

**The View From The Other Side of the Courtroom:
Prosecutor Perceptions of Indigent Criminal Defense in Texas**

Allan K. Butcher

and

Michael K. Moore

Department of Political Science
University of Texas at Arlington
Arlington, TX 76019-0539

Prepared for delivery at the annual meeting of the Southwestern Political Science Association, March 18-21, 1998, Corpus Christi, TX

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 extends our examination of the structure and effectiveness of the court-appointed system for providing indigent defense as it exists in Texas. Comparing data from a sample of criminal defense attorneys and prosecutors we learn that the perceived effectiveness of the system depends on one's vantage point in the courtroom. Prosecutors, unlike defense attorneys, are much less likely to support the proposition that the current system is dysfunctional and in need of substantial reform.

Of the questions which are before the American people, I regard no one as more important than the improvement of the administration of justice. We must make it so that the poor man will have as nearly as possible an equal opportunity in litigating as the rich man, and under present conditions, ashamed as we may be of it, this is not the fact. President Taft in an Address before the Virginia Bar Association.

One of the theoretical foundations of a democratic government is that all citizens should be equal before the law. Many important governing documents have asserted the importance of equal access to justice. The Magna Carta states "To no one will we sell, to no one will we refuse or delay, right or justice" and most state constitutions include a provision similar to New Hampshire's which states "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character that there be an impartial interpretation of the laws and administration of justice". 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-Marcias' 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 rich and the poor. Indeed, news accounts, law reviews, and court records are replete with 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. This paper aims to partially fill that gap by focusing on one particular system -- court-appointed attorneys -- in one southern state (Texas). Unlike most examinations of indigent defense which draw data from court records, we focus on the attitudes of those who work day-in and day-out in representing and prosecuting indigents accused of criminal matters.

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 public - - 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 society's most serious crimes. In a not unusual example, a Fort Worth, Texas attorney 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 O J 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. This 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 examples at the outset 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. (1991, 10)

While it may be reaching a bit to suggest that the current disparity between rich and poor in our criminal courts will end in 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 held in *Gideon v. Wainwright*, 372 U.S. 335, that indigents must be provided legal representation if they are charged with a felony. 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.¹ 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).

¹ While several Supreme Courts cases in the 1900s extended the right to legal counsel to the state criminal matters, some states were already providing this service.

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,² contract defense systems,³ and court-appointed systems.⁴ Variation among states exists as to the machinery selected with some employing a combination of systems and others opting to use one system to the exclusion of all others. States also differ in 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 (for a summary of the various systems see Spangenberg 1986).

The Case of Texas

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 counties that range in size from 107 (Loving) to 2.8 million residents (Harris). This size and diversity afford excellent opportunities to compare the delivery of indigent criminal

² 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.

³ 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).

⁴ 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.

defense in a variety of contexts. Second, Texas largely 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 the 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 system for indigent criminal defense" (Long 1994, 48). Texas is one of only seven states that fail to provide state funds 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).

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 in large measure due 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." This guarantee of legal counsel in criminal cases, regardless of ability to pay, has therefore been the law in Texas for some 130 years and over 100 years before *Gideon*. In addition to the Texas Code of Criminal Procedure, Article 1, Section IO of the present (I 876) 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*, 767 S.W. 2d 89 (Tex. Crim. App. 1990).⁵

Today, criminal cases in Texas are tried in the counties in which the offenses occur, and given that there are 254 counties each with the authority to develop its own delivery system, to say that there has been diversity in the provision of legal services to indigent defendants is, no doubt, a gross understatement.⁶ It appears that until fairly

⁵ It appears that there are some slight differences between the U.S. Constitution's Sixth Amendment and Article 1, Section 10 of the Texas Constitution which would permit Texas courts to provide a more expansive interpretation of the right to counsel. As of this date, these differences have not been used, but such a possibility certainly exists. For example, in *Ramirez v. State*, 721 S.W. 2d 490, 492 (Tex. App. - Houston [1st Dist] 1988) Justice Levy argued for an expanded view of the Texas right of counsel provision and wrote in dissent that, "(t)he right to counsel clause (in the Texas Constitution), having been earned by our forefathers only through much blood and agony, should correspondingly be accorded liberal construction in favor of the right it was intended to secure." If this view attracts support from other appellate courts, it may well be that Texas could take a national leadership role in right to counsel questions such as the threshold showing required to secure legal assistance, the establishment of minimum levels of experience, training and overall competency of the counsel providing this representation, and the implementation of better standards for compensation and other financial requisites of effective assistance of counsel.

