2001

Effective Assistance of Counsel

Adele Bernhard

ADELE BERNHARD

11 Effective Assistance of Counsel

The adversarial system is the foundation of our judicial branch of government. When one of the adversaries is substantially weaker than the other or unfairly handicapped, just outcomes are less likely. As the Supreme Court has stated,

> the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated lawman has small and sometimes no skill in the science of the law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. (*Powell v. Alabama* 1932: 68–69)

Far too frequently, lawyers hired or appointed to represent the accused provide woefully ineffective assistance of counsel. In every study of wrongful convictions, investigators inevitably conclude that ineffective assistance of counsel—bad lawyering—is an important factor in unjust convictions.[1] Of the thirteen men originally sentenced to death in Illinois who have been exonerated since 1987, "four were represented at trial by an attorney who had been disbarred or suspended" (Armstrong and Mills 1999). Twenty-six men, once sentenced to death,

have received a new trial or a new sentencing hearing because reviewing courts determined that their trial counsel was ineffective (Armstrong and Mills 1999). This chapter reviews the systemic factors that disadvantage defense counsel and excuse poor lawyering, discusses the impediments to improving systems that provide counsel to the poor, and proposes reforms. It begins, however, with a case study that illustrates the relationship between ineffective assistance of counsel and wrongful conviction.

The People of the State of New York v. Luis Rojas (1995) is a typical appellate court decision that tells the story of a state court murder prosecution. The mistakes made by the witnesses, police, prosecution, and defense counsel are commonplace. Although defense counsel was hired, not appointed to the case, the deficiencies in his work are representative of mistakes made every day, even by attorneys who specialize in criminal defense. Even the most diligent and competent attorney cannot prevent a false accusation or misidentification or ensure an honest police investigation or a fair prosecution. What an attorney *can* do—and what the public has a right to expect that an attorney *will* do—is protect the accused from the mistakes, corruption, or overreaching of others.

The People of the State of New York v. Luis Rojas

One Saturday night in November 1990, Luis Rojas and a friend took the PATH train from New Jersey to Greenwich Village. The pair walked around Washington Square Park and the surrounding streets, enjoying the evening. Early in the morning, they ate a late dinner at the always crowded barbecue spot on Eighth Street and University Place.

Unbeknown to Luis, a tragedy was unfolding several blocks away. A pair of young men—one wearing a puffy orange jacket, the other in green—bumped into a group of boys walking in the opposite direction on the cool side of lower Broadway. The slight physical contact evolved into a full-scale argument, and soon the youth with the orange jacket drew a revolver and fired shots into the air. The weapon was passed to his companion in green, who fired at the now fleeing boys. Two were hit; one lived, and the other died three weeks later.

The shooters fled up Broadway, turning west on Eighth Street, as one of the group that had been fired on called the police and accompanied them in a search for the perpetrators. Meanwhile, an alarm was

broadcast to all squad cars in the area and to police stationed in the nearby subway platforms. As the officers fanned out, Luis was heading home wearing a maroon jacket lined in bright orange. He entered the nearby PATH station with half a mind to jump the turnstile and beat the fare home. On the steps of the station, Luis turned his jacket inside out, to the orange side, so that the cameras he thought might be watching would record an orange-jacketed fare beater, not one in a maroon coat. Just as he was ready to jump, he noticed police in plain clothes hiding in the station and bought a token.

The PATH police watched all this activity in secret, hoping that Luis would be their next arrest. The officers saw Luis and Carlos board the PATH train as it pulled into the station. When they received the all-points alarm, "Looking for one in orange," the officers held the train. Moments later, a friend of the slain youth arrived with the police and identified Luis as "orange jacket." The same witness identified Luis's friend, Carlos, as one of the crowd on Broadway and identified another PATH rider, sitting further back in the train with shopping bags and a school backpack, as "green jacket"—the shooter. The PATH officers turned the three youths over to the New York Police Department and relinquished involvement in the case.

The three suspects, in handcuffs, were taken to the scene of the shooting so that more witnesses could view them. The following morning, before the district attorney formally charged the suspects, the three were identified once again in what were later called confirmatory lineups. But before the trip to 100 Centre Street, where the criminal courts process people twenty-four hours a day, the boy identified as "green jacket" was released when the train conductor called the investigating detective to verify that she had seen her passenger, with his Macy's bags, board the train much farther uptown. The witness had confused an innocent stranger on the train with the perpetrator simply because each was wearing a green jacket. The witness's misidentification should have caused the prosecution to worry about whether he had the capacity to accurately distinguish among individuals. Nevertheless, despite the previous mistake, the witness was permitted to testify at trial that he was sure Luis was the perpetrator in orange.

Carlos's case was dismissed because he had only been identified as someone in the crowd, not as a participant in the crime. "Green jacket" was never charged because of his verifiable alibi. Luis alone was tried (and convicted)—even though he, too, was innocent.

