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REDEFINING THE SIXTH AMENDMENT

JOHN B. MITCHELL*

INTRODUCTION

This Article centers upon one partner to a wild dance, the lower court public defender who, unlike the superior court public defender, has received almost no attention.¹ In doing so, I recognize that it takes two to tango, but will leave the prosecutor's story to another day. Moreover, in many ways, this Article is as much about the dance floor, the lower criminal courts,² as about the institutional advocates who move across it. Similar to the attorneys who work there, almost nothing has been written about the lower courts themselves.³ Perhaps their staggering load of misdemeanors seems too small-time to merit

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1. Most written-about public defenders deal with those in the felony system. See, e.g., JONATHAN D. CASPER, *CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE* (1978) [hereinafter CASPER, *CRIMINAL COURTS*]; JONATHAN D. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* (1972) [hereinafter CASPER, *AMERICAN CRIMINAL JUSTICE*]; Jerome H. Skolnick, *Social Control in the Adversary System*, 11 *CONFLICT RESOL.* 52 (1967); David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office*, 12 *SOC. PROBS.* 255 (1965).

2. The jurisdiction of lower criminal courts generally involves misdemeanors and gross misdemeanors, punishable by up to a one-year sentence in county jail.

3. See Malcolm M. Feeley, *Pleading Guilty in Lower Courts*, 13 *LAW & SOC'Y REV.* 461, 465 (1979) ("[T]hose who generalize about plea bargaining have only a small, if important, set of criminal cases in mind - usually felonies, rather than the great masses of petty offenses."); Maureen Mileski, *Courtroom Encounters: An Observation Study of a Lower Criminal Court*, 5 *LAW & SOC'Y REV.* 473, 477 (1971) ("The great bulk of criminal cases start and end at the lower court level. Our understanding of courts does not reflect court volumes since our accumulated knowledge disproportionately pertains to the higher courts.").

serious attention.⁴ Yet these lower courts handle a significant majority of the cases in our criminal justice system.⁵ That means that most citizens' encounters with the criminal courts (as defendant, witness, or juror) will be in these lower tribunals,⁶ and most criminals who graduate to the superior courts will likely have made their first few appearances here.

As for the public defender, it is common wisdom that throughout its existence it has not been well thought of by either clients or the public, and those working for it occupy a status of second-class attorney or not-really-a-real lawyer at all.⁷ Public defenders in the lower courts, being young,⁸ inexperienced, and frequently in transition to

4. See, e.g., OFFICE OF THE ADMINISTRATOR FOR THE COURTS, THE 1992 REPORT OF THE COURTS OF WASHINGTON 7-8 (1993) [hereinafter WASHINGTON COURTS] (courts of limited jurisdiction disposed of 391,135 cases in Washington state in 1991); Harry I. Subin, *The New York City Criminal Court: The Case for Abolition*, OCCASIONAL PAPERS FROM THE CENTER FOR RESEARCH IN CRIME AND JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW 1 (1992) ("What the Court's caseload may lack in relative seriousness, is made up in volume: about 213,000 cases were disposed of in the Criminal Court in 1990."); Mileski, *supra* note 3, at 477.

5. "The misdemeanor is in various ways the forgotten man of the criminal legal system, even though offenders like himself comprise the great bulk of the police and court workload." Mileski, *supra* note 3, at 488.

6. "Often, the average citizen's only contact with the judicial system is through district and municipal courts." OFFICE OF THE ADMINISTRATOR FOR THE COURTS, THE 1991 REPORT OF THE COURTS OF WASHINGTON 6-7 (1992).

7. The negative articles are legion. E.g., AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE 37 (1988) [hereinafter CRIMINAL JUSTICE IN CRISIS] ("[I]t is clear that those who represent the poor are not generally held in high esteem, either within the legal profession or outside it."); CASPER, CRIMINAL COURTS, *supra* note 1; CASPER, AMERICAN CRIMINAL JUSTICE, *supra* note 1; ROGER A. HANSON ET AL., INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL 3-4, 103 n.66 (1992) (submitted to State Justice Institute by National Center for State Courts); Abraham S. Blumberg, *The Practice of Law as Confidence Game*, 1 LAW & SOC'Y REV. 15 (1967); Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. L. & SOC. ACT. 4 (1971) [hereinafter Casper, *Did You Have a Lawyer?*]; Dean J. Champion, *Private Counsels and Public Defenders: A Look at Weak Cases, Prior Records, and Leniency in Plea Bargaining*, 17 J. CRIM. JUST. 253 (1989); Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986-87); Sudnow, *supra* note 1. This sentiment towards public defenders appears to be the same even in England. See *Judges Will Be Told to Get Tough With Bad Defence Lawyers*, THE INDEPENDENT, July 5, 1993, at 1 (Eng.).

8. See LISA J. MCINTYRE, THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE 46, 80 (1989); Champion, *supra* note 7, at 259; Dennis R. Eckart & Robert V. Stover, *Public Defenders and Routinized Criminal Defense Processes*, 51 J. URBAN L. 665, 673-74 (1974); Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 147 (1986). Although, with a tightening job market fewer attorneys appear to be leaving the felony divisions. That means fewer slots for attorneys to move from misdemeanors to felonies and thus more experienced attorneys remaining in the lower courts.

somewhere else,⁹ carry this burden to even a greater degree. I do not share this negative view of public defenders. In the lower courts, which are the focus of this Article, most defenders are good, dedicated, and brutally overworked attorneys who do their best for their clients. This Article seeks to elaborate upon the role of these public defenders in the lower courts in a way that will both provide a fair description of their work and workplace, and hopefully improve their functioning in the system. It would be nice if this would also change the public perception, but that is not guaranteed to follow.¹⁰

In fact, almost all the attorneys working in the lower courts in one defender's office I interviewed were very experienced.

We're getting a high number of applicants for entry level positions. Many applicants will have 4, 5 or 6 years of experience. We're just not in general getting green attorneys at the entry level position for assigned counsel anymore. The Public Defender used to be here for a year and go out and do something else. Now we're having a lot of those people come back. And, we're having very little turnover.

And other than [], most of the other attorneys we have in District Court right now have at least 5 years if not more of experience.

Interview with Deputy Public Defenders, Pierce County Public Defender (misdemeanors), in Tacoma, Wash. (Aug. 12-13, 1993) [hereinafter Public Defender Interview] (the author interviewed six defenders, and the interviews were granted on condition their identities be kept confidential).

9. See MCINTYRE, *supra* note 8, at 80 ("[M]any public defenders said that at the time that they joined the office, they expected to remain no more than a year or two."); DEBRA S. EMMELMAN, *DEFENDING INDIGENTS: A STUDY OF CRIMINAL DEFENSE WORK* 47 (1990); James M. Doyle, *It's the Third World Down There! The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71, 93 (1992) (noting that one can experience the stresses of defending indigent criminals and then move on to another way of life); see also Charles J. Ogle-tree, Jr., *Beyond Justification: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1245 (1993) ("The problem in indigent defense is that the conventional justifications for doing the work often do not correspond with effective or sustaining motivations.").

10. Two factors limit the ability of the public defender to alter this perception. First, we have all grown up within the culture of a market economy: you get what you pay for, and public defenders are free. In fact, in interviews with criminal defendants, they consistently correlate their lack of confidence in the public defender with the fact that they do not pay the defender. This lack of payment both symbolizes the attorney's low value and the fact that the defender is not "theirs" but the system's. See, e.g., CASPER, *CRIMINAL COURTS*, *supra* note 1, at 18; CASPER, *AMERICAN CRIMINAL JUSTICE*, *supra* note 1, at 113. Second, the defender has an interest in not changing the public perception, and in not appearing too successful. Put simply, the public does not like the idea that they are paying taxes for someone to put criminals back on the street. See generally MCINTYRE, *supra* note 8, at 72 (explaining the precariousness of the public defender's role in the system); H.L. Richardson, *Abolishing the Public Defender's Office*, 95 L.A. DAILY J., Nov. 19, 1982, at 4:

More and more people are contending that justice is not being served by the public defender's office and that it is one of the contributing factors in our nation's rising crime rate. It is becoming more evident that the public defender's office, instead of serving to bring justice, is now little more than the legal arm of the criminal element in our society

. . . .
 . . . [I]s it the responsibility of the public to . . . provide the criminals with attorneys who are masters of delay and dilatory tactics?

More money would of course do much to improve the effectiveness of the public defender system. The system is terribly underfunded,¹¹ as is the entire criminal justice system.¹² It is, however, unlikely that this will change appreciably.¹³ On the macro-allocation level,¹⁴ criminal justice is not likely to take many scarce dollars from health care, education, jobs, or defense,¹⁵ although concern about

11. It is widely acknowledged that the entire public defender system is terribly underfunded: "[T]he problem is not that the defense representation is too aggressive but that it is too often inadequate because of underfunded and overburdened public defender offices." CRIMINAL JUSTICE IN CRISIS, *supra* note 7, at 9; *see id.* at 41 ("The pressure to negotiate pleas cannot be substantially reduced without a dramatic increase in resources."); Melvin M. Belli, *Public Defenders: There Just Aren't Enough?*, NAT'L L.J., Aug. 12, 1991, at 16; Stacey Colino, *When Justice Goes Begging—The Crisis in Indigent Defense*, STUDENT LAW., Oct. 1988, at 14 ("The nation's public defense system is in the midst of a financial crisis that threatens to undermine its effectiveness."); Mark Curriden, *Indigent Defense in the South—Begging for Justice*, 77 A.B.A. J. 64, 67 (1991); *A Plea From Public Defenders*, 122 N.J. L.J. 1 (1988); *Defending the Public Defender*, 96 L.A. DAILY J., Oct. 24, 1983, at 4 (Open Forum) (from Sacramento Bar); Laura Freinont, *Defenders Cite Need for More Funds for Poor Defendants*, 93 L.A. DAILY J., Dec. 17, 1980, at 2; *Lack of Public Funding Affecting Counsel: Are Indigents Hurt?*, 93 L.A. DAILY J., Dec. 10, 1980, at 1; *State's Attorney, Public Defender Seek Budget Hikes*, 137 CHI. DAILY L. BULL., Nov. 8, 1991, at 1.

To put this in some perspective, the average cost of an entire criminal case—including both felony and misdemeanor cases together in coming to the average—in 1986 was \$223.00, BUREAU OF JUSTICE STATISTICS BULLETIN, U.S. DEPT. OF JUSTICE CRIMINAL DEFENSE FOR THE POOR, 1986 (1988). That's less than the hourly fee for most partners in large commercial law firms. In fact, the combination of serious underfunding and crushing caseloads recently led the Minnesota Supreme Court to give public defenders immunity from malpractice suits. *Dziubak v. Mott*, 53 Crim. L. Rep. (BNA) 1466 (Minn. 1993).

12. "The entire criminal justice system is starved for resources. . . . Less than 3% of all government spending in the United States went to support all civil and criminal justice activities in fiscal 1985. This compares with 20.8% for social insurance payments, 18.3% for national defense and international relations, and 10.9% for interest on debt." CRIMINAL JUSTICE IN CRISIS, *supra* note 7, at 5 (footnote omitted). *See also id.* at 39-40 (discussing the major problems of the criminal justice system); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1314 (1975) (describing the problem of providing adequate resources for criminal courts as difficult).

13. I do not condone this. In a better world, in which our constitutional promises under the Sixth Amendment were backed with sufficient resources to carry them out, there would be no need to even write this Article. But I am an optimistic realist. I hope for a better world while planning how to make the best of the one we have. And it is this present world that this Article addresses.

14. "Macro-allocation" decisions are ones that take place on a programmatic level, for example, health versus defense versus education. *See* Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street Level Bureaucracy*, 43 HASTINGS L.J. 947, 962 (1992); *see also* ROBERT H. BLANK, RATIONING MEDICINE 78, 80 (1988) (defining "rationing" of healthcare); GERALD R. WINSLOW, TRIAGE AND JUSTICE 19 (1987) (discussing triage in modern medicine).

15. As already noted, criminal justice comes out on the short end of this macro-allocation decision. *See supra* note 14. This distribution is unlikely to change over the foreseeable future.

The sheer lack of financial resources is also implicated in the poor operation of the [criminal justice] system, but it is hard to see how substantial new money will be found to address the problem.

crime may garner a few more dollars for police. Given that the public does not even allocate money to many of its deserving poor,¹⁶ the public is unlikely to rally behind the protection of those it perceives are preying upon it.¹⁷ (The more affluent, on the other hand, will hedge against any risk of accusation, false or otherwise, by retaining a private attorney if needed.) On a meso-allocation level,¹⁸ public defense in the lower courts will not compete well with courts, police, prosecutors, or felony (including death penalty) public defense in the superior courts.¹⁹

....

It is also politically improbable. Most trends are in the other direction, as shown by new mechanisms for medical cost containment. And the political consensus for providing medical care in the U.S., while weak, is a lot stronger than the public consensus for providing counsel to indigent criminal defendants. We are in a period when the national administration, because of budget pressures, is successfully reducing nutritional aid to mothers and newborn infants. If these expenses can be reduced, the prospects for increased public dollars for the criminal defense of the indigent seem remote indeed.

Richard McGahey, *Response*, 14 N.Y.U. REV. L. & SOC. CHANGE 259, 260-62 (1986); see also BLANK, *supra* note 14, at 126 (noting that "whether or not one approves, there is little possibility that national defense funds soon will be transferred to social programs"); Richard L. Abel, *What Is the Assistance of Counsel Effective For?*, 14 N.Y.U. REV. L. & SOC. CHANGE 165, 169 (1986) (noting "the unwillingness of our society to spend enough money on justice"); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1092 (1988) ("[H]ardly anyone in the society would want to devote the resources needed to bring us even close to a state in which rights could be generally enforced.").

Moreover, even if our society was willing to put out more money for justice and defense, it would never be enough. The demand for legal services is elastic and "the elasticity of legal demand prevents full funding that would eliminate scarcity." Paul R. Tremblay, *Toward a Community-Based Ethic for Legal Service Practice*, 37 UCLA L. REV. 1101, 1103 n.7 (1990). The same has been said of health care. BLANK, *supra* note 14, at 126.

16. See, e.g., McGahey, *supra* note 15; cf. Norman Lefstein, *Keynote Address*, 14 N.Y.U. REV. L. & SOC. CHANGE 5, 10 (1986) ("From the standpoint of legislatures and county governments, criminal defense services are just another social service for the poor and, by and large, much less worthwhile than other poverty programs.").

17. It is hardly news that the public is concerned about crime. See John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 294 nn.6-7 (1980). In response to a poll in 1989, 84% answered that there was more crime in the United States than the year before. U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF STATISTICS, SOURCEBOOK FOR CRIMINAL JUSTICE STATISTICS—1990 172 (Timothy Flanagan & Kathleen Maguire eds., 1991). See also DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF STATISTICS, BJS DATA REPORT, 1989 17, 55 (1989) [hereinafter BJS DATA REPORT] (analyzing the increasing crime trends); *Law Poll: Crime Problem? It's Extremely Serious, Lawyers Say*, 68 A.B.A. J. 146, 147 (1982) ("[L]awyers perceive crime to be an extremely serious problem in the United States.").

18. "Meso-allocation" refers to the allocation of resources to competing "programs, applicants, and uses" within a particular budget (for example, the Legal Services Corporation budget). Tremblay, *supra* note 14, at 962 n.63.

19. The public defender does not fare well compared to other players in the justice system at a meso-allocation level. "In pursuing cases, prosecutors generally have three times the budget

This leaves the micro-allocation level; the choice of resources among clients.²⁰ Herein lies the practical reality upon which this Article's notion of redefining the Sixth Amendment is grounded. In that

of public defenders, as well as the use of police, forensic laboratories, and state-employed psychiatrists. Public defenders must pay for these services out of their limited budgets." Colino, *supra* note 11, at 14.

Specifically, "[i]ndigent defense services receive the smallest allocation of criminal justice funds Public defense receives 1.5 percent of state and local government criminal justice funds, whereas prosecution services [not including police] receive 5.9 percent." *Defenders Underpaid*, ABA Report Says, 67 A.B.A. J. 1107, 1107 (1981). Thus, in Orange County, California, when the costs of police, sheriffs, coroners, and jails were factored in, the government spent "\$16 for prosecution-related functions for each \$1 spent on indigent defense." William Vogeler, *Defense Cost Study Data May Be Flawed*, 104 L.A. DAILY J., June 6, 1991, at B11; cf. Blumberg, *supra* note 7, at 18 n.6 ("Even under optimal circumstances a criminal case is a very much one-sided affair, the parties to the 'contest' being decidedly unequal in strength and resources.").

This skewed distribution between defense on the one hand and the prosecution and police on the other is hardly surprising. To begin with, "[p]ublic defenders are social anomalies. They are paid by the state to befriend those whom the state believes are its enemies." McINTYRE, *supra* note 8, at 1.

Like welfare or public housing, the criminal process deals almost exclusively with poor people. But whereas other social services are seen by the public as directed toward the "deserving" poor, at least in part, the criminal process handles a deeply stigmatized population. Therefore, although the public may endorse expenditures that expand the repressive apparatus, for instance, by increasing the police force or prison capacity, they are extremely reluctant to spend money on humanizing the criminal process.

Abel, *supra* note 15, at 169; see also Robert MacCrale et al., *Legal Education and Professional Development—An Educational Continuum*, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992 A.B.A. SECT. OF LEG. EDUC. AND ADMISSIONS TO BAR 56 ("In various jurisdictions, any semblance of balance has been destroyed between resources made available for police and prosecution and for defense."); John F. Rooney, *Remove Public Defender From Court Control*, 136 CHI. DAILY L. BULL., Nov. 19, 1990, at 1 ("Providing more funds for prosecutors is more politically popular than providing more money for an office that represents criminal defendants.").

Public defenders have at times adopted strategies, other than resignation, to meet the problems of inadequate resources: Law suits (see NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, INDIGENT DEFENSE CASELOADS AND COMMON SENSE: AN UPDATE 46-57 (1992) [hereinafter INDIGENT DEFENSE]); strikes (see Alschuler, *supra* note 12, at 1249 n.203, 1251); refusal to take further cases under statutory, ethical, or constitutional authority (see INDIGENT DEFENSE, *supra*, at 8-9, 17; *Proposed Minimum Standards for Court-Appointed Criminal Trial Counsel*, 65 MICH. BAR J. 868, 868 (1986) ("*Declining Appointment*. Counsel shall decline an appointment to represent an indigent client if the nature or extent of counsel's existing caseload is likely to prevent effective representation of that client.)); motions to withdraw (see *Order on Motion to Withdraw Filed by Tenth Circuit Public Defender*, Fla. Dist. Ct. App. (2d Dist. Apr. 22, 1993) (en banc), 53 Crim. L. Rep. (BNA) 1157 (May 19, 1993); Alschuler, *supra* note 12, at 1255); motion declaring that counsel can't competently handle existing caseloads (see *Ligda v. Superior Court*, 85 Cal. Rptr. 744 (1st Dist. 1970)); and unions (see Colino, *supra* note 11, at 19; *Public Defenders Criticize Report*, 134 CHI. DAILY L. BULL., July 21, 1988, at 1).

20. "Micro-allocation" problems center upon the division of resources among clients, or patients, to the same program. See WINSLOW, *supra* note 14, at 19; Maxwell J. Mehlinan, *Rationing Expensive Lifesaving Medical Treatments*, 1985 WISC. L. REV. 239, 244; Treinblay, *supra* note 14, at 962-63.

reality, the guarantee given to the Sixth Amendment's indigent criminal defendants in the lower courts²¹ finds meaning not in this constitutional provision nor even in professional standards and norms.²² Rather, the meaning of the Sixth Amendment becomes a direct function of how the institutional defense advocates choose to allocate their scarce resources among an overwhelming number of clients²³—some whom they will fight for, some whom they won't.²⁴ This is no slight decision, because a significant percentage of cases can be successfully defended with adequate effort. Those defendants who get the effort are thus likely to fare better than those who do not.²⁵

21. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (right to counsel in misdemeanor cases); *Scott v. Illinois*, 440 U.S. 367 (1979) (right to counsel comes into play when defendant will do actual jail time); see also *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel is made obligatory on the states by the Fourteenth Amendment).

22. While ethical standards and rules circumscribe the role of the public prosecutor—see, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103, EC 7-13 (1981); ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION Part III (1980) [hereinafter PROSECUTION FUNCTION]—very little is similarly directed at guiding the public defender through the reality of day to day practice.

There are, however, a few guideposts. For example, there exists a single paragraph in the explanatory text of the ABA Standards that specifically concerns public defenders entitled “trading the interests of one client for that of another.” PROSECUTION FUNCTION, *supra*, § 6.2 cmt. c. Also both STANDARDS RELATING TO PROVIDING DEFENSE SERVICES (1967) and NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION, GUIDELINES FOR LEGAL DEFENSE SYSTEMS (1976) [hereinafter NLADA], do provide standards for public defense. See *McConville & Mirsky*, *supra* note 7, at 658 n.453. On the other hand, these standards are predominantly concerned with institutional structure (for example, facilities, eligibility, discouragement of horizontal representation, caseload standards), rather than responsibility of the individual defender. The NLADA guidelines, however, do permit an overworked defender “to decline any additional cases” when additional cases might result in inadequate representation. NLADA, *supra*, Guideline 5.3, at 517. Other than these few guideposts, the body of ethical standards and rules available to guide the conduct of the defender responsible for 400-600 cases does not differ from those guiding private defense attorneys with a handful of files.

23. Overall, we have paid little attention as a profession to the reality of the practice faced by public defense attorneys with their overwhelming caseloads. See, e.g., *Schulhofer*, *supra* note 8, at 137-38.

24. “[T]he notion of providing an adequate defense . . . becomes defined in terms of what is possible given limited time and resources” Eckart & Stover, *supra* note 8, at 670; cf. Simon, *supra* note 15, at 1093 (“[T]he prevailing approaches to legal ethics should be faulted, not for failing to guarantee full access to the legal system, but for failing to contribute to an appropriate distribution of this necessarily scarce resource.”).

25. A good defense can make a difference in a particular case. See MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 40 (1978) (“the comments of one of Arborville's elite private practitioners suggest the ease with which a minor fine for a possession of marijuana charge can be obtained in the circuit court, and the more vigorous advocacy he relies on to secure a nolle or dismissal”); Alschuler, *supra* note 12, at 1187 (“‘A lawyer always gets more by fighting . . . but most attorneys don't know how. . . . A lawyer who scares the D.A.'s office gets better fees and better pleas. My philosophy is always

Currently, these resource allocation decisions are made randomly and haphazardly, if at all. In place of the current practice, this Article offers a coherent, ethical approach for choosing where to allocate resources among clients that is workable and will, I believe, improve the overall quality of representation in the lower courts. My perceptions are based upon twelve years of experience as an attorney in the criminal courts and another ten as a law professor and clinical supervisor, as well as many conversations with,²⁶ and observations of, countless public defenders over the past twenty-two years.

Thus, the primary concern of this Article will be to develop an ethical approach for making scarce allocation choices within a Sixth Amendment regime, and thereby to provide a practical definition of the Sixth Amendment in the lower courts.²⁷ Yet this is only one piece of a larger enterprise. The lower criminal court system does not work.

give the prosecutors the long-form treatment and the full-court press.' " (quoting Boston attorney Paul T. Smith)); Floyd Feeney & Patrick G. Jackson, *Public Defenders, Assigned Counsel, Retained Counsel: Does the Type of Criminal Defense Counsel Matter?*, 22 RUTGERS L.J. 361, 409 (1991) ("The best lawyers do make a difference."); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 90 (1986):

[The attorney] would use every legal means at her disposal to help her clients. Such a defense counsel imposes great costs on the prosecution. She may change the quality and character of the prosecution's evidence and thus weaken its case. She may cause the prosecution to make a misstep. The time, effort, and money expenses which she imposes on the prosecution may force it to reassess the case and perhaps become willing to downgrade charges or to bargain.

This is as much a function of effort as talent, because most cases, if you dig deeply enough, yield some seed of a potentially successful defense. CASPER, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 35 ("Examining the stories of men interviewed, we find that a majority of them had some potential legal defense that might have been raised—although it might well not have succeeded."); Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 40 ("In a significant number of cases, defendants may plead guilty even when there is a significant possibility of being acquitted at trial."). Or at least the belief that there is always a way to win a case is part of the belief structure of the competent criminal defense attorney. See MCINTYRE, *supra* note 8, at 160:

Lawyers hate to lose because, although reason tells them a case is a loser, sentiment says that justice favors not the stronger case but the better lawyer. What makes losing any case, even a loser, so bad is their belief that, in the hands of a good attorney, there is really no such thing as a dead-bang loser case.

26. As part of my research I interviewed a number of defenders in the Seattle area who practiced in the lower courts. See *supra* note 8 (interviews on file with author).

27. My desire is to develop an ethics of reality, what has been termed in the bioethical field as "applied ethics." See Daniel Callahan, *Shattuck Lecture—Contemporary Biomedical Ethics*, 302 NEW ENG. J. MED. 1228, 1233 (1980).

It is simply not enough for those in ethics to roll up to the bedside the ghost of Immanuel Kant, John Stuart Mill, or G.E. Moore and provide instant moral diagnoses. It is hardly better to do the same with the writings of John Rawls. If the ultimate strength of ethics lies in its capacity to develop coherent modes of ethical analysis and comprehensive moral systems, it needs at the moment far greater skill in penetrating the often confused dynamic of the clinical setting. Only after a detailed analysis of the actual

This holds true regardless of an individual's perspective or jurisprudential ideology, unless it is anarchy. The lower criminal court system does not work as a due process model,²⁸ a crime control model,²⁹ or an administrative model.³⁰ Dangerous people slip through the cracks.³¹ Innocent and de minimis offenders get crushed.³² And the

experience of the clinician (or a patient trying to work out a moral choice) can it be in any position either to invoke traditional theories or develop new ones.

Id. In attempting to ground an ethical system in the day-to-day conduct of a work group, like defenders, there is a tension that at all times must be kept on the surface. On the one hand, one seeks an ethics that is workable. On the other hand, the enterprise bears the risk that day-to-day practice will become the standard, bereft of any aspirational elements, or worse, that the daily norm will eventually define aspirations and, therefore, the acceptable standards for actual practice will be systematically lowered.

28. In his book, Herbert Packer posits two models that compete as antagonistic value descriptions within the criminal justice system: the "due process" and "crime control" models. HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). The due process model "emphasizes 'due process,' strict adherence to legal rules, and a full-fledged adversary relationship." Malcolm M. Feeley, *Two Models of the Criminal Justice System: An Organizational Perspective*, 7 *LAW & SOC. REV.* 407, 414-15 (1973). A similar description is found in Subin, *supra* note 4, at 3. The due process model also includes a set of attitudes towards the criminal justice system (for example, desirability that process has visibility; maximum opportunity for scrutiny and social challenge). See Roger W. Benjamin & Theodore B. Pedeliski, *The Minnesota Public Defender System and the Criminal Law Process: A Comparative Study of Behavior at the Judicial District Level*, 4 *LAW & SOC. REV.* 279, 285 (1969).

29. The crime control model "emphasizes effective 'crime control' for the community, and tends to minimize the concern for formality and individual rights." Feeley, *supra* note 28, at 415; see also Subin, *supra* note 4, at 3 (explaining the crime control model). This model also possesses its own set of attitudes towards the criminal justice system (for example, favoring the disposition of as large a proportion of cases as possible without trial, at the earliest stage; a reduction in redundancy and technicality in procedure). See Benjamin & Pedeliski, *supra* note 28, at 285.

30. The administrative model is based on the "paradigm of rational management," that is, how well those responsible are meeting their budgets. James F. Gilsman & James R. Valentine, *Bending Granite: Attempts to Change the Management Perspective of American Criminologists and Police Reformers*, 15 *J. POL. SCI. & ADMIN.* 196, 202-03 (1987).

31. Although, admittedly, it is not always easy to predict dangerousness. As one defender put it,

I've seen people that I would recognize as being dangerous slipping through the cracks. I've seen people who I haven't yet perceived as dangerous slipping through the cracks also, and read about them later in the paper. It's difficult to correctly characterize somebody as being dangerous or not being dangerous, and I don't know that I would trust my judgment to make that decision. It's not easy to predict.

Public Defender Interview, *supra* note 8; see also John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 *STAN. L. REV.* 293, 332 n.152, 333 nn.153-54 (1980) (discussing the inability of scientific studies to predict future dangerousness).

32. The defenders I interviewed believed that the system ground up the poor, particularly in trapping them in an endless series of violation hearings resulting principally from their failure to meet conditions of probation or a deferred sentence.

[The lower court system] punishes the poor. It's the fines that cause the repeated review hearings, the repeated court appearances, puts in jeopardy all these folks' jobs, even though they may only be earning minimum wage, this job is important to their survival. They're having to bounce in and out of court like a yo-yo, and they don't have money.

....

system costs a fortune.³³ Eloquent and plausible arguments have been put forth for the total elimination of these lower courts.³⁴ Yet this is not likely to happen in the near future. We are not ready to decriminalize, or increase to felonies, all the misdemeanors on the books.³⁵ The two institutional advocates, the prosecutor and the

Money will solve every problem that District Court places upon these people at least 95% of the time. If they had money, they wouldn't have the problem, they could afford the counseling, they'd go get the counseling, they could afford the evaluation, they'd go get an evaluation, they could afford to pay their fines, they'd pay all their fines, clean up their record, and they wouldn't have the problems.

And that's the difference between private and public process. Our clients are treated differently, just because the courts know we don't walk them over to probation. We don't make sure that they do their alcohol evaluation and they go to the victim's panel. So our client on a DWI, typically would be referred to probation for them to monitor it, and that's where they get into trouble a lot of times, because they go to probation, they fill out the forms, probation sends them a letter with an appointment, who knows how much later, and in the meantime, they're, like, "out there," and the judges are reluctant to accept our word that, yes, he has an appointment for the alcohol evaluation for Monday, and it will be filed with the court, and he will do the victim panel. So a lot of times we will set pre-trial conferences over long enough for them to have done what they need to do, just so that we can avoid probation. Because a lot of times, that is where they get into trouble, is being monitored by probation.

And once the probation services send a letter to the judge saying that they are in violation of some term of their sentence, the probation service will then not see them, because they will say, well it's now in the hands of the judge. So if your original offense was not seeing your probation officer, you get a copy of the nasty letter to the judge saying you won't see the probation officer and you take that letter to probation, they will say, "Don't come and see us, because we've already written to the judge that you won't come and see us."

In private practice, I would tell my client, obviously before going to court, what was going to happen, and go over it with them. I would go to court and before the case was called, I would tell them again, then the judge [would] have a shot at it and tell him what he needed to do, and then I'd tell him what the judge told him to do, and then I'd send a follow-up letter, so by then the person would have it drummed into him 5 times, and by the way, if I don't get the documents within a certain period of time, I send yet another letter saying, "What the heck, ya know, what's happening here," and then probation would say, "Hey! you know, your client isn't showing up . . . Your client missed such and such meeting," I'll send a letter then you know, "What the hell you doing? Get down there and make your meeting. Get in contact with your agency." We can't baby-sit like that. A private attorney is paid to baby-sit and they charge for baby-sitting. We don't have the ability to baby-sit in that fashion, we don't have the staffing, our caseload is way too high.

Public Defender Interview, *supra* note 8; see also B.J. Palermo, *Under the Influence: Treatment Programs for Drunk Drivers May Benefit Providers More Than Offenders*, 12 CALIF. LAW. 17 (1992) (exploring subsidiary "treatment" industry which feeds off criminal defendants).

33. For example, Professor Subin has found that the lower courts in New York spent \$37,000,000 processing cases in 1980, but "collected only \$2,000,000 for its efforts." Subin, *supra* note 4, at 17.

34. "[W]e should abolish the Criminal Court, and transfer all of its functions and personnel to the Supreme Court." Subin, *supra* note 4, at 15.

35. There have certainly been suggestions (and experiments) that these minor crimes be dealt with in a diversion system. See, e.g., Edward J. Borkowski, *Prosecutorial Discretion and the Current Status and Applicability of Accelerated Rehabilitative Disposition Under the Pennsylvania Criminal Justice System*, 24 DUQ. L. REV. 253 (1985); Steven W. Feldman, *The Tennessee Pretrial Diversion Act: A Practitioner's Guide*, 13 MEM. ST. U. L. REV. 285 (1983); Diane Reynolds, *The*

defender, must instead use their limited resources in the most meaningful way possible; they must each choose to fight³⁶ when it makes the most sense. Developing a system for the defender to make such choices takes us halfway to this goal. This Article begins with the defender because of the Sixth Amendment overlay, and because one must begin somewhere.³⁷

Part I of this Article reviews the various theories of the defender's role, from our cultural images and ABA standards to the views of social science and organizational theorists. Though all describe some aspects of the defender, each is incomplete and misleading. Instead, this Article suggests the defender's work is better described by the medical/disaster theory of allocation in chaos—triage.³⁸

Use of Pretrial Diversion in Spouse Abuse Cases: A New Solution to an Old Problem, 3 J. DISP. RESOL. 415 (1988). Even if that were done, however, I do not believe it would eliminate the criminal system for minor crimes. A diversion system will be just that, a system. And it will be a system that must have some enforcement mechanism for those who fail to carry out the terms of the diversion. That enforcement mechanism can either be incorporated into the new system (in which case it will be like a criminal system) or be one that transfers cases back to the criminal system. Also, a diversion system is not likely to give offenders unlimited bites from the apple. Thus recidivists are likely to be dealt with in some type of criminal system. All this does not mean that a well-conceived diversion program would not benefit defendants, victims, the community, and the lower court system. It's just not likely to eliminate that system.

