

# Harvard Fellow Hacks CJA Lawyers

Contributed by James Ostgard

There's bullshit, there's total bullshit, there's libelous bullshit, and then there's statistical analysis about federal courtroom practice by non-lawyer economists with hidden agendas at Harvard.

The "study" of indigent defense lawyers by Radha Iyengar, described in the New York Times is startling for the both the blatant invalidity of her critical assumptions, and for her reckless "conclusion" which makes too obvious her biases.

The Times article summed up Iyengar's "findings" with a chart showing that, in the average federal case, a defendant represented by a CJA lawyer would receive a sentence that was 7.76 months longer than a defendant represented by an FPD. Those of you who practice in federal court — think about that number for a minute and it'll come back to it. Remember, that is 7.76 months, not years.

As a preamble to her analysis which purports to show that defendants represented by court-appointed lawyers received "substantially longer sentences" (in the words of the summary provided by the Times on Saturday, July 14, 2007), her Abstract concludes:

"...These systematic differences in performance disproportionately affect minority and immigrant communities and as such may constitute a civil rights violation under Title VI of the Civil Rights Act."

Get that? Now, my brother and sister CJA lawyers, you are not only a walking violation of the Sixth Amendment, but your acceptance of an appointment of a federal criminal case makes you an automatic defendant in a massive class action Section 1983 lawsuit.

Iyengar is not exactly a wizened academic, rich in experience in the world and judiciously examining life's great issues, letting the cards fall where they may. Google her name and you'll come up with letters to editors and other publications which reveal Iyengar as perhaps less scientist and more social activist with a bone to pick on a number of subjects. She is currently a post-doctoral fellow at the "Institute for Quantitative Social Science" at Harvard, one of those institutes with an oxymoron built into its name. And she's not exactly very far "post" her doctorate. She received it only in 2006, from Princeton. Guess what her dissertation was? Yes. The study which made headlines this weekend and sucker punched the CJA lawyer.

Cooler heads than mine argue that her study really only stands for the proposition that younger, less experienced lawyers with less contact with prosecutors (the kind of lawyer prevalent on many CJA panels) is less likely to receive optimum results in any given case. That conclusion, of course, does not require rocket science or a Princeton dissertation.

But Iyengar, it seems to me, isn't being so reticent. As the incautious language of her Abstract suggests, she is using her patently flawed study as a platform for attacking the whole idea of appointing private lawyers to represent indigent defendants in federal courts.

Her study depends completely on her starting assumption: that the cases she analyzed reflected the random distribution of criminal cases between federal defender offices and CJA panel lawyers. If assignment of cases is completely random, then her statistics would not be skewed by the possibility that federal defenders are getting a greater share of cases which can settle for a good 'cooperation' discount, for example. In trying to control for this, she employed numerous ineffective tactics.

For instance, she assumed that districts and time periods in which the FPD and the CJA panel each received roughly half the appointments were more likely to reflect a pattern of random assignments. Thus she eliminated districts and periods of time in which the panel received a substantially greater share of appointments. If at a certain point in the fiscal year the local federal defender office concluded it had reached its maximum case load and started referring all cases to the panel, that period of time would apparently be excluded from Iyengar's study. Likewise, districts which had no federal defender at all were excluded from the study. (In the period of her study, from 1997 to 2001, 19 federal districts either had no federal defender or a very small FPD office handling few cases). Thus in precisely every situation in which a CJA lawyer had a chance at getting all the kinds of client the federal defender could get, it didn't count.

Iyengar also assumes the order in which defendants' names appear on an indictment is entirely random. This is important because she further assumed a defendant's rank on the indictment affected his or her probability of receiving an FPD. Neither of those assumptions is at all correct. In a significant number of cases you will see the more culpable defendants toward the top of the list in the indictment. For the most part, prosecutors control the order of the names so it is not a random process at all. Furthermore, at least in the district of Minnesota, if a complaint or indictment

comes out with more than one defendant, the Federal Defender's office could take appointment on defendant Number 1 or Number N — many times it is a matter of the assistant defender's choice. Again, not random as Lyengar's statistical analysis requires for accuracy.

