

**BRENNAN**  
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**FOR JUSTICE**

Brennan Center for Justice  
*at New York University School of Law*

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**Before the**  
**New York City Council Committees on Courts & Legal Services and Public Safety**  
**Regarding Indigent Criminal Defense Services**

**January 26, 2015**

Good morning, Chairman Lancman and Chairwoman Gibson and members of the Committees on Courts and Legal Services and Public Safety. Thank you for the opportunity to provide testimony to the New York City Council on indigent defense reform on behalf of the Brennan Center for Justice at NYU School of Law. The Brennan Center is a nonpartisan law and policy institute that seeks to improve our systems of democracy and justice. We work to hold our political institutions and laws accountable to the twin American ideals of democracy and equal justice for all. The Center's work ranges from voting rights to campaign finance reform, from reducing mass incarceration to Constitutional protection in the fight against terrorism. Our work encompasses efforts at both the state and national levels. I have the distinct honor of serving as the Center's Washington Office Director where I work, among other things, on justice issues, including efforts to reform indigent defense. The Brennan Center works in collaboration with several national organizations in Washington, most notably with the National Indigent Defense Collaborative<sup>1</sup>, in efforts to influence both the Executive and Legislative branches of government to improve our nation's indigent defense system.

We are pleased that the Committees on Courts and Legal Services and Public Safety are holding today's joint hearing on how New York City evaluates its provisions of indigent defense criminal

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<sup>1</sup> The National Indigent Defense Collaborative (NIDC) is a coalition of legal organizations that have historically worked on advancing and protecting legal services to the poor through a combination of litigation and advocacy work. NIDC has, most recently, been overseen by the National Legal Aid and Defender Association. Its member organizations consist of several national organizations including, but not limited to, the Brennan Center for Justice at NYU School of Law, the National Association of Criminal Defense Lawyers, the NAACP Legal Defense and Educational Fund, Inc., and the American Civil Liberties Union.

services. I am here today to offer testimony regarding efforts to improve indigent defense at the federal level and to share recommendations and best practices for federal reform that may be useful to the Council as you consider changes to the City's indigent defense delivery system.

**I. The Brennan Center Has Consistently Supported Efforts to Enhance and Improve Legal Services for the Poor**

When the Brennan Center was founded almost twenty years ago, our Justice Program had as one of its main focuses, protecting legal services for the poor. The Brennan Center became involved with efforts to ensure adequate funding for indigent defense and worked on the national front to protect adequate funding levels for the Legal Services Corporation, the nation's single largest funder of civil legal aid for low-income Americans in the nation.<sup>2</sup> This dedication to advancing and protecting the right to counsel has continued throughout the Center's existence.

Our current Justice Program is focused on creating a rational and effective criminal and civil justice system that treats all people fairly and equally by reducing mass incarceration, closing the justice gap and ensuring racial equality within these systems. This work continues to encompass efforts to ensure adequate legal defense for the poor. The Brennan Center is alarmed at the fact that 80% of low income people have trouble obtaining legal representation or otherwise accessing the civil court system to protect their property, family and livelihood. As discussed in several Brennan Center reports, access to counsel has very real implications for individuals being processed in the justice system. In the criminal context, research suggests that socially vulnerable individuals more readily submit to assertions of government authority.<sup>3</sup> This is particularly so with respect to people of color. Black suspects are more likely to feel coerced by the police compared to white suspects, less confident that their rights will be respected. Poor black and brown suspects similarly accede more quickly to government demands in the courtroom, such as pressures to plead guilty by prosecutors or judges. Without meaningful and adequate legal representation, socially vulnerable people are more likely to succumb to external pressures to plead guilty to offenses, regardless whether they committed the offense or not.<sup>4</sup> Given such realities, the need for balanced and independent representation of individuals is critical. In order to close this "justice gap" the Brennan Center aims to improve the effectiveness of the civil justice system to better serve all.<sup>5</sup>

In late 2014, legal services advocates won a significant victory in the effort to ensure a defendants' Sixth Amendment right to counsel in *Hurrell-Haring v. State of New York*. Plaintiffs in this case argued that the New York counties provided inadequate representation to the indigent. In 2010, the Brennan Center filed an amicus brief in the case representing 62 prosecutors, including former Manhattan District Attorney Robert Morgenthau, former District Attorney Joseph Jaffe, and former U.S. Attorneys Zachary Carter, Robert Fiske, Jr., and John S. Martin. The brief explained that "the judiciary has a particularly strong duty to act here, where

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<sup>2</sup> See <http://www.lsc.gov> for general information and a description of the Legal Services Corporation.

<sup>3</sup> Jessica Eaglin, Danyelle Solomon, *Reducing Racial Disparities in American Jails* (2015), Brennan Center for Justice report to be released in February 2015.

