Indigents and the Courts: The Failures of Public Defense Systems

Annalee Levine

Introduction

The criminal justice system starts with investigation and arrest and can end with life imprisonment or even death. Along the way there are many steps for which having a good attorney can make a significant difference. This paper examines how the indigent are specifically disadvantaged by public defense systems at bail determination and plea bargaining discussions. The Federal Sentencing Guidelines are discussed to illustrate how a lack of quality representation plagues an indigent throughout his or her stay in the court system. The specific laws and procedures of Virginia and Massachusetts, two states considered to be on separate ends of the political spectrum, prove that although indigent defendants have the same constitutional guarantees as any other defendant, the workings of an overtaxed system clearly put them in an inferior position.

The Right To An Attorney

The Sixth Amendment to the Constitution of the United States reads, "In all criminal prosecutions, the accused shall enjoy the right…to have Assistance of Counsel for his defense.[1] This right is commonly understood as the "right to an attorney" and is often perceived as being an absolute right. However, it does not mean that the state will provide an attorney to be at your side at all times once you are arrested. Through a series of Supreme Court cases the right to counsel has been extended only to all criminal prosecutions, state or federal, misdemeanor or felony that carry a sentence of imprisonment if the court is actually going to impose imprisonment.[2]

[1] U.S. CONST. amend. VI.
[2] Scott v. Illinois, 440 U.S. 367 (1979).

Types of Defense Systems

The courts decide whether you will be appointed an attorney if you can not afford one and the standard for being able to afford one leaves many accused without representation. In 1991, about 75% of state prison inmates and 80% of local jail inmates reported that they had a public representation for the offense for which they were serving time.[3] There are no specific guidelines for the representation of the indigent and as a result each state has adopted its own system.[4] There are currently three methods for delivering indigent defense services: public defender programs, assigned counsel, and contract attorney systems.[5] Public defender programs are public or private nonprofit organizations. They have either a full-time or part-time salaried staff. Assigned counsel involves the appointment of private attorneys by the courts as they are needed. The names come from a list of available attorneys. Contract attorney systems involve government units that reach agreements with private attorneys, bar associations or private law firms to provide indigent for a specified amount for a specified time period.[6] Many states use a combination of methods to provide indigent representation.[7]

The Prevalence of Public Counsel

Appointed counsel is extremely common. One study by the Bureau of Justice Statistics (BJS), which reports on statistics for the Department of Justice (DOJ) compiled statistics on

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[3] Smith, Steven K. and Carol DeFrances. Indigent Defense. BUREAU OF JUSTICE STATISTICS, 1996.
[4] Id.
[5] Id.
[6] Id.
[7] Id.

defendants who received public counsel from the nation's 75 largest counties.[8] The study found that those with criminal records, less education, low monthly incomes, and no full-time employment were most likely, but not certainly the only ones, to have public counsel.[9]

The same 1997 BJS study examined contact with counsel The numbers on initial contact with counsel clearly illustrate how those with public counsel are disadvantaged in their representation from the very beginning. Defendants with public counsel met with their lawyer within twenty four hours of arrest only 8.8% of the time. Those with private counsel met with their attorney within twenty hours 26.3% of the time. Of those with public counsel, 12.6% did not meet with their attorney for the first time until either within a week and 13.6% did not meet until trial. Defendants with private counsel were less likely to wait that long before meeting with their attorneys (only 4.8% met within a week of the trial and only 3.5% met at trial).[10]

Statistics on the frequency of contact also reveal the flaws in the public counsel system. The majority of those with public counsel talked to their lawyer two to three times compared with the majority of defendants with private counsel who spoke with their lawyer six or more times.[11] In these critical first days and weeks in which those with appointed counsel do not met with their attorneys, evidence collection is takes place. It is possible that witnesses might leave town, begin to suffer from spotty memory loss, or possibly be influenced by others involved with the case or the media. Certainly forensic evidence might decline in quantity and quality. There are also direct effects on the defendant and his family. If not on bail, the defendant is completely unable to work. The family will suffer from having a member missing and the stress of a looming criminal punishment. As discussed earlier, there is a nominal fee often associated with

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[8] Defense Counsel in Criminal Cases, U.S. DEPARTMENT OF JUSTICE, 2000.
[9] Id.
[10] Id.
[11] Id.

appointed counsel that the family might not be easily able to pay. Therefore, money might be diverted from other important needs to pay the lawyer's bill.

