Solving the Lawyer Problem in Criminal Cases

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Abstract

We are learning that the vaunted American adversarial system too often fails to protect innocent defendants. Part of the problem is that indigent criminal defenders, in many parts of the country, are overburdened to the point that they cannot always provide an adequate adversarial testing of the State’s case. Part of the problem is the emotional burn out that many defenders experience. A less well known part of the problem is that the very nature of the adversarial mentality too often causes prosecutors to cut corners and thus threaten innocent defendants. “Solving the Lawyer Problem in Criminal Cases,” a 9,000 word essay, describes these problems and then offers an original and radical solution. States and the federal government could create a single pool of criminal law specialists who would both defend and prosecute criminal cases, working under the supervision of district attorneys and chief public defenders and their staffs. This redefinition of the role of lawyers in the criminal process would instantly create near parity between the prosecution and the defense. It would also create a more efficient process and thus could improve the representation of criminal defendants without a substantial increase in the funds currently allocated to prosecution and criminal defense.
Solving the Lawyer Problem in Criminal Cases

By

George C. Thomas III*

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* Distinguished Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar, Rutgers University, Newark. I presented a version of this paper in a Rutgers law school colloquium in the fall of 2004. I thank my colleagues for many helpful suggestions. I thank also Susan Bandes, Susan Brenner, Mike Dimino, Joshua Dressler, Donald Dripps, Peter Henning, John Leubsdorf, Suzanne Goldberg, Stephen Henderson, Richard Leo, Erik Luna, Daniel Medwed, Sam Pillsbury, Andy Tatzlitz and Lloyd Weinreb for helpful comments. No one but me, of course, bears responsibility for the far-fetched ideas contained herein.
Solving the Lawyer Problem in Criminal Cases

Advances in DNA testing have made plain that the American criminal justice system is failing in one of its most important goals—protecting innocent defendants from being convicted and, probably, executed. The complete story of how a system with many vaunted procedural protections can make so many mistakes will never be fully known. As Andrew Siegal has remarked, “Like an unhappy family, every wrongful conviction is unique. Breaking down the factors that lead to wrongful convictions is an exercise in generalizing and simplifying. Patterns must be identified, themes traced.”¹ I will focus in this essay on the theme of lawyer failure—both those who defend crime and those who prosecute crime.

We know from DNA exonerations that hundreds of innocent defendants have been convicted,² which is just the tip of the iceberg. A study of the files of defendants convicted in England suggests that five percent who went to trial were erroneously convicted and, hard as it is to believe, that two percent of guilty pleas were by innocent defendants.


defendants.\textsuperscript{3} A statistical model of criminal trials in this country estimated erroneous convictions at trial in 2.2\% of the cases.\textsuperscript{4}

To be sure, as some early readers pointed out, an English study and an American statistical model are far from conclusive evidence of the rate of wrongful convictions. But I am interested only in “ball park” figures. Approximately 9,000,000 convictions are entered for non-traffic offenses each year, almost all of them as a result of guilty pleas.\textsuperscript{5} If we apply the two percent estimate from the English study of guilty pleas, that would be 180,000 innocent defendants convicted each year. Even if this estimate is too high by a factor of 10, that still leaves 18,000 convictions of innocents. Whatever the number, I

\textsuperscript{3} John Baldwin & Michael McConville, JURY TRIALS, 41 tbl. 3 (1979). The English study was based on the charging files that, in England, took the place of a grand jury. A bit like the investigating magistrate’s file in France, English charging files set out the case against the defendant. Readers of the files did not know the ultimate outcome of the case and the error rate is based on their judgment, from the files, that the defendant was likely innocent.


\textsuperscript{5} Government data reveal about 14,000,000 million arrests for non-traffic offenses and a sixty-eight percent conviction rate in the seventy-five largest counties. That gives roughly 9,000,000 convictions, 1,000,000 of which are felonies. About five percent of felony convictions resulted from a trial. See Department of Justice, Federal Bureau of Investigation, CRIME IN THE UNITED STATES: 2004, tbl. 29, at http://www.fbi.gov/ucr/cius_04/persons_arrested/table_29.html; Bureau of Justice Statistics, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 2002, at tbl. 23, available at http://www.ojp.usdoj.gov/bjs/abstract/fdluc02.htm.
believe that the Due Process Clause requires all mechanisms that protect innocent defendants at a reasonable cost.⁶

Dozens of articles, and more than one commission report, have decried the problem of inept defense lawyers.⁷ Many solutions have been offered. Most depend on legislatures spending much larger sums on indigent defense and thus contain the seeds of their own failure. What has not been widely noted is that prosecutors also contribute to the failures of the American criminal justice system. I will propose a radical restructuring of prosecution and defense services that can solve most of the problems that plague the current system. It is modeled after the system used in the military and, to some extent, in England. Most lawyers will take turns prosecuting and defending. With the exception of the prosecutor and her lieutenants and the chief public defender and his lieutenants, the other lawyers will be “criminal law specialists,” who are available to prosecute one day and defend the next.


I begin with a brief description of the intractable problems that attend the prosecution and defense of criminal cases in the United States.

The Adversarial Prosecutor

Erik Luna has noted that “there are ‘ghosts’ in the machinery of criminal justice—the men and women who investigate, litigate, and adjudicate cases—and their erroneous decisions haunt the system.”\(^8\) Focusing just on prosecutors, Susan Bandes notes “a tendency to develop a fierce loyalty to a particular version of events: the guilt of a particular suspect or group of suspects.”\(^9\) The prosecutor’s “[l]oyalty to a particular version of events may develop at a very early stage, and may prove mightily resistant to reconsideration.”\(^10\) In addition, McConville and coauthors note the close working relationship between police and prosecutors that creates a “desire to achieve a result which legitimates police action in the case.”\(^11\)

This commitment to one theory of a case is often called “tunnel vision.” It helps explain one phenomenon that is otherwise inexplicable. Prosecutors sometimes continue to insist on the guilt of suspects who have been conclusively exonerated by DNA

\(^8\) Erik Luna, System Failure, 42 Amer. Crim. L. Rev. 1201, 1207 (2005).


