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# Defending the Poor

Bennett L. Gershman

**G**iven the harsh reality that the quality of justice that people get in this country often depends on how much money they have, is our society's aspiration toward "equal justice" attainable? Probably not. A criminal defendant's poverty is not necessarily inconsistent with zealous advocacy. But whether lawyers for the poor adequately protect their clients' rights in criminal cases is the subject of ongoing debate.

A recent report by the National Center for State Courts (NCSC) emphatically states that "indigent defenders get the job done and done well." It concludes that such defenders generally do as well as privately retained counsel in resolving cases expeditiously but without sacrificing their clients' interests.<sup>1</sup> This conclusion is dramatically at odds with other recent reports by experienced commentators and practitioners who have characterized the system as a "failure,"<sup>2</sup> in "complete chaos," and at a "crisis stage."<sup>3</sup>

Curiously, these reports all may be accurate, depending on which jurisdictions are being examined and what performance standards are applied. For example, New Jersey's indigent defense system recently went broke, and private lawyers were ordered to represent the poor in a pro bono capacity.<sup>4</sup> By contrast, indigent defense systems in the jurisdictions examined by the NCSC, including cities like Detroit, Seattle, and Denver, show attorneys' compensation and administrative support on a par with that of prosecutors.<sup>5</sup>

Anecdotal evidence reveals similar disparities. Reports of horrifyingly ineffec-

tive lawyering by indigent defenders are not uncommon, but neither are reports of extraordinarily zealous representation by grossly underpaid attorneys.

The landmark case of *Gideon v. Wainwright* established that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."<sup>6</sup> Since then, state and local governments have established systems for the delivery of legal services to defendants charged with crimes who are financially unable to retain private counsel.

These systems have followed four basic models:

- ▶ public defender systems, organized on a county or state level, in which service is provided by full-time or part-time salaried staff attorneys;

- ▶ assigned counsel systems, in which private attorneys are appointed as needed from a list of available attorneys;

- ▶ contract systems, in which individual attorneys, bar associations, or private law firms agree to provide services for a specified amount reflecting either a total annual cost or a stated cost per case; and

- ▶ hybrid systems, which may include any of the models described above in any combination.

## Persistent Problems

Because of the diversity of indigent defense systems, and the varying responses of lawmakers, judges, and attorneys to the problem of delivering legal services to the poor, generalizations are hazardous. Still, three major recurring issues can be highlighted and discussed: the need for adequate funding, the ever-increasing caseloads, and the continuing debate over the quality of lawyer performance. These issues are substantially interrelated.

Inadequate funding drives away some talented lawyers and impels others to cut corners—for example, by urging their clients to make quick plea bargains. Underfunding also limits lawyers' ability to provide effective representation by denying funds necessary for investigative or expert assistance.

The pressure of heavy caseloads compels lawyers to devote insufficient time to each case, characterized by one lawyer as the "defendant shuffle." Volume also drives the system toward "plea-bargained justice" where all the principal actors—judges, prosecutors, defense attorneys, and even defendants—frankly recognize that the efficiency and even the survival of the system can only be achieved at the expense of fairness.

Finally, relegating indigent defense work to the bottom of the fiscal priorities list sends a disturbing message to practitioners about the value that our society places on defending poor people. Indeed, this message may partly explain the substandard defense lawyering frequently encountered, most conspicuously in capital cases.

Inadequate funding has traditionally been the principal complaint. One-half of public funds for criminal justice matters go to law enforcement, another quarter to corrections. The remainder is split among judges, prosecutors, and indigent defense costs.<sup>7</sup>

Recent budget cuts have markedly contributed to the present crisis, resulting in fewer public defenders, investigators, and clerical staffers, with less equipment and books to help them handle their growing caseloads. Although prosecutors also have to cope with budget problems, they generally rely on police work to assemble their cases, and they usually have enough investigative, expert, and other supporting resources to overwhelm the indigent defender.

