CRIMINAL DEFENSE LAWYERS AND THE SEARCH FOR TRUTH

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Defense lawyers are largely powerless. In this they are unlike the other two essential components of the criminal justice system—courts and prosecutors. They cannot sign orders, hold anyone in contempt, issue search warrants, or indict. Their only power, when they are allowed the opportunity to exercise it, is the skill of persuasion.

What of their role in the search for truth? If "truth" means simply "Did he do it?" then defense lawyers are obstructionists. But they are constitutional obstructionists. They properly interpose the beyond-a-reasonable-doubt burden of proof between the prosecution's version of "truth" and the defendant's fate. Without such an advocate for the defense, the basic constitutional protection of the presumption of innocence would be meaningless. Thus defense lawyers preserve constitutional truth.

There are several "truths" at work in the criminal justice system. The search for factual truth is an important goal, but it is not the only goal. It is subservient to a higher societal value, justice. Justice involves more than factfinding achieved by brute force. This is why important constitutional protections overlie the criminal justice system's factfinding mission. A system of justice seeking only factual truth without regard to fairness or other important values would not be a just system. Because our country aims toward a just system, we do not allow law-enforcement officers to kick down doors in an attempt to seize physical evidence illegally; we do not reward coercive police interrogations with admissible confessions; and we do not permit even the "obviously guilty" to be convicted and

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sentenced without a trial and the assistance of an attorney.

The task of defense lawyers is to defend their clients honestly and zealously under the constitutional mandate of the Sixth Amendment. This insures that the innocent are protected, that the state's search for truth is monitored, and that a balanced system results. Only in this way will society accept the end result as just.

Without doubt, defense lawyering is becoming increasingly difficult. Attacks on the independence of defense attorneys have become increasingly successful.[1] These attacks are not new.

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1. In the last twenty years, legislatures and prosecutors have taken the following measures, with court approval, which have undermined the independence of the private defense counsel:

a) punishing through bar discipline defense attorneys who publicly respond on behalf of their clients to refute officially leaked allegations of criminal conduct, *see* Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) (holding that a lawyer has more limited free speech rights than the press, and holding constitutional a state rule prohibiting lawyers from making extra-judicial statements if they know or should know the statements would have a likelihood of prejudicing a proceeding);

b) permitting forfeiture of legal fees paid for the defense of the client, *see* Caplin & Drysdale v. United States, 491 U.S. 617 (1989) (holding that the balance of power between defendants and the government is not upset by a statute permitting both forfeiture of assets to the government, and freezing of assets pursuant to a pretrial restraining order, despite the argument that denying defendants access to funds prior to trial or conviction denies them the right to the counsel of their choice);

c) permitting a subpoena of a defense lawyer before a grand jury so that the grand jury could question the lawyer about the client's fee arrangement, *see* In re Goodman, 33 F.3d 1060 (9th Cir. 1994);

d) requiring attorneys to report to the IRS the receipt from clients of legal fees amounting to $10,000 or more during a calendar year, if received in the form of cash, travelers' checks, or money orders, *see* United States v. Blackman, 72 F.3d 1418 (9th Cir. 1995) (noting that client identity or fee amount generally is not protected information);

e) permitting searches of an entire law office under the auspices of a warrant where only one attorney is a target, even though collecting many or all of an office's client files has been held to endanger the protected privacy expectations of the clients of multi-attorney law firms, *see* Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 960-961 (3d Cir. 1984); DeMassa v. Nunez, 770 F.2d 1505 (9th Cir. 1985) (holding that clients have a legitimate expectation of privacy in their trial files). Defense attorney commentators see such searches as part of a concerted government war on the defense bar that undermines client confidence that the attorney-client relationship will be free from government oversight and chills the willingness of defense attorneys to continue vigorous advocacy against the government. *See* Barry Tarlow, *RICO Report: Law Office Searches: The Devil is in the Details,* THE CHAMPION, Mar. 1996, at 31, 31-34.

