Pre-Trial Legal Aid for Criminal Defendants: A Cost-Benefit Approach

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1. Introduction

In an earlier paper, "Pre-Trial Detention: A Cost-Benefit Approach," (Bowles & Cohen, 2008) we developed a model of Pre-Trial Detention ("PTD") for individuals accused of committing a crime. That model determined the optimal PTD policy (or its counterpart, an optimal bail policy) taking into account the social costs of PTD versus the risks of an offender absconding and/or re-offending while out on bail. That simplified model assumed that the court determines the proportion of accused offenders to release prior to trial. While it is assumed that this determination is made based on factors such as the seriousness of the alleged offence, prior criminal record of the accused, the risk of flight, and the risk of future criminal activity while awaiting trial, the setting of bail itself is abstracted away in the model – and instead the court is assumed to choose the optimal "proportion" of accused offenders released prior to trial.

In practice, the proportion of offenders awaiting trial is determined by setting a bail amount for each offender based on these factors, and the accused either accepts or rejects the bail amount. The bail amount may be anywhere from zero – in which case the accused is released "on his own recognizance" – and infinity – in which case the accused is not released at any price. Of course, bail is not set in a vacuum. Instead, it is generally set at a court proceeding where the prosecution might argue for a high bail based on flight risk or seriousness of the offence and the accused has an opportunity to argue for a lower bail. This adversarial court proceeding is the subject of this paper. In particular, we consider whether there is a role for legal aid for indigent defendants at the pre-trial stage for purposes of determining an appropriate bail decision.

Our goal is to characterize the role that legal aid plays in providing an appropriate bail decision (and hence, as discussed in our previous paper, an appropriate PTD policy). In doing so, we make two important assumptions about the process. First, we assume that if legal aid is provided, it is done so through competent attorneys who are tasked with working on behalf of their clients (not, for example, working with an inherent conflict of interest and truly representing the prosecutors under guise of legal aid). Second, we assume that the PTD process is handled fairly in the sense that the judge

(or other decision maker on PTD) actually incorporates the information provided by the adversarial process in the outcome. That is, we assume throughout the paper that the legal system can accommodate a legal aid structure and not simply "waste" any resources spent.

2. Modelling the Role of Legal Aid at the Pre-Trial Detention Stage

2.1 The Bail Decision

Lim, Quah and Tan (2005) provide a useful starting point for our analysis, as they model the socially optimal amount of bail. Similar to the Landes (1973) model, they identify the various social costs of a bail system, including the cost of the bail system itself, the harm caused by a defendant who commits a crime while on bail, the cost of maintaining a defendant in PTD if bail is set too high, and the lost freedom to the defendant who is held in PTD (and is not otherwise found guilty to a crime punishable by prison). The setting of an optimal bail amount is thus the factor that clears this market and results in a socially optimal level of PTD. However, the Lim, Quah and Tan (2005) model assumes that the decision maker who sets bail has unbiased information about the relevant probabilities. While there might be uncertainty about whether or not the defendant is likely to skip bail or commit a crime if released, the probabilities can be calculated in an unbiased manner.

To understand the potential importance of indigent legal aid at the PTD stage, assume that the factors chosen by the legal system promote an optimal proportion of PTD and hence an optimal level of bail under a model like Lim, Quah and Tan (2005). For this to happen, one key assumption is that the court that is charged with making the bail decision has perfect information about the factors that must be considered in the bail decision. Information suggesting that the accused is a higher flight risk than he really is, for example, will tend to encourage the court to set bail too high and lead to too much PTD. Alternatively, information suggesting that the accused is less of a flight risk than he really is, will lead to too low a bail amount and too little PTD. The process by which these factors are presented to the court is generally a legal proceeding whereby the prosecutor presents his assessment of these factors – and the defence counsel is permitted to present an alternative view and facts. Without such legal representation, we expect too much PTD.

2.2 Prosecution decisions

Rhodes (1976) modelled the criminal court as one in which both prosecutors and defendants make choices to maximize their own utility. Since this is a model that includes both plea bargaining and trials, the prosecutor is presumed to care about both the number of convictions and the length of sentences – but is constrained by an exogenously given budget that limits its ability to pursue trials. The defendant's utility obviously depends upon the expected length of the sentence - which depends upon the probability of a guilty outcome at trial, the sentence length expected if convicted, as well as the sentenced offered by the prosecutor if the defendant pleads guilty. The defendant also has a budget constraint and must determine how much to spend on legal fees and their own time and resources to defend themselves at trial.