⁶ 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.

recently, many of the counties merely assigned local attorneys to handle these cases with little or no compensation or funds for expenses. Because receiving these appointments was so unpopular, the bar associations in some counties developed a system whereby they assessed their membership to establish a pool of funds from which attorneys who were willing to take these cases would be paid or paid additionally. Indeed, it was such an arrangement that resulted in a statute creating the first public defender effort in Texas. In 1969, the Tarrant County Bar Association (Fort Worth), which had been assessing its members for these funds, succeed in transferring that financial burden to the county by persuading the legislature to provide one public defender position for each district court in that county that handled criminal matters. Even at present, some county bar associations continue to assess members who do not want to take court appointments and use these funds to "sweeten" the compensation paid by the courts to those attorneys willing to handle them (e.g. El Paso County).

Despite a lengthy history of requiring indigent defense in criminal matters, we have precious 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 focus on disposition patterns within a particular jurisdiction (Ballard 1995) or rely on isolated court cases and anecdotes. What has been largely missing from discussions of this topic are opinions gathered from those working within the system -- defense attorneys, prosecutors, and judges. 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 Spangenberg and his colleagues. These studies, while somewhat informative, are of limited value given their data collection and analysis techniques.⁷

Given the lack of appropriate data and the pressing need for examination of this topic, our research moves beyond anecdotal evidence and suspect data related to how Texas has carried --or attempted to carry -- the guarantee of equal access to justice into effect. Specifically, this paper reports findings gathered from a systematic survey of all criminal prosecutors and compares those findings to our earlier work (Butcher and Moore 1997) which examined the criminal defense bar's attitudes related to the court-appointed system and its effectiveness. Our earlier analysis of the criminal defense bar reported, in part, that defense attorneys feel the current court-appointed system is wrought with political overtones, places unfair financial burdens on assigned counsels, hamstringing their efforts to provide effective representation by denying them access to the necessary special services (e.g., criminalist, DNA expert, etc.), and results in less effective representation for indigent defendants compared to non-indigent defendants.

It is worth remembering that the perspective of the defense bar is, after all, just one piece of the puzzle. Moreover, there are many reasons to believe that defense attorneys may be less than objective in their assessment of the current system. First, those involved

⁷ In one study (Spangenberg 1993), surveys were distributed to lawyers attending a continuing 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, creating the erroneous impression that all the data were from a representative sample.

in the day-to-day representation of indigents may simply be too close to the "problem" to offer an objective assessment of the current system. Attorneys who are involved on a daily basis with the system may overgeneralize from a particularly distasteful court-appointed experience. Second, it could be suggested that defense attorneys are not objective in their evaluations since they have the most to gain from any reform of the system. Complaints that attorney compensation is too low or that the level of support services is insufficient might be offered in hopes that both would be increased. In this light, defense attorney responses could be seen as self-interested. Third, since the practice of criminal defense is often not held in high regard by much of the public (and also by many members of the civil bar), defense attorneys may use problems with "the system" as a scapegoat to justify what is perceived as their poor performance.

Given these concerns, an examination of prosecutors - - the view from the other side of the courtroom - - is especially important. In addition to offering a counter balance to defense attorney perspectives, prosecutors merit examination in their own right since they bring to the table a different set of values and perspectives. For example, prosecutors are not directly involved with the indigent client, consequently they may be more objective about the current system. Additionally, prosecutors have a unique vantage point in that they see large numbers of cases each year which involve both indigent and retained individuals charged with the same offense. This unique experience affords prosecutors an opportunity to evaluate how similar cases involving court-appointed and retained counsel are processed. Finally, and perhaps most importantly, prosecutors are able to observe the behavior of the defense attorneys and comment on how the same attorney behaves when they represent court-appointed and retained clients. Instead of relying on members of the

defense bar to incriminate themselves related to how they might treat their indigent clients, prosecutors should be well positioned to objectively evaluate differences in defense attorney behavior.