Further direct attacks on counsel and their clients occur when the government conducts illegal infiltrations of the defense camp—for example, through the use of undercover informants. When such a "spy" in the defense camp is detected and exposed, no judicial sanction results in the criminal cases unless the defense can show that the information illegally obtained worked an actual prejudice to the fair trial rights of the defendant. *See* United States v. Morrison, 449 U.S. 361 (1981). In a related area, since 1989 the U.S. Justice Department has taken the position that its agents and attorneys have the right to interrogate persons suspected of illegal conduct even though they are represented by defense counsel and even though the latter admonishes the

Politicians have long focused on defense attorneys as the cause of the criminal justice system's problems, a criticism as meritworthy as blaming doctors for the incidence of cancer. Great leaders of our country who have worn the proud mantle of criminal defense attorney (e.g., John Adams, Daniel Webster, Abraham Lincoln) were similarly criticized in their day for their work defending citizens accused of crime. Indeed, back in the 16th century, Shakespeare suggested that one of the first steps toward despotism is the elimination of those who uphold the rule of law, when he had one of his would-be revolutionary characters suggest, "The first thing we do, let's kill all the

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government that the client is not to be interrogated. *See* United States v. Lopez, 4 F.3d 1455, 1459-63 (9th Cir. 1993). The government asserts this power despite ethical standards in many States prohibiting attorneys (prosecutors included) from contacting represented persons. *See e.g.*, Cal. Rules of Professional Conduct, Rule 2-100. *See also Lopez*, 4 F.3d at 1462-64 (holding that California's state ethical rules apply to federal prosecutors).

A more subtle means of undermining the independence and effectiveness of defense counsel occurs when the government is permitted to join dozens of defendants in a single "megatrial" that may last many months. Among the "staggering hardships" imposed by such legal marathons is that few defendants, if any, can afford to hire private counsel to defend them. *See* United States v. Baker, 10 F.3d 1374, 1389-93 (9th Cir. 1993) (noting that the eleven appellants were appealing a case in which 24 defendants were charged, 250 witnesses appeared, and over 30,000 pages of trial transcript were generated).

The Supreme Court has also undermined the right to choose one's own counsel over government objection, thus giving prosecutors the right to eliminate vigorous defense attorneys from a case. In *Wheat v. United States*, 486 U.S. 153 (1988), the Court upheld a trial court's decision effectively to deny a defendant his choice of attorney by refusing to approve the substitution of this attorney into the case. *See id.* at 160-62. The reason for the denial of this choice of counsel was that the defense attorney had represented other defendants in the same conspiracy—even though all of the defendants had waived their rights to any conflict and would have permitted the substitution. *See id.* at 160.

Other judicially-approved mechanisms that work to undermine the effectiveness of defense counsel include the holding that there is no federal constitutional right to counsel in a variety of contexts—with the result that the defendant either has no lawyer or, if the defendant pays for private counsel, no right to have that lawyer perform competently. For example, there is no right to counsel, even for those condemned in state capital convictions, in seeking the all-important federal habeas review. This has had devastating consequences. In *Coleman v. Thompson*, 501 U.S. 722 (1991), the petitioner, a condemned Virginia inmate, litigated in state court the Sixth Amendment issue of his trial attorney's effectiveness, and lost. *See id.* at 727. His new attorney filed an appeal, but the filing was three days late under Virginia law, which resulted in the state appellate court dismissing the appeal for reasons of procedural tardiness. *See id.* Coleman then went into federal court on habeas corpus; the Supreme Court ultimately held that Coleman had to bear the consequence of his attorney's error in filing the state appeal three days late, and therefore that the error defaulted the constitutional claim from review in state court. *See id.* at 729. Because no federal right had been violated by the attorney's error, federal review was also foreclosed. *See id. See also* Custis v. United States, 511 U.S. 485 (1994) (refusing to allow a defendant in a federal sentencing procedure to challenge a prior state conviction on grounds of ineffectiveness of counsel, even when that conviction was being used to enhance substantially the length of his sentence).

lawyers."[2] More recent history confirms this intuition. One only need look to Hitler's Germany to find a sophisticated society in which the role of the independent defense counsel was turned into that of toadying partner of the state. The architects of this change were some of the leading intellectuals of the day. For example, Heinrich Henkel, a professor of criminal law, wrote:

> By freeing ourselves from the notion of parties [to a lawsuit], we free ourselves from the liberal notion of a trial as a conflict of aims, an unleashing of a struggle to find the truth, which by its very nature as a conflict between two parties makes the finding of truth difficult. We thus become free to set against the liberal system of opposing forces a new order, in which the participants have a unanimity of aim.[3]

Similarly, Dr. Alfons Sack, a criminal lawyer, urged judges, public prosecutors, and defense attorneys to be "comrades on the legal front . . . fighting together to preserve the law."[4] He wrote:

> The coordination of their tasks must guarantee their practical cooperation and comradeship. . . . Just as the new trial no longer represents a conflict between the interests of an individual and the state, now the legal participants should regard their tasks no longer as opposed to one another, but rather as a joint effort infused with a spirit of mutual trust.[5]

Men like these helped eliminate an independent defense bar in the Third Reich. With it, they assisted in the demolition of the rule of law and paved the way for world war and genocide.