For purposes of this paper, one of Rhodes' key theoretical findings from his model is that anything that reduces the cost of trial for the defendant – such as provision of public counsel – "is expected to decrease the number of prosecutions, increase the number of trials and decrease the number of settlements. In addition, the ratio of trials to settlements should increase as the availability of public counsel increases." (Rhodes, 1976: 319) Using data from criminal prosecutions in U.S. District Courts, he finds empirical evidence that the "ratio of guilty pleas to trials was shown to be inversely related to the availability and quality of public counsel…" (p.327). Ultimately, he concludes "This finding is strong support for the belief that the appointment of quality public counsel can significantly reduce the inequities suffered by the indigent in the criminal courts." (p. 332: fn 23).

While the Rhodes model does not consider the role of PTD hearings and thus does not directly assess the impact of legal aid on PTD, it does have implications for legal aid for PTD hearings. By lowering the cost of challenging a bail proposal by the prosecutor, we expect to see lower bail amounts and a higher number of pre-trial releases. Note also that sometimes individuals will plead guilty in order to avoid PTD – presumably when they believe they might otherwise avoid a prison sentence (or in the case either that PTD does not count towards prison or the conditions of PTD facilities are less safe than the conditions of prison). To the extent this is true, offering legal aid at the PTD stage will thus decrease guilty pleas of innocent defendants. In

other cases, the threat of PTD might be used by prosecutors as a mechanism to extract guilty pleas from suspects. Once again, legal aid will tend to reduce the potency of this threat as the defendant will presumably have access to sound legal advice from an experienced attorney and will also have a better opportunity to counter any inappropriate evidence in court.

Of course, in some criminal justice systems, guilty pleas are not allowed. At the same time, there may be other types of pre-trial settlements which do not result in a conviction, e.g. discontinuation of a case for lack of evidence. Therefore, in jurisdictions where plea bargaining is not allowed, legal aid might increase the number of early settlements – hence reducing the length of PTD. This is consistent with Rhodes' findings that legal aid results in fewer prosecutions.

2.3 Police decisions

While PTD and bail decision are made by judges, with recommendations from prosecutors, police also have a role in this process to the extent the evidence they gather informs the decisions by prosecutors and judges. Thus, a system providing legal aid at the PTD stage is likely to "raise the bar" in terms of the quality of evidence gathered, reducing procedural errors in the gathering of evidence, abuse of discretion or mistreatment of suspects, timeliness of collecting data (where statutory time limits exist), etc. Police officers do not want to arrest defendants who are going to be released almost immediately by a judge or a prosecutor who dismisses charges for lack of appropriate evidence. Thus, legal aid could perhaps serve as an incentive for police to investigate cases more efficiently and with less error.

2.4 Arrestee Perception of Fairness

Being represented by legal counsel at the PTD stage is likely to improve the perception of fairness on the part of those being charged with crimes (see Section 4.3, below, for evidence of this in the U.S.). It is quite possible that a suspect who believes they have been treated fairly at the PTD hearing – even if bail is set high – will be inclined to behave in a more socially desirable manner and be more likely to conform to social norms whether in or outside of prison. For example, they might be less inclined to offend while on bail or might be less inclined to engage in fights or other disruptive behaviour while in PTD. While we do not have strong evidence of this

effect, this is a benefit worth exploring. In fact, even if this effect did not exist, the mere existence of a more "satisfied" (or perhaps better put "less dissatisfied") suspect is itself a social benefit.

2.5 Type I and Type II errors in PTD decision-making

Another way of looking at how the PTD decision might be modelled is to take a statistical perspective. The PTD decision has similarities with the decision to be made later at the trial stage. The presumption (the 'Null Hypothesis') is that the defendant is innocent and will not offend if released on bail. The opposing possibility (or 'Alternative Hypothesis') is that the defendant is guilty and may re-offend if released on bail. There is a lack of perfect information about which of the two groups a particular defendant belongs to. So when courts make PTD decisions they can make two sorts of errors. They may incorrectly remand an innocent defendant to PTD, thereby rejecting the NH incorrectly, or making a 'Type I' error. Or they may release a defendant who is guilty, thereby accepting the NH incorrectly and making a 'Type II' error.