Research Design

To gauge prosecutor's attitudes related to the provision of legal services to the poor in criminal matters, a survey was mailed to every criminal prosecutor in the state of Texas. The list of prosecutors was obtained from the Texas District and County Attorneys Association (TDCAA) which maintains a comprehensive list of prosecutors in the state. The Research Division of the State Bar of Texas mailed the survey to the population employing a variation of the Total Design Method (Dillman 1978). A total of 1942 surveys were mailed and 1,113 were completed and returned for a response rate of 57 percent.⁸ Over 85 percent of the respondents were white (86.1 percent); the rest of the sample was comprised of 9.6 percent Hispanic, 2.8 percent black, 0.7 percent Native American, and 0.5 percent Pacific Islander.⁹ Males comprised 63.4 percent of the sample.

The basic design of the survey was similar to the instrument used to gauge opinions of members of the defense bar and included both open and closed ended questions grouped into five broad categories: (1) Respondents were asked to provide information

⁸ The response rate for the sample of members of the defense bar was 46 percent (n=1,376) reaching attorneys in 87 percent of Texas' 254 counties. Male respondents constituted 83.7 percent of the sample. Over 80 percent of the respondents were white (81.1 percent); the rest of the sample was comprised of 11.7 percent Hispanic, 5.0 percent black, 1.4 percent Native American, and 0.9 percent Pacific Islander.

⁹ These numbers are just slightly different from those reported by Spanhel and Shimatsu (1996) who examine both the civil and criminal bar in Texas. 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.

regarding the machinery currently used to provide representation for indigents in their jurisdictions; (2) Respondents were asked to evaluate the level of support provided to court-appointed counsel, both as to attorney remuneration and the provision of support services provided by the courts; (3) Respondents were asked to give their best estimate of the actual amount of remuneration court-appointed counsel receive for various types of cases; (4) Respondents were asked to evaluate the quality of representation provided by retained and court-appointed counsel; and (5) Respondents were asked a variety of demographic questions. In addition to traditional questions on gender and ethnicity, questions in this section were designed to determine the respondents' level of experience in trial and appellate courts and whether the prosecutor had ever worked as a defense attorney.

The View from the Other Side: Defense Attorney and Prosecutor Opinions Compared

As noted above, this manuscript extends our earlier work which examined the attitudes of the defense bar and is part of our larger effort to examine the system of provision of legal services to the poor in criminal matters in Texas. As such, it might be useful to recap the findings from our survey of members of the defense bar. Generally speaking, members of the defense bar believe the following: (1) in most circumstances the judge unilaterally makes the appointment of counsel and politics (e.g., reelection concerns, the need for the appearance of a fiscally sound budget, etc.) unduly influence the process; (2) court-appointed counsel are hampered in their efforts to represent indigents because they are denied access to the requisite special services (e.g., criminalist, investigator, DNA expert, etc.). Moreover, the denial of these services adversely affects the quality of

representation provided to the State's poor; (3) the level of compensation paid to court-appointed counsel is so low as to deter the best attorneys from accepting appointments and discourages those that do take cases from vigorously pursuing them; and (4) indigent clients are treated despairingly during various stages of the judicial process. Specifically, indigent clients are believed to have less experienced and less prepared attorneys, to be given different plea offers from prosecutors, to be treated differently by judges and to receive harsher sentences. In addition to the daily hardships of being poor, this picture painted by the defense bar is not a pleasant one for the State's indigents accused of crimes.

To characterize the opinions of the State's prosecutors as starkly different from those of the defense bar would, perhaps, overstate the case, however, it is clear that substantial differences exist between these two groups. Generally speaking, prosecutors are far less alarmed by the current system of provision of legal services to the State's poor. In most cases, prosecutors do not believe that indigents receive substantially different levels of representation than defendants who retain private counsel. And where prosecutors concede the system may be somewhat dysfunctional, they do not believe its shortcomings translate into injustices levied against indigent defendants.

