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The Right to Counsel Must Be Protected and Expanded

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The right to counsel must be protected and expanded

Chronic underfunding and creeping limitations threaten public defenders
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by [Lauren Carasik](#) [@LCarasik](#)

On Feb. 7, the Maryland Court of Special Appeals [granted Adnan Syed's request](#) for an appeal hearing on his claim of ineffective assistance of counsel. The Baltimore Circuit Court sentenced him to life in 2000 for killing his ex-girlfriend. His case captured the national imagination after investigative journalist Sarah Koenig [chronicled serious missteps by his attorney](#) in National Public Radio's "Serial" podcast last year. While the adjudication of Syed's guilt is still being contested, his attorney's failure to pursue a plea deal and investigate a witness who offered a credible alibi underscored the fallibility of the U.S. criminal justice system and the terrible costs to defendants.

Syed's case has highlighted the critical role of counsel in ensuring justice in criminal proceedings. Yet the right to counsel is not as sacrosanct as popularly believed. For example, last month, a [judge](#) in Utah ruled that Curtis Allgier, a white supremacist convicted of killing a local corrections officer, forfeited his right to court-appointed counsel for threatening and sending mail to his lawyer's home address. Yet it is precisely the most despised and feared among us who most desperately need an attorney to protect against prosecutorial overreach.

States are imposing financial barriers to counsel. In November indigent defendants in New Jersey faced fee hikes to help offset budget shortages in the courts. Many states already charge defendants to use public defenders services and cover court costs. The American Bar Association and other legal advocacy groups have argued that the increase in user fees can undermine the right to counsel by deterring defendants by raising, not removing, financial barriers to justice.

And public defenders are often blocked from doing their jobs competently. Not only are they overtaxed and underfunded, but they can face hostility from authorities. For example, on Jan. 27, San Francisco public defender [Jami Tillotson was arrested](#) for telling her African-American client not to answer questions from police officers or submit to being photographed. The incident, which came a month after the public defender's office participated in a Black Lives Matter rally, highlighted police overreach and the importance of access to counsel.

Courts and the legal procedures that guide them can be mystifying and intimidating for the poor and disempowered, who are the least likely to possess the resources and social capital to vindicate their rights. A fair adversarial system requires that the parties who present the evidence and arguments must be evenly matched to ensure that the vulnerable are protected from the powerful machinery of the state. On March 18, 1963, in a landmark decision in [Gideon v. Wainwright](#), the U.S. Supreme Court held that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided to him.” The court has extended the right to counsel for [convicted defendants' first appeal](#), [juvenile delinquency proceedings](#) and [misdemeanor cases](#).

The public defender system was set up ensure that poor defendants are not steamrolled by the system. It enables them to challenge the constitutionality of police conduct, test the factual and legal sufficiency of the charges, navigate complex procedural and evidentiary rules and preserve appeal rights. But the nation is failing to vigorously uphold that ideal. Poor defendants are not playing on a level field. The indigent defense bar's ability to carry out its directive is hamstrung by funding inadequacies and crushing caseloads. This is why Gideon's half-century mark [ignited a flurry of criticism](#) about the decision's unfulfilled mandate.

The US must safeguard the foundational right to counsel and fully fund legal defense for the indigent to ensure that justice is not only for the affluent.

The U.S. currently incarcerates 2.3 million people, mostly from minority communities. African-American and Latinos, who constitute about 30 percent of the nation's population, comprise nearly two-thirds of those imprisoned. By contrast, whites, who make up 64 percent of the population, account for 35 percent of the incarcerated. The mass incarceration is partly attributable to tough-on-crime policies that impose harsh penalties for petty offenses and mandatory drug sentencing. Almost half of state inmates are in jail for nonviolent offenses, and a similar proportion of federal inmates are there for drug crimes. More than 80 percent of state defendants qualify for appointed counsel. Yet few of these cases result in full trials. In 90 percent of cases [indigent defendants plead guilty](#).

In 2012 the American Bar Association [issued a report](#) decrying the persistent underfunding of public defenders and private defense counsel who are charged with safeguarding the rights of poor defendants and juveniles. Given the inadequate funding, attorneys are often required to seek approval to hire investigators, experts and interpreters, which impedes their ability to pursue a vigorous defense. Meanwhile, prosecutors have more accessible resources at their disposal and work closely with police departments, which conduct much of the investigative work. Low performance standards, inadequate training and lax oversight often characterize public defender offices and private attorneys with whom the state contracts to provide representation. Some defense attorneys [spend just minutes](#) with their clients before assessing the merits of the case, marshaling arguments, counseling defendants, negotiating with prosecutors and appearing before judges.

A high threshold

Yet proving wrongful conviction because of ineffective assistance of counsel requires clearing a very high threshold. Under [Strickland v. Washington](#), defendants have to establish that their lawyer was incompetent and that they would have prevailed with another lawyer. The decision signaled that a fairly low level of representation is required. [Napping through part of the trial](#) or drinking a [quart of vodka a day](#) does not necessarily establish that the performance of a defendant's attorney was constitutionally deficient.

To be clear, even with low pay and grinding dockets, there are many committed public defenders who provide robust representation to their clients. And there have been some positive developments to protect defendants' rights. In October the U.S. Department of Justice [announced](#) plans to cease its practice of requiring defendants who enter a guilty plea to waive any future claim of ineffective assistance of counsel.

The consequences of criminal convictions can be severe. They range from deportation, limited access to housing, the disenfranchisement of felons, threatened parental rights, diminished employment opportunities and the stigma of inclusion on sex offender registries. Incarceration is costly for society and takes a generational toll on families and communities, especially when the nation's penal system houses those who might have been acquitted or faced more lenient sentencing with adequate representation. That's precisely why the right to counsel should expand to include [misdemeanor charges](#) even when jail time is not contemplated.

"There can be no equal justice where the kind of trial a man gets depends on the amount of money he has," Supreme Court Justice Hugo Black wrote in 1956. Unfortunately, the inadequate representation of poor and minorities is as true today as it was more than 50 years ago. Syed's case provided the public with a rare and compelling glimpse into what can go wrong when defendants are not effectively represented in the system. And the continued underfunding and overburdening of public defenders show that our vaunted legal system is failing to protect constitutional guarantees to ensure equal justice. The U.S. must

safeguard the foundational right to counsel and fully fund legal defense for the indigent to ensure that justice is not only for the affluent.

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