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Rights of Defense

By Andrew Rachlin

In 1963, the U.S. Supreme Court ruled that states were constitutionally required to provide representation to everyone, including those who cannot afford it. This decision, as stated in the case Gideon v. Wainwright, largely impacted the criminal justice system. Consider our criminal justice system if only those with means maintained representation in criminal case processing. One can only imagine the level of injustice that would exist if the poor, who are disproportionately represented in our courts, were not provided representation. While the Court ruled that indigent defendants are to be provided representation, it said little about the quality of the representation.

Representation for the indigent (i.e., those who cannot afford representation) comes in various forms. Public defender's offices are created solely to provide representation for the poor. Their offices are primarily in large cities where most crime occurs. Some jurisdictions use the assigned counsel system in which attorneys practicing in a particular jurisdiction are encouraged or required to provide indigent representation. Other areas use contract systems in which a law firm will contract with the court to provide representation to the indigent for a set period of time for an established cost.

Indigent defense is not a high priority for many jurisdictions. To begin, those who enter courts are technically "innocent until proven guilty." In reality, they may appear "guilty until proven innocent." The challenge for indigent defendants is to find adequate representation. The level of resources devoted to indigent representation is nowhere near the level of resources provided to district attorneys. In turn, attorneys representing the indigent are faced with large caseloads and limited resources—two significant challenges to say the least.

Let's assume you're a taxpaying citizen. You're provided a breakdown of where your tax money goes. Would you rather your money go toward the defense attorney (who indeed represents mostly, although not all, guilty individuals) or toward the district attorney's office, where the prosecution of criminals is a priority? Chances are, you'd like to have the bad guys put away, thus you'd prefer your resources go toward crime control and the district attorney's office. However, consider the plight of the poor in our criminal justice system. They are constitutionally guaranteed representation. Where, do you suggest, funding for their representation comes from? Would you like to devote a small portion of your taxes toward representing them? Does your response seem fair? Defendants are innocent until proven guilty. Wouldn't it make more sense, given their status prior to conviction, to devote more resources to indigent representation?

Let's be real. Most defendants who enter courts are guilty. The challenge is to provide adequate representation for all. Some cases are clear-cut and defense attorneys know they are dealing with a no-win situation. Should they pretend that their client is innocent and continue to waste government resources? No—but their job is to secure the best outcome for their clients. Again, all defendants are innocent until proven guilty. Thus the job of the defense attorney is to protect defendants' rights.

Indigent representation is a difficult subject for the general public. In one sense, the public generally prefers that everyone receive a fair day in court. On the other hand, some believe that some defendants try to beat the system and waste government resources. In the end, it's a classic battle of respecting individual rights while maintaining concern for crime control.

Jeremy Gersovitz is a lawyer in Helena, Montana. Lately he has been having a pretty good run. In the past few months, his office has added several new attorneys, beefed up its support staff, and completely renovated its technology, putting in a first-class computer system that links him to lawyers all around the state. He and his assistants have gotten salary bumps and a new car to ferry them around.

None of this would sound unusual if *Gersovitz* were a partner at *a high-priced* corporate law firm. But he's a defense attorney for the indigent—the head of the regional public defender's office in Helena. He has a job notorious for crushing its practitioners under mountains of stress and disillusionment. Not too long ago, Gersovitz was feeling a little disillusioned himself, overwhelmed by a sense that he was frantically "treading water." That has changed.

It has changed because of a single lawsuit—one that didn't even come to trial. Four years ago, the American Civil Liberties Union took the state of Montana to court, charging that its indigent-defense system was so feeble as to violate the constitutional rights of the clients. The ACLU convinced the state that the consequences of losing the case would be cataclysmic. Thousands of old cases might have been reopened on the grounds that the convicts had not received proper representation. Faced with the terrifying prospect of a justice system thrown into chaos, the Montana attorney general agreed to go to the legislature as an advocate of reform—and won a major expansion of the indigent program, big enough to pay for more lawyers, better computers and even more comfortable offices.