(Table 1 about here)

System Satisfaction and Experience of Appointed Counsel. Overall, there is only moderate difference between the attitudes of defense attorneys and prosecutors as it pertains to the process of appointed counsel. Over 70 percent of respondents to both surveys indicate that judges make the appointment in their jurisdiction. As the data in

Table 1 indicates, the defense bar is somewhat more dissatisfied with this process of appointment (37.3 percent responded "somewhat dissatisfied" or "very dissatisfied") than prosecutors (20.7 percent responded with similar levels of satisfaction). While the two sides of the courtroom do not hold widely different views about the appointment process, they do believe very different types of attorneys are being appointed. For members of the defense bar, the attorney that is typically appointed is seen as less experienced than retained counsel in similar cases (53.9 percent responded that retained counsel were "usually" or "always" more experienced). By contrast, a majority of prosecutors perceive the experience levels of the court-appointed and retained counsel are nearly equal.

Finally, based on comments from several members of the defense bar, prosecutors were asked to evaluate what factors they believed were likely to influence the appointment process. As the data in Table 2 reveals, substantial numbers of prosecutors believe that personal relations with the judge, political connections, and the ability to move the case off the docket (with or without concern for the quality of the defense) play a part in the appointment process. Given the responses to this question, it is somewhat surprising that more prosecutors did not express higher levels of dissatisfaction with the appointment process. It may simply be that many prosecutors have come to accept these factors as part-and-parcel of a system that allows elected, partisan judges to make the appointments.

(Table 2 about here)

Compensation and Effective Representation. One of the largest concerns raised by members of the defense bar was the perceived lack of sufficient compensation. As

characterized by the defense bar, the frequent failure of the court to approve appropriate support services results in sub-par legal representation of the State's indigents.

Additionally, the low levels of pay discourage some of the State's most qualified attorneys from taking indigent cases¹⁰ and create such financial hardships that some attorneys provide a less than vigorous legal defense of their indigent client.

On the issue of compensation and representation quality, the view from the other side of the courtroom is dramatically different. Unlike their defense attorney counterparts, a majority (60 percent) of prosecutors believe that defense counsel receive the necessary support services and two-thirds (66.5 percent) believe that denials of requests for special services "rarely" or "never" affect the quality of representation (see Table 3). Prosecutors and defense attorneys also have starkly different views of the consequences of the current levels of compensation paid to court-appointed defense counsel. For example, only 15 percent of defense attorneys believe the current rates of compensation are sufficient to attract qualified counsel and two-thirds (67.4 percent) contend the rates of compensation affect the quality of representation. In contrast, nearly half of the prosecutors (49.3 percent) believe the current rates attract appropriate counsel and just over one-third (38.3 percent) believe the rates are at a level that would not adversely affect the quality of representation.

While most prosecutors seem content with the current rates of compensation, six in ten (60.6 percent) prosecutors have observed defense counsel who behave differently

¹⁰ El Paso County actually permits attorneys to "buy out" of court-appointed service. One can easily envision those attorneys who could attract more business from retained work simply paying the necessary fee to buy out of their court-appointed duties and leaving the work to less qualified attorneys.

depending on the financial means of their client. This finding is particularly disturbing since it means that the *same attorney* defends his or her retained client in a manner inconsistent with how he or she defends an indigent client in a similar situation. Specifically, prosecutors note that court-appointed counsel devote less time, are less prepared, and put on a less vigorous defense of their indigent clients. This pattern of behavior runs counter to several of the rationales offered for using the court-appointed system instead of the other alternative methods of delivering legal representation to the poor. There are many reasons that defendants, regardless of financial class, should be treated in a similar manner. First, legal ethics require that lawyers provide the best defense possible - - regardless of financial means. Second, court-appointed counsel have private practices to maintain and it is believed that attorneys would work diligently for their indigent clients in hopes of attracting future business from others who might observe their work. Third, much of the legal business is based on referrals from one attorney to the next. As such, attorneys representing indigent clients would seem to have an incentive to provide quality representation in case other attorneys are watching their efforts and are not aware of the financial means of client. A poor showing could be bad for future business while a strong performance would earn the respect of the attorney's peers. When further queried as to the motivation for the changed behavior, 73.6 percent of the prosecutors responding (n = 587) noted that money was at the root of the behavior.

