. L. & Criminology 556 (1924) (bibliography of books, articles, and bar association discussions advocating for various forms of state-funded criminal defense services).

[47] Powell v. Alabama, 287 U.S. 45, 66 (1932).

[48] *See* Gideon v. Wainwright, 372 U.S. 335, 341 (1963) (recognizing the Sixth Amendment right to counsel for anyone facing felony charges); Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972) (extending the Sixth Amendment right to counsel to anyone facing jail time, including for a non-felony offense).

[49] *See* Greenstein, *supra* note 7.

[50] *See* Emily Gutierrez, *The Effect of Universal Free Meals on Student Perceptions of School Climate: Evidence from New York City*, EdWorkingPapers, 5-11 (2021), https://edworkingpapers.com/sites/default/files/ai21-430.pdf [https://perma.cc/GBB5-KFLA] (observing that making free food available to everyone in a school regardless of income increased participation among all students, likely because it removed the stigma that free food was only for "poor kids").

levels, such as Medicaid, which attract widespread support.[51] Targeted programs can create an "us" versus "them" mentality, which dissipates when there is no distinction made between who is eligible to receive the benefit and who is not.[52] A similar dynamic may result with universal public defense. Although universal public defense differs from UHC and UFM,[53] assessing the perception and operation of each can indicate how universal public defense might fare.

This Article requires readers to accept certain parameters and set aside legal constraints. I ask that you unlock your imagination as I create and assess this alternate reality in the preceding three parts. Part II invites readers to envision a mandated system of universal public defense for all, including those who would otherwise be able to hire private counsel. It defines how universal public defense would operate, including limitations on choice, increased funding, impact on quality, and the delivery system across jurisdictions. Part III examines the genealogy of public defense through contemporaneous reports from the Progressive Era, unearthing what motivated reformers to advocate for free legal services for all people facing criminal charges. Part IV anticipates the benefits and challenges of universal public defense by comparing it to existing universal benefits in other contexts, such as universal healthcare and universal free meals in public schools. It then explores potential behavioral changes among criminal legal system actors. This Article concludes with a call for other radical thought experiments to help better understand seemingly intractable problems.

II. Universal Public Defense

This Part invites readers to envision a mandated system of universal public defense. It defines how universal public defense operates, requiring all people facing criminal charges, regardless of income, to receive a state-funded defense lawyer.[54] A universal system of state-funded defense requires readers to suspend disbelief given current Sixth Amendment law.[55]

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[51] *See* Greenstein, *supra* note 7, at 13 (noting how government expansion of Medicaid recipients to people "up the income scale" from the "very poorest[,]" helped attract more support, including an increase in spending).

[52] *See* Skocpol, *supra* note 11, at 414, 419, 432-33.

[53] The biggest difference between these two programs and universal public defense, is that participation in universal public defense is mandatory. However, there are some mandated universal healthcare systems, like the National Health Insurance Service in South Korea. *See infra* section IV.B.

[54] Note that the state can criminally prosecute corporations. *See* U.S. Dept. of Just., *Principles of Federal Prosecution of Business Organizations*, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/5HDD-QQ8G] (last visited Mar. 1, 2025). The universal model does not contemplate an exception for corporations, but the details of corporate prosecution are beyond the scope of this Article.

[55] Forcing defense counsel on a defendant who has the ability and desire to hire their own defense counsel violates the Sixth Amendment right to counsel of choice. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) (recognizing that the right to counsel of

A critical feature of this universal system is that it is mandated, meaning defendants do not have the freedom to opt out of a public defender, nor can they supplement their state-funded defense with additional privately funded defense services. A universal model would also end self-representation.[56] Prohibiting self-representation advances the main thrust of universal public defense, which is meant to equalize the lack of choice for all defendants across income levels. This Part then discusses how the state would fund this enterprise, the potential impact on the quality of representation, and the appointment process across jurisdictions.

Contemplating universal public defense might produce a strong negative reaction. Recognizing and grappling with this response is part of the thought experiment. It is worth interrogating. A mandated universal system removes a person's reliance on privilege and agency when their liberty and/or life are at stake. This might cause discomfort. Yet, society is largely comfortable with stripping agency and choice away from indigent people. The Court has interpreted our Constitution to protect the right to counsel of choice for people with means.[57] But indigent people do not have the same constitutionally protected right. The Court's rationale is that allowing indigent people to choose their lawyer would be inefficient.[58] A universal model removes this income-based disparity and creates a common denominator among economically privileged and indigent defendants. This Part encourages readers to consider these tensions while contemplating universal public defense.

A. Free Defense for All

Mandated universal public defense works exactly as it sounds. Trial courts would be required to appoint every person facing criminal charges a state-funded public defender. This system would eliminate private criminal defense. Like other principal actors in a criminal courtroom—the judge and the prosecutor[59]—the state would fund defense counsel in each case.

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choice is reserved for those with the ability "to spend [their] own money to obtain the advice and assistance of . . . counsel") (internal citation omitted). Similarly, the Sixth Amendment also protects defendants' right to self-representation. *See* Faretta v. California, 422 U.S. 806, 821 (1975).

[56] *But see Faretta*, 422 U.S. at 821 (recognizing that the Sixth Amendment protects defendants' right to self-representation).

[57] *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) ("[A]n element of [the Sixth Amendment] is the right of a defendant who does not require appointed counsel to choose who will represent him.") (internal citation omitted).

[58] *See infra* Part II.A.I (describing the Sixth Amendment right to counsel of choice); *see also* Hoag, *supra* note 20, at 1514-15 (explaining that judicial efficiency trumps right to counsel of choice for indigent defendants).

[59] *But see* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 42 U.C. Davis L. Rev. 411 (2009) (recognizing the history and limited contemporary use of private prosecutors).

Critical aspects of a mandated system are that defendants would not be able to opt out of receiving a public defender, nor would they be able to supplement appointed counsel with privately funded defense services or engage in self-representation. The ability for a defendant to opt out and simply retain private counsel would reproduce aspects of the current defense delivery model which tends to reward and prioritize privilege. Opting out would also relieve the pressure a universally mandated system places on society to fund the system, the actors within the system, and society's perception of the system. Prohibiting self-representation removes choice from all defendants in selecting counsel. The sections below further explore the legal and practical implications of these prohibited features.

1. No Opting Out of Publicly Funded Counsel

Envisioning a mandated system of universal public defense requires setting aside well-established Supreme Court precedent that would otherwise prevent its enforceability.[60] In interpreting the Sixth Amendment right to counsel,[61] the Court has recognized several related rights,[62] among them, the right to counsel of choice[63] and the right to self-representation.[64] Notably, the right to counsel of choice only exists for defendants who have the funds and desire to hire their own lawyer.[65] A mandated system of appointing state-funded defense counsel to every defendant would violate the right to counsel of choice for defendants who have the ability to hire a private defense lawyer.

The Sixth Amendment right to counsel of choice does not exist for indigent defendants. This might come as a surprise. It seemed to catch Chief Justice Roberts off guard during oral arguments on the issue.[66] Upon hearing that indigent defendants did not have the same right to counsel of choice as paying defendants, he asked "Why not?"[67] Unless appointed counsel has an

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[60] Considering the Roberts Court's decisions overturning well-established precedent, perhaps this is not such a difficult exercise. *See generally* Loper Bright Enters. v. Raimondo, 603 U.S 369 (2024) (overruling Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), and ending federal court deference to agency interpretations of ambiguous statutes that the agency enforces); Students for Fair Admissions v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (overturning affirmative action in higher education); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (overturning the constitutional right to abortion).

[61] U.S. Const. amend. VI.

[62] These include the right to effective counsel, Strickland v. Washington, 466 U.S. 668, 686-87 (1984), and the right to conflict-free counsel, Glasser v. United States, 315 U.S. 60, 69-70 (1942) (recognizing that the Sixth Amendment protects defendants' right to conflict-free counsel).

[63] *See* Wheat v. United States, 486 U.S. 153, 159-60 (1988).

[64] *See* Faretta v. California, 422 U.S. 806, 819 (1975).

[65] *See* Linton v. Perini, 656 F.2d 207, 209 (6th Cir 1981).

[66] Transcript of Oral Argument at 33-34, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (No. 05-352).

[67] *Id.*

actual conflict of interest or there is a serious breakdown in communication,[68] indigent defendants do not have a constitutionally enforceable right to choose to work with a different attorney.[69] In *Caplin & Drysdal v. United States*, the Court explained that the Sixth Amendment right to counsel of choice "guarantees defendants . . . the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented . . . ."[70]

Indigent defendants may have several legitimate reasons for wanting a new lawyer that do not rise to the level of an actual conflict or a serious breakdown in communication. Perhaps, a defendant does not trust their appointed counsel or believes appointed counsel does not believe them. A defendant could also experience bias, poor communication, and lack of rapport with their appointed lawyer. But there is no enforceable remedy for these situations.[71] The Court's decisions on choice and indigency reflect the maxim that beggars cannot be choosers. For defendants lacking the money "to shop" for a defense attorney of choice, the law will not support their desire to pick and choose among appointed counsel.

There are some logistical constraints that prevent the Court from extending the right to counsel of choice to indigent defendants. There may not be available substitute counsel if a defendant does not want to work with their appointed lawyer. Even if there was an available substitute counsel, there may not be sufficient time for newly appointed counsel to become familiar with the case. Lastly, if an indigent defendant relies on some impermissible reason for requesting new counsel, perhaps the defendant harbors racist or sexist views, appointing substitute counsel may implicate the state in unlawful discrimination.[72]

Even considering these logistical constraints, there is something amiss with a defendant's access to wealth controlling whether they can enjoy a constitutional right. In other contexts, the Court has interpreted the Sixth and Fourteenth Amendments to require parity between rich and poor defendants in criminal cases. For example, the Court has held that due process and

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[68] *See* Stenson v. Lambert, 504 F.3d 873, 886 (9th Cir. 2007) (finding that the Sixth Amendment prevents courts from "forcing a defendant to go to trial with an attorney with whom he has an irreconcilable conflict"); Daniels v. Woodford, 428 F.3d 1181, 1198-20 (9th Cir. 2005) (granting habeas relief where a complete breakdown in communication between the defendant and appointed counsel resulted in the effective denial of counsel).

[69] *See* Luis v. United States, 136 S. Ct. 1083, 1089 (2016) (plurality opinion) ("[A]n indigent defendant, while entitled to adequate representation, has no right to have the Government pay for his preferred representational choice.").

[70] Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989).

[71] *See* McKee v. Harris, 649 F.2d 927, 932 (2d Cir. 1981), *cert. denied*, 456 U.S. 917 (1982) (concluding that defendant's loss of trust and lack of confidence in appointed counsel did not constitute denial of defendant's right to counsel); Perez Goitia v. United States, 409 F.2d 524, 527 (1st Cir. 1969), *cert. denied*, 397 U.S. 906 (1970) ("[L]ack of rapport between attorney and client does not automatically mean that there has been inadequate representation.").

[72] This is because the appointment of counsel involves state action, and the state is prohibited from engaging in certain forms of discrimination. *See* U.S. CONST. amend. XIV.

fundamental fairness prevent the state from charging indigent defendants a fee to file a notice of appeal,[73] require the state to furnish indigent defendants with their trial transcript when pursuing permissible appeals,[74] prevent the state from charging an indigent defendant on the first direct appeal as of right,[75] and require the state to provide indigent defendants an opportunity to present their defense, including funding for necessary expert services.[76] However, income distinction related to counsel of choice is an outlier relative to the parity the Court created in other contexts.

Mandated universal public defense would extend this parity to counsel of choice. It ends the income distinction between people with means who have a constitutional right to select a lawyer of their choosing and indigent clients who do not. In a mandated universal system, defendants with the ability to hire private counsel would be placed on the same footing as indigent defendants, neither group enjoying the constitutional right to counsel of choice.

This parity of representation would extend to substitution of counsel as well. Under the current regime, indigent defendants have little recourse if they do not trust their lawyer or believe their lawyer is working in their best interest.[77] Some trial judges will appoint indigent defendants a new lawyer if substitute counsel is available and the procedural posture of the case allows for substitution, but that is a discretionary decision.[78] One of the only constitutionally protected ways an indigent defendant can obtain a new lawyer is if the defendant demonstrates a complete breakdown in communication with counsel.[79] Regardless of income, all defendants can obtain another lawyer if there is an actual conflict of interest between the defendant and counsel that adversely impacts representation.[80] Under a universal model, all defendants would still be able to obtain a new lawyer if they experienced a

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[73] *See* Burns v. Ohio, 360 U.S. 252, 258 (1959) (finding that financial barriers restricting appellate review had "no place in our heritage of [e]qual [j]ustice").

[74] *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) (enabling indigent defendants to obtain a trial transcript).

[75] *See* Douglas v. California, 372 U.S. 353, 355 (1963).

[76] *See id.* at 355 (requiring the state to fund a competent psychiatrist where defendant's mental state is a significant factor in the case).

[77] *See* Perez Goitia v. United States, 409 F.2d 524, 527 (1st Cir. 1969), *cert. denied*, 397 U.S. 906 (1970) ("[L]ack of rapport between attorney and client does not automatically mean that there has been inadequate representation.").

[78] *See* Maynard v. Meachum, 545 F.2d 273, 278 (1st Cir. 1976) ("The right to counsel of one's choice is not absolute. A court need not tolerate unwarranted delays, and may at some point require the defendant to go to trial even if he is not entirely satisfied with his attorney.").

[79] *See* Daniels v. Woodford, 428 F.3d 1181, 1198-1200 (9th Cir. 2005) (granting habeas relief where defendant experienced complete breakdown in communication and trust with counsel, resulting in the effective denial of counsel).

[80] *See* Cuyler v. Sullivan, 446 U.S. 335, 350 (1980) (recognizing that an actual conflict of interest that adversely impacts representation violates the defendant's Sixth Amendment right to effective counsel).

complete breakdown in communication or an actual conflict of interest with an adverse impact on representation.

Universal public defense would also prohibit defendants' right to self-representation. The Court recognized an implied right to self-representation within the text and history of the Sixth Amendment.[81] It explained that "[t]he right to defend is personal[,]" and since the defendant "will bear . . . the consequences of a conviction[,]" "the defendant . . . must be free personally to decide whether . . . counsel is to his advantage."[82] Even so, the Court conceded that most defendants would fare better "with counsel's guidance [rather] than by their own unskilled efforts."[83] The dissent disagreed that the text and history of the Sixth Amendment support the right to self-representation.[84] It also expressed concern that allowing defendants to represent themselves would injure society's interest in a just adjudication system.[85] Under a universal model, defendants would no longer have a constitutionally protected right to self-representation. The prohibition serves as an extension of curbing all defendants' right to counsel of choice, including the decision to represent oneself.

2. No Supplementing with Private Defense Services

In this speculative reality, universal public defense would also prohibit defendants from supplementing their appointed attorneys with privately funded defense services. Allowing defendants to supplement their publicly funded defense would reproduce the income-based disparities in representation under the current regime. If well-resourced defendants had the ability to hire private co-counsel, universal public defense would exist in name only.

For the system to operate as intended, each defendant would receive only publicly funded defense counsel. As discussed below, each publicly funded lawyer would be part of a public defender office that would include necessary support services, such as investigators and administrative assistants. Offices with larger client populations would also employ in-house support services, such as social workers, psychologists, conflict management facilitators, and liaisons for client employment, technical training, and education programs. Those with smaller client populations or those located in more rural jurisdictions would have the ability to work with such specialists on an ad hoc basis.

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[81] *See* Faretta v. California, 422 U.S. 806, 819-833 (1975).

[82] *Id.* at 834.

[83] *Id.*

[84] *Id.* at 846-51 (Blackmun, J., dissenting).

[85] *See id.* at 849; *see also id.* at 839 (Burger, C.J., dissenting) (explaining that "the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to" represent themselves).

