Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender.

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The research reported here was conducted during the winter of 1970-71 in Connecticut and involved seventy-two interviews with men charged with felonies. Forty-nine of the respondents were inmates in the state prison or in a reformatory for youthful offenders; the remaining twenty-three were not incarcerated, but were on probation or had received dismissals or acquittals. Approximately two-thirds of the men had been represented by Public Defenders; the remainder had been represented either by private attorneys or by a legal services organization in one Connecticut city. The material presented here is excerpted from lengthy interviews with these men (averaging about two hours) which explored their attitudes toward the criminal law and the institutions of criminal justice, with special attention to the plea-bargaining process.

The Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration and the Social Science Research Council provided financial support for this study. Neither is in any way responsible for nor endorses the arguments advanced here.

"Only when we. . .adopt a consumer perspective are we able to perceive the practical significance of our institutions, laws and public transactions in terms of their impacts upon the lives and homely experiences of human beings. It is these personal impacts that constitute the criteria for any appraisal we may make. How, we ask, does the particular institution affect the personal rights and personal concerns, the interests and aspirations of the individual, group, and community? We judge it according to its concussions on human lives."*

Much of the discussion and controversy surrounding the provision of counsel to indigents in criminal cases, and especially the development of public and quasi-public institutions to do this job, seems to have focused on two related issues: (1) the case overload that such systems typically encounter and the consequences of such caseloads for the quality of representation; and (2) the tendency for many lawyers who practice regularly in criminal courts to develop relationships with and dependencies upon the prosecutors with whom they have frequent contact, and hence to modify the attorney's putative role as unequivocal advocate of the interests of his client.

At least a partial solution to both these difficulties may appear to lie in the provision of a greater number of defense counsel. For example, the argument goes, larger Public Defender staffs would have more time to spend with their clients, might be in a better position to raise

*Edmond Cahn, *The Predicament of Modern Man.*

all potential legal defenses and might be less infected with the production ethic that makes so much of our criminal court system resemble an assembly line. Another notion, sometimes offered by those dismayed with the frequent collaborative relationships that develop between Public Defender and prosecutor, suggests that modification in the system ought rather to stress the use of assigned counsel—including lawyers who do not spend a great deal of time in criminal courts. Though these attorneys may lack the expertise in criminal law and in plea bargaining that the Public Defender possesses, they might not labor under the pressures for collaboration that many Public Defender offices seem to bear.

However, both of these institutional mechanisms ignore a factor that ought to be considered in evaluating and changing institutional arrangements for provision of counsel to indigents. The research reported here suggests that viewing the process from the defendant's perspective reveals things that are not evident if one simply thinks about the issue from the perspective of adequate legal defense or if one makes inferences about what defendants *may* think. Definite attitudes about the nature of the relationship between lawyer and client emerged from these interviews, attitudes which might be helpful in assessing the merits of present and proposed systems. Since the data were all gathered from a single state, it is dangerous to generalize to the whole of American criminal justice. Nonetheless, these observations are offered as a contribution to the continuing dialogue over the provision of counsel to indigent defendants.

The general attitude of most defendants toward their experience with the legal system was resignation (though not satisfaction). Almost all who had been convicted (and were either serving time in prison or were on probation) readily admitted that they were guilty of all or some of the charges against them. They were not, for the most part, openly embittered men, railing against the injustice that had been perpetrated upon them. "It was time for me to do some time" sums up the philosophy of many.

Almost all saw their "crimes" as involving behavior that ought to be punished, and most accepted the fact that repeated law violation would eventually lead to apprehension. Notions like adversary proceedings, the presumption of innocence, abstract concepts like "fairness," were not especially salient to these defendants and of little relevance to the world in which they found themselves. Reality—on the street and in the courtroom—was what concerned them. Though many hated this reality, the idea of holding it up and measuring it against abstract standards like fairness was somewhat removed from their general concerns.

As they saw it, the application of the criminal sanction was a process not much different from life on the street as they knew it. They tended to see the individuals and institutions which apprehended and punished them—police officers, prosecutors, Public Defenders, judges—as essentially playing "games" not much different from the games they played themselves. They per-

ceived the behavior of law enforcement officials as being essentially the same as the behavior of law violators–conning, manipulating, lying, using power and resources rather than applying principles of justice, and lacking in concern for the characteristics and needs of others. Thus, law violation and law enforcement seemed to be morally indistinguishable.

