

Re: Indigent Defense Counsel and Vouchers. January 20, 2013  
To: Kent Hart  
From: Joseph Lindberg

The mandate from Gideon: every person has a right to counsel in a criminal proceeding, is fundamental to due process. This legal maxim has confronted interminable difficulties because of its economic price tag. In the recent political environment of economic austerity many states have encountered compounded problems implementing Gideon rights.

This memo addresses the difficulties with funding the right to indigent counsel. It briefly looks at some of the solutions writers have proposed to solve those difficulties and concludes by highlighting the worst, or least workable, solutions to the problem.

Most estimates show about eighty percent of all criminal defendants are represented by indigent defense counsel. See Gideon's Promise Unfulfilled, 113 Harv. L. Rev. 2062, 2 (2000). Because the demand for indigent defense attorneys is high, while the supply of indigent defense attorneys providing citizens with the constitutional right to counsel is low, funding Gideon rights is problematic.

Providing indigent defense is difficult and that difficulty has been acutely exacerbated by times of economic austerity. Yet, policy can either further compound, or on the other hand, ameliorate problems.

Underfunding for indigent defense happens for ideological reasons that conflict with basic constitutional rights. It is clear that accused criminals, people who come from the least enfranchised portion of the population, are least likely to

have much pull with politicians and the polis. See Darryl K Brown, Essay: Rationing Criminal Defense Entitlements, 104 Colum. L. Rev. 801 3 (2004).

Yet, it should be made clear, right to counsel is at the heart of due process not simply for abstract due process and constitutional reasons. When due process fails because an indigent defense attorney did not have adequate time and resources to spend on a case and that failure results in a wrongful conviction, the wrong person goes to prison and the guilty person remains at large to continue a career of violence and crime. See Lawrence C. Marshall, Access To Justice: Gideon's Paradox, 73 Fordham L. Rev. 955, 6 (2004).

There are places in the United States, "in which in which the contract to represent the county's indigent defendants is offered to the lowest bidder, without regard to experience, qualification, or the ability to spend a reasonable amount of time on given cases." Id., at 2

It is clear this policy leads attorneys to take on more clients and shirk the responsibilities concomitant with a heavy caseload. When the caseload exceeds a reasonable limit, no attorney can handle responsibly the tasks associated with each criminal case. Id., page 2.

A key policy problem happens because the policy makers fail to establish a public defender office. Gideon's Promise Unfulfilled, at 5. A good example of establishing an effective public defender is Maryland. See David Allan Felice, Justice Rationed, 52 Ala. L. Rev. 975, 4 (2001). Maryland's Public Defender is directed by a commission and because it is directed with state and, not local, funds the

commission can compensate for districts that are overburdened with indigent defendants and underfunded. Id., at 4.

Darryl Brown suggested that because underfunding and resource scarcity cause attorneys to ration time and resources, policies for rationing should be imposed on attorneys. Instead of spending time on establishing legal innocence, attorneys should focus efforts on defendants who show the greatest likelihood of being factually innocent. See Darryl K Brown, Rationing Criminal Defense Entitlements, 104 Colum. L. Rev. 801. Brown points out that the vagaries in predicting who is factually innocent and who isn't aren't easily overcome. He admits rationing isn't pretty. Id., at 11.

Two writers from the Cato Institute, Stephen Schulhofer and David Friedman argue that free-market principles should dictate the policy regarding indigent defense. A defendant should be given a voucher with which he can shop for an attorney on the free-market. See Stephen J Schulhofer, Reforming Indigent Defense, Cato Pol. Analy. 666 (2010).

This is very reminiscent of the policy of auctioning off contracts to the lowest bidder, with one glaring difference. While the person auctioning off contracts to the lowest bidding attorney knows that the law is specialized and that a personal injury or bankruptcy lawyer is not best equipped to deal with criminal law, an indigent defendant likely will not know the law is specialized. This compounds the problem of giving the contract to the lowest bidder, because a criminal defendant isn't in a position to shop for an attorney. Generally, she is in detention, and is uninformed about the specialties involved in legal advocacy. See Access, at 2

Right to counsel is part of the groundwork of American justice. It costs money, and while many solutions to adequately pay for the right to counsel can be implemented, the Cato Institute's solution is merely a way to divert funds from the public defender offices and put the funds into the pockets of the lowest bidder. It should not be done because the lowest bidder cannot offer the best defense, they only offer the lowest price. Commensurate with the right to counsel is access to competent counsel.