Counsel for the indigent is extremely costly. States typically spend several hundred millions dollars each year on indigent defense.[12] In 1999, both Massachusetts and Virginia spent over $60,000,000 on indigent defense on comparably sized populations.[13] In 1999, the maximum annual entry-level salary for an assistant public defender in Massachusetts was $28,600 and an assistant public defender with five years of experience made a maximum of $42,000 in 1999.[14]

Virginia's Defense Sytem

Virginia does not have a statewide public defender program. About half of Virginia's counties or independent cities have public defender programs and those without use the court-appointed method.[15] In March 2003, the Virginia Indigent Defense Coalition (VIDC)[16] published a "Progress Report" on Virginia's public defense system.[17] The report began by describing Virginia's test for indigency. An indigent is "a person who requests legal counsel, but is unable to provide for full payment of a lawyer's fee without causing undue financial hardship to himself or his family."[18] Once a defendant alerts the court that he would like an attorney, there are three ways to qualify: through a presumption of indigency achieved by showing receipt

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[12] DeFrances, Carol J., State-Funded Indigent Defense Services, 1999. BUREAU OF JUSTICE STATISTICS. U.S. Department of Justice, 2001.
[13] Id.
[14] Id.
[15] Id.
[16] Virginia Indigent Defense Coalition, Progress Report (April 17, 2005), *available* at http://www.vidcoalition.org/supplement.html.
[17] Id.
[18] Virginia Indigent Defense Coalition, Progress Report (April 17, 2005), *available* at http://www.vidcoalition.org/supplement.html**.**

of certain government assistance; through a financial resources calculation (includes net income, assets and exceptional expenses); and though exceptional circumstances calculation, which might consider factors such as disabilities or whatever else justice would require.[19] The court then assigns either an attorney from the Public Defender's Office or an attorney from the court appointed system.[20]

This system sounds good in practice, but in reality there is a terrible strain on resources that affects the quality of representation that indigents receive once they qualify. According to the VIDC, the caseload of court appointed counsel has been continually increasing.[21] Currently there is no limit to the number of cases that a Public Defender can be assigned to at one time.[22] VIDC even points the inability of defense attorneys to meet with their clients in a timely fashion[23] that leads to inadequate preparation for hearings. Other problems include lack of facilities in jails and courthouses to meet with clients and a culture that says every attorney should be able to handle every case even if they do not really have the experience.[24]

Arguably the biggest problem facing the attorneys who represent the indigent in Virginia and other states is compensation. Public defenders are supposed to make a comparable salary to Commonwealth's Attorneys (prosecutors), but they receive no local supplements or grants and there is no loan forgiveness program.[25] Therefore, the defense attorneys find themselves coming out behind other lawyers with comparable experience. There is a $90/hour salary cap in

[19] Id. There is a presumption of eligibility if an adult is receiving state or federally administered public assistance.
[20] Id. There can also be occasions where the court appoints counsel because the ends of justice require it. The difference between the Public Defender's Office and the court appointed system is that those who work for the Public Defender are solely public defenders whereas court appointed attorneys can be "attorneys-at-bar" who do pro bono work by choice or by assignment from a judge.
[21] Id. http://www.vidcoalition.org/supplement.html (I don't know why these footnotes start to double space, but I will fix it)
[22] Id.
[23] The Public Defender Commission sets a forty eight hour time limit to meet with appointed clients but there is no state administrative body to enforce a time limit.
[24] Virginia Indigent Defense Coalition, Progress Report (April 17, 2005), *available* at http://www.vidcoalition.org/supplement.html.
[25] Id.