For many of the men, the game-like nature of the system extended even to their relationship to their lawyer. In particular, most of those who were represented by Public Defenders thought their major adversary in the bargaining process to be not the prosecutor or the judge, but rather their own attorney, for he was the man with whom they had to bargain. They saw him as the surrogate of the prosecutor–a member of "their little syndicate"–rather than as their own representative. A defendant who was rather metaphorically inclined described his relationship with his lawyer and the nature of "the deal" as follows:

"It's just like, you know, you got a junkie there, you know, and he needs a bag of dope, you know what I mean, and you tell him, 'Well, here's the bag of dope if you want it, or you gotta suffer it out, if you want to,' you know. I mean, here's the bag of dope if you want it; I mean, you don't have to take it, when you know damn well he gonna snatch at it, you know, 'cause the man is sick, you know what I mean."

"You say the Public Defender is like that?"

"Sure, you know, [it's as if someone says to a junkie] 'Well, here's the bag of dope. If you want it, you can take it; if you don't. . .' Well, you know, you say, 'Yeh, I want it, I want it, you know, I'm sick, man,' you know. That's the way it is, man. It's nothing big to him. Like I say, he makes deals like this every day."

Others made similar comments:

"He seemed like he didn't care one way or the other. He just cop out, you know. Like, like you see a police walking on the street writing a ticket out, you know. He puts a ticket on the car. He don't care whose car it is. Just like you, man. [The Public Defender] say, just, you know, 'You cop out to this', and you say, 'no', and he says, 'I see if I can get a better deal.' Then he brings another offer: 'You cop out to this.' Just like that, you know. Just checking on the cop-outs."

"A public defender is just like the prosecutor's assistant. Anything you tell this man, he's not gonna do anything but relay it back to the public defender [*sic:* he means the prosecutor], they'll come to some sort of agreement,and that's the best you're gonna get. You know, whatever they come to and he brings you back the first time, well, you better accept it because you may get more."

". . .he just playing a middle game. You know, you're the Public Defender, now you, you don't care what happens to me, really. . .you don't know me and I don't know you. . .this is your job, that's all. . .so, you're gonna go up there and say a little bit, you know, make it look like you're tryin' to help me, but actually you don't give a damn."

"Do you think he was on your side?"

"Ah, naw. . .I don't even. . .he didn't care, like I say, he didn't care. . .he just wanted to, you know, get it over with, get the case over with."

"What do you think [the Public Defender] was trying to achieve in your case?"

"Just, ah, hurry up and get rid of me, get paid for another client, you know."

One defendant summarized the process in much the same way as do many critics of the interaction between defense counsel and prosecutors:

"If a court has a heavy case load, it affects the prosecutor, the judge and everybody concerned. Now, if they can ease this case load by the prosecutor giving a few, the Public Defender giving a few, it's a little better for everyone concerned. Take, for instance,. . .Mr. Watkins [the chief prosecutor in the district from which this man came]. Mr. Watkins runs his office, and Mr. Stankowski, the head Public Defender, he runs his office, but no one can't tell me that they're not on good terms or even friends. If not friends, they're. . .they've got a nice working arrangement. They've been knowing each other for over ten years. They got to have respect for each other, so forth and so on. Now, I guess when they sit down and go over a bunch of cases, they say, well, look at this guy, what are we going to do about him? You know he's guilty, but he's got this little technicality here, and it's true. I think the Public Defender sacrifice him and in his opinion he justifies it by asking a favor to maybe a kid that he's guilty but he's not pleading guilty. He's going to cause a lot of stink, and he's. . .say, because he's young, let's give him a break. They could go through the trouble of convicting him if they want. Just. . .always, I think, in a sense, one hand washes the other."

The bulk of the men I interviewed who were represented by Public Defenders (unlike those represented by private attorneys) did not feel that their lawyers were on their side. Rather, most felt, he was either a kind of middle-man or, more often, an agent of the prosecution. Why do they feel this way? Several factors seem important, including the way in which their lawyer behaved towards them, their perception of his career ambition, and his institutional position.

Most of the men spent very little time with their Public Defender. In the court in which they eventually plead guilty, they typically reported spending on the order of five to ten minutes with their Public Defender. These conversations usually took place in the bull-pen of the courthouse or in the hallway.

The brief conversations usually did not involve much discussion of the details surrounding the alleged crime, mitigating circumstances or the defendants' motives or

backgrounds. Instead, they focused on the deal, the offer the prosecution was likely to make or had made in return for a cop-out. Often the defendants reported that the first words the Public Defender spoke (or at least the first words the defendants recalled) were,'I can get you. . . , if you plead guilty.' Frequently, the Public Defender had already talked with the prosecutor, had seen the statements or evidence against the defendant and hence perhaps felt it unnecessary to ask him for his version of the offense.