To be clear, a privately hired defense lawyer does not necessarily equate to better quality representation.[86] In certain jurisdictions, lawyers who work within public defender offices, such as the Public Defender Service ("PDS") in the District of Columbia, offer exceptionally high quality representation.[87] This is particularly true among federal defenders relative to retained counsel and court-appointed lawyers in federal court.[88] Federal public defenders tend to have more experience, lower caseloads, more resources, and the ability to devote more time to each case.[89] Likewise, better resourced offices have lower caseloads per attorney and better access to support services.[90] Further, paid private counsel covers a wide spectrum, ranging from private lawyers who accept a low flat rate to high-priced white collar defense lawyers at law firms who charge nearly one thousand dollars an hour.[91] A universal model would flatten distinctions among fee collecting lawyers by eliminating private defense counsel, and as discussed below, perhaps even change the criminal defense profession over time.[92]

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[86] *See* Lindsay Graef, Sandra G. Mason, Aurelie Ouss & Megan T. Stevenson, *Systemic Failure to Appear in Court*, 172 U. Pa. L. Rev. 1, 4-5 (2024) (finding that private attorneys, both hired and court appointed, failed to appear in court at least once in 36% of their cases in Philadelphia between 2010 and 2020, which was a much higher rate than public defenders). *But see* Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent"*, 3 Ohio St. J. Crim. L. 223 (2005) (finding that public defenders achieved poorer outcomes relative to privately retained counsel as measured by sentences received but noting that seriousness of the charges factored into defendants' decisions to retain counsel).

[87] *See* Roger A. Fairfax & Justice Ketanji Brown Jackson, *In Memoriam: Professor Charles J. Ogletree, Jr.*, 137 Harv. L. Rev. 2115, 2116 (2024) (describing PDS as "legendary" and "one of the most celebrated indigent defense agencies in the nation."); Barbara Allen Babcock, *The Duty to Defend*, 114 Yale L.J. 1489, 1494 (2005) (referring to PDS as "a model agency"); Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 Geo. J. Legal Ethics 401, 453 (2021) (describing PDS as "one of the preeminent criminal defense advocacy offices in the country").

[88] *See* Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 Stan. L. Rev. 317, 326-27 (2011) (showing that federal judges rated the performance of federal defenders higher than the performance of retained counsel and court-appointed counsel).

[89] *See Federal Versus State Work*, Univ. Mich. L. Sch., https://www.law.umich.edu/mdefenders/students/Different-Types-of-Indigent-Defense/Pages/Federal-versus-State-Work.aspx [https://perma.cc/WYQ9-9H8A] [hereinafter *Federal Versus State Work*) (last visited Mar. 9, 2025) (describing the differences in funding, caseload, and experience of lawyers between state and federal public defender offices).

[90] *See* Justice Policy Institute, System Overload: The Cost of Under-Resourcing Public Defense 29-30 (2011), https://justicepolicy.org/research/system-overload-the-costs-of-under-resourcing-public-defense/ [https://perma.cc/BAF7-94W8] (identifying PDS as an office with "enough time, funding, manageable caseloads and access to resources" to provide high quality representation).

[91] *See* Peter A. Joy & Kevin C. McMunigal, *Obligations When Receiving Flat Fees and Other Fees Paid in Advance*, Amer. Bar. Ass'n Crim. Just. Mag., Winter 2024, at 50 (observing that "most lawyers providing criminal defense representation usually charge a fixed or flat fee for most state court and many federal crimes other than white-collar crimes or the representation of corporate and wealthy clients").

[92] *See infra* section IV.C.1 (contemplating changes to the criminal defense profession under a universal model).

A universal model would prohibit defendants from supplementing their defense counsel with privately funded experts, such as a crime scene reconstructionist, a psychiatrist, or various forensic experts. These services would not be eliminated under a universal model as defendants could still obtain expert assistance through state funding. Such services would be contingent on the defendant's demonstration of need, as communicated to the court in a pretrial motion, and based on the nature and complexity of the case.[93] Should the court deem that a defendant's case requires supplemental or expert services after reviewing the defendant's motion, there is a constitutionally protected mechanism to fund such services.[94] Under a universal system, this mechanism would apply equally to all defendants.

In *Ake v. Oklahoma*, Canadian County charged Glen Ake with two counts of murder and two counts of shooting with the intent to kill.[95] Based on Mr. Ake's indigency, the court appointed him defense counsel. After Mr. Ake exhibited bizarre behavior during a pretrial appearance, the court ordered a psychiatrist to evaluate him.[96] The doctor found Mr. Ake incompetent to stand trial and the state committed him.[97] Once medication restored Mr. Ake's competency, the proceedings continued.[98] At trial, the defense sought to raise an insanity defense and requested funding from the court for expert psychiatric services to support the theory and to establish mitigating evidence if the case proceeded to a penalty phase.[99] The trial judge refused.[100] Defense counsel argued that Mr. Ake was insane at the time of the offense, but was unable to present expert evidence in support.[101] The jury convicted Mr. Ake and sentenced him to death.[102]

In overturning both the conviction and death sentence, the Court relied on due process and fundamental fairness, holding that the trial court violated Mr. Ake's Fourteenth Amendment right to present his defense.[103] Writing for the Court, Justice Marshall explained that "justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at

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[93] For example, the American Bar Association guidelines recommend that in death penalty cases, counsel "must promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist." *See* Am. Bar Ass'n, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 925 (2003).

[94] *See* Ake v. Oklahoma, 470 U.S. 68, 76-84 (1985).

[95] *Id.* at 70-72.

[96] *Id.* at 71.

[97] *Id.*

[98] *Id.* at 72.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 72-74.

[102] *Id.* at 73.

[103] *Id.* at 76.

stake." Further, "that fundamental fairness entitles indigent defendants… the 'basic tools of an adequate defense or appeal' . . . and . . . that such tools [must] be provided to those defendants who cannot afford to pay for them."[104]

Under the current regime, there is a limit on the defense resources that the trial court will fund. In *Ake*, the Court specified that the state is not required to "purchase for the indigent defendant all the assistance that his wealthier counterpart might buy."[105] For the trial court to fund the expert, indigent defendants must demonstrate that the assistance is "necessary for an adequate defense."[106] Thus, *Ake* provides a framework on which all defendants could rely to request and receive publicly funded expert services.

Under a universal system of public defense, counsel would assess the needs of the case to determine whether to request defense services. If counsel determines that the case requires such services, counsel would file an *ex parte* motion and potentially request an *ex parte* hearing. Filing *ex parte* prevents the state from learning the defense's strategy. In the request for funding, defense counsel would identify the relevant facts of the case and connect those facts to the need for the service. Using the *Ake* framework, all defendants would have the ability to receive funding for necessary services from the trial court, regardless of income. Adequacy of the defense limits trial court approval, and the law affords trial courts broad discretion in making the determination.[107] Thus, under a mandated universal public defense system, public funding would not cover what the trial court deems unnecessary, even if a defendant with means would pay for such services. In this way, mandated universal defense would eliminate the gap under the current regime between what a defendant with means could afford and what the trial court deems necessary for an adequate defense.

Currently, wealth establishes the outer limits for a defendant with means. Depending on the extent of the defendant's wealth, hired expertise could far exceed what a court would approve for an indigent client. For example, in 1994, when Los Angeles County charged Orenthal James ("O.J.") Simpson, a wealthy former professional athlete, actor, and media personality, with two counts of murder, Mr. Simpson hired the "dream team"[108] to defend him. At one time or another, Mr. Simpson's defense team included Johnnie Cochran, Jr., a seasoned trial lawyer, F. Lee Bailey and Alan Dershowitz, two high-profile lawyers from out of town, Robert Kardashian,

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[104] *Id.* at 77 (internal citation omitted).

[105] *Id.* at 77.

[106] *Id.* at 79-80.

[107] *See* Commonwealth v. Carter, 643 A.2d 61, 73 (Pa. 1994) (explaining that "[t]he decision to appoint an expert witness is within the sound discretion of the trial court and will not be disturbed except for a clear abuse of discretion.").

[108] *See* David Margolick, *O.J. Simpson's 'Dream Team' of Lawyers: Are They Running Out of Gas?*, N.Y. TIMES, Feb. 5, 1995, at 22 (referring to Mr. Simpson's defense team as the "dream team").

a local attorney and Mr. Simpson's friend, LeRoy Taft, Mr. Simpson's personal lawyer, Gerald Uelman, the dean of Santa Clara Law School, Barry Scheck and Peter Neufeld, two DNA testing experts, and a handful of junior attorneys associated with the more senior lawyers on the case.[109] The team also included several non-lawyers, such as a psychiatrist, New York City's former medical examiner, a hair and fiber evidence expert, a blood spatter expert, a molecular geneticist, and the chief of a state crime laboratory.[110]

At the time, estimates calculated that Mr. Simpson's dream team cost him between 3.5 and 6 million dollars.[111] Accounting for inflation, in 2024 it would cost approximately 7.6 and 13 million dollars.[112] One could argue that Mr. Simpson's high-priced defense team was necessary to secure his acquittal. [113] By any measure, the incriminating evidence facing Mr. Simpson was strong.[114] However, a trial court would not have approved a similar amount of funding for defense services for an indigent defendant.[115] In this way, mandated universal defense places all defendants on equal footing when hiring experts and other defense services.

B. Funding

The discussion of funding and quality relies on an assumption that society would experience universal public defense *universally*, meaning that people of all income levels, but particularly those with power and

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[109] *See* Seth Mydans, *Meter's Ticking for Costly Simpson Defense*, N.Y. TIMES, July 31, 1994, at 14 (naming various members of Mr. Simpson's defense team).

[110] *Id.* (mentioning psychiatrist Dr. Saul J. Faerstein); David Margolick, *In Mounting Defense, O.J. Simpson's Lawyers Plan to Focus on 3 Themes*, N.Y. TIMES, July 10, 1995, at A11 (mentioning defense experts).

[111] Claire Brownell, *Juice-o-nomics: The Economic Value of the O.J. Simpson Trial*, FIN. POST (Apr. 8, 2016), https://financialpost.com/news/juice-o-nomics-the-economic-value-of-the-o-j-simpson-trial [https://perma.cc/3AM4-8GJX].

[112] *See* AMORTIZATION SCHEDULE CALCULATOR, https://www.amortization.org/inflation [https://perma.cc/FDK2-MXV7] (last visited Mar. 1, 2025) (calculating average inflation from 1994 to 2025 at 2.52%).

[113] *See* David Margolick, *Not Guilty: The Overview; Jury Clears Simpson in Double Murder; Spellbound Nation Divides on Verdict*, N.Y. TIMES, Oct. 4, 1995, at A1.

[114] For example, police found a bloody leather glove on Mr. Simpson's property that matched a glove found at the murder scene; Mr. Simpson's history of assaulting his ex-wife during and after their marriage provided a motive; Mr. Simpson did not appear to be at home when a hired driver arrived to take him to the airport around the time the murder occurred; Mr. Simpson's houseguest Kato Kaelin heard a noise outside his room shortly after the murder; police found a bloody footprint matching the size and make of Mr. Simpson's shoe at the crime scene; a bloody impression of the same shoe was found inside Mr. Simpson's white Bronco; police found blood drops consistent with Mr. Simpson's blood type at the murder scene; blood found on a pair of socks at Mr. Simpson's matched the victim's blood; police found fibers consistent with the carpet in Mr. Simpson's Bronco at the crime scene; and other evidence tying Mr. Simpson to the crime scene. *See* Christopher B. Mueller, *Introduction: O.J. Simpson and the Criminal Justice System on Trial*, 67 U. COLO. L. REV. 727, 731-32 (1996) (summarizing the physical and circumstantial evidence supporting the state's theory that Mr. Simpson committed the double murders).

[115] *See* Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

privilege, would rely on and benefit from state-funded criminal defense services. While Part IV questions this assumption and explores some of the challenges if universal public defense is not experienced universally across income levels,[116] this discussion relies on the assumption that society is universally impacted.

Insufficient funding is one of the biggest obstacles to competent representation in accordance with the Sixth Amendment requirements.[117] Most "jurisdictions cannot or do not fully fund their public defense counsel."[118] This includes "vital" defense services, like investigators.[119] Conversely, prosecutors benefit from "office[s] that [are] better funded and well-staffed with paralegals and legal assistants" in addition to "police department investigators and laboratory technicians."[120] Lack of funding cuts across every indigent defense delivery model, negatively impacting the work of public defender offices, nongovernmental offices providing representation through contracts, and court-appointed private attorneys.[121]

Although *Gideon* guaranteed state-funded counsel for indigent defendants, it was silent about how states should fund indigent defense.[122] The decision left a void for each state to fill. Some devised funding structures that operated better than others. Research from the Sixth Amendment Center identified three categories of funding structures among the fifty states: (1) state-funded, whereby the state relieves the local government from funding indigent defense; (2) mixed funding between the state and local government, where both share the responsibility; and (3) minimal or no state funds, where the local government bears most of the burden of funding indigent defense.[123]

State funding provides the greatest stability of the three models, helping to ensure that each locality within a state receives funding.[124] Conversely, states that rely on local funding tend to have disparities among jurisdictions given that localities most in need of indigent defense funding tend to be

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[116] *See infra* section IV.A.2.

[117] *See* John Gross, *Reframing the Indigent Defense Crisis*, Harv. L. Rev. Blog (Mar. 18, 2023), https://harvardlawreview.org/blog/2023/03/reframing-the-indigent-defense-crisis/ [https://perma.cc/BU56-CF5Y] (identifying lack of funding as a major impediment to "the decades-long crisis in indigent defense").

[118] William S. Moreau, *Desperate Measures: Protecting the Right to Counsel in Times of Political Antipathy*, 48 Stetson L. Rev. 427, 429 (2019).

[119] *Id.* at 430 (noting that about 40% of county-based defenders cannot afford investigators).

[120] Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 Ind. Int'l & Comp. L. Rev. 237, 243 (2015).

[121] *See* Joe, *supra* note 19, at 143-48.

[122] *See* Furst, *supra* note 28, at 9 (describing *Gideon* as "an unfunded federal mandate"); *see also* Mayeux, *supra* note 28, at 120.

[123] *See* David Carroll, Right to Counsel Services in the 50 States: An Indigent Defense Reference Guide for Policymakers 100-02 (2017), https://www.in.gov/publicdefender/files/Right-to-Counsel-Services-in-the-50-States.pdf [https://perma.cc/G4R3-ABRL].

[124] *Id.* at 101.

those with the least access to it.[125] The same factors that lead to crime—"low property values, high unemployment, high poverty rates, limited house-hold incomes, limited higher education"—are the same factors that contribute to limited revenue for public programming such as indigent defense.[126] At the federal level, offices receive funding from a centralized source, the federal judiciary.[127] The funding source—centralized and disbursed to localities or locally generated—can impact the amount of resources, attorney autonomy, and quality of representation.[128]

Mandated universal public defense has the potential to centralize the funding source and increase the amount of funding, both of which can improve the quality of representation. The ideal funding source is a single centralized entity: the federal government. Federal funding could then flow to the states and each state could disseminate funds to individual localities (counties, parishes, and judicial districts). Because universal public defense would benefit all defendants—wealthy and indigent alike—it has the potential to shift support in favor of allocating more funds to public defense. The apathy directed at poor people receiving underfunded, inadequate representation might dissipate when the people receiving such representation also include the more affluent and privileged.

A similar trend has occurred with other universal programs, and even with targeted programs that increase the income eligibility requirements to include people from the middle class, thus broadening the pool of beneficiaries.[129] This is because the programs start to impact people with higher incomes, whom society tends to view with less stigma. With a broader constituency comes improved public perception, increased support, and a potential for increase in funding for the program.[130] Aspects of these trends are evident in the universal programs discussed below.[131] Once public schools began providing free meals to all children, regardless of income, researchers noticed broader participation and a decrease in stigma.[132] Likewise, the broad constituency that benefits from universal healthcare can lead to positive public perception and adequate public funding.[133]

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[125] *Id.*

[126] *Id.*

[127] *Defender Services*, U.S. Courts, https://www.uscourts.gov/services-forms/defender-services [https://perma.cc/6HFQ-HCC9] (last visited Mar. 1, 2025) (describing federal defender funding).

[128] *See* Alexis Hoag-Fordjour, *Community Responsive Public Defense*, 94 Fordham L. Rev. 1309, 1328-30 (2024) (describing impact that source of funding has on indigent defense office resources, personnel, and responsiveness to clients).

[129] *See* Greenstein, *supra* note 7, at 2.

[130] *See id.* at 13.

[131] *See infra* section IV.B (discussing universal healthcare and universal free meals in public schools).

[132] *See* Gutierrez, *supra* note 50, at 5.

[133] *See infra* section IV.B.1 (discussing government-funded universal healthcare programs).

