

## **Interacting Forces in the Judicial System: A Case Study in American Criminal Law**

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### ***Introduction***

*“[Law] is a word of many meanings, as slippery as glass, as elusive as a soap bubble.”*

--Lawrence Friedman

“At the heart of the American paradigm is the perception that law and its agents . . . are colorblind and thus justice is impartial, objective and seeks *la verdad* (the truth). But, *la realidad* (reality) differs . . . decision makers are often more guided by their environment than by objectivity” (Urbina, 2003a:124),

suggesting that the *dynamics* of courtroom officials influence how defendants are treated. The mere dynamics of the judicial process indicate differential treatment in favor of those with community ties, resources, money, power, or prestige. In effect, contrary to the *popular imagination* that the legal system is grounded on a balance of power, prosecutors decide which cases to prosecute, which cases to plea bargain, which cases to try, indirectly influence bail and sanctions, and informally control the grand jury in indictment decisions. In theory, prosecutors function only as legal advisers to the grand jury, but in practice, prosecutors dominate. As noted by Justice Robert Jackson, equipped with unmatched independence and discretionary powers, “The prosecutor has more control over life, liberty, and reputation than any other person in America” (cited in Neubauer, 2005:126).

The opposing side, the defense, is normally hindered with limited resources, time, and, oftentimes, expertise and experience, as opposed to the prosecutor who controls the rules of the *legal battle*. Still, defense attorneys have the legal and moral responsibility of protecting the constitutional and statutory rights of their clients, and thus they are the prime movers in suppression matters if illegalities exist. Unless the defense objects, it is assumed that law enforcement officials behaved properly in their investigation, which is not always the case (Urbina, 2004a, 2011a). However, in deciding whether to make a motion to suppress evidence, defense attorneys are influenced by the informal norms of the group; that is, the prosecutor and judge, who serve as a symbol of justice. Indeed, in the case of attorneys who typically represent minorities and the poor, legal rationality indicates that public defenders, as paid employees of the state, are possibility not providing a vigorous defense in that they are tied too closely to other practitioners in the courtroom who are interested in *selected cases* and the fast moving of caseloads, with severe consequences for attorneys who go against institutional norms (Blumberg, 1969; Urbina and Kreitzer, 2004). This type of selection and case mobility might ensure continuity and appear *normal* on the surface, but it places those in the greatest need of protection, particularly minorities, the poor, uneducated, immigrants, and undocumented people, at a critical disadvantage.

In sum, the basis and forces of American law are more of human conflict, power, and control than of efficiency, equality, fairness, and justice. In essence, the application of American law is shaped by the simultaneous interaction of powerful forces, like philosophical views, moral sensibilities, cultural considerations, and bureaucratic mentalities. Together, the literature has provided great insight into the various dynamics of courtroom justice. Research, however, has not fully explored the complexity of the legal process in its totality, as it pertains to certain issues confronting Latina, Latino, and minority defendants in general, as in the area of legal and extralegal factors, particularly economics. This investigative gap in legal research is partly attributed to the fact that the experience of minority and indigent defendants is governed according to each court’s interpretation of criminal laws and circumstances, even after *Gregg* (1976) in the case of capital punishment.

Thus, even though courtroom reforms have been implemented so that decision-makers are better guided by legal parameters, final outcomes do not necessarily match legislative expectations or the reality of crime and deviance, with capital punishment being a prime example of this historical situation, as noted by Urbina in *Capital Punishment in America: Race and the Death Penalty Over Time* (2011b). Judges and prosecutors may want more standardization or autonomy, but having it is unlikely to change their behavior in any significant way. Some courtroom officials will not alter their behavior in the treatment of minority, particularly Latinas, Latinos, and African Americans, or indigent defendants, simply because a law is revised or a new statute is in place. In effect, data show that judges' decisions are often based on personal standards, for there is no consistency in the decisions of individual judges in the same community (Pinkel and Louthan, 1985; Hofer, Blackwell, and Ruback, 1999). According to Joycelyn Pollock (2010:378), "One thing is clear: A judge . . . carries baggage of personal, political, and social bias," and thus "The final decision of the judge, prosecutor, and defense attorney is personal" (Urbina, 2005:149; Urbina and Kreitzer, 2004; Urbina and White, 2009), largely attributed to the fluidity of US jurisprudence.

Race and ethnic effects interact with various other legal and extralegal factors. Though, among the most consequential factors for minorities is poverty, and thus their limited ability to hire legal counsel, particularly competent attorneys. In the case of Hispanics, the Latina and Latino experience in the judicial system is heavily governed by the powerful forces of poverty, combined with other crucial factors, like mental illness, which will impact their ability to hire competent legal counsel and understand the complex nature of legal proceedings. The primary objective of this article, then, is to further explore the processing of minority defendants in the legal system vis-à-vis the views of practitioners responsible for the daily operation of the *machinery* of courtroom justice. Judges, prosecutors, and public defenders in Wisconsin, a state which has experienced a significant shift in race and ethnic demographics, were asked to express their views and concerns regarding the experience of minorities in the Wisconsin court system, focusing primarily (but not exclusively) on the following elements: legal and extralegal factors, the public defender system, and mental illness.

### **INTERTWINING FORCES OF AMERICAN JUSTICE**

#### **Race and Ethnicity**

Studies show that various legal and extralegal factors influence judicial proceedings and final outcomes (Spohn and Spears, 1996; Urbina, 2008; Welch and Spohn, 1986). For instance, studies show that the combination of various factors are influential in crucial decisions, including whether a criminal defendant is released on recognizance by a judge, the amount of bail required, and whether to offer a defendant a cash alternative to a bond (see Bosworth and Flavin, 2007; Nagel, 1983). However, no single factor has received more attention in academic investigations than the historical and polemic thesis of race and, more recently, ethnic discrimination (Urbina, 2007).

