Encyclopedia of Law & Society: American and Global Perspectives

Legal Aid, Criminal

Contributors: Debra S. Emmelman
Editors: David S. Clark
Book Title: Encyclopedia of Law & Society: American and Global Perspectives
Chapter Title: "Legal Aid, Criminal"
Pub. Date: 2007
Access Date: December 08, 2014
Publishing Company: Sage Publications, Inc.
City: Thousand Oaks
Print ISBN: 9780761923879
Online ISBN: 9781412952637
DOI: http://dx.doi.org/10.4135/9781412952637.n425
Print pages: 941-945

http://dx.doi.org/10.4135/9781412952637.n425
Legal aid for criminal defendants in the United States consists of providing free and effective defense counsel to those who cannot afford it. This service takes various forms, including the public defender system (all services are provided by the municipality it represents), the private contract system (individuals or corporations compete for contracts from a municipality to handle indigent criminal cases), as well as the pro bono system (private practitioners voluntarily or involuntarily handle indigent criminal cases on a rotating basis). A comparatively recent development in U.S. history, legal aid was first recognized as a legal right in the mid-nineteenth century. It has since continued to be the object of scrutiny both inside and outside the courts.

Legal Background

The National Legal Aid and Defender Association traced the legal history of the right to counsel in the United States to the 1853 case of *Webb v. Baird* (6 Ind. 13), in which the Indiana Supreme Court acknowledged the right of indigent persons accused of crimes to free defense counsel. Although this early argument was grounded in the values of "a civilized society," later arguments were grounded in the Sixth Amendment to the U.S. Constitution, which states that, "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defense."

In 1938, the U.S. Supreme Court affirmed the right to free defense counsel for indigent persons accused of crimes at the federal level in *Johnson v. Zerbst* (304 U.S. 458). Guaranteed protections at the state level developed slowly and sporadically. In 1932, the Supreme Court held in *Powell v. Alabama* (287 U.S. 45) that Fourteenth Amendment extended the Sixth Amendment's right to counsel in all *state* capital proceedings. The Court refused to extend the Sixth Amendment right to state felony proceedings, however, in *Betts v. Brady* (316 U.S. 455, 1942). In 1963, the Supreme Court overruled *Betts v. Brady* and unanimously held in *Gideon v. Wainwright* (372 U.S. 335) that an indigent person accused of a serious crime was entitled to the appointment of defense counsel at state expense.

In 1967, the right to free defense counsel was extended to juveniles (*In re Gault*, 387 U.S. 1), and in 1972, to all misdemeanor state proceedings where there is a potential

loss of liberty (*Argersinger v. Hamlin*, 407 U.S. 25). In 1984, the court decided that the defendant was entitled to *effective* assistance of counsel (*Strickland v. Washington*, 466 U.S. 668). Other Supreme Court decisions protect the right to counsel for low-income defendants at various stages of criminal and postconviction proceedings, as well as for certain legal proceedings that threaten the loss of liberty outside of criminal court.

Law and Society Research

The primary concerns among social scientists are whether some types of defense systems provide better service than others, and the extent to which unfavorable case outcomes for poor defendants is less the result of the quality of legal services provided them than the everyday circumstances and characteristics associated with defendants having a low social status.

Early Research: “You Get What You Pay For”

It appears that most people equate free defense counsel with incompetent or unprofessional legal services. In essence, most people believe that “one gets what one pays for”; because one does not pay for publicly provided attorneys, one cannot expect quality service. This sentiment is reflected in much of the early research on attorneys for the poor.

