



**Kansas Journal of Law and Public Policy Symposium  
Access to Justice: Commemorating the 50<sup>th</sup> Anniversary  
of the Criminal Justice Act**

Adams Alumni Center, University of Kansas  
February 20, 2015

9:40-10:30 pm Criminal Law - *1.0 CLE credit*

**“Access to Justice on the Borderlands”**

David Gottlieb, Professor of Law, Wake Forest University School of Law

**“Unequal Assistance of Counsel”**

Professor Peter Joy, Washington University Law School

Access to Justice on the Borderlands

By David J. Gottlieb, Professor Emeritus

University of Kansas School of Law

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*Introduction*

My talk today will focus on what I believe to be the single biggest problem with access to justice in the United States in 2015—the inability of immigration detainees to access counsel in deportation actions in immigration cases. These cases are literally at the borderlands, since many of the detainees are housed in private prisons at incredibly isolated locations, like Eloy, Arizona, Calexico, California, or Artesia New Mexico, that are miles from any city, remote from attorneys, and near our border with Mexico. The cases are also figuratively at the border between criminal and civil confinement. Many of the individuals referred to detention are in fact referred under the Criminal Alien Program, a deportation program that operates through cooperation between Immigration and Customs Enforcement and local law enforcement, which targets individuals either under arrest or after conviction for criminal offenses. Criminal litigation and deportation are also linked because criminal convictions can be the basis for a finding that an individual is eligible for removal or act as a bar to remedies, such as cancellation of

removal or asylum, which would otherwise entitle an individual to stay in the country.

Finally, in my mind, criminal law and immigrant removal litigation are linked because the legal position of immigration detainees today bears some resemblance to that of criminal defendants in the years before *Gideon v. Wainwright*.<sup>1</sup> In both cases, individuals were entitled to fair process under the due process clause of the Constitution. In both cases, that process was believed, in at least some circumstances, to require counsel, but no general right to counsel was available. In both cases, case law was completely inadequate to insure that the poor and ignorant in fact received counsel, and in both cases, injustice was and is routine.

Of course, the analogy is not perfect. There is no civil *Gideon* in the pipeline. Remedies are more likely to come from legislative fixes rather than court decisions. The politics of the two issues are not the same. So a favorable outcome in the case of immigration may be more distant. But the need for a change in the law and for leadership from the legal community in the immigration area is as pressing as it was in the criminal system two generations ago.

It is routine in political conversation to hear our current immigration system described as “broken.” We know there are millions of undocumented individuals in our country, some of whom have been here for decades. Our system of immigration laws is incredibly complex. We have a procedural system that gyrates between incredible delays and incredible haste.

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<sup>1</sup> 372 U.S. 335 (1963).

At the bottom of this pyramid is a system of mass detention and an absence of legal representation. At any given time, as many as 35,000 people are held in a “patchwork” of local jails and remote detention facilities.<sup>2</sup> The number of removal proceedings in the country is over 300,000 per year, and most of the individuals caught up in the process are unrepresented.<sup>3</sup>

This lack of representation has been described by a number of studies and commissions as a “crisis.”<sup>4</sup> The reasons for the crisis are apparent, at least for those of us who work in the area.

First, the consequences of removal proceedings are overwhelming. As the Supreme Court has recognized, these consequences are often as great or greater than those in criminal litigation.<sup>5</sup> For individuals facing removal “deportation is always a harsh measure.”<sup>6</sup> Some of the individuals that are caught up in the removal system may have lived in the United States for a generation. They may have no ties at all to their “native” land and indeed, may have no ability to even speak the language of the place where our government is sending them.

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<sup>2</sup> I Urbina and C. Rentz, *Immigrant Detainees and the Right to Counsel*, New York Times, Mar. 30, 2013

<sup>3</sup> *See, Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings*, New York Immigrant Representation Study (2010) at 1 n.2;

<sup>4</sup> *Id*; *see also*, ABA Commission on Immigration, *Reforming the Immigration System: Proposals to Promote Independence, Fairness Efficiency and Professionalism in the Adjudication of Removal Cases* (2010); NYU School of Law Immigrant Rights Clinic, Immigrant Defense Project, Families for Freedom *Insecure Communities, Devastated Families: New Data on Immigrant Detention Practices in New York City* (July 23, 2012).