To investigate the allegations and handle the trial, Luis's family

hired a New Jersey lawyer recommended by friends. Rojas family members are working people who earn too much to qualify for a public defender but do not have the means to hire one of the handful of exceptional local criminal defense attorneys. Moreover, the family may have been afraid to rely on the local public defender, who is too often considered an expert in plea bargaining only. Tragically, the attorney's pretrial investigation was perfunctory, and his performance at trial was confused, unskilled, and unconvincing. To begin, the New Jersey attorney was unfamiliar with the variety of trains that stopped close to Washington Square Park. He subpoenaed Metropolitan Transit Authority (MTA) records to document the time when Luis entered the station. But because Luis's stop was on the PATH line, the subpoena went unanswered. PATH trains run from New York to New Jersey and are supervised by the New York/New Jersey Port Authority. Because the MTA is a completely separate New York City system, it had no information about the incident. Counsel did not bother to ascertain why his subpoena was ignored. As a result, he did not discover the officers who had been watching for fare beaters and who would have testified, as they later told defense investigators working on Luis's appeal, that Luis was already in the station when the shots rang out on lower Broadway. The alarm that prompted them to hold the train did not specify the exact time of the shooting; so the officers simply assumed, because of Luis's subsequent identification, that the murder had happened much earlier. Post-conviction, when the officers learned when the shooting had really occurred, they swore that Luis could never have been the shooter. The officers had not realized that they were actually alibi witnesses for the defense. Defense counsel did not know either.

Defense counsel did not obtain from the prosecution the tape recordings of emergency 911 telephone calls made by witnesses to the shooting. The descriptions on the tapes were more detailed than were those contained in the police reports. On the tapes, witnesses reported that the orange-jacketed perpetrator had long hair worn in a pony tail. Luis did not.

Luis was arrested and convicted because police focused their investigation on him too quickly and neglected to track any other leads. Moreover, the police were so sure they had a killer in custody that they conducted sloppy, suggestive identification procedures that failed to protect him from mistaken identifications. If Luis's attorney had conducted a complete, thorough, and diligent investigation, he would

have been able to discredit the police work at trial and establish Luis's innocence. He accomplished neither goal.

The attorney expended little time conferring with his client. Counsel never traveled to Rikers Island, where Luis was held awaiting trial, and spent a total of only thirty minutes with him in the jail cells behind the courtroom where incarcerated defendants wait for their cases to be called. Counsel's lack of empathy, energy, or commitment had terrible results at trial. Apparently unconvinced of Luis's innocence as well as unprepared to establish it in the courtroom, the attorney failed to present a consistent defense to the charges at trial. For some portion of the trial, he argued that Luis was the innocent victim of a mistaken identification, while at other times he suggested that Luis was present at the scene of the shooting but did not fire the gun. These hypotheses are inconsistent and cannot be harmonized. If one is true, the other simply cannot be. Arguing both undercut each.

Of course, Luis Rojas was not present at the shooting. The witnesses had simply mistaken him for one of the perpetrators. Instead of building an alibi and establishing innocence, Luis's own lawyer's questions undercut the best and true defense. The following excerpt from the trial illustrates how defense counsel's questions placed Luis on lower Broadway just before the shooting.

Q: *[defense counsel]* Now, at the time the [bumping] occurred, your testimony was that some word [*sic*] were exchanged. Is that correct?
A; *[witness]* Correct.
Q: And those words were between Anthony Oquendo and Mr. Rojas. Isn't that right?
A: That is correct.
Q: You saw Mr. Rojas or the man in the orange jacket at that point, isn't that right, somebody in an orange jacket like this one, right?
A: Correct. (*People v. Rojas* 1995: 66)

Luis Rojas's attorney failed to pursue leads, neglected to visit the scene, failed to interview either the PATH officers or the waitress in the barbecue restaurant, overlooked the New York State discovery statute that requires the prosecution to relinquish tape recordings related to a criminal prosecution (but only on request), ignored the basic rules of cross-examination, and delivered a closing argument that was not only incoherent but also placed Luis at the scene of the shooting—

contrary to Luis's version of the events. Rather than protecting Luis, defense counsel actually compounded the mistakes made by the police and prosecutors.

The Inadequacy of Criminal Defense Services

For the past thirty years, U.S. law has affirmed that people charged with serious crimes are entitled to be represented by an attorney free of charge (*Gideon v. Wainwright* 1963). Although courts interpret the right to counsel to mean the right to effective, meaningful assistance of counsel (*Evitts v. Lucey* 1985; *McMann v. Richardson* 1970), they have done little to ensure such effective or meaningful assistance.

As our nation's population has expanded, so have the number of people arrested each year.[2] Even though serious crime has been diminishing since the second half of the 1990s, after climbing for two decades, incarceration continues to increase—more than tripling since 1980 (U.S. Department of Justice 1998: 162). "The United States is building prisons at a record pace. If the current trend continues, the number of Americans behind bars will soon surpass the number of students enrolled full-time in four year colleges and universities" (Smith and Montross 1999: 443).[3] As a result of the increase in the rate of crime (Stunz 1997) and society's preference for incarceration to solve intractable social problems (Schlosser 1998), the industry of providing criminal defense services has expanded.[4] In many jurisdictions, indigent defense systems represent the overwhelming majority—as much as 90 percent—of those arrested (Spangenberg and Beeman 1995: 31–32).

Naturally, the cost of providing constitutionally required defense services has become a pressing concern for counties and states, while the adequacy of the services has been less of a worry for the public. There is a widening gap between the states' obligation to provide services and their resolve to do so.[5]

Jurists, bar associations, journalists, and academics readily agree that poor people are too often badly represented in criminal court. Former chief judge David Bazelon of the Washington, D.C., Circuit Court of Appeals put it this way: "The battle for equal justice is being lost in the trenches of the criminal courts where the promise of *Gideon* and *Argersinger* goes unfulfilled. The casualties of those defeats are easy to identify. . . . The prime casualties are defendants accused of

street crimes, virtually all of whom are poor, uneducated, and unemployed . . . represented all too often by 'walking violations of the Sixth Amendment'" (Klein 1986: 656, quoting Bazelon [1976]).