Under the current indigent defense system, over 80% of people facing criminal charges qualify for a public defender.[134] That means about 20% of the people charged with crime hire private counsel. Under a universal system, 100% of the people facing charges would receive a public defender. With universal public defense, the fact that trial courts would appoint those with resources and relative privilege a public defender might result in increased public approval and an increase in defense funding. More funding could enable states to hire more lawyers, which would in turn lower the number of cases each lawyer handles and increase the time that a lawyer could devote to each case, both of which have a positive impact on the quality of representation.[135] However, the main difference between universal public defense and the other universal programs discussed herein is that recipients are eligible for public defense based on the fact that they are facing criminal charges. The public may not be supportive of a universal program when the recipients are people facing criminal charges.[136]

Whether universal public defense leads to an increase in funding depends on how, if at all, public perception changes once relatively privileged people are assigned public defenders. Current research does not address how the public perceives wealthy people facing criminal charges. One can extrapolate how the public views poor people charged with crime based on lack of government funding and resources allocated to indigent defense.[137] Individuals' intersecting identities, such as a marginalized racial and ethnic identity, undocumented immigration status, and disability, all of which are overly represented among people in under-resourced communities and communities with higher rates of law enforcement engagement, also shape these public views.[138] But the arguments in this Article focus on slightly different issues: public perception of relatively wealthy people facing criminal charges and of state-funded defenders representing such people. Without further research, we are left to decipher how the public would react based on anecdotal evidence of prominent privileged figures facing criminal charges and of privileged people who are charged with crimes that garner significant media attention.[139]

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[134] *See* Oppel & Patel, *supra* note 2.

[135] *See* Joe, *supra* note 19, at 138-48 (describing different public defender funding schemes and the impact each has on representation).

[136] *See* Phil McCausland, *Public Defenders Nationwide Say They're Overworked and Underfunded*, NBC News (Dec. 11, 2017), https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111 [https://perma.cc/AU4V-SWZ8] (noting that politicians can easily cut funding from indigent defense because the beneficiaries are "people accused of crimes" and 'few people will be angry'").

[137] *See id.*; Marea Beeman & Claire Buetow, Gideon at 60: A Snapshot of State Public Defense Systems and Paths to System Reform 35 (2023).

[138] *See* Morgan, *supra* note 4; *see also* Carbado, *supra* note 4; Butler, *supra* note 4.

[139] *See infra* section IV.A.2 (discussing public perception of prominent and privileged people charged with crime); *see also* Peter Suciu, *Luigi Mangione Has Become a Social Media Folk Hero*, Forbes (Dec. 12, 2024), https://www.forbes.com/sites/petersuciu/2024/12/12/

Instead of sufficiently funding indigent defense, society has grown comfortable with legions of poor people receiving inadequate representation.[140] As with most services for low-income people, there are those whom society deems deserving and those it deems undeserving.[141] Poor people facing criminal charges are seen as the least deserving and indigent defense remains politically unpopular to fund.[142] Research shows that "perceptions of deservingness are also linked to race."[143] A 2023 United States Department of Justice study on indigent defense observed that the population that public defense primarily serves—low-income Black and brown people accused of committing crimes—is a group that "lacks a politically influential constituent base."[144] In addition, politically powerful groups, like lawmakers, judges, prosecutors, and even defense attorneys, resist public defense reforms that would increase financial investment to the benefit of indigent defendants.[145] Under the current regime, these economic and social forces combine to prevent the state from adequately funding indigent defense. This could change once the pool of people receiving public defense expands to people with more means and political power.

Oregon is one example where lack of funding and the delivery model negatively impact the quality of indigent defense representation. In 2024, a federal appellate court found that Oregon's public defender delivery system was failing thousands of defendants, many of whom languished in jail on charges without ever seeing an attorney.[146] The Oregon Public Defense Commission ("OPDC") oversees statewide public defense services.[147] Through state funding, OPDC delivers services primarily through a contract system, whereby it pays private attorneys via contract to represent indigent individuals.[148] In addition, there are a small number of salaried public

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luigi-mangione-has-become-a-social-media-folk-hero/ [https://perma.cc/T2RM-YRLH] (observing public support for Mangione, a privileged person charged with murdering a healthcare chief executive).

[140] *See* Doug Mataconis, *There's a Criminal Defense Crisis in New Mexico, and Nobody Seems to Car*e, OUTSIDE THE BELTWAY (Dec. 30, 2016), https://outsidethebeltway.com/theres-a-criminal-defense-crisis-in-new-mexico-and-nobody-seems-to-care/ [https://perma.cc/TTP6-NQ9V] (recognizing general apathy directed at lack of funding for indigent defense in New Mexico and elsewhere in the country).

[141] *See* BRIDGES, *supra* note 12, at 48-51 (describing the moral construction of poverty).

[142] *See* McCausland, *supra* note 136.

[143] Daniel Lanford & Jill Quadagno, *Identifying the Underserving Poor: The Effect of Racial, Ethnic, and Anti-Immigrant Sentiment on State Medicaid Eligibility*, 63 SOCIO. QUART. 1, 2 (2022).

[144] *See* BEEMAN & BUETOW, *supra* note 137, at 35.

[145] *Id.*

[146] Betschart v. Oregon, 103 F.4th 607, 612 (9th Cir. 2024) (concluding that "there are not enough qualified attorneys in Oregon to represent criminal defendants, some of whom remain detained without counsel.").

[147] *See State of the Sixth: Oregon*, SIXTH AMEND. CTR., https://6ac.org/us-territory/oregon/ [https://perma.cc/R9CY-6VB7] (last visited Mar. 1, 2025).

[148] *Id.*

defenders who represent indigent individuals.[149] Providing indigent defense primarily through contracts with private attorneys stands apart from national best practices, which recommend representation from salaried public defenders affiliated with offices.[150] Maine is the only other state that operates in a similar fashion, "administer[ing] indigent defense services mainly through private attorneys paid hourly."[151]

Oregon is also a state in which over 90% of people facing criminal charges depend on a public defender to represent them.[152] In 2021 and 2022, the state changed the rules regarding compensation and caseloads, rendering the system "financially untenable."[153] A 2024 study found that the state would need to hire almost 500 more attorneys to meet the threshold competency requirements under the state and federal Constitutions.[154] That increase in staffing would require the budget to increase by over 200 million dollars over a six-year period.[155]

This Article posits that the public would become more concerned about state-funded defense once relatively wealthy people are facing criminal charges and required to receive a state-funded lawyer. Instead of allowing relatively wealthy people to receive potentially inadequate representation, the public would increase support and funding for state-funded defense. If this were to occur, public defense could improve for people of all income levels facing criminal charges. Critical race theorist Derrick Bell described this phenomenon as interest convergence, the theory that the interests of marginalized people will only improve when they converge with the interests of those in power.[156] Under a universal system, indigent defendants would have an opportunity to benefit from any policy improvements based on the expanded client population of state-funded defenders. The benefit would be the result of income interests converging.

In Oregon, a universal public defender model would mean that the 10% of defendants now hiring counsel would receive a public defender instead. The question then becomes whether 10% is enough to convince lawmakers to allocate sufficient funding in Oregon in support of public defense. Considering Bell's interest convergence theory, how many members of

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[149] *Id.*

[150] *See* FURST, *supra* note 28, at 5 (noting that salaried defender offices are the most effective "as measured by conviction rates, sentence length, and likelihood of receiving a life sentence" and they cost states less to operate than contract defenders).

[151] *State of the Sixth: Maine*, SIXTH AMEND. CTR., https://6ac.org/us-territory/maine/ [https://perma.cc/U78A-B3EH] (last visited Mar. 1, 2025).

[152] OR. PUB. DEF. COMM'N, SIX-YEAR PLAN TO REDUCE REPRESENTATION DEFICIENCY 1 (2024) (quoting the Oregon Justice Resource Center).

[153] Betschart v. Oregon, 103 F.4th 607, 613 (9th Cir. 2024).

[154] OR. PUB. DEF. COMM'N, *supra* note 152, at 2.

[155] *Id.* at 3 (noting that the budget would need to increase from $1.08 billion to $1.3 billion to hire enough attorneys over a six-year period).

[156] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

the majority must be impacted for interests to converge? Perhaps the more important factor is not the number of people needed to share an interest but rather the nature of the interest at stake. Here, incarceration restricts one's liberty and threatens one's life. Under Oregon's current public defender system, some indigent defendants languished in pretrial detention for months without the court appointing counsel.[157] Even those 2,700 individuals whom the state released pending trial were "subject[ed] to certain liberty constraints as a condition of their continued release," some awaiting counsel for 269 days.[158] Pretrial detention can be devasting for people, even deadly.[159]

Now consider Phil Knight, the wealthiest person in Oregon and co-founder of Nike with an estimated wealth of over 30 billion dollars.[160] Let's imagine that the Multnomah County prosecutors in Portland charged Phil Knight with a crime that resulted in a judge placing Mr. Knight in pretrial detention. Under the current regime, Mr. Knight might spend months in jail waiting to meet with a court-appointed attorney. The conditions in Multnomah County jails, where officers use isolation as a disciplinary method, are particularly hard on people with mental health conditions and substance abuse histories.[161] After an increase in in-custody deaths, an investigation into Multnomah County jails uncovered staffing shortages, lapses in security, and overwhelming mental health issues among those incarcerated.[162]

Knowing that Phil Knight, or someone like him, might be subjected to the conditions of a Multnomah County jail while awaiting appointed counsel could shift public opinion regarding funding. However, the extent of such a shift depends on whether someone like Knight would garner public support after facing criminal charges. Perhaps, once someone like Knight experiences the injustice that results from a lack of funding directed to

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[157] Betshart v. Garrett, 700 F. Supp. 3d 965, 974-75 (D. Or. 2023), *aff'd sub nom.* Betschart v. Oregon, 103 F.4th 607, 612 (9th Cir. 2024).

[158] *Id.*

[159] *See generally* Léon Digard & Elizabeth Swavola, Vera Inst. for Just., Justice Denied: The Harmful and Lasting Effects of Pretrial Detention (2019) (describing the negative impact of pretrial detention).

[160] *See* Ginnie Sandoval, *Who is Oregon's Richest Resident? Where Nike's Phil Knight Ranks on New Forbes List*, Salem Statesman J. (Dec. 26, 2024), https://www.statesmanjournal.com/story/news/2024/12/26/how-wealthy-is-phil-knight-billionaire-university-of-oregon-forbes/77175677007/ [https://perma.cc/EFZ7-KGDW] (noting Knight's wealth).

[161] *See* Lucas Manfield, *Newly Released Documents Contain New Ways to Measure the Dysfunction in Multnomah County's Jails*, Willamette Week (Jan. 24, 2024), https://www.wweek.com/news/2024/01/24/newly-released-documents-contain-new-ways-to-measure-the-dysfunction-at-multnomah-countys-jails/ [https://perma.cc/8XMA-FAZG] [hereinafter *Dysfunction in Multnomah County's Jails*]; *see also* Sydney Dorner & Anthony Macuk, *Multnomah County Jail Conditions Improving, Audit Follow-up Finds, but Isolation Policies Show No Progress*, KGW8 (Dec. 22, 2023), https://www.kgw.com/article/news/local/multnomah-county-jail-isolation-discipline-audit/283-b5f150a7-5b61-4860-8dbd-1ab71cb7e655 [https://perma.cc/23UN-ZYSH] (describing jails' ongoing use of isolating incarcerated people as a method of discipline).

[162] *See* Manfield, *Dysfunction in Multnomah County's Jails*, *supra* note 161.

public defense, they use their power and wealth to influence lawmakers to support public defense.

C. Delivery System

Under the current regime, a jurisdiction's indigent defense delivery system can impact the quality of representation.[163] Some jurisdictions operate defender offices staffed with attorneys who specialize in criminal defense, and the attorneys are employees of the government or a nonprofit.[164] Others award a flat fee to an agency or group of lawyers who can provide the lowest bid to represent indigent defendants; this is known as contract defense.[165] In yet another model, the local trial court appoints lawyers on an ad hoc basis, including lawyers who may not have experience practicing criminal law.[166] In those instances, courts either pay the lawyer a flat rate for the case, thus disincentivizing counsel from performing more than the bare minimum, or an hourly rate up to a maximum total, which tends to have a similar effect on attorney effort.[167] Each state uses a mix of delivery models.[168] The mix allows jurisdictions that operate institutional defender offices to appoint private attorneys outside those offices in cases that present a legal conflict of interest.[169]

Across defense delivery models, large caseloads, lack of funding, and lack of resources can have a negative impact on representation.[170] Yet, the very structure of some delivery models can also negatively impact representation.[171] In jurisdictions that rely on trial courts to appoint private counsel to represent indigent defendants, some judges value efficiency and self-interest over justice.[172] A desire to keep cases moving through the system can lead some judges to appoint defense counsel who will not file pretrial motions,

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[163] *See* Primus, *supra* note 1, at 218.

[164] *See* Beeman & Buetow, *supra* note 137, at iii-iv; Suzanne M. Strong, Bureau of Just. Stat., U.S. Dep't of Just., State-Administered Indigent Defense Systems, 2013, at 2 (2017) (describing different indigent defense delivery models).

[165] *See* Strong, *supra* note 164, at 2.

[166] *Id.*

[167] Furst, *supra* note 28, at 6; *see generally* James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 Yale L. J. 154 (2012) (finding that flat fee payment schemes can create a conflict of interest between counsel's fiscal interests and the client's interests, impacting the quality of representation).

[168] *See* State of the Sixth, *supra* note 28 (describing indigent defense delivery model in each state).

[169] Beeman & Buetow, *supra* note 137, at iv (citing ABA Rule 1.7 Conflict of Interest, explaining that conflicts can arise between defense counsel's duty to a current or former client and the instant client, compromising counsel's duty of loyalty to the instant client).

[170] *See supra* notes 1-3.

[171] *See* Primus, *supra* note 1.

[172] *Id.* at 225-27 (noting jurisdictions where judges "handpick assigned counsel" and judges' desire for efficiency or other motives override zealous representation).

request expert assistance, or otherwise delay the resolution of a case even if such efforts would be in the best interest of the client.[173] Some criminal court judges who rely on campaign contributions for reelection preferentially assign cases to private defense attorneys who have contributed to their campaigns.[174] Research shows that defendants fare worse in these instances as measured by conviction rate and incarceration.[175]

Dedicated public defender offices tend to be the most cost-efficient and produce the best results for defendants.[176] A study compared the outcomes in Philadelphia murder prosecutions between indigent defendants to whom the court assigned a public defender and to whom the court assigned a private attorney.[177] It found a significant difference in the conviction rate, sentence type, and sentence length depending on the type of representation.[178] Relative to appointed private defenders, public defenders reduced their clients' murder conviction rate by 19%, and for clients who were convicted, reduced the sentence to life by 62%. Further, public defenders reduced their clients' overall expected time in prison by 24%.

The researchers attributed the differences in outcome to three factors: fiscal and temporal conflicts of interest between judges and appointed counsel; the low compensation that appointed counsel, investigators, and other experts receive; and the relative isolation of appointed counsel who lack the ability to collaborate with colleagues.[179] They based these findings on qualitative interviews, a review of prior research, and a review of cases.[180] These are all factors that universal public defense could avoid by operating well-funded public defender offices in each jurisdiction.

The federal government primarily operates federal defender offices staffed with attorneys who are employees of either the federal government or nonprofits.[181] These offices tend to be well-resourced relative to state offices.[182] When there is a conflict of interest, the federal court can appoint

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[173] *See* Richard A. Oppel Jr., *His Clients Weren't Complaining. But the Judge Said This Lawyer Worked Too Hard.*, N.Y. Times (Mar. 29, 2018), https://www.nytimes.com/2018/03/29/us/indigent-defense-lawyer-texas.html (describing judge who admonished defense counsel for "overwork[ing] cases," which prevented quick resolution).

[174] *See* Arturo Romero Yáñez & Neel U. Sukhatme, Judges for Sale: The Effect of Campaign Contributions on State Criminal Courts (Feb. 1, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4602994 [https://perma.cc/3H7X-ETUU].

[175] *Id.*

[176] *See, e.g.*, Anderson & Heaton, *supra* note 167, at 154.

