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OPINION

States shouldn't shirk responsibility to indigent defendants

The federal government can help provoke reform of local indigent representation, but it should not relieve states of their constitutional duties.

Erik Luna

March 29, 2010



Washington and Lee University School of Law's Erik Luna

Last week, New York's highest court heard arguments in a class action challenging the legal representation of indigent defendants. The Michigan Supreme Court will consider a similar case in April. Both suits are part of a larger litigation strategy to force negligent states to live up to their constitutional obligations. In some places, the poor receive the facade of representation from overloaded, undercompensated defense attorneys.

At the same time, the Justice Department has launched an initiative to improve the representation of indigent defendants, led by Harvard law professor Laurence Tribe. The program could draw attention to those jurisdictions that skimp on their legal duty to provide competent counsel for indigent defendants.

The problem of inadequate representation is very real and must be remedied, but the difficult question is the appropriate role of the federal government. Although tempting, Congress should not throw more money at the states; instead, it needs to get out of this business altogether. Among other things, the federal government should stop feeding local law enforcement and focus on its own criminal justice system (which, by the way, is a mess).

Attorney General Eric Holder Jr. has been lauded for his initiative and appointment of Tribe — and rightfully so. *The New York Times* recently opined that Tribe's teaching and advocacy skills could be a catalyst for reform, although he "cannot be expected to solve all the financial and other problems impeding the delivery of indigent legal services."

I would apply that statement more generally. The federal government can provoke a national discussion about indigent defense, and the Justice Department should use its bully pulpit to persuade state officials to fulfill their obligations. But the federal government should not underwrite and regulate indigent representation, just as it should not bankroll local police and prosecutors.

Calls for congressional involvement in these areas are well intentioned but motivated by a widely held misconception — namely, a problem in America necessarily requires heavy doses of federal funding and management. This type of thinking has led the national government to distribute billions to state law enforcement, encouraging wasteful spending and blurring the lines of accountability, all without a dime going to indigent defense.

In a recent speech, Holder used the apt phrases "responsibility" and "fairness" in discussing indigent defense, but he also claimed that no single institution can solve the problem on its own. This latter point is mistaken: The problem is entirely of the state's own making and within its control. State lawmakers determine what will be a crime in the first place and the attached punishment, while state agents choose which individuals will be propelled through the criminal justice system. As a matter of federal constitutional law, the states have no obligation to criminalize and punish any particular behavior, nor are they required to arrest and prosecute any given individual.

But when jurisdictions wield their awesome power to deprive liberty, they cannot disavow the attendant responsibilities. Nor is it fair for the nation as a whole to absorb costs owed by a state from the choices and neglect of its officials, when that state can and, in all good conscience, should pick up the check. After all, why should taxpayers in jurisdictions that meet their constitutional obligations have to pay for a state that does not? Under most circumstances, it would be absurd for the federal government to fund an entity precisely because it violates the law. A constitutional bailout might even create perverse incentives: State officials could pass along the unpopular funding of indigent defense without having to temper the policies that overextended their criminal justice system and generated the need for more defense attorneys.

Indeed, one of the only benefits of the current economic downturn is a growing bipartisan movement to scale back criminal codes and reduce punishment. Massachusetts decriminalized low-level marijuana possession, for example, and New York eliminated some of its draconian mandatory sentences. Organizations from the American Civil Liberties Union to the Heritage Foundation are speaking out against overcriminalization.

This collective sobriety comes after a multidecade bender during which lawmakers enacted new crimes and harsher sentences without concern about costs. Now with lighter wallets and clearer heads, people are recognizing that it makes more sense to fund schools than build prisons. The fiscally driven reconsideration of criminal justice is a good

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thing, and the federal government should avoid undermining the process by relieving a state of its responsibilities.

If reasoned dialogue and the weight of constitutional duty fail to move state officials, they should be haled into court with the goal of forcing the state to fulfill its obligations. This is precisely what the class actions in Michigan and New York seek to do. The attorney general could support such efforts by opposing a recalcitrant state in amicus curiae briefs, which would pack a heavy punch in court. On these and other fronts, Tribe is an ideal point man.

Whatever path is taken, delinquent jurisdictions must be held responsible for their decisions, not absolved from their constitutional debts. The states owe indigent defendants competent legal representation. It's time to pay up.

Erik Luna is a professor at Washington and Lee University School of Law and adjunct scholar at the Cato Institute.

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