

## Viewing Justice for the Poor from the Bench:

An Examination of Judges' Attitudes Related to Indigent Criminal Defense

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## **Abstract**

One of the theoretical foundations of a democratic government is that all citizens should be equal before the law. Despite professed commitments to equal access to justice, reality is often starkly different for our nation's poor. This paper examines the opinions of judges related to the structure and effectiveness of the court-appointed system for providing indigent defense. The findings reveal that the process of assigning counsel may be partially influenced by patronage and political concerns. Additionally, some members of the judiciary believe that court appointed lawyers are less experienced, are less prepared, and defend their clients less vigorously than retained attorneys.

## Viewing Justice for the Poor from the Bench: An Examination of Judges' Attitudes Related to Indigent Criminal Defense

One of the theoretical foundations of a democratic government is that all citizens should be equal before the law. Many historic governing documents have asserted the importance of equal access to justice. The Magna Carta states “[T]o no one will we sell, to no one will we refuse or delay, right or justice” and most state constitutions include a provision designed to guarantee the impartial administration of justice and the protection of life, liberty, and property. Despite these professed commitments to equal access to justice, reality is often starkly different for our nation’s poor. Consider the following:

In 1984, Calvin Burdine was on trial for capital murder. His attorney was Joe Frank Cannon, a court-appointed lawyer from Houston, Texas. At the conclusion of the trial, the jury foreman and Cannon’s co-counsel signed “affidavits saying Cannon slept through significant portions of the trial” (Connelly 1995, 18). The affidavit suggested that Cannon “has become so notorious for how quickly he picks juries in capital cases that the speed has become a courthouse joke” (Connelly, 1995, 18).

After years of watching herself and her children be abused by her husband, an Alabama woman had her husband killed. In a rare decision, the jury sentenced the woman - - the victim of the abuse - - to death. Reasons for this unusual decision may have been because her lawyers failed to present hospital records providing evidence of abuse, because an expert on domestic abuse did not interview the defendant until the night before he testified, or because “one of her court-appointed lawyers was so drunk that the trial had to be delayed for a day after he was held in contempt and sent to jail” (Bright 1994, 1835).

In 1992, the United States Court of Appeals for the Fifth Circuit ordered a new trial for death-row inmate Francisco Martinez-Macias of El Paso because his legal representation had been incompetent. Martinez-Macias’ court-appointed counsel was paid \$11.84 an

hour for his work. In making its ruling the Court noted “the justice system got only what it paid for” (*Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992)).

While these anecdotes do not provide systematic evidence of a trend, they do reflect what many believe to be different standards of justice for the nation’s rich and the poor. Indeed, news accounts, law reviews, and court records are replete with similar stories of ineffective representation of our nation’s poor.

Over the years the courts have decreed that all individuals, regardless of economic status, should have equal access to the law. In response, state legislatures and local governments have developed a variety of delivery vehicles designed to provide equal access. For many, the system remains far from perfect. Surprisingly, after years of good faith efforts on the part of policy-makers, there have been few systematic efforts to examine the effectiveness of the machinery designed to provide equal access to justice. Our aim here is to partially fill that gap by extending our research on the assigned counsel systems in one large, diverse southern state (Texas). Having previously reported on the attitudes of criminal defense attorneys (Butcher and Moore 1997) and prosecutors (Butcher and Moore 1998), we take this opportunity to report on the attitudes of the judiciary.

In many respects, of all the courtroom participants, it is the judges and their actions and attitudes which are the most important. After all, it is the judge's role to oversee the conduct of the trial and to ensure that any outcome is both fair and just. Defense attorneys are bound to vigorously defend their client, regardless of the evidence or their own personal opinions to the contrary. Likewise, although the prosecutor is entreated to "see that justice is done" (Texas Code of Criminal Procedure, Article 2.01), the reality of the adversary system dictates otherwise. The

prosecutor represents the state and is expected to "strike hard blows" in aggressively advancing the state's interests as he or she see them. (*Jordan v. State*, 646 S.W. 2d 946, 948 (Tex. Crim. App. 1983)). The adversary system is dependent on the prosecutor and the defense actively promoting the interests of their respective clients and attacking and seeking to defeat the other party. As a result, of all of the court participants, it is only the judge who is neutral. It is the judge who sits as an arbitrator and who has a responsibility to monitor the proceedings and to keep each side in check. As part of that responsibility, the judge can, and indeed has a duty to, remove an ineffective defense counsel when required. Thus, the judges are in a unique position to view and to an extent control the actual conduct of the representation of indigents in the courts of any state. The attitudes and actions of these judges are of obvious importance to the understanding of the process by which indigents are provided counsel and the other necessary wherewithal to defend themselves against criminal charges.

### **On the Need to Examine Justice as it Relates to the Poor**

The time is long past when one had to detail the purpose or justification for a governmental response to the need to provide legal services to indigent persons facing criminal charges. Re-runs of Henry Fonda as Clarence Earl Gideon in "Gideon's Trumpet" are known to all late-night television viewers and now it is somewhat difficult to explain why it took so long for the Court - - and indeed the people - - to recognize this "obvious" need. The image of a non-lawyer, who has been accused of an offense, attempting to defend himself or herself in a criminal proceeding in which all the other court room participants are law school trained, offends anyone's sense of justice.