[177] *Id.*; *see also* Furst, *supra* note 28, at 5 (noting that salaried attorneys in public defender offices provide "the most effective form of indigent defense" relative to other defense delivery models).

[178] *See* Anderson & Heaton, *supra* note 167, at 154.

[179] *Id.* at 188-200.

[180] *Id.* at 188.

[181] *Defender Services*, U.S. Courts, *supra* note 127 (describing the federal public defender system).

[182] *See Federal Versus State Work*, *supra* note 89 (comparing funding, resources, and compensation between state and federal public defender offices).

a private lawyer who is a member of the Criminal Justice Act panel ("CJA panel").[183] The requirements for obtaining membership on the CJA panel vary slightly among federal jurisdictions, but they often require candidates to submit an application, indicating a certain amount of experience, training, and continuing education. Individual federal defender offices often provide training and support to CJA panel members within their district.[184] The relative success of the federal defender program compared to many state offices reflects the amount of funding, the source of funding, and the independence with which federal defenders operate. The structure, operation, and funding of the federal defender program provide valuable insight about what could be possible nationwide at the state level under a universal model.

Under a universal public defense system states would operate salaried public defender offices in localities. Such offices would also employ a variety of non-lawyers trained to assist with advocacy. This delivery model provides the most effective representation. The federal government could encourage jurisdictions to institute the desired delivery model by making state-operated salaried defender offices contingent on states receiving federal funds for indigent defense. A funding incentive could put an end to jurisdictions that rely on contracts with private counsel to provide representation to indigent defendants, often to the detriment of clients.[185] Ending contract defense includes jurisdictions where trial judges appoint private attorneys to represent indigent defendants. Jurisdictions would be disincentivized from operating such models or risk losing out on a substantial amount of indigent defense funding.

In a universal system, defender offices would be located in jurisdictions where there is a criminal trial court and a prosecutor's office. In most states, criminal trial courts and prosecutors are located in a county (or parish) or in a judicial district that encompasses more than one county (or parish). At the federal level, federal trial courts are in federal districts, each of which encompasses multiple counties or parishes. To avoid conflicts of interest, such as current or prior representation of a co-defendant, complainant, or witness, each state and the federal government would operate regional conflicts offices.[186] For example, if a locality charges two people with engaging in the same criminal action, the local public defender office would represent one defendant and the regional conflicts office would represent the other defendant to prevent a conflict of interest. This structure mimics the

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[183] *Defender Services*, U.S. Courts, *supra* note 127.

[184] *Id.*

[185] *See* Bureau of Just. Assistance, Contracting for Indigent Defense Services: A Special Report 13-15 (2000) (describing characteristics of deficient indigent defense contract systems).

[186] For example, in Colorado, the Office of the Alternate Defenses Counsel supervises the appointment of counsel in cases of conflict. It operates separately and independently from the state's primary office, the Office of the Colorado State Public Defender. *See* Carroll, *supra* note 123, at 108.

structure of some existing state public defender offices and of the federal government.[187]

III. Unearthing the Genealogy: The Progressive Era and Public Defense

As radical as universal public defense might seem now, the idea is over a century old. Before *Gideon*, only thirteen states operated public defender offices, with the majority located in California and Illinois.[188] In addition, elite lawyers in a few jurisdictions created volunteer defender associations, in which private lawyers volunteered their legal services to poor people facing criminal charges.[189] However, with scarce resources, these voluntary defenders restrictively allocated their services to the "deserving" poor.[190] Thus, in much of the country during the preceding decades, there was no formal system for the appointment of counsel for people facing criminal charges who could not otherwise afford to hire a lawyer.[191] As a result, many low-income defendants either represented themselves or were vulnerable to whomever a trial court could find to appoint to represent them.[192] During the Progressive Era, from about 1895 to 1920, reformers suggested addressing this injustice with the creation of a state-funded public defender.[193]

It was within this context that a subset of more radical reformers advocated for free public defense for all, regardless of a defendant's income. Edward Bellamy was one such reformer.[194] A nineteenth century political activist, journalist, and author, Bellamy believed in gender equality, eradicating poverty, ending capitalism, and state control over all industries[195] He explored these themes in his popular novel, *Looking Backward, 2000-1887*.[196] Bellamy referred to his belief system as Nationalism, which

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[187] *Id.*; *Defender Services*, U.S. Courts, *supra* note 127.

[188] *See* Edward N. Bliss, Directory of Public Defenders 1957, at 1-12 (1957) (listing public defender offices operating at the time in California, Connecticut, Florida, Illinois, Indiana, Minnesota, Missouri, Nebraska, New York, Ohio, Oklahoma, Rhode Island, and Tennessee).

[189] *Id.* at 9 (listing the voluntary defender associations in Springfield and Boston, Massachusetts); *id.* at 11 (describing the same in Philadelphia).

[190] Mayeux, *supra* note 27, at 64 (meaning defendants who lacked a criminal history and were plausibly innocent of the charges).

[191] *See* Mayer C. Goldman, The Public Defender: A Necessary Factor in the Administration of Justice 15-23 (G.P. Putnam's Sons 1917) (describing the unjust, inefficient, and inconsistent appointment of counsel system for indigent defendants charged with non-capital crimes).

[192] *See id.* (describing the appointment system without public defenders).

[193] *See infra* sections III.B & C.

[194] *See An Author of Renown*, Boston Globe, May 23, 1898, at 5 (describing Bellamy's ideas as radical, reformist, and socialist, and his belief that the government should play a larger role in people's lives).

[195] *Id.*

[196] *See* Edward Bellamy, Looking Backward, 2000-1887 (Houghton Mifflin 2003).

garnered followers nationwide.[197] In Bellamy's weekly newspaper, *The New Nation*, he promoted the concept of "free justice," recommending that the state abolish private lawyers and fund public defenders—just as it funded prosecutors—to represent everyone facing criminal charges.[198] Bellamy's influential ideas helped kickstart the Progressive Era.[199] Although Bellamy died in 1898, social reformers and policymakers embraced and promulgated his ideas.[200]

This Part examines the genealogy of public defense and the subset of reformers who advocated for free justice for all. Relying primarily on periodicals and other reports from the period, it unearths the rhetoric that reformers used to advocate for free legal services for all people facing criminal charges. It begins with a brief discussion of the Progressive Era, a period of dynamic thinking and action directed at addressing society's political, social, and economic problems. It traces some of the early discussions for (and criticism of) free defense services for the poor and then focuses on the more radical suggestion to provide free defense services to everyone. Throughout, this Part highlights the economic and social forces that inspired reformers to push for universal public defense, revealing that some of these same forces continue to animate contemporary discussions around public defense.

A. The Progressive Era and Criminal Reform

The Progressive Era was a period of significant social, cultural, and economic change in the United States.[201] From the late 1800s into the

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[197] *See Bellamy's Utopia*, San Francisco Exam'r, June 4, 1889, at 1; *see also The Nationalist Club,* Minneapolis Daily Times, Oct. 10, 1889, at 4 (reporting on a recent club meeting in Minneapolis); *Equal Justice*, Oakland Trib., May 28, 1889, at 7 (reporting on a club meeting in Oakland); *Bellamy's Utopia*, San Francisco Exam'r, June 4, 1889, at 1 (reporting on club activities in Boston and noting that "[t]he Nationalists already have branches in upwards of twenty cities . . .").

[198] *How Poor and Rich Can Be Equalized Before the Law*, New Nation, July 9, 1892, at 434 (arguing to "turn[] hired attorneys out of criminal court" and replace them with "public defender[s]").

[199] *An Author of Renown*, *supra* note 194, at 5 (noting Bellamy's influence as a journalist, author, thinker, and reformer); *see also* Barbara Allen Babcock, *Inventing the Public Defender*, 43 Am. Crim. L. Rev. 1267, 1298 (2006) (referring to Nationalism as "the direct ancestor of Progressivism."); Arthur Lipow, Authoritarian Socialism in America: Edward Bellamy and the Nationalist Movement 142 (1991) (explaining that "Nationalists . . . belonged to the next generation of reformers that came to maturity in the closing years of the nineteenth century and provided intellectual and political leadership for the era of urban middle-class reform, the Progressive era.").

[200] *An Author of Renown*, *supra* note 194, at 5 (reporting on Bellamy's death and on his followers organizing Nationalist clubs based on his book); *see also* James J. Kopp, *Edward Bellamy and the New Deal: The Revival of Bellamyism in the 1930s*, 4 Utopian Stud. 10-16 (1991) (noting strong similarities between Bellamy's plan for a new social order in the late 1880s and New Deal legislation in the 1930s).

[201] *See generally* Maureen A. Flanagan, America Reformed: Progressives and Progressivisms, 1890s-1920s (2006).

early 1900s, millions of people flocked to cities for job opportunities, among them European immigrants and Black migrants fleeing racial terrorism in the South.[202] These urban newcomers encountered cramped living quarters and poor working conditions. Amid these demographic changes, reformers sought to promote democracy and citizenship among the new migrants and immigrants.[203]

Turning their attention to industry, reformers focused on advancing efficiency and professionalism.[204] Criminal law, including criminal courts, criminal law practitioners, law enforcement, and prisons, was one such industry.[205] In many ways, the Progressive Era was an opportunity for the white protestant ruling class to impose their culture, values, and morals on these "outsiders."[206] This was when the country allocated whiteness on a more restrictive basis, relying on a group's perceived capacity for self-governance and pathologized behavior.[207] In addition to Black people, some Asian and Latino subgroups[208] and foreign-born people from across Europe—Italians, Irish, and Jewish people—were considered nonwhite.[209]

The increase in people from diverse backgrounds living closely to one another and with limited resources contributed to an increase in crime.[210] In addition to advancements in policing, prisons, and prosecution, this period marked the birth of the public defender.[211] The idea of the public defender emerged from the frustration of "advocates[,]. . . elected officials and policy-makers seeking to manage crime in urban areas" and "who found the [adjudication] system to be an ineffective deterrent."[212]

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[202] Matthew Frye Jacobson, Whiteness of a Different Color: European Immigrants and the Alchemy of Race 13-14, 43-44 (1999); Equal Just. Initiative, Lynching in America: Confronting the Legacy of Racial Terror 3 (3d ed. 2016).

[203] *See generally* Khalil Gibran Muhammad, The Condemnation of Blackness (2010).

[204] *See generally* Robert H. Wiebe, The Search for Order, 1877-1920 (1967) (describing introduction of new scientific and technological advancements and a bureaucratic order).

[205] *See* Jonathan Simon, *Visions of Self-Control: Fashioning a Liberal Approach to Crime and Punishment in the Twentieth Century*, *in* Looking Back at Law's Century (Austin Sarat, Bryant Garth & Robert A. Kagan, eds., 2002)

[206] *See* Flanagan, *supra* note 201, at 34-35 (describing the strong white, Protestant influence on Progressive era reforms).

[207] Khiara Bridges, Critical Race Theory: A Primer 7, 10-11 (2018) (explaining critical race theorists' view of race as a social construct).

[208] *See* Flanagan, *supra* note 201, at 109-11 (observing that reformers excluded some groups of Asians and Indigenous people when considering citizenship).

[209] Jacobson, *supra* note 202, at 41.

[210] *See* Flanagan, *supra* note 201, at 15-17 (describing living conditions in urban cities as overcrowded, lacking sanitation, and dangerous).

[211] *See* Goldman, *supra* note 191, at 662-64 (advocating for public defenders to help with the administration of justice).

[212] Matthew Clair, *Unequal Before the Law*, Nation, Dec. 14, 2020 (reviewing Mayeux, *supra* note 27).

One argument in support of public defense was that it would help produce better citizens among people who received free defense services.[213] This aligned with the overarching aims of reformers during the era who sought to assimilate certain groups of immigrants into American society.[214] The rationale was that without defense services, indigent defendants "even if acquitted," would "come[]from the court house a changed man," soured by the "malicious," "unjust," and "abus[ive]" proceedings.[215] The defendant "thinks of all this and is it any wonder that his love of country turns to bitterness and his soul filled with hatred at . . . the government," which "only persecut[ed] him when he needed a defender." In this way, a state-funded defense system would help reinforce and produce good citizenship.

B. Clara Foltz and the Birth of the Public Defender

Clara Shortridge Foltz, the first woman lawyer in California, was an early proponent of adopting state-funded public defender offices.[216] With virtually no legal opportunities open to women, Foltz and a handful of other female legal pioneers gained experience representing criminal defendants in trial courts.[217] While appearing in criminal court, Foltz observed the power imbalance that existed between prosecutors and appointed defense counsel, the latter of whom were often under-resourced or inexperienced.[218] Further, even when the court appointed counsel to indigent defendants, the defendants were still legally obligated to pay for the service, resulting in impoverished people falling further into debt.[219] Foltz was offended that people facing criminal charges were compelled to "buy justice in a land that boasts that justice is free."[220]

Foltz was a follower of Edward Bellamy, the proponent of free justice, social equality, and other progressive ideas that aligned with state-funded defense, and, as explained below, with abolishing private defense counsel.[221]

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[213] *See* Foltz, *supra* note 44, at 432.

[214] *See* FLANAGAN, *supra* note 201, at 107-12 (explaining reformers' desire for "white" immigrants to assimilate into American society).

[215] Foltz, *supra* note 44, at 432.

[216] Babcock, *supra* note 199, at 1269-70 n.16 (noting that Foltz was the first to promote the idea of a public defender).

[217] *See* Miriam Russell, *Women in Public Defense*, STATESMAN J., Jul. 22, 1915, at 4 (describing women lawyers volunteering as defense counsel in New York); *see also* Barbara Allen Babcock, *Women Defenders in the West*, 1 NEV. L.J. 1, 1-5 (2001) (identifying Clara Foltz, Lelia Robinson, Laura Gordon, and Lavinia Goodell as women legal pioneers who practiced criminal defense).

[218] Foltz, *supra* note 44, at 432.

[219] *Id.* (observing that appointed counsel is not free, regardless of the defendant's income: "If he is not able to hire counsel . . . it becomes the duty of the court to appoint counsel . . . Do not imagine . . . that this counsel is free. It is not. The accused is under actual legal obligation to pay . . .").

[220] Clara Foltz, *Public Defenders*, 31 AMER. L. REV. 393, 397 (1897).

[221] *See infra* section III.C.

The San Francisco Examiner referred to it as "absolute paternal government." Nationalist clubs sprung up throughout the country,[222] with Clara Foltz serving as the vice-president of the San Diego club.[223]

On August 7, 1893, Foltz addressed the Congress of Jurisprudence and Law Reform at the World's Fair in Chicago.[224] A seasoned orator, Foltz argued for a novel proposal: state-funded public defenders to represent poor people accused of crime.[225] She detailed the state's ability to marshal significant resources in prosecuting individuals who "have no money to spend in an investigation" and who "come to trial wholly unequipped" to meet the state's case.[226] Foltz called the legal system's treatment of the poor a "miscarriage of justice."[227] Four years later, Foltz went on a one-woman crusade across the nation, introducing bills before state legislatures to establish an office of the public defender.[228]

In 1897, Foltz sent bills to state legislatures in California, Connecticut, Delaware, Minnesota, New York, and other states.[229] The bills were identical, specifying that the people should elect a public defender in each county for a two-year term, that the public defender "may appoint one or more assistants" and "clerks or other employees," and that "[e]very assistant public defender . . . shall be a resident of the county in which the service is to be performed."[230] The client population would be people "charged with violation of the law, who are without counsel, and who desire an attorney to appear for them."[231] Each county would be responsible for funding the

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[222] *Id.* (reporting on club activities in Boston and noting that "[t]he Nationalists already have branches in upwards of twenty cities . . .").

[223] *Mrs. Clara Foltz on "Nationalism in California"*, Boston Globe, Mar. 11, 1890, at 5 (noting that Foltz served as vice-president of the San Diego club).

[224] Foltz, *supra* note 44, at 431-32.

[225] *Id.*

[226] *Id.* at 432.

[227] *Id.*

[228] *See A Woman Proposes a New Office*, New-York Daily Trib., Jan. 22, 1987, at 3 (reporting on Foltz's proposal for a public defender in New York); *see also* Foltz, *supra* note 44, at 393 (describing her involvement in introducing public defender bills before "more than a dozen" state legislatures).