In the 1960s, David Sudnow studied the manner in which public defenders employ the penal law in their daily activities. He argued that because attorneys are more beholden to prosecutors and judges than defendants are, they presume that their clients are guilty and seek only to strike “reasonable” plea bargains. Abraham Blumberg described a similar situation in his study of the criminal defense bar in New York City. In the 1970s, Anthony Platt and Randi Pollock found that most public defenders viewed their position as training for private practice. Most left the public defender's office after an average of two and a half years, feeling ‘burned out' and embittered. Those who remained as career civil servants were usually motivated by an unwillingness or inability

to successfully compete in the marketplace of private practice. Gregg Barak studied the system historically and maintained that the public defender system arose not as the consequence of progressive and humanitarian legal reform but rather because of the economic forces of capitalism. In the same way, he argued that the contemporary public defender system merely reinforced the corporate capitalist order and served ruling-class interests.

Through empirical testing, numerous other researchers have provided findings that support these earlier contentions. They have noted that the type of attorney a defendant retains (that is, privately retained versus publicly provided) is associated with unfavorable case outcomes.

More Expensive Attorneys Are Not Always Better

A wave of studies that emerged later pointed out that publicly provided attorneys for indigent criminal suspects supply service comparable to that of privately retained attorneys, but that certain structural or systemic flaws appear either to produce some unfavorable outcomes or to obscure the attorneys' effectiveness. Some of these researchers have gone so far as to argue that attorneys for indigent defendants perform satisfactorily because of particular systemic or structural conditions inherent in the system of public defense.

Lynn Mather, for example, found in an ethnographic study of public defenders that two features were most important to these attorneys' assessments of cases: (1) the strength of the prosecution's case, and (2) the seriousness of the case, which in turn included the seriousness of the charge and the defendant's prior record. These factors affected not only pretrial screening decisions and the choice of disposition method but also the assignment of cases to more or less experienced attorneys; more experienced attorneys handled the more serious cases. Overall, private attorneys and public defenders tended to make the same recommendations to their clients and achieve the same results in their cases. Court-appointed attorneys who were paid on an hourly basis, however, were more likely to take cases to trial than either public defenders or

private attorneys. Additionally, defendants appeared to trust privately retained attorneys more than publicly **[p. 942 ↓]** provided attorneys, and, thereby, went along with their recommendations more often.

Many researchers have also found that private and publicly provided attorneys perform comparably. In addition, Gerald and Carol Wheeler found that the most significant factor in case disposition was whether defendants received pretrial release, which some defendants failed to secure because their attorneys were unable to obtain a bail bond. The authors suggested that fixing this flaw in the system would go far in promoting justice for poor criminal suspects.

Jerome Skolnick appears to have been the first to note that certain systemic conditions might actually encourage adversarial behavior among criminal attorneys for the poor. In his 1967 study of social control in the adversary system, he argued that public defenders not only perceived their role to be similar to that of most private defense attorneys, but that they appeared in some respects to be better equipped to carry out their role. They controlled many cases and were therefore better able to frustrate the district attorney's office. He also observed that because they have less client control, public defenders were more likely to take cases to trial. Similarly, Roy Flemming found that to win their clients' confidence, as well as avoid allegations of professional incompetence, attorneys who represented public clients played an advisory rather than a stronger, more insistent, recommendatory role. This actually resulted in public clients becoming more involved in the development of their cases. William McDonald concluded that elite American lawyers had a vested interest in maintaining a creditable system of indigent criminal defense because it prevented challenges to their privileges as well as freed them from pro bono work in the criminal courts.

Lisa McIntyre provided a new model of public defense to explain both how public defenders managed to do about as well for their clients as private lawyers did for theirs and why public defenders—regardless of the actual quality of their work—continued to be plagued by a stigma that they were inept. According to McIntyre, an adversarial character among public defenders appeared to be cultivated by the court system's need to maintain legitimacy. However, this situation implied a contradiction whereby a truly effective public defender system entailed calling into question the legitimacy of behaviors performed by other members of the court system. Therefore, she reasoned,

the survival of the public defender's office appeared to hinge on its ability to remain in the shadow of disrepute.