In 1986, the American Bar Association's Special Committee on Criminal Justice in a Free Society reported that defense representation "is too often inadequate because of underfunded and overburdened public defender offices" (Klein 1993: 390). Michael McConville and Chester L. Mirsky's exhaustive study (1986–87) of criminal defense services in New York City criticizes both The Legal Aid Society, the nation's largest public defense law firm, as well as the city's assigned counsel plan for failing to investigate cases, consult with clients, file motions, or even appear in court on cases.

Stephen Bright, director of the Southern Center for Human Rights and a visiting lecturer at both the Yale and Harvard law schools, has collected innumerable stories of lawyers, assigned to represent poor people charged with capital offenses, who slept through the presentation of evidence, arrived at the courthouse intoxicated with alcohol or narcotics, were unable to recall a single relevant case, failed to conduct any investigation, or failed to present any evidence "in mitigation of their clients' sentences because they did not know what to offer or how to offer it, or had not read the state's sentencing statute" (Bright 1997b: 791–92).[6]

Professor Vivian Berger (1986: 60–62) of Columbia Law School concludes that the crisis in criminal defense is serious enough to "call into question the 'legal and moral foundations of the criminal process.'"[7] She grounds her verdict on a study of the literature, the increasing complexities of the criminal procedure laws, the youth and inexperience of those who generally volunteer for service in the public defender offices, and the increasing numbers of claims of ineffective assistance of counsel. The more challenging the laws become and the more inexperienced, overworked, and embattled the defenders, the more likely it is that unjust convictions will result.

The Structure of Defense Systems

To fulfill their constitutional obligation, counties and states have developed various mechanisms for providing counsel to those who cannot afford to hire an attorney, including assigned counsel programs, contract attorney plans, and full-time public defender offices (Spangenberg and Beeman 1995). Although no one way of organizing services fully

protects against malpractice, a well-managed, supervised, and financed provider system minimizes the likelihood that a client will be wrongfully convicted.

Assigned counsel plans can be either informal or organized. In rural counties, where both population and crime are low, the plan may be no more than local judges' appointment of available attorneys to handle criminal matters as necessary. In fact, thousands of poor people in this country are represented by attorneys who are picked by the judge who will preside over their case and to whom they must petition for fees and permission to hire an investigator or expert. Assigned counsel plans are notoriously underadministered, unsupervised, and unregulated. Lawyers simply ask to join. Neither experience nor qualifications are reviewed, and participation in training programs is not required. Membership lasts forever. Attorneys stop taking assignments when they no longer need or want to. Their capacity to provide a competent defense is never reviewed.

In organized assigned counsel plans, attorneys must meet specific criteria to be assigned cases. Administrators screen candidates, rotate assignments, and try to insulate attorneys from judicial influence and pressure. Nevertheless, even in well-administered plans, attorneys must seek court approval for expert and investigative services as well as their own fees.

The second and most worrisome of the three delivery models involve contract attorney programs, especially fixed-price contracts in which a contracting firm agrees to handle all assignments in a given jurisdiction over a set period of time for a set price. Attractive to governments concerned about containing costs and accurately predicting expenditures, fixed-price contracts risk reducing the quality of services, especially when contracts are awarded through competitive bidding.

A public defender office is a public or private nonprofit organization staffed by attorneys who usually work for the defense office full time and whose exclusive responsibility is to handle criminal cases. Public defender programs have the best chance at delivering adequate services. "When adequately funded and staffed, defender organizations employing full-time personnel are capable of providing excellent defense services" (American Bar Association 1992b, commentary to 5–1.2). Unfortunately, defender organizations are not always adequately funded, supported, or supervised. When the organization is compromised, the work of the individuals is affected.

The Major Contributors to Ineffective Assistance of Counsel

Inadequate Funding

Commentators agree that inadequate funding leads to bad lawyering. Richard Klein (1993: 363) believes that "inadequate funding has created a situation wherein overburdened defense counsel cannot possibly provide competent representation to all of the clients they are assigned to represent." Inadequate funding adversely affects all defense systems (Spangenberg and Beeman 1995). Assigned counsel plan lawyers are frequently paid at rates so low that only lawyers who are beginning practice or have been unsuccessful in business will agree to take assignments. In New York City, lawyers who accept court-appointed, noncapital criminal cases in the state courts are paid $25 an hour out of court and $40 an hour in court—less than they would be paid in Alabama for the same work. The rates force those attorneys who make their living through assigned cases to accept a large volume of cases, limit out-of-court time (preparing motions, conducting investigations, and researching the law), and minimize expenses—responses antithetical to effective representation. The fee cap of $1,500 can be exceeded only in extraordinary circumstances and only if the trial judge agrees, a requirement that has the potential to impinge on counsel's independence and zealous advocacy.

In addition to low hourly rates, many state- or county-assigned counsel systems limit reimbursement to a maximum number of hours, even on capital cases. The Texas Court of Criminal Appeals, for example, limits lawyers to fifty hours on a capital case despite the fact that a local state bar association committee found that it takes between four hundred and nine hundred hours of time to prepare adequately (Bright 1997b: 806–7).