Fig. 1 Type I and Type II errors associated with PTD versus bail decisions

	NH: Defendant is innocent and will not offend again	**NH: Defendant is guilty and will offend again**
Reject bail request: hold on remand (PTD)	Type I error	Correct
Accept bail request: release on recognizance	correct	Type II error

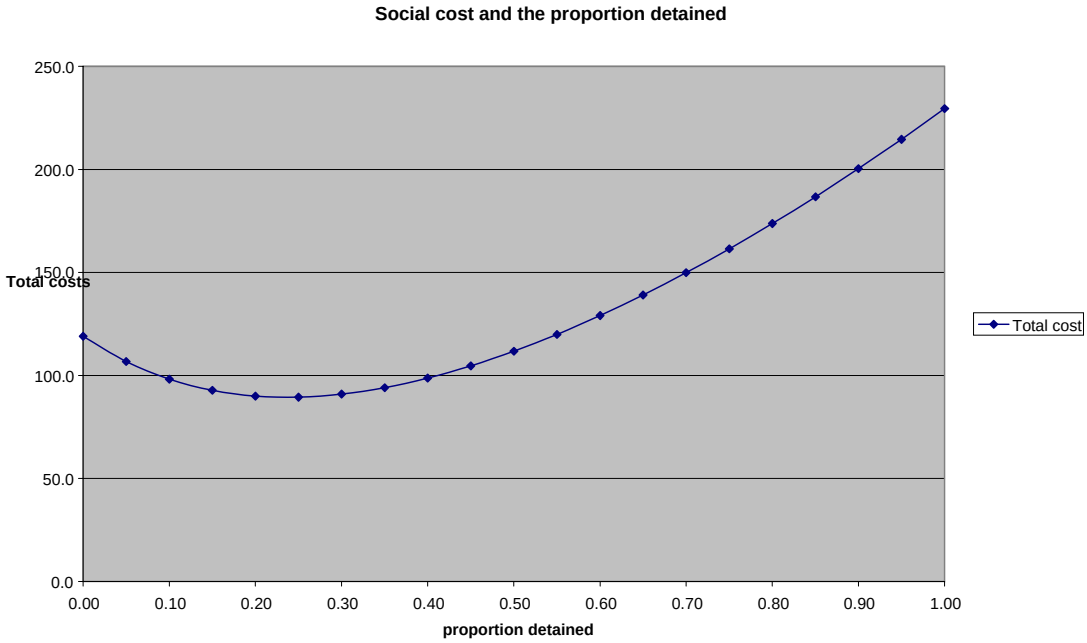
The significance of legal aid at the pre-trial stage is that it will in general enable a better-informed view of the defendant to be reached at the stage in the process when a detain or bail decision is being made. A state prosecutor may be inclined to ask for PTD purely on grounds of risk aversion. Bad publicity may result as and when a bailed defendant commits further offences while on bail. A prosecutor can pre-empt such an outcome by pressing for the detention of defendants when there is thought to be any significant possibility of further offences occurring. In the absence of the defendant's position being put effectively to the court, therefore, the prediction is that 'too many' defendants will be detained.

In more technical terms, an unopposed prosecutor will tend to make a large number of Type I errors: see Fig. 1. The social cost of such a policy may be very high, but from the prosecutor's perspective the 'downside' risk of detaining an innocent suspect appears to be much lower than the 'high profile' risk of releasing a defendant who goes on to be convicted at trial but only after having committed further offences.

This problem results because of an **incentive compatibility** problem: Ledyard (2008). The private incentives for the prosecutor are not aligned with the social costs of the various possible outcomes. Of course the court will be aware of this possible bias on the part of representations from prosecutors. But in the absence of effective representation on the part of defendants they also may veer in the same direction, possibly for similar sorts of reasons. Courts are not responsible for prison costs but may be blamed if defendants they have released on bail commit offences prior to their trial.