Montana isn't the only state that has undertaken wholesale renovation of its indigent-defense procedures in recent years. Motivated by a wave of successful lawsuits and a sympathetic political climate, legislatures are enacting reforms that even the most skeptical observers admit have the potential to bring important changes to the process of criminal justice in America.

The changes have been a longtime coming. It was back in 1963 that the U.S. Supreme Court ruled, in *Gideon v. Wainwright,* that states were constitutionally required to provide publicly funded counsel to criminal defendants who could not afford a lawyer. After the ruling, many activists rejoiced; the poor were finally going to get a fair chance to win when their cases came to trial.

But anybody who expected a revolution out of the *Gideon* case was soon disappointed. The Supreme Court left the implementation of indigent-defense systems to the individual states, and in most places, the indigent were not a high-priority constituency for lawmakers. The result, according to a recent article in the *Capital University Law Review,* was "a vicious cycle of politically unpopular subject matter leading to a lack of funding and, consequently, exhausting caseloads."

A 2004 report by the American Bar Association reached a similar conclusion. It found horrific caseloads: In Pennsylvania, for instance, an office that had been handling 4,172 cases in 1980 was handling 8,000 cases 20 years later with the same number of attorneys. The ABA also declared that "inadequate compensation for indigent-defense attorneys is a national problem." In Massachusetts, public defenders were starting at salaries of $35,000 a year, and even after 10 years of service were earning just $50,000. Indigent-defense programs were finding it impossible to compete not only with private-sector firms but with public prosecutors' offices. Nationwide, the ABA found, states and counties were spending almost twice as much on prosecution—$5 billion—as on defense—$2.8 billion.

Funding was seen as inadequate for expert witnesses, investigators and other support services, as well as for the defense lawyers themselves.

Given those statistics, it's no surprise that the quality of defense most indigent persons receive has been compromised. In Riverside County, California, in 2003, more than 12,000 people pleaded guilty to misdemeanor charges without benefit of counsel because there were no resources to provide attorneys for municipal court arraignments.

By almost any standard, indigent defendants do not fare as well in court as defendants who provide their own lawyers. A U.S. Department of Justice report found that while indigent defendants and defendants who can afford counsel are found guilty at roughly comparable rates indigents are incarcerated at significantly higher rates—88 percent versus 77 percent in federal courts and 71 percent versus 54 percent in large counties.

VICTIMS OF INCOMPETENCE

Indeed, indigent-defense horror stories have become commonplace. Of these, Calvin Burdine's is perhaps the most famous and the most appalling. Burdine was charged with the 1983 murder or W. T. Wise. During the trial, Burdine's lawyer, Joe Cannon, fell asleep 10 times, sometimes for as long as 10 minutes at a stretch. According to some accounts, Cannon never once intervened during the prosecution's lengthy examination of his client, and joined with the prosecutor in mocking his gay client as a "queer" and a "fairy." Burdine was found guilty and served 15 years in prison before a federal court overturned the conviction and granted him a new trial.

Cases such as this turn up every few years or so, and sometimes generate a minor media frenzy. But the furor tends to die down without generating any serious changes in the system. Most of the time, something more than scandal or media attention is needed to create the momentum for serious reform of the system. Increasingly often, the momentum is coming from lawsuits.

A lawsuit can scare a state into reforming, as in Montana, or, if that fails, courts can order a state to change its practices. Still, without some direction as to what an adequate system should look like, it's difficult for lawmakers to set priorities and targets. There have been blue-ribbon commissions and advisory panels, but in the absence of clear rules, few states have been able to address the problems that indigent-defense attorneys say keep them from doing their jobs well.

After years of largely futile effort, the American Bar Association began moving several years ago to establish clearer guidelines for states to follow. In 2002, the ABA pared its gargantuan rulebook on indigent defense, which totaled nearly a thousand pages, down to 10 simple recommendations.

It was the first of the ABA recommendations, requiring an indigent-defense system independent of political influence and overseen by a nonpartisan body, that convinced Montana legislators there was no way to shoehorn reform into the state's old structure, in which each county set up, managed and funded its own indigent-defense system. "They realized that they had to centralize," says David Carroll, of the National Legal Aid and Defender Association. "They had to provide funding and administration at the state level."