36. While the author uses the metaphors of war ("fight," "battlefield") throughout this Article, the concept of concentrated effort, "*focus*," embodies the full range of creative solutions, including those embodied in Alternative Dispute Resolution ("ADR"). Thus, some of our law student teams in the clinic have channeled client and complaining witness into mediation, and developed creative sentencing packages.

37. Unquestionably, the prosecutor had much to commend as a starting point for my analysis. It is the prosecutor who makes the decision to charge and who is the central figure in the lower court criminal system. CASPER, *AMERICAN CRIMINAL JUSTICE*, *supra* note 1, at 126; Jack Kress, *Progress and Prosecution*, 423 ANNALS 99 (1976). In charging, the prosecution's exercise of discretion is all but unreviewable. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). In court, the prosecutor has significant "administrative concerns" such as keeping "the calendar moving," Skolnick, *supra* note 1, at 55, and "one can argue that the adversary component of the prosecutor's job is shifted from establishing guilt or innocence to determining the seriousness of the defendant's guilt and whether he should receive time." HEUMANN, *supra* note 25, at 103. As such, bad screening and charging decisions can clog the system, stretching both adversaries' resources.

38. A medical dictionary defines triage as:

The medical screening of patients to determine their priority for treatment; the separation of a large number of casualties, in military or civilian disaster medical care, into three groups: those who cannot be expected to survive even with treatment, those who will recover without treatment, and the priority group of those who need treatment in order to survive.

STEDMAN'S MEDICAL DICTIONARY 1322 (22nd ed., 1972); accord *Scarce Resources in Health Care*, 57 HEALTH & SOC'Y 265, 273 (1979). In fact, when discussing resource allocation and the political process in health care, in 1984, Governor Richard Lamm of Colorado referred to being

Part II of this Article discusses the lower criminal courts from this chaos perspective, articulating the ways in which the criminal courts are similar to, and different from, a field hospital at the edge of a battlefield. Part II then sets up the two basic triage categories that will be used throughout the remainder of the Article: those cases for whom the defender will fight (expressed in terms of the allocation of the scarce resource that I term "focus") and all those other cases which, though not receiving focus, will be given representation satisfying the Sixth Amendment (what I term "pattern representation").

Part III of this Article utilizes various theories of moral philosophy underlying triage and rationing, which have principally evolved in medical contexts, to develop a specific, workable approach to triage in the lower courts.

Part IV of this Article explores the concepts of focus and pattern representation in detail. In the course of this analysis it explains why even pattern representation comports with the Sixth Amendment, and attempts to provide both a deeper and more concrete understanding of what these choices really mean for the nature and quality of defense representation.

I. UNDERSTANDING THE ROLE OF THE PUBLIC DEFENDER IN THE LOWER COURTS

The image of the criminal defense attorney is deeply embedded in our cultural psyche. Perry Mason, Atticus Finch in *To Kill a Mockingbird*,³⁹ television's Ben Matlock, Rumpole of the Bailey,⁴⁰ and Alejandro "Sandy" Stern in *Presumed Innocent*⁴¹ are of one piece. A sole attorney, generally with seemingly endless resources, defends a single client for an entire movie, novel, or program with unrelenting vigor and intensity. The American Bar Association standards basically presuppose this lone, private attorney.⁴² The United States Supreme

governor in a time of cutbacks as conducting "public policy triage." *The Coming Era of Hard Choices*, 59 HOSPITALS 96 (April 16, 1985).

Note that in the world of the public defender, this triage function does not involve any real "gatekeeper" role, that is, the decision whether to initially take the client's case; the 6th Amendment requires initial representation to all who meet the indigency requirements.

39. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

40. Rumpole, so perfectly played by Leo McKern in the PBS series, first appeared in JOHN MORTIMER'S *RUMPOLE OF THE BAILEY* (1978).

41. SCOTT TUROW, *PRESUMED INNOCENT* (1987).

42. See *supra* note 22.

Court, in its recent treatment of competence under the Sixth Amendment,⁴³ makes no reference to even the existence of institutional advocates, let alone the possible unique problems they face.

While public defenders in the lower criminal courts do at times appear to function like the mythical defense advocate, this single role image does not accurately describe their world. This observation is obvious to all writers in the social sciences and organizational theory who have studied public defenders.⁴⁴ For that matter it would be obvious to anyone who has watched public defenders for an hour or so in court. In truth, however, as this Article will demonstrate, the descriptions and metaphors used by these theorists to describe institutional defense advocates—double agent, player in a marketplace, bureaucrat—do not more adequately capture the essence of their work than those offered by Hollywood.

A. THE ATTORNEY AS “DOUBLE AGENT”

In this popular sociological vision defenders are “con men”⁴⁵ and “double agents”⁴⁶ or, more kindly, “insiders”⁴⁷ who are “co-opted by the system”⁴⁸ to act in the interest of administrative efficiency. As such, their role is to communicate deals and to persuade their clients to plead guilty, thus avoiding a trial and its attendant use of resources,⁴⁹ and, by their participation in the process, to give

43. See *Strickland v. Washington*, 466 U.S. 668 (1984).

44. See, e.g., CASPER, *CRIMINAL COURTS*, *supra* note 1; Blumberg, *supra* note 7; George F. Cole, *The Decision to Prosecute*, 4 *LAW & SOC'Y REV.* 331 (1970); Skolnick, *supra* note 1; Sudnow, *supra* note 1.

45. Blumberg ascribes participation in the “client confidence game” to both private and public criminal attorneys. See Blumberg, *supra* note 7, at 25.

46. See CASPER, *AMERICAN CRIMINAL JUSTICE*, *supra* note 1, at 69; Blumberg, *supra* note 7, at 28.

47. See Sudnow, *supra* note 1, at 264.

48. See McINTYRE, *supra* note 8; Blumberg, *supra* note 7, at 20; Feeney & Jackson, *supra* note 25, at 402.

49. “[I]t is a major job of the Public Defender, who mediates between the district attorney and the defendant, to convince his ‘client’ that the chances of acquittal are too slight to warrant this risk.” Sudnow, *supra* note 1, at 258; cf. Casper, *Did You Have a Lawyer?*, *supra* note 7, at 6-7 (“The brief conversations usually did not involve much discussion of the details surrounding the alleged crime, mitigating circumstances or the defendant’s motives or background. Instead, they focused on the deal, the offer the prosecution was likely to make or had made in return for a cop-out.”).

legitimacy to this administrative assembly line masquerading as a justice system.⁵⁰

Unquestionably, aspects of this vision are correct. Defenders are part of the day-to-day workings of an institutional system. They have their most significant on-going relationships with prosecutors and judges, and only transitory ones with their clients.⁵¹ While some clients may be recidivists, the defender does not depend on repeat business to make a living. Further, it is true that most of the defender's clients will plead guilty,⁵² often at an early phase of the process. Nonetheless, this view is flawed in a number of respects.

First, as indicated, at times defenders fight very hard for their clients.⁵³ Many are excellent attorneys,⁵⁴ even in the lower courts where they are generally less experienced. They file motions, take cases to

50. "In the most immediate sense, the function of the public defender is merely to represent indigent defendants; but more important, I suggest, these lawyers have helped to preserve the legitimacy of the courts." McINTYRE, *supra* note 8, at 29.

51. "His [the defender's] relationship to any one client is transient; his relationship to prosecutors, judges, and other court personnel is 'permanent.'" CASPER, *AMERICAN CRIMINAL JUSTICE*, *supra* note 1, at 103; *see also* Blumberg, *supra* note 7, at 20 ("[L]awyers . . . have close and continuing relations with the prosecuting office and the court itself . . ."); Tremblay, *supra* note 15, at 1107 ("The clients themselves are not a critical focus group since they are fungible, not scarce, and have no exit capability."). Questions concerning the locus of the defender's loyalty have naturally been raised as a result of this observation. *See, e.g.*, Blumberg, *supra* note 7. More interesting is the possibility that these relationships may bring historical "baggage" to a defendant's case that would be absent without representation by the particular institutional advocate. "When a defendant obtains a lawyer to fight his case, he not only obtains a legal buffer between himself and the judge, he also—even if unwittingly—wedges his fate into a series of organizational battles irrelevant to the legal status of his case." Mileski, *supra* note 3, at 488.

52. Plea bargaining is nothing new. Professor Heumann's research disclosed that since 1880, only 10% of all criminal cases in the jurisdiction he studied went to trial. HEUMANN, *supra* note 25, at 28; *see also* CRIMINAL JUSTICE IN CRISIS, *supra* note 7, at 38 (roughly 80% or more); PROSECUTION FUNCTION, *supra* note 22, § 5.3 (on the order of 90%); Blumberg, *supra* note 7, at 18 (over 90% plead guilty). This is all the more so in the lower criminal court since "[t]he lower court is largely a sentencing court, rarely a trial court—more a sanctioning than a truth-seeking system." Mileski, *supra* note 3, at 491.

53. *See* McINTYRE, *supra* note 8, at 88, 153, 169; Michael J. Lichtenstein, *Public Defenders: Dimensions of Cooperation*, 9 JUST. SYS. J. 102, 103 (1984) ("In a study focusing on whether a case resulted in a plea bargain or a trial, Mather noted that public defenders recommend trials when the risks were low and the possible gains were high."); Skolnick, *supra* note 1, at 64; Alissa Pollitz Worden, *Privatizing Due Process: Issues in the Comparison of Assigned Counsel, Public Defender, and Contracted Indigent Defense Systems*, 14 JUSTICE SYS. J. 390, 395-96 (1991) ("some public defender offices are characterized by strong advocacy cultures").

54. *See generally* McINTYRE, *supra* note 8 (discussing dilemma of public defenders who cannot let the public know how successful they are in their cases); Feeney & Jackson, *supra* note 25, at 377 ("federal district court judges, however, found public defenders to be better rated than either retained or assigned counsel"); Philip Hager, *High Court Opposes Defender Fund Cuts*, L.A. TIMES, Mar. 4, 1983, at I-3 ("The letter [from the California Supreme Court] went on to praise the public defender's office for its handling of complex and time-consuming cases.").

jury trials, and gain dismissals and acquittals. Paradoxically, they cannot make too much of their successes.⁵⁵ The public does not like the idea that they are paying taxes for someone to get accused criminals off, and such victories are an embarrassment to the public defender's institutional adversary, the prosecutor. After all, an acquittal generally means only one of two things to the public, neither good for the government: Either the prosecution tried an innocent person or they messed up the trial and let a guilty one get away.⁵⁶

Second, public defenders represent their clients quite well. In fact, contrary to accepted myth, the results they achieve for their clients are as favorable as or better than those achieved by most private

The author's own observations over the past 23 years are consistent with these authorities. There are numerous excellent, dedicated counsel at all levels of public defense practice.

In contrast, many of the private attorneys involved in criminal representation practice at the margin. "In fact, many private lawyers are neither like Perry Mason nor do they behave as the defendants believe, for many are somewhat marginal practitioners depending upon turning over large numbers of cases paying rather small fees." CASPER, CRIMINAL COURTS, *supra* note 1, at 17; *see also* CASPER, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 115 n.* ("In some states low-level 'courthouse' criminal lawyers hang around courthouses offering their services to poor defendants for relatively low fees. These attorneys are generally highly exploitative—turning over cases quickly to generate their fees."); Alschuler, *supra* note 12, at 1262 (arguing that the plea bargaining system is necessarily destructive of sound attorney-client relationships); Feeney & Jackson, *supra* note 25, at 409 (discussing why the "type of defense counsel seems to have no effect on criminal case outcomes"). More broadly, there is a widespread belief that regardless of their public or private status, a substantial portion of trial lawyers, both criminal and civil, are inadequate in some way. *Id.* at 396.

55. *See supra* note 10.

56. *See* McINTYRE, *supra* note 8, at 72.

attorneys.⁵⁷ They know the system and its players intimately.⁵⁸ Furthermore, they quickly come to learn three pieces of information that rationally justify their overall approach to representation: (1) most defendants are factually guilty,⁵⁹ (2) the deals being offered are very good and the sentences extremely lenient, and (3) defendants to a large extent want to take the deal and get it over with.⁶⁰

Third, the intense emphasis in the literature on the defender's cooperation with the prosecution⁶¹ is misguided. Cooperation is not equivalent to being nonadversarial.⁶² The best attorneys get along

57. When studies are controlled for "client factors" (for example, previous record, bail status), there is no difference between the results obtained by public and private defense attorneys. See, e.g., HANSON, *supra* note 7, at 103-04; Feeney & Jackson, *supra* note 25, at 407; Pauline Holden & Steven Balkin, *Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel*, 76 J. CRIM. L. & CRIMINOLOGY 176, 177, 199 (1985); Pauline Holden & Steven Balkin, *Performance Evaluation for Systems of Assigned Service Providers: A Demonstration Assessing Systems of Indigent Defense*, 9 EVALUATION REV. 547, 569 (1985) ("In all respects then, the part-time public defender appears superior to ad hoc assigned counsel."); Gerald R. Wheeler & Carol L. Wheeler, *Reflections on Legal Representation of the Economically Disadvantaged: Beyond Assembly Line Justice*, 26 CRIME & DELINQ. J. 328-30 (1980) (pretrial detention key variable in case outcome); cf. Skolnick, *supra* note 1, at 63 ("Not only does the public defender tend to follow a theory of his role similar to that of most private defense attorneys, but he is, in some respects, better equipped to carry it out."). One study even found that defendants were more satisfied with the results of representation by the defender than private counsel. See Burton M. Atkins & Emily W. Boyle, *Prisoner Satisfaction With Defense Counsel*, 12 CRIM. L. BULL. 427 (1976).

Many defendants in the lower courts represent themselves, see Mileski, *supra* note 3, at 487, 532, and there is some indication that these "unrepresented" defendants fare as well or better than those represented by counsel. See PAUL ROBERTSHAW, *RETHINKING LEGAL NEED: THE CASE OF CRIMINAL JUSTICE* 137, 138-39 (1991); Alschuler, *supra* note 12, at 1274; Feeney & Jackson, *supra* note 25, at 409. *But see* Alschuler, *supra* note 12, at 1276 (noting that several courts have ruled such bargaining with defendants violates their constitutional rights).

58. See Alschuler, *supra* note 12, at 1229-50.

59. See, e.g., ALAN M. DERSHOWITZ, *THE BEST DEFENSE*, at xiv (1982) ("Any criminal lawyer who tells you that most of his clients are not guilty is either bluffing or deliberately limiting his practice to a few innocent clients."); Ogletree, *supra* note 9, at 1269 & n.121.

60. See HEUMANN, *supra* note 25, at 90; cf. Stanley Penn, *How Public Defenders Cope With System*, 131 CHI. DAILY L. BULL., July 5, 1985, at 2 ("Most prosecutors are eager to dispose of misdemeanors with plea bargains in order to concentrate on felonies . . .").

61. See literature discussed in Feeney & Jackson, *supra* note 25, at 402-03.

62. The old adage that you can catch more flies with honey than vinegar has been articulated in the context of law practice as: "Cooperation is reconceptualized here to include the dimension of a tactical approach. When viewed in this context, it may be seen that cooperation may actually benefit rather than harm a client." Lichtenstein, *supra* note 53, at 102 (article summary); see also Alschuler, *supra* note 12, at 1225 (describing "rapport" as an important determinant of a prosecutor's willingness to disclose information); Feeney & Jackson, *supra* note 25, at 403-04 (reviewing studies that attempt to determine the empirical effects of combative-ness); Skolnick, *supra* note 1, at 61 ("Every leading white defense attorney interviewed insisted that the layman's notion of adversariness was not in the interests of their clients, and that their clients did better as a result of a 'cooperative' posture."); Abbe Smith, *Rosie O'Neill Goes to*

with, and are reasonable to, the other side. It is easier to call someone with whom you have a good relationship and informally arrange to pick up a copy of the police report than to have to schedule a written motion to compel its production. In fact, one of the most powerful current bench-bar movements is to restore the lost civility and cooperation of the past among attorneys.⁶³

Fourth, it is a mistake to equate cooperation with plea bargaining, and advocacy with trial. One can have an adversary plea bargaining/sentencing and a pro forma trial.⁶⁴ For example, a team of students in our law school clinic represented a man accused of Driving with a Revoked License. There are two elements to this crime: 1) driving, and 2) suspended license (as evidenced by a certified copy of the driving record).⁶⁵ As a predicate showing, the prosecutor must establish that the defendant received constructive notice of the initial administrative license suspension hearing⁶⁶ by presenting a copy of a certified letter. Actual notice is not required.⁶⁷ If the prosecution can make all these usually easy showings, it is generally believed that there is no defense.

In this case, the prosecution asked for fifteen days in jail on a plea. This was a first-time offense and the prosecution's position appeared outrageous.

Law School: The Clinical Education of the Sensitive New Age Public Defender, 28 HARV. C.R.-C.L. L. REV. 1, 59 (1993) ("The 'can we talk' approach—to the extent it is about creating options for the client and avoiding a criminal conviction—is an essential part of being a good trial lawyer.").

63. See, e.g., *Professionalism and Civility*, 69 MICH. BAR J. 882 (1990) (entire issue of journal devoted to this subject); Fred R. Butterworth, *Professional Courtesy Guidelines: Why Now?*, 8 SEATTLE-KING COUNTY B. BULL. (May 1989); Timothy Clifford & Joan Lukasik, *Professional Courtesy, or, Kindness Amidst Conflict*, 8 SEATTLE-KING COUNTY B. BULL. 311 (May 1989). But see Steven Lubet, *Civility: A Tale of Deconstruction and Constraint*, 1992 WISC. L. REV. 157 (1992) (author's humorous parody of judicial decisionmaking in the context of assessing breaches of civility by an attorney carries a serious warning about the risks of incorporating notions of civility into the disciplinary arena).

64. See Malcolm M. Feeley, *Bench Trials, Adversariness, and Plea Bargaining: A Comment on Schulhofer's Plan*, 14 N.Y.U. REV. L. & SOC. CHANGE 173, 178 (1986). For a description of a nonadversary trial, see Sudnow *supra* note 1, at 272-73, and for a sense of the intense "game" that can be involved in plea bargaining, see Douglas W. Maynard, *The Structure of Discourse in Misdemeanor Plea Bargaining*, 18 LAW & SOC'Y REV. 75 (1984).

65. The elements for driving with a license suspended are articulated in WASH. REV. CODE § 46.20.342 (1988).

66. Before a driver's license can be legally revoked, due process requires hearing and notice. *Bell v. Burson*, 402 U.S. 535 (1971).

67. The notice does not have to be actual, but may be constructive, for example, a certified letter sent to the last address on file with the Department of Licensing. See *Seattle v. Foley*, 784 P.2d 176 (Wash. Ct. App. 1991).

The students began with a motion to dismiss because the initial notice had been sent to the wrong address. This was a good argument, but it turned out the defendant had given a nonexistent address to the police. A second motion followed, asserting that the Department of Licensing still had to take further reasonable steps to find the defendant once the letter was returned. The motion was denied. The defendant waived a jury trial and a bench trial was set. The students filed a memorandum arguing that, although the prosecution did not need to prove actual notice as part of its case-in-chief, the defendant should be able to argue the affirmative *mens rea* defense that, by a preponderance of the evidence, he honestly and reasonably did not know his license was suspended at the time he drove.⁶⁸ This was a novel defense, and one that few expected the court to accept. Rather, this "trial" was really a sentencing hearing where the students' objective was a narrow one: to change the judge's image of the defendant from someone who had deliberately given the police false information in an attempt to obviate responsibility, to one about a decent young man with a serious learning disability that caused him to mix up numbers (like his address). At the end of the "trial," the judge deferred findings for six months, at which point the case was to be dismissed on the condition of no further criminal conduct. This was obviously an intensely adversarial plea/sentencing.

On the other hand, a pro forma jury trial on this same case could go as follows:

- Prosecution puts officer on the stand to identify defendant as driving on the relevant date. Cross-examination, aimed at questioning how it is possible that the officer can now identify the defendant four months later with so many intervening cases. Officer says that he does remember defendant because of some

68. The defense was grounded in Justice Jackson's pronouncement in *Morissette v. United States*, 342 U.S. 246, 250-51 (1952) (footnote omitted):

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory "But I didn't mean to," and has afforded the rational basis for a tardy and unfinished substitution of deterrence and reformation in place of retaliation and vengeance as the motivation for public prosecution.

The students found support for their position in a line of Washington state cases providing a true affirmative defense of honest and reasonable unwitting possession of a controlled substance. See *State v. Cleppe*, 635 P.2d 435, 439-40 (Wash. 1981); *State v. Knapp*, 773 P.2d 134, 138 (Wash. Ct. App. 1989), *rev. den.*, 781 P.2d 1323 (1989). Further support was found in California cases allowing an analogous defense to rape, *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975), and statutory rape, *People v. Hernandez*, 393 P.2d 673 (Cal. 1964).

peculiar conversation they had. Also, took defendant's license at time of arrest with his picture on it. On redirect, prosecution lays foundation for admission of license officer seized. Defense attorney also explores the seemingly inconsistent theory of defendant's cooperativeness at the time of arrest.

- Prosecution offers certified copy of driver's record including copy of certified letter giving notice of license revocation hearing into evidence.⁶⁹

DEFENSE ATTORNEY: I object, your Honor. The document has to be certified. This is a faxed copy, not an original certification.

PROSECUTION: As your Honor knows, the *Smith* case allows admission of just such certified documents that are faxed.⁷⁰

COURT: Denied.

- Prosecution rests.
- Defense puts defendant on the stand.

* * * *

DEFENSE ATTORNEY: And did you know your license was suspended when the officer stopped you?

PROSECUTION: Objection. Irrelevant. Actual notice is not an issue. We've shown constructive notice and that's all the law requires of us.

COURT: Sustained.

- Jury convicts. Defendant has misdemeanor conviction on record and is sentenced to one weekend in county jail.

The point is clear; while describing the defender as an "insider" has some basis, when more carefully examined in the full context of the defender's work, this metaphor and its more pejorative cousin, "double agent," is both unfair and inaccurate.

69. A certified copy of a public record in Washington state meets both authentication and hearsay concerns. WASH. REV. CODE § 5.44.040 (certified copies of public records shall be admitted into evidence); *State v. Monson*, 784 P.2d 485, 787 (Wash. 1988).

70. The certification on a faxed public record qualifies the document for treatment as a certified public record. See *State v. Smith*, 832 P.2d 1366 (Wash. Ct. App. 1992).

B. THE ATTORNEY AS A PLAYER IN A "MARKETPLACE"

This sociological/economic theory analyzes the defender as part of an interlocking series of "exchange relationships" with other institutional players.⁷¹ In this view, the defender, the prosecutor, and the court all have things of value to offer each other. Their roles are defined by a trading relationship in which each is dependent on the other. Like the previous metaphor, it would be difficult to dismiss this as a totally unfitting description. The players do, to a large extent, depend on each other and, as such, have "commodities" of value to give and receive from each other.⁷² Yet, at the same time, this image of a marketplace, even if we conjure up one as hysterical as the stock or futures market, paints a far too rationalistic picture of the interaction. It does not capture the routine nature of a large percentage of interactions,⁷³ and overplays the role of individual attorney interests in what is an ongoing social activity.⁷⁴ Over time, the defenders do try to get along with other players in the system, but they also look at the specific individual cases and frequently alter their interactions accordingly.

71. "The legal system may be viewed as a set of interorganizational exchange relationships. . . . Exchanges do not simply 'sail' from one system to another, but take place in an institutionalized setting which may be compared to a market." Cole, *supra* note 44, at 332; *see also* Feeley, *supra* note 28, at 415 (relating Skohnick's study on the administration of criminal justice).

72. Defense attorneys "trade" the commodity of cooperating in case resolution. This then allows the prosecutor to speedily resolve a large caseload. Furthermore, "[t]he exchange relationship between the defense attorney and the prosecutor is based on their need for cooperation in the discharge of their responsibilities. Most criminal attorneys are interested primarily in the speedy solution of cases because of their precarious financial situation." Cole, *supra* note 44, at 340. Public defenders have no such financial interest, but certainly are trying to stay afloat in light of their staggering caseloads.

73. Maynard, *supra* note 64, at 76 (citations omitted):

Exchange theory, from which this perspective on plea bargaining derives, has been criticized along two interrelated lines relevant to this study. One is that it tends to reduce social activity to the behavior and expectations of individuals. Thus, in plea bargaining, decisions are "dictated" by participants' "interests"—their "personal or professional gain." The other is that exchange theory is overrationalistic and so understates the importance of routine in everyday interactions.

74. Plea bargaining involves less concessions than it does consensus from shared norms. *See* John Paul Ryan, *Criminal Courts Revisited*, 23 LAW & SOC'Y REV. 933, 934 (1989); *see also supra* note 73 (plea bargaining decisions are dictated by partial participant's interests).

C. THE ATTORNEY AS "BUREAUCRAT"

Under this organizational description of the defender's role,⁷⁵ the defender acts to carry out the routine functions of the judicial system, which is characterized as a bureaucracy.⁷⁶ Here the defender is a cog in a machine that efficiently processes, grinds up, and spews out criminal defendants.⁷⁷ And truly, there is much routine about the lower courts, routine that administratively allows the judges to deal with massive caseloads on inadequate budgets. Public defenders play an important role in maintaining this routine. By helping their clients fill out speedy trial waivers and plea forms, reciting the various litanies, and carrying out the numerous encoded rituals, they help keep the cases moving. So what is the problem with using the metaphor of bureaucrat to conceptualize the defender's role? The problem is one of imagery. "Bureaucrat" connotes one who is indifferent to the unique needs of the individuals with whom she interacts, and one who is slavishly devoted to efficiently following the rules and procedures of the institution, thus absolving her from any personal or moral responsibility for her actions. This image plainly does not do justice to an

75. Numerous articles analyze the work of public defenders as that of bureaucrats within an institutional bureaucracy. See, e.g., McINTYRE, *supra* note 8, at 46; Blumberg, *supra* note 7, at 19, 31; Mileski, *supra* note 3, at 488-89, 533; cf. Tremblay, *supra* note 15, at 1105 (describing legal-services lawyers as functioning like "street-level bureaucrats").

76. Max Weber, when applying his concept of "bureaucracy" to the Western criminal justice system stated:

Above all, bureaucratization offers the optimal possibility for the realization of the principle of division of labor in administration [sic] according to purely technical considerations, allocating individual tasks to functionaries who are trained as specialists and who continuously add to their experience by constant practice. "Professional" execution in this case means primarily execution "without regard to person" in accordance with calculable rules. The consistent carrying through of bureaucratic authority produces a leveling of differences in social "honor" or status, and, consequently, unless the principle of freedom in the market is simultaneously restricted, the universal sway of economic "class position." The fact that this result of bureaucratic authority has not always appeared concurrently with bureaucratization is based on the diversity of the possible principles by which political communities have fulfilled their tasks. But for modern bureaucracy, the element of "calculability of its rules" has really been of decisive significance. . . . Bureaucracy provides the administration of justice with a foundation for the realization of a conceptually systematized rational body of law on the basis of "laws" as it was achieved for the first time to a high degree of technical perfection in the late Roman Empire.

Max Weber, *Rational and Irrational Administration of Justice*, in MAX WEBER ON LAW IN ECONOMY AND SOCIETY 350 (Max Rhenstein ed., 1954). But see Feeley, *supra* note 28, at 422 (questioning Weber's description of the criminal system and noting that in reality the system is "highly decentralized" and decidedly "non-hierarchical"); Worden, *supra* note 53, at 395 (defenders do not comport with classic bureaucracy); *infra* note 84 (explaining that attorneys, prosecutors and judges do not function like a classic Weberian bureaucracy).

77. It has been suggested that all lawyers are "freelance bureaucrats." See Edward A. Dauer & Arthur Allen Leff, *The Lawyer as Friend*, 86 YALE L.J. 573, 581 (1977).

increasingly large number of those who work in bureaucratic institutions.⁷⁸ It does, however, correspond to the cultural image of a bureaucrat—an image antithetical to that of the archetypal defense attorney.

Moreover, defenders do not see themselves as bureaucrats.⁷⁹ This is strongly borne out in interviews with public defenders.

I see our job as to defend the rights of people. I mean, I see that as my job to make sure that someone who is poor gets at least the same sentence as someone with money. Not to be a cog in the wheel.

....

A significant portion of the job is to be an obstructionist, absolutely. And that's the most fun portion of our job. There is a significant portion where I am working within and working to process the caseload, the paperwork, etc., but I love being an obstructionist and I think that's why I like being a public defender as much as I do.

....

I'm more of a paper pusher than anybody, and I'm the supervisor, and that's what I do. But, I love to go to trial and force the State to do things right, and I won't force somebody to plead guilty. If they want to go to trial, they're going to trial.⁸⁰

Perhaps their views are partially attributable to cognitive dissonance, but public defenders can also support their beliefs with some

78. Like each worker in a bureaucracy, each defender is a separate human individual. Each has his or her own personal history, private goals, emotional makeup, personal values, and reaction to symbolic ideations such as professional norms and mythology. As McIntyre found, the quality of public defense "ultimately depends on the individual lawyer's desire to do a good job." MCINTYRE, *supra* note 8, at 172. While public defenders are influenced by the institutional setting in which they are situated, they are individuals:

Permanent role occupancy by the defense counsel position is a critical factor that may affect defense counsel behavior. The individual public defender is also bound to an institution. While the public defender maintains his professional independence when fulfilling his role, the institutional relationship indicates the pursuit of organizational maintenance goals (objectives directly related to the stability and prestige of the organizational unit with which he identifies) in addition to personal goals (satisfying clients, gaining an advantage over the prosecutor, winning a case).

Benjamin & Pedeliski, *supra* note 28, at 283 (emphasis added); see also WILLIAM GORE, ADMINISTRATIVE DECISION-MAKING: A HEURISTIC MODEL 21 (1964) ("In very general terms, any form of organizational behavior . . . is a means of realizing multiple sets of collective objectives, the different sets of objectives being held by distinct aggregations of people.").

79. See MCINTYRE, *supra* note 8, at 50.

80. Public Defender Interview, *supra* note 8. Similarly, Professor Ogletree finds motivation, as opposed to justification, for public defenders keeping up the fight over time in the "heroism" of taking on the system. Ogletree, *supra* note 9, at 1242-43.

pretty good arguments. Defenders are professionals.⁸¹ As such, they have a great deal of autonomy and discretion⁸² and, in fact, are governed by professional norms that demand such autonomy.⁸³ While the administrative functions and personnel of the court may increasingly resemble a bureaucracy,⁸⁴ defenders in a sense float loosely within this structure.⁸⁵

The truth is that defenders resemble bureaucrats to various degrees. A public defender organization is far too complex to define each attorney within it by such circumscribing labels. Such an organization is not a machine.⁸⁶ It reflects a complex interaction of structure, value pronouncements from leadership, and emerging value

81. Contrary to prior belief, professionals and bureaucracy can mix. "While definite hierarchical and impersonal bureaucratic structure exists within such organizations [i.e., "professional bureaucracies"], it performs a facilitating role and works *around* professionals . . ." McINTYRE, *supra* note 8, at 95. The professionals "play the central role in the achievement of the primary organizational objectives." W. Richard Scott, *Reactions to Supervision in a Heteronomous Professional Organization*, 10 ADMIN. SCI. Q. 65, 65 (1965); *see also* Tremblay, *supra* note 15, at 1105 n.13 (discussing the appropriateness of the street-level bureaucrat model for legal services); *cf.* Wolf Heydebrand, *The Context of Public Bureaucracies: An Organizational Analysis of Federal District Courts*, 11 LAW & SOC'Y REV. 759, 762-63 (1977) (applying a similar model to the interaction of administrative and judicial decisionmaking).

82. As professionals, lawyers in the public defender's office exercise autonomy and discretion. *See generally* McINTYRE, *supra* note 8, at 95 (discussing the public defender's approach to organizing professionals).

83. *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4 (1983) ("Professional Independence of a Lawyer"); Rule 1.7 ("Conflict of Interest: General Rule").