This behavior of the man who was supposed to be *their* lawyer– his previous contact with the prosecution, his immediate offer of a deal–led many of the defendants to wonder whether the Public Defender was in fact "their" attorney or the state's. In one of the excerpts quoted above, a defendant said "the Public Defender" when he meant to say "the prosecutor". This mistake was common–at one point or another, most of the men interviewed either called the Public Defender the prosecutor or called the prosecutor the Public Defender. This is a subtle, but significant indication of the confusion of roles that these defendants perceived–the near interchangeability of "their" lawyer with the prosecutor.

Another factor which generated mistrust was the common conviction that Public Defenders want to become prosecutors and, after that, judges. One man put it this way: "The more convictions he get and the higher he can get." There are no systematic data available describing career patterns of Public Defenders in this state, but it is by no means unheard of for a Public Defender to join the prosecutor's staff. Such incidents become widely known, and contribute to the notion that the Public Defender must be working with the prosecution in order to further his own career ambitions.

A third factor leading to distrust is the impression that the Public Defender really has nothing to gain by fighting hard for his clients. "He gets his money either way" was the common phrase–whether his client wins or loses. The ability of a "street lawyer" (private attorney) to get clients depends upon his reputation, and defendants believe that a good reputation is built by winning cases. The Public Defender, on the other hand, doesn't have to depend upon his reputation to get clients–he receives them automatically, whether he wins a lot of cases or loses a lot. Thus, from the defendant's vantage point, the Public Defender has nothing to gain (and, perhaps, something to lose) by vigorously defending his clients.

The final factor contributing to the view that the Public Defender is not on the side of his clients is perhaps the most important. The Public Defender is an employee of the state and hence receives his income from the state. Defendants approach life with a simple, yet powerful premise. Put in the abstract form it might be stated as follows: any two or more people receiving money from a common source must have common interests. In this context, it urges that since the prosecutor and the Public Defender are both employees of the same entity ("the state"), in a very important sense they *cannot* fight with one another. The piper calls the tune in this world, and if the same source is paying the prosecutor and the Public Defender, the reasonable expectation is that they will work together.

In many ways, the men interviewed were "good" Americans. They have been exposed to and are very accepting of the ethic of the marketplace. For example, although most of the defendants felt that the poor fare worse in the legal system than do the affluent, they also believe that this situation could not be changed. Moreover, a majority felt that a society in which "there weren't any rich and weren't any poor, but everyone had about the same", would be less desirable than a society in which there was an opportunity for some to get more than others. By the same token, almost all–even those convicted of property crimes–were very accepting of and supportive of laws against taking the property of others: "After all, when I get rich I don't want someone taking it away from me." With a couple of exceptions, none of the men I spoke with was a modern-day Robin Hood taking from the rich to aid the poor, or a "radical" who believed that the rich had no "right" to possess what the poor cannot have. Indeed, they have internalized the market-place ethic of our society. They believe that you get what you pay for and that what costs more is better than (or at least as good as) what costs less.

It is not surprising, then, that defendants who didn't have the money to purchase an attorney's service think that the "merchandise" which they were provided by the state was inferior to that which is available on the open market. In the defendants' view, the crucial difference between the private attorney and the Public Defender is not so much how each behaves, though this is of some significance, but rather the difference in the nature of the transaction between lawyer and client. The street lawyer is paid by his client and hence, again almost by definition, he *must* be on the client's side; the Public Defender is paid by the state, and hence he *must* be on the state's side.

Thus, the common view was: "If only I'd had a street lawyer, I'd have come out much better." On the basis of the charges against the defendants, their own reports of the evidence against them, their past records, etc., this expectation often appeared to be somewhat unrealistic, for many seemed to have come out fairly well indeed.[1] They were nevertheless generally dissatisfied with their representation, feeling that they had had no advocate.

Each of the defendants who intimated he would have done better with a "street lawyer" was asked whether he had ever had one. Some had not, and were simply expressing blind faith in street lawyers and distrust of the Public Defender. Many others, though, *had* experiences with street lawyers, but the stories they told were quite mixed. A few spoke of "sure" convictions beaten by wily and dedicated street lawyers. Many described cases in which they appeared to have fared only moderately well–i.e., the outcome was about what one would expect–but which had cost them substantial amounts of money. Some related stories in which it looked as though they had been exploited–their sentences were harsh and the fee charged seemed exorbitant. Some expressed dissatisfaction with the outcome (none actually

wanted to be in prison), and some felt that their lawyers might have worked harder or that their minds were on someone else's case and not theirs. But for almost all of them, an entirely different aura surrounded their view of the relationship they had had with their street lawyers. The lawyer was almost invariably reported to have been on their side, whether the man went to jail or got out—and though they might quibble with his behavior, he still represented *them.*

Having a lawyer "on my side" meant a variety of things—more mutual trust, an impression that the lawyer cared about the outcome of the case, a feeling that the defendant was entitled to give instructions to his attorney and participate in choices about how to proceed with the case.