(Table 3 about here)

Judicial Outcomes Examined. The fact that prosecutors and members of the

defense bar hold disparate views on the appointment process and the appropriate levels of compensation would be interesting, but of little consequence, as long as both classes of defendants received similar levels of representation and justice. As the data in Table 4 reveals, however, members of the defense bar and prosecutors hold different views of the level of representation and judicial outcomes provided to clients with retained and court-appointed counsel.

(Table 4 about here)

Generally speaking, three in four (76.5 percent) defense bar members believe that defendants with retained counsel received better representation. In contrast, a majority of the those on the other side of the courtroom (57.2 percent) believe that representation is the same for both indigent and non-indigent defendants. It should be noted, that while prosecutors are somewhat more positive in their evaluations of the level of representation than members of the defense bar, 38.7 percent of the prosecutors also believe that defendants with retained counsel “always” or “usually” provide better representation.

The differences between members of the defense bar and prosecutors is also evident when the two groups are asked about actions that take place in the courtroom. While a majority (58.6 percent) of defense bar members believe that prosecutors offer the same pleas to both indigent and non-indigent clients, nearly four in ten (39.5 percent) feel that clients with retained counsel receive better plea offers. In contrast, nearly 90 percent (89.2 percent) of prosecutors believe they provide the same plea offers to attorneys, regardless of whether the defendant is indigent or non-indigent. Similar patterns are

observed when the two groups are asked about the way judges treat defendants from both groups in sentencing decisions. Just over 15 percent (15.6 percent) of members of the defense bar believe that non-indigent defendants are treated more favorably by the judge, compared to just 3.9 percent of prosecutors who hold the same view. Similarly, over one-quarter (26.2 percent) of defense attorneys believe that indigent clients "always" or "usually" receive harsher sentences, compared to just 7.5 percent of prosecutors who profess the same belief.

Admittedly, as the data in Table 4 reveals, overwhelming majorities of both the defense bar and prosecutors believe indigent and non-indigent clients receive similar judicial treatment and similar sentences. However, it bears remembering that the requirement of both case law and statute is that all defendants, regardless of financial means, receive similar treatment. To the extent that either defense attorneys or prosecutors observe disparate treatment of defendants based on their financial resources we believe we have a reason to be concerned and continue to investigate this topic.

Discussion and Future Directions

To withhold the equal protection of the laws, or to fail to carry out their intent by reason of inadequate machinery, is to undermine the entire structure and threaten it with collapse. For the State to erect an uneven, partial administration of justice is to abnegate the very responsibility for which it exists, and is to accomplish by indirection an abridgment of the fundamental rights which the State is directly forbidden to infringe. To deny law or justice to any persons is, in actual effect, to outlaw them by stripping them of their only protection. It is for such reasons that freedom and equality of justice are essential to a democracy ... (Smith 1919, 5)

Reginald Smith may have been prone to overstatement, but his sentiment is well-placed. The principle that all individuals, regardless of economic status, are entitled to access to justice is widely held, however it appears that attorneys on each side of the

courtroom have quite different views as to the extent that equal justice is currently provided. Defense attorneys believe that court-appointed attorneys tend to be less experienced. Prosecutors do not. Defense attorneys believe they are not provided with appropriate support services. Prosecutors believe they are. Defense attorneys believe that they are paid at levels that deter the best attorneys from taking court-appointed cases and encourage others to put on a weaker defense of their indigent clients. Prosecutors believe that compensation levels are sufficient. Defense attorneys believe that indigents receive lower levels of representation, disparate judicial treatment, and divergent judicial outcomes. Prosecutors believe this is not the case.

Unfortunately, the data currently available do not allow us to determine whether the perspective of defense attorneys or prosecutors is more accurate. We hope to correct this shortcoming by surveying judges and by collecting data from the actual disposition of court cases involving indigent and non-indigent clients. The data available, do however, point to the value of gathering data from various parties in this process. It is quite clear from our findings that the picture of the current system of providing justice to the State's poor is colored, in large part, from where in the courtroom the observer is seated.