[229] *See* Foltz, *supra* note 44, at 393; *Public Defender*, Sacramento Union, Feb. 1, 1987, at 4 (noting that Foltz introduced a public defender bill in California); *Public Defender*, Star Trib., Feb. 7, 1897, at 16 (mentioning that Foltz intended to present a public defender bill to the Minnesota legislature); *The Public Defender Scheme*, New Haven Morning J. & Courier, Feb. 8, 1997, at 4 (noting the Connecticut bill); *Public Defender*, Morning News, Feb. 2, 1897, at 3 (noting Delaware bill); *Excitement in the Senate*, Weekly Or. Statesman, Feb. 5, 1897, at 5 (noting Oregon bill); *A Public Defender*, Argus-Leader, Jan. 30, 1897, at 6 (describing South Dakota bill); *A Public Defender*, Detroit Free Press, Feb. 14, 1897, at 12 (noting Michigan bill).

[230] *Compare Public Defender*, Minneapolis Trib., Feb. 7, 1897, at 16 (describing Minnesota bill), *with Wants Public Defenders*, Jersey City News, Jan. 21, 1897, at 1 (describing New York bill), *and The Public Defender Scheme*, New Haven Morning J. & Courier, Feb. 8, 1997, at 4 (describing the Connecticut bill), *and Public Defender*, Morning News, Feb. 2, 1897, at 3 (describing Delaware bill).

[231] *Public Defender*, Minneapolis Trib., Feb. 7, 1897, at 16.

office.[232] Further, the existence of a public defender was not meant to limit a defendant from retaining "special counsel" if he had the means and desire to do so.[233] The purpose, Foltz explained, was "to provide the means whereby every man brought to trial in a criminal court shall be properly defended at the public expense, if he is too poor to provide his own counsel."[234]

The very suggestion of a public defender was met with skepticism and in some instances, derision.[235] A *New York Times* editorial described the public defender proposal as superfluous and "ignoran[t]" given that "[t]he District Attorney is in theory a public defender as well as a public prosecutor, [as] it is part of his duty to see that innocent persons do not even get indicted."[236] *The Detroit Free Press* concluded that "[t]he plan did not seem . . . a meritorious one . . . ."[237] Similarly, a paper in New Haven referred to the pending legislation as "a queer concoction" that "should be nipped in the bud."[238] The St. Louis Chief Detective condemned the idea, arguing that it benefited criminals: "[l]ooks to me like putting a premium on robbery to let thieves know they'll have a first-class lawyer to try to keep them out of the penitentiary."[239]

The Detroit Free Press observed that Michigan already provided adequate representation to defendants in need and that prosecutors could be trusted to protect innocent defendants' rights.[240] Moreover, the editorial board claimed that providing free lawyers to poor defendants in criminal cases would open the flood gates for poor people in the civil contexts, resulting in an unwanted increase in taxation to fund more civil jobs.[241]

Some of the criticism was directed at the perceived lack of necessity in jurisdictions that differed from New York in population and character. For example, a South Dakota paper recognized the need for a public defender in New York, "a cold blooded, busy, and struggling society," but deemed the position unnecessary in South Dakota where injustice was rare and there were plenty of volunteer lawyers willing to help the poor.[242] The editorial

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[232] *Id.*

[233] *See Wants Public Defenders*, Jersey City News, Jan. 21, 1897, at 1 (describing the New York bill).

[234] *Public Defender*, Minneapolis Trib., Feb. 7, 1897, at 16.

[235] *See* A.E. Howard, Jr., Book Review, 26 Yale L.J. 625, 625 (1917) (reviewing Mayer C. Goldman, The Public Defender: A Necessary Factor in the Administration of Justice (1917)) (noting that committees of the New York Bar Association and the New York County Lawyers' Association "reported unfavorably upon" a proposal for a state-funded public defender).

[236] *Editorial*, N.Y. Times, Jan. 23, 1897, at 6.

[237] *A Public Accuser*, Detroit Free Press, May 16, 1897, at 16.

[238] *The Public Defender Scheme*, New Haven Morning J. & Courier, Feb. 8, 1997, at 4.

[239] *Should the Poor Have a Lawyer?*, St. Louis Post-Dispatch, Feb. 6, 1897, at 3 (including comments from St. Louis Chief of Detectives William Desmond).

[240] *A Public Defender*, Detroit Free Press, Feb. 14, 1897, at 12.

[241] *Id.*

[242] *A Public Defender*, Argus-Leader, Jan. 30, 1897, at 6.

board of a Nebraska paper expressed similar sentiments, explaining that "Miss Foltz' plan would be excellent for large cities, particularly in New York city, where there have been many instances of the conviction of innocent men."[243] In contrast, the paper claimed, there were "no complaint[s] of inadequate legal defense" in Nebraska because "some of the poorest, as well as many of the least deserving, have had the best possible fight made on their behalf."[244]

Amid the criticism, there were some tentative supporters. The editorial board of the *Harvard Law Review* recognized that the proposal "certainly merits consideration."[245] Foltz's ideas eventually inspired the nation's first public defender offices in California throughout the 1910s.[246] By 1915, a handful of other jurisdictions operated some sort of state-funded defense system.[247] In 1917, New York lawyer Mayer C. Goldman embraced and elevated Foltz's arguments in his book advocating for a system of state-funded defense counsel, *The Public Defender*.[248] That same year, the *Columbia Law Review* issued a report on recent state legislation that resulted in establishing public defender offices, pending state legislation to introduce additional offices, and arguments for and against public defenders.[249] The *Review* called "much of the criticism of . . . [public defense] is unwarranted" and argued that relying solely on appointed counsel to represent indigent defendants was itself "open to serious criticism."[250] There was a clear benefit "to designat[ing] a capable and responsible public officer" to represent indigent people as opposed to an appointed lawyer "whose chief interests are necessarily his private practice."[251]

C. Free Justice for All

Despite early skepticism for state-funded indigent defense, a subset of Progressive Era reformers went one step further. This more radical group viewed criminal courts as sites of inequality and injustice necessitating sweeping structural change.[252] Bellamy and his followers began

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[243] *A Public Defender*, EVENING WORLD-HERALD, Feb. 2, 1897, at 4.

[244] *Id.*

[245] *Public Defenders*, 10 HARV. L. REV. 514, 514 (1897).

[246] *See* A. Mabel Barrow, *Public Defender*, 14 J. AM. INST. CRIM. L. & CRIMINOLOGY 556, 556 (1924) (noting that Foltz's efforts helped open the first public defender office in Los Angeles).

[247] *See* Mayer C. Goldman, *Necessity for a Public Defender*, 5 J. AM. INST. CRIM L. CRIMINOLOGY 660, 665 (1915) (noting that Oklahoma operated a public defender office, and that Houston, Evansville, Salt Lake City, Seattle, Boston, Kansas City, Portland, Oregon, Chicago, and New York were all in the process of forming offices).

[248] *See* GOLDMAN, *supra* note 192.

[249] *The Office of Public Defender*, 17 COLUM. L. REV. 261 (1917).

[250] *Id.* at 262.

[251] *Id.*

[252] *See How Poor and Rich Can Be Equalized Before the Law*, *supra* note 198, at 434 (calling for "a radical[] restruct[uring]" of society to address inequality in criminal court);

championing the concept of "free justice" and the eradication of paid private attorneys.[253] The rationale was that money—the desire for private attorneys to profit from rendering defense services—had a corrupting influence on truth and justice.[254]

Edward Bellamy first promoted this idea in his weekly paper, *The New Nation*, in the early 1890s. He described the court's treatment of rich and poor defendants as one of the "many abuses in our society resulting from the inequalities of wealth."[255] According to Bellamy, the adversarial nature of criminal court combined with privately employed defense attorneys created an environment incapable of producing justice. He referred to murder trials as "brutal and demoralizing spectacle[s] . . . without regard to the interests of justice."[256]

"Free justice" meant that "the poorest man in the state would be sure of a fair defense without cost, and the richest man in the state would not be able to get anything more than a fair defense."[257] Thus, not only should there be a state-funded attorney for anyone who could not afford to hire defense counsel, state-funded defense attorneys should be made available to everyone. Another caveat was that the court should prohibit wealthy defendants from hiring other counsel.[258] The proposal was meant to equalize the experience of all people accused of criminal conduct. Bellamy observed that "[w]e do not permit. . . private persons . . . to pay the judges or the jurors" and then asked rhetorically, "why should we permit them to pay the lawyer, upon whose cunning the result of the trial as must depends as upon either judge or jury?"[259]

Bellamy and other radical reformers perceived that hired attorneys engaged in trickery, delays, and other tactics to secure an acquittal on behalf of paying clients, regardless of culpability.[260] In contrast, poor defendants were often subjected to "shyster lawyers" or forced to appear before the

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see also Parmelee, *supra* note 43, at 738 (describing the combination of the public prosecutor and private defense counsel as an "unjust" system for "the poor defendant").

[253] *Let Us Have Free Justice*, New Nation, Apr. 29, 1893, at 214-15; *see also* Barbara Allen Babcock, Woman Lawyer: The Trials of Clara Foltz 296-97 (2011) (noting that Progressive Era thinkers Clara Foltz, Edward Bellamy, and William Aldrich advocated for state-funded defense counsel for all defendants regardless of income).

[254] *See How to Secure Free and Speedy Justice and Stop Lynching*, *supra* note 42, at 420 (describing the corrupting role that money plays in the criminal adjudication system).

[255] *How Poor and Rich Can Be Equalized Before the Law*, *supra* note 198, at 434.

[256] *Let Us Have Free Justice*, *supra* note 253, at 214.

[257] *Id*.

[258] *How to Secure Free and Speedy Justice and Stop Lynching*, *supra* note 42, at 420 (specifying that the defendant "should be allowed to have no other counsel in court" beyond the state-funded public defender).

[259] *Id*.

[260] Parmelee, *supra* note 43, at 743 (describing "professional criminals" who "are able to employ" private counsel); *see also How to Secure Free and Speedy Justice and Stop Lynching*, *supra* note 42, at 420 (describing the behavior of paid attorneys as "thwarting, delaying, and tripping up justice at every step").

court defenseless.[261] Even if such defendants were innocent, the result was often a conviction.[262] Bellamy argued that poor defendants had "so little chance in court," not because the judge was unfair, but "because [the defendant] cannot afford a good lawyer."[263] Reformers believe that money had no place in the justice system; "no one, not even a rich person, ought to be forced to provide his own defense."[264]

In addition to barring private attorneys from criminal court, Bellamy advocated for "short trials, few or no postponements and prompt executions of sentences."[265] According to Bellamy, state-funded attorneys on both sides—for the prosecution and the defense—would ensure fair, efficient proceedings.[266] Fixed salaries for all attorneys, untethered to time spent, work performed, or the outcome of the case were a critical element of the proposal.[267] Importantly, public defenders should be paid the same as public prosecutors.[268] In theory, removing money as an incentive to defend would restore professionalism, justice, and equality to criminal courts. Public defenders, unlike private attorneys, would not have a private financial interest in the case.[269] The focus would be on securing justice.

Reformers believed public defenders would help improve criminal law practice. For example, establishing state-funded defenders would put an end to plea deals, which reformers believed produced a "glaring miscarriage of justice."[270] When an indigent defendant plead guilty, it was because he was ill-advised or unrepresented and thus ignorant of what was at stake.[271] The thought was that a public defender could "more feasibl[y] have a trial in every case . . . [and] be ready to prepare carefully the defense."[272] With the state funding defense, another belief was that the state could require defenders to receive training in certain fields—sociology, psychiatry, and penology—something the state could not force upon private counsel.[273] The state could also have a hand in requiring certain courses of study in law school, such as policing, investigation, and evidence.[274] Both Bellamy and Parmelee encouraged public defenders and public prosecutors to switch

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[261] Foltz, *supra* note 44, at 397.

[262] *Id.* at 432.

[263] *How to Secure Free and Speedy Justice and Stop Lynching*, *supra* note 42, at 420.

[264] Parmelee, *supra* note 43, at 739.

[265] *Let Us Have Free Justice*, *supra* note 253, at 214.

[266] *Id.*

[267] *Id.*

[268] *How to Secure Free and Speedy Justice and Stop Lynching*, *supra* note 42, at 420.

[269] *Id*.

[270] Parmelee, *supra* note 43, at 741.

[271] *Id*.

[272] *Id.*

[273] *Id.* at 743-44.

[274] *Id.*

roles regularly, beginning with serving as a public defender, so as "to "avoid any possible bias against the defendant."[275]

Although Foltz is more closely associated with the birth of indigent defense, she at times argued for free legal services for all.[276] An ardent follower of Edward Bellamy,[277] Foltz believed that state-funded defense counsel for everyone facing criminal charges would enable "rich and poor" to receive "equal[]. . . justice."[278] Foltz reasoned that because other constitutional rights—like the right to a jury, the right to a speedy trial, and the right to be free of unreasonable searches—were all free, the right to the assistance of counsel should be free as well.[279] According to Foltz, requiring everyone charged with crimes to rely on a state-funded defender would ensure that the public defender system would be well-funded and well-respected.[280] The proposal in this Article adopts a similar rationale.

The reasons for universal public defense advanced during the Progressive Era differ in some ways from the reasons herein. Then, state-funded defense and the eradication of private lawyers were meant to ensure that all defendants, regardless of income, received a scrupulous public official ready to assist the court in holding the guilty accountable and freeing the innocent.[281] Proponents of "free justice" were concerned with how money (or lack thereof) could dictate the outcome of a proceeding more than the strength of the case against an accused person. Here, the concern is with improving the quality of indigent defense, which requires a few inferences. The rationale is that if the state mandated universal public defense for all defendants, it would compel the government to allocate sufficient funding to public defense. In this new reality with increased funding, there would then be enough public defenders to meet client demand and these public defenders would be well-compensated, and have the time, bandwidth, and expertise to provide high quality representation to their clients.

Setting aside the differing motives, both proposals manipulate economic and social forces in ways that could improve the criminal adjudication experience for the most marginalized defendants.

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[275] *Id.*; *see also How to Secure Free and Speedy Justice and Stop Lynching*, *supra* note 42, at 420 ("[I]t would be well for [prosecutors and defenders] to be required to exchange duties every year.").

[276] Babcock, *supra* note 199199, at 1272.

[277] *Id.* at 1298.

[278] Foltz, *supra* note 44, at 431-32.

[279] *Id.* at 398-99.

[280] Babcock, *supra* note 199, at 1272 (noting Foltz's belief that if public defenders only represented the poor, the role "would not command the respect or resources necessary to do the job").

[281] Foltz, *supra* note 44, at 432; *see also* GOLDMAN, *supra* note 191, at 40-47 (describing the public defender's role in advancing justice, meaning defending the innocent and ensuring that the court treats guilty people fairly).

IV. Assessing Universal Public Defense

This Part assesses universal public defense by comparing it to other existing universal programs. These programs include universal healthcare ("UHC") and universal free meals in public schools ("UFM"). Relative to targeted social programs, universal programs tend to enjoy broader support because they benefit a wider spectrum of people.[282] Universal programming can even be more effective at addressing harms specific to one group relative to programs explicitly targeting that one group. This is true for some tax policies intended to address harms specific to a racially marginalized group; a universal policy can be more effective at addressing harms.[283] Some of this can be explained by negative public perceptions of the targeted group receiving the benefit.

Similar forces exist in the indigent defense context where under the current regime people receive a targeted benefit, free criminal defense services, based on income. In general, the public has a negative perception of indigent people facing criminal charges, reflecting the intersectional identities of the recipients as both poor and criminally charged.[284] Under a universal model, public support could change because the recipients would come from higher incomes. Improved public perception could increase support and funding for state-funded defense, leading to improved services for defendants of all income levels.

This line of reasoning depends on the public responding with concern and empathy to relatively wealthy people facing criminal charges and being appointed state-funded defenders. More research is needed to determine whether the public would be sufficiently concerned and whether such concern would translate into increased support and funding for a state-funded service to help relatively wealthy people.

The implementation and impact of other universal programs can offer valuable insights into the potential effect of universal public defense. Like universal public defense, UHC and UFM are intended to level the playing field between rich and poor by providing necessary services to people who would not otherwise be able to afford them. These programs can improve the quality of the services rendered, public perception of the benefit recipients, and the experience of recipients.[285] However, a major difference between universal public defense and the two comparator programs is the lack of mandated participation, which exists in some, but not all, universal

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[282] *See* Greenstein, *supra* note 7, at 18.