<sup>4</sup> *Id.*

<sup>5</sup> See <http://www.brennancenter.org>

the alleged constitutional deficiencies threaten the integrity of the judicial system and its very capacity to render justice.” The settlement reached in the case on October 21, 2014 offered remedies that are meant to fix the systemic flaws through the use of broad reforms.

The Brennan Center previously filed an amicus brief on behalf of the Florida Association of Criminal Defense Lawyers arguing that overworked public defenders should be allowed to refuse new case assignments when their caseloads become unmanageable. The brief argues defense attorneys have shown that excessive caseloads threaten to create "conflicts of interest" and deprives their current and former indigent clients of the effective assistance of counsel and that public defenders should therefore be entitled to limit further representation.

Currently, the Center is drafting a new report entitled “Reducing Racial Disparities in American Jails.” This report examines the many factors that lead to racial disparities in our nation’s jails and outlines a set of recommendations to help eliminate these disparities in our jails. Our findings show that one of the major contributing factors leading to this disparity is the lack of available legal counsel. For example, of the approximate 10 million misdemeanor cases filed every year, almost 25 percent of individuals charged go before a judge without a lawyer. Public defenders are guaranteed for all cases where a criminal defendant faces a term of incarceration. Nevertheless, counsel is physically or effectively denied due to court practices, overwhelming caseloads, and underfunded public defense systems.<sup>6</sup> Our report will outline ways in which this problem can be combatted.

Finally, the Brennan Center continues to use our tools of advocacy, litigation and strategic communication to focus on representation of the poor with respect to the nation’s foreclosure crisis. We recognize the crucial need for representation in the criminal context but also understand that many vulnerable Americans lose precious rights and protections due to lack of representation in civil proceedings. The nation’s recent foreclosure crisis has stripped many economically challenged populations, particularly in black and brown communities, from the generational benefits of homeownership. We think that combatting these disparities due to lack of counsel is equally worthy of our attention. We continue to work to ensure access to legal services and improving court procedures in foreclosure cases.

These are just a few examples of the ways in which the Brennan Center works to help protect the interests of the poor whose access to representation is often severely limited.

## **II. National Efforts to Reform Indigent Defense Systems**

The Brennan Center, along with our partners at other national advocacy organizations, has worked diligently to increase the national focus on indigent defense reform. Our goal of improving indigent defense, nationwide, was buoyed when Attorney General, Eric Holder, made clear at the start of his tenure that improving indigent defense would be one of his top priorities. This commitment was further enhanced when, in 2010, he created the Access to Justice Initiative within the Department of Justice and, at the same time, created a range of new grant programs

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<sup>6</sup> Jessica Eaglin, Danyelle Solomon, Reducing Racial Disparities in American Jails (2015), Brennan Center for Justice report to be released in February 2015.

meant to support indigent defense.<sup>7</sup> We and our partners took the Attorney General's new found commitment to heart and began working diligently to capitalize on this moment of new found national focus on improving legal services for the poor. These efforts have manifested themselves in the creation of myriad reform recommendations.

First, as a result of the joint effort of several of the organizations that make up the National Indigent Defense Collaborative and other key groups that either provide or work to protect legal services, the Department of Justice formed an Indigent Defense Working Group. This group meets regularly with the Department of Justice to discuss what steps the Department is taking to improve indigent defense, what issues the groups want to bring to the Department's attention concerning areas that could benefit from Executive level support, and to discuss recommendations for indigent defense improvements. This direct access to the very decision-makers who oversee relevant grant programs and other mechanisms for supporting indigent defense is a crucial part of advancing the continued effort to ensure right to counsel for the poor.

Second, the national groups that work on efforts to protect and reform legal services for the poor have, and continue to, engage in efforts to meet and confer regularly about shared work and ideas. The range of groups involved in these efforts include, but are not limited to the National Legal Aid and Defender Association, the National Association of Criminal Defense Lawyers, the ACLU, the Constitution Project and the Public Defender Service of the District of Columbia, just to name a few. These regular meetings have resulted in developing a common set of issues around which the national groups can coalesce and, through our unified voice, we work jointly to press for reforms on the national level. These reforms, range from executive action, requests for assistance and support from the Department of Justice and proposed legislation. Similar collaborative efforts among stakeholders with similar interests can be beneficial on the local level as well.

### **III. Specific National Reform Recommendations and Strategies**

As a result of the joint efforts of the national groups, a platform of recommendations is being advanced at the national level. Similar reforms may be useful as this body considers the best ways to improve indigent defense at the local level.