Of course, eliminating defense counsel is not a goal unique to fascist regimes. As his communist regime crumbled in Romania, ex-President Ceaucescu fell victim to the injustice he had helped create. He was arrested, and trial was held immediately. During the hour-and-a-half long trial, his assigned counsel successfully advocated the proper punishment for his client: death.

Such extreme examples of political systems gone bad teach

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2. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4 sc. 2, at 571 (David Bevington ed., Harper Collins 1990) (1594). The line is that of Dick the Butcher in response to Jack Cade's call for a revolution after which "[t]here shall be no money. All shall eat and drink on my score, and I will apparel them all in one livery, that they may agree like brothers and worship me their lord." *Id.* at 571.

3. INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 64 (Deborah Lucas Schneider trans., 1991) (quoting Heinrich Henkel, *Die Gerstalung des Künftigen Strafverfahrens*, 40 DEUTSCHE JURISTEN- ZEITUNG 531 (1935)).

4. *Id.* (quoting ALFONS SACK, DER STRAFVERTEIDIGER UND DER NEUE STAAT 106 (1935)).

5. *Id.*

that an important component in establishing a totalitarian state is eliminating the rule of law, and that this is best accomplished by undermining the role of independent defense counsel. The Framers of our Constitution knew that without someone to remind the system of its paramount dedication to the rule of law and human dignity, liberty would exist only at state sufferance. The Constitution thus preserves an important role for defense attorneys, who, like Socrates' gadfly, must constantly goad the state to do the right thing—acquit, find a lesser degree of guilt compatible with the facts, dismiss for reasons of police entrapment, or sentence justly.

The reactionary echoes of past attempts to endanger the rule of law by undermining the role of criminal defense lawyers are still heard today; indeed, they are increasing in volume. These forces, propelled by a mythology of their own making about the criminal system, are undermining the independence of defense counsel, and with it the guarantee of the Sixth Amendment and the rule of law. The false message spread by these forces demonizes defense counsel, trumpets anecdotal or unusual incidents as the "norm," and attacks the constitutional protections of the accused by characterizing these protections as dangers to the public safety. This message is a fear-based doctrine propagated by those who see constitutional rights as destructive tools of society's outcasts. It has had an impact.

For defense attorneys, the result of legislative, executive, and court decisions[6] based on this mythology is that today there exists a huge distance between the promise of the constitutional right to counsel and its delivery. There is at work a process bent on converting independent defense attorneys into the "comrades" of state prosecutors. This process is simultaneously diluting important constitutional protections to the point of insignificance.

The public believes in this false message, this media-propagated mythology about the justice system. But reality is far different. Let us examine some of the components of this mythology in more detail.

Myth 1: Defense counsel act with a license to lie their clients out of trouble. The reality is that most defense attorneys are outstanding servants of their clients and the public good. The public is

6. *See supra* note 1.

protected from miscreant counsel by rules of professional conduct that "prevent counsel from making dilatory motions, adducing inadmissible or perjured evidence, or advancing frivolous or improper arguments . . . ."[7] These rules exist, as they should, to require honest conduct, an absolute prerequisite for any justice system to work. Furthermore, these rules are enforced by the ability of police, prosecutors, courts, or bar associations to discipline those who violate them.

Further, vigorous defense counsel, in the course of their defense of the citizen accused of crime, provide an important teaching function. For example, every police department in this country has learned that if it does not rid itself of, or at least appropriately discipline and retrain, rogue officers, then vigorous defense counsel will expose the truth about those officers and the fate of a case may hang in the balance. Another important lesson has been that sloppy police lab work will be exposed in the courtroom. As a result of such exposure in the O.J. Simpson case, crime labs throughout the United States underwent self-examination to insure the integrity of their process. Good defense lawyering casts light on dark corners of the criminal justice system to help keep it honest. Such self-examination and correction makes prosecution cases more accurate, stronger, and properly deserving of credibility and respect by the public. Without a zealous and independent defense, this cannot happen.