84. While the clerk's office does function a great deal like the classic Weberian bureaucracy, Heydebrand, *supra* note 81, at 766, the other players do not. "[T]he collegial-professional network of lawyers, which includes attorneys, prosecutors, and judges . . . may dominate the respective chains of decision-making which, though not without conflicts, are nevertheless highly interdependent." *Id.* In fact, Heydebrand articulates a variety of ways in which the "organizational characteristics" of courts, as organizational units, stray from the classic bureaucratic model:

1. Courts are networks of organized activities rather than bureaucratically integrated formal organizations.
2. Courts are legally and politically heteronomous (i.e., resources, structure, jurisdiction externally defined by executive and legislature) rather than autonomous organizations.
3. Courts are labor-intensive professional service organizations.
4. Courts are an arm of the government.
5. Courts are, for the most part, non-specialized or "generalist" organizations.
6. Courts are relatively passive organizations within a demanding environment.
7. Although they have strict boundaries, courts are also highly enmeshed in a vertical and horizontal interorganizational network.

Id. at 765-70.

85. *See supra* note 78.

86. Gilsinan & Valentine attribute the "organization as machine" metaphor to the functionalist paradigm that "has generated most modern management and organizational theory." Gilsinan & Valentine, *supra* note 30, at 200. Noting that this functionalist approach has been "rapidly losing ground" in organizational theory, the authors embrace the interpretive approach.

positions within the organization vying for dominance.⁸⁷ "Who are we?" "What are we about?" "Why is it worth it?"⁸⁸ It is an organization, moreover, that constantly interacts with and is shaped by other organizations such as the judiciary, court personnel, prosecution, police, probation, and citizen's groups.⁸⁹ Individual defenders likewise interact with and are shaped by these other organizations *qua* organizations. Their attitudes and perceptions are further shaped by their constant personal contacts (formal, informal, and social) with other individuals and groups of individuals within their own and other organizations.⁹⁰

Id. This "perspective views organizations as systems of meaning. People actively structure their organizational reality. Thus, organizations act primarily as interpretive lenses through which people assign meaning both to their own activity and to the activity of others." *Id.*

87. Organizations are complex playing fields where organizational structure and organizational values interact, with competing and emerging values vying for dominance. GORE, *supra* note 78, at 119:

Perhaps this function of structure can be characterized as one of rationalizing individual belief and maintaining faith in the efficiency and worth of the organization. The result of continuous changes in structure is a continuing reinterpretation of the organization and its environment and hence recurrent reinforcement of individual commitments to the numerous symbols of organization. Major changes in structure seem to come about when a sudden buildup of anxiety manifests itself in a hurricane of feeling which topples an organization over its threshold of change into a precipitate act. Change may also come about through a more casual continuing process of adjustment, with several issues in revision at any given time, each being shepherded along at a rate consistent with tolerably comfortable levels of anxiety.

Id. at 122. A similar view is expressed in Gilsinan & Valentine regarding the "interpretive perspective" of organizational theory. Gilsinan & Valentine, *supra* note 30, at 200-201.

88. See GORE, *supra* note 78, at 122 ("[T]his function of structure can be characterized as one . . . maintaining faith in the efficiency and worth of the organization.").

89. All organizations, to a greater or lesser extent, interact with, and are influenced by, other organizations. For a careful analysis of the factors that affect the nature of this influence, see William Evan, *Toward a Theory of Inter-organizational Relations*, 11 MGMT. SCI. J. B-217 (1965). For the public defender, external organizations in the "legal system" include the trial court, the appellate court, the prosecutor, the police, jails, probation, citizen action groups like Mothers Against Drunk Driving, funding agencies, and the like. More broadly, the legal system itself is "a subsystem of a larger political system." James R. Klonoski & Robert I. Mendelsohn, *The Allocation of Justice: A Political Approach*, 14 J. PUB. L. 323, 323 (1965).

90. Anyone who has worked in a law office, or any other office, knows how much their approach to their work is influenced by the various individuals and groups of individuals with whom they come in regular contact:

Rather the "rules" the organization members are likely to follow are the "folkways" or informal "rules of the game" within the organization; the goals they pursue are likely to be personal or sub-group goals; and the roles they assume are likely to be defined by the functional adaptation of these two factors. These three features of the organization then are the objects to be accounted for, and the functional-systems approach is likely to begin to identify and examine the adaptation of the actors to the environment, the workload and the interests of the persons placed within the system, *i.e.*, other goals of the actors within the organization.

Feeley, *supra* note 28, at 413; *cf.* GORE, *supra* note 78, at 156 ("But whereas the systemic components of the body are physically integrated into the human physiology by connecting tissue, even

D. IN THE FIELD HOSPITAL

None of the previous descriptions of the public defender are totally inaccurate. Sometimes Perry Mason, sometimes a player greasing the administrative wheels, sometimes a bureaucrat with a "Form D-17," the defender equally generates and eludes easy definition. The goal of this Article is not description for its sociological sake, although the description this Article proposes is a far more fitting one for how defenders really function in the lower courts than the traditional ones. Rather, this Article seeks to develop a role description that can then lead to practical, workable ways for defenders to do their jobs better in the lower courts (and then have prosecutors do the same, bringing the system to some semblance of a workable order).

Transcending all these various cultural, sociological, economic, and organizational descriptions (generally based on defenders in felony court, not the lower courts) is a simple reality: Defenders in the lower courts work in a world of virtual chaos⁹¹ in which they are constantly making almost instantaneous decisions about how to allocate scarce fixed resources. As such, defenders in the lower courts are most accurately described as carrying out a role analogous to those in field hospitals practicing triage, the art first developed by Napoleon's surgeon, Baron Dominique Jean Larrey, of choosing among the wounded who will get priority to scarce medical resources.⁹² The challenge is to develop a coherent, ethical approach for conducting this task.

II. PERFORMING TRIAGE IN THE LOWER COURTS

Those who have never seen the lower criminal courts (particularly in urban areas) in operation would likely be shocked at what they saw. Of course there is a judge, a jury box, and attorneys. But in most respects it does not comport with any image one might have of this country's court system, unless one is a devotee of Dickens' novels

the human cells in the corpus of organization are connected by nothing more than invisible relationships.").

91. One commentator specifically characterized the New York criminal system as existing in "all the chaos." Steven Brill, *Fighting Crime in a Crumbling System*, AM. LAW., July/Aug. 1989, at 124. In the next section, I will focus upon the general chaos that characterizes our lower criminal courts.

92. See WINSLOW, *supra* note 14, at 1.

or television's *Night Court*.⁹³ In the first place, these courts are generally teeming with people. Filled courtrooms, people standing in the hallways, and a constant stream of people walking in, and out and back in, over and over again is typical. Nearly twenty cases are disposed of for every one that progresses to Superior Court.⁹⁴ Attorneys blithely walk up to the clerk to discuss some matter while a case is being heard, and bargain with the prosecutor on their own case while a defense attorney is addressing the court on another.⁹⁵ And for the

93. My description of the lower courts is consistent with the one given by HEUMANN, *supra* note 25, at 35-36.

While this brief drama is enacted, the spectators in the courtroom engage in a number of activities which create an atmosphere of bustle, as well as an often intolerable noise level. Defendants confer with attorneys; bail bondsmen discuss rates and collateral with defendants; defendants greet old acquaintances; prosecutors and defense attorneys negotiate cases; clerks and bailiffs wander about, bringing files, various forms, incarcerated defendants, and coffee. Occasionally a prosecutor from another courtroom pops in and reads off a list of defendants' names. These defendants are instructed to move to another courtroom for their cases. In one of the circuit courts, the public defender also reads off lists of names while court is in session. These are the names of his clients, defendants who failed to consult with him that morning about their cases. The public defender corners them (quite literally) in the courtroom and discusses disposition for the first, and probably only, time.

The turmoil in the courtroom is matched only by the confusion in the adjoining corridor. Prosecutors, bondsmen, defense attorneys, defendants, police officers, family members, victims, witnesses, and clerks meander about passing the time, arranging deals, looking for someone—or simply because they are confused. No neat boundary separates courtroom and corridor; activities flow back and forth between the two.

Id. at 36 (footnote omitted).

Most matters that come before the court for resolution are disposed of quickly. "In this city, it usually takes one or two hours to obtain auto license plates, but it takes a matter of minutes to dispose of accused auto thieves in court." Mileski, *supra* note 3, at 480. This likely explains how one defenders' office processed misdemeanor cases for less than \$100. Gail D. Cox, *Public Defender Challenged Over Costs, Productivity*, L.A. DAILY J., July 22, 1985, at 1. In fact, most court time is spent in administrative "churning activity." As Subin found in his study of the lower courts in New York City:

The Table [statistical compilation] assumes that judges spend seven hours a day on the bench, and work a little over 200 days a year. It also estimates, based on [Office of Court Administration] statements, that an average of five minutes is taken on each case called on the calendar.

The Table reveals that only 21% of the judge's time is spent at hearings or trials, on determining facts. Only another 19% is spent taking action on cases, either dismissing them or taking pleas of guilty. All the rest of the judge's time (nearly 60%) is spent in futile presiding over the churning activity, adjourning cases either because some necessary party is not there, or because they are there but are not ready.

Hopelessly awash in a sea of cases, the Court is unable to administer justice. Recognizing that, it has redefined its mission. The measurement of success is the disposition rate, how many cases can be moved in and out of the court, without regard to how they are moved.

Subin, *supra* note 4, at 8; *cf. supra* notes 11-24 (describing the problem of inadequate resources).

94. See, e.g., WASHINGTON COURTS, *supra* note 4, at 6-9 (indicating 391,135 dispositions in the lower court, while only 26,270 in the superior court). It is little wonder, given these statistics, that the lower courts are principally sentencing courts. See Mileski, *supra* note 3, at 491.

95. See, e.g., HEUMANN, *supra* note 25, at 36; Sudnow, *supra* note 1, at 265 ("If, during the course of a proceeding, the P.D. has some minor matter to tend to with the D.A., he uses the

defender, the flow of cases is endless;⁹⁶ a limitless stream of files. A dozen or so clean, raw files appear on their desks in the morning, at most containing a police report and the defendant's application for indigent defense. Into court they come, stack of files in hand, yelling to determine if their clients have even shown up. "Is there a Mr. Firmen here? Is Ms. Nonce in court?" On some days, half of the defendants do not respond to their calls, and bench warrants are subsequently issued. This is not uncommon. These are the lower courts. Defendants often neglect to come to court.⁹⁷ The same is true of

time when a private attorney is addressing the bench to walk over to the prosecutor's table and whisper his requests, suggestions or questions.".)

96. The horror stories of staggering public defender caseloads are legion. *See, e.g.*, Alschuler, *supra* note 12, at 1248 (a single defender "handled more than 400 cases in a single month"); Suzanne E. Mounts, *The Right to Counsel and Indigent Defense Systems*, 14 N.Y.U. REV. L. & SOC. CHANGE 221 (an attorney collapses in court while carrying caseload of 2000 cases per year); Alan Ashby, *Lack of Funding of Public Defenders Affecting Counsel*, L.A. DAILY J., Dec. 10, 1980, at 1, 15 ("[A]bout half the deputy public defenders in the state are carrying caseloads as much as 40 percent in excess of what the American Bar Association recommends as the maximum that can be carried and still maintain competent standards of representation."); Richard Shumate, *I Will Not Accept Any More Cases*, 18 BARRISTER'S MAG. (Young Lawyer's Division) 10, 11 (Winter 1991-92) (an attorney who had closed three times as many cases in ten months as prevailing standards recommended for a year refuses to take any more cases). Professor Ogletree recognizes the "staggering caseloads" and "[t]he loss of public defenders to burnout [which] threatens the ability of the system to fulfill its commitment[s]." Ogletree, *supra* note 9, at 1240-41.

Various standards purport to guide the maximum misdemeanor caseload that a public defender will handle. These include standards from: national advisory commissions, *see, e.g.*, CRIMINAL JUSTICE IN CRISIS, *supra* note 7, at 43 (300 misdemeanors per attorney per year); INDIGENT DEFENSE, *supra* note 19, at 6 (400 misdemeanors per attorney per year (citing NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS)); state statutory limitations, *id.* at 15, 19, 22 (Minnesota, 250-300 gross misdemeanors per attorney per year, 400 misdemeanors per attorney per year; Florida, 400 misdemeanors per attorney per year); and contract limitations, *id.* at 22 (Yakima County, Washington, 600 misdemeanors or gross misdemeanors per attorney per year).

In reality, a National Legal Aid and Defender Association ("NLADA") survey determined that the average yearly misdemeanor caseload nationally is 613 cases per attorney. *Id.* at B-1. Of those responding to the survey, 33% were handling 370-480 cases, 33% were handling 598-636 cases, and 33% were handling 700-1000 cases. *Id.* In contrast to this reality, the number of cases recommended by 36% of the defender offices was 400 (the standard recommended *id.* at 6), while 21% recommended 250-300 cases, 57% recommended 350-450 cases, and 21% recommended 500-750 cases. *Id.* at B-1. When one thinks of the effort a team of students in a clinical program will put into a single case in order to provide quality representation, these figures are truly staggering.

In response to "[t]he crushing caseloads and workloads in indigent defense," NLADA has attempted to begin careful exploration and development of a variety of methods for measuring caseload/workload as a necessary predicate to begin management of this overwhelming system. *See id.* at 1, 25 (unit base method), 28 (time base method), 40 (case weighing method).

97. My own observations correspond with that of Feeley: "The primary question for many defendants in lower courts is not whether to go to trial but whether to show up in court at all." Feeley, *supra* note 3, at 462. To give some sense of the magnitude of this possibility, in the New

civilian witnesses and police officers.⁹⁸ Those defendants that do respond will likely be meeting with their defender for the first time, a meeting unlikely to last more than a few minutes, and then all too often only to discuss the prosecutor's offer. In the swirl of all the bodies, movement, and bargaining, the defender must quickly assess the course a case will likely take. He or she must practice triage.

For the public defender, district courts have much in common with the field hospitals on the edge of battlefields where triage was first developed:

- chaos
- limited resources
- great numbers
- a constant stream of new clients
- the inability to give each client the care that the professional has been trained to provide

York City lower courts, "[o]ver the past five years [since 1987] another 165,000 outstanding bench warrants have accumulated." Subin, *supra* note 4, at 18. Interviews with public defenders indicate that this may be at least as much a function of social and economic factors as recalcitrance.

I would estimate that about one-third of our cases, the client doesn't show on any given day. However, [there is functionally] no mailing of notices to appear. So you get this little scrap of paper with about 20 various things checked, handwritten, and so on, and you are supposed to be smart enough to know exactly which line to look for and it's part of the form that gets worn out if you put it in your wallet. . . . Then they issue bench warrants every time someone doesn't appear, whether or not he has moved, whether or not he is in another jail, whether or not he has done anything right or wrong, the bench warrant is issued. . . . Now they aren't going to let him out; then we run into the situation [where] we gotta plead him, right or wrong, because he can't make bail, because the bail is ridiculously high on a FTA [failure to appear], and so you end up trying to process him without regard to guilt, innocence or the constitution. . . .

I would say the highest single percentage is when the year is up and you are supposed to come back to court on your little flimsy [case]. Come on, these are people who don't even live in the same house for a whole year. They don't have a calendar by their telephone, it's just ridiculous. . . .

The difference between a private attorney and a public defender with respect to FTA's is that [when I was] a private attorney . . . I would get a notice that my client needed to come back in, [because] they would send it to . . . me, as well as to the client. I would, of course, follow that up immediately with a letter to my client. I'd tell him to get in contact with me and that we would need to be there at this time and . . . talk about this, and if I don't get contact then I would try to catch him by phone, and I am more familiar with that particular person's circumstances. I don't think, in better than ten years of private practice, that I had more than 2 or 3 matters where my clients didn't show up for their court appearances. It has just virtually never occurred, where here it is just an extremely high percentage. We just do not have the ability to follow up, to send out [a letter] every time the court sends out something . . . and then follow it up with phone calls in an attempt to assist our client in getting into court. In private practice, I often times, if my client didn't have transportation . . . would drive by, pick him up and bring him to court.

Public Defender Interview, *supra* note 8.

98. See *infra* note 136.

This of course is only an analogy. Obviously the courtrooms of the lower courts differ in many significant ways from a field hospital:

- There is a constitutional provision, the Sixth Amendment, which guarantees care to all.
- There is an advocate on the other side still trying, from the client's perspective, to "hurt" the client even while the triage process is taking place.
- Most clients are not victims of accident or misfortune (except perhaps in a larger societal frame).
- It is generally more difficult to divide up or quantify scarce lawyering resources than doses of medication or medical procedures.

These differences, however, make developing a coherent and practical theory of triage in the lower courts even more complex, as will be seen in later sections of this Article.

Initially, it is important to recognize that, even if public defenders are not functioning as if in a field hospital, rationing of scarce resources is a natural part of their world. As Professor Tremblay recognized when writing about the civil, legal-aid context,⁹⁹ all lawyering involves some rationing.¹⁰⁰ Time, and human and material resources are limited.¹⁰¹ What one client gets will often limit what is available to others, even for a price. In public practice where the attorneys represent indigents, this natural rationing is exacerbated.¹⁰² Public defense

99. See Tremblay, *supra* note 15, at 1104. Professor Tremblay further develops a theory of rationing in the legal-aid context based on a community-values oriented approach. See *id.* at 1129-55.

100. See, e.g., Alschuler, *supra* note 12, at 1201, 1203; Tremblay, *supra* note 15, at 1116; cf. Simon, *supra* note 15, at 1093 ("In deciding whether to commit herself to a client's claims and goals, a lawyer should assess their merits in relation to the merits of the claims and goals of others she might serve.").

101. See Tremblay, *supra* note 15, at 1116.

102. See, e.g., Ogletree, *supra* note 9, at 1278:

Another potential danger of empathy is that it can lead to problematic allocation of resources. The empathic role I have described demands that the public defender devote substantial time and effort to every client. In a situation of extremely limited attorney resources, hours spent in the service of one client necessarily come at the expense of another equally needy criminal defendant. The motivation of empathy does not tell the defense lawyer *toward whom* she should direct her empathy. The time that I spend getting to know my clients, listening to their stories, helping them find jobs, is time that I could spend representing others.

representation operates out of a fixed pie and holds a virtual monopoly position. After all, where else can their clients go?¹⁰³ Unlike private practice where clients can, in theory, bid further resources to expand the pie, public defense is truly a zero-sum game. Resources expended on one client are not there for someone else. Public practice also includes implicit rationing. Waiting lists for initial appointments, levels of procedures to be followed, and forms to be filled out, all discourage some from seeking access to the public defense service.¹⁰⁴

Public criminal defense, in addition, has its own inherent rationing. Short of some fantasy where each defender only has one client at a time (or, at least, the reasonable caseload of a good private attorney), defenders always need to ration one of their most significant limited resources among clients, their credibility.¹⁰⁵ The need to parse

103. "Scarcity is inherent in legal services work. . . . [T]he presence of any fixed budget inevitably creates allocation choices, and without the usual market or price mechanisms some allocation methodology must be used." Tremblay, *supra* note 15, at 1103 n.7.

Additionally, while the nature of legal practice is quite elastic, the reality of legal services' existence is that its resources are not at all elastic. Time, energy, personnel, support services, supplies, and, of course, money, are all finite resources. A private law firm, by contrast, retains some options to increase the supply of resources if the demand increases; the individuals making the demands will pay for the increase. While this facile generalization may fail to capture the tensions of work in a very strained and busy private firm, the elasticity and option to expand in the private sphere still does exist, and contrasts fundamentally with the experience of the fixed budget legal services office.

Id. at 1116 (footnote omitted); see also Simon, *supra* note 15, at 1092 ("[L]egal services are necessarily a scarce resource."); Tremblay, *supra* note 14, at 961 n.61 (discussing how poverty lawyers must work with fixed budgets); cf. JON ELSTER, *LOCAL JUSTICE* 247 (1992) ("With respect to the allocation of scarce medical resources, for instance, I have largely limited myself to the issue of *whether* a patient should receive a certain treatment. Often, however, the more important question is *how much* he should receive.").

104. The concept of implicit rationing is explored in David Mechanic, *The Growth of Medical Technology and Bureaucracy: Implications for Medical Care*, 55 MILBANK MEMORIAL FUND Q. 61, 65-66 (1977).

105. Alschuler makes this point:

Chicago's Sam Adam, for example, insisted that as a private attorney he could secure better plea agreements than could a public defender:

A particular Assistant State's Attorney is unlikely to handle more than a half-dozen of my cases during a single year. If I am on good terms with this Assistant, I can go to him with every one of these cases, make my pitch, ask for a favor, and probably persuade him to give every last one of my clients a break. A public defender may be on equally good terms with the prosecutor. He may even have been the prosecutor's law school roommate. *But he just cannot do that with fifteen cases a day.*

Supra note 12, at 1223 (emphasis added); cf. *id.* at 1222 ("An advantage to one client arises because the defender does not make the same effort for the others."); Martin Guggenheim, *Divided Loyalties: Musings on Some Ethical Dilemmas for the Institutional Criminal Defense Attorney*, 14 N.Y.U. REV. L. & SOC. CHANGE 13, 19 (1986) (Conflicting responsibilities exist when representing large numbers of clients because how the defender behaves toward one client affects how judges will treat present, and even future, clients.).

credibility is the inevitable outcome of representing a substantial number of clients before the same judges on a regular basis. A private attorney can stand beside a client at sentencing and say, "This is one of the most decent young men I have known in my years of practice. It is true that his actions here showed bad judgment, but only that, and he has learned his lesson." A public defender can occasionally do the same, but cannot do so for ten clients in a row.

Furthermore, it is important to realize that the need for rationing is not just a limitation on representation but, like a good physician, an important part of being a good attorney. In medicine, this is represented by two principles. The principle of "diagnostic elegance" requires just the right degree of economy in diagnosis.¹⁰⁶ That of "therapeutic parsimony" requires just those treatments which are demonstrably beneficial and efficacious.¹⁰⁷ In the context of the work of the defender in the lower criminal courts, this means that the attorney must do no more than is necessary and good for the client. This ethic of beneficial rationing raises a number of concrete concerns for the defender. Many cases in the lower courts tend to be relatively minor, even for the defendants. If the defendant has to keep coming into court for hearings on some cutting-edge motion dealing with a somewhat peripheral issue in the case, the defendant (who by definition is indigent) may lose pay, or even a job.¹⁰⁸ Also, being in court can be an unpleasant, pressure-filled experience for many. Prolonging

106. See Edmund D. Pellegrino, M.D., *Rationing Health Care: The Ethics of Medical Gatekeeping*, 2 J. CONTEMP. HEALTH L. & POL'Y 23, 27 (1986).

107. *Id.*

108. In fact, in one study, clients sometimes refuse representation because having an attorney prolongs the process, costing them wages and such. See PAUL ROBERTSHAW, *RETHINKING LEGAL NEED: THE CASE OF CRIMINAL JUSTICE* 29 (1991). Similarly, Malcolm Feeley reported,

Defendants whose applications for a PD have just been approved often approach a PD asking for and expecting an instant opinion, something that the PDs are loathe to express. Invariably the PDs firmly and politely tell them to make an appointment so that they can review the case in detail. While most defendants accede to these suggestions, many of them continue to press the PD, emphasizing that they want to get their case "over with today," and become irritated when the PDs refuse. This results in tension between PDs and many of their clients, a tension that contradicts popular opinion. For it is the defendant, anxious to get his case over with, who wants the quick advice, and it is the PD, anxious to preserve a sense of professionalism, who wants to extend the case and review it more carefully.

MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 222 (1979) (emphasis added). Denying further representation is, of course, a defendant's right and part and parcel of informed consent. My point, however, is that this common reaction by defendants is evidence of the fact that, in some circumstances, allocating scarce resources will not benefit the client.

Of course, if the defendant can't make bail and is just sitting in jail awaiting trial, pleading guilty is even more rational. "For if he insists on trial he often must wait months in jail just for

a case with legal maneuvering that is unlikely to produce any beneficial result may therefore unnecessarily maximize the torment.

Finally, sometimes it is better not to draw too much attention to a particular case or client. The initial offer may be far better than the defendant will get if the prosecution looks carefully at the police report or the client's criminal history. Putting resources into fighting such a case may only force such careful scrutiny by the prosecution.¹⁰⁹

Against the backdrop of inherent, and even at times beneficial, rationing the defender in the lower criminal courts conducts triage, albeit haphazardly and intuitively. Repeatedly, the defender must decide whether to fight for a client, what I call bringing to bear the scarce resource of "focus," or to provide only what I term "pattern representation." Thus, there are times when public defenders fight and fight well, just like Perry Mason, Matlock and their ilk, by using the scarce resource of focus. Most times, however, they rely upon "patterns" and their understanding, as members of the legal community, of "worth."

To avoid misunderstanding, one should recognize that this latter approach (pattern representation) is one which, as will be explained later, fulfills the Sixth Amendment and frequently leads to favorable results for the client. On the other hand, focus carries a greater likelihood of such a result and, therefore, the initial triage decision may well determine the defendant's fate.¹¹⁰

the trial to be scheduled." Stanley Penn, *How Public Defenders Cope With System*, 131 CH. DAILY L. BULL., July 5, 1985, at 2. As one defender I interviewed put it,

Part of our representation is we're representing poor people who are in jail, they have triable issues, [but] they can't bail out. They, themselves, will want to plead guilty to get out of jail, so they don't [have] to sit there another sixty days [the speedy trial period] waiting for their trial. And very often these are the cases we would give our eyeteeth to go to trial on, the really good cases. What does that person do [when offered to stipulate to facts on condition of a 60-day suspended sentence] . . . and there won't be any jail time?

Public Defender Interview, *supra* note 8.

109. There are a number of situations in which early resolution will be in the client's best interest. The client may have a far worse criminal record than the prosecution realizes, or the actual facts of the case are more unsympathetic towards the client than they initially appear. Also, the defendant may be charged with a lesser included offense, though the prosecutor could charge the greater, and a quick plea to the lesser will bar subsequent prosecution for the greater under principles of double jeopardy. *But see* State v. Fitzgerald, 622 A.2d 1245 (N.H. 1993) (conviction for failing to stop at red light does not bar subsequent negligent homicide prosecution because, under the test of U.S. v. Ward, 448 U.S. 242 (1980), the traffic infraction was "civil" in nature).

110. See *supra* note 25. The nature of pattern representation and focus is discussed in detail in Part IV.

Currently, no systematic ethic or approach for guiding this triage exists, even though, again, the decision whether or not to bring focus will frequently be the difference between a guilty plea (admittedly to a minor charge with a minimal penalty) and acquittal or dismissal. At this point one might recognize that having an articulated system is not always best. Randomness is better than a bad system. Informal systems possess flexibility and can sustain consensus that would be impossible if the system had to be publicly articulated. Also, even what appears random may not actually be so. Rather, unarticulated, yet well-grounded, schemata may guide the choosing process.

Nonetheless, it is important to articulate and justify an approach to triage in the lower criminal courts for a variety of reasons. First, criminal defense is constitutionally and ethically circumscribed. A process which may be determinative of the nature and outcome of representation should likewise have an ethical basis. Focus, moreover, is a scarce resource. It should be allocated to its best use. Furthermore, articulating an approach is a necessary first step for a clear system to guide the prosecution and defense in choosing where to fight. This, in turn, is a predicate for our lower criminal court system to even begin to function as a marginally workable system. Finally, it has been my experience that although defenders do fight at times, it is easy for them to stop altogether under the numbing weight of their ceaseless caseload.¹¹¹ Thus, they tend to stop using focus altogether, even though the resource is available, because in the blur of their caseload they can no longer distinguish one case from any one of the other dozen cases that have come in the door that morning.

On trial days, you can . . . have seven trials set for each of the trial days. You can have up to twenty set for violation of hearing days. Right?

At least.

And in between we may have to cover all these things like arraignments . . . so that the days off aren't necessarily totally devoted to trial preparation.¹¹²

As a result, all defendants receive pattern representation. An ethical, practical, and workable approach to triage can cut through

111. Brill describes the system as a "numbing grinding bureaucracy where cases are processed" and in which "almost everyone, except the victims and an oddball judge or two and some unhardened defense attorneys and prosecutors like Karas, seem numb to it all." Brill, *supra* note 91, at 50.

112. Public Defender Interview, *supra* note 8.

this mind-numbing blur and quickly target those cases appropriate for focused representation, leaving the others to pattern defense.

III. AN ETHICAL FRAMEWORK FOR CHOOSING

Certainly, the defender's task of conducting triage is not without ethical guidance. Triage and its less chaotic counterpart, rationing of scarce resources, have a large body of ethical literature¹¹³ (particularly, though not exclusively,¹¹⁴ in the healthcare field). On the surface the literature is cast as a debate between utilitarianism and egalitarianism, efficiency and equity.¹¹⁵

113. The advent of organ transplants, artificial organs, treatments such as kidney dialysis, and the general concern about cost containment in health care, *see, e.g.*, Lester C. Thurow, *Sounding Board: Learning to Say "No"*, 311 *NEW ENG. J. MED.*, Dec. 13, 1984, at 1569, has spawned a corresponding body of literature exploring the ethics of rationing and triage. *See, e.g.*, TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 265 (3d ed. 1989); MICHAEL COOPER, *RATIONING HEALTH CARE* (1977); WINSLOW, *supra* note 14; George J. Annas, J.D., MPH, *The Prostitute, the Playboy, and the Poet: Rationing Schemes for Organ Transplantation*, 75 *AM. J. PUB. HEALTH* 187 (1985); E. Lovel Becker, M.D., *Finite Resources and Medical Triage*, 66 *AM. J. MED.* 549 (1979); Nora K. Bell, *The Scarcity of Medical Resources: Are There Rights to Health Care?*, 4 *J. MED. & PHIL.* 158 (1979); Daniel Callahan, *Allocating Health Resources*, 18 *HASTINGS CENTER REP.* 14 (1988); James Childress, *Rationing of Medical Treatment*, in *ENCYCLOPEDIA OF BIOETHICS* 1414 (W.T. Reich ed., 1979) [hereinafter Childress, *Rationing of Medical Treatment*]; James Childress, *Who Shall Live When Not All Can Live?*, in *READINGS ON ETHICAL AND SOCIAL ISSUES IN BIOMEDICINE* 143 (Richard Wertz ed., 1973) [hereinafter Childress, *Who Shall Live?*]; Mehlman, *supra* note 20; Gene Outka, *Social Justice and Equal Access to Health Care*, 2 *J. RELIGIOUS ETHICS* 11 (1974); V. Parsons & P. Lock, *Triage and the Patient With Renal Failure*, 6 *J. MED. ETHICS* 173 (1980); William B. Stason & Milton C. Weinstein, *Allocation of Resources to Manage Hypertension*, 296 *NEW ENG. J. MED.*, Mar. 31, 1977, at 732.

114. For example, Jon Elster's analysis deals with rationing decisions in access to higher education, allocation of prison space, selection of workers for layoffs, demobilization from the army, as well as kidney transplantation. ELSTER, *supra* note 103, at 28-61.

115. The distribution of scarce resources has been the subject of the moral realm known as distributive justice.

It is helpful to begin by noting the broadest definition of justice: Justice is rendering to each his due. Distributive justice is the form of justice concerned with distributing among persons the benefits and burdens that are due to them. Abstractly stated, distributive justice requires persons to be treated alike unless there are relevant differences among them.

Roy Branson, *Theories of Justice and Health Care*, in 2 *ENCYCLOPEDIA OF BIOETHICS* 630-31 (Warren T. Reich ed., 1978).

As Professor Tremblay noted, these questions of distributive justice, though regularly receiving "substantial attention within medicine," receive far less interest in law. Tremblay, *supra* note 14, at 960.

All ethical theories for justifying and guiding ethical choices of distribution can be seen as falling under this single rubric of distributive justice. *See, e.g.*, Branson, *supra*, at 631 (noting that persons have been described as "relevantly similar or different" depending on their social utility, deserts, or equal humanity). Some, however, have excluded utilitarianism from the concept of distributive justice. Of these, some have done so because "it depends on computing the sum of

good produced, rather than the justice of how the total is distributed to individuals." *Id.* at 631 (footnote omitted). Others have excluded utilitarianism because they believe that, while utilitarianism does consider issues of distributive justice, "[t]hese [utilitarian] theories view distributive justice as one among several problems about maximizing value." BEAUCHAMP & CHILDRESS, *supra* note 113, at 265.

Regardless how one comes out on the debate whether distributive justice ought to encompass utilitarianism, at a general level the moral debate over the ethical distribution of scarce resources pits utilitarianism against egalitarianism. See WINSLOW, *supra* note 14, at 110; Beauchamp & Childress, *supra* note 113, at 265; Branson, *supra*, at 631; Paul E. Kalb & David H. Miller, *Utilitarian Strategies for Intensive Care Units*, 261 JAMA 2389, 2392 (1989); Mehlman, *supra* note 20, at 268.