Virginia, which VIDC reports to be one of the lowest unwaivable salary caps in the country.[26] Ninety dollars an hour sounds like a lot of money but it does not properly take into account everything that an attorney needs to do in order to properly defend a client. Defense attorneys might need to travel to meet with witnesses or try to collect evidence, engage in expensive legal research, pay other people's salaries, spend time preparing for motions and attend many pre-trial hearings. Even if defense attorneys put in many extra hours on a case, the court will not allow them to exceed the cap, and they sometimes end up losing money on cases. The extremely low monetary compensation clearly exacerbates the problems of finding good lawyers to represent the indigent because there is a lack of motivation to enter the world of criminal defense.

Litigation Over Attorney Compensation in Virginia

In 2000 case of Webb v. Commonwealth,[27] Steven Benjamin, an attorney appointed to represent Salahundin David Webb in a criminal trial, moved to dismiss the charges asserting that (1) the statutory cap in Virginia on attorneys' fees was unconstitutional, (2) the compensation was inadequate and operated to deny Webb his right to conflict-free and effective assistance of counsel, and (3) the statutory compensation scheme caused a conflict of interest because it created a financial disincentive for him to effectively represent Webb.[28] The conflict of interest claim arose, according to Benjamin, because the compensation so burdened and impaired an attorney's ability to represent is or her client that an actual conflict of interest occurred.[29] The court affirmed the conviction saying that the salary cap was not unconstitutional based on the

[26] Id.
[27] Webb v. Commonwealth, 32 Va. App. 337, 528 S.E.2d 138 (2000).
[28] Id. at 341.
[29] Id. at 343.

Strickland[30] test for ineffective counsel which says that the lawyer's performance must fall below an objective standard of reasonableness and but for that performance the defense would not have been prejudiced.[31] There was no factual basis to support the argument that the amount of compensation created a financial disincentive to provide quality representation.[32] In fact, the court found that Benjamin had done a good job in his vigorous representation of Webb.[33] In regard to the amount of compensation, the court held that it was narrowly tailored (through different hourly rates for different types of cases) to suit a compelling government interest and therefore was not unconstitutional.[34]

Indigent Defense in Massachusetts

In 1983, the Massachusetts legislature provided for the creation of the Committee for Public Counsel Services (CPCS).[35] The role of CPCS is "to plan, oversee, and coordinate the delivery of criminal and certain non-criminal legal services by all salaried pubic counsel, bar advocate and other assigned counsel programs, and private attorneys serving on a per se basis."[36] CPCS provides representation where "the laws of the commonwealth or the rules of the supreme

[30] Strickland v. Washington, 466 U.S. 668 (1984).
[31] Strickland v. Washington, 466 U.S. 668 (1984).Webb v. Commonwealth, 32 Va. App. 337, 341, 528 S.E.2d 138 (2000).
[32] Webb v. Commonwealth, 32 Va. App. 337, 341, 528 S.E.2d 138 (2000).
Id. at 345-346.
[33] Id. at 346.
[34] Id. at 350-351.
[35] ALM GL ch. 211D, § 1 (2005).
[36] Id.

judicial court require that a person in such proceeding be represented by counsel; and, provided further, that such person is unable to obtain counsel by reason of his indigency."[37]

The legislature gave CPCS the power to define "indigency" in order to determine what, if anything, defendants can pay their lawyers.[38] A probation officer gives an opinion as to what whether a defendant can pay according to the standards.[39] A judge then submits a report to CPCS. The fee for a CPCS attorney is generally $150 but can be waived or added to if the court finds that the defendant is indigent but able to contribute (see next paragraph).[40]

The indigency determination is made by placing the defendant in the category of indigent, indigent but able to contribute, or not indigent.[41] A person is deemed indigent if she receives certain government benefits, are a patient in a mental health facility or treatment center and lacks funds, is in jail or a correctional institution and lacks available funds, has an annual income, after taxes, of 125% or less of the current poverty threshold.[42] A person is deemed indigent but able to contribute and the court will assign the amount that must be contributed if the defendant has an annual income, after taxes, of more than 125% and less than 250% of the current poverty threshold or is charged with a felony within the jurisdiction of the Superior Court and has available funds sufficient to pay a portion of the anticipated cost of counsel.[43] Defendants who do not meet the requirements for indigency or indigency with ability to will not receive appointed counsel and need to hire a lawyer privately or represent themselves.[44]