A number of the men interviewed had been represented by the Public Defender and had received suspended sentences or dismissals. Though they had fared much better than those who received prison terms, their views of their lawyer—whether he was on their side, whether he cared what happened to them—were typically the same as those who had fared worse. They tended to attribute the "good" outcome not to their lawyer, but to their own efforts ("I talked up to the judge") or to chance (e.g., "the prosecutor and judge had seen me play basketball;" "the clerk had misspelled my name and they didn't find my rap sheet and realize what a long record I had"). They generally refused to believe that their own attorneys were responsible for the outcome, for they refused to believe that their attorneys were on their side. Thus, in this jurisdiction at least, even when the Public Defender does well for his client, he does not usually seem to convince them that he has adequately represented them. The importance of money and the exchange process of the market-place emerges in the following dialogue with a defendant who had been represented by a Public Defender:

"Suppose you'd said to your Public Defender, 'Here's a hundred dollars if you can get me a suspended sentence'. Do you think he would have fought any harder for you?"

"I'm almost positive he would. If you were a Public Defender. . .now, you're only gettin' paid by the state and a guy said, 'Look, if you can get this. . .beat this case, I'll give you an extra hundred dollars on the side'... I mean, you think, it's a hundred dollars, all you gotta do is put a little more effort into it. . .and the judge usually listens to what they say. . .I mean they do. . .just like anybody else would do, cause it's the next hundred dollars and that's what he's tryin' to do, he's trying to make as much money as he can."

Many of the men interviewed envisioned the ideal relationship between lawyer and client to be a contingent fee arrangement. The defendant would retain a lawyer for a small fee, and would pay him a further fee based upon the outcome of the case (e.g., $1,000 for an acquittal or dismissal; $500 for a suspended sentence; $300 for a one to three; $100 for a two to five). Such an arrangement may not make great economic sense, for the outcome may not vary directly with the amount of time spent on a case. On the other hand, in some areas of litigation lawyers already charge flat fees, rather than hourly rates.

The importance of the financial exchange between lawyer and client is further illuminated by the experience of defendants represented by attorneys from a neighborhood legal services program. Some confusion was evident in their attitudes toward these lawyers.

Compared to Public Defenders, the legal assistance lawyers were generally perceived as fighting harder for their clients and as caring more about what happened to them. These attorneys do have the general reputation of being somewhat more confrontation-oriented than the Public Defender, of filing more motions, of having less cordial relationships with prosecutors and judges. In addition, more often than most Public Defenders, they visit their clients in the jail rather than meeting with them at the court-house. But, significantly, defendants represented by the legal assistance attorneys did not pay their attorneys and, as a result, they were somewhat confused about *why* these attorneys seemed to care about them, and were somewhat suspicious of this concern. All respondents were asked whether they felt that their lawyer had been on their side. Almost without exception, those represented by private attorneys responded "yes" (many, in fact, indicated that they thought the question almost too obvious to answer). The bulk of those represented by Public Defenders said "no," indicating that they felt that their lawyer was on the state's side, or in the middle. Those represented by legal assistance attorneys were about equally divided in their replies to this question. Even those who replied that they felt that their attorney was on their side, though, did so with some qualification or bewilderment. Nearly all the men represented by legal assistance attorneys reported that, if they had a choice, they would prefer to be represented by private attorneys in future cases, but preferred the legal assistance attorneys to the Public Defender. This confusion and equivocal attitude toward the legal assistance lawyers again suggests the importance of the actual financial transaction between lawyer and client in providing defendants with the feeling that they have someone on their side.

A defendant, then, is much more likely to believe that he has been adequately represented—that he has not stood alone as the object of a conspiracy of "them"—if he is able to engage in some kind of exchange relationship with his attorney. With such an exchange—particularly in the case of private lawyers—may go other things: a lawyer's willingness to spend more time with a client, more mutual trust, a client's feeling that he is in a position to give instructions to his attorney rather than simply do what he is told, more time spent on preparation of the case. But the crucial thing, from the defendant's view—perhaps the prerequisite for the feeling that he has someone on his side—may be the exchange itself. And, thus, no matter how a Public Defender behaves, the defendants feeling of standing alone may persist.

If this is true, and if we care about whether a defendant takes from his encounter with the legal system some satisfaction that he has been treated fairly and that he has not simply been an object processed by a group of

men interested not in him but in maintaining the production system, then it suggests that it may not be enough simply to hire more Public Defenders or to adopt assigned counsel systems (in which the lawyer is paid by the state).