Despite general public commitment to the idea of equal access to justice, the public is frequently less supportive when the general concept is applied to specific circumstances. For example, those committed to the principle of “justice for all,” occasionally support proposals designed to expedite the imposition of death sentences by limiting the number of post-conviction appeals. A similar dichotomy is found in discussions of the provision of legal services to the poor. While the public remains committed, in principle, to each individual’s right to an attorney, they frequently resist efforts to spend tax dollars on such services and often despise the attorneys who are asked to represent those accused of our societies most serious crimes. In a not unusual example, a Fort Worth, Texas attorney recently appointed to defend a client accused of burying his victim alive received an anonymous call which “obscenely assured him that he would be delivered into the torments of hell by a vengeful Almighty” for defending his client (Swickard 1997, B4).

This inconsistency in public opinion is more than an intellectual curiosity. The inability of the public to translate its general support for civil rights into specific policies which protect general rights is quite troubling. As suggested above, the common perception is that there exist two judicial systems - - one for the wealthy and another for the poor. This perception is reinforced when the public witnesses wealthy defendants, such as OJ Simpson, hire a team of high-priced defense attorneys to secure his acquittal. Understandably, the resulting attitude is that the wealthy are afforded, or rather can afford, a different standard of justice than the typical citizen. The view that all individuals are not equal before the law is certainly not new. Decades ago, Reginald Smith noted that “(t)he administration of American justice is not impartial, the rich and the poor do not stand on an equality before the law, the traditional method of providing

justice has operated to close the doors of the courts to the poor, and has caused a gross denial of justice in all parts of the country to millions of persons” (1919, 8).

The costs of not providing equal access to justice are perhaps obvious, but are nonetheless worthy of mention so that the seriousness of this issue is clear. Individuals unable to afford appropriate legal representation may receive delayed justice, or worse, may be denied justice. As the above examples indicate, there are heavy human costs associated with inadequate legal representation - - costs which range from small fines and probation to lengthy incarceration and even death. As Justice William O. Douglas noted in *Furman v. Georgia*, 408 U.S. 238 (1972), “[o]ne searches our chronicles in vain for the execution of any member of the affluent strata in this society.” It might be tempting to dismiss concern over this issue since it seems to affect only the least advantaged among us, however, Smith reminds us that lack of justice for the poor holds consequences for the rule of law and society in general:

The effects of this denial of justice are far reaching. Nothing rankles more in the human heart than the feeling of injustice. It produces a sense of helplessness, then bitterness. It is brooded over. It leads directly to contempt for law, disloyalty to the government, and plants the seeds of anarchy. The conviction grows that law is not justice and challenges the belief that justice is best secured when administered according to law. The poor come to think of American justice as containing only laws that punish and never laws that help. They are against the law because they consider the law against them. A persuasion spreads that there is one law for the rich and another for the poor. (1919, 10)

While it may be reaching to suggest that the current disparity between rich and poor in our criminal courts will lead to anarchy, Smith makes a point worthy of consideration - - when justice is denied, respect for laws and the system of justice is lessened.

## A Brief History of Criminal Indigent Defense

The Sixth Amendment to the U.S. Constitution provides that defendants accused of crimes are entitled to “assistance of counsel.” Despite this provision, it was not until the 1900s that states were required to provide legal counsel to indigents in criminal matters. *Powell v. Alabama*, 287 U.S. 45 (1932), provided that legal counsel must be provided for all indigents charged with capital crimes. In 1963, the Court in *Gideon v. Wainwright*, 372 U.S. 335, held that indigents must be provided legal representation if they are charged with a felony. The Court in *Gideon* observed that “...in our adversary system of justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth” (372 U.S. 344 (1963)). The right to counsel was extended to individuals charged with misdemeanors that involve possible imprisonment in *Argersinger v. Hamlin*, 407 U.S. 24 (1972).

*Gideon* and subsequent cases created a body of law which, in some cases, radically altered the way states treated indigent criminal defendants.<sup>1</sup> Instead of providing counsel only when an indigent defendant appeared wholly incompetent, states were now required to provide legal representation for all criminal defendants who were unable to afford counsel. In a report prepared for the American Bar Association shortly after *Gideon*, Lee Silverstein noted “[b]y this group of decisions the Supreme Court has made it quite clear that counsel for the defense is just as vital a part of the machinery of justice as the trial judge, the prosecutor, and the police” (1965, 9). Moreover, both state and federal courts now require that defense lawyers provide “reasonably

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<sup>1</sup> While several Supreme Courts cases in the 1960s and 1970s extended the right to legal counsel to the state criminal matters, some states were already providing this service.

competent assistance of counsel” (*Flores v. State*, 576 S.W. 2d 632, *United States v. Bosch*, 584 F.2d 1113). While this standard is quite vague and allows room for tremendous variation in the quality of legal representation, it recognizes that the right to legal counsel involves more than simply naming a licensed professional to guide the case through the legal labyrinth.

States have responded to the requirement to provide indigent criminal defense in varied ways. In general, one of three indigent defense systems is used: public defender systems,<sup>2</sup> contract defense systems,<sup>3</sup> and court-appointed systems.<sup>4</sup> Variations among states exists as to the machinery selected with some states employing a combination of systems and others opting to use one system to the exclusion of all others. States also differ as to whether the machinery is administered by the state or by local jurisdictions (typically counties). Finally, states differ in whether the state foots the bill for indigent defense, subsidizes local efforts, or relies entirely on local funding sources (see Spangenberg 1986).