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[37] ALM GL ch. 211D, § 5 (2005).
[38] ALM GL ch. 211D, § 2 (2005).
[39] ALM GL ch. 211D, § 5 (2005).
[40] ALM GL ch. 211D, § 2A (2005).
[41] ALM Sup. Jud. Ct. Rule 3:10 (2005).
[42] ALM Sup. Jud. Ct. Rule 3:10 (2005). Current poverty threshold is determined by taking a Department of Agriculture-created minimum food budget that was initially created in the 60s and has since been adjusted for inflation, and multiplying it by three. Speak Out, Poverty: Is it Time to Redraw the Line? *Available at* http://speakout.com/activism/issue_briefs/1282b-1.html.
[43] ALM Sup. Jud. Ct. Rule 3:10 (2005).
[44] ALM Sup. Jud. Ct. Rule 3:10 (2005).

In a perfect world, CPCS would provide representation equal to that of other defendants. However, recent litigation in Massachusetts has shown that the CPCS system does not pay comparable salaries and therefore fewer experienced attorneys are available to handle the more complex cases and to supervise and mentor less experienced attorneys. In Machado v. Leahy,[45] the plaintiffs (a group of lawyers suing on behalf of their clients) claimed that counsel was often unavailable or appointed only after a delay which denied defendants of their rights to counsel and due process.[46] The court held that the plaintiffs did not have sufficient standing to bring the case on behalf of their clients and that the attorneys do not have a good claim because they receive compensation from private clients.[47]

This ruling does not solve anything but simply highlights the complexity of the problem with assigned counsel (as opposed to public defenders). Assigned counsel have private clients who pay them more than the indigent ones do. As a result, an attorney might be likely to spent a significant larger portion of time working on the private clients' cases.

Lavallee v. Justices in the Hampton Superior Court[48] dealt with the specific issue of bail hearings for indigents and the presence of representation in Massachusetts.[49] Petitioners in that case were indigent criminal defendants who had no attorneys to represent them due to a shortage of lawyers in their county's bar advocate program.[50] The shortage was caused by a low fiscal appropriation which paid appointed lawyers $30 an hour for a District Court case (a case for which the defendant can receive time only in a house of correction, not a state prison),$39 an

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[45] Machado v. Leahy, 17 Mass. L. Rep. 263, 11 (2004).
[46] Id.
[47] Id. at 32-33
[48] Lavallee v. Justices in the Hampton Superior Court, 812 N.E.2d 895, 422 Mass. 228 (2004).
[49] Id.
[50] Id. at 899-900.

hour for a Superior Court case other than a homicide (most felonies), and $54 an hour for a homicide case.[51] The court noted that these rates are among the lowest in the nation and have been basically unchanged since 1986.[52] This case was filed by the CPCS and the ACLU on behalf of 24 defendants being held in lieu of bail or other preventive detentions without counsel.[53] The petitions were denied by the lower courts.[54] Petitioners claimed that there was no longer a sufficient number of bar advocates willing to except their cases because of Massachusetts's chronic underfunding of CPCS.[55] Petitioners asked the court to provide counsel under the court's "inherent powers of superintendence," which would allow the court to order higher compensation at a rate of $60 an hour.[56] The Supreme Judicial Court of Massachusetts decided the petitioners were deprived of their right to counsel but instead of granting the required remedy, the court held that the defendants could not be held more than seven days and the criminal case against a defendant could not continue beyond forty-five days.[57] This did not do anything to solve the problem of extremely low compensation for CPCS attorneys.