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Budget cuts have also exacerbated problems involving representation of poor people by private assigned counsel, as the New Jersey situation demonstrates. Historically, requiring private counsel to provide legal services to the indigent has been controversial. The hourly rates for assigned counsel are usually a small fraction of the rates ordinarily billed by private attorneys. Often, defenders' fees are subject to financial caps—for example, as low as \$500 for representing a defendant charged with a felony.<sup>8</sup> These caps often apply regardless of how much time the lawyer devotes to the case—quite a powerful incentive for the lawyer to pressure the client to accept a speedy guilty plea rather than go to trial.

System overloads compound the problem. Some public defenders have misdemeanor caseloads running as high as 1,200 a year, and some attorneys have as many as 30 trials per day.<sup>9</sup> The prison population nationwide has tripled in the past 15 years, and the "war on drugs" has resulted in substantially increased court volume, with the vast majority of these defendants being indigent.<sup>10</sup>

The pressure on provision of defense services can be enormous. Indeed, pro-

cessing heavy caseloads may raise ethical issues, a point that is noted in Standard 5-4.3 of the American Bar Association Standards for Criminal Justice: "Neither defender organizations nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations."<sup>11</sup>

[REDACTED]

*Inadequate funding drives  
away some talented lawyers  
and impels others  
to cut corners.*

[REDACTED]

One major consequence of increasing volume is the pressure to dispose of cases by negotiated settlement. Guilty pleas account for over 90 percent of all convictions.<sup>11</sup> Most court administrators contend that if guilty pleas were not maintained at this rate, the criminal justice system would break down. Judges, prosecutors, and defense lawyers are aware of the need for guilty pleas, cooperate to get them, and are often

praised and promoted for their efforts.

The downside of this tacit arrangement, of course, is that both defendants and society may lose from such a process. Defendants forgo their right to have their guilt proven in order to avoid the risk that going to trial will result in far harsher punishment. Society suffers because the rights of all are threatened by an arguably unfair system; the perception of unfairness fosters resentment and unrest, even riots; and costs of prison for offenders and welfare for their families may be unnecessarily high.

Perhaps recognizing the inequities in a system that depends for its very existence on plea bargaining, the district attorney in Bronx County, New York City, recently banned plea bargaining in felony cases, thereby joining Alaska as the only other jurisdiction to adopt such a policy.<sup>12</sup>

Even if funding were adequate and volume were manageable, the issue of lawyer performance would remain. Some jurisdictions set performance standards, but they are merely aspirational, not mandatory.<sup>13</sup>

Public defender offices have been criticized for failing to provide specialized

representation for juveniles, parole violators, or high-level offenders; failing to provide continuous representation by one attorney; hiring part-time staff attorneys; and not providing adequate training and supervision. Assigned lawyers have been criticized for having insufficient experience in criminal matters or insufficient trial skills.<sup>14</sup>

The inadequate legal assistance provided by lawyers assigned to represent capital defendants is a pervasive problem, and has been repeatedly criticized, most recently in a task-force report prepared by the American Bar Association.<sup>15</sup> This report emphasized that one of the major problems undermining the fairness of death-penalty litigation was the poor quality of defense services provided to those facing execution.

The problem of ineffective counsel has been aggravated by Supreme Court decisions like *Strickland v. Washington*,<sup>16</sup> which establishes an extremely low threshold for lawyer competence and further requires a showing of prejudice even if incompetence is demonstrated. What this means in practice is that appellate courts will affirm convictions even when counsel has been grossly deficient—for example, failing to call crucial witnesses,

refusing to raise critical issues, declining to make a closing argument, appearing in court intoxicated, or filing a one-page appellate brief without citing a single case.<sup>17</sup>

Providing adequate legal defense for the poor requires a combination of efforts and initiatives.

Judicial administrators and bar associations are in a position to lobby law-

[REDACTED]

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toward 'plea-bargained  
justice.'*

[REDACTED]

makers for a larger slice of the criminal justice budget for indigent defense. Other sources of funding could also be found. Potential sources include a percentage of crime-forfeiture proceeds, a portion of the interest from lawyers' trust accounts or lawyer licensing fees, or a larger share of assessments taken from court disposition fees or traffic convictions.