### **The Case of Texas**

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<sup>2</sup> Public defender systems are staffed by either full-time or part-time attorneys who represent nearly all the indigent cases in the jurisdiction. Under ideal circumstances the public defender’s office, which represents the interests of the indigent defendant, is funded and staffed in a fashion that is comparable to the district attorney’s office, which represents the interests of the state. The chief public defender can be elected or appointed.

<sup>3</sup> Contract defense systems allow individual attorneys, law firms, or bar associations to “contract” to handle indigent cases for a specified fee. The fee is calculated either on a flat fee per case basis or a for specific period (usually annual).

<sup>4</sup> In a court-appointed system a member of the private bar is appointed on a case-by-case basis for each criminal defendant. The appointment is typically made by a judge, a court clerk, or drawn from a rotating list of eligible attorneys.

The analysis in this paper focuses on the criminal indigent defense system in Texas for a variety of reasons. First, Texas is one of the nation's most populous states with 254 counties that range in size from 107 (Loving) to 2.8 million residents (Harris). This size and diversity allow us to gather information from a variety of settings that likely approximate judicial settings similar to those found in jurisdictions throughout the US.<sup>5</sup> Courts located in the state's most densely populated counties have heavy caseloads and substantial numbers cases involving indigents charged in criminal matters, much like those in any large city in the US. At the other extreme, small counties from rural areas may hear both civil and criminal matters and will have less frequent dealings with indigent defendants, much like the large number of rural jurisdictions throughout the nation. Second, Texas primarily relies on county-based court-appointed counsel systems. These systems merit examination since roughly 60% of American counties rely on court-appointed counsel systems, and nearly all remaining counties use this system for cases where contract or public defenders are disqualified (Spangenberg and Smith 1986, Schulhofer and Friedman 1993). Third, Texas' system has been said to be "arguably the least effective delivery

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<sup>5</sup> The overwhelming majority of Texas counties rely on the court-appointed counsel system, however, other delivery systems are found in various parts of the state. For example, Wichita County (Wichita Falls) utilizes a public defender office in which it is expected that the office will handle the vast majority of indigent cases, with appointed counsel being used only when there is a conflict of interest or similar particular need. Dallas County (Dallas) employs a public defender office in which the office only takes a portion of the indigent cases with a substantial number being handled by appointed cases. Often these latter cases are the ones that will require special experience or will be prolonged (e.g., capital cases). Tarrant County (Fort Worth) uses public defenders (no "office" in any sense of the word) that serve a particular court and are expected to handle only a relatively small percent of the cases. This is commonly a part-time position often used by the judge to handle cases that can be disposed of quickly (e.g., obvious probation cases [young person caught joy riding] or probation revocations). Finally, Young County (Graham) enters into a contract with a particular attorney or firm of attorneys to handle the vast majority of the indigent cases, with appointed attorneys being used only when there is a conflict of interest or similar need.

system for indigent criminal defense” (Long 1994, 48). Texas is now one of only five states that fail to provide any state monies for indigent representation, relying on counties to fund 100 percent of the program. The result is that Texas ranks 40th in the nation in per capita spending on indigent defense, expending \$.99 per capita per year (Spangenberg 1986). Moreover, the state permits each county to develop its specific machinery and does not provide any form of programmatic oversight (Long 1994, 48). Finally, and a more practical reason, our joint work with the State Bar of Texas’ Committee on the Provision of Legal Services to the Poor in Criminal Matters provided an opportunity to gather a variety of data related to indigent criminal defense in Texas.

*Some Background on Indigent Criminal Defense in Texas.* The effects of *Gideon* had been long anticipated in Texas, and its revolutionary consequences were not nearly as dramatic in Texas as was the case in many other states. This is due in large measure to the fact that as early as 1857 the *Texas Code of Criminal Procedure* provided, “[w]hen the defendant is brought into Court, for the purpose of being arraigned, if it appears that he has no counsel, and is too poor to employ counsel, the Court shall appoint one or more practicing attorneys to defend him” (*Marin v. State*, 891 S.W. 2d 267, 269). This guarantee of legal counsel in criminal cases, regardless of ability to pay, has therefore been the law in Texas for more than 130 years and over 100 years before *Gideon*. In addition to the Texas Code of Criminal Procedure, Article 1, Section 10 of the present (1876) Texas Constitution guarantees the right of counsel and this provision, has been found in every Texas Constitution since Texas became a Republic in 1836. (See, *Foster v. State*, 787 S.W. 2d 385 (Tex. Crim. App. 1990, Clinton, J. dissenting)).

Despite a lengthy history of requiring indigent defense in criminal matters, there is little

systematic evidence about the effectiveness of these delivery systems in Texas and elsewhere. Most examinations of this topic have relied on aggregate state-wide data which describe the level of funding, the number of indigent cases heard, and the structure of the various delivery systems. At other times, the data employed focuses on disposition patterns within a particular jurisdiction (Ballard 1995) or rely on isolated court cases and anecdotes. What has been missing from discussions of this topic are opinions gathered from those working in the system (e.g., defense attorneys, prosecutors, and judges) and in-depth systematic analysis. As such, any examination of criminal indigent defense will remain incomplete. The actual participants in the process are uniquely positioned to offer assessments of how the system works in practice, which we suspect is quite different from the intent of legislative mandates. To our knowledge the only attempt to gather data from those actually working in the indigent defense systems has been by Robert Spangenberg and his colleagues. These studies, while somewhat informative, are limited in their value since the data collection and analysis are less than rigorous.<sup>6</sup>