<sup>5</sup> *See Bridges v. Wixon*, 326 U.S. 135, 164 (1945); *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010).

<sup>6</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

On top of this separation and hardship a detainee may face incredible danger if deported. That danger is particularly evident in those classes of cases involving asylum or relief under the Convention Against Torture. These cases often, even commonly, involve individuals who have suffered incredibly cruel treatment and have been threatened with violence or death. In my brief experience as a clinical teacher in asylum clinic, I represented an individual from Ghana, who had been tortured by members of a neighboring tribe in a dispute over tribal succession, individuals who had been tortured by Mexican drug cartels, individuals fleeing from domestic abuse, individuals threatened as a result of their sexual orientation, individuals threatened with imprisonment and abuse because they were the children of dissidents, and an individual threatened with death for failing to pay a “war tax” to a guerrilla group.

Given these overwhelming consequences, and the existence of legal rights to stay for certain classes of immigrants, it is no surprise that the courts have long held that individuals caught up in deportation proceedings have the right to due process under the Fifth Amendment. This right to “fundamental fairness” has been held to require that individuals who have retained a lawyer have a right to that lawyer’s assistance at a deportation hearing.<sup>7</sup> Moreover, ineffective assistance of counsel is a statutory ground of relief for overturning of an adverse deportation decision.

However, when it comes to appointment of counsel at government expense, the courts have reached a different outcome concerning the necessity of legal help.

Appointment is not required under the Sixth Amendment, since deportation

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<sup>7</sup> *Leslie v. Attorney General*, 611 F.3d 171, 181 (3d Cir. 2010); *Castaneda-Delgado v. INS*, 525 F.2d 1295, 1302 (7<sup>th</sup> Cir. 1975).

proceedings are civil, rather than criminal. The Immigration and Nationality Act does not at this time require appointment of counsel. In addition, as yet, no court of appeals has held that aliens, even those who are detained, are required to have counsel appointed as a matter of “fundamental fairness.”<sup>8</sup>

These holdings and statutory limits create a “playing field” that guarantees injustice. If it was an “obvious truth” to the Court in *Gideon* that an individual too poor to hire a lawyer could not be assured of a fair criminal trial without provision of counsel, the need in removal cases is even greater.

First, unlike criminal litigants, asylum litigants bear the burden of proof to qualify for relief. This burden will not simply require applicants to state what has happened to them. It will require them to prove the conditions that exist in their “home” country that make it dangerous for them to return. The gay individual who fears return to a country such as Kenya, because he believes he will be persecuted on the grounds of sexual orientation, is required to demonstrate the kinds of harm likely to befall him. The individual alleging that she will be tortured must demonstrate that she will be subject to harm amounting to torture in the current country conditions. In order for either of these litigants to sustain their position, they are likely to need evidence of what is occurring abroad.

Second, applicants must deal with legal issues of staggering complexity. Bars to relief such as conviction of an “aggravated felony” require parsing of state statutes to determine the elements, whether the statutes are analogous to federal statutes, whether, if not, they are “divisible” and whether they can be added to or

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<sup>8</sup> See K. Manuel, *Aliens’ Right to Counsel in Removal Proceedings: In Brief* (Congressional Research Service)(June 20, 2014), at 6-8.

explained by various charging documents. Individuals in asylum cases must demonstrate that their harm is “on account of” a discrete qualifying factor, which may depend on both complex facts and legal argument. Establishing a connection between the qualifying factor and harm may be particularly complex in the case of non-governmental actors.

Third, immigrants face trained government attorneys in their immigration hearings. While it is true that these attorneys are themselves overburdened and operating under heavy caseloads, they do have significant expertise. They are also repeat players.

Navigating these complex legal and factual challenges would be difficult for an educated layperson with full access to modern modes of communication. To put it mildly, most immigration detainees do not have those advantages. Many are children. Many, if not most, new arrivals are unable to speak or write in English. They are often housed in detention centers in some of the most remote places in the country. They are not permitted telephones or computers while in detention. They appear for the first time in court in groups of ten or more, equipped with interpreters that they have met for the first time, faced with charges that they are unlikely to understand. They are often not even in the same room as judges, who may be appearing with government attorneys via a video connection.