\(^10\) Id. at 493.

testing.\textsuperscript{12} Tunnel vision is exacerbated by the adversarial nature of our justice system. Fred Zacharias notes the assumption of American law “that legal combat is the best method for arriving at truth. . . . Partisan advocacy enables judges and juries to see controversies from the litigants' perspectives; it ensures that fact finders will not overlook obscure but relevant information.”\textsuperscript{13}

But partisan advocacy tends to blur or even obscure truth, as David Luban, Bill Pizzi, Lloyd Weinreb, and others have noted.\textsuperscript{14} Readers who have practiced law will know from experience how advocacy can distort truth. Positions staked out tentatively at the beginning of a case harden as the lawyer develops her arguments. Doubts about the contrary position become muted or disappear entirely. For example, a prosecutor told me that he had, as far as he knew, convicted only one innocent defendant, a rape defendant convicted solely on a shaky victim identification. DNA testing later proved the prisoner’s innocence. I did not ask why the prosecutor proceeded to trial with weak evidence because I knew the answer: The prosecutor believed in the defendant’s guilt and it was up to the jury to make the final decision.

\textsuperscript{12} See, e.g., Daniel S. Medwed, The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence, 84 B.U. L. Rev. 84 125, 133 (2004).


\textsuperscript{14} See David Luban, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988); William T. Pizzi, TRIALS WITHOUT TRUTH (1999); Lloyd Weinreb, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES (1977).
I’m not sure that is a good answer. Though DNA testing was not available at the time, if the prosecutor had doubts, shouldn’t he dismiss the indictment? He could always re-file later if more evidence was uncovered. Of course, if the prosecutor dismissed, he would have to face the rape victim who had identified the defendant, as well as her family and the community. In the United States, the prosecutor to some extent works for the victim and must explain his decision to dismiss a case, or his failure to win a case, to the victim.

Since our system places so much responsibility in the hands of prosecutors, we should choose them with utmost care and create incentives that will encourage them to dismiss weak cases. We do precisely the opposite. In many states, and in the federal system, prosecutors are political appointees. In other states, district attorneys are elected. But even here, the hand of the executive is often seen. It is common for a prosecutor to resign or retire in the middle of her term, which permits the governor to appoint her replacement. Once in office, it is rare for a prosecutor to lose re-election. Thus, the selection of American prosecutors is shot through with politics. Political appointees are highly ambitious and skilled at politics. That brings us to the problem with the incentives we create for prosecutors.

If our goal is protecting innocent defendants, the set of prosecutorial incentives that exist are positively perverse. Prosecutors typically have ambitions that transcend their current position—to advance in the ranks of prosecutors, to become a judge, to run

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15 See, e.g., Luna, supra note 8, at 1213; Medwed, supra note 12, at 132-48.
for political office. The current system rewards conviction rates and either ignores or penalizes dismissals and acquittals. We have thus failed “to develop an incentive structure for prosecutors that rewards the pursuit of justice rather than the pursuit of competitive advantage.”

Is there another model for choosing prosecutors and rewarding prosecutors? Yes, Michael Tonry has recommended that we adopt a career civil servant model for prosecutors (judges, too). This is also the French model. France reserves its best and brightest lawyers for the ranks of prosecutors and judges. To be admitted to training as a judge or prosecutor, lawyers must take a “rigorous entrance exam”—only 150 of roughly 4,000 applicants are accepted each year—and then “must finish a special thirty-one month judicial training program.” Upon successful completion of that training program, the lawyers must complete “several internships in different courts” and then face another exam that will determine the order in which they can choose a post either as a prosecutor or a judge. Prosecutors are thus selected for their success in law school and in post-school internships, rather than politics. French prosecutors are in the top four percent of all lawyers who apply to be prosecutors or judges.

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16 Siegal, supra note 1, at 1225.


19 Id. at 809-10.
Moreover, there is no real incentive for French prosecutors to “win” a particular case. French prosecutors do not effectively work for the victim; they work for the government. Moreover, French prosecutors are not responsible for investigating cases or for deciding what charges to bring and which cases to pursue and which ones to dismiss. Magistrates do all of those things at the first level. For the cases that stay in the system, an investigating chamber of three judges reviews the magistrate’s file—the chamber can take more evidence if it wishes—and makes its own independent assessment of whether the case should be tried and, if so, the appropriate charge.

At trial, the presiding judge is in charge of every aspect of the hearing. The judge decides which witnesses to call, in what order, and is principally responsible for questioning the witnesses. The prosecutor and defense lawyer can ask questions only after the presiding judge has completed his examination and then only with the permission of the judge. In the United States, if a case is dismissed prior to trial without the consent of the prosecutor, or if an acquittal results at trial, the prosecutor views the outcome as a sharp rebuke. In France, neither a dismissal prior to trial—roughly ten percent of the cases are dismissed by the examining magistrate—nor is an acquittal

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21 Id., Articles 191-229.

22 Id., Articles 306-354.
viewed as a loss for the prosecutor. Instead, it is a natural outcome of a system that values uncovering the truth.23

Kay Levine concludes that the American prosecutor “has emerged as the empire builder of the American criminal justice system. . . . the principal actor responsible for determining case outcomes and sentences for criminal defendants.”24 In her view, “the imperial role of the prosecutor has reached new heights” recently, and prosecutors now “are more than just advocates in an adversary system; they are social engineers.”25 And they are social engineers chosen for their skill at politics and burdened with a truly perverse set of incentives.

Given the perverse incentives, the goals of serving justice and being an advocate are in tension—if not downright contradictory—as Susan Bandes, Daniel Medwed, Fred Zacharias and others have noted.26 Justice requires the prosecutor with a weak case to

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23 Stephen Henderson perceptively asked whether I merely wanted to reduce the adversarial nature of American prosecutors or, instead, preferred the French system with its greater concentration of power in judges rather than lawyers. The short answer is that, on paper at least, the French system is superior to ours in every way. For a fuller description of French criminal procedure, see THOMAS, supra note 6, at Chapter 8 and Lerner, supra note 18. But my goal in this essay is to think about ways to improve the delivery of legal services from both prosecutors and defense counsel.


25 Id.

26 See, e.g., Bandes, supra note 9; Medwed, supra note 12; Zacharias, supra note 13.
dismiss the indictment. Advocacy, and her ambition, will sometimes move her to go forward and try her best to win the weak case.

French prosecutors are much less committed to winning the case. They not only care less about advocacy but also have no experience as a legal advocate. French prosecutors never practice law as an advocate. The French believe that practice “at the bar could produce a cast of mind which would be a defect in a judge [or prosecutor]. The lawyer, whose duty is to win the case for his client, is often led not to favor the emergence of the truth.”27 In the United States, prosecutors are chosen after years or decades of practicing law and honing their skills as a dogged advocate. To the extent we are surprised at how much American prosecutors value winning, it means only that we have closed our eyes to the inherent flaws in how we choose prosecutors and how we reward prosecutors.