"Many jurisdictions process the maximum number of cases at the lowest possible cost without regard to justice" (788). For example, Bright reports that the county commission in McDuffie County, Georgia, hired Bill Wheeler, whose $25,000 bid for the year was almost $20,000 lower than that of the next-closest contenders, to handle all local criminal cases in the county. After four years of contract attorney service, Wheeler had tried only three contract cases and filed only three motions but had entered 313 guilty pleas (788–89).

Although public defender offices are best equipped to provide quality services, even a dedicated and focused work force cannot do its job without adequate funding. Typically, a public defender organi-

zation provides representation to everyone in its designated area who is arrested and in need of a lawyer. The budget for the office is negotiated in the local legislative body, where it competes with more popular public expenditures such as schools, hospitals, and police. It is hardly surprising that prosecutors and public safety officers receive more funds than do the public defenders whose nonvoting clients are universally disliked and feared (Taylor-Thompson 1999: 201–2).

A funding disparity between the prosecutorial and the defense function is expected and accepted, if not always explicitly acknowledged (Luban 1993). Moreover, any budget-line comparison will underestimate the size of the discrepancy. A public defender office rarely receives any supplements to its budget from other agencies or funding sources. The office must provide all essential services—including investigation and social work support services—from its legislative grant. An expenditure in one budget line necessitates a cut in another. Prosecutors, on the other hand, are provided with an array of services from other public agencies, free of charge. The police investigate crime, make arrests, and turn the results of their efforts over for prosecution. The police collect evidence, contact and interview witnesses, and generally assist with the preparation of the trial. In short, prosecutors do not pay to prepare their cases (Luban 1993). Defender organizations do.

When budgets are tight, public defenders make hard decisions about where to spend their funds. Staff vacancies are not filled, and caseloads rise. Social workers and investigators shoulder too many assignments and spend insufficient time working with individual clients. Everyone on staff selects among individuals represented by the office and compromises on services. Lawyers are compelled to spend more time in court, answering calendar calls on behalf of their greater number of clients, and less time in the field or in the library (Bernhard 1998).

Increasingly, urban defender organizations have been disadvantaged by "zero tolerance" or "broken windows" crime-fighting techniques characterized by numerous arrests for low-level violations, such as jumping onto a subway without paying the fare or carrying an open beer bottle on the street, which give police a pretext to search for weapons or drugs or to check for outstanding warrants. These approaches pump a huge number of cases through local criminal justice systems. If the public defender or contracting law office has not been included in planning for the flood of minor cases, staff members will find themselves responsible for more cases than anticipated or budgeted (Indigent

Defense Organization Oversight Committee 1998: 6–7).[8] Jurisdictions that depend on assigned counsel plans will quickly run short of lawyers to send to court, and those lawyers who are available will be stretched to their limit. Naturally, mistakes will be more likely as lawyers devote less time to each case and skimp on preparation, investigation, and research.

Absence of Quality Control

Underfunding is not the sole impediment to quality lawyering in the criminal courts. The absence of mechanisms designed to ensure quality adversely affects the caliber of the work, the public's appreciation of defense services, clients' trust in the services provided, and the support of local legislatures. Part of the explanation for the almost total lack of monitoring or evaluation can be attributed to the difficulty of defining quality legal work, especially when the work is criminal defense. Outcomes (acquittals or reduced sentences) do not accurately reflect excellent effort. Client satisfaction is irrelevant in a system in which market forces play no role.[9] And although standards exist that purport to identify the components of quality lawyering, such as the American Bar Association's (1992b) *Standards for Criminal Justice,* those standards are purposely vague so as to be generally applicable to a variety of cases.[10]

Although "lawyers have a duty to report unprofessional conduct to appropriate authorities" (American Bar Association 1994: 101/201), they report some types of unprofessional conduct more than others. Complaints about attorney competency are reported to disciplinary committees almost exclusively by clients despite the existence of rules that define incompetent lawyering as unprofessional or unethical. The Model Code of Professional Responsibility, for example, states: "A lawyer shall not . . . 1) handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it. 2) Handle a legal matter without preparation adequate in the circumstances. 3) Neglect a legal matter entrusted to him" (American Bar Association 1969: disciplinary rule 6–101[A]).

Perhaps because attorneys discount lay opinions on lawyering competency, such complaints are rarely treated seriously. An American Bar Association study of professionalism in Illinois found that, although more than 50 percent of the complaints filed with the disciplinary commission were from clients claiming that their cases had been neglected

or their lawyers had failed to communicate with them, these complaints were generally not investigated or pursued. Most attorneys were disciplined only for mishandling client funds and dishonesty, not for incompetence (Grosberg 1987: 658, note 337). "A 1996 national survey by [the National Association of Criminal Defense Lawyers] of bar discipline counsel revealed only one clear-cut example of acknowledgment of the problem and concern by bar officials" ("Low-Bid Criminal Defense," 1997: 26).[11]

Further insulating ineffective assistance of counsel, more than a few recent court decisions grant public defenders immunity from personal liability for malpractice, a trend that protects attorneys at the expense of their clients (*Coyazo v. State* 1995; *Dziubak v. Mott* 1993; *Scott v. City of Niagara Falls* 1978). Ironically, in at least one jurisdiction, the court was persuaded to grant immunity by the difficult conditions of the defenders' employment. In other words, while the court recognized that some poor defendants would be badly represented because the defense provider was overburdened and understaffed, it nonetheless opted to protect the attorneys from liability for potential malfeasance rather than design a remedy to reduce the chances that malfeasance would occur (*Dziubak v. Mott* 1993).

