ROUTLEDGE REVIVALS

Justice for the Poor

A Study of Criminal Defense Work

Debra S. Emmelman

JUSTICE FOR THE POOR

In this study, the author examines the behavior of one group of court-appointed defense attorneys and reaches the conclusion that although, in contrast to popular opinion, these attorneys maintain an adversarial stance against the prosecutors and behave in a legally ethical (or 'procedurally just') manner, case outcomes are unduly shaped by social class and are therefore substantively unjust. This occurs because poor defendants typically lack cultural rhetoric that favorably influences those who construct and operate the criminal court system. Ironically, this indicates that, in many cases, the process of plea bargaining may be more substantively just than trials. A major contribution of the study is the detailed analysis of the manner by which oppression and substantive injustice occur in the adjudication of many cases and how the cultural practices of the powerful can frequently misconstrue, exclude and mute the voices of the poor.

This is dedicated to defenders of the poor everywhere

Justice for the Poor

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DEBRA S. EMMELMAN
Southern Connecticut State University

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Foreword

In 1963 the United States Supreme Court reversed an earlier decision and extended the right to legal assistance from defendants in capital cases to those in felony cases as well. It was initiated by the actions of a prisoner, Clarence Gideon, and argued by the Supreme Court-appointed attorney, Abe Fortas (later a Supreme Court justice himself). The decision marked a distinct progression toward efforts to eliminate the disadvantages of indigent defendants in obtaining the justice that a fair trial would ensure. It guaranteed that everywhere in the United States poverty was not a barrier to adequate legal counsel.

Clarence Gideon was a poor man of limited education. He had a record of past convictions and prison for felonies. At his original trial, he had maintained to the judge that his was not a fair trial because he could not afford a lawyer and none had been provided for him. Acting as his own lawyer, he claimed that his constitutional right had been denied. In his petition to the Supreme Court he stated the issue to which Debra Emmelman's absorbing study is devoted:

> It makes no difference how old I am or what color I am or what church I belong to if any. The question is I did not get a fair trial. (Anthony Lewis, Gideon's Trumpet, 1964, pp. 37–38)

What is a 'fair trial'? Does adequate counsel assure fairness? Debra Emmelman's study of defense attorneys operating under contract with local courts reminds us of the complexities of 'fairness'. 'Law on the books' requires a level plane in which the prosecution and the defense appear as adversaries and the prosecution is governed as much by a sense of achieving justice as by winning cases. In this form the structure is 'loaded' in the direction of the defendant. Innocence need not be proved but guilt must be established 'beyond a reasonable doubt'. The onus is on the prosecution.

A more realistic view has been at variance with this view. It suggests that prosecutors and defense attorneys are more interested in winning than in achieving a just decision. Past studies have suggested that defense attorneys are bound to cooperate with prosecution in clearing dockets; that they are co-opted into being helpful rather than adversarial. Equal treatment before the law is foiled by the organizational structure of the courts, the prosecution and the defense bar.

It is also the case that criticism has been directed at the processes of plea bargaining and settlements under which the right to trial is bypassed by

negotiations between prosecution and defense. Under such bargaining the defendant pleads guilty to a charge and both defense and prosecution avoid trial. The defendant ostensibly gains a lighter sentence than a trial is likely to offer. Thus the right to a trial is meaningless. The 'real' disposition goes on in the settlement process.

It has long been recognized that most criminal as well as civil cases are decided by settlements between adversaries. Trials are rare events. In criminal cases plea bargaining and the determination of charges is the most common result. Emmelman, as is true of several past studies, also finds the importance of negotiated settlements. Like other studies, she does not thereby negate the importance of the trial. The trial is crucial to the bargaining process itself. How the defendant is seen as likely to fare before a jury has much to do with what the defense attorneys studied here call 'the value of a case' – the kind of settlement that is attainable.

It is here, in the bargaining process, that the relation between prosecution and defense becomes important to the fairness of the process. If the defense attorney is obligated to the prosecution or the court then his/her adversarial function is colored in the direction of prosecutorial wishes. This was the conclusion in Abraham Blumberg's classic study of defense lawyers (1967) as practicing a 'confidence game' in which they were 'double agents' convincing the defendant into accepting pleas. In this defense attorneys helped the prosecution to gain resolution of cases without the costs of time and money entailed by a trial. Emmelman's study finds this is not the case in the agency she studied in the late 1980s.

In her observations, defense attorneys and prosecutors were involved in a process of opposition clearly in keeping with the legal commitment to adversarial relations. Each tried to do the best they could; the defense attorney attempted to gain the best result s/he could for his/her client; the prosecutor to exact the toughest result s/he could. They were both affected by the value of the case – by what in their judgment was a better outcome than a trial might bring or when a trial was warranted. Ultimately the client or the prosecutor's supervisor had the final word and the lawyer the obligation to advise his/her client. The usefulness of the lawyer to the defendant and his/her support of indigent defendants are in keeping with the concept of a 'fair trial' and might even have pleased Clarence Gideon.