Utilitarianism, of course, seeks to promote the most good for the most number. In its most simplistic form, it would justify slavery or the burning of babies if, in total, more good than harm would be produced. But it has far more sophisticated incarnations that would preclude such intuitive moral outrages. "Rule utilitarianism," as contrasted with simple "act utilitarianism," focuses upon the overall social good of replicating the principle embodied in a particular act. See Branson, *supra*, at 631. Thus one author notes that "it is difficult to believe that such arrangements [i.e., slavery] ever would have served the general welfare better than any social alternative." David Lyons, *Nature and Soundness of the Contract and Coherence Arguments*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE* 141, 148 (Norman Daniels ed., 1974) [hereinafter *READING RAWLS*]; see also Joel Feinberg, *Rawls and Intuitionism*, in *READING RAWLS* 108, 121-23 (rule utilitarianism permits civil disobedience; that is, though one cannot violate the law simply to obtain a small gain, they may do so to avoid a disastrous loss). Advanced theories of utilitarianism, in fact, posit "ideal observers" or "universal proscribers," entities imbued with impartiality and a bent towards benevolence in all decisionmaking, to conduct the utility calculus. See, R. M. Hare, *Rawls' Theory of Justice*, in *READING RAWLS* 81, 93. In fact, Rawls, while viewing utilitarianism as perhaps the chief rival to his own theory, does not attack simplistic utilitarianism, but rather recognizes that justice and the protection of liberty and rights can be accounted for under a utilitarian theory. JOHN RAWLS, *A THEORY OF JUSTICE* 107 (1971).

Egalitarianism focuses on individuals, their equal human value and equal right to a share of scarce goods. Like utilitarianism, this theory has simpler and more sophisticated versions. The latter is reflected in Rawls' *A Theory of Justice*. This book has been characterized as "a work that anyone in [the] future who proposes to deal with any of the topics it touches must first come to terms with if he expects the scholarly community to take him seriously." BRIAN BARRY, *THE LIBERAL THEORY OF JUSTICE* ix (1973). Desiring to be taken seriously, I will therefore briefly address Rawls. I do so even though Rawls likely has little to do with the types of problems I address, those of micro-allocation. Rather, Rawls is concerned with developing just institutions distributing liberty and other primary goods, that is, macro-allocation. See ELSTER, *supra* note 103, at 229; WINSLOW, *supra* note 14, at 121. As Robert Wolff put it: "[The principles of justice as fairness are to] apply to the broad, basic organization or institutional arrangement of a society, not to every baseball team, stamp club, and mom-and-pop grocery store." ROBERT PAUL WOLFF, *UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF A THEORY OF JUSTICE* 77 (1977).

Rawls' vast and complex work really contains three elements: 1) a vision of individuals and society as they should be, 2) a conception of moral theory, 3) a construction that attempts to derive principles expressive of the vision, in accordance with methods that reflect the conception of moral theory. See Thomas Nagel, *Rawls on Justice*, in *READING RAWLS* 1.

Politically, Rawls' work is a theoretical justification for liberal democracy. In it, his substantive doctrine has been characterized as "pure egalitarianism," where the justice of society's institutions is measured, not by their tendency to promote the good [utilitarianism], but from their

ability to counteract inequality from the "natural" and "social lotteries" [hereditary and environmental disadvantage]. See Nagel, *supra*, at 3; see also RAWLS, *supra*, at 136-42. But see Benjamin R. Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, in READING RAWLS 292, 299 (seeing Rawls' primary concern as security, making him conservative, not liberal: "The egalitarianism in which they [Rawls' tendency towards a risk-free "maximin" strategy] issue is purely prudential, a device to ensure that the self-interested man will not be worse off than anyone else."); T.M. Scanlon, *Rawls' Theory of Justice*, in READING RAWLS 169, 194 (Rawls' principle of equalization—the Difference Principle—provides less than full egalitarianism).

The construction that Rawls employs, which is of principal interest in my search for methodology, is a social contract theory, like the contract for a civil society in Locke, Hobbes, and Rousseau. See Norman Daniels, *Introduction*, in READING RAWLS xviii. Rawls' contractors begin in the "Original Position," see RAWLS, *supra*, ch. III, a situation analogous to the "state of nature" in previous liberal contract theories. See Barber, *supra*, at 294. Key to this original position is the "veil of ignorance." See RAWLS, *supra*, at 136-42. Under this veil, the contractors do not know their or anyone's position in the natural and social lotteries. Thus, for all they know, when the veil is lifted, they will be at the bottom rung. Because this prospect is so awful, Rawls believes that these self-interested contractors will be extremely risk-averse, see *id.* at 154, and choose that everyone be guaranteed the maximum minimum ("maximin") of every primary social good. Cf. Ronald Dworkin, *The Original Position*, in READING RAWLS 16, 51 (the right to "equal respect" is not only a primary social good, it is a condition of entry into the original position); Frank I. Michelman, *Constitutional Welfare Rights and A Theory of Justice*, in READING RAWLS 319, 346 (espousing the same view as Dworkin).

Winslow articulates the three principles that Rawls' contractors would develop under the veil of ignorance as follows:

- I. Each person has an equal right to the most extensive liberties compatible with similar liberties for all.
- Iia. Social and economic inequalities are attached to offices and positions open to all under fair equality of opportunity.
- Iib. Social and economic inequalities are arranged so that they achieve the greatest benefit for the least advantaged.

WINSLOW, *supra* note 14, at 116.

Rawls' focus on society's "worse-off" is embodied in Iib on Winslow's list, the so-called "difference principle." Citizens may take advantage of their fortune in the social and natural lotteries so long as they use their advantages for the "greatest benefit to the least advantaged." Inequality is only justified if there are compensating benefits for all, especially the worse-off. RAWLS, *supra*, at 14-15, 60-64, 303. Thus, like previous liberal theoreticians, Rawls attempts to construct a society in which political equality exists simultaneously with economic and social inequality. See Norman Daniels, *Equal Liberty and Unequal Worth of Liberty*, in READING RAWLS 253, 253. But see *id.* at 254 (finding the notion that people can have equal liberty even if economically unequal unrealistic).

Attacks on Rawls' theory have come from a multitude of directions. Rawls is said not to give sufficient attention to class conflict. Richard W. Miller, *Rawls and Marxism*, in READING RAWLS 206. Also his "analysis is insufficiently political as well as egregiously ahistorical." Barber, *supra*, at 309. Others point out that Rawls' extremely risk-averse "maximin" is not the only, or even best, response to decisionmaking in the face of uncertainty. See Barber, *supra*, at 296-98; Hare, *supra*, at 106; Miller, *supra*, at 220. From the utilitarian point of view, Rawls has completely stacked the deck to ensure that the contractors will not choose utilitarianism. Rawls denies his contractors the pool and proportion of general lottery outcomes in the society, as opposed to denying them only their own position, and will not let them resort to the rule of Insufficient Reasons (when you don't know the odds of various outcomes, assume all are equal). See Hare, *supra*, at 101-03. Finally, because the contractors are not permitted to know their own conception of the "good," Rawls has skewed the entire enterprise with a strong individualist

In fact, it is all far more messy.¹¹⁶ Deconstructive possibilities abound. Egalitarianism may be a utilitarian choice if it is most efficient.¹¹⁷ In other words, egalitarianism may be instrumental. The egalitarian construct of "need" is routinely modified by the utilitarian notion of "conservation"¹¹⁸ (that is, don't let one needy person use up

bias, and thus excluded a variety of other types of social arrangements. *See, e.g.,* Milton Fisk, *History and Reason in Rawls' Moral Theory*, in *READING RAWLS* 53, 67 (Rawls' self-interested individualism does not lead to community); Nagel, *supra*, at 9.

Two other ethical theories for distribution appear to proceed from the concept of "entitlement" and, according to at least one author, do not fit neatly into the utilitarianism-egalitarianism split. WINSLOW, *supra* note 14, at 155, 159. These are "merit" and the "right to use one's own resources."

The former concept, merit, has certain definitional problems: Are we to consider accomplishments or just plain hard effort regardless of result? Do we give credit for natural talent? How do we compare moral (Mother Theresa) with non-moral (George Steinbrenner) merit?

The latter, the right to use one's own resources, is concerned with the right to take advantage of our "natural assets." *See* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 225-26 (1974); *see also infra* note 202 and accompanying text for further explication and critique of this theory. With all respect to Winslow's view, both of these offshoots of entitlement would appear to also find philosophical support under rule-utilitarianism in that they tend to reward, and therefore encourage, behavior that particular societies may find desirable.

116. "[L]ocal justice is above all a very messy business." ELSTER, *supra* note 103, at 15.

117. The boundaries between utilitarianism and egalitarianism can quickly become murky in spite of the superficial clarity of the two categorizations. Egalitarianism can be sustained by utilitarianism. If the recipients have equal utility functions with respect to the good (and it has decreasing marginal utility), total utility is maximized by dividing it equally. *Id.* at 70.

Conversely, an egalitarian foundation can be posited for what would otherwise have been assumed to be based in utility.

But, as has already been seen, a difference principle, such as the principle of immediate usefulness, need not be justified simply in terms of a utilitarian calculus. Favoring the "doctor or nurse" may be viewed as a way of improving the prospects for the worst off. *The difference principle, thus, represents an attempt to come as close as possible to equality of treatment in the long run, and not just a means of maximizing utility.* Although in practice the difference principle and an unembellished utilitarian approach may produce identical strategies, they clearly exemplify different perspectives.

WINSLOW, *supra* note 14, at 153 (emphasis added) (footnote omitted); *see also* Robert Baker & Martin Strosberg, *Triage and Equality: An Historical Assessment of Utilitarian Analyses of Triage*, 2 *KENNEDY INST. ETHICS* J. 103, 104 (1992) ("challeng[ing] the standard utilitarian interpretation of triage, and attempt[ing] to demonstrate that in actual wartime and peacetime practice triage is an egalitarian mode of allocation").

118. Winslow describes conservation as a principle giving priority to "those who require proportionately smaller amounts of the resources." WINSLOW, *supra* note 14, at 73. As such, it "suggests maximizing strategies which could be better applied in military and disaster medicine." *Id.* Recognizing that this utilitarian principle may limit the egalitarian principle of "need," Winslow notes, "if greater medical need refers to need for larger amounts of the medical resources, then giving priority to those with greater needs could run counter to the principle of conservation." *Id.* at 95. In fact, focusing on need can result in inequality: "But distribution according to need can be used also to support highly inequalitarian social arrangements. The Australian courts, for example, have used need arguments to justify lower wages for women (their needs are not as great as men's)." Karol E. Soltan, *Survey Article: Empirical Studies of Distributive Justice*, 92 *ETHICS* 673, 682 (1982) (citation omitted).

all of a scarce resource). Rationing programs mix and match.¹¹⁹ Therefore, likelihood of medical success (utilitarian) may put one in the pool eligible for an organ transplant, but a lottery (egalitarian) will determine who from the pool gets the first organ available.¹²⁰

Overall, however, in this volume of work from bioethics and related fields there exists a highly developed set of principles for evolving a practical ethic. As such, this Article considers four central, recurring principles for making rationing decisions as potential tools for developing a rationing regime for defenders in the lower courts. It then analyzes each to determine what guidance each can provide for allocating our scarce resource of focus in the lower criminal courts. The four principles are as follows:

1. Greatest good for the greatest number (utilitarianism)
2. Help those with the greatest need (egalitarianism)
3. Queues, randomness (egalitarianism)
4. Let the market decide (merit)

A. GREATEST GOOD FOR GREATEST NUMBER:¹²¹ WHO GETS THE "GOOD"?

1. Whose "Good"?

a. *Criminal defendant versus the wider society*: If this fundamental utilitarian principle is to have any use in assisting triage in lower court criminal representation, it must first be determined what

119. Actual rationing programs are generally created from a mix of ethical principles. "Convergence among positions appears at certain points. Even those positions that select a single concept such as utility, desert, or equality as the essence of distributive justice do not ignore the importance of the others." Branson, *supra* note 115, at 636; *see also* WINSLOW, *supra* note 14, at 110 (most theories of distributive justice see utilitarianism and egalitarianism as "first principles" and differ in how they prescribe the balance between the two). The various weighing of first principles has been termed "intuitionism." While, in addition to utilitarianism, Rawls perceived intuitionism as a rival to his theory, *see* Feinberg, *supra* note 115, at 108, in fact, Rawls himself cannot escape intuitionism in developing many of his supporting arguments, *see* Hare, *supra* note 115, at 83-84, nor in applying his own theory to a specific ethical situation, civil disobedience. *See* Feinberg, *supra* note 115, at 108, 119-20.

120. Thus Katz and Capron suggest rationing be conducted in a two-phase process: first, narrow the field by relevant medical criteria; second, conduct a lottery within that pool. JAY KATZ & ALEXANDER M. CAPRON, *CATASTROPHIC DISEASES: WHO DECIDES WHAT?* 194 (1975). A similar view can be found in WINSLOW, *supra* note 14, at 32-33; *cf.* Childress, *Rationing of Medical Treatment*, *supra* note 113, at 1415 ("Two different sets of criteria appear to be necessary . . . one set establishes the pool [rules of exclusion] from which the final selections are made according to another set of criteria [rules of final selection].").

121. A good discussion of the utilitarian principle of "greatest good for greatest number" can be found in WINSLOW, *supra* note 14, at 6-21.

population will define the "good" that is to be distributed.¹²² As will be seen, that choice may well influence how one distributes the scarce resource of focus.

On the battlefield, the context for the "greatest number" is culturally obvious. We are interested in the wounded as a group.¹²³ Of course, our interest in these unfortunates is tied to the interests of the greater number of those citizens for whom the wounded fight. But that is the point. In the battlefield or disaster situation, the interests of the injured and those of the wider citizenry are congruent. They are part of us. We are part of them. This, however, is not the case when the group who is to receive our scarce resource, focus, is accused criminal defendants. Since most, but far from all, criminally accused did something illegal, the interests of this pool of individuals seem to differ from those of the broader society on whom they prey.¹²⁴ One might even suspect that members of this latter group might vote to withhold focus altogether.

An initial response could be "so what." The Sixth Amendment has already decided the issue. That amendment equates the interests of the wider society with the zealous representation of the criminally

122. As in many areas of life, what is considered "good" in the criminal justice system will often be a function of where the evaluating constituency is situated:

Finally, we acknowledge that there was one problem that we simply cannot resolve. Evaluation is not possible unless there are agreed upon objectives and goals, yet such an agreement does not exist within the criminal justice system, nor within society. The objectives and goals of indigent defense depend upon whether one is the defendant, the prosecutor, the victim, a member of the county board, or a relatively uninvolved citizen. Defendants will think that a desirable indigent defense is acquittal or the least possible sentence. Victims will likely think otherwise. Prosecutors may think a positive indigent defense system involves speedy disposition. The county board will be concerned mainly with lowering costs.

Holden & Balkin, *supra* note 57, at 553 (citation omitted).

123. Starting with the position that every criminal defendant cannot be given the scarce resource of focus, one could advance the argument that if all can't have it, none should. Such an argument has been advanced in the classic lifeboat situation on the theory that this situation puts those involved into the "last day," when they are no longer individuals but part of a species. See PAUL RAMSEY, *THE PATIENT AS PERSON* 261 (1974). Facing a misdemeanor of course does not place one at the steps of the judgment day. Further, as Winslow noted, it is an intuitively ethical idea that "it is more just to provide a limited good to some people who have rights to it than it is to waste the good for fear that it cannot be provided to all who may have rights to it." WINSLOW, *supra* note 14, at 58.

124. In other words, the general citizenry may have little interest in seeing accused criminals helped out of their difficulties. Cf. H. Tristram Engelhardt, Jr., *Shattuck Lecture—Allocating Scarce Medical Resources and the Availability of Organ Transplantation*, 311 *NEW ENG. J. MED.* 66, 68 (1984) ("In providing a particular set of protections against losses at the social and natural lotteries, societies draw one of the most important societal distinctions—namely, between outcomes that will be socially recognized as unfortunate and unfair and those that will not be socially recognized as unfair, no matter how unfortunate they may be.").

accused. While this response may be correct, it does not resolve our dilemma. We do not guarantee that the poorest citizen will be provided with as skilled an attorney as the wealthiest who has the ability to retain private counsel.¹²⁵ We certainly do not guarantee representation by an attorney with the same caseload as the highest priced private counsel. In short, the Sixth Amendment does not require focus. If it did, literally every lower court criminal system in the country would be constitutionally wanting. In practice, the Sixth Amendment stands as a symbol for the vague notion that representing accused criminals is not a bad thing,¹²⁶ and serves as a check at the most extreme boundaries of attorney competence.¹²⁷ In this latter regard, the core of the Supreme Court's current conception of the Sixth Amendment is to provide an advocate for the indigent defendant to help assure procedural fairness.¹²⁸ But ensuring procedural fairness, and putting forth the extra effort (focus) to get the factually guilty off, are two different things.

On the other hand, one could argue for a piggy-back theory. The Sixth Amendment requires representation. Although this does not require focus, one could argue that the only recipient of "good" that one should consider once this representation has begun is one's client. A defender's allocation of focus to a particular client thus piggybacks on the initial duty of representation. Yet this argument goes too far. It is not true that one is to consider exclusively the good of one's client. The interests of the court and the adversary system preclude a whole range of actions that might inure to the client's benefit.¹²⁹ The

125. Cf. *Griffin v. Illinois*, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (holding that the Fourteenth Amendment does not require absolute equality or precisely equal advantages, nor does it require the state to equalize economic disadvantages).

126. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) (Meritorious Claims and Contentions) ("A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established.")

127. *Strickland v. Washington*, 466 U.S. 668 (1984), provides a wide playing ground for attorney competence. To be found incompetent under *Strickland*, counsel must have fallen below "prevailing professional norms"—with a "presumption that counsel's conduct falls within a wide range of reasonable professional assistance," *id.* at 688-89—and this inadequacy must have resulted in prejudice against the defendant such that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. That is a nearly impossible standard to meet. Clearly, the Supreme Court has left ensuring attorney competence to the profession—state bars, lawyer groups, and the law schools.

128. See *id.* at 686-87. For example, counsel's role is described by the *Strickland* court as ensuring "that the adversarial testing process works to produce a just result under the standards governing decision." *Id.* at 687.

129. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3, Rule 3.4 (counsel cannot lie to the court, put in false information, or fail to provide relevant authority; counsel cannot hinder discovery, suborn perjury, or destroy evidence).

“good” of a potential future victim may even transcend the otherwise sacrosanct attorney-client privilege.¹³⁰

Perhaps a different perspective might assist the analysis. The tension between defendants and the wider society can be narrowed somewhat by establishing that, even if the good is to be that of the wider society, the use of focus is nevertheless desirable. This can be established in the true utilitarian spirit by balancing the goods and harms to the wider society, beginning with the harms. What are the harms from focus? The factually guilty may get off altogether or may receive a lower penalty than would otherwise be the case. What is the harm from that? People in general, and this person in particular, will think they can get away with crimes. This person will be free to commit more crimes, and may even feel encouraged to do so. From a purely rhetorical perspective, this analysis of harm might resonate. From a reality-based one it does not.

First, focus does not guarantee exoneration. It is merely a commitment of mind, a commitment to planning and preparation. The result may only be a somewhat lowered sentence, or even one that is no different than could have been obtained with a less intense defense. After all, there are some cases that are just losers. Second, because most criminal cases involve misdemeanors, the possible fate avoided by a focused defense will not likely be one that would have kept the defendant off the streets for an extended period of time. As will be discussed later, jail time in the lower courts, if given at all, is generally of short duration. Third, though some of those who cycle through the lower criminal courts may believe that they can get away with crimes, this is not because they or a friend happened to receive a good defense their last time through the system. Basically two types of defendants go through the lower court system: street criminals who regularly live outside the law and those who are like most of us at some stage of our lives. The former conduct their lives accumulating long records of car prowls, thefts, possession of drugs, and assaults. The latter group, novices in the criminal system, punched a neighbor, drove while intoxicated, shoplifted a comb, or were hanging around with the wrong bunch.¹³¹

130. Counsel may even report information obtained from a client if done to prevent certain criminal acts. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1); see also Curtis J. Sitomer, *My Client Right or Wrong?—Lawyers May Revise Tradition*, THE CHRISTIAN SCI. MONITOR, Feb. 1, 1983, at 6 (discussing the proposed limits to attorney-client confidentiality).

131. Arguably there is a third group—indigent individuals, marginally heeding society’s laws, who are tempted towards crime but are kept away by their perception of the risk, even with

Those familiar with the system already believe they can usually get away with crimes. Their belief is well-founded. Most crimes are either unreported or undetected.¹³² Arrests rarely follow.¹³³ Cases are often dismissed.¹³⁴ Defendants fail to show up altogether¹³⁵ and are only found if they have the bad fortune to be stopped for something else and have their bench warrant discovered. If they do show up in court, complaining witnesses often do not.¹³⁶ Even if convicted,

knowledge of the limited risk involved. See *infra* notes 132-37 and accompanying text. One may suggest that some indigents, knowing that others have been provided a good defense and thus that they may receive a similar defense should they commit a crime and get caught, will be incrementally encouraged by this knowledge just enough to cross the line. Though this is theoretically possible, it seems highly unrealistic or, at best, likely to push only a very few across the line. This may be different, however, in the hypothetical situation where members of this group know that they would always get focus. In that case, they would be like some of those currently in more organized criminal endeavors who have top quality private attorneys on retainer.

132. See, e.g., CRIMINAL JUSTICE IN CRISIS, *supra* note 7, at 4 (“[O]f the approximately 34 million serious crimes committed against persons or property in the United States in 1986, approximately 31 million never were exposed to arrest, because either they were not reported to the police or if reported, they were not solved by arrests.”); Mitchell, *supra* note 17, at 325 & n.110. The reason most given for not reporting a crime was that “[t]he crime was not important enough to report to the police.” BJS DATA REPORT, *supra* note 17, at 54. “The matter was private or personal” was the principal reason for not reporting violent crimes. *Id.*

133. The rate of solution of reported crimes in New York gives a sense of the relatively small likelihood of getting caught for a single crime: “The police claim to have solved just 24 percent of the 86,000 (ten an hour) reported robberies in New York last year; 10 percent of the 128,000 (15 an hour) burglaries; and 7 percent of the 110,000 (12 an hour) larcenies.” Brill, *supra* note 91, at 124; see also Mitchell, *supra* note 17, at 325 & n.10; cf. CASPER, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 159 (“First, most assume that for any given job they will not get caught, though in the long run they will.”). Interestingly, the arrest rate for those misdemeanors actually reported may be somewhat higher than the felony statistics given above. Many misdemeanors result from direct intervention by the police (driving offenses, substance abuse, prostitution), cases where the defendant and victim know each other (domestic assaults, bar fights), and cases where the defendant has been caught red-handed (shoplifting).

134. Dismissal of cases in the lower courts on the day of trial is quite common from my experience, at least once it is made clear to the prosecutor that the defense will go to trial rather than giving the government “a little something” on a plea. This parallels Feeley’s observations: “If the state’s case is weak, the prosecutor is quite likely to drop the charges—contrary to myth—and in many jurisdictions about as many arrests are disposed of in this manner as are handled through guilty pleas.” Feeley, *supra* note 3, at 461.

135. See *supra* note 97.

136. Whether through forgetfulness, an unwillingness to face the defendant, or a concern about losing a day’s pay, from my experience, prosecution witnesses often do not appear the day of trial. In fact, it is not uncommon for police witnesses to fail to come to court. Some judges in our jurisdiction have a “half hour” rule; if the witnesses the prosecution needs to proceed are not in court within a half hour of the time trial commences, the case will be dismissed. Cf. Don J. DeBenedictis, *ABA Offers Help to Victims of Court Delay*, L.A. DAILY J., July 18, 1986, at 3 (quoting Louisiana District Court Judge Frank Marullo) (“It ‘puts undue strain on people to keep going back to court and being continued’ . . . That in turn ‘really puts a strain on justice and may cause injustice’ if the victims and witnesses finally give up.”). Part of the problem stems

sentences rarely involve extensive jail time, if any.¹³⁷ Thus, even if unlucky enough to get caught, street criminals will quickly be back on the streets. Again, that they received a good defense in a particular case (by being allocated focus) will hardly affect their or their friends' attitudes toward crime. The novices, on the other hand, are horrified with finding themselves in the criminal process, realize that they were lucky to get good representation, and are unlikely to come into that process again. In other words, the harm is minimal.

What, then, is the "good"? As the following sections reveal, there are a number of significant "goods" to balance against these minimal harms. Here, however, the tension between the individual defendant and the wider society reappears. Depending on whether it is the defendant or the wider society that is to be the recipient of the good, what counts as "good" in the balance may vary. For example, the society may see the type of system-protection discussed in Part III.A.1.b. and protection of the innocent discussed in Part III.A.2.b.ii.c. as goods, but not the use of focus to help those facing serious sentences discussed in Part III.A.2.b.ii.b. Those accused of crimes, on the other hand, may find assistance in this latter category a great good. As the discussion in the following sections reveals, the choice of subjects for focus as a result of triage really incorporates the

from witnesses having to give up a day's pay each time they come to court, hire baby-sitters, and other financial constraints.

137. In reality, those defendants who are convicted in the lower courts will serve little, if any, jail time. "Of those convicted on original misdemeanor charges, few end up serving time in jail. The typical outcome is a suspended jail sentence together with probation or a fine." Feeley, *supra* note 3, at 461; *see also* HEUMANN, *supra* note 25, at 42 ("time" in circuit court is a rarity; "time" in superior court is what the system is about). This was confirmed in interviews with the defenders. "It isn't common [to spend more than a weekend, if that] for an offense, until you get a track record of having two or maybe three of that particular type of offense." Public Defender Interview, *supra* note 8.

In discussing punishment in the New York City lower courts, Professor Subin observes:

In 1990 there were some 4,000 jail spaces available for the 119,000 convicted misdemeanants. If all of them had been sentenced to jail, each space would have to have been occupied by thirty different prisoners in a year. This in turn would mean that the average length of incarceration could only have been twelve days. That possible average term was increased in two ways: first, by not sentencing half of the convicted population to jail at all; and second, by sentencing only a small fraction to long terms—7% to six to nine months, for example. But the increase was slight, as the data reveal: the actual average stay possible in 1990 was thirty days.

It would appear, therefore, that the deterrence function of the Court has suffered the same fate as its due process function: by trying to provide some due process in a caseload far beyond its capacity to handle, it ends up providing no process in most. Similarly, by trying to impose some punishment on a convicted population far beyond its capacity to punish, it ended up imposing a significant punishment on very few.

Subin, *supra* note 4, at 12.

concerns of both constituencies, individual defendants and the wider society.

b. *Current clients versus future interests of subsequent clients and the wider society:* The public defender's client pool is never static. A constant stream of new clients or old clients with new cases pours in daily. Most of these cases will only be of interest to the particular defendants and their circle of friends and intimates. Some, however, have broader, systematic significance. These cases are of two types. The first type raises a recurring issue that affects a significant number of clients. Thus, the case may provide the right vehicle to put on a full evidentiary hearing challenging, for example, the admissibility of the portable breath test under *Frye*,¹³⁸ or the legality of speedy trial waivers that are not to a date certain. The second type of case does not raise such obvious system-wide issues, but instead is characterized by one or more of three factors: insufficient evidence, significant overcharging,¹³⁹ or determinative evidentiary or procedural issues.¹⁴⁰ Fighting hard by the defense counsel in such cases carries the system-wide benefit of what this author has in past writings termed "making the screens work."¹⁴¹ The criminal justice system is not so much a truth-finding system as a screening system¹⁴² that protects the public

138. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (articulating the standard for admissibility of novel scientific evidence).

139. Prosecutors commonly overcharge as a bargaining tactic. See Gifford, *supra* note 25, at 43 ("Where there is doubt as to whether the defendant can be convicted on the original charge, it is often because the prosecutor has 'overcharged' to gain additional leverage to induce the defendant to plead to the 'real offense.'").

140. There are cases that the defense attorney can use as a vehicle to educate judges, jurors, and prosecutors about discrimination and difference. I do not choose such cases as a separate category of cases for providing focus because, ironically, such bias and blindness is so widespread in our society and our judicial system that the category would swallow up all the others and make any notion of triage all but meaningless. Rather, I would consider such factors in the category of "concrete injustice." See, e.g., Melissa Evangelos, *Bias in Washington Courts: A Call for Reform*, 16 U. PUGET SOUND L. REV. 741 (1993); Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, XX FORDHAM URBAN L.J. 621, 625 (1993) ("Institutional racism in the criminal justice system is not just a California problem. The United States Sentencing Commission's report on mandatory sentencing found racial disparity in the means by which the sentencing statutes were implemented.").

141. See Mitchell, *supra* note 17, at 298-313; John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission"*, 1 GEO. J. LEGAL ETHICS 339, 347 (1987) [hereinafter Mitchell, *Reasonable Doubts*].

142. Mitchell, *supra* note 17, at 300-301 (footnotes omitted):

In performing this screening process, however, the criminal justice system does not operate primarily as a truth-seeking process in the scientific sense. It is weighted at trial in favor of protecting the innocent, even at the cost of acquitting the guilty. It is weighted on the streets in favor of protecting the individual from intrusion by the state, at the cost of the more efficient methods of crime control that would result if police

from the abuse of executive power by promoting the dual goals of protecting the innocent and keeping government out of people's lives. At each "screen," from the initiation of detention and arrest through trial, the system is geared to sift out the innocent and get government out of people's lives at the earliest possible juncture.¹⁴³ Fighting hard on cases in the above three categories helps make the screens work¹⁴⁴ by holding prosecutors and police accountable for their decisions, and thus benefiting us all.

The problem with all this from the perspective of triage is that whatever focus is brought to one person's case for institutional good will not be available for another current, or soon to be current, client. In fact, some cases concentrating upon systematic change may take more resources than would likely be seen as economically rational by a client facing similar charges who is represented by private counsel.

In some ways this parallels the tension between making the choice whether to use medical resources to serve existing patients, or to enable medical research that will prevent future illnesses.¹⁴⁵ Unlike

could stop, question, and search anyone they desired. In so doing, our process protects two interrelated and overlapping values (or perhaps, more accurately, two aspects of the same value, human freedom)—dignity and autonomy.

The "weighing" of the system to avoid conviction of the innocent reflects the paramount value this society places upon the dignity of the individual, as well as our concern for the value of human autonomy, a concern which makes us reticent to allow government to enter our daily lives either to restrict our freedom or to intrude into our privacy. The "weighing" against police intrusion similarly reflects these two interrelated values.

143. Mitchell, *Reasonable Doubts*, *supra* note 141, at 347:

The ultimate objective of this screening system is to determine who are the proper subjects of criminal sanction. The process goes on continually. Someone notices a window which looks pried open or a suspicious-looking stranger. Neighbor talks to neighbor, and information filters to the police. The police comb the streets gathering information, focusing upon those whose behavior warrants special attention. Those selected by the police for special attention are then placed in the hands of prosecutors, courts, and juries who constantly sift through this "residue" to make final determinations about who is to be subjected to criminal sanction.

The criminal justice system is itself composed of a series of "screens," of which trial is but one. These screens help keep innocents out of the process and, at the same time, limit the intrusion of the state into people's lives. Each of these screens functions to protect the values of human dignity and autonomy, while enforcing our criminal laws. Further, to ensure that the intrusion of the state into the individual's life will be halted at the soonest possible juncture, our system provides a separate screen at each of the several stages of the criminal process. At any screen, the individual may be taken out of the criminal process and returned to society with as little disruption as possible.

144. See generally Mitchell, *supra* note 17, at 303-13 (discussing screening by the police, prosecutor, courts, and jury); Mitchell, *Reasonable Doubts*, *supra* note 141, at 347 (discussing the functioning of the screening system).

145. This problem is analogous to the one faced by those in health care: research vs. immediate care; preventive medicine vs. rescue medicine. See, e.g., BLANK, *supra* note 14, at 121-22 (noting the paradox of liberals frequently supporting preventive medicine, a plainly utilitarian notion, over individual care, an egalitarian one); KATZ & CAPRON, *supra* note 120, at 180 (noting

much medical research, however, the individual criminal client here gets a benefit on his or her current case.¹⁴⁶ Thus, I am not talking about making the system better at the defendant's expense (for example, taking all prostitution cases to trial because the prosecution is asking too much time on its standard plea offer, even though the first wave of defendants will be heavily sentenced).¹⁴⁷ Is that enough to justify this use of focus? After all, while the results may benefit future clients, as well as current clients who will be recidivists, the immediate benefit is to an actual client and flows naturally out of the course of representation. That, however, does not answer the question. Why should this individual's case be given scarce resources, and a disproportionate amount of resources in violation of the utilitarian principle of "conservation," as opposed to giving resources to some other clients' cases?¹⁴⁸

the difficulty in deciding how many present lives we are willing to forgo to save more people in future generations because "we are not particularly adept at weighing future versus present costs and benefits"); Norman Daniels, *Health-Care Needs and Distributive Justice*, 10 *PHIL. & PUB. AFF.* 146, 177 (1981) ("There has been much debate about whether the United States' health-care system overemphasizes acute therapeutic services as opposed to preventive and public health measures Efficacy aside, preventive measures have distinct distributive implications from acute measures. The opportunity approach requires we attend to both.").

Professor Tremblay has taken this debate into the legal aid sector and found that to the extent a legal service office chooses future, yet unspecified, clients over existing ones, "that rebelliousness may need to be imposed upon, rather than chosen by, individual lawyers and clients." Tremblay, *supra* note 14, at 968. Tremblay gives weight to choosing the long-term as part and parcel of what he calls "the rebellious view": "To the extent that the rebellious view privileges the empowerment of clients over their chances of success in the immediate controversy, that stance must also be viewed as one which favors long-term power development over short-term instrumental gain." *Id.* at 959.