Many of these debates were reflected in a 1985 New York University symposium convened to discuss whether the promise of effective assistance of counsel for indigent criminal defendants, as stipulated in *Strickland v. Washington*, had been fulfilled. The general consensus was that this guarantee had not been satisfied. Additional discussion focused on whether plea bargaining itself undermined effective assistance to indigent defendants and should therefore be modified or abandoned altogether, as well as how a better system for defending the poor might be achieved. Debra Emmelman addressed these issues and argued that a private nonprofit corporation of court-appointed defense attorneys appeared to be most effective at encouraging an ethical defense posture among its attorneys. She presented evidence that plea bargaining could be seen not merely as an effective method for representing indigent defendants but perhaps equally as or more effective than trial.

Social Class and Criminal Case Outcomes

Poor criminal defendants endure higher conviction rates, higher rates of conviction for more serious crimes, and more severe sentences. Numerous researchers have considered the extent to which these case outcomes can be attributed to ineffective defense services, the possibility that poor people are more likely to commit crimes (as well as more serious crimes), or simply some type of discrimination based solely on their low social status. Their findings have been mixed.

Ronald Farrell found that lower-class homosexuals were more likely to receive severe sentences than their middle-class counterparts. Daniel Willick and colleagues found that severity of sentencing was not related to social class when scientific controls were used for the defendant's record of prior convictions. Lower-class defendants, they found, were more likely to have had previous convictions. John Hagan found **[p. 943 ↓]** that there was some evidence of differential sentencing based on social class in capital cases, but that the relationship between these factors in noncapital cases was statistically insignificant. In contrast, Stevens Clarke and Gary Koch found that, although defendants' incomes did not affect the likelihood of their being convicted of crimes,

their incomes did affect the likelihood of their getting prison sentences. Similarly, Ivan Jankovic found that socioeconomic status affected the punishment received by persons convicted of drunken driving, and Alan Lizotte found that laborers and nonwhites were more likely to be incarcerated between arrest and final disposition, as well as given longer prison sentences, than those from higher socioeconomic groups. However, Malcolm Holmes and colleagues found in 1987 that social status had little direct effect on charge reductions and that the effect was not in the direction that one would expect. Instead, minorities received less severe responses.

Donald Black has argued that the manner by which social class as a component of social status influenced criminal case outcomes had been improperly conceptualized. According to Black, a defendant's social status told one little or nothing about how a case would be handled. Instead, one must consider each adversary's social status in relation to that of others involved in the case. Variations in the social characteristics of people involved in legal cases affected the quantity of law applied. That is, in cases where the status of persons associated with the defense side was lower than the status of other persons involved in the case, more law, as well as more severe law, would be applied than in cases where the opposite was true.

Emmelman addressed elements of all these empirical conceptualizations in her interpretive study of justice for the poor. According to Emmelman, poor criminal defendants endured inequities in the adjudication of criminal cases because litigation procedures involved commonsense “classism.” In other words, unequal treatment based on social class occurs because of commonsense reasoning, not because attorneys behave incompetently or because some defendants are more criminally culpable than other defendants are. Specifically, the legal battles in which the public defenders engage are story-telling battles, wherein the parameters, along with the “weapons” for battle are prescribed and circumscribed by two cultural domains of meaning: legal expertise and common sense. Common sense, in particular, consists of the values, beliefs, and norms of the status quo; it is a system of meaning invoked by judges and jurors charged with adjudicating criminal cases. Unfortunately, lower-class defendants and their personal allies tend to employ a culturally incongruent symbolic system compared with that used by those prosecuting and adjudicating their cases. Therefore, poor criminal suspects typically lack the cultural resources (or compelling rhetoric) with which to present themselves as socially acceptable and

”upstanding” members of society to judging authorities. This deficiency handicapped their cases throughout all phases of criminal proceedings, including bail reviews, plea bargaining, trials, and sentencing hearings. In addition to being an extralegal variable, this factor enters into adjudication proceedings as a component of such legal variables as ”strength of the evidence.” Consequently, social class affects conviction rates, the severity of sentences received, and even prior records. One can conclude, therefore, that in order for indigent criminal defendants to receive justice, they must be provided with the economic and cultural resources to achieve parity with other types of defendants in addition to being provided with the effective assistance of counsel.