Almost a century since Thorsten Sellin (1928) first introduced the subject for scientific research, the discrimination thesis in the judicial system remains unsettled, sensitive, and polemic. While some investigators (Pridemore, 2000; Wilbanks, 1987) characterize the discrimination thesis as an historical myth, others report that "judicial decisions are not made uniformly. Decisions are made according to a host of extralegal factors" (Quinney, 1970:142), particularly race, ethnicity, and social class (Urbina, 2011a, 2004b, 2007). Similarly, Albert Reiss (1974:694) reports, ". . . there is much de facto discrimination. The poor and the minorities . . . are likely to be sanctioned more severely, and to be denied their rights and the full opportunity to defend their interests."

Martin Guevara Urbina (2007:41) reminds us that

with few exceptions, prior explanations of racially disparate punishment have followed a dichotomous approach (i.e., African Americans versus Caucasians) . . . consequently there is not much on Latinos/as, whose experiences with the criminal and juvenile justice systems differ from those of African Americans and Caucasians.

Together, though, the weight of the empirical evidence lends towards the race discrimination thesis (Free, 2001; Urbina, 2011a, 2011b; Zatz, 1987), a trend that is becoming apparent in ethnic investigations (Urbina, 2007, 2008; Urbina and Smith, 2007). Indeed, a state-wide sentencing study by Darrell Steffensmeier, Jeffery Ulmer, and John Kramer (1998) showed that young African American men are sentenced more harshly than any other group, with race being the most influential in the sentencing of younger rather than older males.

Some scholars suggest that race discrimination occurs primarily as a result of less favorable plea bargains made for African Americans than for Caucasians by defense attorneys and prosecutors (Welch, Spohn, and Gruhl, 1985; see also Mann, 1993; Mann and Zatz, 1998), with most courtroom practitioners being middle-class Caucasian men (Urbina, 2004b, 2005; Urbina and Kreitzer, 2004; Urbina and White, 2009). Other investigators report that “. . . a great deal of the variance in discrimination scores for the judges could be explained by their backgrounds and attitudes” (Gibson, 1978:475), particularly race and ethnic stereotypes (Fontaine and Emily, 1978; Kluegel, 1990). Urbina (2011b) argues that as citizens and as elected or appointed officials, courtroom officials might share the general stereotyping predominant in the community, with race and ethnic attributes influencing them in deciding whether to prosecute, convict, and for how long to incarcerate. Alberto Mata (1998:146) claims that

those employing race politics ignore history. They tend to promote homogeneous images of Latinos as drug lords aiming to destroy America’s youths through drugs, as dangerous gang bangers who shoot anyone unfortunate enough to stumble through their neighborhoods, or as poor peasants sneaking across the border.

Crucially, empirical studies that have investigated the effects of ethnicity on sentencing decisions in non-capital cases show that Caucasian-Latino differences are small (or mixed) from the 1970s to the 1990s. However, studies using data from the 1980s and 1990s typically show a Caucasian-Latino effect in both incarceration and sentence length favoring Caucasians (see Steffensmeier and Demuth, 2001; Urbina, 2007). Other recent studies also show that Latinos are sentenced more harshly than Caucasians (Albonetti, 1997; Holmes et al., 1996; Kramer and Ulmer, 1996; Maxfield and Kramer, 1998; Spohn and DeLone, 2000; U.S. Sentencing Commission, 1995). Darrell Steffensmeier and Stephen Demuth (2001), for example, found that Latinos are the most at risk to receive the harshest penalty, the disadvantaged held for in/out and term-length decisions, for both drug and non-drug cases. Together, ideological and structural forces, to include systematic bias, racism, and lack of resources, against minorities lead to different opportunities and thus differential treatment (Schehr and Sears, 2005).

## **Employment**

Since the majority of criminal defendants have traditionally been inherently poor, no single extralegal factor is probably more influential in judicial proceedings than employment and subsequent income, in that it determines whether the defendant will be able to hire an attorney and the “caliber” of the attorney, which in turn influence the quality of representation and, by extension, final outcomes. As argued by Jeffery Reiman and Paul Leighton (2009) in *The Rich Get Richer and the Poor Get Prison*, the criminal justice system is designed to expand, control, and silence the poor, those who are not considered worthy of accommodation, those perceived as undeserving strangers, outsiders, and immigrants, and those viewed as indifferent to social norms. For Latinas and Latinos, the combination of being a minority, poor, unemployed, and thus not being able to hire competent counsel, clearly paving the way to jail or prison.

In effect, studies show that the defendants’ income influence “. . . the likelihood of going to prison after conviction. Most of this effect could be explained by low-income, and the defendant’s poorer opportunity for pre-trial release and greater likelihood of having a court-appointed rather than privately retained attorney” (Clarke and Koch, 1976:57). Arguably, low-income defendants are less likely to obtain both bail and competent defense attorneys, especially for lengthy and complicated trials, which in turn reduces their opportunity to prepare for trial, plea bargaining, prosecutorial proceedings, sentencing, appeal, and post-conviction remedies.<sup>1</sup>

Further, it has also been reported that unemployed offenders are perceived to be more threatening and dangerous than employed offenders (Spitzer, 1975; Urbina, 2007). An early study found that judges view unemployed people as a threat, and thus this “belief alone is sufficient to propel them towards stiffening their sentencing practices” (Box and Hale, 1985:209-210). More recent studies report that unemployment increased the odds of incarceration for young men and for young Latinos, and increased the length of sentence for males, young men, and African American men (Nobiling, Spohn, and DeLone, 1998; see also Chiricos and Bales, 1991), supporting the proposition that certain segments of unemployed offenders are perceived as *social dynamite* in need of strict social control (Spitzer, 1975; Urbina, 2003a, 2004a). Lastly, Cassia Spohn and David Holleran (2000) multi-jurisdictional investigation found that Latinos (notably Chicanos and Puerto Ricans) and young African American men face greater odds of incarceration than middle-aged Caucasian men, and unemployed Latinos (particularly Mexicans) and African American men are substantially more likely to be sentenced to prison than employed Caucasian men, supporting the race and ethnic discrimination thesis.

