



Indigent Defense: International Perspectives and Research Needs

by Maureen McGough

Domestic and international researchers, policymakers, practitioners and advocates explore promising international programs and identify research priorities in the hopes of improving of indigent defense in the United States.

The U.S. Constitution guarantees all criminal defendants the right to be represented by counsel. Those defendants who cannot afford a lawyer have the right to have counsel appointed free of charge.¹ A considerable majority of criminal defendants in the United States fall into this category; yet, there are insufficient resources to meet their legal needs.

The American Bar Association (ABA) has characterized the funding for indigent defense services as “shamefully inadequate” and found that the system “lacks fundamental fairness and places poor persons at constant risk for wrongful conviction.”² Public defenders represent the majority of indigent defendants

in nonfederal cases,³ but public defender offices are significantly understaffed and underfunded. In 2007, the Bureau of Justice Statistics examined caseloads in public defender offices and found that the majority of offices exceeded the recommended number of cases per attorney under the National Advisory Commission on Criminal Justice’s Standards and Goals and employed insufficient numbers of support staff.

Simply put, indigent defense in America is in crisis.⁴ Given shortages in funding and staffing for public defender offices, there is a critical need to develop evidence-based practices that help guarantee every person’s fundamental right to counsel and due process.

A Crucial Collaboration

In 2010, the Department of Justice (DOJ) launched the Access to Justice Initiative (ATJ) to improve access to justice for all Americans, regardless of their means. NIJ and ATJ came together in January 2011 to sponsor a two-day workshop to identify domestic and international best practices for representing low-income defendants and to devise a research agenda on criminal indigent defense in the United States. This collaboration highlighted the importance of using the study of international practices to advise reform of the American justice system.

Though America has developed a legacy of ensuring that indigent defendants are represented in court, the system is far from perfect.⁵ The ABA cites, among other things, the lack of adequate funds for public defender offices, the lack of oversight and standards, the lack of independence from political and judicial pressure, and the lack of formal, systematic training for indigent defense attorneys as posing threats to the quality of indigent defense in the U.S.⁶

Several jurisdictions outside of the U.S. have developed successful approaches to provide high-quality, accessible indigent defense despite financial constraints. One of the primary goals of the workshop was to determine if any of these practices might be transferable to the United States.

Understanding how other countries have approached indigent defense — the research they have conducted, the policies they have developed, the practices they have instituted, and the political and financial challenges they have overcome — can help practitioners and researchers in the

U.S. reflect upon their own policies and practices, offer new directions for research, and inspire innovative suggestions for replacing, modifying or complementing components of the current system.

The workshop's 40 attendees included domestic and international public defense practitioners, researchers, advocates and government officials. In addition to the participants from the United States, attendees hailed from Canada, China, Colombia, Finland, Hungary, the Netherlands, Sweden and the United Kingdom.

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America's Legacy of Indigent Defense

The workshop coincided with DOJ's celebration of Robert F. Kennedy's achievements and enduring legacy, which commemorated the 50th anniversary of Kennedy's swearing-in as U.S. Attorney General. In welcoming remarks, Associate Attorney General Thomas Perrelli reminded participants of Kennedy's commitment to developing quality public defense systems and safeguarding the rights of indigent defendants. Perrelli reaffirmed, through the words of Kennedy himself, that

indigent defense is a moral imperative: "The poor man charged with crime has no lobby. Ensuring fairness and equal treatment in criminal trials is the responsibility of us all."

Perrelli noted that identifying gaps in research, addressing those gaps and disseminating findings about best practices was critical to solving problems in indigent defense. "Only by having that robust research agenda and asking the right questions about public safety and justice can we most effectively protect the public and ensure that our courts mete out true justice," Perrelli stated.

In her introduction of the workshop's keynote speaker, recently retired Chief Justice Margaret H. Marshall of the Massachusetts Supreme Judicial Court, Assistant Attorney General Laurie Robinson emphasized that the issue of indigent defense is a crucial one for Attorney General Eric Holder and she welcomed Chief Justice Marshall as "a champion of the poor and disenfranchised."

Born and raised in South Africa, Chief Justice Marshall was a leader in student-led anti-apartheid efforts. Appointed as the first female Chief Justice of the Supreme Judicial Court in 1999, she led the court in making significant progress in guaranteeing adequate representation for indigent defendants. In her remarks, she challenged participants to work together to identify ways to improve the circumstances faced by indigent defendants. She emphasized the importance of judicial leadership, oversight and independence of public defender offices, active participation from the private bar in indigent defense, and early assignment of counsel in raising the quality of public defense to the caliber of the defense a defendant with means receives.

Workshop Topics and Discussions

Concerns about public defenders' heavy case loads, the lack of time they are able to devote to each case and the lack of money for public defender offices to hire more attorneys were raised by the first panel and were echoed throughout the conference. Participants stressed the need for increased resources for public defenders and several advocated for increased participation in indigent defense by the private bar. They identified a number of other factors compounding the indigent defense crisis, including racial disparities in effective representation and a lack of state or federal entities to enforce defense standards such as the DOJ's *Compendium of Standards for Indigent Defense Systems*.⁷

Panelists discussed the costs borne by indigent defendants in the U.S. criminal defense system and the high costs of death penalty defense. Participants discussed the value of experience in representing indigent clients and the U.K.'s recently implemented experience-based accreditation system requiring that lawyers attain a minimum certification before defending more serious crimes.