Myth 2: Publicly appointed defense attorneys have abundant resources at their command, and are free to act independently. In fact, the vast majority of the accused in this country are represented by appointed private counsel or public defenders. Both types of attorneys are paid by the government. As creatures of politics, both types are subject to political economics. Defending unpopular accuseds does not make for political influence or easy budget sessions with local Boards of Supervisors. Due to fiscal restraints and generally declining resources, the bright and energetic people in public defender offices often are not given the basic tools with which to do their work. Lack of access to investigators, experts, criminalists, computers, and support staff is often a major impediment to proper representation.

7. McCoy v. Court of Appeals of Wis., 486 U.S. 429, 435 (1988) (noting that Wisconsin, like all States, has both ethical rules and court rules limiting the ability of attorneys to make frivolous arguments).

With underfunded and overworked public defenders handling massive caseloads, the promise of the constitutional right to counsel and its delivery become two entirely different concepts.

Secondly, defense lawyers are not independent. Local governments in larger cities are creating multiple "alternative public defender" offices so that government offices will handle *all* indigent cases. This exclusion of the appointed private defense attorney is another threat to the Sixth Amendment. A government that employs all those who serve in the indigent defense system has the power to diminish both the quality and the independence of that system. Quality can be brought down by overloading the attorneys with cases. Independence can be blunted by a bureaucratic leadership more interested in the continuity of the defender office than in its underlying mission of representing its clients. Vigorous *independent* advocacy is necessary to keep the criminal justice system honest. A government takeover of all indigent defense is a threat to that goal.

Myth 3: Defendants are bamboozling juries and thereby walking free. In the O.J. Simpson case, we saw an unusual event—a trial by jury. The reality is that our adversarial system bears more resemblance to a confessional system of justice in which lines of defendants, escorted by their defense counsel, approach the altar of court to confess their sins openly and then obediently go to jail to pay their debt to society. In most cases, defense lawyers function like confinement brokers, plea-bargaining their clients into custody in a system which bears more resemblance to a settlement bureaucracy than an adversarial trial system. In California, for example, well over 90% of criminal cases are resolved by guilty pleas.[8] In 1991-92, only 3.7% of felony cases actually reached a jury trial.[9] If our system of justice truly were one where a jury trial was a sure "get-out-of-jail-free card," all guilty-pleading defendants would be terribly misguided, especially given the strong likelihood that at sentencing they will be sent to jail or prison.

Of course, guilty pleas may serve the search for truth. However, every time a quick guilty plea takes place, a system-

8. *See* II JUDICIAL COUNCIL OF CALIFORNIA, 1993 ANNUAL REPORT: JUDICIAL STATISTICS FOR FISCAL YEAR 1991-92, at 56.

9. *See id.*

check opportunity is lost. Conduct of the system's participants—police, prosecutors, judges, and the defense—goes largely unreviewed. Our court system today, typified by near unanimous guilty pleas and an overburdened public defender system, is one in which power is largely unchecked and where abuse is most likely.[10]

Myth 4: Exclusionary rules are commonly used by defense attorneys to free the guilty. In fact, defense motions to suppress physical evidence and confessions are almost always denied.[11] Therefore, while exclusionary rules serve an important role as the only means of teaching police the necessity of obeying the laws they enforce, they seldom have outcome-determinative impact on criminal cases. Yet, merely by bringing the motion and examining the officer's conduct under oath to determine if it complies with the law, the defense lawyer provides a key and valuable check on police misconduct. Indeed, exclusionary rules for constitutional violations are well worth the cost of an infrequent ruling banning the evidence from the court.

Myth 5: If the defense loses the trial, it will use a "legal technicality" to win on appeal. In fact, with all the defendants pleading guilty, there are not that many appeals. Moreover, of those few criminal appeals that "win," the vast majority are remanded for retrial.[12] The few reversals[13] that are ordered each year are not

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10. On the role of defense counsel in keeping the system honest, see John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980).

11. *See* Thomas Y. Davies, *A Hard Look at What We know (and Still Need to Learn) About the 'Costs' of the Exclusionary Rule: The NIJ Study and Other Studies of 'Lost' Arrests*, AMERICAN BAR FOUNDATION RESEARCH JOURNAL 611, 659-61(1983) (extrapolating statistics from GENERAL ACCOUNTING OFFICE, THE IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 8-14 (1979)). This article reports that prosecutors rejected for prosecution only 0.2% of arrest cases primarily because of the exclusionary rule, *see id.* at 659-60, and that evidence was actually suppressed due to the exclusionary rule in only 1.3% of prosecuted cases. *See id.* at 660. Because convictions resulted in some cases even after evidence was suppressed, less than 1.3% of cases were dismissed due to the exclusionary rule. *See id.* The GAO study here described was performed before the U.S. Supreme Court, and many States, greatly relaxed the exclusionary rule by granting the police a "good faith" exception for violations of the Fourth Amendment. The exception provides that even if a search warrant is ruled illegal, no exclusion of evidence will take place unless there is a showing of "bad faith" by the officers executing the warrant. *See* United States v. Leon, 468 U.S. 897 (1984) (announcing the new rule); *In re* Lance W., 37 Cal.3d 873 (1985) (adopting federal rules on exclusion in California, based upon a state constitutional amendment).