I offer three examples of how prosecutorial advocacy can undermine innocence. Begin with the unquestioning use of jailhouse informants who are, as a group, not exactly the most trustworthy of witnesses. A prosecutor who wants to get Mr. Big, say Jimmy Hoffa, can make concessions to some bit player that would tempt him to lie about Mr. Big. If the whiff of perjury is strong enough, and the prosecutor ignores it, she is actively undermining innocence.

Consider the Hoffa case itself. What if an ambitious, zealous young Attorney General became convinced that the Teamster’s leader was involved with organized crime? If Robert Kennedy believed in his heart that Jimmy Hoffa was damaging the fabric of the union movement, would he not use whatever tools at his disposal to get Hoffa? And if federal prosecutors heard rumors that Hoffa was trying to bribe jurors in his trial for, ironically enough, accepting bribes as head of the Teamster’s union, wouldn’t the prosecutors welcome a jailhouse informant and make a very generous offer to encourage him to join Hoffa’s entourage and become a spy? That, or something close, is how Robert Kennedy finally got Jimmy Hoffa.

The jailhouse informant was Edward Partin. He was languishing in a Louisiana jail, facing indictments “for such state and federal crimes as embezzlement, kidnapping, and manslaughter (and soon to be charged with perjury and assault)”28 when he apparently conceived a plan to save his own skin. He told his cell mate, “I know a way to get out of here. They want Hoffa more than they want me.”29 To carry out his plan, he contacted federal authorities and told them he was willing to become, and would be useful as, an informer against Hoffa who was then about to be tried in the Test Fleet case. A motive for his doing this is immediately apparent—namely, his

29 Id. at n.2.
strong desire to work his way out of jail and out of his various legal
entanglements with the State and Federal Governments. 30

The federal authorities wanted Partin inside the Hoffa circle so much that they
also found a way to shield him from state as well as federal charges. To use Chief Justice
Warren’s words, Partin was not “prosecuted on any of the serious federal charges for
which he was at that time jailed, and the state charges have apparently vanished into thin
air." 31 And why would a man charged with embezzling, kidnaping, and manslaughter
(and about to be charged with perjury) not be willing to lie to save himself? I am not
suggesting that Partin did lie, or that Hoffa was innocent, only that if the government
wants a conviction badly enough, the price for jailhouse informants can reach the point
where lies about innocent people become a very real possibility. As Chief Justice Warren
put it,

This type of informer and the uses to which he was put in this case evidence a
serious potential for undermining the integrity of the truth-finding process in the
federal courts. Given the incentives and background of Partin, no conviction
should be allowed to stand when based heavily on his testimony. And that is
exactly the quicksand upon which these convictions rest, because without Partin,

30 Id. at 317-18.
31 Id. at 318.
who was the principal government witness, there would probably have been no convictions here.\textsuperscript{32}

But Chief Justice Warren disagreed alone,\textsuperscript{33} and the Court has done nothing in the intervening forty years to assure the honesty or integrity of jailhouse informants or to warn jurors that the testimony might be false. Lying jailhouse informants were a factor in twenty-four percent of the wrongful convictions uncovered by the Scheck-Neufeld Innocence Project.\textsuperscript{34} The willingness of prosecutors sometimes to offer very good deals in exchange for testimony, and close their noses to the stink of potential perjury, creates an environment in which innocence is at risk.

Then there is the problem of “foul blows.” Working within the limitations of the adversarial system in which they find themselves embedded, prosecutors can influence the process in a variety of ways and at many points. If they do so fairly, striking (in the Supreme Court’s words) “hard blows,” the adversarial process is served, and the prosecutor is not to be blamed for the flaws in our adversarial approach. But the prosecutor can aggravate these flaws by striking what the Court calls “foul blows.” This of course is forbidden. The Court has said that it is as much the prosecutor’s “duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use

\textsuperscript{32} Id. at 320.

\textsuperscript{33} Justices Douglas and Clark did not reach the merits of the case.

\textsuperscript{34} Barry Scheck, Peter Neufeld, & Jim Dwyer, \textit{Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted}, app. 2 (2000).
every legitimate means to bring about a just one.”35 But detection of “foul blows” is often impossible and, even when detected, enforcement is almost unknown.

My second example of prosecutorial advocacy undermining innocence demonstrates “foul blows.” In the Lloyd Eldon Miller case, the Supreme Court corrected “foul blows” committed by overzealous Illinois prosecutors, but one wonders how many thousands of other cases do not get corrected. Because this is an old case, we have no way to know whether Miller was innocent but, at a minimum, much of the evidence was inconsistent with his guilt.

Two days after Thanksgiving in 1955, an eight-year-old girl was raped and brutally murdered in Canton, Illinois. Early the next morning, suspicion settled on twenty-nine-year-old Lloyd Miller because he did not return his cab to the taxi company the night of the murder and could not be found at his home. The police questioned a waitress who had ridden in Miller’s cab shortly after the murder. The interrogation over several sessions seemed “endless[]” to her. They kept asking whether Miller said he did it. “By this time, I was very confused and crying, and I said, ‘I guess he did.’ . . . And from that moment on, I told lies.”95 Police arrested Miller.

He agreed to take a lie detector test.96 Though the test results were inconclusive, the police polygraph operator told Miller that the machine said he was lying. He insisted on his innocence during an eight hour interrogation. He insisted on his innocence even

when the police told him, falsely, that a pubic hair was found on a vaginal swab of the victim that matched his. He insisted on his innocence even when police showed him the waitress’s statement in her presence. He said to her, “Tell these people I didn’t say no such thing to you.”

The waitress recanted her statement and then recanted her recantation. As she was going to be a dicey witness for the State, the only solid evidence of guilt was Miller’s confession. According to Miller, he confessed to because the interrogating officer said that it was the only way he could avoid the electric chair. Miller repudiated the confession on the witness stand. To corroborate the confession, the prosecutor introduced bloody under-shorts found not far from the murder scene. In his statement, Miller said that he had abandoned the shorts because they were bloody. The existence of the shorts and the presence of blood on the shorts would serve as corroboration of the confession and would likely send Lloyd Miller to the electric chair.

It is unclear whether there was any blood on the shorts. Sophisticated tests performed eight years later found no blood. But as the police and prosecutor knew at the time, at least some of the stain was brown paint. The way the prosecutor questioned the expert on the witness stand, and the way he answered the questions, made it seem that all of the stain was blood. Was the use of shorts stained with brown paint a hard blow or


37 Id. at 23.

38 Id. at 166-67.
a foul blow? The Supreme Court of the United States, unanimously, took the view that it was foul, concluding that the “prosecution deliberately misrepresented the truth.”