## Legal Counsel

Within the judicial system, no single legal right is more significant to defendants than the right to counsel, especially the poor who might not be able to hire private counsel, and thus might have to rely on court-appointed attorneys. The US Supreme Court ruled that based on the 6<sup>th</sup> Amendment's provision to the right to counsel, indigent defendants, including juveniles, charged with a felony are entitled to the service of a lawyer paid by the government.<sup>2</sup> The *Gideon v. Wainwright* (1963) ruling was limited to state felony prosecutions, but in *Argersinger v. Hamlin* (1972) the Court ruled that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel." Under *Mempa v. Rhay* (1967), a defendant is entitled to legal representation at every stage of prosecution "where substantial rights of the accused may be affected," requiring the "guiding hand of counsel." In all, indigent defendants have a right to court-appointed counsel from the time they first appear before a judge until sentence is pronounced and the first appeal is concluded, the only exception being the grand jury.<sup>3</sup> In *Scott v. Illinois* (1979), though, the Supreme Court ruled that counsel applies only to cases that actually lead to imprisonment, but not fines. In criminal appeals, indigent defendants are entitled to a free trial court transcript (*Griffin v. Illinois*, 1956), and a court-appointed lawyer (*Douglas v. California*, 1963). However, under the leadership of Chief Justice Warren Burger, the Supreme Court rejected attempts to extend counsel beyond the first appeal, and thus indigent defendants are normally not granted free legal service to pursue discretionary appeals (*Ross v. Moffitt*, 1974) or appeals to the Supreme Court.<sup>4</sup> Therefore, defendants sentenced to death must rely on voluntary counsel in pursuing post-conviction remedies (Urbina, 2011a, 2011b).

The judge inquires whether defendants understand the nature of the charge and the possible punishment upon conviction, whether any threats were made, if they are satisfied with the service of the defense counsel, and whether defendants realize that a plea waives the right to a jury trial (*Boykin v. Alabama*, 1969). Under *Alford v. North Carolina* (1971), however, judges have the authority to accept guilty pleas while claiming innocence (see Urbina, 2004a). The Constitution guarantees defendants the right to counsel, but, realistically, for most defendants this abstract legal right collides with their everyday reality, to include economic resources, life style, education, ignorance, fear, and language barriers.

Within the realm of justice, equity, and fairness, the more crucial question remains open to legal interpretation: Is it enough to have a lawyer? Or, must lawyers also be competent and effective? The Supreme Court noted that appellate courts must reverse only if the proceedings were fundamentally unfair and the outcome would have been different if counsel had not been ineffective. The legal standard for what constitutes ineffective counsel, though, is quite high, so high that in the case of Calvin Burdine, whose lawyer slept through parts of his trial, the appellate court said that if the lawyer was not sleeping during crucial parts of the trial, it was not ineffective counsel. In Texas, one of the most punitive states in the country, the Texas Bar Association (2000) reported major problems in the system when appointing attorneys for indigent defendants. The Texas Bar Association's investigation found that some of the appointed lawyers had been disciplined by the state bar and that there was no mechanism for monitoring the quality of their representation. More recently, an investigation discovered that some lawyers submitted poorly written appeals and, at times, did not cover the most crucial legal elements (Lindell, 2006a, 2006b, 2006c). In fact, the system of appointing lawyers for habeas corpus petitions, a highly technical area of appellate law, has no mechanism for evaluating the competence of attorneys in Texas, even though briefs are of extreme importance in that if issues are not raised on appeal, defendants may lose the right to ever raise them again (Lindell, 2007). When habeas corpus appellate attorneys are competent, they could save the lives of innocent people in death penalty cases.

In effect, a close exploration of the judicial dynamics shows, at best, public defenders as *conditioned* agents of court bureaucracy and regular private attorneys as rationally calculating realists. With a few selected cases going to trial and the fact that the typical American lawyer never actually trying a case, defense attorneys are closer to ideological and economic captives of the court than they are aggressive advocates in search of the truth. According to one observer,

The practice of defense law is all too often a 'confidence game' in which the lawyers are 'double agents' who give the appearance of assiduous defense of their clients but whose real loyalty is to the criminal courts. The defendant, from this perspective, is only an episode in the attorney's enduring relationships with the prosecutors and judges whose goodwill is essential to a successful career in the defense bar (Scheingold, 1984:155).

At worse, consider the following notion: "In prison, 'PD' stands not for *public defender* but for *prison deliverer*." Ironically, one of the most often cited reasons for false conviction, in addition to eyewitness testimony, is ineffective assistance of counsel (Schehr and Sears, 2005). With limited resources, minority defendants, most of whom are poor, are forced to rely on public defenders, who are being pressured to dispose high volumes of caseloads (Hall, 1999; Worden, 1991). From an economic standpoint, the typical defendant is too poor to hire a well respected private attorney, having to choose between an overworked and, at times, unprepared and inexperienced public defender and self-representation.<sup>5</sup> Case in point: If a defendant is working fulltime at federal minimum wage (40 hours a week at \$7.25 an hour), the yearly income sums up to about \$14,000 before taxes. As such, it's impossible for defendants to provide, say, a \$15,000 (or more) retainer for a private attorney. However, even though research supports the proposition that those who can afford private lawyers receive "better" representation (Martínez and Pollock, 2008), private attorneys, appointed by the court and paid with state funds, may not be better than public defenders, according to a Harvard study, which reviewed federal criminal cases between 1997 and 2001 and found that lawyers who were appointed to represent indigent clients were less qualified than federal public defenders, took longer to resolve cases, with worse results for clients (Liptak, 2007). Still, economically, even former President Bill Clinton was daunted by the high cost of lawyers representing him in his personal matters.