Worse yet, Lyengar does not account for the extremely common prosecution strategy of the staggered indictment, in which one or two low-level suspects are charged initially so they can snitch off the higher ups. When this happens, unless there's a conflict for the FPD, that office is bound to pick up the defendant at the low end of the heap, skewing the statistics and invalidating the random-assignment assumption. Of course, that low end snitch gets the lowest sentence in the conspiracy. Score: FPD: 1, CJA lawyer: Zero.

And what about those sentencing differences? Seven months? If only that chart in the New York Times provided meaningful graphics. Instead, it just shows the difference between 7 months and 16 months. The chart breaks down the differences between FPD results and CJA results using the FPD results as the baseline, and then compares several categories of defendant, i.e., defendants in drug crimes, violent crimes, gun crimes, etc. The study's findings were that clients of CJA lawyers received an average 3.7 months longer sentence in property crimes, for example, and 16.97 months longer in "weapon" offenses, the latter being the category of the widest disparity. What the chart didn't show was the difference between these results in relation to the actual sentence received. Raise your hand if you've ever represented an indigent client facing mandatory life in prison, or mandatory 20 plus 5 consecutive for the gun, and you think a 7 month difference is statistically significant. Okay, you can put your hand down now, Mr. Assistant Federal Defender.

Lyengar also attacks the credentials of CJA lawyers, their number of years in practice, their law schools, even the size of their law firms (small). She crunches her numbers and whines that we CJA lawyers cost the system an average of \$5800 extra per case compared to FPDs, and that we take an average 20 days longer to settle cases than FPDs. (Twenty days? How the hell does she figure that? "Get ready, get set ....GO!" Tuesday, the FPD settles her case. Does Lyengar mean to say that on average, I settle my case two weeks from the following Monday?). She suggests that the difference is consistent with the hourly payment arrangement. In other words, we're churning the file.

During most of the period included in Lyengar's study, CJA lawyers faced a statutory cap on fees of \$3500 even though we were making a whopping \$65 per hour. In the great majority of districts (Minnesota being one of the rare exceptions), judges would almost never approve fees in excess of that cap. So guys representing drug kingpins in a three week trial received \$3500 (if the judge didn't cut the voucher). It's a variation on the old joke: We're losing money every hour we work, but we make it up by working more hours.

Not only that, but CJA lawyers then and now need the Court's permission to get investigators, translators, blood experts, or someone to hold defendant's Exhibit 1, a hand-drawn picture of a stickman cop pretending to be able to see the defendant through a concrete wall. Meanwhile, FPDs were showing up with computer-generated graphics and an expert in drug dog genetics from Oxford University in London, where the assistant FPD chanced to meet him while attending an all-expense paid seminar (on to topic of decorating government offices in ways which please appointed clients). . . . Where was I? Oh yeah. Lyengar's stats don't take the expert-gap into consideration either.

Finally, at least for purposes of this rant, during the period of the study there were many districts around the country in which you needed no criminal defense credentials at all in order to be on the panel. I remember talking with a CJA Panel Representative from Savannah who described his district's practice of requiring every lawyer who wanted to bring civil cases in federal court to agree to take criminal appointments. Bankruptcy lawyers have to be admitted to practice in the federal courts. Bankruptcy lawyers never have jury trials. Bankruptcy lawyers were representing drug kingpins in federal court in Savannah, Georgia, and their results were contributing to your statistics, boys and girls.

Remember that Lyengar said we CJA lawyers were walking civil rights violations, the system that employs us having a disproportionate impact on minorities and immigrants? It turns out that immigrants are the one class of defendants we CJA lawyers know how to represent. We get them an average of 2.52 fewer months in prison than do FPDs. Does that make any sense?

Thank you, New York Times, for publicizing this important study of indigent defense.

Fortunately, the flaws are pretty clear to anyone who does not have the same agenda possessed by Lyengar. Jeralyn Merritt is talking about it at TalkLeft and well-known and respected Federal Defender Jon Sands, who is always helping out in training CJA lawyers nationally, is quoted as saying the study paints a picture he doesn't recognize at all.

Unfortunately, it is our clients who will be reading those headlines. Let us hope it blows over before the politicians get hold of it.

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