[283] *See* Jeremy Bearer-Friend, *Race-Based Tax Weapons*, 14 U.C. Irvine L. Rev. 1067, 1092-99 (2024) (describing how universalist tax statutes can be more effective at targeting harms to specific racial groups than tax statutes that are explicitly targeted).

[284] *See* Bridges, *supra* note 12, at 48-51 (describing the moral construction of poverty); McCausland, *supra* note 136 (noting lack of financial support for indigent defense).

[285] *See infra* section IV.B.

healthcare models.[286] Nonetheless, there are insightful parallels to draw between the comparator programs and universal public defense.

This Part also explores some of the potential behavioral changes among criminal legal system actors that might result under a universal defense system. A universal model, where a public defender's clients could come from a range of incomes, may change who is attracted to the profession. It could change the way prosecutors make charging decisions. And it could change the way judges consider criminal conduct, punishment, and the people accused of engaging in criminal behavior.

A. Benefits and Challenges

The potential benefits and challenges of universal public defense depend on the extent of its universality. A truly universal system, in which people from all income levels, the most privileged to the most marginalized, receive state-funded defense services, would help improve state-funded defense.[287] The targeted versus universalism policy literature supports this contention.[288] For income interest convergence to kick in, the most privileged people must perceive that they would benefit—either directly or indirectly—from a well-resourced and well-funded public defense system. This means privileged people must anticipate that they or someone they care about would need to rely on a state-funded defense attorney.

Conversely, a lack of universality, in which the most marginalized Americans—low-income, people of color, and disabled people—continue to be the primary recipients of state-funded defense counsel, would result in replicating the current regime's quality and funding issues. The link between deservingness and race further exacerbates these sentiments,[289] meaning that society would continue to see state-funded defense counsel as a benefit only for the poor and undeserving. Said another way, if privileged people do not perceive that they would benefit from a well-funded and well-resourced defense system, it is unlikely that funding would increase, creating a sort of interest divergence.

1. The Benefit of Increased Funding

Let us start by assuming the former: the full spectrum of society relies on (or expects to rely on) state-funded defense services and experiences it as a truly universal benefit, whether directly or indirectly. This means that the 20% of defendants who can afford to hire their own defense counsel under the current regime rely on and benefit from a state-funded defense

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[286] *See infra* section IV.B.1.

[287] *See supra* section II.B (discussing funding and interest convergence).

[288] *See* GREENSTEIN, *supra* note 7.

[289] *See* Lanford, *supra* note 143, at 2.

attorney.[290] As discussed above, this has the potential to place pressure on lawmakers and society to prioritize funding public defense.[291] One of the many obstacles to providing high quality indigent defense services is lack of funding.[292] Accordingly, an increase in funding should help to improve services for all defendants.[293]

Increased funding for public defense has the potential to result in several benefits. A well-funded program can offer pre-arrest and pre-charge defense services, whereby public defenders are available to begin working with clients and investigating relevant issues even before law enforcement officials formally arrest or charge a defendant.[294] These are the type of services that well-compensated private defense attorneys routinely offer. Early intervention in a case, before police make an arrest and before the state files charges, can significantly improve the outcome of the case in the defendant's favor. Defense counsel can begin to investigate and speak to potential witnesses before law enforcement.[295] These efforts can help counsel prepare a defense, such as identify an alibi, build facts in support of a suppression motion, and/or develop evidence for an attractive plea offer or case dismissal. Early intervention can also enable defense counsel to negotiate the defendant's peaceful surrender to law enforcement, if appropriate.[296] A defendant's volitional surrender to law enforcement can factor into a judge's decision when determining pretrial release and, upon a potential conviction, can factor into the judge's sentencing decision.[297]

Perhaps most importantly, increased funding can increase the number of public defenders in each jurisdiction, which can help lower each lawyer's caseload and enable lawyers to spend more time and resources on each

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[290] There is a wide spectrum of affordability among defendants who can pay for counsel, including defendants who are marginally indigent. *See* Hoffman et al., *supra* note 86, at 230 (describing defendants who can barely manage to afford hiring private counsel as "marginally indigent").

[291] *See supra* section II.B (discussing funding).

[292] *See id.*; *see also* McCausland, *supra* note 136 (identifying various barriers that lack of funding creates, including lawyers who "don't have the time to build proper defenses" and who are "forced to leave charged people in jail for long periods of time until they can address a particular case").

[293] More research is needed to demonstrate how an increase in funding would improve services, measured by a variety of factors, such as release from pretrial detention, suppression of evidence, client satisfaction, reduced conviction rate, reduced sentence, and fewer wrongful convictions.

[294] Neighborhood Defender Services, a public defender program with offices in New York City and Detroit, among other locations, offers this service. *See Pre Arrest Services*, Neighborhood Def. Serv., https://neighborhooddefender.org/services/pre-arrest-services/ [https://perma.cc/Z2HN-6HBP] (last visited Mar. 1, 2025).

[295] *See id.*

[296] *See id.*

[297] *See* N.Y. Crim. Proc. Law § 510.30 (Consol. 2023) (listing factors that the judge can consider when determining bail); 18 U.S.C. § 3553 (listing factors that the judge can consider when determining sentencing).

case.[298] A decrease in caseload for defense counsel can improve the quality of representation in several ways, like enabling lawyers to spend more time investigating and developing a defense, building a trusting relationship with the defendant, filing pretrial motions to challenge the state's case, preparing for court appearances, retaining and consulting with relevant experts, and developing information to mitigate sentencing. Increased funding can also enable public defender offices to retain in-house support staff and defense services beyond investigators and paralegals. Depending on the needs of the client population, this could include forensic experts;[299] trauma-informed social workers, nurses, addiction counselors, and therapists;[300] liaisons for work, job training, and education;[301] and public relations and media experts.[302] Increased funds would also enable public defender offices to hire additional experts on an ad hoc basis.

2. The Challenge of Interest Divergence

Now let us assume the latter scenario, an interest divergence. This is where universal public defense lacks sufficient universality, which would present a significant challenge to securing more public support and funding for public defense. If the appointment of a state-funded defender to represent relatively privileged people does not raise sufficient public concern, a funding increase for public defense is unlikely. This could occur based on a variety of reasons, including negative perception of people charged with crime or that an insufficient number of relatively wealthy people are impacted. Currently, 10-20% of the population can afford to retain counsel. Under a universal system, this population would receive public defenders. However, this might not be enough to move public support in favor of allocating more resources to state-funded defense. If universal public defense lacks sufficient universality for either of these reasons, then the current issues

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[298] *See* PACE ET AL., *supra* note 28; *see also* Richardson & Goff, *supra* note 5, at 2631-32 (connecting lack of funding to "crushing," "unmanageable caseloads [that] make it virtually impossible [for defense counsel] to provide zealous and effective representation to every client").

[299] Depending on the nature of the case, this could include a crime scene reconstructionist, ballistic expert, experts in interpreting DNA, finger proof, and blood evidence, a toxicologist, and others.

[300] Trauma-informed experts are individuals who understand the impact that trauma can have on a person's behavior and development. They can help manage issues defendants may be experiencing pretrial, facilitate trusting attorney-client relationships, and assist counsel in preparing witnesses and the defendant for court appearances.

[301] Liaisons can help connect defendants to school, training, and work programs pending trial or in preparation for sentencing, which can result in pretrial release or a reduced sentence.

[302] Communications professionals can draft press releases on relevant matters, provide counternarratives when negative reports about defendants and cases arise, develop proactive, original, and journalistic content on issues related to the criminal adjudication system, guide social media content creation and develop appropriate internal and external tactics, proactively follow current events in the media and hot button events unfolding locally and nationally that impact the client population, and promote the work of the office.

with public defense would likely persist.[303] Moreover, given the expansion of public defense to defendants of all income levels under a universal model, individual public defender caseloads would increase and the public defender funding crisis could worsen.

Changing the income eligibility for the appointment of counsel is unlikely to have an impact on whom the state charges with a criminal offense. Research shows that wealth and race are inextricably linked to involvement with the criminal adjudication system.[304] The most marginalized people in society—poor people, people of color, and disabled people—are disproportionately subject to arrest, prosecution, and incarceration.[305] Society assigns a presumption of criminality and dangerousness to these groups, particularly to Black people.[306] This presumption is activated at each stage of criminal proceedings, beginning with arrest.[307] This was true during the Progressive Era and continues to be true today.[308]

On average, 80% of defendants qualify for a state-funded defender based on indigency.[309] In some jurisdictions, that number is over 90%.[310] According to a 2000 report studying seventy-five of the nation's largest counties, government-funded attorneys represented a majority of defendants of all races in both state and federal courts, but they represented a higher percentage of racially marginalized defendants relative to white defendants, with the exception of Latino defendants in federal court where appointed counsel represented about 56% of both Latino and white defendants.[311] Appointed counsel represented the majority of Black people in both state

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[303] *See* FURST, *supra* note 28, at 1 ("Spending tax dollars on indigent defense has long been unpopular.").

[304] *See* ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM (2018), https://vera-institute.files.svdcdn.com/production/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf [https://perma.cc/M8HJ-XAB9]; Nazish Dholakia, *How the United State Punishes People for Being Poor*, VERA INST. JUST. (Sep. 21, 2023), https://www.vera.org/news/how-the-united-states-punishes-people-for-being-poor [https://perma.cc/EM9Z-HV74].

[305] HINTON ET AL., *supra* note 304; Dholakia, *supra* note 304; *see also* Morgan, *supra* note 4; KAREN DOLAN & JODI L. CARR, INST. FOR POL'Y STUD., THE POOR GET PRISON 13, 23-26 (2015), https://ips-dc.org/wp-content/uploads/2015/03/IPS-The-Poor-Get-Prison-Final.pdf [https://perma.cc/23EF-SV8X] (describing the criminalization of necessary human activities that people who lack housing regularly engage in).

[306] *See* Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice*, *in* POLICING THE BLACK MAN 3 (Angela J. Davis ed., 2017) (describing presumption of criminality and dangerousness that society assigns to Black people); *see also* Buck v. Davis, 580 U.S. 100, 121 (2017) (finding ineffective assistance of counsel where defense counsel injected the "powerful racial stereotype—that of black men as 'violence prone'"—into trial for jury's consideration) (quoting Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality)).

[307] *See* Stevenson, *supra* note 306; Morgan, *supra* note 4.

[308] *See* MUHAMMAD, *supra* note 203.

[309] *See* Oppel & Patel, *supra* note 2.

[310] OR. PUB. DEF. COMM'N, *supra* note 152, at 1.

[311] CAROLINE WOLF HARLOW, BUREAU OF JUST. STAT., DEFENSE COUNSEL IN CRIMINAL CASES 9 (2000), https://bjs.ojp.gov/content/pub/pdf/dccc.pdf [https://perma.cc/ZQ57-K4PF].

and federal court, with appointed counsel representing 76.6% of incarcerated Black people in state court and 64.7% of Black people in federal court.[312] In state court, appointed counsel represented 73% of Latino defendants.[313] It is unclear the rate of Native defendants whom state-funded attorneys represented given that Native people have a statutory right to the appointment of counsel in tribal court proceedings and a constitutional right to appointment of counsel in state and federal courts.[314] However, like Latino and Black people, Native people are overly represented in the criminal legal system with an incarceration rate that is four times higher than that of white people.[315]

Given the demographic realities under the current regime, it is unlikely that law enforcement would shift their attention toward charging more privileged people under a universal system of public defense. As discussed below,[316] there is a potential for prosecutors to file lesser charges or decline to charge privileged people if universal public defense activates an empathetic response in prosecutors.[317] Under the current regime, the fact that it is less likely for a relatively privileged person to become involved or know someone who will become involved in the criminal adjudication system will likely persist. However, there are some high-profile exceptions in which privileged people are prosecuted and receive public support.[318]

Public response to wealthy people whom the state has charged with violent and non-violent offenses has ranged from horror and fascination to disgust and anger. Examples include disgraced lawyer Richard Alexander ("Alex") Murdaugh, film producer Harvey Weinstein, or comedian William ("Bill") Cosby, Jr.[319] Given the heightened racial polarization at the time of

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[312] *Id.*

[313] *Id.*

[314] *See* Jordan Gross, *VAWA 2013's Right to Appointed Counsel in Tribal Court Proceedings—A Rising Tide that Lifts All Boats or a Procedural Windfall for Non-Indian Defendants?*, 67 Case W. Rsrv. L. Rev. 379, 380-83 (2016).

[315] *Native Incarceration in the U.S.*, Prison Pol'y Initiative, https://www.prisonpolicy.org/profiles/native.html [https://perma.cc/S2PL-SLQ6] (last visited Mar. 1, 2025).

[316] *See infra* section IV.C.2.

[317] *See* Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. Cal. L. Rev. 313 (2012).

[318] *See* Hurubie Meko, *In C.E.O. Murder Case, a Test of New York's Antiterrorism Laws*, N.Y. Times (Dec. 26, 2024), https://www.nytimes.com/2024/12/26/nyregion/luigi-mangione-terrorism-charge.html (describing public support for Luigi Mangione, a privileged person charged with murdering a healthcare executive).

[319] *See Social Media Insights Lab Analysis: A Lot of People Don't Believe Alex Murdaugh*, Univ. S.C. Coll. Info. & Commc'ns.: Social Media Insights Lab, https://sc.edu/study/colleges_schools/cic/initiatives/social_media_insights_lab/reports/2023/people_dont_believe_Alex_Murdaugh.php [https://perma.cc/E5DX-EZ3X] (last updated Mar. 2, 2023) (analyzing 51,000 social media posts about the Murdaugh trial); Christine Hauser & Heather Murphy, *Reactions to the Harvey Weinstein Verdict: 'You Did a Public Service'*, N.Y. Times (Feb. 24, 2020), https://www.nytimes.com/2020/02/24/nyregion/weinstein-verdict-reaction.html; Gary Levin, *Bill Cosby's Legacy: From America's Dad to 'America's Rapist*', USAToday (Sept. 26, 2018), https://www.usatoday.com/story/life/people/2018/04/26/bill-cosbys-legacy-americas-dad-americas-rapist/555163002/ [https://perma.cc/3V57-ECUA].

O.J. Simpson's prosecution,[320] Mr. Simpson initially received support from a substantial number of Black people,[321] but even that waned in subsequent years.[322] One notable exception is Luigi Mangione, a white Ivy League graduate from a wealthy family who was charged in both state and federal court for the murder of a healthcare chief executive officer.[323] After his indictment for murder, Mr. Mangione received significant public support, including people donating money to his defense fund.[324]

Conversely, the public withheld support from other wealthy people charged with non-violent offenses. This included FTX founder Samuel ("Sam") Bankman-Fried, financial wealth manager Bernard ("Bernie") Madoff, and Theranos founder Elizabeth Holmes.[325] Lifestyle celebrity Martha Stewart's convictions related to insider trading garnered the least negative public responses, but perhaps not enough sympathy to translate into an increase in funding under a universal public defense model.[326] Donald Trump, who was convicted of several felony charges for falsified business

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[320] *See* Jim Newton, *Opinion: How Rodney King Helped O.J. Simpson Win a Non-Guilty Verdict*, L.A. Times (Apr. 11, 2024, 4:35 PM), https://www.latimes.com/opinion/story/2024-04-11/oj-simpson-rodney-king-lapd-nicole-brown-simpson-ron-goldman [https://perma.cc/BJE5-4WJJ] (connecting the 1992 acquittal of white officers charged with beating Black motorist Rodney King and the subsequent racial uprisings in Los Angeles County with Mr. Simpson's 1995 acquittal for murder).

[321] *See* Devon W. Carbado, *The Construction of O.J. Simpson as a Racial Victim*, 32 Harv. C.R.-C.L. L. Rev. 49, 66 (1997) (noting that several polls found that between 55-75% of Black people believed that Mr. Simpson was not responsible for the murders).

[322] *See* Darryl Fears, *Black Opinion of O.J. Simpson Shifts*, NBC News (Sept. 27, 2007, 11:50 AM), https://www.nbcnews.com/id/wbna21012641 [https://perma.cc/G5F6-9VRY] (describing shift in support among Black people following the 1995 verdict from the majority of Black people believing in Mr. Simpson's innocence to the majority of Black people believing in his guilt).