In short, independent of constitutional parameters, every part of the judicial system has its own unique procedures and its own way of defining and re-defining rules and decisions, with each part responding to a cluster of structural, ideological, political, financial, and social forces that impinge on it in a different way (Friedman, 2004; Urbina, 2003a), indicating that the application of law will be affected by the task that legal decision-makers, like judges, prosecutors, and defense attorneys, confront. In retrospect,

Explicitly or implicitly the question underlying sociological analysis of the criminal justice process always seems to be concerned with why the people who routinely operate the law also routinely depart from the principles of justice . . . violating the principle of equality before the law . . . (McBarnet, 1981:3-4).

What is barely mentioned is the nature and role of criminal law itself, often operating more in an autonomous way than in a semiautonomous fashion. Of course, this would require that the *foundations of American jurisprudence be put on trial*. Contrary to legal descriptions in many American textbooks,

Laws are made by dominant interest groups in society, who believe in protection for the social values which they conceive to be important. These laws are, furthermore, administered by men imbued with the ideas and concept of the social environment which has molded their personalities. The judge is no exception to the rule . . . When the judge dons his robes of office he is unable to divest himself of his social beliefs and prejudices (Sellin, 1935:212).

In essence, equality and fairness in jurisprudence is a social fiction that operates to the advantage of people who can afford justice, while brutally penalizing the poor, minorities, immigrants, and those who do not mix well with those operating the machinery of justice.

#### **A CASE STUDY OF AN AMERICAN STATE**

Once viewed as a role model for safeguarding the rights of defendants in judicial proceedings, Wisconsin affirmed the right of poor defendants to have lawyers in 1859, more than 100 years before the US Supreme Court declared that such constitutional right applied to both state and federal courts, and abolished the death penalty in 1853 to avoid grave injustices. Then, in 1965 the Wisconsin legislature created a pilot public defenders program, which went statewide in 1985, later adopting the income guidelines of 80% of the 1987 state poverty standards for the former Aid to Families with Dependent Children program, an income standard that remains the same today. However, it was not until 2003 that some reformers began to seriously advocate the adjustment of Wisconsin's public defender system, with the objective of allowing an individual earning up to 115% of the poverty level of \$22,050 for a family of four to qualify. Unable to implement legislative reform, the once model state fell into a state of crises. A 2001 investigation, for instance, found that about one in five misdemeanor defendants and one in 14 felony defendants represented themselves for at least one crucial hearing after being denied a public defender in Wisconsin. Currently, many poor defendants in Wisconsin are going to court without legal help because they make more than \$248 a month, nearly \$500 a month below the federal poverty line of \$738.

According to state Supreme Court Chief Justice Shirley Abrahamson, “The public defender guidelines should be realistic. They are old and outdated” (Zahn and McBride, 2002:1A). Janine Geske, former Wisconsin state Supreme Court Justice reports that “The right to counsel goes to the heart of the whole process because all those other rights don’t mean a lot if you don’t have lawyers explaining them to you” (Zahn and McBride, 2002:1A). Similarly, Milwaukee County District Attorney E. Michael McCann remarked: “In the absence of lawyers, the probability . . . for a miscarriage of justice clearly rises” (Zahn and McBride, 2002:1A), issues which could lead to grave results in death penalty states, with the state of Illinois, neighboring Wisconsin, being an example of miscarriages of justice in death penalty cases (Urbina, 2011a, 2011b).

This critical situation, though, is not unique to Wisconsin in that years after the US Supreme Court ruled in *Gideon v. Wainwright* (1963) that indigent defendants have a right to legal counsel in felony cases, the indigent defense system throughout the US appears to be in “crises . . . that far too many people are being tried, convicted and sentenced without even the rudimentary legal representation guaranteed by the Constitution” (Gleick, 1995:8).<sup>6</sup> In some states, including Illinois, Connecticut, Minnesota, Mississippi, and Indiana, the indigent-defense system has been so inadequate that states have been sued. According to New York State’s chief judge, because of the “acute shortage” of attorneys for poor defendants, the “problem had reached a crises stage” (Fritsch and Rohde, 2001:A1). As for death penalty cases, in Texas, one of the wealthiest US states, in 2005, Harris County spent only \$5.27 per capita on indigent defense, less than half the national average of \$11.88, and, worse, Harris County is the largest jurisdiction in the country without a public defender office, using an appointment method instead (Phillips, 2009a). More globally, one District Attorney quoted:

the ‘noble idea’ of the Sixth Amendment is unrealistic in its fullest form . . . if everybody asked for a jury trial, nobody would get any justice at all . . . we don’t have a system to determine who is guilty of crime in Texas. In fact, for minor crimes . . . poor defendants are often simply held in jail for about the period of time they would serve if they were actually convicted of the crime (Gleick, 1995:40),

clearly a critical situation in Texas, the leading death penalty state.

Beyond criminal defendants in non-death penalty cases, mothers with young children are trying to escape domestic abuse, poor tenants are battling evictions, and indigent migrant farm workers are among the thousands of poor people in Wisconsin (and throughout the country) who need legal representation. In some cases, the state pays private lawyers to represent poor defendants, though, at times at a higher cost than public defenders. Of those who qualify for court-appointed lawyers, defendants are now being asked to pay part of their bill in greater numbers, a legislative mandate that started in the mid-1990s. Logically, the economic threat is enough to frighten some poor defendants into forgoing counsel and making a quick deal with the prosecutor, even in homicide cases, where the prosecutor could threaten with seeking the death penalty.

As a point of *economics and priority* comparison, in 2001, the Wisconsin State Public Defender Office handled a total of 125,538 cases: attorneys with a felony caseload of 184.5 cases and a misdemeanor caseload of 492. Staff attorneys handled 57% of the cases, with the remaining being handled by private attorneys under contract to the agency (McBride and Zahn, 2002). That same year, Walworth County, where fewer than 2,000 criminal cases were filed, spent more than Milwaukee County on court-appointed lawyers even though Milwaukee County, which contains a high concentration of minorities and poor people, had 42 times as many criminal cases (Zahn and McBride, 2002:1A). From a national standpoint, some defendants who are turned down for a public defender in Wisconsin would have received one in other states, like Iowa and Minnesota, again, indicating judicial variation based on geographical difference.