Given the lack of appropriate data and the pressing need for examination of this topic, we move beyond aggregate data and anecdotal evidence related to how criminal courts have carried - or attempted to carry -- the guarantee of equal access to justice into effect. Specifically, this paper reports findings from members of the judiciary related to their perceptions of the court-

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<sup>6</sup> In one study (Spangenberg 1993), surveys were distributed to lawyers attending a continuing legal education course. Such data gathering efforts are vulnerable to selection bias and may be quite unrepresentative of the population. Additionally, Spangenberg pooled these surveys with those drawn from a small random sample to create the impression that all the data were representative as of attorney opinions. Finally, Spangenberg's data analysis techniques are descriptive and, at times, take on the flavor of an advocate. As such, Spangenberg's research makes no attempt to employ the necessary techniques to establish statistical relationships, control for alternate explanations, or "explain" the patterns he observes.

appointed system and its effectiveness. It is our hope that these findings will shed light on the structure and effectiveness of the indigent criminal defense system in court appointed systems.

### **Research Design**

To gauge the judiciary's attitudes related to the provision of legal services to the poor in criminal matters, the population of judges with criminal jurisdiction were surveyed. Using a list of judges supplied by the Texas Judicial Council, the Research Division of the State Bar of Texas employed a variation of the Total Design Method (Dillman 1978) to mail all judges having criminal jurisdiction a survey and follow-up reminders. A total of 846 surveys were mailed and 494 were returned for a response rate of 58.4 percent.

Just over 85 percent of the responding judges were white (85.9 percent); the rest of the sample was comprised of 8.6 Hispanic, 1.9 percent black, 0.4 percent Native American, and 3.2 percent who classified themselves as "other."<sup>7</sup> The sample was 84 percent male, 54.5 percent Democratic, and the typical respondent fell into the 41 - 50 years of age category. Two-thirds of the judges responding (66.8 percent) were District Judges (as opposed to County Judges), had been associated with criminal law for 23.8 years, and had been in their present judgeship for 10.2 years. The typical judge in the sample hears cases in a county with a population of 606,137, however, judges in our sample report being from counties as small as 3,750 residents and as large as 5,000,000 residents.

The basic design of the survey included both open and closed ended questions centered

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<sup>7</sup> These numbers are just slightly different from those for the entire Texas Bar as reported by Spanhel and Shimatsu (1996). They report that the Texas Bar is composed of 91.8 percent Anglo, 4.8 percent Hispanic/Latinos, 3.2 percent African-American, and 0.2 percent Native-American.

around a variety of themes.<sup>8</sup> Initially, judges were asked to provide information regarding the machinery used to provide representation for indigents in their courts, including the factors that influence the decision to appoint specific counsel. Respondents were also asked to comment on the level of compensation and support services they provide counsel representing indigent defendants. Relatedly, judges were asked to comment on the pressures they might feel from county commissioners related to budgetary matters. Finally, respondents were asked to evaluate the quality of representation provided by retained and court-appointed counsel.

### **The Process Begins: Determining Indigent Status and Assigning Counsel**

Once an individual is charged in a criminal matter, if they cannot afford to retain counsel the court is required to provide legal representation. The process necessarily begins with a determination that the individual charged is indeed indigent. Over three-quarters (77.2 percent) of the judges responding to the survey report that they (or someone using their criteria) make the determination that an individual is indigent and in about half of these cases (48.1 percent) this decision is made without the use of formal written criteria. As we learned from our earlier surveys (Butcher and Moore 1997, 1998), it is common for a single criterion, jail status, to be used to determine whether a particular person will be appointed an attorney. Apparently, the thinking is that if an individual has enough money to make bond, then he or she has enough money to hire his own lawyer. This practice is in direct violation of state law which explicitly states: "The court may not deny appointed counsel to a defendant solely because the defendant has posted or is capable of posting bail" (Texas Code of Criminal Procedure, Article 26.04(b)).

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<sup>8</sup> The survey, along with marginal responses to the closed ended questions, can be viewed at [www.uta.edu/pols/moore/indigent/judge\\_results.htm](http://www.uta.edu/pols/moore/indigent/judge_results.htm).

As noted above, judicial jurisdictions utilize a variety of different models and each can be found in Texas to varying degrees. Twenty-six percent of the respondents indicate that their county is authorized to use a public defender,<sup>9</sup> however, only 49.1 percent of these respondents report that their county actually makes use of the public defender despite being authorized by statute to do so.<sup>10</sup> Given that the prevailing model of providing legal service is the court appointed counsel system, it should come as little surprise that a majority (54.5 percent) of judges in this sample prefer this model (“slightly” or “strongly”) to the public defender model (24.1 percent) (see Table 1).<sup>11</sup> A couple of explanations might be offered for the nearly two to one preference for the assigned counsel system. One might be that judges are more comfortable with this system since it is the system with which they have the most experience. Indeed, 89.1 percent of the judges indicate they are satisfied (either “very satisfied” or “somewhat satisfied”) with the method they use for assigning counsel.<sup>12</sup> Interestingly, only 60.7 percent believe that their method of assigning counsel would be a good model for others to follow.<sup>13</sup>

(Table 1 about here)

A second explanation, might be that judges wish to retain the discretion and independence

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<sup>9</sup> Respondents were asked, “Is your county authorized by statute to use public defenders, who are regular salaried, either full or part-time, county employees? Yes nor No.”