Although these procedures are Kafkaesque, they are a part of a legal system that does in fact provide significant remedies. Many of the migrants in groups such as the women and children who fled Central American for our borders this past summer are fleeing violence under circumstances that, if articulated to a court,

might constitute grounds for asylum. What they require is access to legal help. The current system simply does not allow that to happen, so many of their claims go unspoken.

The remedy to these injustices is not complicated. We should provide lawyers to individuals facing deportation who cannot afford legal help. This is certainly the position of numerous bar groups that have studied the issue.<sup>9</sup> Somewhat surprisingly, it is also the position of a majority of United States citizens. In a frequently cited poll, three quarters of respondents, including a majority of members of both major parties, supported provision of lawyers for immigrants facing deportation.<sup>10</sup> A limited right to free legal help was in fact included in the Senate version of the most recent Immigration Reform bill.

While we are waiting for a legislative remedy, we find ourselves in the borderland analogous to the one that criminal litigation was in between *Powell v. Alabama* and *Gideon*. The courts have acknowledged a right to a fair hearing for individuals but have not ruled that a fair hearing requires counsel for the indigent. In the pre-*Gideon* world the courts acknowledged that even if counsel was not invariably required, it might be required in “special circumstances.” So too today, at least some forums are considering whether due process might require attorneys for individuals or groups particularly vulnerable and unable to proceed on their own.

The first major case finding a right to appointed counsel was decided in 2013. A federal judge in the United States District Court for the Central District of

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<sup>9</sup> See, *supra*, n.3.

<sup>10</sup> See M. Noferi, *Deportation Without Representation*, Slate Magazine, May 13, 2013, at [www.slate.com/articles/news\\_politics/jurisprudence](http://www.slate.com/articles/news_politics/jurisprudence)

California ruled that the government must provide representation for mentally ill immigrants incompetent to represent themselves in removal proceedings.<sup>11</sup>

Although the court's decision was based first upon the Rehabilitation Act, one of the rulings in the case stated the assumption that the immigrants in the class have a constitutional right to representation at government expense.<sup>12</sup>

More recently, litigation has commenced on behalf of a group of immigrant children between ages 10 to 17, arguing that they should be provided with attorneys during their deportation hearing. A motion for preliminary injunction was denied, but the litigation is currently ongoing.<sup>13</sup> Here too, the plaintiffs are arguing that due process should require representation for individuals completely unable to argue on their own behalves.

In addition to these litigation efforts, there are numerous pro bono projects that are attempting to narrow the gaps and to provide representation. Some of these efforts are funded via the Department of Justice and Health and Human Services, as well as through the efforts of different cities and states.<sup>14</sup> These efforts in turn supplement the charitable contributions of law firms and the free pro bono efforts of attorneys throughout the country to attempt to remedy at least some of the injustice that is going on today.

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<sup>11</sup> Franco-Gonzalez v. Holder, No. CV10-02211, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

<sup>12</sup> See Franco-Gonzalez v. Holder, 828 F. Supp.2d 1133, 1145 (C.D. Cal. 2011).

<sup>13</sup> J.E.F.M. v. Holder, No. 2:14-cv-01026-TSZ (Motion for Preliminary Injunction, Aug. 22, 2014).

<sup>14</sup> A. Pong, *Humanitarian Protections and the Need for Appointed Counsel for Unaccompanied Immigration Children Facing Deportation*, 21 W.&L.J.C.R.&S.J. 67, 77-79 (2014).



# Unequal Assistance of Counsel

Peter A. Joy  
Washington University School of Law

*Kansas Journal of Law & Public Policy Symposium*

**Access to Justice: Commemorating the  
50<sup>th</sup> Anniversary of the Criminal Justice Act**

February 20, 2015

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## Introduction

- Criminal Justice System: Ideal vs. Reality
- Right to Counsel
- Criminal Justice Act & State Public Defender Systems
- Does the lawyer make a difference?
- Blueprint for Better Public Defender Systems

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Cornealious Michael Anderson,  
Charged with Robbery, November 16, 2014

- Arrested approx. 30 minutes after a robbery
- Description of robber “black male wearing hoodie and Nike sneakers”
- Mr. Anderson – leather jacket and boots
- Show-up to victim and witness
- Police-
  - never checked surveillance tape
  - never checked alibi of 30 witnesses, including photo time stamped showing him at party at time of the robbery