[323] *See* Corey Kilgannon, Mike Baker, Luke Broadwater & Shawn Hubler, *Suspect in C.E.O. Killing Withdrew from a Life of Privilege and Promise*, N.Y. Times, https://www.nytimes.com/2024/12/09/nyregion/united-healthcare-ceo-shooting-luigi-mangione.html (last updated Dec. 11, 2024) (reporting that Mangione is from a privileged Italian-American family in Baltimore and graduated from an expensive private high school and from an Ivy League university).

[324] *See* Bill Hutchinson, *Defense Fund Established by Supporters of Suspected CEO Killer Luigi Mangione Tops $200k*, ABC News (Dec. 24, 2024, 11:30 AM), https://abcnews.go.com/US/supporters-suspected-ceo-killer-luigi-mangione-establish-defense/story?id=116718574 [https://perma.cc/F4P7-9BW7] (noting that anonymous supporters have donated over $200,000 to fund Mangione's defense).

[325] *See* Ginia Bellafante, *Sam Bankman-Fried Was a Grown-Up Criminal, Not an Impulsive Man-Child*, N.Y. Times (Nov. 3, 2023), https://www.nytimes.com/2023/11/03/nyregion/sam-bankman-fried-ftx-trial-cryptocurrency.html; Emma Brockes, *Why Are People So Delighted at the Downfall of Elizabeth Holmes?*, Guardian (Jan. 4, 2022, 1:17 PM), https://www.theguardian.com/commentisfree/2022/jan/04/downfall-elizabeth-holmes-theranos-founder-silicon-valley [https://perma.cc/5MDZ-VH2Y]; Janet Morrissey, *The Penalty for 'Extraordinary Evil': Madoff Gets 150 Years*, Time (June 29, 2009, 12:00 AM), https://time.com/archive/6906194/the-penalty-for-extraordinary-evil-madoff-gets-150-years/ [https://perma.cc/H6EH-3NQP].

[326] *See* Jane Gross, *The Martha Stewart Verdict: The Reaction; Sympathizer or Gloater, They Agree It Was All About Her*, N.Y. Times (Mar. 6, 2004), https://www.nytimes.com/2004/03/06/business/martha-stewart-verdict-reaction-sympathizer-gloater-they-agree-it-was-all-about.html (describing public reaction to Ms. Stewart's conviction as generally agreeing with the conviction but disagreeing with the federal prison sentence).

records, is another outlier.[327] Mr. Trump's political supporters expressed outrage that the Manhattan District Attorney's Office charged the former President[328] and doubled down on their support for him following the jury's conviction.[329]

Under the current regime, the public's reaction to privileged defendants involved in the criminal adjudication system, with some exception, has not garnered much sympathy. Interest divergence is a real concern under a universal model. Not only because increased funding is unlikely, but because a universal system would increase the number of cases assigned to each public defender, placing added pressure on an already overburdened system.

B. Comparing Other Universal Programs

A universal system of public defense is a program akin to existing social benefits that are rendered universally, such as universal healthcare ("UHC") and universal free meals in public schools ("UFM"). Both UHC and UFM are funded through the state, which would be the source of funding for universal defense. Like universal defense, universal free meals and universal healthcare are provided to everyone regardless of income.[330] These commonalities can help reveal the impact of a universal system of public defense.

That said, there are significant differences between universal public defense and the two comparator programs that might limit the transferability of insight. One difference between universal public defense and the two comparator programs is mandated participation. Universal public defense does not allow opting out nor supplementing with private defense services. Conversely, students can opt out of or supplement free meals in public schools and people can obtain supplemental healthcare even when enrolled in a universal program. Another difference is necessity. All school children need to eat during the school day, and everyone needs and uses healthcare.

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[327] *See generally* Press Release, Manhattan Dist. Att'y's Off., D.A. Bragg Announces 34-Count Felony Trial Conviction of Donald J. Trump (May 30, 2024), https://manhattanda.org/d-a-bragg-announces-34-count-felony-trial-conviction-of-donald-j-trump/ [https://perma.cc/U8YL-2YUZ].

[328] *See* Michael Williams, *D-FW Trump Supporters Rally, Say They're Energized Following Former President's Indictment*, Dallas Morning News (Apr. 4, 2023, 6:47 PM), https://www.dallasnews.com/news/politics/2023/04/04/d-fw-trump-supporters-rally-say-they-re-energized-following-former-presidents-indictment/ [https://perma.cc/K62T-KLYT] (reporting on Trump supporters who claimed the indictments "hardened their support for Trump and weakened their belief in the American judicial process"); Ellie Silverman & Hannah Allam, *Among MAGA Extremists, Trump Charges Draw Big Talk, Small Crowds*, Wash. Post (Aug. 3, 2023), https://www.washingtonpost.com/national-security/2023/08/03/trump-indictment-violence/.

[329] *See* Kate Plummer, *'Civil War' Warning Issued by MAGA After Donald Trump Guilty Verdict*, Newsweek (May 31, 2024, 6:28 AM), https://www.newsweek.com/donald-trump-hush-money-verdict-maga-civil-war-1906671 [https://perma.cc/WD7V-VR76] (reporting on Trump supporters' anger).

[330] *See infra* sections IV.B.1 & 2.

However, the only people who require the assistance of defense counsel are people under investigation for suspected criminal conduct or people facing criminal charges, typically a small segment of the population.

The contexts in which each of the comparator programs arise are also different. The triggering event for the appointment of a public defender is often when the state files criminal charges against a defendant, whereas a free meal is akin to a safety net, existing before crisis occurs or to help prevent crisis. Healthcare can exist as either a safety net, as with preventative services or regular checkups, or it can arise in a moment of crisis during a healthcare emergency, similar to the appointment of counsel upon a criminal charge. Regardless of these distinctions, the two comparator programs offer important lessons for a mandated system of universal public defense.

1. Universal Healthcare ("UHC")

Universal healthcare is a national health insurance system that provides equitable health services to every citizen or resident regardless of their ability to pay.[331] Under this measure, the United States does not operate a universal healthcare system.[332] For this reason, as a comparator, this section focuses on universal healthcare systems that exist in countries like Canada, South Korea, and Taiwan.[333] Each of these nations operates a government-funded health insurance system whereby every citizen or resident can receive services from private and/or government operated providers.[334] Like universal public defense, the healthcare systems in these countries are state-funded and participation is mandatory.[335] These defining factors make

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[331] *See Universal Health Coverage*, World Health Org. https://www.who.int/health-topics/universal-health-coverage [https://perma.cc/Z6K6-4EVQ] (last visited Mar. 1, 2025) (defining universal health coverage).

[332] The United States operates a mixed healthcare system whereby it relies on private and public financing. Many working people and their dependents receive employer-sponsored healthcare. *See* U.S. Dep't of Health & Hum. Serv., 2021 National Healthcare Quality and Disparities Report, at O-1-40, A-15 (Dec. 2021), https://www.ahrq.gov/sites/default/files/wysiwyg/research/findings/nhqrdr/2021qdr.pdf. [https://perma.cc/SB7W-6YPQ]. Despite spending the most on healthcare costs, health outcomes in the United States are worse than other developed nations, many of whom spend less. *See* Danielle Martin, Ashley P. Miller, Amélie Quesnel-Vallée, Nadine R. Caron, Bilkis Vissandjée & Gregory P. Marchildon, *Canada's Universal Health-Care System: Achieving Its Potential*, 391 Lancet 1718, 1722-23 (2018).

[333] *See generally Taiwanese Citizens Who Reside in Taiwan*, Nat'l Health Ins. Admin., Ministry of Health & Welfare, https://www.nhi.gov.tw/en/cp-53-2f212-30-2.html [https://perma.cc/VT6Q-MA7H] (last updated May 20, 2022) (describing Taiwanese health coverage); *Healthcare System in Korea*, Health Ins. Rev. & Assessment Serv., https://www.hira.or.kr/dummy.do?pgmid=HIRAJ010000006000 [https://perma.cc/8NP3-8WH8] (last visited Mar. 1, 2025) (describing South Korean health care); *About Canada's Health Care System*, Health Canada, https://www.canada.ca/en/health-canada/services/canada-health-care-system.html [https://perma.cc/KK24-2TLT] (last updated Oct. 10, 2023) (describing Canadian health care).

[334] *See Taiwanese Citizens Who Reside in Taiwan*, *supra* note 333; *Healthcare System in Korea*, *supra* note 333; *About Canada's Health Care System*, *supra* note 333.

[335] *See Taiwanese Citizens Who Reside in Taiwan*, *supra* note 333 ("Any Taiwanese citizen whose household is registered in Taiwan must enroll in the National Health Insurance program

it an attractive comparator to assess the potential impact of universal public defense. Although the healthcare programs in Canada, South Korea, and Taiwan differ from each other in small ways, their similarities provide helpful insights into the possible impact of universal public defense.

The goal of Canada's healthcare system is to provide quality coverage based on need rather than ability to pay.[336] Although coverage is national, the administration and services are delivered in a decentralized fashion through individual provinces and territories.[337] Universal public defense would operate in a similarly decentralized manner, funded through the federal government, but administrated through localities. The benefits of Canada's publicly funded healthcare system are that it provides residents equitable access[338] to physicians and hospitals and has resulted in a higher life expectancy for recipients relative to other wealthy nations, including the United States and Denmark.[339] Two difficulties of the system are long wait times for elective care[340] and health disparities among Indigenous people.[341]

Outcome disparities for marginalized people are a concern transferrable to universal public defense. Under the current indigent defense regime, marginalized people, particularly Black, Latino, and Indigenous, have higher rates of arrests, prosecution, and incarceration relative to white people.[342] There is also evidence that defense counsel can be racially biased against marginalized defendants, particularly Black clients, in ways that can impact representation and case outcomes.[343] One of Canada's suggested interventions to address health disparities among Indigenous people was to train more Indigenous doctors and nurses.[344] Studies show that racial and cultural congruency between healthcare providers and patients can have a positive impact on patients' health outcomes.[345] There is some indication that racial congruency between attorneys and clients may help mitigate some of

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when their six-month residency has been established."); *Healthcare System in Korea*, *supra* note 333 (noting that the health care system in Korea is mandatory and that it "provides healthcare coverage to all citizens"); *About Canada's Health Care System*, *supra* note 333 (noting that provincial and territorial healthcare plans must cover all residents). There is no federal mandate that Canadians carry health insurance, but many provinces and territories require coverage for residents to use publicly funded services. *See About Canada's Health Care System*, *supra* note 333.

[336] *See* Martin et al., *supra* note 332, at 1718.

[337] *Id*.

[338] *Id.*

[339] *Id.* at 1725-26.

[340] *Id.* at 1726-27.

[341] *Id.* at 1729.

[342] *See supra* section IV.A.2 (mentioning rates of arrests, prosecution, and incarceration by demographic groups).

[343] *See* Richardson & Goff, *supra* note 5; Avery et al., supra note *5*.

[344] *See* Martin et al., *supra* note 332, at 1729.

[345] *See* Michael D. Frakes & Jonathan Gruber, *Racial Concordance and the Quality of Medical Care: Evidence from the Military* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30767, 2022), https://www.nber.org/system/files/working_papers/w30767/w30767.pdf [https://perma.cc/F62U-NYYT].

the system's racial bias in ways that can help a defendant's case.[346] Just as Canada needs to train more Indigenous healthcare providers, this country may need to recruit and train more defenders from marginalized groups in a universal public defense system.

In South Korea, the National Health Insurance Corporation ("NHIC") receives funding from citizen tax contributions, government subsidies, tobacco surcharges, and other sources.[347] The diversity and amount of funding enables Korea to provide high-quality, "modern[,] and efficient" health services to its citizens.[348] However, one challenge is that most healthcare providers are located in Korea's urban areas, leaving rural residents with limited access.[349] The current indigent defense regime faces a similar challenge in providing adequate representation to defendants in rural communities,[350] which could persist with universal public defense. To help address this issue, the state could enact a law school loan repayment program for lawyers to provide state-funded defense services in rural communities for a designated amount of time.[351]

In a study comparing Taiwan's healthcare system to the system in the United Kingdom, researchers found several benefits and weaknesses of Taiwan's system that are instructive to universal public defense.[352] The Taiwanese government adopted a national health insurance ("NHI") program in 1995, with funding from employees, employers, and local and national governments.[353] Highlights include good accessibility, comprehensive population coverage, short waiting times, low administration costs, high coverage rate, and national data collection systems for planning and research.[354] Some of the challenges include short consultation times leading to high rates of outpatient visits to obtain secondary and tertiary opinions, a

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[346] *See* Hoag, *supra* note 20, at 1538-42 (demonstrating that racial congruency between defense counsel and defendant may mitigate anti-Black bias within the criminal adjudication system).

[347] *See* YongJin Yi, *A Profile of Health Care in South Korea*, Borgen Project (June 10, 2020), https://borgenproject.org/health-care-in-south-korea/ [https://perma.cc/H9V7-F345].

[348] *Id.*

[349] *Id.*

[350] *See* Romero, *supra* note 19 (describing the challenges of providing quality defense services in areas); *see also* Lisa R. Pruitt, Amanda L. Kool, Lauren Sudeall, Michele Statz, Danielle M. Conway & Hannah Haksgaard, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 Harv. L. & Pol'y Rev. 15, 23 (2018) ("[T]he dearth of lawyers in many rural communities—and the complete absence of them from others—are cause for alarm.").

[351] *Cf.* U.S. Dep't of Health & Hum. Servs., Health Res. & Servs. Admin., National Health Service Corps Rural Community Loan Repayment Program (Feb. 2024), https://nhsc.hrsa.gov/sites/default/files/nhsc/loan-repayment/rural-lrp-fact-sheet.pdf [https://perma.cc/H2VJ-9RSE] (describing the federal loan repayment program that awards loan repayment to clinicians who work in rural communities).

[352] *See* Tai-Yin Wu, Azeem Majeed & Ken N. Kuo, *An Overview of the Healthcare System in Taiwan*, 3 London J. Primary Care 115, 115-19 (2010).

[353] *Id.* at 116.

[354] *Id.* at 117.

weak referral system whereby patients have easy access to specialists, and the system's high cost.[355]

Outcomes that are potentially transferrable to universal public defense include short waiting times to obtain state-funded counsel, in contrast to lengthy wait times in Missouri and Oregon,[356] and a national data collection system for planning and research. Assuming an increase in funding under universal public defense, offices can hire more attorneys, enabling a decrease in per attorney caseload. Such an increase could put an end to jurisdictions where there are not lawyers to represent the number of indigent defendants in need of representation and who wait weeks, or even months, to meet with their court appointed attorney.[357] With a centralized funding source under universal public defense, the federal government can require states to collect robust data to regularly assess and monitor state-funded defense. Data collection can help states and localities track systemic issues, advocate for increased funding in certain areas, make well-informed program adjustments, and other policy decisions. In terms of challenges, the high cost of running Taiwan's universal NHI program is likely to translate to a high cost of running universal public defense. As proposed above, the key will be to obtain adequate funding based on an increase in public support for state-funded defense.[358]

2. Universal Free Meals in Public Schools ("UFM")

Like in the criminal adjudication system, where most defendants qualify for a public defender, most children enrolled in public schools qualify for free lunch.[359] In both contexts, recipients must meet income eligibility requirements to receive the state-funded benefit.[360] For both, the income eligibility requirement, which connects poverty to the benefit, can stigmatize the benefit as less than or of poor quality.[361] To address this and other

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[355] *See id.* at 118.

[356] *See supra* sections II.B & C.

[357] *See id.*

[358] *See supra* section II.B.

[359] *See* Oppel & Patel, *supra* note 2 (observing that over 80% of defendants qualify for a court appointed attorney); *How Many US Children Receive a Free or Reduced-Price School Lunch?*, USAFacts (Oct. 26, 2023), https://usafacts.org/articles/how-many-us-children-receive-a-free-or-reduced-price-school-lunch/ [https://perma.cc/AP7J-6QEL] (noting that 60% of public school students receive free or reduced-price lunches from the National School Lunch Program).

[360] *See The National School Lunch Program (NSLP)*, Feeding America https://www.feedingamerica.org/take-action/advocate/federal-hunger-relief-programs/national-school-lunch-program [https://perma.cc/5QKK-DNZ8] (last visited Mar. 1, 2025) (specifying income eligibility requirements for children to receive free meals); Nat'l Assoc. of Crim. Def. Laws., Gideon at 50: A Three-Part Examination of Indigent Defense 10-18 (2014) (identifying the various ways that jurisdictions define indigency based on income for defendants to receive a public defender or other court appointed lawyer).