The intersection of indigent defense and immigration can be particularly difficult for public defenders to navigate. Panelists discussed the need for public defenders to receive training regarding pleas and verdicts that could affect a defendant's immigration status. Participants also noted that public defenders should be encouraged to consult with immigration lawyers because of the complexity of immigration law. In addition to the participants who discussed working with experts from

external agencies, several also spoke about good outcomes and increased efficiency from bringing experts in-house.

Several panelists gave presentations on protecting the rights of juveniles in the court system. Common concerns about juvenile defense in the U.S. included lack of resources, lack

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of due process for juveniles (particularly unrepresented juveniles⁸) and the over-institutionalization of youth. Participants discussed international human rights standards for juvenile defense, namely the United Nations Convention on the Rights of the Child (which the U.S. has not ratified), and European alternatives to the court system for juveniles.

Participants also discussed the state of indigent defense in indigenous communities. Indigenous communities have distinct needs and there can be tension between preserva-

tion of culture and administration of justice. Panelists highlighted effective indigenous justice programs in Canada as possible best practices, including the Gladue court (which trains court personnel, judges, prosecutors and defense attorneys on the history and unique needs of Canada's Aboriginal communities) and using restorative measures, such as sentencing circles, whenever possible.

Near the end of the meeting, participants broke into groups based on individual expertise. Each group prioritized specific, actionable measures aimed at improving indigent defense in the United States. They provided detailed recommendations to NIJ and ATJ on the main issues affecting indigent defense and suggestions for drawing on practices from other countries.

The research priorities identified by participants included:

- Studying the cost of implementing national indigent defense standards and the potential cost savings that could result from that implementation.
- Researching how competition, particularly the involvement of the private bar and paralegals in the provision of services, might improve the system.
- Looking at systems of partnerships between tribal and federal systems, especially in the pretrial and post adjudication services areas.
- Comparing places in the juvenile justice system where counsel is waived to places where it is not to study the cost effectiveness of providing counsel and to determine whether providing counsel produces benefits for public safety.

Among participants' suggestions for international programs and practices to assess for transferability were Canada's Gladue court and adoption of the Convention on the Rights of the Child as well as other international treaties having to do with the rights of children and human rights.

The report that will be generated from the workshop, due to be released in 2011, will be used to inform ATJ's priorities and NIJ's

future research agenda on indigent defense, including which international practices may be ripe for a transferability assessment to determine the domestic viability of the practice.

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Notes

1. Different jurisdictions fulfill the mandate to provide counsel in different ways. Indigent defendants in the U.S. might be defended by public defenders, assigned counsel or contracted private attorneys, depending on the jurisdiction.
2. American Bar Association (2004), *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, American Bar Association Standing Committee on Legal Aid and Indigent Defendants, available at http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html. (Hereinafter ABA (2004))
3. In 1998, approximately two-thirds of felony federal defendants and more than 80 percent of felony defendants in the country's 75 largest counties were represented by publicly-funded counsel. Specifically, in federal court, 30.1 percent of all defendants were represented by counsel from a public defender organization and 36.3 percent were represented by a panel attorney. In the large state courts, 68.3 percent were represented by public defenders and 13.7 percent were represented by assigned counsel. See: Harlow, Caroline Wolf (2000), *Defense Counsel in Criminal Cases 1*, U.S. Department of Justice, Bureau of Justice Statistics, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf>.
4. See, e.g., Eric H. Holder, Jr., U.S. Attorney General, Remarks at the American Council of Chief Defenders Conference (June 24, 2009), available at: <http://www.justice.gov/ag/speeches/2009/ag-speech-090624.html>.
5. For further discussion, see National Right to Counsel Committee (2009), *The Constitution Project, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, available at <http://www.constitutionproject.org/manage/file/139.pdf>.
6. ABA (2004).
7. *Compendium of Standards for Indigent Defense Systems: A Resource Guide for Practitioners and Policymakers* (2000), available at http://www.nlada.org/Defender/Defender_Standards/Defender_Standards_Comp.
8. Juveniles have a right to counsel in the U.S. In some jurisdictions, they also have the right to waive counsel (the specific requirements for waiving the right to counsel vary from jurisdiction to jurisdiction). There is debate in the U.S. over whether or not every child should have an unwaivable right to counsel and, if not, what the requirements for waiving counsel should be.



Read the report from the International Perspectives on Indigent Defense workshop on NCJRS.gov. Keyword: NCJ 236022.

To learn more about public defender offices in the United States, see the Bureau of Justice Statistics' Census of Public Defender Offices, 2007:

- **County-based and Local Public Defender Offices:** <http://bjs.ojp.usdoj.gov/content/pub/pdf/clpdo07.pdf>.
- **State Public Defender Programs:** <http://bjs.ojp.usdoj.gov/content/pub/pdf/spdp07.pdf>.