The Court’s conclusion was, however, rejected by the Grievance Committee of the Illinois Bar Association. In a defiant report, made public “[b]ecause of the serious implications of the Supreme Court’s charges,” the Committee accused the Court of “misapprehend[ing] the facts of the case.” The Committed concluded that the prosecutor violated no ethical duties when he failed to inform the defense, the court, or the jury of the existence of paint stains on the shorts. The law journal that published the report titled it: “The Vindication of a Prosecutor.”

The report would make the Pharisees proud. The Committee correctly noted that the presence of paint on the shorts was not inconsistent with the presence of blood and thus the testimony was not technically a lie. But the critical question for my purpose is whether the prosecutors served justice by hiding from the defense that the stains were mostly paint. Consider the effect on the jury when the prosecutor presented shorts that appeared to have been soaked in the blood of an innocent child. The Commission might

39 Miller v. Pate, 386 U.S. 1, 6 (1967).
41 Id.
42 The prosecutor contended that the difference in stains was “apparent,” id., but the Commission carefully avoided making any finding to that effect.
be right that no technical violation of ethics occurred, but I reject its conclusion that hiding the paint stain was consistent with serving justice.

Perversely enough, prosecutorial abuses are likely to found more often in cases of innocent defendants than guilty ones because cases against innocent defendants will, on balance, be weaker than cases against guilty defendants. I assume here, without empirical evidence, that a prosecutor who believes in his heart that Lloyd Miller raped and murdered a little girl will be more likely to resort to foul blows. The attitude of the Illinois Grievance Committee helps create the climate in which prosecutors might feel justified in over-reaching. Willard J. Lassers’s book on the Miller case concluded that the case “has a fearful message” for America. Lassers asked hard questions about the conduct of the Illinois authorities.

[Miller’s] confession was inconsistent with, and indeed contradicted, known facts. Even convinced as they were of Miller’s guilt, one would have expected the authorities to be troubled by this, but they made little or no effort to resolve the inconsistencies or contradictions. When they learned, for example, that the hair on the vaginal swab did not match Lloyd’s, they should (one thinks) have had profound doubts about the confession and bent every effort to study the matter. Yet they did not. On the contrary, at the trial, they misrepresented the evidence and suppressed evidence favorable to the accused. Why did they behave in this fashion?  

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43 Lassers, supra note 36, at 202.
My third example of prosecutorial advocacy undermining innocence is the 1991 case of Ray Krone. Because DNA evidence exonerated him, we know that the foul blow here produced a wrongful conviction that cost Krone ten years in prison. At 8:10 in the morning on December 29, 1991, a female bartender was found, dead, in the men’s room of the C.B.S. Lounge in Phoenix. She was nude. The killer left behind no physical evidence save bite marks on her breast and neck. The police found Krone because the victim had told a friend that he was going to help close the bar that night.

Police asked Krone to make a bite impression, and an expert witness prepared a videotape that purported to show a match by moving Krone’s bite impression onto the marks on the victim. According to the Arizona Supreme Court, the videotape “presented evidence in ways that would have been impossible using static exhibits.”\(^{44}\) Although defense counsel had been given the opportunity to examine the State’s dental expert, counsel was not informed of the existence of the videotape until the eve of trial.\(^{45}\)

The only other evidence against Krone was that he was “evasive with the police about his relationship” with the victim.\(^{46}\) Of course, without the bite mark identification, being “evasive” about a relationship is practically worthless as evidence. The case turned on the bite mark evidence, but the court-appointed defense expert had no experience in


\(^{45}\) Id.

\(^{46}\) Id.
video production. Accordingly, counsel moved for a continuance to obtain an expert who could evaluate the videotape. Alternatively, counsel moved to suppress the videotape or to allow testimony about an earlier case in which the same expert’s testimony was successfully challenged as not sufficiently scientific. The trial court overruled all the defense motions. The prosecution expert used the videotape in his testimony, no defense expert challenged his presentation, and the jury convicted Krone of murder and kidnaping. The trial judge sentenced Krone to death.

The Arizona Supreme Court held that the trial judge had acted improperly in refusing to allow a continuance. My concern is not with the trial judge’s conduct, though I agree that the judge acted improperly. I shake my head in amazement at the prosecutor who, based on nothing more than “evasive” responses to the police, was willing, in effect, to cheat by not informing defense counsel of the new, and unproven, method of matching bite marks until the eve of the trial.

The conduct of the prosecutors in the Krone and Miller cases can only be understood as the byproduct of an adversarial process that emphasizes winning cases rather than achieving justice. It is one kind of problem if a party in a civil suit fails to investigate or present its case fairly. We can safely leave those cases to the adversary system, confident that a universe of cases will achieve civil justice. We cannot afford to take such a laissez-faire approach to criminal cases. We need to find additional ways to encourage prosecutors to seek justice.
Some might wonder at my failure to mention that defense lawyers and defendants hide the truth. I have no doubt that defense teams commit far more “truth evasion” than prosecutors. Two reasons explain my failure to explore this phenomenon. One virtue in our adversarial system is that it puts the burden on the State to prove guilt. To the extent that criminal defendants and their lawyers evade truth by remaining silent or by telling an exculpatory version of the truth, that does not concern me. More importantly, my essay is about the role of lawyers in undermining innocence. If guilty defendants deceive the system and are acquitted when they rightfully should have been convicted, that is a problem that deserves attention. But it is outside the scope of my essay.

The Problem of Overburdened, Marginally Competent Defenders

I will make some harsh comments about the quality of the representation of defendants. But I want the scope of my criticism to be clear. I do not for a moment claim that most or even many criminal defense lawyers are incompetent or burned out. During my small-town law practice, the representation of criminal defendants by appointed counsel was, in my opinion, competent if not stellar. Shifting the focus to big-city representation, I take Andy Taslitz’s point that city public defender offices have relatively large numbers of “ideologically passionate left-wing libertarians who view prosecution as a dirty, evil business, aiding state oppression of powerless groups.”

Ironically, just as I was finishing this essay, I watched a documentary that shows two big-city defenders in a very good light indeed. Sandy Guerra recommended Murder

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47 Andrew Taslitz, email to George Thomas, 08/30/2006.
on a Sunday Morning to me and now I recommend it to my readers. Jacksonville, Florida police arrested a fifteen-year-old young black man suspected of murdering a tourist. Police coerced a confession from him by beating and threatening him. When preparing this essay, I sought some information about the documentary on the internet. Each description that I read focused on the ineptitude or corruption of the police. While that is true enough, what stood out to me was the performance of his two public defenders. They prepared the case with great care and were excellent in the courtroom. Patrick McGinness’s cross-examination of the officers who interrogated the defendant and took his confession was especially effective. The jury acquitted the defendant, who was almost surely innocent. Justice was done.

