

Indicators of Access to Justice for Defendants in Criminal Cases

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If we measure just one thing, make it be this

When *Heckman, et al. v. Williamson County* was settled in Texas in 2013 it was revealed that “Williamson County appointed attorneys in only 8% of all misdemeanor cases.”¹ Simply by requiring defendants to speak with prosecutors prior to applying for counsel, and making the process of applying for a lawyer as forbidding as possible, the right to counsel was, for all intents and purposes, effectively undone.

The threshold for access to justice in criminal courts is access to counsel because ‘lawyers are necessities, not luxuries.’² Yet examples of ‘no counsel courts’ have been found across the nation.³ Accordingly, I recommend that if we are able to adopt only one metric for access to justice in criminal courts, it should be the following.

The percentage of defendants in a court for whom counsel is appointed in a given year
(Disaggregated, if possible, by felony vs. misdemeanor)

A major advantage of this metric is that obtaining it should be relatively straightforward. Courts are ultimately the bodies responsible for making assignments of counsel and so a national survey of courts similar to the *Civil Justice Survey of State Courts* or the *Court Statistics Project* could be conducted to request this information.⁴ Fundamentally, courts need to supply only their total annual caseload (the denominator) and the number of assignments of counsel made (the numerator).⁵

Access to justice indicators must be feasible to obtain across the nation, relatively intuitive, and above all profound and direct indicators of access to justice itself. We could do little better than this metric.

And then one day, we can measure all this too

For indigent defendants, access to justice⁶ means the assurance of access to lawyers (1) who provide quality services (2) and are adequately supported in their work (3) leading to defendant clients experiencing the system as just (4). In the next two pages I suggest additional metrics in these areas.

¹ Sixth Amendment Center (2013), *Williamson County TX settles “no counsel court” lawsuit*.

<http://sixthamendment.org/williamson-county-tx-settles-no-counsel-court-lawsuit/>.

² *Gideon v. Wainwright*, 372 U.S. 335 (1963), at page 372.

³ See e.g. Smith & Maddan (2011) *Three-Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts*, <https://www.nacdl.org/reports/threeminutejustice/>; Boruchowitz, Brink & Dimino (2009) *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*, <https://www.nacdl.org/reports/misdemeanor/>.

⁴ Bureau of Justice Statistics, *Civil Justice Survey of State Courts*, <http://www.bjs.gov/index.cfm?ty=dcdetail&iid=242>; National Center for State Courts, *Court Statistics Project*, <http://courtstatistics.org/>.

⁵ In a pinch, providers of defense could be asked to supply the latter, taking care to make sure cases are counted similarly to the courts.

⁶ The United Nations Development Program defined access to justice as the “ability of people... to prevent and overcome human poverty by seeking and obtaining a remedy, through the justice system.” Ramaswamy Sudarshan (2003). *Rule of Law and Access to Justice: Perspectives from UNDP Experience*.

#1 Access to lawyers

For defendants, access to justice hinges on access to lawyers themselves. But the time between arrest and meeting an attorney can vary from minutes to months.⁷ Additionally, procedural and logistical barriers may prevent indigent defendants obtaining access to lawyers. The metrics in Table 1 would capture this variety.

A survey of courts would be one approach to gathering these data.

Table 1: Metrics for access to lawyers

How many cases are processed annually in which the right to counsel attaches?
In what percentage do defendants apply to have counsel appointed?
In what percentage is counsel actually appointed?
After a person is arrested or summoned to court, how long, on average, until:
- An opportunity to request or apply for counsel is provided?
- A decision on eligibility for assignment of counsel is made?
- An attorney is assigned?
- An in-person meeting between the attorney and the client occurs?
% defendants provided opportunity to apply for counsel at first appearance in court
% defendants where counsel is present at first appearance in court
% defendants provided with lawyer's contact information
% defendants charged for some or all of the cost of their representation
% lawyers informed of new assignments within 24 hours
% jurisdictions which levy an application fee for counsel
% jurisdictions which assign counsel immediately upon request
% jurisdictions requiring defendant to speak to prosecuting attorney prior to application
% courts with standards for determination of financial eligibility for counsel
% courts considering assets of persons other than the accused in eligibility determination
% courts automatically declining counsel to persons able to post bond
% courts requiring documentary proof of defendant financial status
% courts providing an appeal process for persons denied counsel

#2 Quality and extent of representation services

Access to justice implies that the legal services defendants receive are of sufficient quality. National standards set out expectations for what such services should include.⁸ Defense providers also emphasize the need for 'holistic' legal assistance

Table 2: Metrics for quality of legal representation & vulnerability to enmeshed penalties

