



A New Approach to Indigent Defense

By: Vikrant P. Reddy – March 29, 2013

Last week marked the 50th anniversary of the Supreme Court’s unanimous decision in *Gideon v. Wainwright*, in which the court held that state governments—like the federal government—are constitutionally obligated to provide attorneys for indigent defendants in criminal trials.

The last few years have seen a surge of interest from conservatives and libertarians in improving indigent defense services, which are widely acknowledged to be inadequate. Two weeks ago, the Heritage Foundation held an event on indigent defense, hosted by former Attorney General Ed Meese. Also, as this *Washington Monthly* piece notes, a CPAC panel hosted by David Keene of the National Rifle Association last week touched on the importance of indigent defense. (Incidentally, improving indigent defense is just the tip of the iceberg for Meese and Keene, both of whom are signatories to the Right On Crime Statement of Principles, which advocates far-reaching reforms in American criminal justice.)

In a recent Cato Institute paper, Professors Stephen Schulhofer and David Friedman argued that this interest among advocates of limited government makes perfect sense:

[O]f all the services that governments provide to the poor, [indigent defense] is arguably the one most defensible on libertarian (as well as other) grounds. Judicial proceedings, including the opportunity to present a defense, are an intrinsic part of a broader service that governments provide to the public as a whole—law enforcement and social protection....[T]hat service is one of government’s most basic tasks and indeed is typically seen as the primary *raison d’être* of the state.

Schulhofer and Friedman went on to discuss the conflict-of-interest problems that plague indigent defense services. A judge generally chooses an indigent’s lawyer for him, and while most judges are well-intentioned, they face pressure to move crowded dockets. So their jobs are easier if they appoint a lawyer who will file the fewest motions and enter a quick plea regardless of the facts.

To address this problem, Schulhofer and Friedman suggested that jurisdictions experiment with indigent defense “vouchers.” (I also authored a paper for Texas Public Policy Foundation last year that further develops the voucher idea, and explains how such a system might operate in my home state of Texas.)

Vouchers would empower indigent clients to select the most capable and independent counsel. To help clients make informed decisions, local bar associations could provide information on how prior clients have rated various attorneys and monitor their caseloads to identify counsel whose high volume of cases suggests they may simply be

entering pleas rather than providing a vigorous defense. In Texas, the state Task Force on Indigent Defense is already beginning to explore these ideas.

Nearly forty years ago, Milton Friedman argued that although government may have a role in ensuring access to food and education, it does not necessarily follow that government is well-suited to managing grocery stores and schools. Food stamps for use in privately-managed groceries and vouchers for private schools probably work better. There is no reason the same logic would not apply to indigent defense services.