

TRANSFORMING THE SYSTEM



ENSURE FAIR TRIALS AND

Quality Indigent Defense

Every accused person is entitled to a fair trial. Indigent defendants have a constitutional right to competent representation at trial.²⁵² Yet, there is a national indigent defense crisis.

At the federal level, the Obama administration has created an initiative to aid state and county indigent defense systems. In 2010, the Department of Justice established the Access to Justice Initiative to ease the way toward more equitable and egalitarian handling of accused people by the police, courts, and corrections. Despite this effort, there are many instances in which defendants are deprived of their right to fair jury representation, provided with overburdened public defenders, and hampered by structural biases in the system.

Requiring effective indigent defense

All defendants are entitled to competent attorney representation.²⁵³ Low-income criminal defendants and those living in poverty should not be provided with overburdened attorneys, who are unable to provide them with competent representation.

Yet in many courthouses throughout the country, indigent defendants are either not receiving representation at all or being represented by attorneys who must juggle a caseload of several hundred defendants and are thus unable to provide the level of representation that our Constitution requires.²⁵⁴ National and local bodies of government should adopt comprehensive strategies to address the indigent defense crisis in this country, both by ensuring adequate representation for all defendants and making the system easier to navigate.

²⁵² See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that assistance of counsel is a fundamental right under the Constitution); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“the right to counsel is the right to the effective assistance of counsel”).

²⁵³ Ibid.

²⁵⁴ Ryan, *supra* note 109 at 28-33.

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The **Administration** should prioritize judicial appointments and focus on appointing judges who represent diverse sectors within the legal industry, particularly those with public defense and public interest backgrounds.

Congress, and local and state legislatures should pass legislation that does the following:

- ▶ Requires a universal cap on criminal defense counsel caseloads;²⁵⁵
- ▶ Provides additional resources to increase indigent representation for misdemeanor offenses to ensure compliance with constitutional obligations;²⁵⁶
- ▶ Increases payments to attorneys on the indigent defense panel by increasing the attorney compensation rate, especially rate for time outside the courtroom, with regular increases tied to increases in payments to prosecutors, to create incentives for attorneys to allocate adequate time and preparation for these cases.²⁵⁷

Legal aid societies, defender organizations, and the private defense bar should encourage defense attorneys to follow best practices and provide guidelines that are responsive to the conditions of local defenders.²⁵⁸ The Center for Court Innovation published a rubric of best practices for indigent representation, which include:²⁵⁹

1. Collecting the client's information
2. Nurturing the relationship with the client
3. Protecting the client while the case is pending
4. Evaluating the government's case
5. Conducting an independent investigation of the government's case
6. Challenging the government's case

²⁵⁵ Ibid. at 31-32.

²⁵⁶ See generally *ibid.*

²⁵⁷ Ibid. at 4, 32.

²⁵⁸ See Coke, *supra* note 4, at 12 (recommending that defenders practice self-awareness and patience, and educate other about implicit biases).

²⁵⁹ Ziyad Hopkins, Center for Court Innovation, *The Committee for Public Counsel Services Answering Gideon's Call Project* (2012-DB-BX-0010): Best Practices, Objectives and Performances Indicators 4-7 (Nov. 2014), <https://www.publiccounsel.net/cfo/wp-content/uploads/sites/8/2014/12/Best-Practices-Objectives-and-Performance-Indicators.pdf>.

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7. Developing a theory of the case and post-disposition plan
8. Preparing to persuade the finder of fact to support the theory of the case
9. Affirming a continued duty to the client
10. Protecting post-representation client information.

Local bar associations and **law schools** should form partnerships with each other, courts, and defender attorney organizations to expand indigent defense programs.

Promoting fair jury representation

Jury selection practices should encourage participation by a cross-section of the community. Yet, advocates complain that prosecutors frequently engage in racial discrimination during the juror selection process in clear violation of federal law. “Dedicated and thorough enforcement of anti-discrimination laws designed to prevent racially biased jury selection must be undertaken by courts, judges, and lawyers involved in criminal and civil trials, especially in serious criminal cases and capital cases.”²⁶⁰

Moreover, jurors from low-income communities are often unable to participate due to biased exclusion criteria. For example, prosecutors in some jurisdictions may strike prospective jurors because they have family members who have been involved in the criminal justice system.²⁶¹

The Department of Justice, particularly U.S. Attorneys, should enforce 18 U.S.C. 243, which prohibits racially discriminatory jury selection, by prosecuting prosecutor offices that have a pattern or practice of racial discrimination in the jury selection process.²⁶²

Congress should ensure that the “rule banning racially discriminatory use of peremptory strikes announced in *Batson v. Kentucky* should be applied retroactively to death row prisoners and others with lengthy sentences whose convictions or death sentences are the product of illegal, racially biased jury selection but whose claims have not been reviewed because they were tried before 1986.”²⁶³

²⁶⁰ Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (2010), <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf>.

²⁶¹ See Coke, *supra* note 4, at 18.

²⁶² 8 U.S. Code § 243 covers the exclusion of jurors on account of race or color: No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude.

²⁶³ Equal Justice Initiative, *supra* note 260.

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The **judiciary** and **local and state legislators** should promote jury selection practices that do the following, through legislation and through courtroom practices:

- ▶ Restore party-controlled voir dire, which allows attorneys for both sides in a criminal trial to thoroughly question jurors about relevant life experiences to eliminate the use of race or gender as proxies for experience;²⁶⁴
- ▶ Offer hardship accommodations to jurors, which include access to childcare, transportation passes, or mileage reimbursement, to ease the logistical and financial burden that low-income jurors face;²⁶⁵
- ▶ Ensure that prior involvement in the justice system does not bar an individual's ability to participate in a jury;
- ▶ Explore alternatives to voter-based juror rolls that ensure that community members who are not on the voter rolls can nonetheless participate in juries;²⁶⁶
- ▶ Eliminate the pro forma exclusion to jurors with family members in the criminal justice systems.²⁶⁷



For more information on ensuring fair trials, check out:

The **Sentencing Project**, which advocates for a “fair and effective U.S. criminal justice system by promoting reforms in sentencing policy, addressing unjust racial disparities and practices, and advocating for alternatives to incarceration.”

The Lawyers’ Committee for Civil Rights, which seeks to “secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities.”

264 Ibid.

265 Ibid.

266 Ibid.

267 Ibid.