In what percentage of cases did an attorney, or other member of the defense team...
Visit the alleged crime scene?
Interview a potential witness?
Request records other than the defendant's criminal history or discovery materials?
Consult with an expert witness?
Retain an expert witness?
File a written or oral motion to suppress evidence?
File a written or oral motion to dismiss the case?
Retain an interpreter to communicate outside of court?
What percentage of defendants are:
Non-citizens
Resident in public housing
Lost access to children since arrest
Disclose prior mental health diagnosis

encompassing both criminal defense and mitigation of enmeshed penalties (sometimes known as 'collateral consequences'). Representation is rarely available on the latter matters, but assessing needs in this area would quantify unmet access to justice needs. Table 2 contains proposed metrics.

These data would most appropriately be gathered from providers of defense services to indigents. Traditionally the Bureau of Justice Statistics has conducted censuses of such providers, though in a recent RFP it has also contemplated surveying individual lawyers providing representation.⁹ Both approaches may be helpful here.

⁷ Douglas Colbert (2011). "Prosecution Without Representation", 59 Buffalo Law Review, 333 at 428 & *infra*.

⁸ See for example National Legal Aid and Defender Association (1995) *Performance Guidelines for Criminal Defense Representation*. Available at: http://www.nlada.net/library/article/na_performanceguidelines (accessed 9/7/16).

⁹ See Bureau of Justice Statistics, *Indigent Defense Systems*, <http://www.bjs.gov/index.cfm?tv=tp&tid=28> and *Survey of Public Defenders: A Design Study*, <http://www.bjs.gov/content/pub/pdf/spddssol.pdf>.

#3 Resources and justice system structures

Chronic underfunding and other structural impediments to access to justice have been documented across the nation.¹⁰ Certain funding and structural factors may impede access to justice directly. Table 3 contains suggested metrics.

Table 3: Metrics for resources and justice system structures

May attorneys be compensated for representation of defendants at the following stages:

Prior to arrest?

Prior to the defendant's first appearance in court?

Prior to the determination that the defendant is eligible for assignment of counsel?

In post-conviction cases other than direct appeals?

In any case where incarceration is not a possibility?

Do providers of legal services:

Have the ability to refuse cases?

Have the ability to assign themselves to cases?

Have the authority to promulgate legally binding rules?

Have direct control of their own budget (its amount, and authority to expend it)?

Do judges:

Have control over appointment of attorneys to cases?

Have control over approval of payments to lawyers? And investigators or experts?

Must attorneys:

Undergo regular training and/or certification to handle cases?

Meet experience requirements to handle cases?

Discuss their case files with another attorney (i.e. a mentor, supervisor) periodically?

How much is expended on defense by locality

Per capita?

Per UCR index crime?

What is the salary of the chief public defender? (What percentage is this of the district attorney's salary?)

These data would most appropriately be gathered from governments under the auspices of which defense services are provided. The Bureau of Justice Statistics series on *Justice Expenditure and Employment Extracts* may be helpful here, as well as recent BJS publications on defense spending itself.¹¹

#4 Client experiences

The metrics in Table 4 may capture aspects of client experiences relevant to access to justice. The source of these data would need to be a nationally representative sample of defendants. Several researchers and at least one state agency have conducted surveys of defendants.¹² A survey modeled on the Bureau of Justice Statistics' *National Crime Victimization Survey* might be appropriate.¹³

Table 4: Client Experience Metrics

% defendants reporting they had access to an attorney to assist in their defense

% represented defendants reporting attorney listened to their needs

% represented defendants reporting attorney pursued their best interests

% represented defendants reporting they are satisfied with the outcome of the case.

¹⁰ The Constitution Project (2009) *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*. Available at <http://www.constitutionproject.org/manage/file/139.pdf> (accessed 9/8/16).

¹¹ See Bureau of Justice Statistics, *Justice Expenditure and Employment Extracts Series*, <http://www.bjs.gov/index.cfm?tv=dcdetail&iid=286> and *State Government Indigent Defense Expenditures, FY 2008-2012 – Updated*, <http://www.bjs.gov/index.cfm?tv=pbdetail&iid=5052>.

¹² For a review see Campbell, Moore, Maier & Gaffney (2015), "Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of their Public Defenders." *Behavioral Sciences and the Law*, Office of the Legislative Auditor, State of Minnesota, 2010, Evaluation Report: Public Defender System, available at: <http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf>.

¹³ See Bureau of Justice Statistics, *National Crime Victimization Survey*, at <http://www.bjs.gov/index.cfm?tv=dcdetail&iid=245>.