References

- Argensinger v. Hamlin*, 407 U.S. 24 (1972).
- Ballard, Mark. 1995. "Gideon's Broken Promise." *Texas Lawyer* (August): 1, 18-21.
- Bright, Stephen B. 1994. "Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer." *The Law Journal*, 103: 1835-1883.
- Butcher, Allan K., and Michael K. Moore. 1997. An Insiders' View of a Broken System? Defense Attorney Perspectives on the Status of Indigent Criminal Defense in Texas. Paper presented at the Annual Meeting of the Southwest Political Science Association, March 27-30, 1997 New Orleans, LA.
- Connelly, Richard. 1995. "The Best Defense? Performance of Houston Solos Draws Attention to Flawed System." *Texas Lawyer* (August): 18.
- Dillman, Don. 1978. *Mail and Telephone Surveys: The Total Design Method* New York, NY: Wiley Press.
- Foster v. State*, 767 S.W. 2d. 89 (Tex. Ct. of Crim. Appeals, 1990).
- Furman v. Georgia*, 408 U.S.-238 (1972).
- Gideon v. Wainwright*, 372 U.S. 335 (1963).
- Long, Elisa. 1994. "The Crisis in Indigent Criminal Defense in Texas." *LBJ Journal*, 6, 1: 43-63.
- Martinez-Marcias v. Collins*, 979 F.2d 1067 (5th Cir. 1992)
- Perini, Vincent. 1983. "The Real Cost of Defending Charles Ruberge." *Texas Bar Journal* (April) 422-429.
- Powell v. Alabama*. 287 U.S. 45 (1932).
- Ramirez v. State*, 721 S.W. 2d. 490, 492 (Texas App.- Houston [1st District] 1988).
- Schulhofer, Stephen J., and David Friedman. 1993. "Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Defendants." *American Criminal Law Review*, 31: 73-122.
- Silverstein, Lee. 1965. *Defense of the Poor in Criminal Cases: A Field Study and Report*. New York: American Bar. Foundation.

Smith, Reginald Heber. 1919. *Justice and the Poor*. Boston MA: The Merrymount Press.

Spangenberg, Robert L, et. al. 1986. National Criminal Defense Systems Study, Final Report.

Spangenberg, Robert L., and Patricia A. Smith. 1986. An Introduction to Indigent Defense Systems. Prepared for the American Bar Association

Spangenberg Group, The. 1993. *A Study of Representation in Capital Cases in Texas*. Prepared for State Bar of Texas, Committee on Legal Representation for those on Death Row.

Spanhel, Cynthia, and Leah V. Shimatsu. 1996. "A Profile of Minority Lawyers in Texas." *Texas Bar Journal* (October).

Swickard, Joe. 1997. "Appointed Attorneys Defend Responsibility to Law, Clients." *Fort Worth Star-Telegram*.

TABLE 1

OVERALL SATISFACTION WITH APPOINTMENT PROCESS AND WHO GETS APPOINTED

How satisfied are you with the current method of appointing counsel in indigent criminal cases in your jurisdiction?

	Very Satisfied	Somewhat Satisfied	Neither	Somewhat Dissatisfied	Very Dissatisfied
Defense Bar (n=1330)	14.7%	32.0%	15.7%	22.5%	15.2%
Prosecutors (n= 1 079)	22.3	31.0	26.0	16.3	4.4

When thinking of the criminal defense attorneys in your jurisdiction, are the attorneys who provide court appointed representation generally more experienced or less experienced than the typical criminal defense attorney?

	<u>Court Appoint. Always More Experienced</u>	<u>Court Appoint. Usually More Experienced</u>	<u>Equally Experienced</u>	<u>Retained Usually More Experienced</u>	<u>Retained Always More Experienced</u>
Defense Bar (n= 1 288)	0.7%	8.0%	37.3%	50.2%	3.7%
Prosecutors (n=1084)	0.9	17.1	54.4	25.4	2.2

TABLE 2

FACTORS THAT INFLUENCE THE APPOINTMENT DECISION

What influence does each of the following have in the appointment decision?

