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Lawyer's Bookshelf

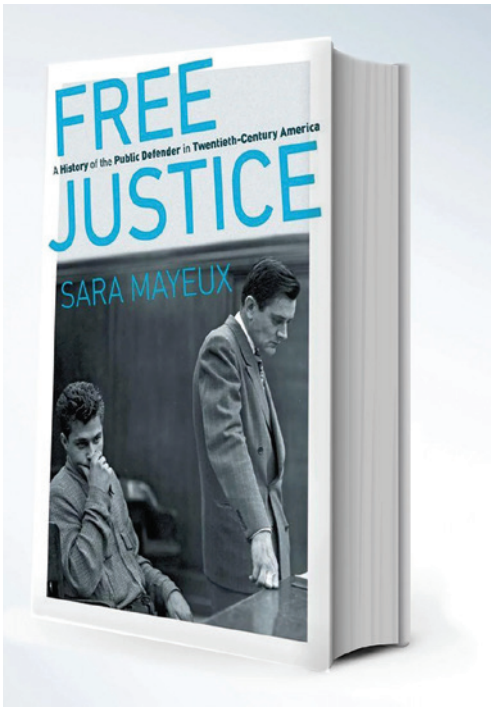
'A Good Read' About Public Defenders

REVIEWED BY PAUL SHECHTMAN

Free Justice: A History of the Public Defender in Twentieth-Century America, By Sara Mayeux, UNC Press (2020), 288 pages, $26.95

Sara Mayeux's book, *Free Justice*, published in 2020, has not been reviewed in the Law Journal and deserves to be. A professor at Vanderbilt Law School, Mayeux traces the history of the public defender from the late 19th century until the 1970s—from Clara Foltz, to Progressive Era reformers, to the *Gideon* decision and the spread of public defender offices in its aftermath.

Mayeux's account begins with Foltz, the first woman to be admitted to the California bar, who campaigned for public defenders to be "chosen in the same way and paid out of the same funds" as public prosecutors. In the late 19th century, indigent defendants were represented by private lawyers, condemned by the organized bar as "harpies" and disparaged as "lawyer-criminals"; by inexperienced lawyers, appointed by the court on an ad hoc basis, typically without compensation; or not at all. In fiery speeches first at the Chicago World's Fair in 1893 and then around the country, Foltz argued that public defenders would restore balance in the courtroom, where prosecutors, without a zealous defender to check them, behaved



like "bloodhounds." The New York Times dismissed Foltz's proposal as the "strange project" of a "female attorney," and it gained little traction nationwide.

California, however, established the nation's first public defender's office in 1914, and Chicago and San Francisco followed suit in 1930. With the Progressive Era, public defense, in Mayeux's words, became part of "an ongoing transition toward accepting social responsibility for the failings of the individual." The public defenders, advocates argued, would be ethical, and, like prosecutors, would owe a duty not only to their clients, but to the state. As Mayor Goldman, a Manhattan lawyer and early champion of public defenders, put it, public defenders would be public spirited; they would "work harmoniously with prosecutors … to strive for the highest ideals in the administration of justice." Perjured defenses would disappear; fewer trials would be needed as public defenders would plead their clients guilty if the evidence and the law compelled a plea; cases would be resolved more expeditiously; and the whole tone of the criminal courts would be elevated.

Mayeux also explains that Progressive Era reformers often saw constitutional rights as "vestigial relics." There was talk of abolishing the grand jury, the privilege against self-incrimination, jury unanimity, and even the presumption of innocence, all of which would be unnecessary if the prosecution and

defense were on equal (and publicly funded) footing. At its extreme, proponents of public defenders called for compulsory state defense for all—a system in which defenders would be "Ministers of Justice," bringing parity to the defense of rich and poor and, in the process, somehow diminishing crime. (It was argued that if defendants felt they had been treated fairly it would "go a long way to reducing crime.") Such proposals, unsurprisingly, got nowhere.

In the 1920s and 1930s, as Mayeux recounts, voluntary defender services sprang up in several cities. Supported by philanthropic contributions (the New York defenders were called "Rockefeller lawyers"), voluntary defender organizations trumpeted their independence from the state, which, as they saw it, freed them to zealously represent their clients. State funding was viewed as a form of "socialization" that risked compromising a lawyer's duty to his client. The defendant's enemy, after all, was the state, and for the state to pay lawyers was seen as akin to a doctor receiving "subsidies … from microbes." But charitable funding meant that such organizations were invariably strapped for resources and had to choose among cases. (Mayeux refers to the organizations' "Sisyphean fundraising efforts.") Only the "deserving poor (no "habitual criminals" allowed) were represented, and the lawyers, many of whom were recently admitted to the bar, were poorly paid. Moreover, the defendant's race, Mayeux suggests, factored into worthiness, even if it was not expressly mentioned.

Mayeux devotes a considerable part of her book to what she calls the "Supreme Court's doctrinal elevation of counsel." She discusses *Powell v. Alabama* (the Scottsboro Boys case); *Johnson v. Zerbst* (requiring counsel for indigent defendants in all federal felony cases); *Betts v. Brady* (declining to extend *Johnson v. Zerbst* to state cases absent a showing of special circumstances); *Gideon v. Wainwright* (overruling *Betts* and requiring counsel for indigents in state felony cases); and *Argersinger v. Hamlin* (extending the right to counsel to some misdemeanor cases). Much of this should be familiar to lawyers who took a criminal procedure class, but Mayeux tells the story well, adding new details along the way.

As Mayeux explains, *Gideon* did not expressly refer to public defenders, but it was interpreted "among journalists, lawyers and academics as a mandate to establish public defender offices and to solicit funds for existing defender organizations." In effect, judicial recognition of a right to counsel undermined the voluntary defender model. In 1961 organized defense services existed in only 3% of counties; by 1973 well over 2/3 of the nation's population was served by such offices. Mayeux's most original research comes in her examination of the post-*Gideon* history of public defense in Massachusetts, Philadelphia and Mississippi. The stories are different, but the bottom line everywhere is much the same: a crisis marked by "not enough funding, not enough lawyers [and] too many cases." One need hardly agree with Black Panther party leader Eldridge Cleaver, who castigated public defenders as "penitentiary deliverers," to recognize that crippling caseloads have often forced public defenders to engage in "assembly line representation."

Mayeux's book ends abruptly in the 1970s. (There is a brief discussion in the Epilogue of *Strickland v. Washington*, decided in 1984, in which the Supreme Court established a deferential standard for judging claims of ineffective assistance of counsel.) In the book's prologue, Mayeux references her mother, who at the end of every endeavor would say "Good game—what's next." One hopes that what is next is a second volume bringing the story of the public defender up to date. Mayeux writes lucidly about how public defenders became a national ideal and the shortcomings in the implementation of that ideal. Her account is a good read.

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