146. It should be noted that there does exist a format for medical research in which at least some current patients receive treatment benefits. This format is known as randomized clinical trials ("RCT"). In RCTs, prospective treatments are tested in a blind study in which patients are chosen at random to receive the experimental treatment, or a placebo, or an alternative treatment. See BEAUCHAMP & CHILDRESS, *supra* note 113, at 349-50; ROBERT J. LEVINE, *ETHICS AND REGULATION OF CLINICAL RESEARCH* 185-212 (2d ed. 1986).

147. Contrary to some tactics institutional defenders have employed, I do not propose making the system better by using current defendants to their detriment. See, e.g., Alschuler, *supra* note 12, at 1237, 1250-51 (reporting systematic efforts aimed at changing a judge's sentencing policy or the prosecution's charging policy where the defender took masses of cases or particular categories of cases to trial even though "[t]he relatively few defendants convicted at trial are, of course, likely to receive harsher sentences than they could have secured by pleading guilty").

On the other hand, a defense attorney must always be aware that by bringing focus, and thus fighting hard, the prosecutor may become more personally involved to the detriment of the defendant. See *supra* text accompanying note 109.

148. Cf. Ogletree, *supra* note 9, at 1279 ("To beat the system when the odds are stacked against her, the attorney must pour an inordinate amount of scarce resources into each case. Again, this is time that she could spend representing others." (footnote omitted)).

This Article suggests an answer. The literature castigating the public defender for its institutional posture has already been reviewed. Like it or not, however, the public defender is an institution, an institution interacting with the other institutions that comprise the major components of the criminal justice system, as well as an association of individual defense counsels. It is out of this reality that any usable ethics must sprout.¹⁴⁹ The tendency to place the smooth, administrative functioning of the system above the rights of those put into that system is worthy of our concern. That is the dark side of the public defender's status as an institutional player. The other side is one of enhanced responsibility. As an institutional player, the public defender has a heightened responsibility to maintain the principles of that institution as a *legal* institution. This means ensuring that the system continues to work to protect all, and taking on issues of systematic concern, though it means taking resources from some in order to benefit the system and the wider society.¹⁵⁰ This is an entirely permissible choice for an institutional advocate.¹⁵¹ Therefore, the system should allocate the scarce resource of focus to this category of case.¹⁵²

2. Allocating the "Good" Among Individual Cases

a. *Those cases corresponding to the profile of certain institutional outcomes:*¹⁵³ The previous sections considered allocating the "good" from the perspective of determining the population that would define that good. Moving to the level of the individual defendant, how are

149. See *supra* notes 23, 27.

150. Cf. Alschuler, *supra* note 12, at 1253:

Nevertheless, a lawyer may have a long-range obligation to help build a just legal system This obligation may conflict with the lawyer's duty to serve the immediate interests of his client, and terrifying though it is to betray these interests, perhaps extreme abuses of governmental power sometimes require this action—through such mechanisms as the public defender strike.

151. The area in which the defenders I interviewed felt a particular obligation towards system-protection was in cases where they perceived "police misconduct," generally in resisting arrest or obstruction of justice cases. They were very clear that they were prepared to fight very hard in these cases.

Because I feel like the police are harassing people and I don't think it's right and I don't think they should have any benefit out of it at all. But the irony of it is they probably don't know the case was dismissed. They really don't care. All they wanted to do anyway was arrest the person, throw them in jail and search their car

Public Defender Interview, *supra* note 8.

152. I explain how I would allocate focus *among* and *within* the selected categories of cases in Part III.E.

153. For an example of an analysis that used such institutional outcomes to determine the efficacy of creating a public defender's office, see Benjamin & Pedeliski, *supra* note 28.

we to describe those who will be candidates for our various triage categories from among the pool of defendants being prosecuted in the lower criminal courts? The natural starting point would be to define those who will receive our scarce resource of focus in terms of institutional outcomes. After all, that's how we talk about our performance on a case. "Got an acquittal on all counts." "I couldn't believe it, I got him to go down to the lesser." "They acquitted on the gross misdemeanor and only convicted on the infraction." "We got probation." "I convinced the judge to O.R. her." The criteria for focus would be to provide it in those cases most likely to maximize positive institutional outcomes.

One can imagine a ten-year computer project correlating case factors to attorney time and outcomes along various dimensions of the process (bail, jail time, motions calendared). This correlation would produce a profile of which cases respond, and how they respond, to different levels of effort (with effort assumed to correlate to time spent). It is debatable how useful that document would be. Any skepticism, however, does not have to face the test because no such analysis exists. At present, even an intuitive notion of what would be good overall institutional outcomes in the above sense is not likely to be very helpful when making the constant, case-by-case decisions that triage requires.

Of course, one might suggest that we link individual cases to likely institutional outcomes, choose as our institutional outcomes "acquittal, dismissal, or the lowest sentence possible," and then select those cases for application of focus that are most likely to achieve this outcome. This surely provides a clear guide. Although superficially this method has some appeal, it becomes problematic in reality. With the high volume of cases, triage decisions must be made quickly, with relatively minimal information.¹⁵⁴ For reasons discussed later in this Article, once one selects a case for focus, one must continue to use that resource until the particular case is resolved.¹⁵⁵ Thus, once a defender has put a case in the triage category of focus, the defender

154. Although I believe that as a rule triage decisions must be made quickly at an early stage of the process, I also recognize that we are discussing very mushy, fluid concepts. Thus, if later in the course of representation information should arise that would justify allocating focus had it been known initially, the accompanying resource-shift in light of the new information should be feasible. However, the initial decision not to allocate focus will make it less likely that such information will arise. The converse carries different problems. Once choosing to allocate focus, I would not later abandon it and leave the client to pattern representation. See *infra* notes 197-99 and accompanying text.

155. See *infra* notes 197-99 and accompanying text.

has made the commitment. The cases that appear at the initial stages¹⁵⁶ as most likely to end in acquittal, dismissal, or the lowest sentence will almost always be “easy” cases. As discussed later, these cases rarely require focus and can be brought to successful conclusion with pattern representation. Thus, applying the above definition of institutional outcomes would waste a great deal of focus.

Another guide must be sought.¹⁵⁷ And traditional utilitarian theories of triage are probably not a bad place to start.

b. *Traditional triage theories and the two alternative senses of “good”: maintain manpower or heal the greatest number possible:*

i. *Maintain manpower:* One view of classic battlefield triage is that primary attention should be given to those who can quickly be put back into battle.¹⁵⁸ The overall good for the society is met by making its fighting force as effective as possible. In wars and disasters this view of triage is comprehensible because there are clearly identifiable roles that correlate to the success of the societal venture. In war, there are soldiers. In disasters, such as floods and

156. The timing of this initial quick triage decision may not correspond chronologically to when the client first comes into court. Many lower-court public defenders use a so-called “zone” defense. In this system a different public defender will appear for the client at different stages of the proceeding. Thus, in many defender offices a client will see a different attorney at arraignment, at pretrial, and, if he or she has not pled yet, at trial. At each stage the case will likely be “new” to the attorney. Therefore the significant triage decision may not take place until the case is given to the trial attorney, although this is obviously problematic. From my experience, most cases will plead out at an earlier stage. Accordingly, the initial triage decision should take place at the earliest point reasonably possible, for example, as soon as a defender has met the client and reviewed the police report.

157. Some sense of such desired institutional outcomes could of course be used to assess how a particular approach to triage is working over time; but it does not provide the basis for day-to-day, moment-to-moment decisionmaking unless the outcomes are defined tautologically so as to correspond to the chosen triage categories.

158. In wartime and during natural catastrophes such as earthquakes the utilitarian notion of the greatest good referring to “the preservation of military manpower [and] the maximization of fighting strength” or “priority . . . to those with medical competence, so that their skills could be put to use aiding the others in need” competes with the alternative notion of “saving the lives and limbs of as many casualties as possible.” WINSLOW, *supra* note 14, at 6, 27-28; see also RAMSEY, *supra* note 123, at 257 (the exception for random choice for scarce medical resources takes place where there is a clearly focused social goal such as war); Parsons & Lock, *supra* note 113, at 173 (describing triage as “[c]asualties are sorted according to the severity of their injuries and their fitness to return to battle, maximum effort being expended on those likely to be able to fight again”). Interestingly, when Napoleon’s surgeon, Larrey, conceived of triage he apparently never considered military usefulness as a criteria for setting priorities. WINSLOW, *supra* note 14, at 4; cf. *id.* at 153 (suggesting that saving the “doctor or nurse” first in disaster triage may have an egalitarian basis); Baker & Strosberg, *supra* note 117, at 104 (contending that battlefield triage and the primacy given those most able to quickly return to battle is based on egalitarian, not utilitarian, principles).

earthquakes, there are medical and rescue personnel. But what does this conception of triage mean when we are talking about those accused of crimes in the lower criminal courts?

One could posit that America is in global economic warfare and that we therefore want to allocate our scarce resource of focus in such a way as to return those to the economic battlefield who will make the citizenry strong. Perhaps we can choose those people who currently are most economically productive. This, however, is obviously rife with problems. The pool of indigents accused in the lower courts do not usually include high-tech wizards or business owners. Most are unemployed or only employed part-time. They are indigent. That is why they are being represented by a public defender and not a private attorney of their choice. Even as to the employed, do we choose those currently most productive or those with the most potential? How do we weigh a sixty-year-old at minimum wage against an unemployed nineteen-year-old? Do we look only at income or what the person does to earn income? Also, value to the citizenry cannot be measured in only those roles that directly produce income. Many people are part- or full-time family caretakers. This role frees others to earn direct income and raises the standard of living for future generations. Will we allocate dollar value to this caretaking role in calculating who is to get priority in triage? If not, such caretakers, the majority of whom are women, will often be excluded in triage. Also, if we are focusing on income, will we adjust for the disparity between men's and women's wages for comparable work?

Perhaps we could instead make rough subjective judgments about the relative social worth of the pool of clients and fight for those ranking highest on our scale.¹⁵⁹ Again we will have to decide whether to focus on potential social contribution or past social contribution (although the past may afford a rough measure of future worth). Although this is not a particularly easy task in any case, there will be added difficulties here. The attorney will have very little information about the client and likely only a few minutes of personal contact.¹⁶⁰

159. Whether perceived as past contribution or future potential, social worth has played in the balance of both triage theory and practice. For an extensive discussion and critique of this basis for distributive justice, see WINSLOW, *supra* note 14, at 81-86; Mehlman, *supra* note 20, at 256-66.

160. See, e.g., Casper, *Did You Have a Lawyer?*, *supra* note 7, at 6:

Most of the men spent very little time with their Public Defender. In the court in which they eventually pled guilty, they typically reported spending on the order of five to ten minutes with their Public Defender. These conversations usually took place in the bullpen of the courthouse or in the hallway.

To the extent such information becomes significant to the type of representation a client will receive, and to the extent clients become aware of this, they will have an incentive to provide inaccurate information that casts them as good candidates for focused representation.¹⁶¹ Also, the situation is a bit skewed. The client is accused of a crime and is being processed through the criminal justice system. This is not a context that places a member of society in her best light.

Before discounting making allocation decisions based on assessments of social worth as an intellectual straw man, one should know that in the recent past, life-and-death decisions have been made in just this way. Whether openly referring to individual worth or masking the assessment under criteria such as "suitability" or "likelihood of success,"¹⁶² decisions about who would or would not obtain kidney dialysis were regularly made by medical boards using this standard.¹⁶³

Shumate, *supra* note 96, at 11 ("I was assigned 45 cases for one arraignment calendar When I figured it out, it wound up being 10 minutes per defendant. I had 10 minutes to devote to each one.") (quoting a public defender); cf. Glen Wilkerson, *Public Defenders As Their Clients See Them*, 1 AM. J. CRIM. L. 141, 142 (1972) ("According to the interviews, the most widely shared grievance among defender clients is that defenders do not visit or contact them often enough.").

161. Cf. ELSTER, *supra* note 103, at 127-28 (using exemptions from the draft in the 1960s as an example of how individuals will distort their behavior to comport with a rationing scheme).

162. Social worth may, of course, be masked under the seemingly-neutral criterion of "medical suitability." See, e.g., RENEE C. FOX & JUDITH P. SWAZEY, *THE COURAGE TO FAIL: A SOCIAL VIEW OF ORGAN TRANSPLANTS AND DIALYSIS* 236-37 (2d ed. 1978) (suitability criteria included such interpretively-loaded social factors such as whether the patient would take an active role in self-care, his or her potential for rehabilitation, and his or her ability to deal with stress); TASK FORCE ON ORGAN TRANSPLANTATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *ORGAN TRANSPLANTATION* 90 (April 1986) [hereinafter *ORGAN TRANSPLANTATION*] ("Another controversial criterion for selecting organ transplant recipients is whether the patient has a social network of support."); Mehlman, *supra* note 20, at 267-68. Perhaps James Childress best articulated the situation:

Thus, in general, selection for dialysis and transplantation has not so much been prejudicial *against* the socially disadvantaged as prejudiced *in favor of* those persons who have, in the eyes of those responsible for triage, certain attributes of "survival value" and who coincidentally exhibit the "social values" which lead to controversy.

Childress, *Who Shall Live?*, *supra* note 113, at 155.

163. "Social worth" was a central criterion for decisions about who would be given access to kidney dialysis in some programs. 29% of the centers definitely excluded patients with "poor family environment, 21% indigency, 20% poor employment record." See FOX & SWAZEY, *supra* note 162, at 230 tbl. 5. Further, " 'marital status', 'net worth', 'occupation', and 'past performance and future potential' were the types of social worth criteria that the committee member avowedly considered." *Id.* at 232.

An even more vivid sense of the role of social worth criteria in these life and death decisions comes from the recollections of one board member who made such decisions.

"The choices were hard," Mr. N, a lay member of the committee told us, "and I wasn't happy about some of the decisions I made. For example, I remember voting against a young woman who was a known prostitute. I found I couldn't vote for her, rather than another candidate, a young wife and mother who had proved her responsibility and

That attacking any such criteria is easy should hardly be surprising. It is not the subjectivity alone, because rationing decisions under triage-like conditions of near chaos will invariably involve subjectivity. Rather, the problem is the topic that is the object of this subjectivity. Human worth is as central to our lives as it is personal. Most of our lives are constant struggles for assurance of that worth. Not surprisingly, then, we tend to find worth in those who appear to value what we do. It validates us. We are fascinated with the lifestyles of the rich and famous, but we do not approve. When deciding who would receive dialysis, medical boards tend to choose people like them.¹⁶⁴ Perhaps it is even more than the validation factor. The boards understand these people and share their stories. They could empathize with them, feeling their fear and need.

Similarly, public defenders tend to find worth in those sharing the values of their own ethnicity, class, or gender.¹⁶⁵ It is not that the clients must be from the same gender, ethnic group, or class. That might happen, but it is less important than the congruence of their (superficial) value structure. Neatly dressed, articulate, intelligent, humorous clients will be given priority. Sullen, withdrawn, inarticulate ones will not. The educated, middle-class values the former, not the latter. More importantly, they understand the story and the

worth. I also voted against a young man who had been a ne'er-do-well, a real playboy, until he learned he had renal failure. He promised he would reform his character, go back to school, and so on, if only he were selected for treatment. But I felt I'd lived long enough to know that a person like that won't really do what he was promising at the time."

Id.; see also Kalb & Miller, *supra* note 115, at 2389 ("such social considerations as quality of life, family preferences, and potential contribution to family and society were all important factors in physician treatment decisions").

164. Thus in making decisions about who would be given dialysis the committee tended to choose people like them, the upper middle class. See FOX & SWAZEY, *supra* note 162, at 230-31.

[T]hose making microallocation decisions have a strong tendency to prefer patients with whom they identify; if the decision-makers are well-educated and well-to-do professionals, an allocation system in which the patient's social worth were a factor would be likely to prefer patients with high socio-economic status. Minority groups and the underprivileged might be underrepresented.

Mehlman, *supra* note 20, at 258 (footnote omitted); see also Kelli D. Back, *Rationing Health Care: Naturally Unjust?*, 12 *HAMLIN J. PUB. L. & POL.* 245, 249 (1991) (noting that those making rationing decisions "tend to patients with whom they can identify"); cf. PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, *ALLOCATION OF RESOURCES FOR MEDICAL INTENSIVE CARE, SECURING ACCESS TO HEALTH CARE: THE ETHICAL IMPLICATIONS OF DIFFERENCES IN THE AVAILABILITY OF HEALTH SERVICES* 306 (1983) [hereinafter *SECURING ACCESS TO HEALTH CARE*] (Doctors consciously or unconsciously are influenced by their affinity, or lack thereof, with a patient, including whether the doctor and patient are of the same socio-economic class).

165. Ogletree, *supra* note 9, at 1284 ("Finding similarity between oneself and another certainly makes it easier to empathize.").

humanity of the former. Under the stereotyping forces of brief encounters in the criminal process, the authenticity of differing lives is lost.

Again, attacking a social-worth standard is easy. It so obviously shouts political incorrectness, plainly presenting a mechanism geared to infuse bias and devalue difference.

The problem is that the notion of worth is so powerful. People constantly make decisions on just such a basis. Although none of the defenders this author recently interviewed mentioned this, it is apparent, through discussions with public defenders over the past twenty years and through this author's own observations, that the notion of worth is among the primary bases upon which the decision to fight is made. After all, if one likes someone and can relate to them, it is natural to be their advocate. Furthermore, these personal qualities become intertwined with factors seemingly relevant to the defense:¹⁶⁶ the person is cooperative; they can explain their story to you; they can help in their defense (find witnesses and documents); they understand what the attorney is telling them and can act on it. But, as the song goes, it ain't necessarily so.

Last year this author and a team of students represented a man accused of two assaults. He was physically powerful, minimally educated, and black. The students were slight, white, and educated. The prosecution offered what seemed to be a good deal and things looked bad in the police reports. The students wanted to have the client take the deal and were annoyed at his resistance. In discussions, they clearly thought he was a violent thug who was lucky to get the deal. The client in turn was angry and kept telling the students that they "weren't on his side." He was right. They had hardly even investigated. When they did, the prosecution's case fell apart. More importantly, as they got to know the client, they found him to be a man of great integrity and decency who was trying his best in the violent

166. A similar complexity arises in medicine where certain aspects of what may be seen as "social worth" factors are also rationally related to likelihood of medical success.

In the future, decisions must be made concerning which patients will maximally and optimally benefit from expensive health care technology, yet a watchful person must focus on such decisions to ensure that "social worth" will not be the criterion of final determination. The problem, however, is that, in many respects, social and medical criteria are inextricably intertwined. People of low socioeconomic status are likely to be in poorer health with multiple disease conditions, which, in part, reflects poor nutritional habits, detrimental lifestyle, and the historical lack of resources to obtain proper health care.

Roger W. Evans, *Health Care Technology and the Inevitability of Resource Allocation and Rationing Decisions (Part II)*, 249 JAMA 2208, 2217 (April 22, 1983).

world in which he lived. Without an articulated set of criteria for triage, however, the rapid, subjective takes on social worth that inevitably occur in the chaos of the lower criminal courts will significantly dictate allocation of scarce resources.

ii. "Heal" the greatest number possible:

a. *Focus on those with the greatest chance for "success"*:¹⁶⁷ The second sense of battlefield triage concentrates on those most likely to benefit (rather than those who are worst off).¹⁶⁸ Again, we encounter definitional problems.¹⁶⁹ What is "success" in this context? The most obvious definition in the criminal context is "winning." The definition of winning, however, is less obvious. To one outside the system, an acquittal or a successful determinative motion is winning. The prosecution ends up with zero. To one inside this system, however, winning a particular suppression motion may be all but pro forma, while avoiding jail time for a certain client may be a victory just short of a miracle. In other words, to the defender, winning is contextually relative.¹⁷⁰ One could set up triage to give priority to those cases with the greatest chance of the prosecutor winding

167. Winslow characterizes this utilitarian standby as "the medical success principle." WINSLOW, *supra* note 14, at 63. Technically this principle is articulated as priority given to those for whom treatment has the highest probability of medical success. *Id.* at 63-70.

168. *Cf.* Mehlman, *supra* note 20, at 266 ("The health care professional then must establish a system of patient priorities, which entails a number of hard choices. It is difficult to determine, for example, whether the potential resource should be provided first to the worst-off case, [or] to the patient likely to benefit the most from it . . .").

169. Without intending to take the definitional problem to extreme, legitimate questions nevertheless remain. When talking about those clients most likely to benefit, do we mean those most likely to benefit, or those who if they do benefit, though they may be less likely than some others, will experience the greatest increment of gain? How do you compare a client with a one out of one hundred chance of success, but if successful it will change his or her whole life, with someone with a one out of two chance who will only be marginally benefited? Do we discount the magnitude of benefit by the chance of success? Perhaps this is only a problem if "benefits" include subjective factors about the defendant's life as opposed to just immediate case outcomes.

170. Thus, for example, the authors of the ABA Standards for the Administration of Justice state:

Several experienced defense counsel, including those with long service in the role of public defender, have emphasized that a defense lawyer who feels he must "win"—*i.e.* gain an acquittal—to secure satisfaction from his work is doomed to disappointment. Since he cannot "win" often, he must accept a set of values in which his professional satisfaction lies in mitigating the impact of the charge on his client and making sure his case is fairly heard.

PROSECUTION FUNCTION, *supra* note 22, at 144; *see also* Worden, *supra* note 53, at 410 ("More generally, these measures tend to presume that the quality of counsel rests largely in the ability to get clients off—through acquittal or lenient sentencing—but a broader view of advocacy embraces activities designed to preserve or establish a place for clients in their communities.").

up with zero. That has a nice aesthetic ring to it, but what else recommends it? Imagine two cases. In one case, the prosecution seeks a sentence of a year in jail for communicating with a minor for immoral purposes. In a second case, the prosecution is willing to continue without findings for four months and then dismiss if a minor found with a can of beer stays clean for that period of time. The first case cannot be won at trial, but with focus the defender has a realistic chance of keeping the client out of jail. The second can be won in a jury trial. It is difficult to accept as an ethical system one that chooses the second case over the first. The definition of winning of course can be broadened to account for the contextual relativity of real practice. This, however, does not get one out of the woods. As the previous example indicates, there will be a variety of cases under this broadened banner of winnability, and one must set priorities among them. Clearly, one needs a different principle than winning to rank within that group.

Also, focusing on winning may not lead to the best allocation of focus. This is the same problem we faced when trying to use the institutional outcomes of acquittal, dismissal, or low sentence to guide triage.¹⁷¹ Many winnable cases do not require focus. A quick read of the police reports may well reveal insufficient evidence or a dead-bang suppression motion. In addition, the defender may know from experience that eventually, when the prosecutor has time to really review the case, she will dismiss.¹⁷²

Finally, if one focuses on winning, one inevitably makes social judgments about a client's worth. How will she appear to a judge or

171. See *supra* part III.A.2.a.

172. The likelihood that this may happen is in part a function of the particular office's charging policy. As Feeney and Jackson recognize, different prosecution offices have very different charging policies and philosophies. Feeney & Jackson, *supra* note 25, at 379. Borrowing from the work of JOAN JACOBY, U.S. DEPT. OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, BASIC ISSUES IN PROSECUTION AND PUBLIC DEFENDER PERFORMANCE 24-32 (1982), the author distinguishes six kinds of prosecutorial policies:

(1) a *transfer policy* (no screening; police simply transfer cases to the prosecutor); (2) a *unit policy* (highly decentralized; individual assistant prosecutors make decisions without organizational guidance); (3) a *legal sufficiency policy* (charges are filed if the elements of a crime are present); (4) a *system efficiency policy* (charges are filed if the elements of a crime are present without any obvious problems, emphasizes early dispositions and continuous docket movement); (5) *trial sufficiency policy* (charges are only filed if conviction at trial is very likely); and (6) a *defendant rehabilitation policy* (cases are prosecuted only if a defendant has been found unsuited for rehabilitation or treatment).

Thus, the possibility that the prosecution would routinely dismiss cases once they have time to review the file is significant if they employ the first or second policy, and extremely unlikely if they use the fourth or fifth.

jury? Will the probation officer writing the sentencing report see the client as sincere? In other words, who the client is and how she presents herself will have a significant impact on the outcome. Therefore, triage based on likelihood of success, in the sense of winning, requires up-front assessment of (at least how others perceive) a client's social worth.

One may then wish to define "success" differently. Analogous to success in medical triage, one could look beyond winning and concern oneself with the "patient" not only "surviving," but leading a healthy, fulfilling life.¹⁷³ In the legal context, this principle of triage will be problematic as well. Is the defender to make on-the-spot decisions about the likelihood that the client, though gaining a successful outcome in this case, will be a recidivist and therefore not "successful"? Additionally, the defender must be able to make social judgments both about the individual client's capacity for a fulfilling life and a usable concept for what constitutes such a life. Putting aside the recurrent problems of personal, gender, race, and class bias, this does not seem a task most of us were trained for in law school.

b. *Use the three traditional triage categories:* Traditional medical triage divides patients into three categories: hopeless, serious, and minor.¹⁷⁴ Those who will die regardless of care are left to their fate. Those who can survive without medical care are left until there is time. Those who are serious, but can survive with reasonable care are attended to first. How to apply this three-part model in the nonmedical world of the lower criminal courts, however, is somewhat unclear.

Translating the concept of a "hopeless" medical case to the arena of the criminal courts, one can imagine a case in which no matter how great the effort of the defender, nothing about the outcome can be changed. The problem with this approach, however, is that, although there are certainly cases that turn out this way, the outcome is not obvious at first view of the case, the very time when a triage decision

173. Medical rationing programs have at times considered the likelihood of the patient leading a subsequently healthy life when assessing the likely "success" of a medical procedure. See ORGAN TRANSPLANTATION, *supra* note 162, at 87 ("allocate organs to the recipient who will live the longest with the highest quality of life"). For a good discussion considering the "quality of life" and the importation of social bias, see WINSLOW, *supra* note 14, at 65-67.

174. See definition of triage, *supra* note 38; WINSLOW, *supra* note 14, at 1.

must be made. This is the whole point of focus.¹⁷⁵ With focus, cases initially seeming hopeless often yield good results (especially in the contextually relative sense of winning already discussed).

Distinguishing “minor” from “serious”¹⁷⁶ is likewise not as obvious as one might suppose. What makes a misdemeanor charge serious or not? To be sure, there is the criminal label of misdemeanant, but all defendants will share this label if convicted. Perhaps, however, one could argue that this label is less serious for a recidivist than a first-timer, and less serious for a major than a minor recidivist. After all, the major recidivist already carries the stigma.¹⁷⁷ This analysis is not without problems. The recidivist’s prior record could be a function of social inequity. She might live in a neighborhood where young people get taken to jail for doing the same thing for which young people in other neighborhoods receive a warning from police and a ride home to their parents.¹⁷⁸ Or, perhaps the defender in the prior case pushed the defendant to take a deal. If the defendant took it, she got out of

175. Every practicing defense attorney has had the experience of thinking a case is a dead-bang loser upon first review, but then upon further thought, and perhaps further research and investigation, finds the case quite defensible.

Other lawyers did not rely entirely upon personal ethical sentiments but, in addition, asserted an almost mystic faith in the fairness and accuracy of the trial process. These lawyers denied that their refusal to permit assertedly innocent clients to plead guilty could ever be harmful. “An attorney never knows that he doesn’t have a prayer,” said San Francisco defense attorney William Ferdon. “I’ve seen it happen too many times. The jury says, ‘There is a lot of evidence against this defendant, but we don’t believe it.’ Somehow the jurors sense the truth.” Added Boston’s Irene Bennett, “There may be no objective ground for optimism at the beginning, but I’ve won many apparently hopeless cases. The evidence only *looks* open and shut.”

Alschuler, *supra* note 12, at 1282.

176. The defense bar does seem to maintain some community-sense of what is “serious.” 97% of defenders responding to a survey believed some cases were more important to win than others. 85% rated the seriousness of the offense most important; 59% thought the defendant’s prior record was very important. Feelings about opposing counsel were a relatively unimportant factor. See Lichtenstein, *supra* note 53, at 104-05.

177. On the other hand one can make a plausible argument that a long record makes the criminal label worse because it will be seen as not representing “a single mistake—a moment of bad judgment,” but rather the essential character of the individual. This is complex because it is, from my experience, a function of the constituency who is making the assessment. Defendants with longer records generally respond to the label attending the new crime far less seriously than a first-time offender (“I just can’t have this on my record!”). The wider society however may well view it differently than the recidivist defendant. Which constituency then defines “seriousness” in this context? I opt for the defendant’s perspective for two reasons. Primarily, my concerns as an advocate align with my client’s interests. Second, there is something patronizing about discounting the client’s perception of seriousness under the rationale, “You don’t think this is a big deal, but I know better; I know how others—middle-class others—see this.”

178. See, e.g., Gaynes, *supra* note 140, at 624.

jail and back onto the streets without doing more time. The defendant did not have a support system telling her to fight because a conviction will limit her future options. Or, maybe she would not have a record if the defender had brought focus to the prior case. In that instance, the defendant would be denied focus now merely because it happened that she had not received it in the past.

Concentrating upon the precise crime initially seems more promising. For example, any sex crime convictions could have serious consequences for a defendant's personal and work lives. This was a factor for one defender in assessing the seriousness of a particular case:

He's charged with indecent exposure and communication with a minor for immoral purposes, the allegation being that he was masturbating in front of a young child and then asked the child if she wanted to touch it. So . . . the allegation comes close to being a felony allegation. The prosecutor, no doubt, will be asking for a year in jail on each of the counts.¹⁷⁹

But beyond this most socially unpopular of charges, things get complex. Is it worse for a person in this society to be convicted of theft, driving while intoxicated ("DWI"), or misdemeanor possession of marijuana? This question is difficult to answer in the abstract. It probably depends on where one lives, what one's family is like, and what job one seeks. If one wants a job as a retail cashier, theft will kill you, marijuana hurts, and DWI is probably not a problem unless the employer infers you have an alcohol problem. On the other hand, if you seek a job as a bulldozer operator, DWI will kill you, marijuana hurts, and theft is less of a problem.

As another approach for assessing "seriousness" as a criterion for triage, one could look beyond the crime and the penalty, and concentrate upon the effect conviction will have on the defendant's life. This is certainly a normal way for one to think about the seriousness of a conviction. While little doubt exists that in actual practice this factor affects everyone, it is obviously extremely problematic. Again, problems stem from identifying with clients whose stories reflect values similar to ours. For a white, middle-class defender, the plight of a white male (or any race, really) college senior who has been accepted to medical school and who was caught shoplifting as part of a fraternity scavenger hunt will likely seem far more poignant than an unemployed man of color with a modest criminal record who left high

179. Public Defender Interview, *supra* note 8. Although as one can tell from the quote, it is clear the defender's concern was not only with the criminal label but the possible penalty as well.

school as a junior and now faces the same charge. It is all but impossible for that attorney to unpack the amalgamation of cultural assumptions—each “true” from his own cultural perspective¹⁸⁰—that circumscribe his perception of the two defendants: The college defendant is facing a true crisis; all his hard work is in jeopardy; he may not get to be a doctor; he won’t get to do important work; he’s not a criminal; this was a case of bad judgment, not criminality; this was a prank, not a crime. The young man of color does not face much; he’ll only get a few days (probably time served at that); he’s not going to lose his job; he’s not “going to med school” so this conviction will not affect his future; he got caught stealing; he was not going to do anything particularly significant with his life anyway; all he wants is to get it over with and not do much time; he’s already got a record, so another minor charge adds nothing. Once we permit our inquiry to go beyond the case to the individual defendant in order to decide seriousness, how else could it be?

Looking at punishment offers an alternative for distinguishing “serious” from “minor” that does not require inquiry into the individual. Realistically, the punishment a defendant actually faces (as opposed to maximum exposure in the statute) reflects something that corresponds to our common notion of a serious case. Not surprisingly, the defenders I interviewed felt similarly.

One characteristic would be, how much jail time they want. Obviously if the prosecutor is offering a slap on the wrist and a dismissal at the end of a year, and your client feels he can comply with the conditions to obtain that dismissal, there is going to be less incentive to fight like crazy on that case than there is on a case where they want significant jail time, or a significant amount of restitution.¹⁸¹

180. Seemingly-neutral events or circumstances can be interpreted from multiple and differing perspectives, each “true” from the basis of the perceiver’s cultural assumptions. See, e.g., Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2082 (1989):

Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events. In law, the adoption of some stories rather than others, the acceptance of some accounts as fact and others as falsehood, cannot ever be the result of inattending evidence against the real world to figure out which story is true.

See also Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989) (describing the world as complex and filled with multi-variant voices).