	None	Some	Moderate	Substantial
Attorneys reputation for moving cases, but consistent with a quality defense	10.7%	17.9%	27.7%	43.7% (n=1054)
Being friends with the judge	26.5	25.9	23.8	23.7 (n=1029)
Being a political supporter of the judge	37.4	25.3	19.5	17.9 (n=1012)
Being a campaign contributor	45.4	25.1	16.8	12.7 (n=977)
Attorneys reputation for moving cases, regardless of the quality of defense	37.5	39.0	17.5	5.9 (n=1009)

TABLE 3
COMPENSATION AND EFFECTIVE REPRESENTATION

Do you believe that defense counsel generally receive the support services they need to represent their indigent clients?

	<u>Yes</u>	<u>No</u>	<u>Don't Know</u>
Defense Bar (n=1252)	39.7%	60.3%	0.0%
Prosecutors (n=1087)	60.0	22.4	17.5

Do you believe that current rates of compensation for court appointed counsel are sufficient to attract qualified private counsel for court appointed indigent cases?

	<u>Yes</u>	<u>No</u>	<u>Don't Know</u>
Defense Bar (n=1334)	15.7%	76.4%	7.9%
Prosecutors (n=1082)	49.3	37.4	13.3

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?

	<u>Yes</u>	<u>No</u>	<u>Don't Know</u>
Defense Bar (n--1338)	67.4%	23.4%	9.2%
Prosecutors (n=1083)	38.3	46.9	14.7

Have you ever observed individual defense counsel who behave differently depending on whether he or she is representing a retained or indigent client? (asked of prosecutor's only)

	<u>Yes</u>	<u>No</u>
Prosecutors (n=1071)	60.6%	39.4%

Thinking of the defense attorneys you have noticed behaving differently depending on the nature of their client...(asked of prosecutor's only)

	<u>Yes</u>	<u>No</u>
Do attorneys devote less time to their indigent clients?	90.2%	9.7% (n=620)
Are attorneys less prepared to defend their indigent clients?	76.1	23.9 (n=599)
Do these attorneys put on a less vigorous defense of their indigent clients?	65.7	33.9 (n--598)

TABLE 4
ARE JUDICIAL OUTCOMES INFLUENCED UNDER THE CURRENT SYSTEM?

Do you believe that clients with retained counsel receive better representation than clients who have received court appointed attorneys?

	Retained <u>Always Better</u>	Retained Usually <u>Better</u>	About the <u>Same</u>	Crt. Appt. <u>Usually Better</u>	Crt. Appt <u>Always Better</u>
Defense Bar (n--1315)	10.3%	64.2%	24.6%	0.9%	0.0%
Prosecutors (n--1082)	1.9	36.8	57.2	4.0	0.1

In similar cases, is there a difference between pleas offered to clients with retained counsel compared to those with court appointed counsel?

	Pleas Better with <u>Retained Counsel</u>	Pleas about <u>the same</u>	Please Better with <u>Appointed Counsel</u>
Defense Bar (n=1277)	39.5%	58.6%	1.9%
Prosecutors (n=1074)	6.7	89.2	4.1

Based on your observations, how does the judge treat retained counsel and appointed counsel in the courtroom?

	Retained <u>Always Better</u>	Retained <u>Usually Better</u>	About the <u>Same</u>	Crt. Appt. <u>Usually Better</u>	Crt. Appt <u>Always Better</u>
Defense Bar (n=1293)	1.8%	13.8%	77.9%	5.3%	1.3%
Prosecutors (n--1079)	0.2	3.7	89.0	6.7	0.5

In sentencing decisions, how does the judge treat clients with retained counsel and appointed counsel?

	Retained <u>Always Better</u>	Retained <u>Usually Better</u>	About the <u>Same</u>	Crt. Appt. <u>Usually Better</u>	Crt. Appt <u>Always Better</u>
Defense Bar (n= 1 273)	1.3%	24.9%	66.7%	6.0%	1.1%
Prosecutors (n= 1 066)	0.2	7.3	89.7	2.4	0.4