Bail Statutes

Bail hearings are typically the first step in the criminal process where an attorney argues for his client. Without representation at a bail hearing, an accused will have difficulty knowing what the judge is looking for because a lay person does not typically know the requirements of a state bail statutes. The requirements for release on personal recognizance versus a bond varies from state to state as do the criteria. A look at the bail statutes of Massachusetts and Virginia,

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[51] Id. at 900.
[52] Id. at 900.
[53] Id.
[54] Lavallee v. Justices in the Hampton Superior Court, 812 N.E.2d 895, 422 Mass. 228 (2004).
[55] Id.
[56] Id.
[57] Lavallee v. Justices in the Hampton Superior Court, 812 N.E.2d 895, 901, 422 Mass. 228 (2004).

shows the specific language that has a greater impact on the poor than on the wealthy and proves how easily a defendant can be disadvantaged at this early stage in the system.

The Virginia Bail Statute

Virginia's bail statute uses a two-pronged test which mandates that a person in custody shall be admitted to bail unless there is probable cause to believe that he will not appear for trial or hearing or that his liberty will constitute an unreasonable danger to himself or the public.[58] There is a rebuttable presumption that no condition or combination of conditions will reasonably assure either appearance or safety if the person is charged with certain crimes.[59] These crimes include certain acts of violence, an offense for which the maximum sentence is life imprisonment or death, many drug crimes, certain felonies which would trigger habitual offender penalties, felonies committed while the person is awaiting trial or sentencing on another offense.[60] In assessing whether the presumption against bail has been rebutted, the Virginia courts consider the history and characteristics of the person, including character, physical and mental health, employment, financial resources, community ties, history relation to drug and alcohol abuse, criminal history and membership in a criminal street gang.[61]

The Massachusetts Bail Statute

Massachusetts has a detailed bail statute used by prosecutors, defense attorneys and judges at bail hearings.[62] ALM GL ch. 276 § 58. When defendant is arrested there is a bail hearing to determine whether that person shall be admitted to bail on his own recognizance or

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[58] Va. Code Ann. § 19.2-120 (2004).
[59] Id. at § 19.2-120(A).
[60] Id. at § 19.2-120(B).
[61] Va. Code Ann. § 19.2-120(D).
[62] ALM GL ch. 276 §8

whether he shall be denied bail. The standard for holding an accused without bail is the judge determines, in an exercise of his discretion that "such release will not reasonably assure the appearance of the person before the court."[63] This is a one-pronged test based only on risk of flight. It differs from many other jurisdictions that consider dangerousness as well. In order to determine whether a release will reasonably assure the appearance of the person before the court, the judge takes into account factors as presented by the prosecutor. These factors include the nature and circumstances of the offense charged, family ties, financial resources, employment record, history of mental illness, reputation and the length of residence in the community, record of convictions, any illegal drug distribution or present drug dependency, history of flight, failure to appear at any court proceeding to answer to an offense, whether the offense is a certain kind of domestic violence offense, and whether there is a history of restraining orders entered against the defendant.[64]

Practical Implications of the Massachusetts and Virginia Bail Statutes

The factors considered in both states' bail statutes above factors clearly disadvantage the poor. First, some of the criteria are going to inherently make the poor more suspect. In addition, it seems that this disadvantage is based on stereotyping, on not at looking at the whole individual. Factors that immediately stand out as problems of the poor include history of mental illness, lack of good reputation and length of residence in the community, a possible prior record of convictions, illegal dependency, domestic violence and the status of being on parole or probation. Therefore it would follow that an attorney is more valuable at bail determination to a poor defendant who would, on the basis of his poverty, be quite suspect in many of these areas.

[63] ALM GL ch. 276, § 58 (2005).
[64] ALM GL ch. 276 § 58 (2005).

However, a poor defendant's lawyer is clearly going to be overburdened and in most-cases not eager to spend a lot of time researching arguments for a bail hearing.

The other way the poor are disadvantaged is because the statutes are complex and involve a lot factors. An attorney who has the time and inclination to sit down and get to know his client and the surrounding circumstances ought to be able to get their client released without bail or with lower bail on average because that attorney has taken the time to tailor their argument to the statute. A client, who is not usually trained in trial advocacy, will not know immediately what to share with the attorney. A client who feels comfortable with his representation is more likely to open up more and participate in crafting an argument.