The 'defensive' solution for the court is to err on the side of committing 'too many' defendants to PTD. In terms of the analysis in the companion paper on PTD (Bowles & Cohen, 2008) this is equivalent to arguing that courts may tend to drive up the proportion detained to needlessly high levels (well to the right of the value of p that minimizes social costs in Fig. 2, taken from Bowles & Cohen, 2008). The purpose of funding legal aid for defendants at the detention stage is to get a better balance into the outcome that recognizes all the elements of social cost, not just the 'possible error' cost elements as viewed from a prosecutor's or court's perspective. Finding organizational structures capable of delivering social cost minimizing outcomes is well known from the incentive contracting literature to be a challenging assignment.

Fig. 2 Social Cost and the Proportion Detained Prior to Trial



From a social perspective the 'costs' of this kind of outcome will potentially be an escalating prison population, and a prison population amongst whom pre-trial detainees represent a growing proportion. To innocent defendants who might otherwise be released in a system where unbiased information is presented to the court, this may result in an additional cost through lost freedom. There may also be the possibility of an escalating bill for compensating defendants who are held in detention only to be acquitted at trial. In practice, however, compensation of this kind may be purely notional, in which case a natural brake on the use of detention will be absent. The net result will then be a level of pre-trial detention that exceeds the socially optimal level.

2.6 Possible "Spill-over" from Legal Aid at the PTD Stage

Providing legal aid at the PTD stage might serve another purpose beyond its direct benefits to those who are served by publicly provided attorneys. To the extent that both prosecutors and judges learn from this new adversarial procedure about the true flight risks of detainees, the effect it might have on their families, and begin to impose more socially optimal bail amounts, it is possible that they will "shift" their default expectations for all detainees – even if not eligible for public representation. In other words, if enough legal aid is provided, over time, there might be a positive spill-over effect that changes the pattern of PTD decisions for all detainees. While this is

conjecture on our part, one could envision a model whereby this is one of the outcomes.

3. Legal Aid and the Cost Benefit Analysis of PTD

The provision of legal aid to poor defendants has various implications for social costs and benefits. Our argument thus far (supported by evidence from Colbert and others, discussed below), is that extending the pool of defendants with access to legal advice and assistance (and perhaps representation) at the pre-trial hearing stage will likely reduce the number of defendants held in PTD closer to its optimal level. The gross spending on legal services would be higher since a new group of recipients of services has been created. There would be a small increase also in the total costs of running the courts since extra time will be needed to accommodate the increase in the number of (and/or the duration of) bail/remand hearings. These costs might not only be borne by courts, but also by prosecutors who now must spend more time preparing for and attending PTD hearings.[1] In terms of the model presented in Bowles and Cohen (2008), legal aid to indigent defendants raises the cost of BAIL.

But these additional costs would be offset by savings from more reliable judgments about whether it is worthwhile to detain a defendant. This in turn would enable the release from prison of a number of defendants with reasonable prospects of being acquitted at trial in due course who would otherwise be detained – thus, the total cost of PTD would decrease by the additional proportion of suspects who are released, and any costs associated with lost freedom (FREE) would also be reduced accordingly. The challenge for the social planner seeking to minimise social costs would be to set the eligibility rules and 'merits tests' for legal aid at the pre-trial stage in such a way as to keep to a minimum the additional costs of legal services and to limit access where possible to the genuinely deserving defendant. Mistakes (Type I and Type II errors) could still be expected but the proportion of defendants not representing a significant risk to public order who were detained could be expected to fall. Of course, it is also possible that some percentage of those released on bail under this new regime will now re-offend and hence there will be additional CRIM and REPR costs associated with providing legal aid. Thus, a cost-benefit analysis of legal aid

[1] It is also possible that police costs will increase to the extent police now take more costly precautions in gathering evidence to ensure that arrests are not thrown out at the PTD stage.

would need to balance any cost savings from less PTD and FREE against any cost increase through BAIL, CRIM, and REPR.