Lack of Motivation

Lack of oversight is doubly dangerous in the world of criminal court, where little independent motivation to perform well exists. No one receives a salary increase for winning a case or creating a new legal theory. Promotions within a public defender office are rare and not always awarded on merit. Clients are notoriously dissatisfied, and gratitude is scarce. Because courts and prosecutors often view zealous defense work as a waste of precious time, lawyers who grease the wheels of justice become more popular than those who put on the brakes with their fervent representation (Bernhard 1998). Outside the courthouse doors, the public variously views defenders as incompetent at their job or immoral for doing it (Ogletree 1995; see also Casper 1971 and Kunen 1983). Quality control would not only improve services but also communicate the profession's commitment to justice.

The Presumption of Guilt and the Strickland *Standard*

Another reason for the poor quality of criminal defense services is the unacknowledged but pervasive belief of all

participants in the criminal justice system—even criminal defense attorneys—that anyone who has been arrested is guilty. The presumption of guilt is a "core belief shared by virtually all personnel who work within the criminal justice system" (Givelber 1997: 1329) and a major hindrance to improving criminal defense services. The presumption of guilt affects everyone in the criminal justice system, from jurors to judges. Lawyers are discouraged from diligent efforts on behalf of individual clients by the broad-based institutional climate that brands all suspects as guilty.

The presumption of guilt can be ascribed to the attractive, although frequently misguided, conviction that police only arrest guilty people. Even though the public will happily speculate about the accuracy of a police investigation in a particular case, especially when the details of the case are highly publicized and familiar, people generally believe that police arrest the guilty. This "predisposition can be ascribed to several . . . causes: the basic feeling that where there's smoke there's fire . . . ; [gratitude to the police for protection against crime]; obedience to authority and a 'belief in a just world'" (Luban 1993: 1741).

The presumption of guilt helps to explain why the Supreme Court has formulated an almost insurmountable standard of review for ineffective assistance claims on appeal. In *Strickland v. Washington* (1984: 686), the Court held that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." In other words, egregiously negligent work will be excused if the reviewing court is not convinced that a better effort would have produced a different result. If the *Strickland* standard for ineffective assistance of counsel were to be applied to the medical realm, it would forgive a doctor's malpractice in the belief—impossible to validate—that the patient would have died anyway.

The problem with the *Strickland* standard was captured by Justice Marshall in dissent:

> It is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be im-

> possible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. (*Strickland v. Washington* 1984: 710)

The majority opinion in *Strickland* overlooks the simple fact that the prosecutor's evidence will always appear unassailable when counsel for the accused neglects to conduct an investigation or fails to challenge the state's version of the case. The decision deprives persons against whom the prosecution has collected persuasive evidence—even if that evidence is misleading—of the right to effective assistance of counsel (Geimer 1995).

The Future: Strategies for Change

In the last decade of the twentieth century, lawyers, students, and journalists succeeded in exonerating a staggering number of individuals who were wrongly convicted.[12] These stories have attracted media attention, fostered debate among academics, interested the U.S. Department of Justice (Connors et al. 1996), and are increasingly becoming part of the national debate over the death penalty. The compelling evidence that people on death row and in prisons across the country have been mistakenly arrested, prosecuted, and convicted will undermine the powerful presumption of guilt. Even a slight change in that sentiment could have far-reaching consequences on the willingness of courts to use their inherent powers to improve indigent defense systems, the desire of local governments to more adequately fund defense systems, and the professionalism and morale of defenders. Capitalizing on this shift in attitude, advocates for a fairer criminal justice system are developing a variety of strategies to improve the quality of criminal defense services, including litigation, mechanisms to increase accountability, and education.

Litigation

Although courts shy away from prophylactic solutions (Berger 1986: 155), judges can be pushed to use their inherent administrative powers when presented with injustices that cannot be remedied otherwise and are particularly within the expertise of the judicial branch of government (Feeley and Rubin 1998). Thus, litigation can force change. Already, courts in states as diverse as Connecticut

and Louisiana, among many others, have forced their state legislatures to invest funds in indigent defense. The cases have arisen in a variety of ways.

In Louisiana, for example, a single public defender, Rick Tessier, was assigned to represent Leonard Peart on a number of violent crimes. At the time, Tessier was also responsible for seventy other active felony cases. Unable to turn to his overburdened office for help, he petitioned the court for relief, claiming that because he was assigned to represent so many individuals, he was actually providing ineffective assistance of counsel to all. After a hearing, the Criminal District Court ordered substantial reductions in the caseload of Tessier's parish office and ordered the legislature to provide funds to pay for additional facilities. The Louisiana State Supreme Court reversed, limiting relief, but warned the legislature that it would not hesitate to "employ more intrusive and specific measures" if conditions did not improve (*State v. Peart* 1993: 784).