181. Public Defender Interview, *supra* note 8.

Punishment in the lower courts is generally very light with little jail time.¹⁸² Infrequently will a first time offender spend even one night in jail. Still, judges have been known to hand out sentences between six months and one year. Also, some crimes carry mandatory minimum jail sentences, and for some defendants collateral consequences, such as deportation,¹⁸³ can follow. The conceptual problems arise when one thinks about how to factor in recidivism. Naturally the risk of a stiff sentence in a misdemeanor case is greatest for recidivists. But are these the people to whom we want to allocate our scarce resource of focus? After all, the dilemma they face is their "fault," so why should they get first crack at scarce resources?¹⁸⁴

One response to this is that, as we've already seen, recidivism may not always be the defendant's "fault" in the sense that we feel justified in denying her a crack at the scarce resource of focus. Analogous arguments have been raised opposing those who would deny scarce medical resources to those who smoke and get cancer or drink and destroy their lives.¹⁸⁵ However, I would find it problematic if recidivism was directly equated with the "serious punishment" basis for triage so that the longer one's record, the higher one's priority for

182. See *supra* note 137.

183. Aliens who commit crimes of moral turpitude or are convicted of a crime relating to a controlled substance (other than a single offense involving possession for one's own use of thirty grams or less of marijuana) are deportable. See U.S.C. § 1251 (1988). Likewise, an asylum claim can be denied if the alien has been convicted of a "particularly serious crime" while in the United States. See 8 C.F.R. § 208.14(c)(1); *Arauz v. Rivkind*, 845 F.2d 271 (11th Cir. 1988) (stating possession with intent to distribute marijuana is a "particularly serious crime").

184. Other commentators have raised positions in favor of denying scarce medical resources to those thought responsible for their health problems (principally smokers, drinkers, and drug users). See, e.g., Branson, *supra* note 115, at 635 ("Nevertheless, those who develop health needs because they voluntarily engage in activities clearly detrimental to health, such as heavy drinking or smoking or recreational stunt flying, ought to contribute more than others to the cost of their restoration to an equal level of health."); Alvin H. Moss, M.D. & Mark Siegler, M.D., *Should Alcoholics Compete Equally for Liver Transplantation?*, 265 JAMA 1295 (Mar. 13, 1991).

185. See, e.g., Norman Daniels, *Health Care Needs and Distributive Justice*, 10 PHIL. & PUB. AFF. J. 146, 174 (1981):

Should smokers be forced to pay higher insurance premiums or special health-care taxes? I do not believe my account forces us to ignore the source of health-care risks in assigning such burdens. But at this point little more can be said because much here depends on very specific details of social history. In the United States, government subsidies of the tobacco industry, the legality of cigarette advertising, the legality of smoking in public places, and special subculture pressures on key groups (for example, teenagers) all undermine the view that we have clear-cut cases of informed, individual decision-making for which individuals must be held fully accountable.

See also ELSTER, *supra* note 103, at 126-27 (explaining why "moral hazard" theory does not apply to health care situation); cf. *id.* at 240 (explaining unfairness of holding certain large groups responsible for their actions).

the scarce resource. First, to argue, as I did when discussing the seriousness of the criminal label, that recidivism should not preclude someone from this resource (on the ground that the label is not that serious for the recidivist) is different from putting prior wrongdoers (many of whom are at "fault") at the head of the line for the scarce resource.¹⁸⁶ Second, while this Article previously rejected the notion that a good defense does societal harm by making criminals think they can get away with a crime, a case can be made that the result might be different if focus was provided in direct proportion to recidivism. It is hard to believe that alcoholics will feel free to continue their bodily abuse just because they know someday they can get a liver transplant.¹⁸⁷ Street criminals may, however, behave differently. If they knew that their very criminality insured top quality and, quite likely, successful representation if they were caught, I believe they would be somewhat encouraged.

In fact, all this concern is somewhat hypothetical. Recidivism, though surely relevant in some cases, does not bear a one-to-one relationship with sentencing seriousness. The issue is far more complex. A long traffic record will not have much effect on a shoplifting conviction, while a single prior assault will weigh heavily in a current assault case. A domestic violence case leading to hospitalization of the victim, in which the offender has no prior criminal record, will confront the defendant with far stiffer penalties than a defendant with a significant criminal record who has violated some criminal noise ordinance with his boombox. In the balance, because punishment comports with our intuitive sense of seriousness and because it avoids the social-

186. An analogous concern has been raised in the medical field. See *supra* notes 184, 185. In Medicare Program; Criteria for Medicare Coverage of Adult Liver Transplants, 55 Fed. Reg. 8545, 8547 (1990), this issue is confronted:

The decision to include Medicare coverage of transplants for individuals with alcoholic cirrhosis may be considered controversial by some, and we invite public comment on it. . . . [W]e would require that the patient meet the hospital's requirement for abstinence and have documented evidence of sufficient social support important to assure both recovery from alcoholism and compliance with immunosuppressive therapy.

In other words, the alcoholic may have sinned in the past but must now go cold turkey.

187. ELSTER, *supra* note 103, at 126:

It is not clear, however, that these are true cases of moral hazard. The probability that a heavy smoker will one day need *and get* a heart transplant is so small even under the present, nondiscriminating system that a further reduction based on discrimination against smokers would hardly have much motivating power. The incentives may be so weak that even rational individuals would not be swayed by them. Even if I knew that I would not be treated for cancer of the pancreas if the cause could be shown to be excessive intakes of coffee, the chances of getting the illness *and* being successfully treated for it are so small, and the importance of coffee in my life so large, that I would be willing (rationally, I believe) to take the risk. If one wants to modify behavior, a higher tax on cigarettes is probably vastly more efficient.

worth dilemma, sentence-seriousness must be added to systems-protection as categories of cases for focus.

c. *The problem of innocence:* One might suggest that innocence constitutes a particular category of "seriousness" that should be given priority for our scarce resource. In doing so, one must examine both legal and factual innocence¹⁸⁸ and consider whether they compel different moral claims to our scarce resource. Factual innocence comports with the public sense of what it means to be innocent.¹⁸⁹ Legal innocence refers to the procedural inability of the prosecution to carry its burden of proving factual guilt beyond a reasonable doubt. Of the two, factual innocence has the strongest moral claim for our scarce resource. While the factually innocent accused may not be totally pure and blameless in a broader frame (we all have been blamed for getting ourselves in the situation),¹⁹⁰ within the framework of the criminal process, she is. Legal innocence's claim to focus, on the other hand, really rests not on seriousness, but on the system-protecting grounds discussed in Part III.A.1.b. Such a person may well be at fault and, in fact, factually guilty.

Deciding to put the factually innocent among the priority triage categories, however, is far from simple. Even if one places the situation of one who is guilty of a lesser included offense but innocent of the greater offense into the categories of "system-protecting" or "charge/sentence seriousness," and not factual innocence, one still has problems with the concept of factual innocence. It is clear what factual innocence means when discussing a theft crime. The defendant did not take the item, took it by accident, or thought it was hers. Misidentification as a defense to an assault or DWI is the same. But what about a self-defense claim to assault, or a defense that even though defendant had four beers she was not under the influence? In other words, verdicts turning on the "reasonableness" of behavior are not

188. For an exposition on the difference between "legal" and "factual" guilt, see Mitchell, *supra* note 17, at 296 n.12; see also PROSECUTION FUNCTION, *supra* note 22, at 227 ("The lawyer's duty is to determine, from knowledge of all the facts and applicable law, whether the prosecution can establish guilt *in law*, not in some moral sense.").

189. Even though a defendant who claims innocence may nevertheless plead guilty through what is known as an *Alford* plea, some public defense offices and private attorneys would not let their clients enter such a plea if they maintained their (factual) innocence. *North Carolina v. Alford*, 400 U.S. 25 (1970); see Alschluer, *supra* note 12, at 1299-1300.

190. For example, under the criminal law, it is "generally recognized that a defendant can lose [the defense of duress] by his own fault in getting into the difficulty." WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.3, at 437 (2d ed. 1986).

really deciding questions of fact¹⁹¹ (assuming the jury believes the defendant's story). Nevertheless, these variations may all be lumped under factual innocence. Our system treats them this way and it would be intuitively strange to treat a defendant accused of assault who acted in self-defense differently than a factually innocent defendant charged with theft.

That settled, there are still epistemological and practical difficulties. How, realistically, in the short encounters with the minimal information provided, do defenders determine innocence? The answer may be that a defender sees so many cases that the "pattern" of a factually innocent defendant will quickly emerge. Also, acknowledging all the risks of bias already discussed, one does get a sense of people and their credibility when one sees so many witnesses and defendants. Of course, this mass experience may have the opposite effect of creating powerful stereotyping that interferes with the attorney's ability to see the true person.

The practical problem, in turn, is analogous to the one criminal defense attorneys would face if they did not have ethical rules permitting them to represent the factually guilty. Without such rules, defendants might avoid candor—even if they are factually innocent—for fear the attorney would adjudge them guilty and refuse representation.¹⁹² In our case, the attorney would represent the factually guilty but perhaps—depending on other facts such as "seriousness" and system-protecting issues involved—not fight as hard, or in other words, not use focus. Thus, a concern about client candor would likewise arise since almost every client would want her attorney to fight hard and might hesitate to provide any information that would indicate other than factual innocence.

On the other hand, we are not talking about the guarantee of universal representation under the Sixth Amendment. Instead, we are talking about a scarce resource that cannot be made available to all defendants. Given that, why not at least provide it to the factually innocent, the very population who represent the primary concern of the criminal justice system?¹⁹³ Even as a strictly utilitarian principle,

191. See, e.g., Alschuler, *supra* note 12, at 1281 (distinguishing "legal" defenses such as self-defense from others in terms of "defenses that turn[] upon the application of vague legal standards to undisputed facts and those that turn[] upon clear-cut factual disputes").

192. For a discussion of this concept, see Mitchell, *supra* note 17, at 299 n.14(4).

193. Concern for the factually innocent lies at the center of our criminal justice system. "[G]uilt beyond a reasonable doubt represents . . . a standard that seeks to come as close to certainty as human knowledge allows—one that refuses to take a deliberate risk of punishing

it is important to the credibility and support of our system that citizens believe innocents will not be convicted. Moreover, even given the clear risk of bias in the selection process, it intuitively seems wrong to deny priority to those one believes are factually innocent. Thus, protection of the factually innocent must be added to sentence-seriousness and system-protection as categories of cases to receive focus.

B. THOSE WITH THE GREATEST "NEED"¹⁹⁴

In contrast to concentrating on those who have the best chance of a favorable outcome ("success") with access to the scarce resources, this section applies egalitarian concerns and concentrates on those who are worse off. In context, "worse off" seems most equatable with those in the most "serious" predicament. Alternative definitions of "worse off" are certainly possible, but upon examination none are equally satisfactory to equating magnitude of need to "seriousness." For example, we could allocate our scarce resource of focus to those lowest on the social-economic ladder or even below reach of its first rung. Because we start with an indigent population, however, our pool is likely to be too large to be useful. Also, it is not clear why such misfortune should constitute a moral basis for a priority claim in triage, unless perhaps where the client's situation is the result of some social injustice. In such a case, priority in allocation constitutes some rough form of compensation. However, how one is to make this predicate determination in the brief initial attorney-client interactions in lower court is unclear.

Moreover, depending on the political framework employed for this analysis, attorneys must view most of their impoverished clients as victims of an exploitive society, thus again providing too large a pool. Narrowing the inquiry to those whose current predicament in the criminal system is significantly traceable to such social injustice does not aid the analysis. Poverty and crime strongly correlate. Because one can employ a political framework that views much poverty in

any innocent man." Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 388 (1970). "Since some error is inevitable, the common law adversary system deliberately chooses to err on the side of risking acquittal of some who are guilty in order to make near certain that no innocent person will suffer conviction." PROSECUTION FUNCTION, *supra* note 22, at 3; *see also In re Wmship*, 397 U.S. 358, 364 (1972) (proof beyond reasonable doubt applies to both criminal and juvenile delinquency proceedings). *But see Herrera v. Collins*, 113 S. Ct. 853 (1993) (implying that proof of actual innocence may not be sufficient to obtain habeas corpus relief from the death penalty).

194. For a discussion of the egalitarian principle that "priority be given to the medically neediest," *see Winslow, supra* note 14, at 92-95.

industrial society as the product of social injustice, we once more are left with a pool encompassing nearly all the potential recipients of focus. To be sure, there are those who would not accept such a political framework or only accept a significantly-diluted or far less encompassing embodiment of such ideas. Consequently, however, a fatal problem remains, even putting aside the all but insurmountable problem of both obtaining information and then making this complex assessment in the course of a brief interview conducted in the chaos of lower court practice. This basis for rationing would permit a system of triage where decisions would vary depending on the particular attorney's political philosophy. That is a system no one could accept.

Finally, though superficially appealing, if one defines "neediest" or "worse off" in terms of the consequences a criminal charge and its aftermath may have on a particular person's whole life (for example, destruction of a career opportunity, or leaving small children without their primary caretaker for months), one confronts the same problems that we've already discussed when similarly defining "success" in terms of the defendant's whole life.¹⁹⁵ This leaves us with "seriousness" as our guide. The previous analysis of "seriousness" thus covers most of the definitional, policy, and practical dimensions involved in using need as a guidepost.

A focus on those worse off, however, demands some discussion of the utilitarian principle of "conservation." The principle of conservation requires that society allocate scarce resources to those who need proportionately less of the resource. This principle is more of a modifier of other principles than one of independent justifying power. In other words, not allowing a few people to use up all the resources will always be a limiting principle in any system allocating scarce resources. As Professor Tremblay recognized in the civil legal-aid context, legal resources are such that a few or even a single client could tie up the resources of a small office if every imaginable step were taken to the most complete and complex level.¹⁹⁶ My experience in practice and clinical supervision confirms this. It seems almost a principle of legal physics that a case takes up exactly as much time as

195. See *supra* part III.A.2.b.ii.a.

196. See Tremblay, *supra* note 15, at 1115; see also Ogletree, *supra* note 9, at 1279 & n.164 ("the character of the demand for legal services creates a situation in which the demand always rises to meet the supply"); cf. *Scarce Resources in Health Care*, *supra* note 38, at 266 ("All that is known for certain is that an advanced form of Parkinson's law operates. It appears that to whatever extent health care facilities are expanded they will generally still all be used; and at the same time there will remain a steady pool of 'unmet' demands.").

you have available to devote to it plus one extra day that you wish you had.

However, applying the principle of conservation to the scarce resource of focus is a bit complex. Focus at the moment one allocates in triage is really just a commitment to use mental resources. It is therefore not like the decision to dole out some scarce medication or a kidney transplant. Though committed at the moment of triage, the resource may never be used. Much will depend on the prosecutor's response. The very commitment to focus on a case, communicated on whatever level transpires between those who regularly work together, may in fact lead to a decision not to prosecute. On the other hand, the prosecution may be determined to go to trial in which case our judicial system could require large quantities of focus. This leads to an ethical and institutional modifier on the principle of conservation—that is, the duty not to abandon a client. Once you start representing someone with focus, you do not drop back to a lesser, but still Sixth Amendment comporting level of representation, either because the client's case is taking too much focus, or because a better client, in the sense of conservation, walks in the door. The medical ethic precluding abandonment would seem to apply equally to lawyers.¹⁹⁷ An

197. Under the doctrine of abandonment, "once a physician has begun to treat a patient, the physician cannot terminate the relationship without the patient's consent and without being certain that the patient has a reasonable opportunity to continue being adequately cared for by another physician. . . . [This doctrine] reveals a moral concern for the preservation of trust relationships." WINSLOW, *supra* note 14, at 75; cf. Childress, *Rationing of Medical Treatment*, *supra* note 113, at 1418 ("Furthermore, practically all institutions used one form of the 'first come, first treated' rule, for they did not drop patients from dialysis or refuse a second or third transplant merely because a superior patient in terms of social worth appeared."). For further discussion on the ethical/legal principle of abandonment, see NEIL CHAYET, *LEGAL IMPLICATIONS OF EMERGENCY CARE* (1969); Charles Fried, *Rights and Health Care—Beyond Equity and Efficiency*, 243 *NEW ENG. J. MED.* 241, 244 (1975).

Professor Tremblay struggles with the notion of abandonment in the course of performing triage in the legal services context. Tremblay, *supra* note 15, at 1153-55. He analyzes the problem in a factual context similar to our criminal defense situation: existing clients will not suddenly be sent away, implicating a variety of ethical and legal liability issues, but rather "a selected neglect or limitation of service for cases which are less urgent." *Id.* at 1153 & n.179, 1154; see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1, 1.3, 1.16(d). Professor Tremblay then justifies possible abandonment on the grounds both that clients can be told from the start that resources will need to be rationed and priorities may need to be arranged, and that an ABA formal opinion exists indicating that in "extreme cases" it may be permissible for a legal aid office to reprioritize resources. Tremblay, *supra* note 15, at 1154-55 (quoting ABA Comm. on Ethics and Professional Responsibility, Formal Op. 347 (1981)). Assuming "selected neglect or limitation of services" still somehow comports with the Sixth Amendment, for the reasons articulated in the text accompanying this footnote. I nevertheless take issue with Professor Tremblay's position on abandonment, at least in the criminal arena with which I am most familiar.

attorney-client relationship, even between an institutional lawyer and a state-subsidized client, is based on trust. Abandonment betrays this fundamental bond.

Even if this concept of trust appears to be grounded on a narrative of the mythical attorney with a single client, and thus has no resonance with the realities of indigent defense where attorneys often see their clients for less than ten minutes, the initial decision to allocate focus changes this in a number of respects. Once attorneys bring focus they have changed not only their approach to the case but as a natural byproduct their relationship to the client and even the boundaries of their role. They much more assume the form of the cultural archetype of the defense attorney. Further, once bringing focus, the attorney changes the entire way the case is handled. Attorneys bring motions with written points and authorities, judges set evidentiary hearings, and both sides aggressively pursue creative discovery. The entire case strategy is based upon the existence of continuing focus. If an attorney decides to withdraw focus mid-representation, the client is not put back to where he or she would have been had the initial triage decision been made otherwise. The client may in fact be worse off since she is now caught in limbo where the attorney has set in motion a case strategy dependent on focus, possibly even raising the stakes as the prosecution also becomes centered on the case. But the client is suddenly without the very resource necessary for protection in this intensified adversarial scenario.¹⁹⁸ Institutionally, moreover, abandoning effort midway in the enterprise sends a message to the prosecution and courts that they are not to take seriously the attorney's nonroutine, representationally-aggressive moves because the attorney may not follow through.¹⁹⁹ This is not a message that an institutional advocate wants to send and certainly does not benefit future clients and system-protecting advocacy.

198. I am therefore rejecting the possibility of abandonment once one allocates focus because of resulting harm to the client, not because of some notion of "breach of promise." In this latter regard I do not imagine the need or desire to tell a client that she will be benefitted by allocation of the scarce (and vague) resource of focus.

199. As should be clear, from my experience I believe "that a prosecutor will notice plainly that you have abandoned focus, which will make this case even worse off than had you done pattern from the beginning, and/or your future focus threats will be devalued." Correspondence from Professor Paul Tremblay (Oct. 12, 1993) [hereinafter Tremblay Correspondence] (on file with the author).

C. THE QUEUE AND RANDOM SELECTION

One might wonder why we don't avoid all of the previous definitional complexities and find refuge in the favorite of many egalitarian philosophers, the queue or the lottery.²⁰⁰ Superficially, if one decides who gets some scarce resources based on their place in line or the number they draw in some lottery, one avoids the social bias inherent in selections based upon the individual's value. First-come, first-served also has other positive attributes. It shows intensity of interest and the importance an individual attaches to receiving a certain resource.²⁰¹ One only need conjure images of young people camping overnight on the sidewalks beside a ticket window to ensure that they will get tickets for their favorite band's upcoming concert. Moreover, we accept as fair that those ahead of us in line get their tickets before us. Of course it may not really be so neutral and fair. Being first in line may also show superior information, knowledge, and access. As such, it may mask a process that is biased in favor of the more educated, connected, or mobile.²⁰² For that reason, some favor lotteries over lines when allocating scarce resources.

However, this problem does not seem a serious one when allocating defender resources in the lower criminal courts. The judicial system informs criminal defendants about their right to a public defender. It is true that recidivists and the more knowledgeable about the system may go to the defender's office prior to arraignment, but this will not give them any real advantage. Waiting for focus is not like waiting in line for the first available kidney. Rather, focus will become available randomly in the form of "openings" in an individual attorney's work cycle when the attorney has sufficient time resources to allocate focus to a case. Clients on the other hand are involuntary participants in the criminal process. That process has its own time

200. Queues or lotteries have been widely considered as mechanisms for equitable rationing of scarce resources. See, e.g., WINSLOW, *supra* note 14, at 98-101 ("[p]riority given to those who arrive first"); *id.* at 101-05 ("[p]riority given to those selected by chance"); Childress, *Rationing of Medical Treatment*, *supra* note 113, at 1417 ("If, on the other hand, 'hard' cases are the model for the system, random choice, a lottery, or 'first come, first treated' may be preferred.").

201. See generally ELSTER, *supra* note 103, at 74 (discussing advantages of queuing).

202. An analogous problem arises with the notion of attempting to distribute scarce medical resources by a queuing system. "Those with sufficient means—wealth, power, information, contacts, confidence to enter the system, and so forth—would clearly have the competitive advantages." WINSLOW, *supra* note 14, at 146; cf. Mechanic, *supra* note 104, at 66 (discussing "implicit rationing" in medicine—the more knowledgeable, more aggressive, and more demanding patients get more service; and these patients are usually the more educated, the more sophisticated, and less needy).

frames that it imposes on the client's case. In other words, the client cannot say, "Oh, there's no focus available at this point; that's all right, I'll just wait until some is available." Like a field hospital, one must make the triage decision on the spot.

Therefore, if one is to use chance as the means for allocating focus it will have to be through the mechanism of randomness. Randomness, however, brings some real difficulties with it. Professor Luban has addressed how society can allocate attorney resources in the civil legal-aid context. Assessing queuing or random systems for allocation of effort, he understandably finds it irrational that such a system could give priority to scarce resources; for example, a dispute about the repair of a dryer over a threatened sterilization.²⁰³ Misdemeanor cases do not generally offer such a moral chasm separating the consequences of two cases. The statutory penalties and actual consequences generally differ within only a relatively small range, yet there are cases which realistically carry more or less serious punitive consequences. Thus, although we have had assault cases in the clinic where the prosecution was willing to agree to deferred findings with eventual dismissal if the defendant enrolled in anger-management counseling, we have also had assault cases where the prosecutor was prepared to seek consecutive one-year terms if the defendant was convicted. Similarly, there are cases that reflect systematic inequities and those in which the defendant is factually innocent. All of these are cases which rationally deserve more attention than those not incorporating such features. However, a randomness system of triage would only give them focus by chance.

More significantly, allocation by lottery does not really seem to fit the type of resource that our concept of focus embodies. Focus is not some tangible medical procedure or commodity; rather, it is a commitment of mind and as such it is not always clear how much one has or how much one will be using. Without concrete, case-specific criteria it would be extremely difficult to know when a sufficient supply of focus has emerged so as to be able to choose the winners of this lottery.

203. Professor Luban dramatically articulates this concept:

The effect of a lottery, or first-come-first-serve too, for that matter, is precisely to break the link of legal aid with human projects and values. A woman faced with court-sanctioned sterilization needs a lawyer fast, and more desperately than does her neighbor who wants to make Montgomery Ward honor the warranty on her dryer; the lottery, however, simply puts both their names in the hat. It disconnects their demands for legal aid from their needs for legal aid, and thus abdicates the very judgment on which the importance of legal aid rests.

D. THE MARKET PLACE

In an economic sense, each defense is a lost opportunity cost. Whenever the system gives to one defendant, less is available for another. Thus, the total pool of defender resources is a fixed commodity. Why not let individual defendants bid for focus?

The ethical basis for this is not without controversy, at least when applied to lifesaving medical technologies.²⁰⁴ Put simply, the argument is that if you acquire your wealth legitimately and don't spend it to hurt anyone, you are ethically entitled to do with it as you please.²⁰⁵ The bidding alternative is interesting, setting aside "source" of wealth problems²⁰⁶ with some defendants and the fact that one could say that taking vital resources from another "hurts" them.²⁰⁷ Bidding certainly avoids definitional problems or perhaps provides a metadefinition: paying equals entitlement. Moreover, unlike with kidneys, we have no problem with permitting the wealthiest to bid for focus. We call it hiring the best private defense attorney money can buy. However, the challenge is how to apply this in a public-defender Sixth-Amendment-regime context.

Right at the start there is an obvious problem: those who go to the public defender are indigent. They have no money; that's why they haven't hired private attorneys. Of course, that's not strictly true, because in order to qualify for defender services you don't need to be literally penniless. Most indigent defendants have some money

204. Robert Nozick's book reposes as a statement of libertarian thought, including the right to sell one's body parts. NOZICK, *supra* note 115. He is not, however, without his critics. See, e.g., ELSTER, *supra* note 103, at 230-36; Branson, *supra* note 115, at 632-33; G. A. Cohen, *Are Freedom and Equality Incompatible?*, in ALTERNATIVES TO CAPITALISM 113, 117 (Jon Elster & Karl Moene eds., 1989) (attacking Nozick by demonstrating the possibility, on Nozick's terms, of uniting self-ownership of one's personal capacities with equality of worldly resources and corresponding equality of conditions; in this regard, the author specifically questions Nozick's assumption that at some point, far distant in time, all resources were ownerless, positing instead mutual ownership).

205. Elster essentially characterizes Nozick's philosophy of distributive justice as a sophisticated form of "finders-keepers." ELSTER, *supra* note 103, at 230. For Nozick, resources obtained through a just original appropriation (justice in appropriation), distributed through a chain of just (uncoerced) transfers (justice in transfer) may be used as the possessor wishes. If the journey of this resource is not just, the offending links must be replaced and the distribution that results (justice in rectification) is the legitimate one. See Nozick, *supra* note 115.

206. The "source" of wealth being that they *stole* their money.

207. For an attack on each of Nozick's premises, see citations *supra* note 204.

if only public assistance. So why not hold a weekly auction for society's scarce resource?²⁰⁸

Of course, by definition the indigent cannot pay what focused representation would cost in the private market and thus cannot pay what the resource is "worth." However, their bidding might show an intensity of preference, revealing those to whom focused representation is most important, and inferentially, those to whom the situation is most "serious." Society thus could define the most important cases by evaluating the importance to the individuals as evidenced by their bids. However, one wonders if there is a sufficient dollar spread (that is, spectrum of wealth) to make this coherent. Also, this may only demonstrate who has friends or relatives with a few spare dollars and not truly those individuals who are most invested in their cases.

One could avoid these problems by creating a market not dependent on dollar wealth.²⁰⁹ Defendants could bid in the form of willingness to do public service tasks (presumably tasks could be found for those in jail who can't make bail). Not wishing to be cynical, enforcement of the bid nevertheless may become an issue.

More broadly, a number of problems appear if society permits bidding for focus regardless of the nature of the market.²¹⁰ Systematically important cases present an initial difficulty because these cases can absorb more resources than an individual case would be "worth" in the private market. If the defender office "subsidizes" these cases it

208. If we were to permit such an auction, what, in economic terms, would the defendants be bidding for? Likely, it would be the value of incrementally reducing the risk of conviction or serious sentence. Cf. J. Steven Landefeld, Ph.D. & Eugene P. Seskin, Ph.D., *The Economic Value of Life, Linking Theory to Practice*, 72 AM. J. PUB. HEALTH 555, 555 (1972) (the measure of value of risk to human life is the willingness to pay for small changes in probability of survival).

209. In fact, the creation of a separate market has been proposed for the distribution of scarce health resources. See KATZ & CAPRON, *supra* note 120, at 185:

Rather than having individuals bid for the limited number of treatment slots available, an alternative market system would extend the right to each person for a portion of the treatment, the size of the portion calculated so that the number of options would use up, but not exceed, treatment capacity.

210. One question that might arise is whether the defendants will bid for focus from some public defender, or will also bid for the particular attorney from among those who have a supply of focus available. While the latter is plainly rational—we all know some attorneys are better than others, although there is some question about the accuracy and source of consumer information on this point that will be available to the bidders—it may be a source of divisiveness in the defender office and undermines the myth of "presumed competency," MCINTYRE, *supra* note 8, at 115-17, and its close relation, what I call the myth of "unitary service" (that all defenders are interchangeable). This latter myth is important. It rationalizes the common form of organizational staffing known as "zone defense"; each defender has a station, but a defendant may move through many stations and therefore have a series of brief interactions with several

can alleviate this problem, but more serious problems remain. What a defendant would bid for is focus, not time. Focus may result in more time being spent, although the marginal increase is likely indeterminable. In a sense the bid would be similar to providing an unrefundable retainer. The fact one buys focus does not mean it will be brought to bear because a judge may dismiss the case at the arraignment.

Further, bidding involves some serious legal and practical institutional problems. Although this Article has maintained throughout that the Sixth Amendment does not provide guidance to a system of triage, lower criminal courts still operate within the boundaries of the Sixth Amendment, and if we permit bidding, some people within that regime will be getting attorneys willing to "try harder" simply because these defendants have slipped the defender office a few extra bucks. This is different than sliding-scale payments or seeking recoupment for services.²¹¹ Those instances maintain the myth of unitary service; that all representation is equivalent.²¹² In fact the system has a great investment in this myth; for instance, the Supreme Court's overwhelming presumption in *Strickland* that all attorneys do a reasonably good job.²¹³ It seems unlikely that the Court would permit the institution to acknowledge differing tiers of legal representation for indigents, let alone state that they are for sale.²¹⁴

defenders. See Alschuler, *supra* note 12, at 1242-43. It diminishes the likelihood that defendants, who already likely feel a bit unlucky and mistrustful of their attorney will further feel dissatisfaction because of the particular attorney they did or didn't draw.

211. For a discussion of partial payments by the "marginally indigent," see *Indigent Defense Costs Can Be Cut, NIJ Report Says*, 18 CRIM. JUST. NEWSL. 5 (1987); ROBERT SPANGENBERG ET AL., CONTAINING THE COSTS OF INDIGENT DEFENSE PROGRAMS: ELIGIBILITY SCREENING AND COST RECOVERY PROCEDURES (1986).

212. See MCINTYRE, *supra* note 8, at 115-17.

213. "Because of the difficulties inherent in making the evaluation, a court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . ." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

214. One can imagine an equal protection argument based on a claim of impediment to equal access to the system due to disparity in wealth (that is, the contrasting plights of those who can pay for focus and those who cannot). See generally *Griffen v. Illinois*, 351 U.S. 12 (1956) (equal protection and due process require that the indigent be afforded transcripts for appeal); *Douglas v. California*, 372 U.S. 353 (1963) (the *Griffen* principle requires appointment of appellate counsel for the indigent). This principle, however, is not unlimited. The Fourteenth Amendment does not require absolute equality or precisely equal advantages nor does it require the state to equalize economic conditions: "A man of means may be able to afford the retention of an expensive, able counsel not within reach of a poor man's purse." *Griffen*, 351 U.S. at 23 (Frankfurter, J., concurring); see also *Ross v. Moffit*, 417 U.S. 600, 617 (1974) (finding no right under equal protection or due process for appointed counsel to aid the indigent in obtaining discretionary review to the state supreme court). Plainly, no court is prepared to hold that indigent defendants are constitutionally entitled to representation comparable to what private money can buy. But this situation is somewhat different. Here all indigent defendants are

There is also a practical-institutional side to this. Studies have shown that defendants have more confidence in private lawyers than public defenders because they pay the former.²¹⁵ This appears to result from a combination of our general market orientation that you get what you pay for and the sense that the attorney is “yours” and not the system’s. To allow bidding would create two tiers of representation within the defender office. Although those paying would likely feel better about their attorney,²¹⁶ those not—who may even be represented by the same attorney, because the office is not likely to have a separate “focus division”—will likely *really* mistrust their attorney. Surely under any triage system there will be different tiers of representation. That is the whole point of triage. However, the process will be more fluid and subtle so as to not define the tiers publicly from the inception as bidding would.

Lest the reader look at this section as frolic through intellectual wonderland, there is an irony. Clients “bid” a commodity that can be characterized as “personal interest.” In some real sense, the strength of this “interest” provides defenders with a mechanism for guiding their triage decisions that is as significant to the allocation process as affinity with the client, seriousness of likely punishment, and existence of serious police misconduct.

To tell the truth, I’m going to tend to give the most attention to the clients who demand it . . . call me, keep coming by. . . .

Those who keep pushing on their cases get the most attention. I don’t know if that’s right, but they’re also the ones who you can count on coming up with witnesses.²¹⁷

placed in a single representational system functioning outside of the market. It is not clear then how a court would view allowing some within that system to use the economic disparity that exists even within the indigent world to “buy” a substantially better defense.

215. Interviews with criminal defendants consistently reveal that they have more confidence in private defense counsel than public defenders because, in large part, the former are paid by the client. Encapsulated within this feeling appears to be the dual notions that you get what you pay for in a market economy, and a private attorney is “yours,” while a defender is “theirs” (loyal to the system that pays her). See *supra* note 10; CASPER, CRIMINAL COURTS, *supra* note 1, at 18; CASPER, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 113; Wheeler & Wheeler, *supra* note 57, at 329.

