

## With Money Tight, Will State Finally Overhaul Its Public Defender System?

by {ga=dking}

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Photo by [kbjesq](#)

"Don't waste your tears on him," Darryl Johnson of Albany's [Center for Law and Justice](#) told the family of a high school student accused of burglary, referring to the court-appointed lawyer who was certain that jail time was the teenager's future.

New York State's indigent defense system has long been criticized for being poorly organized, underfunded and unable to give defendants proper representation. Advocates say the poor in New York state simply cannot receive a fair trial because the system designed to protect them is overburdened. In New York City hundreds of defendants can wait hours to see one of a few available public defenders -- only to get just a moment of their time. During their next court appearance they are likely to have another representative.

While recent efforts by the state legislature and Chief Judge Jonathan Lippman have lead to the first steps in reforming the system, a true overhaul in which the state would take over the reins and set standards now seems long off due to the state's fiscal trouble. In fact, even the small gains that have been made seem in jeopardy. Meanwhile the New York Civil Liberties Union

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has brought suit against the state in hopes that it can expedite justice for thousands of poor New Yorkers.

### The Risk of Court-Appointed Counsel

The Albany family was desperate and indeed in tears; they had asked Johnson to come sit in on a meeting with the lawyer. Johnson's comment sparked the defender's ire.

"I don't know what they want from me!" the lawyer told Johnson. The court-appointed attorney told Johnson that the judge hearing the case was typically hard on burglary.

"He was frightened," said Johnson of the defender. But with Johnson's prodding and oversight the attorney pressed the judge to allow the youth to return to high school to earn his diploma, before serving any jail time. The judge agreed. Johnson wonders what would have happened if there had been no outside organization watching over the case.

Late last month, two middle-aged men sit in swivel chairs taking swigs of black-cherry store-brand soda out of medicine sized plastic cups. They laugh as they fish animal crackers out of a big plastic bag and recall their past experiences as defendants in New York state courts.

For Thurmon Brooks and James Holmes the public defender system has been both a blessing and a curse. Sometimes, they say, they have had knowledgeable lawyers who want to fight. Other times, they say, they didn't see their court appointed representatives for weeks, and then only to find out that the lawyer had cut a deal with the prosecution -- without ever consulting them.

"They come in and say, 'You gotta take this,' said Brooks. "They say you gotta take the cop-out and they don't give you any other option, and you ain't ever said you was guilty."

The pair describe the distrust defendants have of court-appointed council. "You don't see them for weeks, and then they either want you to plea or they are talking to the prosecution," says Holmes. "They don't take the time to know you, to ask whether you are guilty, where you are

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from. But they know the judge and the prosecutor."

Johnson, office operations coordinator for the Center for Law and Justice, leads the discussion. He, too, has spent time as a defendant and been represented by a public defender.

Johnson, a former resident of Harlem, recalls the days when he was a criminal defendant and was stuck "in a pen of 75 other guys waiting to get my chance to talk to one of the three public defenders."

Johnson was able to pay for his defense through some of the process, but eventually his cash ran out, forcing him to rely on a public defender. "I had to tell them how to defend me," said Johnson.

In the years since, Johnson has become involved in helping others whose lives are tied up in the justice system. One of the major issues he confronts is the quality of representation for those who can't afford their own counsel.

Alice Green, who runs the justice center, was recently alerted to such a case. "A family wrote us a letter about their son, who has been in Albany County Jail for 14 weeks and has seen his lawyer only once. When he [the defender] saw him he told him he had a plea deal for him, but he didn't want to plead guilty," explained Green. "We get a lot of complaints that their defenders have waived their right to an initial hearing before they even talk to them. These people are just being fed into the machine." Green said the current system leads poor minorities to not only be funneled into the system without legitimate trial but also breeds a strong distrust of the justice system throughout those communities.

### Problems in the System

The [New York Civil Liberties Union](#) has filed [suit](#) against the state charging that the public defender system does not provide the constitutionally required quality representation for indigent defendants. The case is currently in discovery. Some advocates hope the case will eventually force the state to reform the system.

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"This is a systemic deficiency we are talking about," said Corey Stoughton, lead counsel on the NYCLU case, "not simply one bad apple." Because funding for indigent defense in New York is left up to New York City and 57 upstate counties, each locality has a different structure for their system and provide various levels of financial support.

Some of the most important people in New York's justice system agree on the necessity of change. In fact, Chief Judge Lippman has made reforming the system one of his top priorities. Attorney General [Eric Schneiderman](#) was an outspoken proponent of reforming the system when he was a Democratic state senator and sponsored bills designed to do just that. And the New York Times has focused on defendants who received shoddy representation. But this year, with budget battles and the stuttering state and national economies at the forefront of most agendas, not much has been said about improving New York's indigent defense system.

Some steps have been taken. In 2009 the state [established the Office of Indigent Legal Services](#) to provide cash to counties to improve their defender systems. The state also created a nine-member Indigent Legal Services Board, which was asked to recommend ways counties could change the system to better represent defendants. Lippman is the board chair and the group is still working on its recommendations. Another bill [capp](#)  
[ed](#) the number of cases a public defender can take on in one year in just New York City.