#### **a. Assistance from the Department of Justice**

The Department of Justice has been helpful by inserting support where needed on relevant cases. DOJ has done so by providing Statements of Interest in key cases such as the *Hurrell-Herring* case. DOJ's assistance on the state level has been tremendously helpful and there may be instances in which local jurisdictions will find it useful to request such assistance.

#### **b. The Department of Justice Can Be Instrumental in Investigating Failing Systems**

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<sup>7</sup> Eric Holder, *Defendants' Legal Rights Undermined by Budget Cuts*, The Washington Post, August 22, 2013.

Conducting investigations into failing systems is an important step that must be taken in order to pinpoint where problems exist. The national groups have requested DOJ intervention into particularly troubling matters at the state level. For example, DOJ has led investigations into failing juvenile court systems in several jurisdictions, such as St. Louis, MO and the state of West Virginia. Not only can DOJ be helpful through use of its investigatory power, but also the use of the DOJ bully pulpit can be equally instrumental. DOJ sets positive examples for the rest of the country by ensuring enforcement of the laws meant to protect the indigent.

c. **Work to Ensure Support for Adequate Funding**

Having adequate funding for indigent defense is crucial to ensuring as much legal representation for the poor is put in place in as many jurisdictions as possible. The national groups have focused a great deal of effort on encouraging DOJ to expand funding for indigent defense. These requests have not gone unanswered. During 2014, DOJ provided funding for the “Smart Defender” program to provide money for data collection and analysis. The national groups have also been focused on reforming those parts of large funding programs that we believe can work more effectively to support indigent defense. For example, we have requested that recipients of Byrne/JAG grant monies—the largest DOJ administered grant providing monies to law enforcement agencies throughout the nation—report on their coordination with affected agencies, including public defense agencies. We have also requested that DOJ support including indigent defense as one of the “re-investment” areas in the Justice Reinvestment Initiative.

The Brennan Center is particularly focused on reforming the Byrne/JAG grant program’s system of how the success of its grant recipients is measured. The Brennan Center released a report in November 2013 entitled “Reforming Funding to Reduce Mass Incarceration” which outlined a new proposal to reform grant funding of the nation’s largest criminal justice funding program to promote innovative crime reduction policies nationwide. This funding proposal, if adopted, would, among other things, help to ensure that grant recipients are using their dollars in ways that will help reduce mass incarceration, and this includes protecting the rights of the indigent.

All of these efforts have a huge impact on the overall effort to expand indigent defense funding and, ultimately, to provide a greater level of representation for the poor.

d. **Ensure Leadership Roles Are Filled That Provide Support for Indigent Defense**

Protecting and advancing the right to counsel goes far beyond ensuring adequate funding and investigating failing systems. In fact, it requires a panoply of approaches to tackle the problem. Among those approaches, it is imperative that individuals who recognize the importance of ensuring and protecting the right to counsel are placed in key leadership positions. This leadership is crucial to ensuring that the concerns of those who seek to ensure the promise of *Gideon*<sup>8</sup> are heard and that their voices are a part of reform efforts. When the Access to Justice office at DOJ was in need of a new head, the national advocacy community was fully engaged with the Department of Justice and continuously pushed to ensure that this crucial leadership position would be filled as quickly as possible with someone who championed the right to counsel. Similarly, our efforts have focused on getting defender representation in key posts such

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<sup>8</sup> *Gideon v. Wainwright*, 372 U.S 335 (1963).

as at the United States Sentencing Commission and with the National Commission on Forensic Science.

e. **Legislative Issues**

It is impossible to focus on indigent defense reform without considering the impact that the legislative process can have on the eventual outcomes. Using legislation as a tool to create needed changes is an important part of any effort to protect and advance legal services for the poor. On the national level, our collective groups have continued to support legislative efforts that will positively affect indigent defendants. During the 113<sup>th</sup> Congress, several pieces of legislation were closely followed by the advocacy community including: (1) The National Center for the Right to Counsel Act introduced by Rep. Deutch and (2) reauthorization of the Justice for All Act, sponsored by Sen. Leahy of Vermont. We are also focused on legislation that will reduce the effects of collateral consequences that are inherent in the criminal justice system, which disproportionately impacts those who find themselves in the system without proper and adequate representation. Legislation such as the bi-partisan REDEEM Act, introduced by Sens. Rand Paul and Cory Booker, is an example of such a vehicle.

**IV. Conclusion**

While many of the efforts that are ongoing on the national level are not necessarily transferrable to efforts that New York City may consider in its quest to provide appropriate indigent defense, they should serve as models for how varied approaches can reap significant benefits. Those of us working at the national level are always pleased when local jurisdictions are focused on ways to improve delivery of effective counsel to the poor. The Brennan Center, and our national partners, are available and look forward to serving as a resource as New York City continues to improve its efforts to provide representation to its most vulnerable population.