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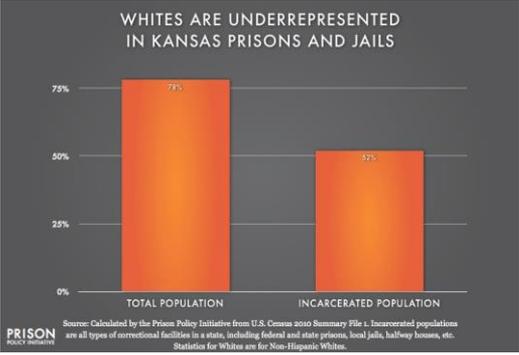
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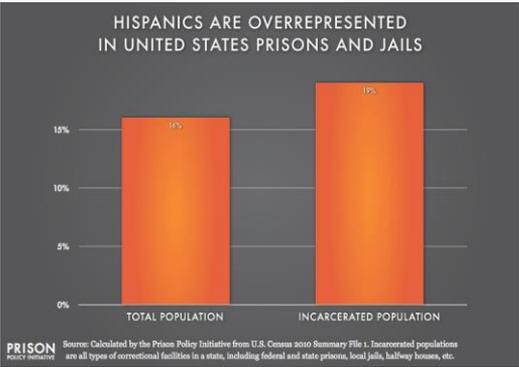
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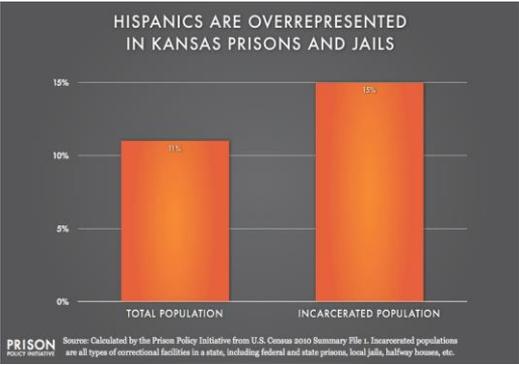
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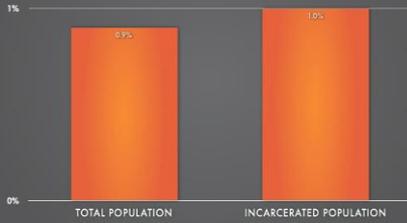
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### AMERICAN INDIANS ARE OVERREPRESENTED IN UNITED STATES PRISONS AND JAILS



**PRISON** POLICY INITIATIVE  
Source: Calculated by the Prison Policy Initiative from U.S. Census 2010 Summary File 1. Incarcerated populations are all types of correctional facilities in a state, including federal and state prisons, local jails, halfway houses, etc.

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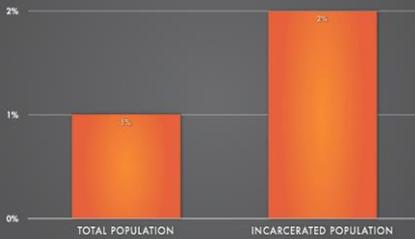
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### AMERICAN INDIANS/ALASKAN NATIVES ARE OVERREPRESENTED IN KANSAS PRISONS AND JAILS



**PRISON** POLICY INITIATIVE  
Source: Calculated by the Prison Policy Initiative from U.S. Census 2010 Summary File 1. Incarcerated populations are all types of correctional facilities in a state, including federal and state prisons, local jails, halfway houses, etc.

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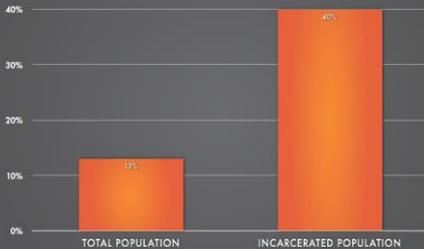
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### BLACKS ARE OVERREPRESENTED IN UNITED STATES PRISONS AND JAILS



**PRISON** POLICY INITIATIVE  
Source: Calculated by the Prison Policy Initiative from U.S. Census 2010 Summary File 1. Incarcerated populations are all types of correctional facilities in a state, including federal and state prisons, local jails, halfway houses, etc.