So I make no large-scale indictment of the defense bar. And most of the evidence I will offer is anecdotal. But there is a very large amount of anecdotal evidence. Moreover, with nine million criminal cases each year, if only a small percentage of the defense bar provides poor representation, hundreds of thousands of defendants are poorly served by their lawyer. Poor representation increases significantly the risk that an innocent defendant will plead guilty or be found guilty after a trial in which her lawyer will not provide the adversarial testing that the Sixth Amendment is meant to require.

The Constitution Project and the National Legal Aid & Defender Association will soon issue a major report on the provision of defense counsel to the poor in the United States. Two of the Reporters have just published an article concluding that the present
provision of counsel is “a true constitutional crisis.”48 Mary Sue Backus and Paul Marcus continue: “The pervasiveness of this failure is particularly shocking in light of the decades of repeated attempts to call attention to and repair the deep flaws in the indigent defense systems across the country.”49

Providing counsel to a “poor man charged with a crime” would make him “equal before the law,” the Court told us in *Gideon v. Wainwright*.50 Thirty years after *Gideon*, Justice Blackmun decried the “general unavailability of qualified to represent capital defendants,”51 but the problem is broader than just capital defendants. It is difficult to avoid Corinna Barrett Lain’s conclusion that *Gideon* is just a “piece of storybook Americana.”52

I agree with Norman Lefstein that the Court’s right to counsel cases “constitute an enormous unfunded mandate imposed upon the states.”53 The states have not responded well. Backus and Marcus conclude that by “every measure in every report


49 Id.


analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.\textsuperscript{54}

The New York Times reported in 2003 that five states pay nothing toward indigent defense, relying on counties to provide funds.\textsuperscript{55} In one county in Mississippi, appointed lawyers are paid next to nothing and sometimes coerce clients into pleading guilty.\textsuperscript{56} Most states pay public defenders substantially less than prosecutors and both groups make far less than private lawyers. To think that defendants get “assistance of counsel” from overwhelmed lawyers working for far less pay than private lawyers make is to indulge in fantasy. Randy Jonakait concludes that “the best and the brightest [of lawyers] often prefer to do other legal work than defending those charged with crimes.”\textsuperscript{57}

Too many defense lawyers seem disinterested, on drugs, burnt out, incompetent, crushed by the work load, or all of the above. Indigent defendants are lucky to have a warm body and even a few minutes to discuss their case with that warm body. Some public defenders handle 700 cases a year—over three dispositions per working day.\textsuperscript{58} One of my former students told me he had an average of 250 cases at any given moment

\textsuperscript{54} Id. at 1045.


\textsuperscript{56} Id.

\textsuperscript{57} Jonakait, \textit{American Jury}, 283.

\textsuperscript{58} Backus & Marcus, supra note 48, at 1054 (quoting source).
and that one of his greatest challenges was recognizing his clients at arraignment. Case loads of that magnitude insure that the most able and dedicated defense lawyer has insufficient time to investigate a client’s innocence, insufficient time to file motions to discover the State’s case, insufficient time to develop alternative theories of the case or do the barest investigation. Michael Mello describes his book about death penalty cases as “rife with exhausted sadness.” Part of his sadness is “that our criminal justice system and the law itself, so noble in theory, are so shabby and seedy in practice.”

My readers likely do not need a study to be persuaded that defendants are better off with an aggressive, reasonably well-compensated lawyer than an overworked public defender. But such a study was just published. Morris Hoffman and his co-authors found that defendants represented by public defenders received, on average, sentences that were three years longer than those represented by private counsel. Moreover, when the authors controlled for seriousness of the crime—precisely where any difference should be most pronounced—they found the difference in sentence to be five years longer rather than three. While the O. J. Simpson case was an outlier, it remains a good, if extreme, example of the kind of defense that money can buy.

The acute and chronic under-funding of indigent defense is a recipe for a dysfunctional system. But the problem is even deeper. While an adversarial system creates the wrong incentives for prosecutors, having a passionate advocate on the defense side should help innocent defendants. Unfortunately, our criminal process has largely lost

its adversarial quality on the defense side. Baldwin and McConville conclude that, though
criminal procedure has “many of the trappings associated with confrontation and
contest,” in reality, it is not “adversarial in theory nor adversarial in fact.”60 Instead, “a
major objective of all participants is to achieve a settlement without recourse to contested
trial.”61 A pivotal role played by defense lawyers is to “transmit to the client the system’s
imperatives” that include “co-operation with the police or the administrative convenience
of a guilty plea.”62

A vivid illustration of a criminal process without adversarial defense can be seen
in the following account of indigent clients meeting their lawyer for the first time in New
York City:

In disgusting pens holding as many as forty prisoners, I would interview clients. I
was the first person many prisoners saw after they had spent up to four days
waiting to appear before the court.

The holding pens were filled with huddling defendants, most of whom were
standing because there was only one bench. Virtually the entire population of the
pens was nonwhite and poor, without the resources or stable families to allow

61 McConville et al., supra note 11, at 6.
62 Mike McConville, Jacqueline Hodgson, Lee Bridges & Anita Pavlovic,
STANDING ACCUSED: THE ORGANISATION AND PRACTICES OF CRIMINAL DEFENSE
LAWYERS IN BRITAIN 281 (1994).
them bail. Most were in shock or panic, yelling questions and begging for help. "What am I charged with?" "When will I ever get out?" "Can you call my mother?" "What if I didn't do it; will they still keep me?" "Will you call my boss because if I don't show up I'll lose my job?"

I came to see that most of them were not really represented at all. Not only would they not make bail, but most would ultimately plead guilty to something, anything, just to move out of the system. I realized that with a lawyer who had a few days to spend with the client instead of a few minutes, a proper fight could be waged, both to get the defendant out on bail and ultimately, to get a favorable disposition.63

The cynical view of criminal defense is at least partially vindicated by the Supreme Court’s own cynical view of what constitutes “effective assistance of counsel.” The Court’s attempt to set standards for “effective counsel” in Strickland v. Washington64 is almost universally viewed as a failure.65 It amounts to little more than insisting that lower courts examine the record and then strongly presume competent representation. In the Court’s words, “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”66


64 466 U.S. 668 (1986).