Debra S.Emmelman

http://dx.doi.org/10.4135/9781412952637.n425
See also

- Access to Justice
- Consensual Penal Resolution
- Defense Lawyers
- Legitimacy
- Penal Court Procedures, Doctrinal Issues in
- Plea Bargaining
- Power, Law and
- Prosecutors
- Relativity, Legal
- Social Status

Further Readings

Barak, Gregg “In Defense of the Rich: The Emergence of the Public Defender.” Crime and Social Justice 3 (1975). 2–14.

Black, Donald. (1989). Sociological Justice . New York: Oxford University Press.

Blumberg, Abraham. “The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession.” Law and Society Review 1 (1967). 15–40. http://dx.doi.org/10.2307/3052933

Clarke, Stevens H., and Gary G.Koch. “The Influence of Income and Other Factors on Whether Criminal Defendants Go to Prison.” Law and Society Review 11 (1976). 57–92. http://dx.doi.org/10.2307/3053204

Emmelman, Debra S. “Organizational Conditions That Facilitate an Ethical Defense Posture Among Attorneys for the Poor: Observations of a Private Nonprofit Corporation.” Criminal Justice Review 18 (1993). 221–35. http://dx.doi.org/10.1177/073401689301800205

Emmelman, Debra S. “Trial by Plea Bargain: Case Settlement as a Product of Recursive Decisionmaking.” Law and Society Review 30 (1996). 335–60. http://dx.doi.org/10.2307/3053962

Emmelman, Debra S. (2003). Justice for the Poor: A Study of Criminal Defense Work . Burlington, VT: Ashgate.

Flemming, Roy B. “Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients.” American Bar Foundation Research Journal 2 (1986). 253–77.

Hagan, John. “Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint.” Law and Society Review 8 (1974). 357–83. http://dx.doi.org/10.2307/3053080

Holmes, Malcolm D., Howard C.Daudistel, and Ronald AFarrell. “Determinants of Charge Reductions and Final Dispositions in Cases of Burglary and Robbery.” Journal of Research in Crime and Delinquency 24 (1987). 233–54. http://dx.doi.org/10.1177/0022427887024003004

Jankovic, Ivan. “Social Class and Criminal Sentencing.” Crime and Social Justice 10 (1978). 9–16.

Lizotte, Alan J. “Extra-Legal Factors in Chicago's Criminal Courts: Testing the Conflict Model of Criminal Justice.” Social Problems 25 (1978). 564–80. http://dx.doi.org/10.1525/sp.1978.25.5.03a00110

Mather, Lynn M. (1979). Plea Bargaining or Trial? Lexington, MA: Lexington Books.

McDonald, William F. (1985). Plea Bargaining: Critical Issues and Common Practices . Washington, DC: U.S. Department of Justice.

McIntyre, Lisa J. (1987). The Public Defender . Chicago: University of Chicago Press.

National Legal Aid and Defender Association . (2006). “History of Right to Counsel.” http://www.nlada.org/About/About_HistoryDefender (orig 2004).

Platt, Anthony, and RandiPollock. “Channeling Lawyers: The Careers of Public Defenders.” Issues in Criminology 9 (1974). 1.

Skolnick, Jerome H. “Social Control in the Adversary System.” Journal of Conflict Resolution 11 (1967). 52–70. http://dx.doi.org/10.1177/002200276701100105

Sudnow, David. “Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office.” Social Problems 2 (1965). 255–75.

Wheeler, Gerald R., and Carol L.Wheeler. “Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly Line Justice.” Crime and Delinquency 26 (1980). 319. http://dx.doi.org/10.1177/001112878002600303

Willick, Daniel H., GretchenGehlker, and Anita McFarlandWatts. “Social Class as a Factor Affecting Judicial Disposition Defendants Charged with Criminal Homosexual Acts.” Criminology 13 (1975). 57–77. http://dx.doi.org/10.1111/j.1745-9125.1975.tb00654.x