The problem of obtaining 'fairness,' as Emmelman realizes, go well beyond the issue of lawyers and adversarialness. The observation of this is of great value and is the chief contribution of this book to the ongoing discussion of how to gain a justice system that is as fair to the poor as it is to the rich. Aspects of class division in American society loom large and affect the operations of the criminal justice system in ways that stem from American

social structure and are difficult to eradicate short of changing that structure itself.

The rich detail and the accounts of specific cases in Professor Emmelman's study enables us to see how the diversities of class affect the process of bargaining by creating a sense of what a trial is likely to yield. The people the defense bar speaks for are not the same as those who will constitute their juries in the event of a trial. Not only are the defendants poor; they are less educated, less aware of the court and legal procedure, of the manners and language that are the staples of a more stable and employed citizenry. What's more the defendants are also more likely to have a criminal record. In addition, the interpretation of behavior given by such diversities makes for sharp differences between the jury or the judge and the defendant. What is conventional for the defendant may well be perceived differently by juries and judges. These unavoidable qualities color the jury's perception of the actions to which the defendant is charged. In the very term 'prejudicial' they are pre-judgments.

I was struck some years ago in observing an arraignment court of the sharp differences in class that clothing represents. Doing research on the sentencing of drinking-driving offenders, I observed courtrooms in San Diego. Walking into the courtroom it was quite easy to know who were the lawyers and who were the defendants, especially for the men. Male lawyers wore jackets, dress shirts and ties. Male defendants hardly ever wore jackets or ties and often only a sport shirt and nondescript trousers. Either defendants owned only the most casual of clothing or were unaware of the manners and dress expectations of a courtroom. (It is notable that drinking-driving offenders are a higher income group than the modal or average criminal.)

Emmelman raises these issues of fairness in her conclusion. They are embedded in the very nature of what social structure means. Perhaps greater attention to obtaining more representative juries might be one means of gaining more of the fairness that Gideon sought. It is the virtue of this study that it has put the spotlight of research on to the problem and raised the issue to realistic inquiry.

Joseph Gusfield
La Jolla, California

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Chapter One

Introduction

An important issue in law and society is whether or not our legal system accords justice to poor criminal defendants.[1] Much of the research on this matter focuses on the conduct of publicly provided defense attorneys and reaffirms popular stereotypes of them. The classic studies of Sudnow (1965) and Blumberg (1967a; 1967b), for example, assert that because their careers hinge largely on cooperative relationships with others members of the court system, lawyers for the poor sacrifice adversarial ideals and induce their clients to plead guilty. Others have found that such factors as high case loads and inadequate funding,[2] the attorney's desire to maximize her income,[3] political co-option[4] and the failure to secure pretrial release[5] undermine the ethical representation of indigent persons.

Despite all the discrediting attestations, the preponderance of research on attorneys' behavior appears to indicate that, in general, publicly provided lawyers are equally as, if not more effective than, other lawyers. For example, many have found that decisions to plea bargain are *not* perfunctory but instead based on legally appropriate considerations.[6] Similarly, others conclude that attorneys for the poor achieve the same, and sometimes better results than private attorneys,[7] and a few analysts have gone so far as to argue that aspects of indigent defense systems actually encourage adversarialness and ethical relationships with clients.[8]

Nevertheless, both casual and formal observations reveal that the poor are more likely to be convicted of crime and to receive more severe sanctions than other types of defendants.[9] Assuming that their attorneys behave responsibly, the question that arises is why the poor are more likely to receive these censures. Should we conclude that they are more likely to *commit* crime and therefore they are simply receiving their 'just desserts'? Or might we conclude that something else is unduly tipping the scales of justice against them?

Examining these latter possibilities, investigators employing positivist methodologies have considered whether and how social class as an *extra-legal variable* influences adjudicative results. Among these studies, some have found that a defendant's socioeconomic status has little or no relationship to criminal case outcomes,[10] while others conclude that class has at least *some* important influence.[11]

Adopting a more critical approach to this concern, Neo-Marxist scholars have considered how *the legal system itself* is used to disguise and perpetuate class injustice. For example, Chambliss' (1964) investigation of the changes in the vagrancy statute during the fourteenth and sixteenth centuries and E.P. Thompson's (1975) analysis of the Black Act during the eighteenth century both show how the early English legal system was used to promote the interests of the dominant class at the expense of the less powerful. Similarly, Hay's (1975) study of eighteenth century English court rituals reveals how that legal system was used to bring about the illusion of justice in order to maintain oppressive class relations.[12]

This book is a study of justice for the poor. Focusing on the behavior of one group of court-appointed defense attorneys (hereafter referred to as 'Defenders'), it considers how indigent defendants' social class influences criminal case outcomes. It does this by examining both the place of law and the place of social class in the lawyers' everyday negotiation of criminal cases. In the end, this book assesses not merely whether social class *undermines* justice ideals but moreover whether the socio-legal environment itself somehow *obfuscates and reinforces* class oppression.