This feeble attempt to give meaning to “assistance of counsel” is a mere expression of a vague norm that lower courts are free to ignore.

More troubling, the Sixth Amendment right to counsel is not violated even if the lawyer was in a coma during the trial unless the defendant can show that a competent lawyer would have produced a different result. This inquiry is extremely difficult, under the best of circumstances, because of its counter-factual nature. But it is almost impossible in the Strickland context because it must be answered from a record created by the lawyer charged with incompetence. As Donald Dripps has noted, it is a strange world indeed when courts look for prejudice in the record created by a lawyer who is accused of providing woefully deficient assistance.67

Given the strong presumption of competence and the difficulty of making the counter-factual showing that competence would have mattered, it is a wonder defendants win any Strickland claims. They win about three percent.68 In the ninety-seven percent of rejected claims, lower courts have applied Strickland to find the Sixth Amendment

66 466 U.S., at 690.


68 The Center for Capital Litigators in Columbia, South Carolina collected citations and summaries of all published successful ineffective assistance of counsel claims since Strickland. As of December, 2001, the list contained roughly 1,200 state and federal cases. Running Strickland in Westlaw for the same time period produced about 37,000 entries. Thus, as the lower courts have understood and applied Strickland, lawyers provided constitutionally competent assistance in roughly 97% of the cases where their performance was challenged.
satisfied when lawyers slept through substantial parts of the trial; failed to interview mitigating witnesses or the police officer who, according to the defendant, used a gun to coerce the defendant’s confession; presented none of the available mitigating evidence at the sentencing phase in a death penalty case; failed to raise the client’s best argument on appeal; and had a sexual relationship with the client’s fiancé that provided a motive not to transmit a plea offer to the client. It did not matter that these failures, and almost all others in this universe of cases, were the result of inept or corrupt lawyering.

The Constitution Project’s blue-ribbon committee recently called for Strickland to be replaced, in death cases, by a standard of “professional competence.” That the committee viewed Strickland as a lower standard than “professional competence” says volumes about the failure of Strickland. We have to do better.

While one should not confuse fiction with reality, Perry Mason provides an aspirational model of what defense counsel could accomplish in the service of the

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71 Id. See also Romero v. Lynaugh, 884 F.2d 871 (5th Cir. 1989).


innocent. His clients were, of course, always innocent, a fact that he never doubted. In addition to his steadfast belief in his client’s innocence, Perry Mason had Paul Drake, a private investigator who conducted his own fact investigation and developed alternative theories of the case. This was an effective antidote to “tunnel vision” police and prosecutors. Compare this to data collected by the American Bar Association showing that lawyers for indigent defendants in four Alabama counties failed to request investigators or experts in 99.4 percent of the cases.\(^75\)

Of course, Drake and Mason appeared to have only one case at a time and thus vast quantities of time and energy to devote to proving the client’s innocence. While the Perry Mason model is unattainable, the reality is often so far removed as to be unrecognizable as criminal defense. As Kent Roach notes, “The battle model does not work well when one of the gladiators is inexperienced, incompetent, woefully under resourced, drunk or asleep.”\(^76\) To take but one example, the State’s child rape case against Jimmy Ray Brombard was extremely thin, but his lawyer “did no investigation, hired no expert to debunk the state’s forensic expert, filed no motions to suppress the identification of a young girl who was, according to her testimony, at best only sixty-five percent certain, gave no opening statement, did not prepare a closing statement, and failed to file an appeal after Brombard’s conviction.”\(^77\) In large part because of the

\(^75\) Backus & Marcus, supra note 48, at 1099 (reporting data and citing source).


failings of defense counsel, Brombard spent fifteen and a half years in a Montana prison for a crime he did not commit. To say that Brombard’s lawyer provided the “assistance of counsel” guaranteed by the Sixth Amendment is to make a mockery of the words.

Does it matter in the world of overburdened defense lawyers in search of a plea bargain if the client says he is innocent? Probably not very much. In addition to the epistemological problem shared by all others in the criminal justice process, defense lawyers are burdened with an attitude problem. Over time, most defense lawyers become cynical. Professor Alan Dershowitz has “discerned a series of ‘rules’ that seem—in practice—to govern” the criminal system: “Rule I: Almost all criminal defendants are, in fact, guilty. Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.”78 Though we are learning that the percentage of defendants who are innocent is a non-trivial number, it is likely to be quite low. And even if it is far higher than we would like, the perception in the criminal justice system remains that Rule II is correct. In this, as in much in life, perception governs.

The state of criminal defense in the United States today is too often a foul mixture of crushing case loads, deep cynicism, and marginal competence. I re-iterate that I am not claiming that many or even most defense lawyers are incompetent. I suspect representation is better in areas where the case load is not crushing.79 If that is correct, it

78 Alan M. Dershowitz, THE BEST DEFENSE xxi (1982). There are eleven more rules but Rule I and Rule II are most relevant to my project.

79 I represented indigent defendants in a rural Tennessee county for several years in the 1970s and 1980s. It was my experience that the private bar was diligent though, in fact, the district attorney offered such good plea bargains that few cases were to trial.
suggests listening to the critics who have long argued for parity in resources and case loads. But as I hope I have made clear, I do not think that a sufficient remedy. I propose here a far more radical re-structuring of the way we prosecute and defend those charged with crime.

Creating Parity between Prosecutors and Indigent Defenders

Proposals to improve the prosecution and defense of crime have proliferated. The number of articles is probably in the hundreds. With one exception, these proposals share a defect. They are not self-executing. All but one requires an actor—a judge, in most cases, or the bar—to make a judgment about the quality and ability of defense counsel. Any time lawyers or judges sit in judgment of their own, I am doubtful that adequate quality standards will be maintained.

The real problem with the proposals offered so far, even the one that is self-executing, is that they miss the real problem of prosecuting and defending criminal cases. I begin with the problem of criminal defense. Scholars tend to assume that defense lawyers and prosecutors are mechanical creatures that, if paid the same amount and given the same caseload, would perform at an equal level. But this assumption fails to take account of the psychic toll of representing clients, most of whom are guilty, and some of whom are not.

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whom are guilty of truly horrible crimes. Every day brings new clients who have stolen, robbed, mugged, and sometimes raped and killed.

