

Let indigent defendants choose their own lawyers

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One of the basic rules governing American politics is that elected officials love to do popular things and hate to be seen doing anything unpopular. In the criminal justice area, everyone knows that money must be spent on police, prosecutors and judges. Less appreciated is the fact that money must also be set aside for attorneys to represent poor persons who are accused of crimes. Indiana policymakers have so neglected indigent defense that the festering problem could bring a constitutional crisis in 2017.

Television cop shows regularly repeat the rules that are supposed to pertain when a person is arrested: “You have the right to an attorney. If you cannot afford an attorney, one will be provided for you.” The principle is sound. Given the complexity of the law and the court system, we can hardly be expected to navigate it ourselves. Those unable to afford an attorney shouldn’t be denied effective representation just because they don’t have a few thousand dollars stashed away. The Supreme Court has ruled that every state must guarantee this right.

Unfortunately, Indiana’s efforts have fallen short. A report from the Sixth Amendment Center, released in October, showed that Indiana’s system of indigent defense has become dysfunctional. A survey of eight counties representing a diverse cross-section of the state found problems of excessive caseloads and bad incentives, which together represent a widespread denial of the right to counsel for those unable to afford an attorney.

The caseload problem is a serious one. When an attorney assumes responsibility for lots of cases, the amount of time he can devote to each client is diminished. As with the expanding ratio between doctors and their patients, or teachers and their students, at some point the quality of their work gets so bad that it amounts to malpractice. Some Indiana attorneys are handling caseloads five times the maximum number recommended by legal bar associations. And when an attorney cannot properly work on a case, innocent people end up in prison. When those injustices are discovered, lawsuits are filed and taxpayers foot the bill.

Civil rights attorneys are now asking the Indiana Supreme Court to intervene and establish a better system by judicial fiat. Inaction by the state legislature may now bring about a constitutional crisis. Judicial orders concerning indigent defense may impinge upon the separation of powers principle because the judiciary should not be involved in the budgetary aspects of state government. No one wants to spend money to fix a leaky roof, but if the problem is not addressed, the integrity of the home is threatened. It’s the same with this legal mess.

The governor and the legislature should avoid the temptation to delay reform again with temporary, Band Aid measures. They should move boldly to reform the state indigent defense system. The ideal reform would bring some client choice to this area. Give indigent defendants the freedom to choose their own lawyer. The basic premise is simple: rather than appoint an attorney for them, the state could guarantee reimbursement, within limits, to the lawyer the client chooses. Like the school choice concept, let the consumer pick his own lawyer or firm.

One should never underestimate the importance of being able to choose who represents you in court. Rather than being stuck with whomever you are assigned, you can proactively choose the lawyer you think will serve you best. That's the American way—we prize the ability to choose our phones, our clothes, our doctors, and the places where we wish to eat. The middle-class and wealthy can already choose their attorney should their sons or daughters get arrested. A system of client choice would allow parents who are poor more options than having an attorney assigned to their teen by the court.

Indigent choice systems are working well in other countries. England has a system which provides the indigent a choice of lawyer. Ontario, Canada also operates a choice program. Closer to home, in Comal County, Texas (near San Antonio), a pilot program has been underway for the past two years in which indigent defendants have the option of choosing a lawyer from a list of those qualified and available for such cases. Comal is expected to keep the system permanently because it is working well.

Indiana's system of indigent defense is overdue for a major overhaul. Policymakers should forget about the popularity of the task that needs doing. Just do it.

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