216. As has already been discussed, defendants often do not show up for court. See *supra* note 97 and accompanying text. It is the author’s belief, however, supported by observations in practice and experience in a law clinic, that this is far less likely to occur with representation characterized by focus. A relationship in which the client knows the attorney is committed to fighting will tend to involve the client and the client’s cooperation.

217. Public Defender Interview, *supra* note 8.

This is the ethics of the squeaky wheel. Those who most bug their attorneys by calling constantly, or writing messages about their cases, get the most attention. This is completely rational from a representational as well as a personal perspective (“If I don’t deal with this case, this client will drive me crazy”). This client effort demonstrates the importance of the case to the defendant and therefore provides circumstantial evidence of the “seriousness.” It also enhances the likelihood that the defender’s efforts will lead to “success,” because as I’ve discussed in another context it indicates that the defendant will probably show up (again, not as common an occurrence in the lower courts as one would imagine), cooperate, locate necessary documents, and witnesses.

Yet this client-initiated effort system of triage may only reflect the client’s personality, including mental disturbance, and education. It may merely identify those clients confident in pushing the people “working for” them and those most sophisticated in the system rather than reflecting the importance of this case relative to others. It will not give any account to systematic issues. Most importantly, it will again leave behind those our governmental institution has subordinated so much that they expect nothing and would therefore not take the trouble to ask.

E. MAKING THE CHOICE WHERE TO ALLOCATE FOCUS

I propose two specific categories and a third catch-all category to guide triage in the allocation of focus. The rationales that justify this system will be evident from the previous discussions. Priority would go to “seriousness”: first to the factually innocent and then to those facing extreme sentences or collateral legal consequences. These comport with areas that most would believe merit primary attention and do not require making judgments about individual social worth. Although I recognize that particular labels can by themselves have devastating consequences (for example, any sex crime in today’s society), the contextually-dependent nature of each label’s impact is so significant that I propose to leave such possibilities to the catch-all category.

Next would be those cases implicating system protection: “social good,” systematic injustice, and “making the screens work” (legally insufficient evidence, determinative evidentiary or procedural issues, clear overcharging). This comports with the institutional advocate’s

responsibility for maintaining the system and remedying systematic problems.²¹⁸

Defenders could realistically apply these categories within the chaos in which they regularly function.²¹⁹ As discussed in Part IV, this is because they get very good at making quick assessments of cases, seeing general patterns, and evaluating how a particular prosecutor, judge, and jury will likely treat a particular case in their particular legal community. Also, although I recognize that the categories are not scientifically precise, I do not find that a serious deficiency. Professor Tremblay stated the position well in recent correspondence:

218. Like those focusing on rationing scarce medical resources, I have developed a "hierarchy" within which to conduct triage. Cf. Pellegrino, *supra* note 106, at 39-40 (placing highest priority on broader functions). One might fairly question the ranking. Why, for example, did I put those situations in category one before those I placed in category two? Placing individual case situations ahead of broader, system-protecting functions was based on my belief that, though the defender bears responsibility for the system, *see supra* note 150, ultimately the defense system is about individual representation under the Sixth Amendment. Once establishing this hierarchy, the defender may not even be able to deal with all of category one with the available resources. How then does one rank *among* a pool of clients that fall within a particular category? I imagine a mix of factors: principally "first come, first served" with a touch of third category factors like "concrete injustice." Finally, the literature indicating that felony defenders determine whether or not to take a case to trial based on the two-variable matrix of "dead-bang" vs. "reasonable doubt" cases and "light consequences" vs. "serious" ones does not affect my hierarchy. *See* Lynn Mather, *Some Determinants of the Method of Case Disposition: Decision-making by Public Defenders in Los Angeles*, 8 *LAW & SOC'Y REV.* 187 (1973). My concern is where to bring focus, not whether that focus should be directed at trial or sentencing.

219. How would my hierarchy fare under RAWLS, *supra* note 115? Again, while Rawls' theory was meant to apply to macro-, not micro-allocation decisions, *see supra* note 115, at least one author has attempted to apply it to triage. *See* WINSLOW, *supra* note 14, at 124. I will, therefore, make a similar attempt. Focusing on the possibility that they may find themselves in the worse-off position (facing criminal charges in the lower courts without resources to hire private counsel), the contractors behind the Veil of Ignorance would likely concur with the first level of my proposed hierarchy and want the scarce resource of focus if they were either factually innocent or facing serious legal consequences. The issue would arise as to the second level, system-protecting cases. While some see Rawls as underlain by the "ideal of social cooperation," Rawls' individualist philosophy, like the libertarian Nozick, does not involve a conception of community. *See* Scanlon, *supra* note 115, at 171, 198; *see also* Callahan, *supra* note 113, at 18 ("most prominent theories of justice in medical ethics and elsewhere . . . are themselves rooted in individual self-interest"); Fisk, *supra* note 115, at 67 ("institutions are 'good in themselves' because they interfere least with the realization of self interest"). The contractors will not choose to put scarce resources into this area unless it benefits their individual self-interest. Such a conception is possible, however, if the contractors perceive system-protection as potentially benefiting them either by keeping them out of the system in the first place (making the screens work) or leading to substantive/procedural changes of which they will be beneficiaries should they have the misfortune to be defendants in the system. Cf. WINSLOW, *supra* note 14, at 140-42 (examining how, under Rawls, contractors would accept utilitarian-like principles of disaster triage).

[A]ll of these judgment calls (and, importantly, *all* of the de facto allocations which by necessity happen every day in court now) can only be made by humans trying their best to be correct. There is never a test to see whether one is right; it is a pure honor system; and it is (almost) entirely and (almost) irrevocably unreviewable. But it is important to inform the decisionmaking of the PD on the front line If the categories are at bottom unknowable, that is critical to consider. But if the categories are mushy and subject to misinterpretation, that is not necessarily a serious objection.²²⁰

The third category could move a case's priority for access to focus anywhere among the first two categories, except never above those who are factually innocent. This is an undefined category that I will call "concrete injustice." It gives the attorney the opportunity to bring focus to cases that touch the heart and gut. The circumstances of life are complex, and somewhere along the way we've all encountered cases that just should be fought. Perhaps it is someone with a past record who is trying hard to clean up her life and now finds she has a baby coming. Plainly this category is hugely bound to the values and culture of the individual attorney. However, that is acceptable so long as two conditions are fulfilled. First, use of this category is rare and does not become so frequent as to take its place with the other two. Second, the attorney continues to sincerely examine and question her cultural biases. The point is that somewhere along the line we each must act on our values, even at the risk of bias.²²¹ We have an ethical duty to use our skills and our legal monopoly for the good.²²² We have an ethical right to use our skills and abilities to fulfill ourselves as

220. Tremblay Correspondence, *supra* note 199.

221. Clearly, the notion of individual bias has been perceived in present society as a buzz word for a failure of character. While that may be so in certain instances, it is not always so when we view some of these "biases" as mechanisms for making personal judgments about our experience. As Richard Shweder put it,

My friend, the literary critic, Anatole Broyard used to tell his writing students, "Hang on to your prejudices, they are the only taste you have got." Almost everyone in the academy these days has heard of the continental dictum that it is our prejudices that makes it possible for us to see, which means that in thinking, as in life, if you do not fix a starting point you'll never get started. Broyard, who sensed our postmodern predicament and knew how to express it with grace and wit, formulated the aphorism this way: "Paranoids are the only ones who notice things anymore." Nietzsche-like he understood that any prejudice is better than no prejudice at all, and that in a postmodern world of cable television and metaphysical jet lag, the best one can do is stay on the move, keeping your options for prejudice open while developing some sensibility or at least some good sense.

Richard Shweder, *The Authority of Voice*, 37 N.Y.L. SCH. L. REV. 251, 257 (1992) (footnotes omitted).

222. See generally MODEL RULES OF PROFESSIONAL CONDUCT pmbl. Cf. *id.* at Rule 6.1 (Pro Bono Public Service).

good people.²²³ Also, there is a moral power to the plight of specific as opposed to statistical lives that cannot be ignored.²²⁴ Why else will we spend unlimited human and material resources to save a child who has fallen in a well, but balk at spending a fraction of that on some program of preventive medicine that could save dozens of unidentified lives?

Over time, use of this system will likely result in some alteration of the landscape in which the system operates. Legal-insufficiency cases and most factual-innocence ones will drop out as prosecutors begin to respond to defenders' willingness to push those cases and their general success when they do. This in turn may well lead the prosecutor to more carefully screen cases at the inception and not even charge such cases in the first place, as well as not overcharge.²²⁵ Aside from the occasional concrete injustice case, that will leave only "system-protection" and sentence "seriousness," which is just where the advocates should fight.

IV. THE NATURE AND APPLICATION OF PATTERN REPRESENTATION AND FOCUS

Within a Sixth Amendment regime, the legitimacy and efficacy of the proposed system of triage is dependent upon two conditions. First, the full range of triage choices must comport with the Sixth

223. Cf. Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236, 268 (1977) (core concept of privacy composed of autonomy, intimacy, identity); Note, *Towards a Constitutional Theory of Individuality: The Privacy Opinions of Justice Douglas*, 87 YALE L.J. 1579 (1978) (finding that the right to privacy is one manifestation of the "principle of individuality"). In grasping for some notion of "personhood" in the constitutional design Lawrence Tribe observes:

But the Constitution's is not a totalitarian design, depending for its success upon the homogenization or depersonalization of humanity. The judiciary has thus reached into the Constitution's spirit and structure, and has elaborated from the spare text an idea of the 'human' and a conception of 'being' not merely contemplated but required.

LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-3, at 1308 (1988); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) (recognizing the "ability independently to define one's identity that is central to any concept of liberty"); cf. RAWLS, *supra* note 115, at 84 (contractors would insist on equality of opportunity to favored positions in part because they would desire opportunity for self-realization that such positions offer).

224. This powerful appeal of identifiable versus statistical lives that we have all felt when clinging to a newscast describing a dramatic rescue of some young child is, not surprisingly, acknowledged throughout the ethical literature on rationing. See, e.g., *SECURING ACCESS TO HEALTH CARE*, *supra* note 164, at 356; Evans, *supra* note 166, at 2216; Mehlman, *supra* note 20, at 352-55; Tremblay, *supra* note 14, at 964.

225. For an extensive discussion of how focus can alter the prosecution's screening behavior, see Mitchell, *supra* note 17, at 308-10. In this regard, note the variety of screening practice options available to prosecutors. Feeney & Jackson, *supra* note 25, at 379.

Amendment, regardless of whether it is pattern representation, focus, or something else. Second, focus must be given sufficient content and direction as to make it a coherent, meaningful, and usable construct.

Throughout this Article, triage in the lower courts has been conceived in terms of ethically dividing defendants into categories for purposes of providing differential effort. In my scheme, there are four possible levels of effort. Going from least to greatest they are:

- Messenger
- Pattern Representation
- Focus
- System-Protection

“Messenger”²²⁶ merely conveys deals from the prosecution without any real analysis or counseling. This embodies the worst possible conception of the public defender as conceived in the most negative law and sociology literature.²²⁷ Here the defender is middleman in the process, an agent for the prosecution. This level of effort comports with neither constitutional nor ethical standards. In no sense of the word is the client being given “representation.”

“System-protection” rests on the opposite side of the spectrum from the messenger. Although this level of effort has been lumped together with focus throughout the Article, in fact, it potentially represents an even greater magnitude of effort because case strategies that involve systematic-institutional goals may require more effort than would be economically feasible for a comparable case in a private-representation setting. However, the construct of “system-protection” does not differ from that of focus except that it may utilize more of that scarce resource. As such, it will not be the subject of a

226. Some sense of the “messenger” seems to be communicated in Casper, *Did You Have a Lawyer?*, *supra* note 7, at 6-7 (“The brief conversations usually did not involve much discussion of the details surrounding the alleged crime, mitigating circumstances or the defendants’ motives or backgrounds. Instead, they focused on the deal, the offer the prosecution was likely to make or had made in return for a cop-out.”); and Eckart & Stover, *supra* note 8, at 675:

At the misdemeanor level, the public defender normally sees his clients for the first time shortly before arraignment. After talking to the client, the public defender will confer with a deputy district attorney about a possible disposition. He usually does not get a chance to relay the offered deal to the defendant until a few minutes before the case is called. As one attorney expressed the problem, “I generally tell my clients, ‘Here’s what the D.A. will give you. You’ve got about three minutes to think about it and make a decision.’” In some cases the public defender is so rushed for time that he does not communicate the proposed deal to the client until the two of them are approaching the bench after the case has been called. Thus, the defendant must decide whether to take the deal or plead not guilty in the time span of a few minutes or less.

227. See *supra* note 7.

separate analysis. In contrast to this quantitative difference between regular focus and system-protection, the distinction between focus (which includes use of patterns) and pattern representation involves a qualitatively different type of effort.

“Pattern representation” means quickly categorizing cases legally, factually, strategically, and predictively by corresponding certain salient features of a case to recurring patterns the defender has abstracted from the masses of cases in which all fellow defenders have been involved.

“Focus” roughly approximates the effort one would expect from a good attorney with a reasonable caseload.

A. THE NATURE OF “PATTERN REPRESENTATION”

Initially, it is important to recognize that there is nothing wrong with utilizing patterns to develop and carry-out a defense strategy. In fact, one attribute shared by most experts is their ability to recognize the patterns that arise from concrete data. This pattern recognition allows experts to work quickly and efficiently without having to reinvent the proverbial wheel.²²⁸ Utilizing patterns is in fact

228. For a discussion of how experts use cognitive models/structures in developing problem representations and solutions, see Marilyn Berger & John Mitchell, *Rethinking Advocacy Training*, 16 AM. J. TRIAL ADV. 821, 822-28 (1993); James Voss et al., *Problem-solving Skill in the Social Sciences*, 17 PSYCHOL. LEARNING & MOTIVATION 165, 191-212 (1983).

Further elaboration of the basic cognitive processes of making meaning through interpretive frameworks, generally referred to as “schema theory,” can be found in Richard C. Anderson, *The Notion of Schemata and the Educational Enterprise: General Discussion of the Conference*, in SCHOOLING AND THE ACQUISITION OF KNOWLEDGE 415, 419 (Richard C. Anderson et al. eds., 1977); Robert Glaser, *Education and Thinking the Role of Knowledge*, 39 AM. PSYCHOL. 93 (1984); John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 275, 277-83 (1989); David E. Rumelhart, *Schemata: The Building Blocks of Cognition*, in THEORETICAL ISSUES IN READING COMPREHENSION 33 (Rand J. Spiro et al. eds., 1980); see also JEAN PIAGET, *THE LANGUAGE AND THOUGHT OF THE CHILD* (1932) (Piaget presents cognitive, as opposed to behavioral, theory regarding child development).

This concept of schema theory has begun to appear in the legal literature in discussions ranging from juror decisionmaking processes to the role of metaphor in legal reasoning. See Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989); Richard K. Sherwin, *Lawyering Theory: An Overview, What We Talk About When We Talk About Law*, 37 N.Y.L. SCH. L. REV. 9, 38 (1992); Richard K. Sherwin, *Preface to Lawyering Theory Symposium: Thinking Through the Legal Culture*, 37 N.Y.L. SCH. L. REV. 1, 1 (1992); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989); Steven L. Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2234-44 (1989) [hereinafter Winter, *The Cognitive Dimension*].

subsumed within the effort of focus.²²⁹ The issue is not the propriety of patterns but whether they can exclusively define the full scope of representational effort without offending Sixth Amendment norms. In other words, can you rely only on pattern representation and be competent? I believe so.

A defender who is in the office for more than a month or so will see an extremely large number of cases and police reports and listen to colleagues²³⁰ discuss and analyze many more. For a number of reasons a fairly complete repertoire of usable patterns will emerge. In the first place, other than the infrequent oddball charge, defenders in the lower courts will be exposed to the same, relatively finite set of case types: assault (bars, domestic violence), vehicular crimes (DWI, reckless and negligent driving, driving while license suspended or without a valid license), shoplifting, car burglaries and car prowls, prostitution, and possession of controlled substances (including minors in possession of alcohol). In the second, this finite list of constantly-recurring crimes in turn raises an equally finite set of legal and strategic issues for each such crime. Thus, knowing no more than that a client has been charged with possession of a small amount of marijuana found in a car, the defender will almost instantly begin to structure a rather broad defense analysis: Did the police have reasonable

229. Eckart and Stover believe that the public defender has set the representational standard as that of achieving an "adequate" or "satisfactory" as opposed to an "optimal" outcome. Eckart & Stover, *supra* note 8, at 668, 670, 682. To accomplish this, the defenders employ what the authors term a model of "routinized choice," which sounds similar to my notion of pattern representation. *Id.* at 676; *cf.* Sudnow, *supra* note 1, at 274 ("The P.D. learns with experience what to expect as the 'facts of the case.' These facts, in their general structure, portray social circumstances that he can anticipate by virtue of his knowledge of the normal features of offense categories and types of offenders.").

The problem, as Eckart and Stover point out, is that the very efficiency of this methodology tends eventually to limit the ability of the defender to consider creative options: "Those search methods that are successful in producing a satisfactory solution to a problem are likely to be used again in future situations of similar type. Thus, the order of alternatives is very important because initial options tend to dominate the outcome of routine choice situations." Eckart & Stover, *supra* note 8, at 679.

230. Much of the learning process of the young public defender comes from exposure to oral storytelling in hearing case experiences and the lore of the profession recounted, and in discussing cases with colleagues. *See, e.g.*, Laura Gardner Webster, *Telling Stories: The Spoken Narrative Tradition in Criminal Defense Discourse*, 42 *MERCER L. REV.* 553, 560 (1991) ("The peculiarities of the appellate casebook method combined with the peculiarities of American criminal jurisprudence suggest why a special need exists for the spoken tradition of telling 'war stories' that pass along vital knowledge among criminal defense lawyers . . ."); *see also* MCINTYRE, *supra* note 8, at 113-15 ("most public defenders do not seem to be as self-taught as they might have one believe"). To some extent this mitigates the sharp criticism for lack of training in public defender offices. *See, e.g.*, U.S. DEPT. OF JUSTICE, BUREAU OF STATISTICS, NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY 36 (1986).

suspicion to initially detain the car? What justified entering the car to seize the drugs? What was defendant's relationship to the car—driver, registered owner, or backseat passenger? What connects defendant to the drugs for purposes of constructive possession? What was the proximity of defendant to the drugs? Were the drugs visible to defendant? Did defendant possess any paraphernalia or show any signs of intoxication?

Even relatively inexperienced defenders with some supervision, and perhaps with the help of manuals²³¹ and such, begin quickly to catch-on and are able with a mere one-sentence description of a case to draw upon an appropriate stock of recurring issues and strategies. The process is really interactive. Facts in the case trigger patterns, and patterns lead the defender to seek out particular facts. This ability allows the defender with minimal information to rather efficiently conduct an "insta-screen." Thus, a police report alone can tell a defender how the case will likely play in the system,²³² pinpoint legal issues, provide the bargaining range, and even guide the defender to rapidly develop competent cross-examination for adversary hearings and trial.

Because they spend day after day with the other players in the system, defenders get a fairly good idea of how particular judges and prosecutors will perceive each case. This will be even more so if, as is the case in many jurisdictions, the same defender works in the same courtroom with the same prosecutor for a set period of time. The defender will also know the institutional attitudes of the prosecutor's office and the collective bench as well as the attitudes of local jurors who decide trials. From all this, the defender is capable of quickly coming to a sense of how this defendant and case is likely to play before the court, prosecution, and jury. The defender will generally know whether the prosecutor, police (to whom the prosecutor may have to justify any decision made as to disposition), and judge will view the case as unusually serious. The defender will also know whether it is triable. From a slightly different perspective, anything that is likely to distinguish this case or defendant in the eyes of any of these players will also quickly pop out of the police report.

231. While, from our experience in the clinic good manuals seem to be useful, in a 1988 survey of public defenders regarding the variables most crucial in determining the number of cases a public defender office can represent, the "availability of trial manual" ranked 42 on a list of 52. See *INDIGENT DEFENSE*, *supra* note 19, at B-3, B-5.

232. "An attorney's feel for the case breeds a certain sense of efficacy, a sense that he knows what can be accomplished in a given case." *HEUMANN*, *supra* note 25, at 76.

[We do this] . . . every day, day in and day out. We know the prosecutors. We know the judge so we can take care of the straight forward ones very efficiently. . . .

It's that we know exactly what the judge is going to order, we know what the prosecutor is going to ask for, and we know what the standard offers are, so we can see if the offer is good or bad. We negotiate pretty efficiently. Whereas you can see a private attorney can take an hour and maybe not even get the thing resolved.²³³

Defenders commonly are also lightning fast at legal-issue spotting, at least as to the recurrent ones. Though hardly lacking the ability, in a practical sense, they are less able to creatively apply existing legal principles or develop cutting-edge theories. This is purely a function of time. The defender cannot do this in the fast-moving world of pattern representation. However, this does not render their representation below Sixth Amendment standards. In reality, in the vast majority of these misdemeanor cases a basic set of recurring legal issues are associated with specific cases and fact patterns. The defender knows these by heart and quickly develops mental checklists (or may even have written checklists and canned briefs).²³⁴ Thus, if a charge arose more than a few months before the state arraigns the defendant, the defender immediately thinks "speedy trial." If the charge was driving with a suspended license, the defender will immediately seek to find if the state sent the required notice of a revocation hearing. If a prosecutor is going to bring breathalyzer results into a DWI case the defender will look for the necessary predicate warnings the police are required to give the defendant.

Also during this "insta-screen" the defender will get a sense of how the prosecution will value the case in a plea bargain, quickly judging the likely range or the "ballpark."²³⁵ In a moment the defender will be able to correspond the facts to some standard deal²³⁶ or arrive

233. Public Defender Interview, *supra* note 8.

234. My own experience with brief and motion banks has been good. *But see* INDIGENT DEFENSE, *supra* note 19, at B-5 ("motions bank" and "brief bank" ranked 50 and 51 out of 52 in the survey); Alschuler, *supra* note 12, at 1257 ("Most of those who did [examine the brief and motion files] reported that they had not found the process worth the effort.").

235. *See* CASPER, AMERICAN CRIMINAL JUSTICE, *supra* note 1, at 108 ("He knows what is 'in the ballpark' for a particular offense given a man's record.").

236. *See, e.g.*, Champion, *supra* note 7, at 256 ("there is an informal 'going rate' for virtually every kind of criminal offense"); Sudnow, *supra* note 1, at 258 ("the P.D. and D.A. have institutionalized a common orientation to allowable reductions").

at a sense of what the case is “worth”²³⁷ in the particular institutional community. The defender will at the same time begin to assess the possibilities of narrative reconstruction,²³⁸ though she may need more information about the client and the client’s involvement to actually carry out the strategy; for example, “This was not really a burglary, this was a trespass. This was about some bad feelings over the defendant and victim both seeing the same person.”

Moving to the motion hearing and trial level the defender is able to quickly access patterns of cross-examination from very limited information and with little or no preparation time. Let me provide a few illustrations.

The defendant is charged with Driving While Intoxicated. Part of the evidence against him is his unsatisfactory performance on the Field Sobriety Tests (“FSTs”). These are various balancing and coordination tests given on the scene, such as standing on one leg, walking heel to toe, and touching nose with fingers from outstretched arms. The defender must cross-examine the officer who conducted the tests. With no more information than that the defendant did not pass the FSTs, the defender could immediately develop the following cross-examination, later adding aspects of the particular case that are obviously relevant:

237. See, e.g., Alschuler, *supra* note 12, at 1269 (“‘Anyone who can try a civil case can try a criminal case, but a civil lawyer is not qualified to *evaluate* a criminal case. He has no way of knowing what a criminal case is worth.’”) (quoting an Assistant District Attorney); Feeley, *supra* note 3, at 462-63 (“[Plea bargains] are more akin to modern supermarkets, in which prices for various commodities have been clearly established and labeled in advance . . . the occasional ‘real’ plea bargain or sentence after trial may reaffirm or revalue the ‘worth’ of a certain type of case”); Penn, *supra* note 108, at 2 (“Verchick, however, views plea bargaining pragmatically, ‘It’s an understanding by all parties as to what a case is worth’ . . .”).

238. As Mather noticed, “the P.D. refers to offenses in terms of their social reality rather than their legal definitions. That is, *legally* the case may be a burglary, but *really* it is just a petty theft.” Mather, *supra* note 218, at 200. Sudnow elaborates on this process of narrative reconstruction:

In the course of routinely encountering persons charged with “petty theft,” “burglary,” “assault with a deadly weapon,” “rape,” “possession of marijuana,” etc., the P.D. gains knowledge of the typical manner in which offenses of given classes are committed, the social characteristics of the persons who regularly commit them, the features of the settings in which they occur, the types of victims often involved, and the like. He learns to speak knowledgeably of “burglars,” “petty thieves,” “drunks,” “rapists,” “narcos,” etc., and to attribute to them personal biographies, modes of usual criminal activity, criminal histories, psychological characteristics, and social backgrounds.

Sudnow, *supra* note 1, at 259-60.

You'd never seen my client before you stopped him, had you?
 So you'd never seen him do any part of the test before you gave it to him?
 You'd never seen him try to stand on one leg?
 Never seen him walk heel to toe?
 In fact, you'd never seen him do anything athletic before?

Now my client is 52 years old, isn't he?
 And you're 26?
 You work out, stay in condition?
 And you were trained to do these tests?
 You practiced doing them?
 And you've demonstrated them for every defendant you gave the FSTs to?
 And you've demonstrated them to juries, as you did today?

Now on the night you gave my client these tests, he was by himself?
 You were with your partner?
 So there were two of you, and just him?
 And it was night?
 And the three of you were standing alone by the side of the road?
 You intended to arrest him if he failed these tests?

Now, none of us in court today get to watch my client take these tests, do we?
 I mean, you don't have a video or anything like that?

Inference for jurors:
 The officer does not know defendant's ability to do these tests and thus does not have a baseline to draw conclusions from defendant's performance.

Inference for jurors:
 These tests are not necessarily easy to perform; the fact this officer can do them with such ease is misleading. The officer is young, trained, practiced, and an athlete.

Inference for jurors:
 The defendant would be nervous; it's more difficult to perform feats of balance and coordination if you're tight and unrelaxed.

Inference for jurors:
 The jury is totally at the mercy of the officer's subjective conclusion.

Similarly, in a car prowler charge where the issue is identification and there has been a one-on-one on the scene show-up, the pattern cross-examination of the victim regarding the show-up would quickly emerge as something like:

Mr. Smith, you had never seen my client before that evening, had you?

You described the person you saw around the cars as “medium height, bluejean jacket, baseball hat” to Officer McCall when she first came on the scene, didn’t you?

You didn’t give an estimate as to weight?

You didn’t describe any facial features—eye color, hair?

Approximately 15 minutes later, Officer McCall brought a man back to your store?

You knew that this man was a suspect the officer had arrested?

And that man was my client?

You noticed he was wearing a blue jean jacket and ball cap?

He was the only man brought back?

An officer stood by his side?

He was handcuffed?

You know what a line-up is?

That’s where the police show you several people who have similar appearances?

You did not attend a line-up, did you?

You weren’t shown a photo display, were you?

Inference for jurors:
The victim would be susceptible to suggestion.

Inference for jurors:
Suggestibility is reasonably possible in this situation.

Inference for jurors:
There exist fairer, more accurate methods to identify the perpetrator.

Finally, imagine the defendant is charged with possession of drug paraphernalia, like a syringe. The police found the syringe in a pat-search of the defendant who was a passenger in a car stopped for reckless driving. The pattern cross-examination at a motion to suppress probing the reasonableness of the officer’s fear that defendant had a weapon so as to justify the pat-search²³⁹ might be something like:

You’d never seen my client before that evening, had you?

You had no prior information about him?

When you stopped the car, you didn’t see any weapons?

And you had no report of weapons?

Inference for judge:
The officer could not reasonably believe that the defendant was armed.

239. “A reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to ‘specific and articulable facts’ which create an objectively reasonable belief that a suspect is ‘armed and presently dangerous.’” State v. Collins, 847 P.2d 919, 922 (Wash. 1993) (quoting Terry v. Ohio, 392 U.S. 1, 21-24 (1968)).

My client didn't reach in his coat or pocket, did he?
By the way, the driver pulled right over when you turned on your siren?
All the young men were cooperative when you did pull the car over?
And specifically my client was cooperative?
He gave you his license?
He complied with all your orders?
He was always polite?
When he got out of the car, he did not make any threatening movements?
There were three young men, including the driver, in the car?
And there were two police cars—four officers?
It was the middle of the day?
The reason you stopped the car was for the way the driver was driving?
You had no information that any other crime was involved?

This section has hopefully demonstrated that defenders can rely on "patterns" and still provide competent representation. This partly assumes some review of discovery and discussions with witnesses,²⁴⁰ if only in the court corridor.²⁴¹ In fact, experienced defenders can do much of their preparation once trial has begun.

240. The process of discovery and investigation is far more limited in misdemeanor than felony cases and so can usually be completed and assimilated rather quickly. On the other hand, misdemeanors are often surprisingly legally complex, rife with hastily drafted local ordinances that smack of vagueness and overbreadth, and statutes without guidance of common law interpretation. Discovery generally consists of only a few pages of police reports, an occasional witness statement, and the client's rap sheet or driving record. Investigation involves a visit to the scene where appropriate and, in general, two to four witnesses. Experts are rare except in drunk driving cases where a blood or breathalyzer test has been done or in drug cases where an analysis is needed, though often in these latter cases the lab report is entered by stipulation without the expert's presence. *See, e.g.,* WASH. CT. J. CR. R. 6.13(b) (1993).

Many of the cases at the District Court level don't have a lot of extra witnesses. . . . You're going to need the client's story and to talk to officers. There may be very few witnesses, maybe a 2 or 3 witness trial. So it won't take near the preparation [of a more complex case]. Also, they may not have a lot of motions. So there are not a lot of written motions that need to be done. Not a lot of particular points. There's basically presenting the story in a light most favorable to your client. [This is done] [t]hrough cross-examination of the State's witnesses and direct examination of your client, and my experience is that it doesn't take a lot of preparation time to be able to do that.

Public Defender Interview, *supra* note 8.

241. In fact, while defenders often have an absurd number of cases set for trial in a single day, they know that very few are likely to "go." In reality, then, they can concentrate on these few.

I have on occasion gotten in trials, where, because the case was handed to me, or whatever, and been calling a jury and still not really had any time to figure out what the client would like to say, but because of the nature of the jury trial process, that client becomes available through voir dire. [Y]ou are going to have recesses, you are going to basically get up to speed . . . enough to do the voir dire process, and if it's going to go over several days . . . you've got evenings and . . . can do some intense preparation during the trial. That has on occasion occurred. I've called down before and said, "Get somebody up here, I've got subpoenas that need to be served." We do have the capabilities of doing that, and we can call into action a lot of people that are now on the team to go out and get some of these things done, so that we can present a good front. That is not ideal, but sometimes time constraints such as you have seven trials one day and another four or five the next day, it may be that you haven't spent the time in advance, but now we know which case is going to trial. Now we can devote all resources to the case to get it ready and present it.²⁴²

No doubt this will not be the best representation available, but it will be competent.²⁴³ In fact, it will likely be far better than that provided by many private attorneys who only infrequently enter the criminal justice system, and even some that are frequent participants.²⁴⁴ Again, even though clients may not respect public defenders overall, these attorneys get good results for their clients.²⁴⁵

I don't think you're going to be 100% ready to do all of them, but you can look at the file . . . and [name omitted] and I have trials in a week or so where there are five on one day and six on another. Of those, four already say on the file is that the only reason these are going to trial is because the defendant isn't ready to suffer the consequence today. It will not be a trial. 95% of the time that note is on there. The other 5% of the time the defendant shows up on the trial day and says, "I'm ready for my trial." [T]hen we'll get a continuance and say, "This is a real trial." Or if we can, we get ready to go ahead and do it right then.

Public Defender Interview, *supra* note 8.

242. Public Defender Interview, *supra* note 8.

243. This level of defense certainly satisfies the first prong of *Strickland* ("reasonableness under prevailing professional norms"). *Strickland v. Washington*, 466 U.S. 668, 688 (1984). To put this in perspective, *Strickland* seemed to find the Sixth Amendment satisfied by an even lower level of performance than pattern representation, and that was in a *death penalty* case, not, for example, driving without a valid license (for which a defendant will agree to a six-month deferred finding and then dismissal if she stays clean). I believe that pattern representation, though hardly the optimum, see Eckart & Stover, *supra* note 8, at 682, does more than just assure a procedurally fair trial, see *Strickland*, 466 U.S. at 688; it can encompass rather decent lawyering. Not great, not like one obtains with focus, but decent.

244. In fact, as already discussed *supra* note 54, a significant number of private criminal defense attorneys practice at the very margin.