A 1996 study compared the pretrial trial release of felony defendants in the nation's 75 largest counties.[65] The study found that 52.5% of defendants with public counsel were released versus 79.0% of defendants with private counsel. Of those who were detained, 38.2% of those with public counsel were detained with bail versus 14.3% of defendants with private counsel.[66]

Background of the Plea Bargaining Process

The Supreme Court has held plea bargains constitutional and recognized their indispensable role in the criminal justice system.[67] In 2002, guilty pleas accounted for 95% of felony convictions in state courts and trial convictions accounted only for 5%.[68]

A plea bargain guarantees a conviction and thus both prosecutors and defense attorneys have various incentives to entering into a plea bargain. Prosecutors stand to gain career-wise

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[65] Defense Counsel in Criminal Cases, Bureau of Justice Statistics, U.S. DEPARTMENT OF JUSTICE (2000).
[66] Defense Counsel in Criminal Cases, BUREAU OF JUSTICE STATISTICS (2000).
[67] Plea Bargaining and Convicting the Innocent, 16 BYU J. Pub. L. 187, 217.
[68] Felony Sentences in State Courts, BUREAU OF JUSTICE STATISTICS (2002).

from having a high conviction rate. The public confidence in the government rises as a result of putting perceived criminals behind bars and the prosecutor is able to handle more cases.[69] A prosecutor is most efficient when he gets maximum convictions of the guilty and dismissal of charges against the innocent and he helps conserve the government's money.[70] The prosecutor's considerations in determining whether to plea bargain should be the gravity of the crime and the adequacy of the punishment.[71] A prosecutor is supposed to obtain a plea for the "most serious, readily provable offense" sometimes taking into consideration the characteristics of the defendant and the wishes of the victim.[72] However, efficiency is usually the overriding cause of entering plea negotiations.[73]

Defense counsel's incentives to enter into plea bargains are largely financial. Unless appointed defense counsel happens to represent extremely wealthy clients, they will need to handle a large volume of cases in order to be successful and that usually means pleading them out instead of trying them.[74] Here again, the problem arises of appointed counsel being tempted to spend more time working on cases for which they are being privately paid. Public defenders are also in a difficult position. If public defenders cannot keep up with their caseload, their job is in peril.[75] Aside from the economic pressures, defense attorneys realize that they are part of a system and that their success often depends on getting the cooperation of judges and prosecutors.[76] The prosecutors and defense attorneys often know each other extremely well and

[69] Plea Bargaining and Convicting the Innocent, 16 BYU J. Pub. L. 187, 217 (2002).
[70] Id. at 192-193.
[71] Id. at 194.
[72] Id. at 195.
[73] Id. at 192.
[74] Plea Bargaining and Convicting the Innocent, 16 BYU J. Pub. L. 187, 217 (2002).
[75] Id. at 209.
[76] Id. at 210, 211.

know that they will need favors from the other in the future. Hence, they might not want to alienate each other or might engage in a "trade-out" at the expense of the defendant.[77]

Reviewing Ineffective Counsel Claims with Respect to Plea Bargaining

The basic test for ineffective counsel in came from Strickland[78]. Through Hill v. Lockhart,[79] the Supreme Court mandated that the claims arising from the plea bargaining process were subject to the same test.[80] The test is two-pronged and both prongs must be fulfilled for a successful claim.[81] Defendants must show that their attorney's performance fell below an objective standard of reasonableness and that "there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.[82]

The American Bar Association (ABA) has also realized the importance of plea bargains and has warned defense attorneys about their role in plea bargaining.[83] The ABA warns, "Under no circumstance should a lawyer recommend to a defendant acceptance of a plea unless a full investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."[84] Under this warning, counsel should definitely speak to witnesses and investigate possible defenses.