4. Legal Aid in Practice

4.1 Facts about Pretrial Legal Aid in the U.S.

The right to legal representation for those accused of a crime is guaranteed in the U.S. Constitution, and through various Supreme Court rulings over the years, this right has been expanded to include the pretrial stage. However, the courts have left several crucial details to the states to determine. “For example, either by statute or State Supreme Court decision, some States require counsel in all misdemeanour cases, while others require counsel only if there is a reasonable likelihood that a jail sentence may be imposed.” (Spangenberg et al., 1986: 1). More importantly, in 1974, the Supreme Court “ruled that states were not required to provide an attorney for indigent defendants at their initial court appearance when judicial officers made a probable cause determination and invited states to experiment with procedural practices that combined bail hearings with probable cause determinations.” (Colbert et al., 2002: 1726). While we are unaware of what percent of suspects are represented at bail hearings, in a 1982 survey, it was reported that 33% of all counties provide legal counsel to indigent defendants within one day of arrest (Spangenberg et al., p. 35, Table 31). While this figure increases to 58% within two days of arrest, 77% within three days, and 88% within one week.

On average, $2.76 was spent on indigent legal defence per capita (Spangenberg et al. 1986: p. 25: Table 20). This compares to about $157.52 per capita spent on the total justice system in the U.S. that year, and $34.30 spent on the “judicial and legal” component of the justice system (Pastore and Maguire, 2003: Table 1.7). Thus, indigent legal aid represented about 1.8% of total justice system expenditures and about 8% of judicial/legal expenditures. On a per case basis (including all stages of the criminal justice system) legal aid cost $195.97 in 1982 (Spangenberg et al., 1986: p. 29, Table 23). Of course, these costs include all legal aid for indigent defendants – including the trial stage. Legal aid at the bail hearing stage is likely to be only a small fraction of these costs.

> A great deal of variation exists among the criteria developed to date. While all States base their determination of defendants' indigency on income and/or liquid assets, they use different definitions for these terms. For example, some State programs consider gross income, while others take into account only net income. Some consider liquid assets to be only those cash assets, which if converted would not jeopardize the defendant's 'ability to maintain his (or her) home or employment,' while others include the defendant's home and automobile. Finally varying cut-off points are used. Some use the Bureau of Labor Statistics' definition of the poverty level; others factor in the estimated cost of representation; still others take into account presumptive evidence of ineligibility, for example, the defendant has posted bail, is not on public assistance, or owns more than one automobile. [Spangenberg et al., 1986: 34]
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> Traditionally, attorneys who provide indigent defense services are not appointed to represent the defendant until his or her formal arraignment. In some jurisdictions, this time period may exceed 30 days or more from the date of arrest. By this time, however, it may be too late to protect many of the defendant's constitutional rights. For example, the defendant may have already inadvertently incriminated him- or herself by providing statements in the absence of counsel. Moreover, witnesses for the defense may be lost between the time of arrest and appointment of counsel. Finally, the defendant may well be placed at a disadvantage in relation to the prosecutor in terms of the preparation of the case. Thus, early representation, defined by some as entry by counsel into a criminal case within 24 hours of arrest, is seen as an important advance in protecting rights of indigent defendants. [Spangenberg et al., 1986: 35]

A randomized controlled experiment was conducted in Baltimore, Maryland in 1998, where 175 suspects charged with non-violent crimes were provided lawyers to represent them at bail hearings, and 125 were not (Colbert et al., 2002). The process in Maryland is that upon arrest, a bail commissioner immediately sets an initial bail amount which is then reviewed at a hearing at a later date. "Before the bail review hearing the two groups had approximately the same amount of bail set. After the review hearing, (represented) clients fared significantly better. The bail review hearing judge reduced the bail for over one-half of the (represented) clients (59 percent), but for only 14 percent of the unrepresented defendants…Moreover, the amount of the reduction was significant." (p. 1753) Average bail was reduced by $1,000 (about 1/3) for those who were represented, compared to only about a 5% reduction for those who were not represented. Those with attorneys were also more

likely to be released on their own recognizance (34%) than those who were not represented (13%).