Another issue is the quality of representation, which is heavily governed by money (Acuña, 1998; Reiman and Leighton, 2009; Urbina, 2003b). In 2001, for example, New York’s appointed attorneys got \$40 an hour in court and \$25 an hour out of court, and New Jersey was paying \$30 an hour in court and \$25 out of court (Fritsch and Rohde, 2001), a similar trend in death penalty cases (Urbina, 2011a, 2011b). On the opposite end, some contract attorneys make a substantial salary representing hundreds, even thousands, of poor defendants each year in court systems so desperate for attorneys, and thus forced to place no limits on the number of cases a lawyer may take (Fritsch and Rohde, 2001). As a consequence, “We too often see lawyers who were woefully unprepared, did little to investigate, were ignorant of the applicable law, had inadequate trial skills and did not appear to be committed to their client’s cause” (Fritsch and Rohde, 2001:A1).

Further complicating matters, no one monitors the performance of the majority of appointed attorneys who represent the poor, and it is usually left to appeals courts to analyze the work of appointed lawyers. However, with the exception of capital punishment, few cases are appealed, with less than 1% of misdemeanors and 6% of felonies going to trial (Fritsch and Rohde, 2001:A1), exposing attorneys to almost no outside review, or, by extension, accountability.<sup>7</sup> In the next section, research findings from the state of Wisconsin are presented, as voiced by participating court officials, to better understand the global nature of race, ethnicity, crime, and punishment, as the influence of race and ethnicity in crime and punishment trends, which transcend geographical boundaries and justice systems.

### **RESEARCH FINDINGS FOR WISCONSIN**

#### **Characteristics of Court Officials**

Of the 52 participating court officials, 32 (61.5%) were male, 20 (38.5%) were female, 43 Caucasian (82.7%), 3 African American, and 5 Latino (1 Mexican, 1 Puerto Rican, 1 Spaniard, 1 Venezuelan, and 1 of unknown ethnicity). Thirty-seven (71.2%) court practitioners reported English being their only language, with 15 speaking additional languages besides English. The number of years practicing law ranged from 3 to 47 years, with a mean of 18.9 years. Lastly, the sample includes 14 judges, 18 prosecutors, and 20 public defenders, with various participants having practiced law in more than one capacity, like defense attorney, prosecutor, or judge.<sup>8</sup>

#### **The Influence of Legal and Extralegal Variables**

The objective of this section is to explore the degree to which legal and extralegal variables influence the prosecution of indigent defendants. Table 1 shows the influence of 15 variables on the judicial process, as viewed by the participating court officials: judges, prosecutors, and public defenders.

Table 1  
THE INFLUENCE OF LEGAL AND EXTRA-LEGAL FACTORS  
IN THE PROSECUTORIAL PROCESS (N=52)\*

Variable	Extremely	Moderately	Mildly	Not at all
Race	13 (25.0%)	10 (19.2%)	4 (7.7%)	23 (44.2%)
Ethnicity	7 (13.5)	15 (28.8)	5 (9.6)	23 (44.2)
Age	5 (9.6)	17 (32.7)	15 (28.8)	12 (23.1)
Gender	5 (9.6)	12 (23.1)	13 (25.0)	18 (34.6)
Marital status	-	9 (17.3)	10 (19.2)	30 (57.7)
Children	2 (3.8)	6 (11.5)	13 (25.0)	28 (53.8)
Income	13 (25.0)	10 (19.2)	7 (13.5)	18 (34.6)
Employment	4 (7.7)	16 (30.8)	11 (21.2)	17 (32.7)
Community ties	3 (5.8)	10 (19.2)	19 (36.5)	18 (34.6)
Medical conditions	-	14 (26.9)	19 (36.5)	14 (26.9)
Jurisdiction	8 (15.4)	11 (21.2)	8 (15.4)	13 (25.0)
Prior record	37 (71.2)	9 (17.3)	2 (3.8)	2 (3.8)
Offense severity	41 (78.8)	7 (13.5)	-	2 (3.8)
Self representation	7 (13.5)	7 (13.5)	11 (21.2)	20 (38.5)
Media	12 (23.1)	7 (13.5)	9 (17.3)	19 (36.5)

\*Since not every participant respond to each question, not every row adds up to 52.

Prior record, severity of offense, age, medical conditions, community ties, employment, income, gender, media, jurisdiction, race, and ethnicity (in descending order) appear to be the most influential variables in the prosecution of indigent defendants, with over half of the participating court officials reporting that such factors influence the judicial process. Almost all (48) respondents reported that prior record and severity of offense are the two most influential factors in the prosecutorial process. As for the age variable, 37 practitioners noted that this factor is influential in the decision-making process. Thirty-three respondents also stated that medical conditions are of crucial importance in court decisions. Signaling the importance of community relations, 32 participants referenced *community ties* as being influential in the legal decision-making process.

As for employment and income, over half (31 and 30, respectively) of the participating court officials claimed that these two factors are influential in judicial decisions. Similarly, 30 respondents cited gender as an influential factor in the court system. In regards to the media, 28 participants referenced media coverage as being influential in the judicial process. As for geographical difference, 27 court officials reported that jurisdiction is crucial in prosecutorial decisions. Lastly, over half (27) of the participating court officials cited race and ethnicity as being influential in the prosecution of indigent defendants, an interesting observation considering the various social reforms to improve race and ethnic relations and prior implemented legal mechanisms to control for variation.

Table 1 also indicates that variables like self-representation, children, and marital status are also impacting the judicial process, but they appear to be less influential in the prosecution of poor defendants. While 25 respondents noted that self-representation places indigent defendants at a disadvantage, 20 participants claimed that it makes no difference. For the children variable, 21 respondents believed that such factor is taken into consideration, but 28 participants thought otherwise. Lastly, 19 of the participating court officials referenced marital status as being influential in the prosecution of indigent defendants, but 30 court practitioners did not see marital status as being influential in the judicial process.