While it sounds as through safeguards are in place through Hill and the ABA warning, the nature of the system still invites unchecked representation. Public attorneys have little time to spend explaining the intricacies of the evidence and the realistic chances of success with their

[77] Id. at 211.
[78] Strickland v. Washington, 466 U.S. 668 (1984).
[79] Hill v. Lockhart, 474 U.S. 52 (1985).
[80] Id.
[81] Plea Bargaining and Convicting the Innocent, 16 BYU J. Pub. L. 187, 217 (2002).
[82] Plea Bargaining and Convicting the Innocent, 16 BYU J. Pub. L. 187, 217 (2002).
[83] Id. at 218.
[84] Id.

clients. As mentioned earlier, the long-term bargaining relationships between prosecutors and defense attorneys also plays a major role. There are also state sanctions and encouragement of plea bargains through prosecutors and judges which results in a decrease in the quality of the representation. Overall, many attorneys find themselves plea bargaining not because they have done the investigation that the ABA tells them to do, but simply because it is more convenient than going to trial.[85]

Implications of Plea Bargain and Possible Solutions for the Future

The fact that the defendant might be innocent is an important factor to consider in any discussion of the plea bargaining system. In theory, the innocent defendant should be less likely to be convicted at trial. There are three ideas that could possibly reduce the chance of that conviction. Increased discovery would allow the defendants, along with their lawyers, to make more reasoned estimates about what their chance for conviction is and, in some cases, can aid them in deciding whether to plea.[86] The second way to reduce the chance of convicting an innocent defender is to require more pro bono work by attorneys which would help to reduce the workload on defense attorneys in general. Third, judicial discretion in dealing with the sentencing guidelines (to be discussed later) could be enhanced.[87] Currently, a prosecutor has significant control over the sentence but in the future, judges could use their powers in regards to mitigating factors and could play a stronger role in the actual bargaining process.[88]

It is apparent that public counsel systems need some reform in order to properly fulfill its obligation to indigents clients. One idea that has been put forth is to revise the appointment

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[85] Id. at 219-220.
[86] Plea Bargaining and Convicting the Innocent, 16 BYU J. Pub. L. 187, 236 (2002).
[87] Id. at 238-239.
[88] Id. at 238.

procedure itself and give the clients a much greater say in selecting their attorney.[89] A client could select his attorney from the pool of available public defenders and assigned counselors. Another way to select the attorney could be through a voucher system. [90] If the court has ensured that there are no conflicts and the attorney is competent, there is no reason why that attorney should not represent the client.[91] The client could also select alternates in case something prevented the original lawyer from completing the case.[92] If the client is happy with his representation, they might be more inclined to participate in his defense.

Final Insult: The Sentencing Guidelines

Regardless of how whether it happened through a plea bargain or a trial, once a defendant is convicted he will be sentenced for the exact crime he was found guilty of committing. The Federal Sentencing Guidelines contain mandatory sentence ranges for all crimes. A complete study of how the Guidelines as a whole affect indigents as an economic group without race being used as a proxy, would be vast and has not, at this time, been completed. However, conclusions can still be drawn about the effects on indigents through an examination of the Guidelines' treatment of drug crimes, specifically those crimes involving with powder cocaine and cocaine base (crack).

Crack is a drug that has had an unusual relationship with the impoverished from its first appearance in the mid-1980s and was an alternative to expensive cocaine. Crack use escalated quickly because it was so affordable, it was easy to smoke, and its effects were rapid and intense.

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[89] I want a Black Lawyer to Represent Me, 20 LAW & INEQ. *J. 1*, 46. (2002). This article specifically points out that race might be an important factor in selecting an attorney for some defendants, especially if the case has race issues.
[90] Id. at 50.
[91] Id. at 47.
[92] Id.