<sup>10</sup> Respondents were asked, “Are public defenders used in your county? Yes or No.”

<sup>11</sup> Respondents were asked, “Generally speaking, do you favor a public defender system or do you prefer the court appointed counsel system?”

<sup>12</sup> Respondents were asked, “Overall, how satisfied are you with the method you currently use for appointing counsel in indigent criminal cases? Very satisfied, somewhat satisfied, neither satisfied nor dissatisfied, somewhat dissatisfied, very dissatisfied.”

<sup>13</sup> Respondents were asked, “Do you believe that the method you use for appointing attorneys would make a good model for all judges to use in making appointments in indigent cases? Yes or No.”

to appoint counsel. In Texas, judges are elected on partisan ballots and several respondents to our surveys of defense attorneys and prosecutors indicated judges are frequently influenced in their decision to appoint counsel by factors as diverse as the need to move the docket to rewarding political allies and punishing political adversaries. The findings from our survey of judges confirm these suspicions. Judges were asked to evaluate what influence several factors play in the decision to appoint counsel (see Table 2).<sup>14</sup> As the results reveal, all of the factors played at least some role in the appointment of legal counsel to indigents charged in criminal matters. Understandably, factors such as the difficulty of the case, the defendant's need for specialized knowledge or skill, the attorney's degree of experience, and the attorney's reputation for moving cases in a quality fashion played important roles in the appointment decision. The more troubling responses relate to what might broadly be called patronage and political factors. Forty-five percent of the respondents indicate that in assigning counsel they, at times, are influenced by their friendship with an attorney, two-thirds note that they may use appointments to supplement an attorney's income and a over a third (38.5 percent) report they use appointments to help supplement a retired attorney's income.

(Table 2 about here)

The notion that political factors influence judicial decisions is not new. It is, nonetheless, still disconcerting when one discovers evidence that raw politics plays a role in judicial decision making since it undermines our confidence in the belief that the system is impartial and just. When asked to reflect on their own appointment decisions, several judges noted that an attorney's position as a political supporter (28.4 percent) or as a campaign contributor (24.3 percent) played

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<sup>14</sup> Respondents were asked, "What influence does each of the following have in the appointment decision in YOUR court?"

at least some role in their appointment decision. Judges were even more critical of their peers in this regard, noting that being a political supporter (56.2 percent) and a campaign contributor (53.4 percent) influenced judicial appointments.<sup>15</sup> Given that the jurisdictions under study are elected judgeships, it should not be surprising that political relationships between judge and attorney find their way into the courtroom.

A final note related to the appointment process. When one thinks of the right to legal representation required by *Gideon*, one envisions an independent attorney putting on a fair, vigorous legal defense for his or her client. Evidence revealed in this survey calls this view into question. Nearly half (48.9 percent) of all respondents indicate that they are influenced in their decision to appoint counsel by how quickly an attorney moves cases, *regardless of the quality of defense*. When reflecting on their peers, the situation is even more dire as three out of four respondents (77.9 percent) report that speed in moving the docket, regardless of quality, plays a role in assigning counsel in cases with indigent defendants. One wonders whether the predilection for moving the docket without regard to quality meets the minimal standard set by the courts to provide “reasonably competent assistance of counsel” or if the standard, itself, is hallow.

The process of assigning counsel, which should result in competent, impartial legal representation appears, *prima facie*, tainted by patronage and political considerations. Judges

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<sup>15</sup> Prior to asking respondents to evaluate the factors that influence their appointment decisions, they were asked “Generally thinking of judges that you may know, what influence does each of the following have in the appointment decision in their court?” Respondents were presented with the same list of options that appear in Table 2. While some might argue that judges cannot know what another judge is thinking at the time the appointment decision is made, we felt this approach was valuable for two reasons. First, we believed it was quite likely that judges engage in a fair amount of “shop talk” and therefore would be privy to the behavior of their colleagues. Second, and perhaps more importantly, we reasoned that respondents would be less likely to admit they engaged in suspect behavior, but would, however, be willing to indicate that they knew someone who engages in such behavior. The responses to our questions suggest that this is indeed the case.

appoint counsel for a variety of reasons, including their ability to do the job properly. However, judges also appear to consider less noble reasons such as rewarding political allies, helping their friends, and simply clearing their docket.

### **Supporting the Assigned Counsel: Compensation, Special Services, and Financial Pressures**

Perhaps the most documented problem facing systems designed to represent indigent defendants is the problem of insufficient financing. While most would readily lend their support to the “right to counsel” and the notion of “equal justice for all,” the political reality is starkly different. Efforts to obtain increased financial support for indigent defense programs all too often fall short since these efforts are seen as supporting criminals and defense lawyers - - two very unpopular groups. The result is a system which Norman Lefstein suggests has many costs.

As a result [of inadequate funding], millions of persons in the United States who have a constitutional right to counsel are denied effective legal representation. . . Defendants suffer quite directly, and the criminal justice system functions inefficiently, unaided by well trained and dedicated defense lawyers. There also are intangible costs, as our nation’s goal of equal treatment for the accused, whether wealthy or poor remains unattained” (1982, 2).