### The Influence of Legal Counsel

With limited resources, stereotypes propagated by the media, a punitive society, and few friends, if any, in high ranking positions, the typical defendant, who tends to be a minority and poor, is left with two options: a public defender or self-representation. Though, the majority (49 or 94.2%) of respondents noted that few defendants opt to represent themselves in court proceedings. Of those who represent themselves, it's normally because they cannot afford to hire legal counsel, they do not trust lawyers, they do not qualify for a public defender due to the \$250 a month standard, they do not understand the possible consequences or seriousness of the case, or a combination of various issues. As expected, the majority (47 or 90.4%) of court officials documented that defendants who choose to represent themselves are at a disadvantage, including conviction and sentencing, vis-à-vis those who have a public defender, court-appointed lawyer, or a private attorney, independent of race or ethnicity. According to some court officials, self-represented defendants are at a disadvantage in every way because of their inability to understand legal proceedings (like rules and suppression of evidence, how and when to file motions and briefs), their inability to analyze obtained evidence by law enforcement, their lack of knowledge in negotiating plea bargains, their inability to no longer exercise their right to remain silent, their "thinking" overtaken by emotion, and their unfamiliarity with the personality of the prosecutor and judge. As such, according to one court official, "judges in particular are patently unsympathetic to unrepresentative defendants," and, consequently, according to another court official, "they will get harsher sentences." More critically, over half (38 or 73.1%) of the participants noted that most offenders who opt to represent themselves are indigent defendants.

Worse, the majority (43 or 82.7%) of respondents reported that not every defendant who wishes to have a public defender has access to one. According to some court officials, the "real problem" is not the judge or prosecutor, but the public defender guidelines that do not equate with "everyday reality" of most offenders, not to mention complicated factors like inflation, leaving many poor defendants without legal representation. Some practitioners noted that eligibility standards have not been calibrated to equate both an increased cost of living and a higher poverty level, especially in the inner city where most defendants come from. One participant reported that a significant problem lies on the hidden issues, which have been ignored by most policymakers. For instance, a wife/spouse income is attributed to the husband, normally the defendant, even though they might be separated.

Indeed, pointing to the influence of economics, most (41 or 78.8%) participants characterized the \$250 legislative standard as unreasonable; that is, *too low*, with 7 respondents citing the monthly requirement as reasonable. In effect, some respondents noted that legislative guidelines for public defender eligibility are inequitable outdated in the sense that they are unreasonably too low, even below the Federal Poverty Line. Consequently, according to one court official, "the majority of indigent defendants cannot afford to retain an attorney for an 'actual trial,' part of the reason why less than 10% of cases go to trial in the first place." One participating court official was more straightforward: "Professor, you asked the question, let's be honest, can anyone live on \$250 per month, let alone have the funds to hire private counsel." In the words of one participating judge, "Factor one, rent, second, other expenses, absolutely nothing for retainer, especially a substantial retainer. Let's face it, some offenders maybe supporting a girl or boyfriend and his or her kids, but cannot count them as dependents."

Another participating judge proclaimed: “the monthly requirement is ridiculous, illogical, and indefinable. It promotes a lack of respect for the criminal justice system.” As such, most (43 or 82.7%) participating court officials reported that the \$250 standard is outdated, with 5 practitioners reporting otherwise. According to one respondent, “the requirement, set in 1987, does not equate with the increased cost of living standards and fails to reflect the higher cost of legal representation.” In effect, a high majority (42 or 80.8%) of respondents recommended that the monthly requirement should be amended from 80% of the 1987 Federal Poverty Line to 125% of the current Federal Poverty Line, making Wisconsin consistent with neighboring states. In this regard, some participants claimed that changing the requirement from 80% of the 1987 Federal Poverty Line to 125% of the current Federal Poverty Line would achieve consistency and be more realistic and reasonable with the higher cost of living in urban areas where most of the indigent defendants are concentrated. In the words of one participant,

I have years of experience as a judge . . . the legislature simply needs to understand that justice is being compromised. Example, some private attorneys charge low fees, but only if defendants plea guilty on the first court appearance, usually not the best decision for the criminal.

Indeed, most (37 or 71.2%) participants supported the implementation of a higher monetary amount, with 9 respondents not being in favor of increasing the \$250 standard.

Further questioning the quality of justice, over half (29 or 55.8%) of the participating court officials claimed that public defenders do not have enough time to adequately prepare for each case; though, 22 respondents stated otherwise. To this end, some respondents cited that lack of public defenders results in high caseloads and thus too much time is spent in court, leaving little time at the end of the day to properly prepare cases for litigation, especially for trial. Further, according to one participant, “under-funded, the state is forced to hire low caliber and inexperienced lawyers with little motivation to defend the poor . . . defending the poor brings no glory or honor.” One participating court official put it nicely:

The so-called ‘dream team’ is for a few isolated cases . . . seen on TV when they happen. For the rest, it’s a fiction! Bottom line Professor, high caseloads allow little time to prepare and think, lawyers are supposed to think.

As for indigent offenders, most (39 or 75.0%) court officials reported that they had witnessed miscommunication or misunderstandings between public defenders and their clients, mostly attributed to the low educational level of indigent defendants, combined with limited resources of the court system and time constraints. Still, a high majority (47 or 90.4%) of participants reported that, all things considered, public defenders are *trying* their best to represent indigent defendants, with 4 court officials stating otherwise.

According to some participating court officials, the biggest challenges currently facing public defenders in Wisconsin include: lack of public defenders, high caseloads, job burnout, lack of funds for proper representation, almost no money to purchase investigative tools or to hire experts or to conduct investigations, low pay for new attorneys, difficulty of retaining attorneys who wish to leave for better paying jobs, and overcoming negative public opinion about both public defenders and indigent defendants. One court official, though, was more critical:

as a group, public defenders are poorly organized, poorly supervised, and they lack leadership. Some are good, some are excellent, some are average, and some are poor. But, there seems to be very little done with the ones who are poor.