12. For example, in fiscal year 1991-92 the California Courts of Appeal decided 5,724 criminal appeals, of which only 321 (5.6 %) were reversed or dismissed. *See* II JUDICIAL COUNCIL OF CALIFORNIA, 1993 ANNUAL REPORT: JUDICIAL STATISTICS FOR FISCAL YEAR 1991-92, at 28.

granted on mere technicalities—the appeals court usually must be convinced that the error at trial actually prejudiced the defendant's right to a fair trial. Finally, appeals provide another important check on the system's functioning, as the intensity of appellate review has direct impact on the integrity of the trial process.

Myth 6: Defendants are receiving light sentences and getting early parole. This myth is continually exploited by politicians seeking votes under the banner of getting tough on crime. The myth is almost sure to be perpetual—if tougher laws are passed and the crime rate still rises, then the political answer is even tougher laws. But the reality is that America today has a relatively harsh system of sentencing. Federal sentences can be, and often are, lengthy. Federal parole has been abolished. With mandatory minimum sentences, in many cases a judge has no power but to give a first-time drug defendant ten or twenty years.[14] States are adopting "three strikes and you're out" laws, which can put a criminal behind bars for life for relatively minor crimes. The rise in mandatory sentencing schemes means that the defense has little influence in sentencing, and judges are fast losing theirs. This trend vests enormous power in the prosecution while undermining the authority of courts to render justice with which legislatures may disagree.

The success the media has had in pounding this myth into the public psyche has resulted in many new laws and court decisions[15] that have created a highly efficient conviction-producing machine in which most accuseds are punished and the most serious offenses are punished severely. But the myth-makers say this is not true, or not true enough. They continue to push for increasingly harsh sanctions and seek to strip away

13. The vast majority of full reversals are for procedural or instructional errors deemed prejudicial to a fair trial. These reversals allow for retrial. As a practical matter, a defendant can succeed in gaining an appellate court order of dismissal only when a court rules on a suppression issue that eliminates the evidence, *see supra* note 11, or holds that the evidence is entirely insufficient to uphold the verdicts. *See, e.g.*, Greene v. Massey (1978) 437 U.S. 19 (holding that the state cannot retry a defendant after a reviewing court has made a determination of insufficient evidence).

14. *See* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL §§ 2D1.1-3.5 (West 1995) (pertaining to offenses involving drugs). In certain limited cases, courts can depart from the mandatory minimum sentences for non-violent first offenders who were not in a leadership role and who confess their involvement. *See id.* § 5C1.2.

15. *See supra* note 1.

more and more constitutional protections. By pandering to public fear and targeting opponents with the label of political death—"soft on crime"—they succeed in diminishing constitutional and statutory rights. Recent changes have diminished the scope of protection afforded by federal habeas corpus, public funding for capital cases, and jury *voir dire.* Each of these changes further limits the ability of independent defense attorneys to defend clients.

Concluding Thoughts

The result of the process driven by the mythology described above is more individual injustice, more unchecked exercise of state power, and more unjust convictions. The very character of our criminal justice system is being altered, and the protections we as a people consider the essence of American fairness are being discarded. With no political or moral leadership willing to oppose—much less offset—this trend, the myth-makers are succeeding in dismantling the balance the criminal justice system once had. The costs to society, both monetary and constitutional, have been enormous, but largely unrecognized. Despite ever-increasing taxes, the public seems not to recognize the enormous monetary costs involved in living in a nation run by fear and myth, a nation that views incarceration as the panacea for all its problems. Public knowledge of what is happening may be delayed until citizens face even higher taxes to pay for the exorbitant costs of prison building programs, and lose their property to unjust forfeiture laws and their loved ones to criminal charges undefended by a strong, independent defense bar.

As the role of independent defense counsel is diminished, so too is the search for truth.