Report after report has detailed the need for adequate compensation and support services. Referring specifically to the assigned counsel system, Lefstein notes that “private attorneys assigned to criminal cases must be reasonably compensated for their time and efforts, lest they be unwilling to accept appointments or do everything required to defend their clients” (1982, 11). Despite the obvious logic of this claim, most jurisdictions do not compensate assigned counsel at rates commensurate with their rate in retained matters. A 1982 study by the American Bar Association revealed that assigned counsel were commonly paid \$20 to \$30 per hour with many jurisdiction setting caps on maximum payments (Lefstein, 1982, 9). Moreover, judges frequently

arbitrarily reduce the compensation paid to assigned counsel, even when an adopted “fee schedule” is in place.<sup>16</sup> The result is that lawyers often do not make enough to cover their overhead expenses and, in effect, make a “contribution” to the state.<sup>17</sup>

The responses to our survey indicate that the situation in Texas is not unlike that found elsewhere. Forty (40.8) percent of respondents report that they have paid less than the fee schedule,<sup>18</sup> which, it would seem, undermines the very reason for having a fee schedule. As Lefstein (1982) suggested, low pay may have a consequence on the willingness of lawyers to take cases and to perform at appropriate levels of quality. Forty (40.9) percent of judges responding to our survey indicate that current compensation rates may deter counsel from seeking cases<sup>19</sup> and one in four (27.1 percent) respondents indicate that current rates of compensation affect the

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<sup>16</sup> Many jurisdictions approve a fee schedule which sets the fee for specific legal services. Indeed, Texas statute requires that each court adopt a fee schedule. Practice, however, reveals that judges often feel free to ignore the schedule and schedules are frequently go years without being updated. See, Texas Code of Criminal Procedure, Article 26.05(b).

<sup>17</sup> At least one observer (Perini 1983) has suggested that current compensation levels result in criminal defense attorneys being “taxed” to represent indigent defendants. It should be noted that this burden falls uniquely on members of the criminal defense bar. In most jurisdictions civil attorneys are not assigned cases in criminal matters. Additionally, no other member of the judicial process is financially disadvantaged by working on an indigent criminal matter. Police officers, judges, prosecutors, court reporters and all other court officials draw their normal salary regardless of the nature of the case - - it is only the criminal defense lawyer that is paid less for working on an indigent criminal matter. In Missouri, the state court has gone so far as to rule that lawyers can be required to provide representation *without* compensation if the jurisdiction has run out of money (*Wolff v. Ruddy*, 617 S.W. 2d 64 (Mo. 1981)).

<sup>18</sup> Respondents were asked, “Do you every pay appointed counsel LESS than the amount specified by the fee schedule? Yes or No.”

<sup>19</sup> Respondents were asked, “Do you believe that current rates of compensation for court appointed counsel are sufficient to attract qualified private counsel for court appointed indigent cases? Yes, No, or Don’t Know”

quality of representation provided by assigned counsel.<sup>20</sup>

Paying attorneys to represent indigent defendants is just part of the financial burden jurisdictions must shoulder. To perform their job properly, defense lawyers require the support of investigators, forensic specialists, mental health experts, and others. While these services are readily available to the prosecution, the defense lawyer must request these services from the court and the rely on the judge's discretion to approve the request for services. A study by the National Legal Aid and Defender Association noted that

...the resources allocated to indigent defense services have been found grossly deficient in light of the needs of adequate and effective representation. Relatively few indigent defendants have the benefit of investigation and other expert assistance in their defense. Their advocates are overburdened, undertrained, and underpaid and as recent studies have shown, the poor have as little confidence in such advocates, who are often hand-picked by the same authority which pronounces their sentence, as they do in the inherent fairness of the American criminal justice system (1973, 70).

As our survey of defense lawyers revealed, many requests for special services are denied, and those that are approved are often underfunded. Just over one quarter (26.7 percent) of the judges concede that court appointed counsel in their jurisdiction do not receive the support services they need to represent their indigent clients<sup>21</sup> and over half (54.6 percent) report that they have, at times, hand-picked the specialist.<sup>22</sup> While the specification of a particular specialist may

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<sup>20</sup> Respondents were asked, "Based on your observations, does the level of compensation paid to assigned counsel in any way affect the quality of representation they provide to defendants in your county? Yes, No, or Don't Know."

<sup>21</sup> Respondents were asked, "Do you believe that defense counsel in your county generally receive the support services they need to represent their indigent client (e.g., investigator, criminalist, forensic experts)? Yes, No, or Don't Know."

<sup>22</sup> Respondents were asked, "When approving special services, how often do you specify who must provide the requested service? For example, how often do you approve a criminalist but also stipulate that the appointed counsel must use the specific criminalist named by you?"

be benign, it does, nonetheless, have an air of unfairness about it. The perception created when members of the judiciary hand-pick support specialists is that they are somehow tying the hands of defense counsel and perhaps limiting his or her defense options. Worse yet, denying the request for a specialist has the possibility of hamstringing the defense lawyer's ability to provide effective representation. As revealed by the survey, 70.9 percent of judges note that the denial of services can, at least some of the time, adversely affect the quality of representation.<sup>23</sup>

The monies used to compensate assigned defense counsel and special service providers in Texas necessarily come from county revenues distributed through the court's budget. As a strictly legal matter, judges can order the payment of any and all expenses related to the provision of indigent legal services (See Texas Attorney General Opinion, H-499 (1975)). The reality of that matter, however, is quite different as judges may feel constrained by their budget or by political pressure from county commissioners when making financial decisions. Indeed, two-thirds (68.0 percent) of judges report that budget considerations have influenced their decision to compensate appointed counsel<sup>24</sup> and their decision to approve special services (66.6 percent).<sup>25</sup> Roughly one-quarter (27.6 percent) of the judges in this sample report that they have been

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Always, Often, Sometimes, Rarely, Never.”