Because of the reduced bail and increased number of suspects released on personal recognizance, the median time spent in jail prior to final disposition of their case was reduced from 9 days to 2 days for all arrestees who had a lawyer at their bail hearing (p. 1756). For those who did not meet bail, the average length of time in jail prior to final disposition was 67.6 days (median 38 days). Based on the additional number of suspects who now meet bail as a result of legal representation, and the fact that 48.1% of detainees ultimately had their criminal charges dropped, the authors estimated that "for every person given a lawyer at the bail hearing, we expect to save 10 bed days overall, and 6 bed days for people who ultimately, have their cases dropped." (p. 1757). Further, it was estimated that if Baltimore guaranteed representation at bail, it would save $4.5 million annually (p. 1757, note 122).[2]

> The obvious question was why the appearance of counsel would make such as difference in the bail review hearing, often as very perfunctory event in the criminal justice process. One reason is that represented defendants could better present beneficial and verified information concerning the appropriate bail that supplemented the information provided by the pretrial release representative. The hearing took slightly more time when an attorney was present: on average, two minutes and thirty-seven seconds, versus one minute, forty-seven seconds without counsel. (p. 1755)

While a formal cost-benefit analysis was not conducted, it was noted that the 6-month re-arrest rate for all defendants released prior to trial was 10% (p. 1757: note 123). This rate was the same for both those who were represented by counsel and those who were not.

Not surprisingly, defendants who were represented by counsel reported a higher level of satisfaction with both their treatment during the process and the final outcome. "For example, defendants were asked to estimate on a scale of 1 (very unsatisfied) to 10 (very satisfied) 'how satisfied they were with the outcome of the bail review hearing.' The average score for (represented) clients was 7.14, while the (score) for

[2] Note: We do not know if this figure is net of the costs of providing legal aid services at bail. Regardless, it is appears that this program would pass a cost-benefit test in Baltimore.

those without lawyers, it was only 5.44, In response to a query as to how satisfied they were with the way the judge treated them, the average score for (represented) clients was 7.00, but only 5.78 for (non-represented) clients." (p. 1758) Perhaps more importantly, defendants who were represented during the bail hearing believed that the court had better information about their case and adequately considered their side of the story. For example, "defendants with lawyers were substantially more likely than those without attorneys to report that the hearing officer had a 'great deal' of information about their case before they made their bail decision (38.5 percent v. 22.6 percent)…(and)…65.8 percent of defendants with lawyers thought all of the information the bail review hearing officer had was correct, compared to only 50 percent of unrepresented defendants." (p. 1760)

Despite this one encouraging study, one cautionary note is that some early evidence of legal aid in the U.S. suggests that defendants who are represented by public defenders lacked trust in their counsel and oftentimes plead guilty rather than go to trial because they lacked confidence in their counsel (Levine, 1975). This was a study of representation at trial (not PTD), but its findings are provocative – especially in the context of a country thinking about adopting legal aid for the first time.

4.1.1 Legal Aid in Africa

Collecting systematic information about the operation in practice of Legal Aid in Africa is not very straightforward. This applies in particular to its role at the PTD stage.

The provision of legal aid in Africa appears limited at all stages. In Botswana, free legal aid is only available for defendants in cases before the high court or when the penalty of the offence is death.[3],[4] A similar situation exists in Gambia, Kenya and Tanzania.[5],[6],[7] It has also been said that in Kenya, legal aid is only ever given during the trial phase, if at all. The provision of legal aid in Ethiopia is also restricted, predominantly to men but even for men it is highly limited.[8] However, in Zambia

[3] http://www.un.org/News/Press/docs/2008/hrct696.doc.htm
[4] http://www.fidh.org/spip.php?article3786
[5] http://www.privacyinternational.org/article.shtml?cmd%5B347%5D=x-347-262509
[6] www.justiceinitiative.org/activities/lcd/cle/durban2003
[7] http://www.commonlii.org/tz/other/TZLRC/report/R8/8.pdf
[8] http://addisvoice.com/article/report.pdf

most do not receive any legal aid and police do not respect the prisoners' right to apply for bail.[9] In Malawi, it is common for defendants not to meet their lawyer until minutes before their trial. However, paralegals do often provide legal advice to allow defendants to more effectively represent themselves in the pre-trial bail hearings. Therefore, some countries do give the right to legal aid during the pre-trial phase, however, this is not always provided.

In sum, legal aid provision in sub-Saharan Africa appears to be very limited as a whole. Its provision in the pre-trial phase appears to be even more limited, with only Malawi, Zambia and South Africa providing much legal aid during this stage. Even then it appears highly restricted.