To another court official, “the problem is the structure of the system, which forces attorneys to just push cases through the legal tunnel, with a focus on mobility, not justice.” Lastly, to reduce the possibility of inequality and injustice in the prosecution of indigent defendants, the majority (40 or 76.9%) of respondents recommended additional public defenders to represent poor defendants. Some (32 or 61.5%) court practitioners noted that the criminal justice system ought to expand legal counsel to include both pretrial and post-trial proceedings. Finally, 21 (40.4%) court officials supported the expansion of legal counsel for indigent defendants beyond the first appeal.

### **The Influence of Mental Illness**

Beyond the historical forces of race, ethnicity, and the consequential element of poverty, the typical defendant is also confronted with an additional barrier, mental illness, which strikes at the very essence of American jurisprudence: *understanding* statutory and constitutional rights.

As reported by recent investigations, mental health among criminal offenders is becoming more critical (Butterfield, 2003; Ditton, 1999). Indeed, “At midyear 2005, more than half of all jail and prison inmates had a mental health problem . . .” (James and Glaze, 2006; Urbina, 2008:24). Before defendants are placed behind bars, though, they must be processed by the court system, and thus court officials, who are making the legal decisions, were asked to express their thoughts on the subject. Contrary to statistical figures on incarcerated inmates, most (34 or 65.4%) respondents claimed that few defendants are mentally ill when they first enter the court system, while 13 participants reporting that most defendants suffer from mental illness when they enter the judicial system. Surprisingly, though, the majority (47 or 90.4%) of participating court officials estimated that most criminal offenders who suffer from mental illness are indigent defendants. Lastly, the majority (48 or 92.3%) of court officials cited mental illness as being influential in the prosecution, to include conviction and sentencing, of indigent defendants.

#### **MAKING SENSE OF AMERICAN JURISPRUDENCE**

The popular phrase, *the first thing we do, let's kill all the lawyers*, is more an image of lawyers as amoral “hired guns” as objective and ethical lawyers acting as officers of the court, sworn to uphold the ideals of justice and democracy. The above findings suggest that there remains a wide gap between legal theory and how the law is actually applied in courts. As illustrated by the *wedding cake* model of criminal justice by Samuel Walker (2005), following Lawrence Friedman and Robert Percival, criminal justice officials handle different kinds of cases very differently. In the lower courts, for example, trials are rare, and thus few defendants are represented by an attorney. Informality in the courtroom predominates and jail/prison sentences are imposed, oftentimes with lightning speed. In rural courts, facilities tend to be out-modeled, with staff being generalists rather than specialists and operate with a limited defense pool. Worse, it could possibly mean “you scratch my back, and I'll scratch yours,” even though it's not always a conscious judicial mechanism. On occasion, judges, prosecutors, and defense attorneys are friends and sometimes they are related. Consequently, the judicial process is sometimes more a matter of convenience than constitutionality, more community-oriented than centered on individual rights, in which case, “. . . community knowledge is substituted for the Constitution” (Neubauer, 2005:427). In some places, lack of funds, lack of expertise, inadequate knowledge about proper procedures, and even unfamiliarity with statutory and constitutional mandates have resulted in an uneven, unequal, and unresponsive judicial process.<sup>9</sup> What some courtroom officials wish to do is preserve the peace and traditional community norms at the expense of the poor, minorities, and those considered *outsiders*, a movement that continues to gain momentum with the advent of the globalization of crime and punishment, as illustrated by cross national studies (Ruddell and Urbina, 2004, 2007).

Similar to the justice of the peace courts, municipal courts are now functioning like an *assembly line*, and thus few trials are held and, as such, the presence of attorneys is rare. As a matter of routine, the major concern is moving caseloads, and therefore any barriers to speedy dispositions, like constitutional rights, lawyers, and trials, are neutralized. Indigent defendants may be fined without having a lawyer, but a judge considering imposing a jail term must give a poor defendant the opportunity to have court-appointed counsel (*Argersinger v. Hamlin*, 1972). However, defendants have a right to a jury trial only if the offense can be sanctioned by imprisonment for more than six months (*Baldwin v. New York*, 1970). If there is a trial, it is usually a bench trial, and, as a result, rules of evidence are not necessarily followed, no trial record is kept, and trials last only a few minutes. In short, in the lower court, whether rural or urban, judges define their role as “doing justice,” rather than merely being bound by rules of criminal law, and judges employ their discretion to achieve what they believe to be a fair and just result in the best interest of the community, especially the *voting class*.

Together, the distribution of justice appears fragmented, with uneven and, on occasions, unjustified results. More globally, Walker (2005) reports that there is *no one system* of justice, Victor Kappeler, Mark Blumberg, and Gary Potter (2000) characterize the criminal justice system as a *dual* system of justice, and Urbina (2004a:256) documents that the “criminal justice system is actually divided into four very distinct systems: one for the poor and defenseless, one for the rich and powerful, one for Euro-Americans, and one for African Americans and Latinos, particularly Mexicans.” These are 20<sup>th</sup> and 21<sup>st</sup> Century observations resonating with 16<sup>th</sup> Century philosopher Anacharsis that “Laws are just like spider's webs, they will hold the weak and delicate who might be caught in their meshes, but will be torn to pieces by the rich and powerful.” As noted by Pollock (2010:376),

The U.S. Supreme Court, as the ultimate authority of law in this country, decides constitutionality, and these interpretations are far from neutral, despite the myth of objective decision making.

This is the reason that the selection of Supreme Court justices (as well as federal judges) is such a hard-fought political contest. Ideological positions do make a difference, and no one is fooled that a black robe removes bias,

as nicely illustrated during the nomination and confirmation of Sonia Maria Sotomayor, the first Latina/o and the third woman to sit on the US Supreme Court. In essence, if the judicial system, including defense attorneys, prosecutors, and judges, is merely a symbol or a machinery of political or economic power, statutory and constitutional rights, due process, and notions of democracy are simply effective *weapons* to silence and control the *faces at the bottom of the well*, as cited by legal scholar Derrick Bell.