<sup>23</sup> Respondents were asked, “How often does denial of special services (e.g., investigator, criminalist, forensic expert) adversely affect the quality or representation provided by court appointed counsel? Always, Most of the time, Some of the time, Rarely, Never.”

<sup>24</sup> Respondents were asked, “How often do budget considerations influence your decision to compensate appointed counsel? Always, Usually, Sometimes, Rarely, Never.”

<sup>25</sup> Respondents were asked “How often do budget considerations influence your decision to approve special services? Always, Usually, Sometimes, Rarely, Never.”

approached by county commissioners about controlling their court's general budget<sup>26</sup> and their indigent defense budget specifically (28.0 percent).<sup>27</sup>

The financial picture is a bleak one. Indigent defense efforts are underfunded and it appears that in some instances this affects the willingness of counsel to take assigned cases and adversely affects the quality of their work. Moreover, because of budgetary and political pressures and perhaps a desire to appear frugal, judges frequently pay below the level specified by the fee schedule and deny special services, even though they appear aware that such actions adversely affect the quality of legal representation provided to the indigent defendant.

### **Evaluating the Legal Representation of Indigent Defendants**

While evidence of patronage, political pressure, and under financing are noteworthy and troubling, they pale in comparison to concerns related to justice and judicial outcomes. The ultimate criterion for evaluating a system of indigent criminal defense should be the quality of representation provided. If, at the end of the day, defendants with retained counsel and those with assigned counsel receive the same type of representation we can safely say the system has its warts, but that it is not dysfunctional. On the other hand, if the system treats these two groups different, as many observers suspect, then we all should be concerned. While our data do not allow an examination of actual judicial outcomes, they do provide an opportunity to learn how those who sit behind the bench view this process.

Unlike defense attorneys who saw the system as yielding disparate judicial outcomes

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<sup>26</sup> Respondents were asked, "Have county commissioners ever approached YOU about controlling the costs of your court's general budget? No or Yes."

<sup>27</sup> Respondents were asked, "Have county commissioners ever approached YOU about controlling the costs of indigent defense? No or Yes."

(Butcher and Moore, 1997), members of the judiciary appear to hold views similar to that of prosecutors which posited that the system is equitable, despite differences between retained and assigned counsel (Butcher and Moore, 1998). When queried, a majority (53.2 percent) of judges report that court appointed and retained counsel are about equally experienced and provide the same quality of representation (52.2 percent) (see Table 3). Upon closer examination, however, the results are suggestive of a system with a hint of a bias toward representation by retained counsel. Nearly twice as many judges (31.2 percent compared to 15.5 percent) indicate that retained counsel are “usually” or “always” more experienced than court appointed counsel. More importantly, forty-eight percent believe that retained counsel spend more time preparing and forty-two percent indicate that retained counsel provide better representation than assigned counsel (only 3.2 and 5.8 percent made the similar reverse claims). This point merits further clarification. It is important to remember what is occurring in the assigned counsel system - - the attorneys that are assigned to represent indigent defendants are members of the private bar who work as retained counsel at all other times. For judges to observe that retained counsel spend more time in preparation and provide better representation, suggests that attorneys behave differently when working on behalf of indigent clients. Judges were specifically asked to comment on the attorneys that they observed behaving differently depending the nature of the client (see Table 4). The results of this inquiry reveal that judges believe that an attorney representing an indigent client will alter his or her work by devoting less time (87.3 percent), being less prepared (72.7 percent), and putting on a less vigorous defense (66.0 percent).

Before we become too concerned about the quality of representation provided to indigent defendants, nearly all judges (92.2 percent) assure us that sentencing decisions involving defendants with retained and court appointed counsel are the same. This response is

understandable given the nature of our sample, however, responses elsewhere in this survey and common sense suggest that judges may be turning a blind eye to probable judicial inequities. It is hard to imagine similar judicial decisions for indigents and non-indigents when the indigents are represented by underfunded, under supported attorneys who are less experienced, less prepared, and who put on a less vigorous defense. There seems to be a disconnect here unless we are to believe that experience, preparation, and hard work are of no consequence in the courtroom. Unfortunately, the data examined in this paper do not allow us to answer this difficult, but important question.

### **Indigent Defense and the Judiciary**

It could be argued that the most important function a judge carries out is the fair, equal application of the law. Judges who fail to carry out this function not only undermine their own credibility, but also undermine confidence in the judicial system as a whole. The findings reported here are not encouraging for those seeking evidence that the system treats all parties equally and that judges equally apply the law. The nation's poor, which are disadvantaged in virtually every aspect of their life, also appear to be disadvantaged in the criminal courts. Instead of having confidence that all persons are equal before the law, the nation's poor would seem to have reason to be skeptical of their treatment in criminal matters.