The right to legal aid in some other African countries is greater; however, as in the case of the US constitutional protections outlined in the previous section, this is often not matched by de facto provision on the ground. In Angola, all arrestees have the right to legal aid.[10] However, a UN working group reported that in practice, any form of legal aid is rarely given and even then it appears restricted to the trial phase. This situation may be mirrored in Ghana.[11],[12] The situation in Nigeria also appears similar. In 1974 a state-run legal aid board was set up to help provide legal aid.[13] However, the number of lawyers providing legal aid is very limited,[14] which results in approximately only 25% of defendants having access to a lawyer before their trial.[15] Therefore, in Angola, Ghana and Nigeria despite rights to legal aid it is poorly provided so is limited to the trial phase.

In some other sub-Saharan African nations, the entitlement to legal aid covers the pre-trial phase. This occurs in South Africa, Zambia and to some degree, Malawi.[16],[17] Prison congestion is an issue in countries such as Uganda. There is no automatic right to a lawyer in court, case processing is slow, remand periods are exceeded, and charge

[9] http://www.state.gov/g/drl/rls/hrrpt/2006/78764.htm
[10] http://appablog.wordpress.com/2007/09/28/un-working-group-on-arbitrary-detention-visited-angola/
[11] http://www.afrimap.org/english/images/report/AfriMAP_Ghana_Justice.pdf
[12] Penal Reform International (2007).
[13] http://www.justiceinitiative.org/activities/ncjr/atj/nigeria_legalaid
[14] http://www.amnesty.org.uk/news_details.asp?NewsID=17676
[15] 'Reducing the use and length of pretrial detention in Nigeria', Open Society Justice Initiative briefing at the World Bank Washington, D.C., 21 March 2007.
[16] http://www.paralegaladvice.org.za/docs/chap03/03.html
[17] Partington (1975).

sheets frequently get lost. The Legal Aid Project (LAP) was established by the Uganda Law Society in 1992 with assistance from the Norwegian Bar Association to provide legal assistance to indigent and vulnerable people in Uganda. There is a State Brief System but this handles only capital cases. There is no statutory free Legal Aid provision in Uganda despite a large portion of the population living below the poverty line.

4.2 Funding of legal aid at the pre-trial stage

All defendants charged with an offence may wish for legal advice and assistance at the time the charge is being made and prior to (and at) any court hearing (or other proceeding) to determine whether they are to be remanded in custody or released on bail.

In some countries there is provision for the direct provision of advice by telephone or in person from a 'duty' lawyer or paralegal based in a police station or court. The advice may be provided by a private sector lawyer and the fees paid for by the state, the so-called '**judicare**' model: Goriely (1998, 2003). It may be that a means test, based on income and/or assets, is used to determine a defendant's eligibility for access to such services. There will generally also be a 'legal merits' test to identify whether the defendant is genuinely 'in need' of legal services in the circumstances of the particular case. Many commentators on the judicare system in England and Wales have pointed out the perverse incentives that may accompany a 'fee for service' approach to the provision of legal services: Gray et al (1996), Fenn et al (2007). This has prompted a move to 'block contracting' for the provision of legal services, a high-powered incentive contracting regime which appears to have reduced the time spent per case and thus the average cost. Of course the provision of legal advice to defendants pre-trial, especially if it is delivered through a 'duty lawyer' in a police station, may be less susceptible to these kinds of moral hazard problems.

Alternatively the advice may be provided by a lawyer employed directly by a state agency, the '**public defender**' model. In some countries this is viewed as potentially problematic either because provision by a public agency is believed to be susceptible to political manipulation or for the (quite different) reason that it will simply be rather inefficient. Experience from Australia, where a high proportion of services provided

under legal aid is directly supplied, suggests that this concern about inefficiency may not be well-founded.

But in many countries there may be little or no government funding of legal advice at the pre-trial stage, or it may be limited to defendants charged with the most serious types of offence. In this event defendants have to decide whether to pay for a lawyer from their own pocket or to forego legal advice altogether.

In some countries there may be some 'intermediate' alternatives. For example there may be some provision through the **Voluntary or Charitable Sectors** or through **external donors**. However this legal advice (and legal services provided under this rubric) is unlikely to be universally available and will often be confined to major cities or to a handful of projects supported via donor agencies. Other intermediate alternatives include the provision of advice through other agencies such as Citizens' Advice Bureaux. This is comparatively rare, however, in the context of criminal law: it is more often found in areas such as employment or housing matters.