When a prosecutor goes home to her family, she can say, “Today I did what I could to convict dangerous criminals.” When a public defender has dinner with her family, the best she can manage in most cases is “I put the State to its burden of proving my client guilty beyond a reasonable doubt.” I have no doubt that the prosecutor’s assessment of her work day is, over time, more uplifting for most lawyers—not all, to be sure, but most—than the defender’s tale. To spend one’s life putting the State to the burden of proving guilt beyond a reasonable doubt must corrode the soul of many lawyers.

Susan Bandes writes, “There may be no other profession whose practitioners are required to deal with so much pain with so little support and guidance.”81 As a result, defense lawyers adopt mechanisms for avoiding the pain, “including avoidance, denial, suppression, repression,” and splitting one’s personal and professional life.82 “Feeling too much is painful; not feeling at all is worse, for the attorney and for those he loves and perhaps even for his clients.”83 For most defense lawyers at some point “the detachment

82 Id. at 366.
83 Id. at 383.
ceases to work” and the “time inevitably arrives “when the lawyer simply can no longer continue to do the work effectively.”

The day before opening statements in an armed rape case, a close relative of the defense lawyer was robbed and raped. He asked himself, “What in God’s name was I doing here representing this rapist?” He did his job and won an insanity acquittal.

“Shortly thereafter, he left the public defender’s office . . . . ‘burned out, . . . sick of representing so many bad people, . . . . sick of being afraid to walk in my own parking lot yet helping people who mug citizens in other parking lots. I have lost much of the empathy I once had for my clients. It’s time to go.’”

It is even worse now that we know that a nontrivial number of the defender’s clients are innocent. Because defense counsel will rarely know for certain which of her clients are innocent, conscientious counsel will approach many of her clients thinking they might be innocent. In those cases, the choices open to the defendant and his lawyer are dismal—plea bargain a perhaps innocent client or face trial. And the stronger the lawyer’s belief in her client’s innocence, the more she is likely to encourage him to face trial. But that very belief in innocence makes the trial a high-stakes gamble indeed.

84 Id. at 379-80.

Imagine the prosecutor who sees a defendant acquitted. She surely feels bad, because she lost and because the defendant, if guilty, is free to prey on society again. Of course, if he does prey again, the prosecutor might get another chance to remove him from the streets. Now imagine the public defender who sees an innocent client convicted. There is no second act here. The lawyer failed in what I believe is the most important task in our criminal justice system—keeping the innocent from being convicted of crime. Imagine sitting down to dinner knowing that once the appeals are exhausted (and defendants rarely win appeals), an innocent man, or woman, will surrender to prison authorities, will be stripped of her clothing and her dignity, and will face years in a dank prison where rape, degradation, and death will be her constant companions.

It is a testimonial to our system that we find so many competent, caring lawyers willing to do indigent defense. The wear and tear of the job is worse for defenders than prosecutors. I cannot imagine that, after a year or two, or ten, most public defenders can get up in the morning and face their job with the same dedication and enthusiasm that prosecutors can muster for their job. We need what Judge Bazelon sought over thirty years ago—a radical rethinking of the role of defense counsel.86

Ironically, the uplifting nature of the prosecutor’s job can also threaten innocence. Prosecutors can succumb to tunnel vision, ignore the possibility that the defendant is innocent, and use the adversarial system quite effectively to suppress evidence of innocence. The prosecutor in the Eldon Miller case failed to disclose that the undershorts

were covered mostly in paint. The prosecutor in the Ray Krone case relied on a novel and unproven scientific test that he did not even disclose to the defendant until the eve of trial. The prosecutor’s job in the early twenty-first century invites an imperial attitude, social engineering, and a win-at-all-costs attitude.

Again, I am not saying that very many prosecutors would cut corners in the arguably unethical way that the prosecutors did in the Krone and Miller cases. But the very nature of the adversarial system that encourages zealous advocacy on the part of the prosecution as well as the defense can in many cases inadvertently mask innocence.

Is it possible to solve the problem of the imperial prosecutor and the overburdened, burnt-out defense counsel? The answer, surprisingly, is that a radical rethinking of both jobs can be implemented rather easily, and in one fell swoop, if we have the political will. I know the lawyers in my audience will be tempted to dismiss my proposal here as unrealistic or, perhaps, insane. I ask your indulgence. Without worrying about the details, or how we get from here to there—issues that can be dealt with if the idea itself is a good one—imagine a criminal process with a pool of “criminal law specialists.” These specialists would work for the district attorney and her assistants in some cases and for the chief public defender and his assistants in other cases.

The specialists will be chosen, or assigned, both to prosecute and defend criminal defendants. Bingo. We have roughly equal resources because the criminal specialists are paid the same salary, and the legislature must provide enough money to make sure that
there are sufficient specialists to prosecute cases. The specialists will draw from the same expert witnesses. The State will still enjoy an advantage because the police work for free as investigators for the State. But even without access to police as investigators, defendants get an advantage over the current system. Having worked with the police when prosecuting cases, the specialists will know which ones might be inclined to cut corners or exaggerate. That knowledge would permit better cross-examination of police and, moreover, should make police more likely to play it straight.

We have instantly created jobs of equal stress, disappointment, dismay, and pride. No longer will there be public defenders who face nothing but an unending stream of mostly lying, guilty clients. No longer will prosecutors overreach because they are always representing the good people of their district. As today’s prosecutors will now spend roughly half their time defending, our “social engineers” will not be tempted to be imperial ones. When public defenders are functioning as prosecutors, they will surely be more likely to open their files for defense discovery. No longer will prosecutors view defense requests for exculpatory evidence as just an annoyance.

While my “switch-hitting” idea would not entirely solve the problem of perverse incentives for prosecutors noted earlier—a career path that rewards convictions and penalizes dismissals—it should moderate those incentives. Most lawyers would work both sides of the aisle, and promotion to top prosecutorial ranks might depend on qualities other than “batting average.” Hopefully, the time spent defending cases will move all lawyers to care less about convictions and more about getting the right outcome.
Assuming we can solve the problems that I will discuss in a moment, I do not see why this proposal would be dead-on-arrival in the legislature. It can be sold as achieving equality of resources in a way that makes the dismissal or acquittal of innocent defendants more likely. Of course, prosecutors will lobby at a radioactive level. Why would they want to join the “other side”—the side that is trying to release dangerous criminals back into our communities? I imagine many public defenders also might not like the idea of switching sides because some view prosecution as an evil business that aids oppression of powerless groups.

To the extent that prosecutors and public defenders view the other side as evil or illegitimate, that is all the more reason to force them to switch sides on a regular basis. If they are temperamentally unable to do this, I think the system would be better off without them. Is this an idea cooked up by an ivory-tower academic? No, at least two systems currently function roughly in the way I have described.