In an alternative approach, the Connecticut Civil Liberties Union successfully sued the state of Connecticut on behalf of indigent defendants. The lawsuit was settled in 1999, with the state agreeing to raise the rates of assigned counsel. The litigation was particularly significant because it required more than an infusion of cash. The settlement required the adoption of specific performance standards for attorneys representing poor people in criminal court.[13]

Accountability: Oversight and Monitoring

Litigation is not the only way for courts to improve the quality of defense services. Institutional defense service providers can be monitored and evaluated in the same way as schools, hospitals, and other public establishments are. The monitoring can be provided by citizen groups, bar associations, or even the courts. For example, the First Department Appellate Division, an intermediate appeals court that presides over the trial bench in Manhattan and the Bronx, has worked with private bar associations to monitor the provision of defense services. The court established a committee that drafted detailed, specific standards for defense organizations, covering attorney qualifications, training, supervision, workloads, evaluation of attorney performance, support services, case management and quality control, compliance with standards of professional responsibility, and reporting obligations. The standards serve multiple purposes, from educating a skeptical public about the value of quality defense

services to engendering support for increased spending and providing notice to the organization itself of what is expected of a publicly funded defense office (Bernhard 1998: 27–28). Applying the committee's standards to the operation of the defense offices revealed problems in the management and delivery of services and alerted the courts and the public to dangerous trends in the operation of the local criminal justice system.

Private attorneys who are not part of an institution, such as the man who represented Luis, can also be held accountable for their actions or omissions. Lawyers traditionally fail to report the malpractice they see. Judges excuse the failings of counsel appearing before them. Loyalty to the profession trumps loyalty to the accused or to the abstract idea of justice. But the collegiality of the bar cannot justify the profession's failure to police itself. Reporting and punishing malpractice and neglect of clients might make a difference in services.

Education and Outreach

Before it will support increased spending on defense services, the public needs more information about the importance of defense work. Guarded about discussing advocacy on behalf of clients, some of whom have committed violent and antisocial acts, and inhibited by rules of confidentiality and ethical prohibitions against public commentary on pending cases, defenders shy away from public conversation about criminal defense. Significantly, many of the essential components of everyday defense work—counseling clients, diverting appropriate cases away from the criminal justice system, monitoring the police, challenging unreliable forensic techniques—are not publicly recognized or appreciated. The public understands and values the work of the prosecutor's office. Public defenders must teach their communities the benefit of a strong and dedicated defender program to reducing recidivism and protecting the innocent accused (Taylor-Thompson 1999). Outreach is not inconsistent with the work of a public defender office. In the South Bronx, a new small defense provider, the Bronx Defenders, has since 1995 worked to educate its community about the job of a defender (Rovella 2000). Staff members travel to schools, invite the parents and siblings of their clients to the office, and join the district attorney at press conferences. So far, the results have been impressive. The office is proving that when defense attorneys are less isolated from the communities they serve, they are less likely to shirk their responsibilities to those communities.

Conclusion

Luis Rojas's conviction illustrates just how easily an innocent person can be convicted when his or her attorney fails to actively engage in the tough, mundane job of building a defense by interviewing witnesses, visiting the scene, and tracking down evidence. Hindsight illuminates mistakes made by the witnesses, the police, and the prosecution at Luis Rojas's first trial. All of these participants contributed to the miscarriage of justice—but it was defense counsel's responsibility to protect Luis from the mistakes of others: from witnesses' misidentifications, police officers' rush to judgment, and prosecution's reluctance to reveal potentially exculpatory material. Instead, the attorney's failures actually contributed to the battery of problems that led to Luis's conviction. Unfortunately, his case is not an anomaly. A study in Maricopa County, Arizona (which includes the Phoenix metropolitan area), showed that only about 55 percent of defense attorneys assigned visited the crime scene before the final felony trial (Steiner 1981). Only 31 percent interviewed all of the prosecution witnesses (approximately 15 percent interviewed none of the prosecution witnesses), while 30 percent entered plea agreements without interviewing any defense witnesses (Lieberman 1981). In New York City, McConville and Mirsky (1986–87: 763) found that only 20 percent of assigned counsel panel attorneys used investigative or expert services regularly, 70 percent used them occasionally, and 11 percent never used them at all.

After Luis Rojas was convicted, his high school photography teacher, shocked by the conviction, began writing letters to local newspapers. He believed that Luis had been unjustly convicted and collected the signatures of two hundred of Luis's fellow high school students, who agreed. The story caught the attention of a local attorney who had never tried a criminal case. This volunteer lawyer, spending her own retirement funds, convinced a retired New York City police detective to investigate and persuaded a young attorney to write and file a motion to set aside the verdict. Together the team found the witnesses, the tapes, and the reports to convince the appeals court that Luis had not been adequately represented.

Luis Rojas served seven and a half years in prison before the appellate division set aside his conviction for ineffective assistance of counsel. When the case was tried a second time, his new trial attorney introduced all of the evidence that had been uncovered post-conviction. This time the jury's verdict was "not guilty."[14]

NOTES

1. In their ground-breaking law review article, Bedau and Radelet (1987) document 350 cases in which individuals were convicted of capital crimes they did not commit. Bedau and Radelet estimate that in 2.8 percent of the cases the incompetence of defense counsel was the primary cause of the unjust conviction, although counsel's incompetence contributed to many others.
2. In 1961, the American population was close to 184 million; by 1997, it had grown nearly to 267 million (U.S. Department of Commerce 1998: 8).
3. Smith and Montross (1999) are quoting here from Butterfield (1997: D1).
4. William Stunz (1997) is relying on the FBI's *Uniform Crime Report* (U.S. Department of Justice 1974, 1981, 1992) for the United States for 1973, 1980, and 1991 as well as on information from the Bureau of Justice Statistics. See also the U.S. Department of Justice's *Sourcebook of Criminal Justice Statistics* (1998: 260) which shows a drop in the rate of crime between 1991 and 1997 after thirty years of steady growth.