These characteristics make it more addictive than powder cocaine. Crack's popularity among the poor and children was enormous and continues to be a major problem.[93]

In 1986, Congress amended the sentencing guidelines to have a crack-to-cocaine powder ratio of 100:1. This means if you have X amount of crack, you will sentenced as if you had 100X of cocaine.[94] For example, the defendant in United States v. Cyrus[95] was convicted of possession of a certain amount of crack and sentenced to 10 years in prison.[96] Had the defendant been convicted of possessing the same amount powder cocaine, there would have been no mandatory sentence and he probably would have received a 2-3 year sentence.[97]

There have been cases in every circuit challenging the constitutionally of the punishments for cocaine base (crack). Several arguments against the 100:1 crack-to-powder ratio have been put forth. One defendant argued that the ratio violates the eighth amendment prohibition against cruel and unusual punishment because it is disproportionate to the crime.[98] The United States Court of Appeals for the District of Columbia Circuit said that the disproportionality argument was baseless.[99] There have only been three instances where disproportionality amounting to an eighth amendment violation. The first was a death sentence for a man who was convicted of a non-homicide crime.[100] The second was imposing life without parole for a non-violent recidivist who passed a bad check for $100[101] and the third was for sentencing a man in the Philippines to

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[93] http://acde.org/common/Cocaine.htm
[94] United States v. Cyrus, 1989 LEXIS 18821, 8 (1989)
[95] Id.
[96] Id.
[97] Id.
[98] United States v. Cyrus, 1989 LEXIS 18821, 8 (1989) Cyrus at 8.
[99] Id.
[100] Coker v. Georgia, 433 U.S. 584 (1976).
[101] Solem v. Helm, 463 U.S. 277 (1983).

15 years hard labor for falsifying a government form.[102] The Cyrus court held that the drug sentencing was not as inequitable.[103]

Another argument claimed that the Guidelines violate equal protection because the crack-to-powder ratio is arbitrary because Congress did not explain why there was a different between crack and powder cocaine.[104] The Cyrus court held that Congress did not have to explain why it had different punishments so it bears a reasonable relationship to a legitimate end. The court said the only test was whether a court "can divine some rational purpose."[105] According to the court, there was a rational purpose because crack is cheaper, more addictive and more popular than powder cocaine.[106] Crack addiction is strong because the drug is purer and progresses faster to the brain producing an almost instant high that increases the likelihood of addiction.[107]

The defendant in United States v. Pickett[108] argued that his 240-month sentence for intent to distribute crack was improper because the ratio violated both the eighth amendment and substantive due process and because the court was required to depart downward from the guidelines and it did not.[109] The court dismissed the eighth amendment argument for the same reasons the Cyrus court did.[110] The court dismissed the substantive due process argument because the statute bears a reasonable relation to a purpose legislative purpose. The legitimate purpose was reducing the likelihood of drug addiction and the evidence that there was a rational relation was that crack is a purer drug than powder cocaine.[111] Additionally, the court found that

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[102] United States v. Weems, 217 U.S. 349 (1909).
[103] United States v. Cyrus, 1989 LEXIS 18821, 8 (1989)1989 LEXIS at 9.
[104] Id. at 9.
[105] Id. at 10-11.
[106] United States v. Cyrus, 1989 LEXIS 18821, 8 (1989)1989 LEXIS at 10.
[107] United States v. Williams, 962 F.2d 1218, 1227 (1992).
[108] United States v. Pickett, 941 F.2d 411 (1991).
[109] Id. at 417.
[110] Id. at 419.
[111] Id. at 419.

Congress was especially concerned with crack's small dosage and cheap price.[112] Specifically, the court mentioned that the price of cocaine allows children to afford cocaine for the first time.[113] The court also dismissed Picket's argument that the judge should have departed downward because it was incorrect. A court is authorized to depart down if there are mitigating circumstances, but it is not required to do so. Also, the ratio is not sufficiently unusual to justify a downward departure and a refusal to depart downward from a properly computed guideline range is not appealable.[114]

Conclusion

Many of the people who commit crimes deserve to be in jail or prison because they represent a danger to themselves and to society. However, people should not be in jail because they could not adequately defend themselves because they were poor. As Americans, we should take a hard look at the way we treat those living in poverty. This paper has shown that we need to allocate more money to ensure that everyone who enters the criminal justice system does so on the same footing. Defendants are assumed to be innocent until proven guilty in a court of law. We need to make sure that everyone has the same resources to prove their innocence.

[112] Id. at 419.
[113] Id. at 419.
[114] Id. 417-418.