Although every county in the state is responsible for providing funding for indigent defense, some counties can't afford to or simply choose to allocate less funding than others. While the U.S. Constitution requires defendants who can't afford their own representation to be assigned counsel, no state-wide standards govern what kind of defense is acceptable. "There are different levels of service in every county due to the varying fiscal health of each county," says Lippman.

In New York City, individual public defenders used to carry up to 700 cases per year. Seymour James, attorney-in-charge of the criminal practice of [The Legal Aid Society](#) and president-elect of the [New York State Bar Association](#), said he has seen a drastic reduction since the cap went into effect. We were at 687 cases per year, and we expect it to be reduced to 565 by the end of September. Certainly our objective is to get it down further to 400, and 70 by 2014." However, James notes that there are ongoing studies to see whether even 70 may be too high for lawyers to carry out a proper defense.

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Lippman declined to comment on the NYCLU case but said, "I think the policy side is where things are going to change. It is where we need to focus. Case caps may be part of it. I think the caps have made a tremendous difference, and I think the goal of 70 cases per lawyer by 2014 is a wonderful number. You would love to get it down to one case per year but it just isn't possible."

As for the Office of Indigent Legal Services, it is still pulling itself together. "The creation of the office is an important first step, but it is not likely to change the experience of those that live the reality of the system," says Stoughton. "But it is a recognition that the state owns this. Change is coming but we have a long way to go."

[Bill Leahy](#), a veteran public defender and the former head of Massachusetts Committee for Public Counsel Services, leads the office and is slowly using the agency's small, \$1.5 million budget to hire staff. The agency was slated to receive \$3 million in funding, but after Senate Republicans moved to eliminate the office entirely during this year's budget process its funding was reduced to \$1.5 million.

"Bill Leahy is committed to these issues," said Stoughton, "but after the legislature created the office they slashed the budget before we could even take a victory lap."

As head of the Massachusetts Committee for Public Counsel Services, Leahy had a \$202 million annual budget, oversaw 265 state attorneys and got to oversee the state's entire public defender system. His current gig only allows him to work toward making recommendations to improve standards for the system and to hand out a grants set aside for counties that agree to improve their legal defense services.

"Right now we are adequately funded to get started," says Leahy. "We are just starting to staff up. We are a small agency, and we will be a small agency. I am very optimistic about where we are going but in these fiscal times we need continued fiscal and political support."

Lippman also is worried about how the state's finances may play into the effectiveness of the Office for Indigent Legal Services. "Of course I'm concerned about the fiscal climate and

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staffing, but now more than any other time -- during this time of fiscal crisis --we need to help people from falling off the cliff. We have to make sure everyone gets their day in court."

On Friday, Leahy was excited to report that he was sending out contracts to 11 counties to enable them to receive state cash to fund projects that would streamline their indigent defense programs. Chenango, Delaware, Franklin, Herkimer, Livingston, Schuyler, Steuben, Tioga, Washington, Wyoming and Yates were on the list, and Leahy said a steady flow of contracts to the rest of the state's counties should begin in the next few weeks.

"The folks I've spoken to at the county level say this is the first time they have talked to anyone from the state about public defense and what they need to focus on," says Leahy. "If you're a cynic you can look at it as a small step, but we look at it as an important step forward."

### **Beyond the Patchwork**

Leahy admits New York's approach is not ideal.

"The optimal arrangement would be to have a single state agency to oversee defense so there is equal representation that doesn't depend on an individual counties' resources," he said.

James endorses that. "The problem," he said "is that we don't have an enforceable guidelines or standards for proper representation. The bar has guidelines but they are not enforceable."

Jonathan Gradess, executive director of the New York State Defenders Association, said he thinks processes are in the works that could lead to a complete overhaul to the system. "I think people are giving them space to act. If there isn't progress made, then I think there is a perfect storm that will either force the legislature to act or we will see the lawsuit force change. Both things are in equipoise."

And Gradess has another hope: He thinks Schneiderman, who [reportedly](#) has a copy of [The New Jim Crow: Mass Incarceration in the Age of Colorblindness](#) by Michelle Alexander on his desk, could very well effect reform of the system. "I expect the AG will make a difference if for no other reason than that change in the public defender system has

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come from attorneys general at both the national and state levels. We hoped the previous attorney general would make strides in this area but he didn't. He is the governor now, so he has a good shot." Gradess said.

Schneiderman is in an awkward position, since the NYCLU is suing the state that he represents over the failure of a system that Schneiderman has also criticized. But his office issued this statement: "Attorney General Schneiderman has always been deeply committed to ensuring a strong statewide public defense system that effectively serves the people of New York. He looks forward to the implementation of the board's recommendations on improving the delivery of the state's indigent legal services, so that every New Yorker will have access to the meaningful assistance of counsel they deserve."

Lippman says he believes Schneiderman will be instrumental. "Its not a question of if," said Lippman, "We have talked many times about how we are going to work together. I know he cares about this in his soul. He has told me many times and he has been very involved in this area."

As the meeting in the Law and Justice Center winds down, both Brooks and Holmes want to make it clear that they have worked with good public defenders, whose names they share with other former inmates. Knowing who is a good defender is valuable information. "You just gotta know where to find 'em," jokes Holmes.