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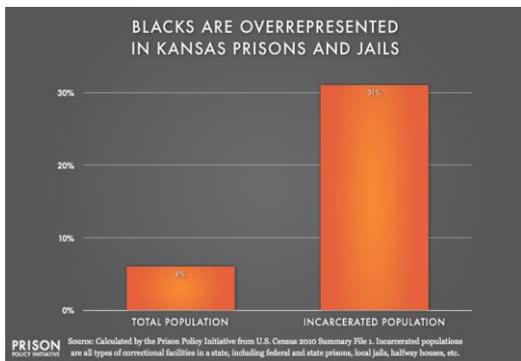
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### Right to Counsel

- 6th Amendment
- *Powell v. Alabama*, 287 U.S. 45 (1932)
- *Johnson v. Gerbst*, 304 U.S. 458 (1938)
- *Gideon v. Wainwright*, 372 U.S. 335 (1963)

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### Criminal Justice Act (CJA) - 1964

- REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE (1963) (ALLEN REPORT).
  - Counsel not paid, no case expenses
  - Inexperienced
  - Spending less than three hours on cases
  - Guilty plea rates higher for appointed counsel than retained
  - Lack of funding implicated "broader social interests" "no less than the proper functioning of the rule of law in the criminal area"

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### Criminal Justice Act

- Approximately 75% federal defendants receive Federal Public Defenders or CJA Panel Attorneys
- Funding for investigators and litigation expenses
- Closer parity with compensation for federal prosecutors
- Caseloads much lower than in most state public defender offices

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### “Assembly-line justice” Many State Public Defender Systems

- National Advisory Commission on Criminal Justice Standards and Goals:
- 150 felonies, or 400 misdemeanors, or 200 juvenile, or 200 mental health, or 25 appeals
- ABA Special Committee on Criminal Justice:

“Emphasis should be placed on the fact that *these guidelines set the maximum conceivable caseload* that an attorney could reasonably manage. These numbers are unrealistic in the absence of ideal support conditions or if the attorney is carrying any number of serious or complex cases or death penalty cases.”

- Cutting Corners

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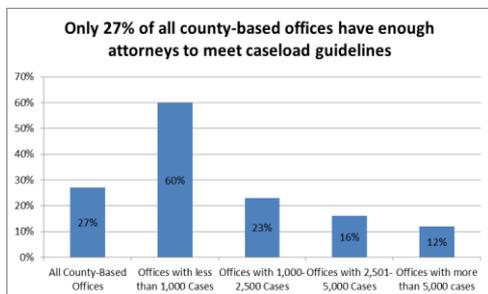
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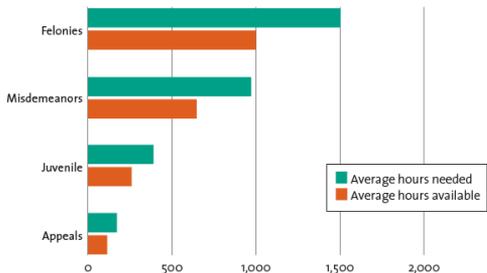
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### Meet 'Em and Plead 'Em

Recommendations vs. reality: Time a public defender should spend on caseload annually



Note: Recommendations based on National Advisory Council on Criminal Justice Standards and Goals, 2007  
Source: Bureau of Justice Statistics

Mother Jones

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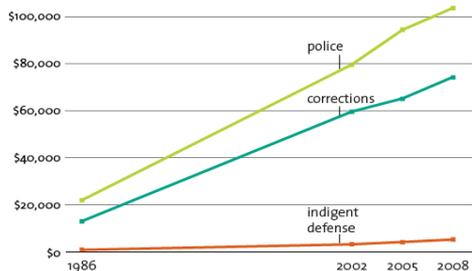
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### Scales of Justice

National spending on public defense, corrections, and police, in millions



Source: Justice Policy Institute

Mother Jones

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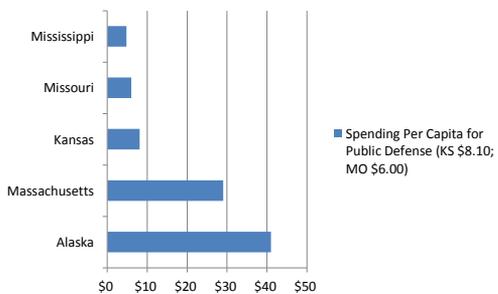
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### The Price of Justice in State Courts



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Questions

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