An Everyday Life Approach to Justice for the Poor

I examine attorneys' behavior here from the standpoint of 'law in everyday life.' As Sarat and Kearns explain, when we examine law in everyday life

> we speak about routine, habit, convention, and the constraints and restraints that each imposes. We confront law in its dailiness and as a virtually invisible factor in social life (1995b: 1).

From this viewpoint, law is neither external to nor wholly constitutive of the everyday world. Instead, it is produced and reproduced in day-to-day encounters and becomes part of the everyday world to the extent that it enters social actors' consciousness and they make it so. Yet permeating daily routines, it also becomes part of the taken-for-granted and therefore not-altogether-obvious social environment.[13]

While law from the perspective of everyday life entails some degree of social consensus (otherwise, how could legal actors interact and agree upon anything?), it is also a *negotiated* reality. Gusfield perhaps best describes this in his discussion of the crime of drinking and driving:

> The idea of law as a statement of a moral reality, a consensus about acceptable and unacceptable behavior, is seemingly contradicted in the process by which the drinking-driving event becomes a 'fact' in judicial practice. Here it is a negotiated reality, not a clear and consistently discovered event. It is a result of values, organizational constraints, pragmatic contingencies, and bargaining between the relevant parties, considerations that make it a matter of the choice, discretion, and power of the several parties interacting in the process of law. It is in this sense that 'driving while under the influence of alcohol' is a social construction – a creation of human beings and not a direct representation of an objective fact (1981:133).

Given an everyday life approach to law, how are we to determine whether Defenders behave ethically? Clearly, it would be tautological to assess this matter on the basis of whether they practice law in a manner consistent with the way they understand it. Consequently, what is instead contemplated is simply what role law and adversarial procedures, *in fact,* play throughout their daily routines: by examining their everyday conduct, we will ascertain the extent to which law and legal procedures enter into the attorneys' consciousness and how these legal considerations influence their relationships with clients and their advocacy behavior in general.

Similarly, how are we to determine whether poor defendants' social class influences adjudicative outcomes in some other manner? From the perspective of everyday life, social class does not exist apart from actors' interpretations of situations but instead is part and parcel of them: it is an ongoing, lived and socially managed experience. Like law and everyday life, these experiences permeate the criminal court system and, if social class affects legal cases, it must be seen to do so somehow through court actors' sensibilities and performances. Thus, in this study, we will consider not simply *whether* social class influences adjudicative outcomes but, if it does, *how* it enters into the attorneys' consciousness and influences their advocacy behavior.

The Place of Culture in the Analysis of Justice for the Poor

In recent years, social scientists have experienced a number of problems in their attempt to define culture and its relationship with law.[14] All the same, as Sarat and Kearns (1998b) point out, the central focus in contemporary times

appears to be on 'meaning' which not only organizes human social interaction[15] but also is nested within some type of larger, more encompassing symbolic frame of reference. As explained by Clifford Geertz,

> Our gaze focuses on meaning, on the ways ... (people) make sense of what they do – practically, morally, expressively, ... juridically – by setting it within larger frames of signification, and how they keep those larger frames in place or try to, by organizing what they do in terms of them (quoted in Sarat and Kearns, 1998b: 6).

Despite the fact that culture entails some type of shared symbolic system or frame of signification, it is also understood in contemporary times that no such system is universal or shared equally among all members of a society.[16] Thus, no single culture constitutes the *only* possible set of ideas and symbols with which human groups may understand their experiences. Even so, culture *does* place constraints on the number of available interpretations that actors may employ. As explained by Silbey,

> [A] person may express, through words or actions, a multifaceted, contradictory and variable legal consciousness ... [However,] ... The possible variations in consciousness are limited, that is, situationally and organizationally circumscribed. Rather than talking about meaning making as an individualized process, cultural analysis emphasizes the limited number of available interpretations for assigning meaning to things and events within any situation or setting. Similarly, access to and experience within the situations from which interpretations emerge are differentially available. Here attention to consciousness emphasizes its collective construction and the constraints operating in any particular setting or community as well as the subject's work in making interpretations and affixing meanings (1992: 44–45).

Overall then, culture can be seen as a type of structured symbolic system that social actors employ to understand, navigate and communicate in their social worlds. As such, it can also be seen as a type of signification or *language* system.

Perhaps the best and most useful depiction of culture as a type of language system is provided in the work of Kenneth Burke,[17] who argues that social