   Presently, the United States incarcerates a greater percentage of its population than does any other country in the world. Thirty-eight states provide for the death penalty, and more than fifty federal crimes are punishable by death. More people were executed in the United States in 1999 than in any year since the reinstatement of capital punishment in 1976. The United States is one of only five countries in the world that has executed children in the past six years (Bright 1997a). "No matter what the question has been in American criminal justice over the last generation, prison has been the answer" (Schlosser 1998: 51).
5. Berger (1986: 26) uses the term *widening gap* slightly differently: "There is a widening gap between the heavy responsibilities increasingly being laid on counsel to safeguard the defendant's rights and her perceived ability to do so."
6. Bright is quoting Chief Justice Thurgood Marshall (1986).
7. Here, Berger is quoting from Cover and Aleinikoff (1977).
8. Spangenberg (1995) discusses the advantages to public defenders of establishing commissions to anticipate the effect on all participants in the criminal justice system of new initiatives.
9. Clients could and perhaps should be surveyed and asked to describe the conduct of their lawyers, but I do not know of any jurisdiction that has tried such an approach to monitoring lawyer quality.
10. Although the American Bar Association Section of Legal Education and Admissions to the Bar (American Bar Association 1992a) has formulated a comprehensive statement of fundamental lawyering skills and professional values (commonly known as the MacCrate Report), those skills and values do not appear to guide practice outside the law schools.
11. "In case No. 96–PDB-012, the Disciplinary Board of the Louisiana Bar Association concluded that inmate Vincent Singleton's right to appeal had been neglected for over two years due to excessive case loads. It directed the Office of Disciplinary Counsel to 'investigate the matter further to ascertain if the system is as the lawyer describes it and if the system needs to be altered to meet the requirements of the Rules of Professional Conduct'" ("Low-Bid Criminal Defense," 1997: 26).
12. As of November 1999, sixty-seven individuals have been exonerated with the use of post-conviction DNA testing. The Innocence Project of the

Cardozo School of Law has succeeded in exonerating thirty-six of the total number (Conversation between the author and Jane Siegel Greene, executive director of the Innocence Project, 30 November 1999).

13. See a letter from the Connecticut Civil Liberties Union to the author, September 1999, on file with the author.
14. Many individuals worked to free Luis Rojas. An NBC television news magazine, *Dateline,* produced a one-hour show on the story entitled "Eyewitness," which aired on 11 October 1999. The show identified Priscilla Chenoweth as the volunteer lawyer who believed in Luis and hired the retired police detective who reinvestigated the shooting and found the crucial evidence. The *Dateline* story does not identify Tina Mazza as the appellate attorney who authored the post-conviction motion on Luis's behalf that resulted in the eventual appellate division ruling setting aside the guilty verdict. Jed Eisenstein volunteered to retry Luis Rojas's case. A second trial was necessary because the prosecution refused to dismiss the charges, even after the reversal. The case was tried for a second time, and the second jury acquitted.

REFERENCES

American Bar Association. 1969, as amended. *Model Code of Professional Responsibility.* Washington, D.C.: American Bar Association.

———. 1992a. *Legal Education and Professional Development—An Educational Continuum.* Chicago: American Bar Association, Legal Education and Admissions to the Bar Section..

———. 1992b. *Standards for Criminal Justice: Providing Defense Services.* 3d ed. Chicago: American Bar Association, Criminal Justice Standards Committee.

———. 1994. *Lawyers' Manual on Professional Conduct.* Washington, D.C.: American Bar Association, Bureau of National Affairs.

Armstrong, Ken, and Steve Mills. 1999. "Inept Defense Clouds Verdict." *Chicago Tribune,* 15 November, metro section.

Bazelon, David. 1976. "The Realities of *Gideon* and *Argersinger.*" *Georgetown Law Journal* 64: 811–35.

Bedau, Hugo Adam, and Michael L. Radelet. 1987. "Miscarriages of Justice in Potentially Capital Cases." *Stanford Law Review* 40: 21–179.

Berger, Vivian. 1986. "The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?" *Columbia Law Review* 86: 9–116.

Bernhard, Adele. 1998. "Private Bar Monitors Public Defense." *ABA Criminal Justice* (Spring): 25–30.

Bright, Stephen B. 1997a. "Casualties of the War on Crime: Fairness, Reliability and the Credibility of Criminal Justice Systems." *University of Miami Law Review* 51: 413–24.

———. 1997b. "Neither Equal nor Just: the Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake." *Annual Survey of American Law* 4: 783–836.

Butterfield, Fox. 1997. "Crime Keeps on Falling but Prisons Keep on Filling." *New York Times,* 28 September, p. D1.

Casper, Jonathan. 1971. "Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender." *Yale Review of Law and Social Action* 1: 4–9.

Connors, Edward, Thomas Lundregan, Neal Miller, and Tom McEwan. 1996. *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA*

Evidence to Establish Innocence after Trial. Washington, D.C.: National Institute of Justice.

Cover, Robert M., and T. Alexander Aleinikoff. 1977. "Dialectical Federalism: Habeas Corpus and the Court." *Yale Law Journal* 86: 1035–1102.

Feeley, Malcom M., and Edward Rubin. 1998. *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons.* Cambridge: Cambridge University Press.