*Gideon* and its prodigy require that all persons charged in criminal matters be provided with legal representation and that the legal counsel be "reasonably competent." Yet, the picture created from examining the opinions of members of the judiciary questions whether this legal mandate is properly being executed. Judges note that their decision to appoint counsel is influenced by patronage and political concerns and by a desire to clear their docket, regardless of

the quality of legal work performed. They also note that they feel pressured by budgetary concerns and, therefore, deny specialized support services and arbitrary cut attorney's compensation even though they are aware that such actions adversely affect the quality of the legal representation provided to the indigent defendant. Judges also note that attorneys assigned to represent indigents are less experienced, less prepared, and put on less vigorous legal defenses than retained attorneys. Under these conditions, it is difficult to see how indigents can reasonably expect to be seen as equal before the law. This situation is made even more unfortunate since indigents are those most likely in need of protection by the state's legal machinery.

The findings presented here, of course, do not confirm that indigents are treated more harshly by the courts. While the evidence presented calls into question the fundamental fairness of the criminal justice system, it is not sufficient to determine that indigents actually receive a lesser quality of justice. Only an examination of judicial outcomes, comparing decisions in similar situations for those with retained and court appointed counsel, can definitively demonstrate that the indigent criminal defense system is not only flawed, but dysfunctional. Our future research plans to move in this direction. Having surveyed prosecutors, defense lawyers, and judges we now plan to examine disposition trends to determine if, in fact, indigents are treated differently by the criminal justice system. For now, it seems appropriate to maintain a healthy skepticism as to quality of legal representation afforded to our nation's poor.

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TABLE 1  
PREFERENCES FOR ASSIGNED COUNSEL AND PUBLIC DEFENDER SYSTEMS COMPARED

Strongly prefer the public defender system over the court appoint counsel system	12.2%
Slightly favor a public defender system instead of a court appointed counsel system, but not strongly	11.9%
Do not have a preference for either system	21.2%
Slightly favor a court appointed counsel system instead of a public defender system, but not strongly	19.6%
Strongly prefer the court appointed counsel system over the public defender system	34.9%

(n=444)

TABLE 2  
FACTORS WHICH INFLUENCE A JUDGE'S DECISION TO APPOINT COUNSEL

	<u>Always</u>	<u>Usually</u>	<u>Sometimes</u>	<u>Rarely</u>	<u>Never</u>	
Difficulty of the case	44.7%	38.7%	15.1%	0.7%	0.9%	(n=450)
Defendant's need for specialized knowledge or skill (e.g., a mental illness or retardation issue or a similar unusual need)	31.9%	43.8%	20.7%	2.2%	1.3%	(n=445)
Attorney's degree of knowledge and experience	34.5%	49.0%	15.4%	0.4%	0.7%	(n=449)
Attorney's reputation for moving cases, regardless of the quality of defense	2.5%	7.9%	13.1%	25.5%	51.1%	(n=444)
Attorney's reputation for moving cases, but consistent with a quality defense	10.8%	37.1%	33.7%	10.3%	8.1%	(n=445)
The attorney is your friend	0.0%	0.9%	20.5%	23.5%	54.9%	(n=448)
The attorney is one of your political supporters	0.0%	0.7%	12.8%	14.9%	71.6%	(n=444)
The attorney contributed to your campaign	0.0%	0.7%	10.6%	13.1%	75.7%	(n=444)
Attorney's expressed desire to be appointed	14.1%	33.0%	38.6%	8.3%	6.1%	(n=446)
To give attorney courtroom experience	0.9%	4.2%	48.7%	25.0%	21.2%	(n=448)
Attorney's need for income	0.9%	1.8%	39.5%	25.1%	32.7%	(n=446)
A retired or semi-retired attorney who uses appointments to supplement retirement funds	0.4%	0.2%	15.0%	22.8%	61.5%	(n=447)

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TABLE 3

RETAINED AND COURT ASSIGNED COUNSEL COMPARED

When thinking of the criminal defense attorneys in your court, are the attorneys who provide court appointed representation generally more experienced or less experienced than the typical criminal defense attorney? (Check one) (n=445)

Court appointed attorneys are always more experienced	1.3%
Court appointed attorneys are usually more experienced	14.2%
Court appointed attorneys and retained attorneys are about equally experienced	53.2%
Retained attorneys are usually more experienced	30.3%
Retained attorneys are always more experienced	0.9%

In general, do you believe that clients with retained counsel receive better representation than clients who have received court appointed attorneys? (Check one) (n=450)

Retained counsel always provide better representation	1.6%
Retained counsel usually provide better representation	40.4%
Retained and court appointed counsel typically provide the same quality of representation	52.2%
Court appointed counsel usually provide better representation	5.8%
Court appointed counsel always provide better presentation	0.0%

Assuming similar cases, what is your perception about the amount of time that retained and court appointed counsel devote to preparation? (Check one) (n=437)

Retained counsel always spend more time preparing	5.0%
Retained counsel usually spend more time preparing	43.7%
Retained and court appointed counsel spend equal amounts time preparing	48.1%
Court appointed counsel usually spend more time preparing	3.0%
Court appointed counsel always spend more time preparing	0.2%

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TABLE 4

OBSERVED DIFFERENCES IN LAWYER BEHAVIOR WHEN REPRESENTING AND INDIGENT DEFENDANT

Thinking of the defense attorneys you have noticed behaving differently in your court depending on the nature of their client

	<u>Yes</u>	<u>No</u>	
Do these attorneys devote less time to their indigent clients?	87.3%	12.7%	(n=322)
Are these attorneys less prepared to defend their indigent clients?	72.7%	27.3%	(n=330)
Do these attorneys put on a less vigorous defense of their indigent clients?	66.0%	34.0%	(n=327)

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