Montana's legislature established the position of chief state public defender, with responsibility for staffing, training and overseeing 11 regional offices. The state pays the bill for all the offices. Public defenders are free from the vagaries of county budgets, and from the control of local governments in which their natural adversaries—police departments and prosecutors—often have heavy influence.

Centralization also adds to the level of available expertise in areas where it is badly needed. When Montana's system was county-based, rural public defenders faced with the most complex cases, such as capital murder trials, were in trouble. Many had never seen a capital case and had limited resources to devote to a lengthy and intricate trial. Now the central office can dispatch a specialist in capital cases and shift resources to support a rigorous defense.

LEGAL HURRICANE

In Louisiana, the event that triggered reform wasn't a lawsuit but Hurricane Katrina. In the view of Walter Sanchez, a member of the state's Indigent Defense Board, Katrina "really exposed the holes in the system; people could see how bad things had gotten."

Katrina strained Louisiana's already fragile indigent-defense system past its breaking point. Understaffed offices lost precious members, and precarious local funding sources dried up. Judges eventually had to halt prosecutions of the poor in some areas, insisting that they could not receive even the semblance of decent representation under the existing system. In that context, lawmakers had little choice but to sit up, take notice and make changes.

In the wake of these problems, Louisiana's Indigent Defense Task Force suddenly acquired the clout it needed to change the process. Long a toothless tiger, subservient to district attorneys and unable to compel individual offices to submit the most basic caseload data, the Indigent Defense Board is now empowered to collect a wide array of performance data and to enforce minimum caseload requirements, in accordance with the ABA's 10th principle, which calls for defenders to be "systematically reviewed for quality and efficiency according to nationally and locally adopted standards."

In those states where legal pressure, administrative process and political fortune have come together to drive efforts at systemic reform, the results sometimes have been dramatic. Paul DeWolfe, the public defender in Montgomery County. Maryland, boasts of a series of impressive victories under a new, centralized state public defender system. There was the pregnant 16-year-old who was about to be sentenced to a year in residential treatment and the loss of her child when the indigent-defense office intervened. Taking advantage of social workers assigned as part of the Maryland public defender system's new "comprehensive service" model, DeWolfe's team put together an alternative plan to keep the girl out of incarceration and together with her child. The plan provided for counseling and supervision, monitored by the public defender's office itself. The judge accepted the plan, and both mother and child have stayed out of trouble.

Then there was the case of a man accused of the misdemeanor theft of $50. Because of a long list of prior offenses, the state's best plea-bargain offer was seven years in jail. Rather than take the plea, DeWolfe's office took the case to trial. They produced evidence that he had been the victim of a robbery and shooting several years before and had become addicted to prescription painkillers during his recovery. All of his crimes had occurred after the trauma of the shooting. The public defenders proposed treatment instead of jail time, and the judge agreed.

In addition to Maryland, Montana, and Louisiana, several other states have begun reforming their indigent-defense programs, most notably North Dakota, Georgia, and Virginia. But it's far too early to say whether these reforms will have the impact their backers hope for. Most of the revamped programs are in their infancy—Montana's came into effect on July 1 of this year—and so it will be a while before any hard data emerges to suggest what they are accomplishing. Stories of young mothers saved and accidental junkies brought back from the brink by dedicated, well-trained, well-supported public defenders are hopeful signs, but for now, the bulk of the evidence is still anecdotal.

And cost remains a powerful obstacle. As compelling as the moral and legal arguments in its behalf may be, indigent defense is expensive, and while some claim that it can at least partially pay for itself by shortening the amount of time people are incarcerated before sentencing and keeping innocent people out of jail, those complex calculations will take time to confirm.

Meanwhile, even the most robust reform programs frequently falter at budget time Mississippi passed sweeping reforms in 1998 only to repeal them a few years later when funding had still not materialized. Montana's 2007 allocation for indigent defense, while it has brought striking improvements to offices such as the one Jeremy Gersovitz runs in Helena, falls short of the state's original funding targets by more than $3 million. Money, says Ronald Waterman of the ACLU," is what keeps me up at night now. If the state doesn't fully fund this program, it won't work."