Geimer, William. 1995. "A Decade of *Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel." *William and Mary Bill of Rights Journal* 4: 91–178.

Givelber, Daniel. 1997. "Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?" *Rutgers Law Review* 49: 1317–96.

Grosberg, Lawrence M. 1987. "Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11." *Villanova Law Review* 32: 575–690.

Indigent Defense Organization Oversight Committee. 1998. "Report for 1998." New York: Supreme Court of New York Appellate Division, First Department.

Klein, Richard. 1986. "The Emperor *Gideon* has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel." *Hastings Constitutional Law Quarterly* 13: 625–93.

———. 1993. "The Eleventh Commandment: Thou Shalt not Be Compelled to Render the Ineffective Assistance of Counsel." *Indiana Law Journal* 68: 363–432.

Kunen, James. 1983. *How Can You Defend Those People? The Making of a Criminal Lawyer.* New York: Random House.

Lieberman, Marty. 1981. "Investigation of Facts in Preparation for Plea Bargaining." *Arizona State Law Journal* 2: 557–83.

"Low-Bid Criminal Defense Contracting: Justice in Retreat." 1997. *Champion* 22 (21 November): 26–28.

Luban, David. 1993. "Are Criminal Defenders Different?" *Michigan Law Review* 91:1729–66.

Marshall, Thurgood. 1986. "Remarks on the Death Penalty Made at the Judicial Conference of the 2nd Circuit." *Columbia Law Review* 86, part 1: 1–8.

McConville, Michael, and Chester L. Mirsky. 1986–87. "Criminal Defense of the Poor in New York City." *New York University Review of Law and Social Change* 15.

Ogletree, Charles J., Jr. 1995. "An Essay on the New Public Defender for the 21st Century." *Law and Contemporary Problems* 58: 81–93.

Rovella, David E. 2000. "The Best Defense . . . Rebuilding Clients' Lives to Keep Them from Coming Back." *National Law Journal,* 31 January, p. A1.

Schlosser, Eric. 1998. "The Prison Industrial Complex." *Atlantic Monthly* (December): 51–77.

Smith, Abbe, and William Montross. 1999. "The Calling of Criminal Defense." *Mercer Law Review* 50: 443–535.

Spangenberg, Robert L. 1995. "Criminal Justice Planning Commissions: Improving the System through Coordination, Cooperation and Communication." *Spangenberg Report* 2: 1–5.

Spangenberg, Robert L., and Marea L. Beeman. 1995. "Indigent Defense Systems in the United States." *Law and Contemporary Problems* 58: 31–48.

Steiner, Margaret L. 1981. "Adequacy of Fact Investigation in Criminal Defense Lawyers' Trial Preparation." *Arizona State Law Journal* 2: 523–56.

Stunz, William. 1997. "The Uneasy Relationship between Criminal Procedure and Criminal Justice." *Yale Law Journal* 107: 1–76.

Taylor-Thompson, Kim. 1999. "Effective Assistance: Reconceiving the Role of the Chief Public Defender." *Journal of the Institute for the Study of Legal Ethics* 2: 199–230.

U.S. Department of Commerce, Bureau of the Census. 1998. *Statistical Abstract of the United States.* Washington, D.C.: U.S. Department of Commerce.

U.S. Department of Justice, Federal Bureau of Investigation. 1974. *Uniform Crime Report.* Washington, D.C.: U.S. Department of Justice.

———. 1981. *Uniform Crime Report.* Washington, D.C.: U.S. Department of Justice.

———. 1992. *Uniform Crime Report.* Washington, D.C.: U.S. Department of Justice.

U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. 1998. *Sourcebook of Criminal Justice Statistics.* Washington, D.C.: U.S. Department of Justice.

CASES CITED

Coyazo v. State, 897 P.2d 234 (Ct. App. N.M. 1995).

Dziubak v. Mott, 503 N.W.2d 771 (Sup. Ct. Minn. 1993).

Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985).

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct.792 (1963).

McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970).

People v. Rojas, 213 A.D.2d 56, 630 N.Y.S.2d 28 (N.Y. 1st Dept. 1995).

Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932).

Scott v. City of Niagara Falls, 407 N.Y.S.2d 103 (Sup. Ct. Niagara Cty. 1978).

State v. Peart, 621 So.2d 780 (Sup. Ct. La. 1993).

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Wrongly Convicted

Perspectives on Failed Justice

Edited by
SAUNDRA D. WESTERVELT
JOHN A. HUMPHREY

With a Foreword by
MICHAEL L. RADELET

RUTGERS UNIVERSITY PRESS
New Brunswick, New Jersey, and London

Fifth paperback printing, 2010

Library of Congress Cataloging-in-Publication Data

Wrongly convicted : perspectives on failed justice / Saundra D. Westervelt and John A. Humphrey ; with a foreword by Michael L. Radelet.
p. cm
Includes bibliographical references and index
ISBN 0–8135–2951–4 (cloth: alk. paper)—ISBN 0–8135–2952–2 (pbk. : alk. paper)
1. Trials—United States. 2. Judicial error—United States. 3. Criminal justice, Administration of—United States. I. Westervelt, Saundra Davis, 1968–
II. Humphrey, John A.

KF220 .W76 2001
364.973—dc21 00–045748

British Cataloging-in-Publication data for this book is available from the British Library.

Manufactured in the United States of America