Why should we worry about whether a man who goes through the criminal justice system *feels* that he has been treated fairly, feels that someone has been on his side? Both instrumental and purely normative arguments can be suggested. If the system is to teach defendants lessons about how they ought not to behave, then the members of the system ought to appear to be operating on a different moral level, not to be playing the same sorts of "games" that the defendant himself is used to playing in his own surroundings. In the eyes of the defendants interviewed, as was suggested above, one of the primary characteristics of the criminal justice system is that it seems to be essentially on the same moral level as their own lives and "crime"; and their feeling that they were not represented contributed greatly to this view. The participants in the system are seen as playing a game whose object is to punish the defendant and get rid of his case as quickly as possible. The outcome of a case is seen as depending primarily upon resources (e.g., money, fortitude, bluffing) and their exploitation and upon luck, not upon principles. Clearly, any suggestion that increasing the defendant's feeling that he has been treated fairly might reduce the incidence of crime is somewhat speculative.

But it seems worthwhile to note that the current operation of the system–in the eyes of the defendants, at least–not only fails to teach them moral lessons, but reinforces the idea that the system has no moral content.

In addition to its potential instrumental consequences, the current operation of the system is subject to criticism on purely normative grounds. When the government intervenes in the lives of its citizens–through taxation, welfare programs, the Selective Service System, or whatever–it ought both to treat its citizens fairly and to give them the feeling that they have been treated fairly. This is especially true when it impinges in ways so severe and potentially destructive as the application of the criminal sanction. The obligation to give citizens the feeling that they have been treated fairly is necessary both to protect their sense of integrity and dignity and to maintain the legitimacy og governmental institutions.

The data reported here suggest that if we are to listen to the defendants, we ought to consider seriously schemes for the provision of counsel to indigents that do not involve as obvious and direct payment of the lawyer by the state as most Public Defender and assigned counsel systems do. Vou cher systems in which the defendant is given something like a chit and is then permitted to hire his own attorney might be a movement toward the literal transaction between lawyer and client that seems crucial in convincing the defendant that he had a lawyer who was on his side. Such systems would, perhaps, provide defendants with the needed feeling that, but for *their* choice, the lawyer would not have gotten the case or the money. It doesn't seem possible to design any system that will convince an indigent that he has been treated as fairly as the man who can afford to hire his own attorney. But some kind of voucher system might tend to alleviate the feeling of standing alone against a conspiracy of "them" that seems to permeate some Public Defender systems.

Although, voucher systems might tend to be dominated by a small number of marginal practitioners who depend upon turning over large numbers of cases very quickly to generate fees, this difficulty might be avoided by restrictions upon the number of cases that an individual lawyer can take. Perhaps a combination of the voucher and assigned counsel systems might be worth considering. A panel of lawyers from a broad spectrum of the bar willing to take criminal cases would be provided to a defendant along with his voucher. He could then choose from the list and engage in the transaction with the lawyer he chooses.

Another problem of voucher systems might be that, should they attract broader segments of the bar, more time will be required to dispose of cases, since a larger number of lawyers would be bargaining with the prosecutor. This may be a price worth paying, however, for giving defendants a greater sense that they had someone on their side.

Giving the defendant the sense that he has been adequately represented is clearly not the only goal that ought to be of concern to members of the legal community. In addition, standards for what constitutes an adequate legal defense must be considered, and, to some extent, certainly, the legal community knows more about what a client ought to receive than does the client himself. Yet, the defendant's views–the consumer's perspective, the "concussions on human lives" of governmental institutions–are worthy of consideration as well.

1. Any statistical demonstration of this conclusion would be extremely difficult. Clearly, whether a sentence is "good" or "bad" depends upon a number of factors, including the nature of the offense, the circumstances surrounding it, the potential maximum penalty for the offense, the amount of harm done, the past record of the defendant. The plea-bargaining process makes statistical comparisons of defendants extremely difficult. The offense of which a defendant is convicted may be quite different from the one he committed (e.g., in many cases–but not all–a charge of robbery with violence becomes robbery; assault with intent to kill becomes aggravated assault; burglary becomes breaking and entering). In addition, comparison of the past records of defendants is also difficult. For example, two defendants may have on their records a conviction for breach of peace. For one it may simply have been making noise or scuffling in the street; for another it may have been an aggravated assault that was bargained down to breach of peace. Because most defendants live in a single jurisdiction, judges and prosecutors are likely to recall the nature of the past offense, and hence be less willing to go easy on a defendant with the latter "breach of peace" conviction than on the former.