The Uniform Code of Military Justice has only one category of lawyers, called “judge advocates.” A prosecutor and a defense counsel are detailed for each trial from the same pool of judge advocates. Unlike the civilian system, the accused in military cases is permitted to request a particular judge advocate. Various rules prevent conflicts

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87 Uniform Code of Military Justice § 801.1 (13).
88 Uniform Code of Military Justice § 827.27 (a)(1).
of interest.\textsuperscript{90} A modest certification requirement exists: No judge advocate can be detailed as trial or defense counsel unless he is a member of the federal bar or the bar of the highest court in a State.\textsuperscript{91} The detailed judge advocates must also “be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.”\textsuperscript{92}

This mechanism for providing prosecutors and defense counsel is a vast improvement over the various approaches outside the military. Congress has achieved for military courts what it denies to the federal criminal courts—rough equality in the resources, case load, dedication, and competence. Moreover, the right to request a particular defender is especially valuable to innocent defendants who, after all, must feel that the whole stage is tilted against them.

I can imagine my reader saying, “but, wait, military courts martial are just different from civilian criminal cases.” The reader is correct that the run-of-the-mill court martial is based on a discrete act that is unconnected to other criminal acts. But that holds true for most criminal cases in civilian court, too. To be sure, military courts martial are not going to be prosecuting complex criminal conspiracies, terrorism cases, and drug trafficking rings—crimes that include many participants and many criminal acts. The more participants and the more criminal acts, the greater the need for continuity in the

\textsuperscript{90} See Uniform Code of Military Justice § 827.27 (a)(2).
\textsuperscript{91} Uniform Code of Military Justice § 827.27 (b)(1).
\textsuperscript{92} Uniform Code of Military Justice § 827.27 (b)(2).
lawyers who are acting as prosecutors and defense counsel. It wouldn’t be efficient, and it 
would create complicated conflicts of interest, to bring a specialist in to prosecute one 
criminal act in a vast conspiracy and then reassign her to defense the next week. I’ll 
return to this problem after we have seen how England handles the provision of counsel 
for the prosecution and the defense.

The English system for providing counsel is more haphazard than the one I 
propose but, at the core, it recognizes that trial specialists can be hired to do either 
prosecution or defense. Prior to 1986, individual English police departments decided 
which cases to prosecute and would then hire a barrister or just use a police officer to 
prosecute.93 In 1986, the Crown Prosecution Service, CPS, created a centralized authority 
to make decisions about what cases to prosecute and then to oversee the prosecutions.94 
The CPS often hires advocates from private practice to prosecute. Indeed, until recently 
CPS lawyers could not appear in Crown Court, where the most serious crimes are tried, 
and CPS hired barristers to prosecute all Crown Court cases.95 Indigent defendants are 
permitted to choose an advocate from a list, the fee to be paid by the government. Thus, it 
remains possible in England that “the barrister who prosecutes one day may defend the 
next.”96

93 Committee of Public Accounts, REVIEW OF THE CROWN PROSECUTION SERVICE, 

94 Id.

95 Report, THE REVIEW OF THE CROWN PROSECUTION SERVICE, presented to 

See also “About Criminal Law Solicitors’ Association,” available at
The English system appears to work just fine with a pool of lawyers who act as specialists for both the prosecution and the defense. To be sure, England seems to be sliding toward public defender systems, which would take barristers and solicitors out of the business of defending indigent defendants. But the reason for the slide is that the belief that it would be more cost-effective than hiring private counsel. Under my scheme, all of the specialists would be employed full time by the government. While public defenders might be more cost-effective than hiring private counsel, having criminal law specialists both prosecute and defend would be far more cost-effective than our current patchwork system where states provide lawyers in a variety of ways—(1) a public defender system; (2) a contract program with lawyers or bar associations, either on a fixed total fee (regardless of the number of cases) or a fixed-fee per case; and (3) a program where judges choose private practitioners, who are paid by the hour or a flat fee per case.

But what about prosecutions of vast conspiracies, of organized crime, and of terrorism? Those cases require continuity of prosecutors. I propose creating a group of lawyers who will work exclusively for the prosecution—call it the Criminal Enterprise Task Force. As for the line separating “criminal enterprise” cases from run-of-the mill cases, I would defer to Congress and the state legislatures and have them indicate which

http://www.clsa.co.uk/Default.asp?page=52 (noting that the association is open to “any solicitor—prosecution or defence”).

97 See Lefstein, supra note 53, at 884-890.
98 Id. at 884.
statutes would be under the jurisdiction of the special task force. A legislature could, of course, make the task force jurisdiction so large that it would essentially replace the new system. But the legislature would not adopt my idea in the first place unless it wanted specialists and would thus have no incentive to gut the system.

The typical criminal law specialist’s day would include working on the defense of clients and the prosecution of defendants. She would sample both sides. The specialist would be more likely to avoid the hubris that sometimes attends the office of the prosecutor. She would be more likely to avoid the despair and burn-out associated with public defenders. Resources would be at more or less parity. What’s not to like about this modification, radical though it is?

*Prescription for Legislative Reform?*

Reactions to my “switch-hitting” idea have ranged from a hushed “are you serious?” to a concerned “are you OK?” to that of Larry Fleischer, who told me he has been saying for years that America should adopt the English model of allowing barristers to prosecute and defend.¹ My pragmatist friends have assured me with great certainty that however good the idea may be, no American jurisdiction would ever adopt it. A trivial response to the Pragmatist is that I am merely putting an idea into the marketplace of ideas and whatever happens, happens.

¹ Conversation with Larry Fleischer, November 20, 2006, NYU Law School.
A substantive response to the Pragmatists is that DNA evidence of wrongful convictions will eventually change much about the face of criminal procedure in the United States. The drumbeat of criticism of indigent defense, by respected commissions as well as academics, has picked up pace in the last couple of years. A jurisdiction faced with a failing indigent defense system that it cannot afford to improve, and with its supreme court suggesting that something better must be done, might consider my idea.

It seems likely that a criminal law specialist system would offer adequate defense at a lower cost than refashioning and putting more money into today’s dysfunctional system. I believe that a combined system would make more efficient use of lawyer time, in part because weak cases would be more likely to be dismissed and in part because evening the burden between defense and prosecution should facilitate more efficient case disposition. Thus, with a modest increase in the amount currently spent on prosecution and defense, a jurisdiction could offer much better lawyering on both sides of the aisle. One of the benefits would be better protecting innocent defendants. Worth trying?

Naturally, I think so.