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DO DEFENDANTS HAVE AN ATTORNEY WHEN THEY HAVE A PUBLIC DEFENDER?

*James Eisenstein**

COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA.
By *Robert Hermann, Eric Single, and John Boston*. Lexington,
Mass.: D.C. Heath. 1977. Pp. xiv, 243. \$15.00.

Some years ago, an academic researcher asked a convicted defendant if he had an attorney when he went to court. The response, which has achieved legendary status, was "No. I had a public defender."¹ *Counsel for the Poor* examines two questions raised by this retort. How good is the representation given indigent defendants? How do these defendants evaluate the attorneys the state pays for?

Although such questions have been asked before, this study offers perhaps the clearest, best focused, and most empirically sound answers to date. The book studies three urban jurisdictions—Los Angeles, New York, and Washington, D.C.—where the systems for providing representation and the proportions of defendants represented by privately retained counsel, private lawyers assigned by the court, and public-defender organizations vary.

The authors assess the quality of representation in two ways. First, they analyze case outcomes for a substantial number of defendants in each city. They measure the effectiveness of defense attorneys by examining the frequency of conviction and of imprisonment; they seek to determine through statistical techniques whether differences in conviction and imprisonment rates among defendants correlate with the type of defense counsel. Second, the authors examine through interviews the perceptions of both defendants and professionals (judges, prosecutors, and defense attorneys) of defense counsels' effectiveness.

The authors conclude that, on the whole, defendants are as effectively represented by assigned counsel—and especially by public defenders—as by privately retained lawyers. What small differences exist among the groups of defendants in rates of conviction and imprisonment turn out, upon statistical analysis, to

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1. J. CASPER, *AMERICAN CRIMINAL JUSTICE* 101 (1972).

be attributable to indigent defendants' more serious criminal records and to their inability to afford bail. Moreover, professionals' evaluations of public defenders' and assigned counsels' performance confirm what the analysis of case outcomes revealed—publicly provided attorneys, in general, are as competent as privately retained lawyers.

Defendants, however, doubt their lawyers' competence. The authors found "a pervasive antipathy of unexpected magnitude toward publicly paid defense lawyers" (p. 153). Indigent defendants questioned both the ability and commitment of publicly paid attorneys and were dissatisfied with the representation they received. The defendants strongly preferred retained counsel who, they felt, do a better job.

These conclusions by themselves are not startling in light of the growing literature reporting empirical studies of the criminal justice system. But several aspects of this book make it particularly useful to policy-makers, practicing lawyers, and teachers of criminal law and defendants' rights. The authors—two attorneys and a sociologist—carefully describe their methodology and clearly explain (with examples) how to interpret the statistical tables. The answers to their research questions rely upon a sound, prudent, and generally valid analysis of primary data. The authors' concern with defendants' perceptions of the quality of representation they received is especially commendable. Few studies have asked defendants what they think of their attorneys; even fewer have systematically interviewed defendants in more than one jurisdiction. The authors convincingly argue that defendants' perceptions are important, both as a matter of principle and because they affect defendants' chances of rehabilitation.

Several modest policy recommendations emerge from the picture of defendant dissatisfaction with publicly provided counsel. The authors suggest that improving defendants' knowledge and understanding of the criminal justice system in general and of the role of publicly provided counsel in particular would somewhat reduce the dissatisfaction born of their misperceptions. The authors propose several structural changes as well, such as assigning public defenders to cases from start to finish and granting defendants the power to hire and fire their publicly paid attorneys.

The book's descriptions of other aspects of the criminal justice system enhance its value to the general reader. For example, the authors discuss the significant effect on case outcomes of whether a defendant makes bail or remains incarcerated. Early

in the book, the prevalence of negotiation and accommodation in the disposition of cases and the infrequency of counsel's reliance upon adversary techniques becomes apparent. An early chapter also briefly summarizes the major cases establishing indigent defendants' rights to publicly provided counsel.

Although the book's analysis is basically solid, and although its conclusions are replicated in other empirical studies of the criminal justice system, academic researchers will find some troublesome methodological and conceptual weaknesses. Perhaps because the study concentrates so intently on how well various types of defense attorneys perform and how their performance is evaluated by others, it fails to present a consistent theoretical approach to the criminal justice process. (Adherents of "organizational" approaches, however, will be most likely to find the implicit theory and analysis compatible with their perspective.) The book does not ask many of the questions the data could address, including why there are differences between indigents and other defendants in the length of prison sentences and the time from arrest to disposition. It does not attempt to measure the strength of the evidence in the cases examined and hence cannot assess how that variable affects conviction and imprisonment rates. The most commonly used measure of the charges lodged ("high risk" vs. "low risk" of conviction and imprisonment) lumps together crimes whose conviction and imprisonment rates barely vary from the average with those that deviate substantially. Further, since the mix of crimes in the cases handled by the three groups of attorneys differs, the higher or lower "risk" associated with certain charges may be due in part to the performance of the category of attorney which most often handles them. The use of measures which themselves may be affected by attorneys' competence to assess attorney-effectiveness introduces the possibility of contamination in the analysis. Finally, the presentation of the statistical data in the middle chapters often bogs down, and at times the book expatiates on relatively small differences.

Despite the authors' diligence in seeking equivalent samples of cases from several jurisdictions, too many important discrepancies between the samples remain. All the defendants from Los Angeles had passed the probable-cause stage, and all were charged with felonies. By contrast, the Washington sample was drawn from those arraigned on both felonies and serious misdemeanors, and one part of the New York sample was drawn from persons arrested for felonies, many of whom disappeared from the

system by the time the cases passed the probable-cause stage. While these differences do not invalidate comparisons of the effectiveness of the three categories of attorneys within each city, they do muddle the clarity of the findings. The data measure attorney performance of somewhat different tasks on somewhat different sorts of cases in the three cities. We do not know, for instance, whether there are differences in dismissal rates attributable to the type of attorney at earlier stages of the criminal process in the Los Angeles sample. Other research has found precisely such differences. The study's inability to distinguish between retained attorneys and private assigned counsel for many of the New York and Washington cases also detracts from its reliability.

Perhaps the most serious methodological shortcoming of *Counsel for the Poor* rests in the authors' choice of defendants to interview. Only incarcerated defendants were questioned in Washington and Los Angeles. In New York, only fifteen percent of the defendants interviewed (twenty-two individuals) were not convicted, and though most of the defendants were black, both interviewers were white. Hardly any comparisons are made between the perceptions of convicted and unconvicted New York defendants. The authors' assertion that these problems with the defendant samples produce only "minimal" damage is speculative. The data provide no empirical answers to a reasonable question: When, if ever, does a favorable disposition obtained by a publicly provided attorney overcome defendants' prejudices against such "state lawyers"? Only interviews with unconvicted defendants can provide the answer.

Despite these shortcomings, the book contributes substantially both to the evidence that the quality of representation offered by the various categories of defense attorneys does not differ significantly and to our knowledge of how defendants perceive their attorneys' performance. Its descriptions of how the three cities provide attorneys to indigent defendants may also be useful to students of the criminal justice system. *Counsel for the Poor's* contributions to policy-makers, practicing attorneys, and teachers of courses on defendants' rights and criminal law are even more significant: When questions are raised about the adequacy of the representation provided by public defenders, this should be the first source examined. And if the authors' well-reasoned arguments are heeded, *Counsel for the Poor* should spur research and discussion of defendants' perceptions of their treatment in American criminal courts.