5. Evidence on "Costs" and "Benefits"

Based on the models and discussion above, the same cost factors that are needed to establish the costs and benefits of a PTD system as elaborated in Bowles and Cohen (2008), will be needed to estimate costs and benefits of legal aid for indigent detainees at the pretrial release stage. The only additional categories of evidence needed are (1) the actual cost of providing indigent legal defence, (2) any increase in court time and other administrative expenses associated with longer bail hearings, and (3) the proportion of newly released suspects who abscond and/or offend while out on bail. If the typical suspect who is released under a legal aid regime has the same flight and re-arrest rate as the suspect who is released without legal aid, then this information will already be available from the PTD study itself.

One way to establish the potential value of legal aid at the PTD stage is to study actual decisions in the absence of such a policy. In a system that currently allows for legal representation a PTD hearing, one could compare the bail and release outcomes of those who are represented versus those who are not represented by private counsel.

If adequate data is collected on charges, past criminal history, family and community ties, etc., it might be possible to use a form of regression analysis to determine what effect legal aid has on actual case outcomes.

As discussed above, one of the benefits of legal aid at the PTD stage is to improve the feeling of fairness on the part of detainees (with potentially positive social outcomes as a result). As done in the Baltimore study, one could survey arrestees who have gone through the PTD system to determine their level of satisfaction with the process – and perhaps even conduct random experiments as was done in Baltimore.

6. Concluding Remarks

Provision of legal aid for indigent defendants is expected to result in significant savings to criminal justice agencies by reducing the number of arrestees held in PTD who would otherwise be good candidates for release prior to trial. Evidence from the U.S. suggests the cost of providing such services is relatively small – and likely to result in significant savings from reduced incarceration costs. It would also improve the perception of fairness among arrestees. Whether or not these findings would hold in a developing country context would be worthy of further study. There are many ways in which further exploration could be conducted, some of which we briefly sketch out next.

In countries that already have some sort of legal aid at the PTD stage, one could study the cost and outcome differences if legal aid is provided in only some jurisdictions or for some type of offenders. This would require data on individual defendants, including information on the charges being brought against them, demographic and family characteristics, ties the community, etc. in order to assess the marginal impact of legal aid on PTD decisions. Even if legal aid is provided throughout the country, one could compare the outcomes of those who have legal aid, no aid, and privately paid counsel to determine what effect, if any, legal aid has on outcomes.

Another study that could be conducted is an experiment along the lines of the Baltimore project, where indigent detainees are randomly assigned “legal counsel” versus “no legal counsel” and outcomes are compared. This might be especially

appropriate in a system that has not adopted legal aid at the PTD stage in order to study the potential costs and benefits. (Data would need to be collected to determine the costs and benefits throughout the system as suggested above.)

Finally, an intermediate level study might explore the perceived fairness and effectiveness of legal aid by means of focus groups or questionnaire-based surveys questions the experience of a group of defendants some of whom had been represented at a PTD hearing by legal aid lawyers, and some of whom had not been so afforded.

As we mentioned at the outset, we have assumed that if legal aid is provided at the PTD stage, the providers will be competent and work on behalf of the accused. We also assumed that the court will rule impartially (or at least give some weight to the evidence) and consider the evidence and arguments brought before it by the legal aid lawyer. These assumptions are important, and unfortunately, might be violated in the context of many developing countries without a strong rule of law culture. For example, legal aid attorneys hired on a contract basis might easily be "bribed" by the court (or prosecutors) simply by being offered the contract in the first place. In other words, attorneys appointed by the court could be expected to provide an implicit "kickback" in the form of poor representation. This might even be true of government lawyers – depending upon who they ultimately report to. Other forms of injustices or corruption might also exist, and need to be considered in the context of any study and proposal to examine the efficacy of legal aid in a developing country. Finally, even in the absence of corruption, one must consider the level of resources elsewhere in the system. For example, if judges and prosecutors are overworked beyond capacity and there are not adequate "speedy trial" laws, no amount of legal aid will help the detainee indefinitely awaiting a bail hearing.

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