### **CONCLUSION**

The findings herein support the thesis that the most disadvantaged defendants in the judicial process, minorities and the poor, are the ones not receiving the most legal assistance, but the ones experiencing the most challenging barriers to find the *truth* and achieve justice, and, worse, sometimes they are victimized by the very agents of the courts, who suppose to uphold the law. Arguably, there has also been a shift from overt race and ethnic discrimination to more subtle, but still systemic, institutionalized prejudice as well as racial and ethnic disparities. The historical legacy of hate, vindictiveness, hypocrisy, and ignorance has simply transformed itself. As noted by constitutional scholar, Richard Delgado, some things just keep on coming back in one form or another. Three years into the 21<sup>st</sup> Century, Andrew Hacker (2003) argued that the US remains divided, separate, and unequal, each group with different social, political, and financial realities. As such, race and ethnic variation in punishment, like crime, can be viewed as a manifestation of much broader issues, like savage poverty, social injustice, prejudice, and racism (Browning and Cao, 1992; Reiman and Leighton, 2009).

Without restructuring the foundation of the judicial system, systematic reforms to store or re-store justice often result in entrenchments of preexisting negligence, marginalization, and injustice. Judicial systems by their nature tend to operate in a semiautonomous fashion, kind of taking a life of their own. Even with constant monitoring and outside review, they can distort process legalities and create inequalities and injustice by recalibrating strategically engineered dynamics that balance legal discretion, authority, and power. As argued herein, the imbalance of power among the judge, prosecutor, and defense attorney results in the exploitation and brutalization of the most disadvantage, Latinas, Latinos, African Americans, and indigent defendants, and overworked and under-funded public defenders. In essence, the outdated and unreasonable guidelines in states like Wisconsin and the inconsistent ways in which minority and indigent defendants are treated by the courts, especially after they are denied a public defender, warrants a federal court challenge. Lastly, since Wisconsin, like the rest of the country, is facing the largest budget deficit in its history, it will be even more difficult to locate money to defend the poor, who lack friends in state capitols and the national Capitol and who are constantly being condemned by *warriors* of law-and-order. Without making resources a priority, it is unlikely that the question of *justice in American criminal law* will be addressed because access to equality is an aspect of the much larger question: “the question of the distribution of wealth in our society.”

### **Notes**

1. Once the appeals have been exhausted, the defendant may rely on post-conviction remedies, like filing a habeas petition in federal court, the most common type of post-conviction relief. Post-conviction remedies may be filed only by those actually in prison, they may raise only constitutional defects, not technical ones, and they may be somewhat broader than appeals.
2. Indigents are defendants who are too poor to pay a lawyer and thus entitled to free legal counsel in one of three ways: by a state or county public defender's office, by court-appointed counsel, or by contract public defenders who have bid to handle many cases in one jurisdiction. Arguably, the assigned counsel system, where attorneys are appointed by the judge on a case-by-case basis, results in the least qualified lawyers being appointed to defend indigents, normally disposing cases quickly in order to devote time to fee-paying clients. The contract system, where attorneys are hired for a specified dollar amount, was actually held unconstitutional in Arizona by the Arizona Supreme Court. The public defender system, a salaried public lawyer representing all indigent defendants, appears to devote more attention to cases, with more experienced and competent counsel, while assuring continuity and consistency in the defense of the poor.
3. The right to counsel in the pretrial stage is much more limited: custodial interrogations, police lineups. Merely being detained by the police is not sufficient to guarantee a right to counsel. The right to counsel also extends to certain post-trial proceedings (e.g., probation and parole revocation hearings), but as in pretrial proceedings, the right to counsel is more limited.

4. Criminal appeals are atypical of crimes prosecuted in trial courts; that is, the vast majority of criminal appeals affirm the conviction. Defendants win on appeal only 1 out of 8 times. Overall, only about 1 out of every 16 criminal appeals results in a victory for defendants. A study showed that defendants convicted of non-violent offenses and who received a relatively lenient sentence were the most likely to win on appeal. Conversely, defendants convicted of violent offenses and sentenced to lengthy prison terms were the least likely to win on appeal.
5. Defendants have the constitutional right to self-representation, but they must show the trial judge that they have the ability to conduct the trial. The 6<sup>th</sup> Amendment right to self-representation, however, is limited to trial; state appellate courts can deny defendants the right to represent themselves on appeal. Self-representation occurs occasionally, most typically when the defendant strongly distrusts the criminal justice system or becomes frustrated with the perceived incompetence of court-appointed counsel.
6. In 1972, the US Supreme Court extended this ruling to all crimes, including misdemeanors that result in imprisonment for any length of time.
7. In criminal cases, only about one of 16 receives a victory on appeal. In most states, state supreme courts have a purely discretionary docket, selecting only a few cases to hear, but these cases tend to have broad legal and political significance and not necessarily based on legal rationality.
8. Mailed questionnaires, telephone interviews, and face-to-face interviews were utilized to gather information from participating court officials. The information was gathered (N=52) in July and August 2007, with a response rate of 37%. All court officials who wished to voice their views were given the opportunity to participate. The objective was to include practitioners who had a diverse legal background, several years of experience, and who had handled criminal cases. The effort to include practitioners with lengthy and diverse legal experience was to gain insight into the treatment evolution of indigent defendants in the judicial system.
9. In rural areas, where the lower courts are collectively known as justice of the peace (or JPs), one study found that 5% of the JPs in Virginia were college graduates, and another showed that between a third and a half of California's lower court judges were not even high school graduates. The assistant attorney general for Mississippi estimated that 33% of the JPs are limited in educational background to the extent that they are not capable of learning the necessary elements of criminal law (Ashman and Chapin, 1976; *North v. Russell*, 1976).

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