Public defenders and the private bar have filed lawsuits over funding and caseload issues, sometimes successfully,

sometimes not. For example, an overworked public defender in Atlanta reported being demoted by the county public defender's office after filing a motion asking the judge to appoint her to no more than six cases per day.<sup>18</sup> The political fallout from such litigation needs to be calculated in advance.

Lawmakers can take the initiative to eliminate, reduce, or reclassify penal offenses, thereby lessening misdemeanor caseloads without necessarily sacrificing public welfare or safety concerns. Prosecutors can use their discretion more broadly to divert criminal cases out of the system—for example, by agreeing to a defendant's participating in a drug treatment program.

Training and continuing legal education programs for indigent defenders should be made mandatory in every jurisdiction. Panels of experienced practitioners should screen and periodically review the qualifications of private attorneys who will be given criminal defense assignments. Mentoring programs in which more experienced practitioners supervise and critique the work of newly assigned counsel should be established.

Defending the poor is not politically popular. But a nation based on the rule

of law has a commitment to provide legal services to defendants who are financially unable to obtain representation. Adequate resources and lawyer performance incentives must be available to ensure that defendants get competent advocacy.

Shrinking funding and expanding caseloads increase the burdens on already beleaguered indigent defenders to get the job done well. Unless society can effectively respond to the current crisis, the quality of our criminal justice system will continue to erode, and with it the rights of all criminal defendants. □

#### Notes

- 1 NATIONAL CENTER FOR STATE COURTS, *INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL* (1992).
- 2 Michael McColville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 901 (1986-87).
- 3 These comments were expressed at a recent conference of the National Association of Criminal Defense Lawyers on May 14, 1992. See *Speakers at NACDL Program Decry Crisis in Indigent Defense, Suggest Responses* (hereafter *Speakers at NACDL Program*), 51 CRIM. L. REP. (BNA) 1285 (1992).
- 4 Iver Peterson, *New Jersey's Poor Find That Blind Justice Is Broke*, N.Y. Times, Oct. 29, 1992, at B1, B8.
- 5 See *INDIGENT DEFENDERS*, *supra* note 1, at 3.
- 6 372 U.S. 335, 344 (1963).
- 7 *Speakers at NACDL Program*, *supra* note 3, at 1287.
- 8 See Rodney J. Uphoff, *The Criminal Defense Lawyer: Zealous Advocate, Double Agent, or Beleaguered Dealer?*, 28 CRIM. L. BULL. 419, 433-34 (1992).
- 9 See *Speakers at NACDL Program*, *supra* note 3.
- 10 See Timothy R. Murphy, *Indigent Defense and the U.S. War on Drugs*, CRIM. JUST., Fall 1991, at 14.
- 11 See *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring); see also BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, *Bulletin: Felony Sentences in the State Courts, 1988*, at 6 (1990).
- 12 See Ian Fisher, *Reconsider Ban on Plea Bargains, Bronx Lawyers Ask*, N.Y. Times, Dec. 4, 1992, at B3; see also Martin Fox, *Next Six Weeks Seen Critical in Bronx Courts*, N.Y.L.J., Jan. 4, 1993, at 1. As of this writing, it is too early to assess the impact of this policy.
- 13 See National Legal Aid and Defender Ass'n, *Standards for Defender Services* (1976).
- 14 See Michael McKeon, *Albany NAACP Says Public Defenders Doing Poor Job*, TIMES UNION, Dec. 19, 1991, at B4.
- 15 Ira P. Robbins, A.B.A. Task Force on Death Penalty Habeas Corpus, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, A.B.A. SEC. CRIM. JUST. (1990).
- 16 466 U.S. 668 (1984).
- 17 *Hearings on the Nomination of Ed Carnes to the U.S. Court of Appeals, Eleventh Circuit, before the Senate Comm. on the Judiciary*, 102d Cong., 2d Sess. (1992) (statement of Stephen B. Bright, Director, Southern Center for Human Rights).
- 18 See *Speakers at NACDL Program*, *supra* note 3.