[361] *See* Dee Crawford, *In-Depth with Ryan Ingram: Attorney Talks About the Stigma Around*

concerns in the public school context, some districts have started to make free meals available for all students, regardless of income.[362] Early research indicates that removing income eligibility may reduce stigma associated with receiving free meals.[363] Given the similarities between indigent defense and free meals in public schools, the shift to a universal free meal delivery system makes it an ideal comparator to universal public defense.

In most districts, public schools provide free meals to children based on income.[364] When income eligibility is a requirement for participation, some schools experience difficulty identifying qualified students and some students who qualified declined to participate.[365] There are multiple factors that may contribute to these challenges, like families who lack citizenship status may avoid providing schools with identifying information and students who experience social stigma as a result of qualifying may forgo participating.[366] However, a handful of public school districts are experimenting with universal free meals for all children enrolled in a school regardless of income.[367] In 2017, the New York City Department of Education began offering free meals to all students enrolled in public school.[368] In addition to reducing stigma, research indicated that universal free meals raised student test scores, increased student safety across income levels, and reduced behavioral problems.[369]

The findings from universal free meals are translatable to universal public defense. In a similar fashion, extending state-funded defense services to people of all income levels could reduce the stigma related to public

Public Defenders, WKBN First News 27 (Aug. 3, 2022), https://www.wkbn.com/news/local-news/in-depth-with-ryan-ingram-attorney-talks-about-the-stigma-around-public-defenders/ (discussing stigma related to public defender and court appointed lawyer); Gutierrez, *supra* note 50, at 6-7 (observing that free meals were stigmatized as "poor kids" food); Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 Law & Contemp. Probs. 81, 86-88 (1995) (describing critical view that the public and clients hold of public defenders).

[362] *See* Gutierrez, *supra* note 50, at 4 (noting that "an increasing number of schools and districts across the US have adopted URM."); *see also* Kim Severson, *Why Are Free School Lunches Becoming a Campaign Issue?* N.Y. Times, (Aug. 14, 2024), https://www.nytimes.com/2024/08/13/dining/free-school-lunch-programs.html (observing that eight states offer some form of UFM for children enrolled in public schools, including some charter schools).

[363] *See* Gutierrez, *supra* note 50, at 5.

[364] *See* Feeding America, *supra* note 360 (noting that the income eligibility requirement for free meals is 130% below the poverty level, and for reduced-price meals, 130-185% below the poverty level); s*ee also* Caroline Danielson, Low-Income Students and School Meal Programs in California 1 (2015) (indicating the same income eligibility requirement for students enrolled in California public schools).

[365] *See* Danielson, *supra* note 364, at 1-2 n.16 (identifying problems associated with identifying qualifying students and participation).

[366] *See* Gutierrez, *supra* note 50, at 3-4 (discussing social stigma); Danielson, *supra* note 364, at 6 (noting reluctance among non-citizen families to submit applications for free meals).

[367] *See* Gutierrez, *supra* note 50, at 1 (mentioning increase in schools adopting UFM programs); Severson, *supra* note 362.

[368] *Free Lunch for All*, Mayor's Off. of Data Analytics, https://modaprojects.cityofnewyork.us/free-lunch-for-all/ [https://perma.cc/7S5T-3RQP] (last visited Mar. 1, 2025).

[369] *See* Gutierrez, *supra* note 50, at 4 (summarizing research on impact of UFM).

defenders. Under the current regime, some indigent defendants are reluctant to work with a public defender or view public defenders negatively.[370]These views stem from an often-accurate perception that public defenders are overworked, lack resources, and have too many cases to be effective on any one case. There is a false perception that public defenders are more aligned with judges and prosecutors than with their clients because state-funded attorneys receive their pay from the state. Such reactions can lead to distrust, poor communication, and a breakdown in the attorney-client relationship.[371] These factors can negatively impact representation.[372] With every defendant receiving a public defender, universal public defense may alleviate some of the stigma associated with public defense. Just as rates of free meal participation went up among income eligible students with UFM, universal public defense could result in indigent defendants more readily forming trusting relationships with their lawyers. A trusting attorney-client relationship is critical for effective representation.[373]

C. Changing the Behavior of System Actors

This section explores how universal public defense would impact the behavior of certain actors within the criminal legal system, specifically public defenders, prosecutors, and judges. Mandated state-funded defense for all removes private criminal defense attorneys from the equation and alters the client population of public defenders to include defendants from relative privilege. These changes could shift the relationship formation between defense counsel and client, alter prosecutor decision-making, and impact judicial decision-making on a range of issues. Further, many people who enter public defense do so for reasons tethered to zealously fighting on behalf of marginalized people.[374] The shift in public defenders' client population could impact who enters the profession and their reasons for doing so.

In *Privilege and Punishment*, sociologist Matthew Clair studied race and class in Suffolk County, Massachusetts criminal courts, finding that

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[370] *See* Ogletree, *supra* note 361, at 87-88 (describing critical view that indigent defendants hold of public defenders).

[371] *See* Hoag, *supra* note 20, at 1495-96 (describing negative impact that lack of trust and poor communication can have on the attorney-client relationship and representation).

[372] *See id.*

[373] *See* Morris v. Slappy, 461 U.S. 1, 21 (1983) (Brennan, J., concurring) (citing Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981)) ("[B]asic trust between counsel and client . . . is a cornerstone of the adversary system."); United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977) (explaining that "mutual trust" between the attorney and client is "necessary to effective representation").

[374] *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240, 1276 (1993) (observing that public defenders are motivated by a desire to "fight injustice," "help the underprivileged," and "represent[] the underdog").

both factors impacted defendants' experiences in criminal court.[375] He observed that indigent and working-class defendants who appeared in court with state-funded lawyers were more likely to challenge their lawyers and advocate for themselves in ways that were detrimental to their cases.[376] Clair attributed this to defendants' distrust of the system generally and their lawyers specifically, and to the cultural mismatch that often existed between appointed counsel and indigent defendants.[377] Conversely, Clair observed that relatively privileged defendants who appeared with retained counsel were more likely to trust their lawyers and defer to their lawyers' expertise, all of which benefited defendants' cases.[378] Clair attributed these findings to the fact that privileged clients tended to have fewer negative interactions with law enforcement and thus approached the criminal legal system with relative good faith and that such clients were more likely to trust their lawyers based on cultural similarities between client and counsel.[379]

Considering Clair's findings and other relevant literature, this section anticipates how a mandated system of universal public defense might impact criminal legal system actors.

1. Public Defenders

Public defense is a challenging profession. Much of the difficulty stems from the conditions in which public defenders work: limited resources, high caseloads, hostility from adversaries and judges, and the fact that clients' liberty interests are at stake. Under the current regime, the people who enter the profession are often motivated by a sense of fighting injustice, defending the underdog, and challenging law enforcement's discriminatory practices.[380] The current client population is at the center of these motivations, most of whom are racially marginalized and all of whom are poor. Universal public defense expands the client population to include people from all income levels. When people like Donald Trump, Alex Murdaugh, and Martha Stewart are included in the potential client population, are the same people inspired to become public defenders?

The reality remains that even under a universal system, most defendants in criminal court will continue to be marginalized and indigent. Law enforcement investigative practices, which can then lead to prosecutions, are unlikely to change in a way that would result in fewer marginalized and

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[375] *See* Matthew Clair, Privilege and Punishment: How Race and Class Matter in Criminal Court (2020).

[376] Clair observed that judges and lawyers were likely to silence, coerce, and punish defiant clients. *See id.* at 136-41.

[377] *See id.* at 64-101.

[378] *See id.* at 127-35, 164-70.

[379] *See id.* at 102-35.

[380] *See* Ogletree, *supra* note 374, at 1240, 1276.

indigent defendants. Further, included within the 10-20% of defendants who currently hire private attorneys are the marginally indigent, those who can barely afford to hire counsel.[381] This group of defendants has little in common with defendants like Trump, Murdaugh, and Stewart who also retained private defense counsel. There are also public defenders who are motivated to enter the profession for other reasons, such as a desire to hold the state to its burden of proof, defend the Constitution, and solve complex legal problems. These motivations remain unchanged under universal public defense. For these reasons, the profession is unlikely to change based on an expanded defendant class.

Although those entering the profession may not change under universal public defense, defenders who represent relatively privileged people may experience a difference in client counseling. Matthew Clair observed that defendants with the ability to retain private counsel tended to share cultural experiences with their lawyers in ways that enabled a trusting attorney-client relationship to form more readily.[382] With trust came client deference to the attorney's expertise, silent acquiescence during court appearances, and delegation.[383] Clair noted that defense counsel tended to reward such behavior in ways that included an "offer to help agreeable clients in future cases or with respect to the mitigation of collateral consequences . . . [resulting] from the[defendants'] . . . sentences."[384] Conversely, where indigent defendants and counsel did not share such commonalities and the defendant approached the relationship with resistance, skepticism, and defiance, defense counsel tended to punish such behavior by withdrawing from representation.[385]

Another potential change under a universal model is an increase in funding available to hire more lawyers, which would help to reduce attorney caseloads. This assumes that universal public defense is experienced in a sufficiently universal way that would result in increased funding.[386] With more funding and lower caseloads, universal public defense could alleviate the impact of unconscious racial bias that defense counsel may harbor against racially marginalized clients. There is evidence that having more time to spend on each case can mitigate a defense attorney's unconscious racial bias directed against their client.[387]

Defense counsel, like all people, harbor unconscious racial bias for and against certain groups.[388] Unconscious anti-Black bias is particularly

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[381] *See* Hoffman et al., *supra* note 86, at 230 (defining marginally indigent defendants).

[382] *See* CLAIR, *supra* note 375, at 103-04.

[383] *See id.* at 101.

[384] *Id.* at 141.

[385] *See id.* at 136-39.

[386] *See supra* section II.B (discussing funding); *supra* section IV.A.1 (discussing the benefit of increased funding).

[387] *See* Richardson & Goff, *supra* note 5, at 2638.

[388] *See* Avery et al., *supra* note 5.

pronounced within the criminal adjudication system given the presumption of criminality and dangerousness that society assigns to Black people.[389] Research shows that the conditions under which public defenders work—unmanageably high caseloads and inadequate resources—force them "to engage in triage, i.e., determining which clients merit attention and which do not."[390] The research then demonstrates that such triage decision-making can activate unconscious racial bias, leading attorneys to spend less time, fewer resources, and less effort defending clients from racially marginalized groups.[391]

2. Prosecutors

A more difficult inquiry is addressing how, if at all, prosecutors' behavior might change in a system of universal public defense. The question considers whether prosecutors' conduct will differ merely because the person representing a small subset of defendants (approximately 10-20%) are now represented by a state-funded lawyer. There is evidence that prosecutors' conduct changes relative to a defendant's privilege, which the type of defense counsel can communicate.[392] Defendants appearing with retained counsel have greater relative access to privilege, whereas those with state-funded counsel are indigent and have less access to privilege. Research also shows that the defendant's race can impact prosecutor decision-making, with prosecutors favoring white defendants and disfavoring Black defendants.[393] Race and privilege are inextricably linked.

Under the current regime there is a perception that prosecutors file charges against low hanging fruit: people who lack access to privilege and are racially marginalized. The percentage of defendants who are indigent supports that perception. Moreover, prosecutors resolve approximately 95% of cases with plea agreements,[394] which often reflects the power imbalance between the prosecution and defendant with the prosecutor holding the power. In *Privilege and Punishment*, Clair found that prosecutors, like other criminal legal system actors, tend to punish defendants for defiance, disruption, and resistance, and that the types of defendants who exhibit such

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[389] *See* Stevenson, *supra* note 306, at 3, 5; *see also* Buck v. Davis, 580 U.S. 100, 121 (2017) (noting the existence of the "powerful racial stereotype—that of [B]lack men as 'violence prone'").

[390] Richardson & Goff, *supra* note 5, at 2632.

[391] *See id.* at 2641.

[392] *See* CLAIR, *supra* note 375, at 140-41.

[393] *See* M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Sentences*, 122 J. POL. ECON. 1320, 1327 (2014) (mentioning studies that show "that prosecutors favor white defendants").

[394] *See* Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2005 (2022) (identifying the national criminal trial rate as between 1-5%).

behavior tend to be indigent.[395] Examples can include prosecutors offering less favorable plea deals, recommending harsher sentences, and being unwilling to drop or reduce charges.

Clair also observed that the legal system (judges, prosecutors, and court officials) tended to reward privileged defendants for the deference such defendants afforded their defense lawyers.[396] This was born out of the fact that privileged defendants were able to more readily trust their lawyers and were more comfortable deferring to their lawyers' expertise.[397] During court appearances, such deference communicated to judges and prosecutors that the defendant was compliant. In turn, Clair noted that prosecutors tended to reward such behavior by offering more favorable plea deals, recommending lenient sentences, and demonstrating a willingness to drop or reduce charges.

With these considerations in mind, the fact that privileged defendants will receive a state-funded lawyer could go one of two ways. First, it could reproduce the existing class hierarchy, whereby the legal system rewards privileged defendants with various beneficial case outcomes based on the defendants' privilege, regardless of the fact that state-funded lawyers represent them. Second, it could create tension between privileged defendants and state-funded counsel, given that privileged clients no longer have the freedom to choose their own lawyer. That tension could result in privileged defendants responding to their lawyers with defiance, disruption, resistance, which could then result in prosecutors punishing such defendants with less favorable plea deals, harsher sentences, and an unwillingness to drop or reduce charges.

3. Judges

Universal public defense is likely to reproduce some of the preferential treatment that defendants receive from judges and the harsher treatment indigent defendants experience. A defendant's privilege, or lack thereof, is one of many factors to which a judge may respond when a defendant appears before them. In observing Suffolk County criminal court judges, Clair found that they tended to reward compliant defendants, most of whom were privileged, with more lenient treatment. This could include reduced sentences or alternative options for less punitive sentences, such as drug or mental health treatment.[398] In these instances, judges may be responding with empathy based on their perception of a shared sense of privilege with the defendant.[399] Because empathy can cooccur with racial bias, a judge's

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[395] *See* CLAIR, *supra* note 375, at 70.

[396] *See id.* at 140-41.

[397] *See id.* at 127.

[398] *See id.* at 141.

[399] *See* Weinberg & Nielsen, *supra* note 317, at 324-27.

preferential treatment can be even more pronounced if the judge and the defendant share the same race.[400]

Judges can also respond with a lack of empathy when the judge perceives differences between themselves and the defendant, such as when they do not share the same race or privilege.[401] Clair's observations supported these findings. He noticed that judges tended to punish defiant defendants, many of whom were indigent or marginally indigent. Clair described one marginally indigent defendant who was unsatisfied with his attorney's efforts and spoke out of turn in court to share his displeasure with the judge.[402] Upon hearing the defendant's protest, the judge then allowed the attorney to withdraw from representation and refused to allow the defendant, who had obtained the first lawyer for free through his union, to obtain a court appointed lawyer.[403]

V. Conclusion

Mandated universal public defense invites us to consider the public response to courts assigning relatively wealthy people state-funded attorneys. Sufficient concern could lead to an increase in funding and support for public defense. A similar concern is missing from the current regime where the public is content with a chronically unfunded, and inadequate defense system for society's most marginalized people. The idea of a universal system of appointed counsel is not a foreign concept. Its origins are from the early twentieth century, when public defense developed. Progressive thinkers first conceived of free defense for all to reform a broken criminal justice system where money and power often dictated a person's access to justice. Society finds itself at a similar position now, where money and power have a corrupting influence on the criminal adjudication system. With this proposal and assessment, it is my hope to encourage other legal scholars to engage in radical thought experiments to help us better understand seemingly intractable problems and generate dynamic solutions. Expanding public defenders' client population to include relatively wealthy defendants is not currently a viable option to transform the criminal adjudication system. However, it reveals that changing public perceptions around criminal culpability, worthiness of benefits, and social programs have the power to improve public defense.

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[400] *See id.* at 348.

[401] *See id.* at 326.

[402] *See* Clair, *supra* note 375, at 136-38.

[403] *See id.*