245. Part of this is a function of their knowledge and experience already discussed; part is because the other players in the system are as overwhelmed as the defender, and the defender has an acute appreciation of this knowledge. In fact, defenders frequently take their cases to the

B. THE NATURE OF "FOCUS"

As previously stated, focus is principally a commitment of mind. Although this commitment may at times also manifest itself in such efforts as trying to find one more case citation or talking to one more witness, and in expending additional momes on experts or demonstrative evidence, the principal ingredient of this resource is still thought and concentration.²⁴⁶

More specifically, focus is comprised of three mental elements:

- Pushing the rules
- Creating deeper narratives
- Persistence in the face of opportunities (that is, taking advantage through hard work of what chance offers)

Although these three elements are frequently interactive in practice, for the sake of clarity I will discuss each separately.

1. *Pushing the Rules*

Under the concept of pushing the rules I include thorough presentations of accepted principles, novel use of existing principles, and development and assertion of cutting-edge doctrine. Pushing the rules is important because to a surprising extent courts will follow the

day of trial, trying to get leverage on plea bargains from the strain of an impossible trial calendar on court and prosecution. *See, e.g., Penn, supra* note 108, at 2:

Most prosecutors are eager to dispose of misdemeanors with plea bargains in order to concentrate on felonies such as homicides, assaults and armed robberies. "We just don't have the resources to bring these misdemeanor cases to trial," a New York prosecutor says. The Legal Aid attorney thus knows he has the upper hand in such cases. "If he holds out long enough, our office will reach some kind of accommodation," the prosecutor says.

246. One might ask whether giving more focus means diminishing resources available for pattern representation. After all, there are only finite resources. While I take this point to be a serious one, I do not believe such a result would follow. First, focus is currently being applied to some cases. It is just done haphazardly. The approach in this Article would provide an ethical system for this existing allocation. Second, I do not think of these mental resources as akin to "matter" in the sense of 1950s physics classes, that is, being capable of neither creation nor destruction. These resources are far more fluid. Under such circumstances, because there exists no articulated system of triage, mental resources in excess of that required for pattern representation which otherwise could be recombined into focus, drift in the ether and are lost. With an effective triage system, these lost resources can be used to provide focus without diminishing those resources available for pattern representation. Third, as I've indicated, effective use of focus generally will affect the prosecution's charging policies, *supra* note 225, in a manner that will tend to free additional defense resources.

rules, the assortment of literature on legal indeterminacy notwithstanding.²⁴⁷ The catch is that it's a great deal of work to lead the court to this result. Careful planning of strategy and factual records, briefs, and the like are well out of the range of resources available in pattern representation (although the level of effort in pattern representation certainly leads to some successful motion practice). It requires focus.

The creation of a novel *mens rea* defense as part of an overall sentencing strategy in the Driving with a Revoked License case discussed previously in Part I.A is one such example of focus as pushing the rules. A Possession of Marijuana case defended by another team of students provides another.

In that case, defendant was the driver in a car where police found marijuana. The sequence leading up to that search is as follows: The police received an anonymous tip that three young black men were smoking crack in a particular car parked in the lot of an apartment complex. The police arrived at the apartment, saw a car matching the description with two young white men inside, and approached the car. Our client was in the driver's seat and a friend was in the back seat. The police found no evidence of drug use. However, they did discover that the car was registered to our client and that neither our client nor his passenger had a valid driver's license. The officers then told the young men that they were trespassing and warned them that if they were still there when the officers returned in a few minutes they would be arrested. The officers left and the client drove away to go home. Within two minutes the same officers pulled the client over, arrested the client for driving without a valid license, and searched his car incident to arrest. The marijuana was found as a result of this search.

The students thoroughly researched, briefed, and carefully planned their cross-examination on basic principles such as the right of the police to initially detain the client under *Terry*,²⁴⁸ and whether

247. For a good assessment of the academic profession's confrontation with the apparent indeterminacy of law, see Steven L. Winters, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990). All is not lost, however. Even those acknowledging such indeterminacy do not believe "anything goes." See, e.g., Anthony D'Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1, 12 (1990). There are, if not absolute determinants, at least some constraints. See, e.g., *id.* at 25-27 (judges are limited by a culturally-shared sense of justice); Winter, *The Cognitive Dimension*, *supra* note 228, at 2444-2555 (judges possess idealized cognitive models generally shared by others in society).

248. See *Terry v. Ohio*, 392 U.S. 1 (1968); see also *Adams v. Williams*, 407 U.S. 143, 147 (1972) (an informant's tip is reliable enough for a *Terry* stop).

the subsequent full search of the car was lawful when conducted incident to an arrest for a minor offense²⁴⁹ for which the officers generally could not make a custodial arrest.²⁵⁰ Additionally, the students created an estoppel theory grounded in the case of *Cox v. Louisiana*,²⁵¹ to the effect that under all the circumstances any reasonable person would have thought that the police had told them it was permissible to drive away, even without a valid license.²⁵² The judge suppressed on all three grounds.

249. Driving without a valid operator's license is a "minor" traffic offense which, except in rare circumstances, cannot provide the basis for a custodial arrest. *See State v. Barajas*, 789 P.2d 231 (Wash. Ct. App. 1990), *rev. denied*, 795 P.2d 1157 (Wash. 1990).

250. In Washington State, police generally may not take a defendant into custody for a "minor" traffic offense, and may not search a vehicle incident to a non-custodial arrest. *See State v. Hehman*, 578 P.2d 527, 529 (Wash. 1978).

251. 379 U.S. 536 (1965).

252. The students developed their due process estoppel theory using *Cox*, 379 U.S. at 571 (prosecution for demonstrating too "near" a courthouse dismissed because police had guided demonstrators to that spot), and *Raley v. Ohio*, 360 U.S. 423 (1959) (defendant can't be penalized for refusing to answer questions at a state hearing when the commissioner at the hearing mistakenly told the defendant that he had a privilege to refuse).

2. *Creating Deeper Narratives*

Defense attorneys constantly tell stories.²⁵³ They tell them to jurors at trial,²⁵⁴ who in turn decide the case by placing the data at trial into narratives and then judging the credibility of those constructed narratives.²⁵⁵ They tell them to judges at sentencing. They

253. As Professor Abrams states:

For the trial attorney, "law" is inevitably about presenting concrete and nonlinear stories, about sensing the features of a narrative that will engage a judge's or juror's attention or expose the tension in a legal rule. Using and telling clients' stories requires trial lawyers to make constant assessments of what they mean, of what elements unite them, of which features are most important.

Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1043 (1991); see also Thomas Shaffer & James Elkins, *Solving Problems and Telling Stories*, in *NARRATIVE AND THE LEGAL DISCOURSE—A READER IN STORYTELLING AND THE LAW* 90, 98-99 (David Papke ed., 1989) [hereinafter *LEGAL DISCOURSE*] (examining Gerald Lopez' conception of a lawyer's job as storyteller); Kathryn Holmes Snedaker, *Storytelling in Opening Statements: Framing the Argumentation at Trial*, 10 AM. J. TRIAL ADV. 15 (1986) (examining the communicative features of the opening statement); Gerry Spence, *How to Make a Complex Case Come Alive for the Jury*, A.B.A. J., Apr. 1986, at 62 (comparing laws' use of narrative to storytelling); Jeffrey S. Wolfe, *Courtroom Choreography: Systematic Use of the Courtroom*, TRIAL DIPLOMACY J., Spring 1985, at 28 (discussing how to enhance persuasive presentation through effective use of the courtroom). But see Clark D. Cunningham, *A Tale of Two Clients: Thinking About Law as Language*, 87 MICH. L. REV. 2459 (1989) (wrestling with the issue of whether the stories we tell when our clients' positions are translated into the vocabulary of the legal arena are really the stories the clients want told). Taking a broader sweep to the lawyer's narrative discourse, Dennis Patterson posits,

that law is an interpretive enterprise whose participants engage in the production of, and debate about, explanatory narratives—narratives that account for the history of the practice and are produced in the service of argumentation about how to resolve legal problems. In short, law is an activity and not a thing. Its "being" is in the "doing" of the participants within the practice.

Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 940 (1990); see also Christopher P. Gilkerson, *Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories*, 43 HASTINGS L.J. 861, 865-66 (1992) ("a critical storytelling approach . . . conceptualizes law as both: a social institution through which people tell stories about their relationships with others and with the state; and an authoritative language, or discourse, with the power to suppress stories and experiences not articulated in accepted forms") (footnote omitted).

254. See Abrams, *supra* note 253, at 1043; Shaffer & Elkins, *supra* note 253, at 96 ("The presence of a jury requires that the entire story, on both sides, be told in ordinary language and made intelligible to the ordinary person.").

255. In their groundbreaking work, Lance Bennett and Martha Feldman conducted what is probably the most systematic study ever done of why and how jurors make the decisions they do. LANCE BENNETT & MARTHA FELDMAN, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981). What they found is that jurors place the scattered information presented at trials into narratives. The credibility of these presented narratives is then judged based upon whether they make sense when compared with the jurors' private "stories" (constructed from experience, logic, knowledge, bias, myth, social convention; in other words, in the context of their personal "schema," see *supra* note 228) concerning what they would expect to take place in the particular situation on which the trial is focused. See also Berger & Mitchell, *supra* note 228, at 835 (discussing training students to develop and control the trial "story"); Jolm A. Call, *The Trial as*

tell them to prosecutors²⁵⁶ when trying to arrive at a plea negotiation.²⁵⁷ Throughout, these stories are composites of circumstantial evidence: information, lack of information, and the inferences that one can draw. That's all there is.²⁵⁸ The court considers an eyewitness direct evidence, and psychologically, the distinction between direct and circumstantial evidence is probably important to jurors ("It's not just circumstantial, this witness really saw the thief"). However, it's really all circumstantial when you're creating narratives. All an eyewitness means is that a particular person with particular perceptual

Story: How Jurors Perceive What They See and Hear During Trial, 22 TRIAL, Nov. 1986, at 84 (discussing strategies for influencing juries); Moore, *supra* note 228 (discussing the role of jurors and their cognitive process); Michael Tigar, *Voices Heard in Jury Argument: Litigation and the Law School Curriculum*, 9 REV. LITIG. 177 (1990) (discussing how law schools do not teach litigation skills).

This narrative concept further explains why, when talking to jurors after a trial, some will ask questions about proof that seems "off the wall" to the litigator (for example, "I was waiting to hear something about whether your client had hooks near the door to place her keys on."). These jurors' private stories (for example, about what people do with their car keys after returning home) were sufficiently idiosyncratic that you did not anticipate it, and the jurors became focused during trial on listening for evidence that would comport with their stories. See Moore, *supra* note 228, at 309-10.

256. These stories and associated strategies, particularly during negotiation, may be very simple, relying on shared community understanding, or rather complex, see Maynard, *supra* note 64, at 86, 94, or really no story at all. See *id.* at 95; see also Penn, *supra* note 108, at 2:

In trying to get a charge against a client reduced, Verchick always seeks a bargaining advantage. "If I find the prosecutor's complainant is a dope dealer—and the prosecutor doesn't know it—he may give his case another look and offer a reduced plea," he says. "If [the defendant] is a retard, I may argue that he doesn't deserve to go to jail because he's not in complete control of himself. If he's accused of illegal gun possession, I'll show that he was carrying a gun because he was mugged several times."

257. These negotiations, in turn, are bound by narrative structures that offer four basic paths for storytelling:

In *routine processing*, participants depend on stories that are textually constructed in police and other documents; in deciding charge and sentence, they may claim particular understandings of cases on the basis of synoptic results. In cases of *character assessment*, participants similarly rely on police reports, and an attorney may introduce background information to justify a bargaining position. Rather than disputing the assessment, the other negotiator simply accepts or rejects the dispositional proposal it supports. When attorneys deploy a *narrative component that denies the offensiveness of an act*, it sets up a negotiational dispute over what happened. This may mean discussing alternative versions of the facts and reconsidering the defendant's identity and character. Finally, if a defense attorney uses an *excusing defense* as part of the narrative, this regularly results in arguments over the subjective state of the defendant during commission of the offense.

Douglas Maynard, *Narratives and Narrative Structure in Plea Bargaining*, in LEGAL DISCOURSE, *supra* note 253, at 125 (emphasis added); cf. Peggy C. Davis, *Law and Lawyering: Legal Studies With an Interactive Focus*, 37 N.Y.L. SCH. L. REV. 185, 193 (1992) (in bargaining with an agency, an attorney tries to develop a story that presents the agency helping the client as being consistent with the agency's mission).

258. See Berger & Mitchell, *supra* note 228, at 831-32.

abilities takes the stand and in particular words relates how at a particular time in her life under particular physical and emotional circumstances she had particular perceptions. This might include perhaps a subsequent identification procedure which itself will have taken place under particular circumstances. From this mass of information within applicable legal burdens, the parties will ask the jury to draw the inferences supporting their respective case theories.²⁵⁹ With focus the attorney is always working with such circumstantial evidence within the framework of an ever-evolving case theory,²⁶⁰ constantly working to reconceptualize the central story and sub-stories as she obtains new information and perceives new combinations of inferences from the information already possessed. This strategic narrative-building comes in at least three forms: telling richer stories, changing belief systems, and recognizing underlying harmful stories with which the attorney must deal.

a. *Telling richer stories*: What is meant by telling "richer" stories? Anyone who has teenagers has had the experience of asking them about school, a movie they saw, or a party they attended. Parents usually get something like, "It was O.K. Nothing special. You know, pretty much like you'd expect." Now that is not a very rich story. It lacks details and texture. It doesn't provide a visual image or resonate emotionally. It does not even offer a structure for intellectual reflection. Richer stories, in the context of criminal defense, embody most or even all of those characteristics. They dig deep into human reality and experience and as such make sense in some fundamental way.²⁶¹ In this process they honestly look at competing

259. To be effective in this task, the lawyer must be deeply attuned to people, their similarities, differences, and diversity. The lawyer must possess "humanity" that encompasses an understanding of victims, defendants, jurors, judges and such in order to tell meaningful stories. See Smith, *supra* note 62, at 49-50. The lawyer must possess "empathy" in order to understand and project his or her client's story. Ogletree, *supra* note 9, at 1243, 1272, 1274; see also *infra* notes 261, 272-74.

260. For an extensive discussion of the process of developing case theories and representational strategies (the overall strategy for achieving a client's objectives) see MARILYN BERGER ET AL., *PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY* 17-35 (1988); MARILYN BERGER ET AL., *TRIAL ADVOCACY TRAINING: PLANNING, ANALYSIS, AND STRATEGY* 17-33 (1989); see also Richard K. Neumann, Jr., *On Strategy*, 59 *FORDHAM L. REV.* 299 (1990) (exploring the process of creating strategy, the effect of temperament on strategy, and the ways in which strategy is learned and most effectively taught).

261. Professor Webster captures some sense of this ability. "Finally, creativity in preparation always seemed to show. The goals of enhanced empathy and instinct, in seeking to dramatize the humanity of the client and organize the case around a core concept, set good defense attorneys apart from those simply forced into duty." Webster, *supra* note 230, at 567; see also Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 *N.Y.L.*

inferences and justify one of the inferential paths.²⁶² The more information you have—from discovery, investigation, your client, or expert testing—the more you have to work with; but ultimately, developing richer narratives is principally a function of thought and concentration. That also takes time—thinking and rethinking, quickly scribbling notes as an idea comes in the middle of a family outing, musings during quiet walks—time that is the brother and sister of focus.

In pattern representation, you can and must tell coherent, legally-relevant stories. However, they will not be what I call rich, and to that extent will be less persuasive because they cannot control the human, emotional, and logical turf as can a rich one.²⁶³ Here is an example from a theft case that students handled.

The client was a salesperson in a mall department store. Because several registers he had worked on had been short, security personnel set up a sting. A security guard from another store played a customer. He took a \$60 pair of jeans, removed the price tags (and the plastic security tag that would trigger alarms if someone left the store without paying), and put on the pants. He approached the register where the client was waiting on a customer, threw down the price tags, threw down a wad of cash and change covering the exact cost of the jeans with tax, said something about being in a hurry, and left the store. The client finished waiting on the customer, put the money left on the counter in his pocket and, because it was the end of his shift, he took his cash drawer to the office. As soon as he handed in the drawer he was arrested by store security. When questioned he claimed that he had intended to go next to the lost-and-found with the money before he went home. For some reason there had been a mix-up and security had neither taped nor recorded the sting.

SCH. L. REV. 55, 117 (1992) (analyzing the archetypal linguistic structure of defense and prosecution closing arguments by considering how lawyers produce “thickly textured tales in which the lawyer’s explicit logical reasoning is backed by the implicit sending of additional messages, strikingly harmonious, mediated by the multiple devices of narration, allusion, and linguistic coding”).

262. Central to the credibility of a particular story is the nature of its construction, including “internal consistency, narrative coherence, reliance on ‘hard’ or physical evidence, and perhaps most importantly, the stability of the storytelling over time.” See Kim Lane Scheppele, *Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth*, 37 N.Y.L. SCH. L. REV. 123, 162 (1992) (considering the credibility of stories in the context of witness testimony).

263. For examples of some “rich” closing arguments, see Amsterdam & Hertz, *supra* note 261, at 75, 83, 105.

With pattern representation (talking to the client for a half hour in the hallway prior to trial about his testimony) the essence of the defense argument would likely have been something like:

Ladies and gentlemen. You have heard from my client²⁶⁴ and he told you how he had intended all along to turn the money into the lost-and-found. That's what he told security when they arrested him; that's what he always said. You heard that the lost-and-found is outside the store and that it is an absolute rule that a salesperson may not take their cash drawer out of the store ever. So he had to take the cash drawer first. But he never got a chance to get to take the money back, because they arrested him first. And think about this when you go into the jury room—he never left the mall with the money; he didn't try to hide or destroy the price tags—they were right on the counter where the security guard threw them. And all in all this must have been pretty confusing with this guy throwing money and tags at you.

This isn't bad. It may well have convinced a jury to find reasonable doubt.

With focus, on the other hand, what was said in the pattern argument might have been augmented by something like:

Let's take a careful look at this sting. Because if you do, I think you'll agree with me that this was so messed up in both plan and execution that we can't infer anything from my client's reaction, certainly not beyond a reasonable doubt. First, the whole idea of the sting was strange. In a sting, you take the way you think someone is committing a crime and replicate that. So, if you think someone in the post office is taking checks out of the mail, you send through a dummy letter with a check and watch. Now obviously the store did not believe that anyone was taking money by pocketing cash that customers throw at them while running out of the store. You've heard testimony that that only happens once in a blue moon. So this was some kind of strange general honesty test, like leaving a \$5 bill on the sidewalk. More importantly, this was a totally aberrational event in the life of a salesperson.

264. In this case, the students spent a great deal of time discussing whether the defendant should testify, or whether to raise reasonable doubts without him. They went back and forth, but by trial were leaning towards putting him on; partly because it seemed he would make a good appearance on the stand, partly because he had pocketed the money and never called store security, which seemed to require some explanation.

You heard salespeople with twenty years experience say that this kind of thing—a customer throwing down money on an expensive item, not something costing a buck or so but \$60, and then leaving the store—happens once every few years if that. And there's nothing in their training or manuals dealing with it. So who is to say what reaction makes sense or what someone's reaction means when confronted with the totally idiosyncratic.

And what's more, the very conception of the sting ensured its own confusion. The "customer" had to rush up to the counter and get away before my client could interact with him, or my client might have talked to him and started ringing up the sale. That would be the end of the sting. So the very concept of this sting all but assured that the interaction would be carried out with such speed and frenzy—fearing contact with my client that might have led to ringing up the sale—that the reality of the communication would likely have been incoherent from my client's perspective. Think what this must have looked like to my client. Here he is near the end of the day, waiting on his last customer. Suddenly, a man rushes to the counter, mumbles something as he throws down a wad of money, and rushes away. Now you're being asked by the prosecution in the calm of the courtroom to assess my client's behavior as if he had been faced with a normal, rational situation to which we would all agree how someone would have acted if he were honest. But this is no such thing.

Because the security so botched this sting that, though they testified that they routinely tape shoplifters, this "carefully-planned" sting provided neither video nor audio demonstration, we are left with our common sense. Again, what must the situation have seemed to my client, especially when his concentration was on another client at the moment this chaos erupted? Finally, as if all that wasn't enough, the sting ensured that my client would be given miscues about what was going on. They took the security tag off the pants so the alarm would not go off when the "customer" left the store. All salespeople knew these jeans have tags on them. So when the guy rushes out and no alarm goes off, what is my client's brain going to register, especially when the situation was so confusing to begin with? "I guess these weren't our jeans." But now he looks at this pile of money

The court dismissed the actual case prior to trial because the store did not want to pursue it.

b. *Changing belief systems*: All of us carry socially-constructed conceptions of the world composed of an array of cognitive structures

that guide the constant process of interpretation that we call giving meaning to our experience.²⁶⁵ The influences that create these structures are both a function of our concrete experiences and our cultural knowledge base. Both of those components of course will likely differ with class, ethnicity, gender, and sexual orientation.²⁶⁶

All involved in trial work know the *Rashoman* effect²⁶⁷ that different individuals will perceive the same event differently. Less obvious is that each of the multiple descriptions may be "true" if situated in the particular individual's cultural context.²⁶⁸ Good advocates understand the significance of this. Juror, judges, and prosecutors all come to the process with an interplay of personal and culturally embedded cognitive structures with which they must make meaning out of the particular case. Sometimes the interpretation we desire will naturally be supported by the cognitive structures of the particular individuals who are the audience for our persuasive efforts.²⁶⁹ Other

265. See *supra* note 228, for authorities regarding the cognitive processes of interpretation.

266. See, e.g., DONALD BLACK, *SOCIOLOGICAL JUSTICE* 10 (1989) (arguing that justice in lawsuits is a function of the relationship of the opposing parties' class status, for example, "all known legal systems tend to be relatively lenient when people of low status victimize their peers"). On a more sweeping, institutional level,

It is the implicit contrast between those whose self-believed stories are officially approved, accepted, transformed into *fact*, and those whose self-believed stories are officially distrusted, rejected, found to be untrue, or perhaps not heard at all. Those whose stories are believed have the power to create fact; those whose stories are not believed live in a legally sanctioned "reality" that does not match their perceptions. "We," the insiders, are those whose versions count as facts; "they," the outsiders, are those whose versions are discredited

Scheppele, *supra* note 180, at 2079; Scheppele, *supra* note 262, at 125-27 (socially constructed gender differences affect how women's stories of victimization are heard).

267. This 1951 Akira Kurosawa film (Japanese with English subtitles), which portrayed the "same" violent event from the perception of several actors, was based on the Japanese novel *Rosho-mon* (*Kyoto Gate*) by Ryunosuke Akutagawa.

268. See, e.g., Scheppele, *supra* note 180, at 2086 (victim claimed she was "lightly choked"; defendant could characterize this same act as a "heavy caress").

Stories may diverge, then, not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense out of real events. *Id.* at 2082; see also Scheppele, *supra* note 262, at 168 ("The difference in accounts that the battered woman and the feminist lawyer would give of this event is not the difference between truth and falsehood. Instead, it is the difference in the interpretive framework through which the events are seen in the first place.").

269. "Postmodern thinkers have revealed that the strength of legal argument depends as much on the consciousness of the listener as it does on the skill of the advocate." Gary Minda, *Jurisprudence at the Century's End*, 43 J. LEG. EDUC. 27, 57 (1993); see also Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779, 1801 (1991) (discussing the controversy over rules and standards).

times those cognitive structures are an impediment. Effectively confronting these latter situations is what is meant by changing belief systems.

There are a number of narrative strategies for accomplishing this. You can tie the client's experience to one of the listeners cultural "stock stories."²⁷⁰ A young person of color struggling on the streets to make a living may be reconceptualized to a white sentencing judge so as to fall within the tradition of the turn-of-the-century immigrants who likewise struggled to make it in America.²⁷¹ The attorney can project the audience into the client's world through imagination²⁷² facilitated by concrete facts that challenge existing cognitive structures.²⁷³ Alternatively, the attorney can show the client and audience

270. In his article, Gerald Lopez, who appears to have coined the phrase "stock story," explains "[t]he knowledge structures I have labeled 'stock stories' have been variously described as 'scripts,' 'schemas,' 'frames,' and 'nuclear scenes.' I make no effort in this essay to distinguish between the various usages." Gerald P. Lopez, *Lay Lawyering*, 32 UCLA L. REV. 1, 3 n.1. See *supra* note 228 for a discussion of schema. Applying this concept as a tool of persuasion, Lopez states:

Human beings think about social interaction in story form. We see and understand the world through "stock stories." These stories help us interpret the everyday world with limited information and help us make choices about asserting our own needs and responding to other people. These stock stories embody our deepest human, social and political values. At the same time, they help us carry out the routine activities of life without constantly having to analyze or question what we are doing. When we face choices in life, stock stories help us understand and decide; they also may disguise and distort. *To solve a problem through persuasion of another, we therefore must understand and manipulate the stock stories the other person uses in order to tell a plausible and compelling story—one that moves that person to grant the remedy we want.*

Id. at 3 (emphasis added) (footnote omitted); see also Winter, *The Cognitive Dimension*, *supra* note 228, at 2272 (explaining that one way in which narrative can persuade is by "invok[ing] an existing storyline . . . familiar to the audience"). Sometimes, of course, it is in your client's interest to have her situation distinguished from the stock story. See, e.g., Amsterdam & Hertz, *supra* note 261, at 105 ("The effectiveness of devices like the rhetorical questions with which defense counsel develops his theme of the cold-blooded murderer commonly depends upon predicting accurately and playing to the stereotypical assumptions of one's audience.").

271. This example is analogous to one offered by Professor Winter regarding the cultural model of the "Horatio Alger" story. Winter, *The Cognitive Dimension*, *supra* note 228, at 2272.

272. This approach to changing belief systems by projecting the decisionmaker into the client's world through imagination has also been put forth in Abrams, *supra* note 253, at 1002; Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds*, 87 MICH. L. REV. 2099, 2105 (1989) ("[A] concrete story comes closest to actual experience and so may evoke our empathic distress response more readily than abstract theory."); Winter, *supra* note 228, at 2272, 2277.

273. See, e.g., Abrams, *supra* note 253, at 988-89 (concrete narratives of battered women reveal them, not as "pathologically weak" as projected by common understandings of battered woman syndrome, but rather as competent people who are "but one partner in a relational contest for power and control"); David Friedrichs, *Narrative Jurisprudence and Other Heresies: Legal Education at the Margin*, in LEGAL DISCOURSE, *supra* note 253, at 43, 45; Massaro, *supra* note 272, at 2105; Winter, *supra* note 228, at 2274 ("[T]he advocate can offer concrete facts and experiences that make the court's ICM [Idealized Cognitive Model] inapplicable and another

to be functioning on the same value structure though in different worlds.²⁷⁴ Thus in a successful diminished-capacity defense to a bank robbery charge, an excellent attorney argued that the defendant had a mental breakdown precisely because he had tried so hard to provide for his family and give them the American Dream; then suddenly faced failure when laid-off from a job on which he had performed well. Again, let me give an example from a case defended by a student team in a clinic.

The client was charged with Driving While Intoxicated ("DWI"). His wife was his main witness. She testified that she met him in her own car at a hardware store and although he had a few beers he was completely sober. She then took the lead with him following. She noticed him start to slow down, but did not know why (it turns out the police were pulling him over). She did not wait or go back because she was running out of gas and wanted to make sure she made it to the nearby station. She then went home. However, she did not hear from him. Finally, hours later, he called to be picked up at the police station. Both the client and his wife were Native Americans in their sixties.

In preparing, the students realized that to the all middle-class white jury this story would not make sense.²⁷⁵ Why wouldn't she go

ICM more obviously so. . . . The sheer force of detail can be used to press the tribunal to rethink the situation, to recategorize a case as an exception to its dominant paradigm and an instance of another ICM.").

274. Professor Singer put his students in a class situation analogous to the plight of workers in a plant closing whose situation they were studying in class. This experience gave them a sense of the real power of the workers' position, a power which had previously escaped them. See Joseph W. Singer, *Persuasion*, 87 MICH. L. REV. 2442, 2447-56 (1989). Prior to this exercise, the students "failed to understand that many courts would understand plant closings as hard cases." *Id.* at 2447. In reflecting on this exercise and its success, Singer notes that "[p]ersuasion normally works, not by convincing others to change their values, but by making them aware of values they already have which they simply had not initially thought were relevant to this situation." *Id.* at 2456 (emphasis omitted); cf. Ogletree, *supra* note 9, at 1284 ("Those who are more prone to see similarities, rather than differences, between themselves and others can empathize with those whose experiences or characteristics differ in significant respects."); Patterson, *supra* note 253, at 989 ("The power of narrative is a direct function of its ability to conceptualize the subject matter in a way previously unseen by the participants, yet in a form most agree still captures the point of the practice.").

275. See *supra* note 255 for the cognitive underpinnings of jury decisionmaking. In fact, underlying the relatively recent acceptance of various trauma syndromes in evidence is the recognized need to admit information in order to counter otherwise negative inferences based on inaccurate or incomplete historical conceptions (for example, if he was really beating her, she would have left or called the police). See, e.g., *Estelle v. McGuire*, 112 S. Ct. 475 (1992) (admission of battered child syndrome evidence does not violate due process); *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. Ct. App. 1979) (battered woman syndrome); *State v. Allery*, 682 P.2d

back once she got gas? Why didn't she call police or hospitals when her 65-year-old husband did not reappear as the hours went by? These jurors would have gone back or called the police. Therefore, this story does not work as a narrative to be interpreted by the jurors' existing cognitive structures.²⁷⁶ What she is saying couldn't have happened the way she says and so she can't be believed.

The students' strategic response to this was to bring out concrete details that would make her narrative make sense on direct examination: the particular nature of her relationship with her husband explained why she didn't drive back, and her experience with police and other institutional authorities as a Native American explained why she didn't call. The jury convicted him, but when discussing the case with the students afterwards they indicated that they believed the wife and even believed the defendant was not drunk. However, they did believe that his driving was "affected" and that's all the statute required.

c. *Recognizing underlying harmful stories with which the attorney must deal:* Embedded in the fabric of many cases are stories that are not explicitly raised by a strict analysis of the elements of the offense, but if ignored can be devastating to a case strategy. In the DWI case just discussed, the mainstream cultural stories about "drunken Indians" had to be extensively probed and challenged on *voir dire*—not the easiest task in a region where alcoholism among Native Americans is as visible as it is tragic.

In another case the client was charged with an assault on his wife. The following was the story told by both parties from the beginning.

The defendant husband had come home very late after closing the bars with friends. Not finding this terribly admirable, his wife tossed his coat outside. When he went to get it she locked him out knowing he didn't have his keys. He kicked the door in just as she

312, 316 (Wash. 1984) (battered woman syndrome); *Frenzel v. State*, 849 P.2d 741 (Wyo. 1993) (child sexual abuse accommodation syndrome). Professor Scheppele, *supra* note 262, at 126-28, explains how women who are victims of sexual violence are still put at a disadvantage by the stock cultural inferences drawn from delayed reporting of the offense. Similarly, in our Immigration Clinic, students must be prepared to present information to the Immigration Judge explaining cross-cultural behavior in order to prevent the judge from drawing incorrect inferences (for example, the fact a Guatemalan highland Indian does not have a particular date in mind correlating to each significant event in his case does not mean he is not telling the truth). See VERONIKA KOTT, *THE IMPACT OF CULTURAL FACTORS ON CREDIBILITY IN ASYLUM CONTESTS* (1988).

276. See *supra* note 255.

was going to open it and the door hit her. She then became furious and struck him repeatedly. The extent of his response was to try to hold her arms back in order to keep her from hitting him by putting his own arms around her. She then hit him with a vase, causing a cut that required the police later to take him to the hospital. He called the emergency operator to have the police sent. When they arrived he was imprudent in how he talked to the police and he was arrested. Now, looking at this case you might think (and rightly so) that this client did not commit an assault. You may not like how he behaves as a partner in his relationship and may even cheer a bit for the wife, but he didn't commit a crime. In fact if anyone committed a crime it was her. Yet this case was not dismissed until the day of trial, shortly before a motion to dismiss was set to be argued. This was also not a case where the prosecutor had not had time to review the file until trial. The students had reviewed the facts and legal authorities with the prosecutor on several occasions. Why did it take so long? It took so long because there was a powerful cultural narrative that eclipsed the actual facts of the case, making it all but impossible for the prosecutor to "see" the parties, until this story was finally worn away through great effort. The belief was that men are the abusers; they physically abuse women and the law must stop it. The fact that he was black and she was white, he was large and she was small, added further narrative elements to an already powerful story.

An institutional story limited the possible outcomes of a 180-day mental commitment hearing²⁷⁷ in which a team of students represented the patient. The client had stabbed her husband five times with a butcher knife, had been charged with attempted murder, and placed in a mental institution when she was found incompetent to stand trial. Her initial commitment had been extended upon finding her "gravely disabled" and "a danger to others." By the time of the current hearing the client had a plausible position that she no longer fit any of the criteria for involuntary commitment.²⁷⁸ Yet no court

277. See WASH. REV. CODE § 71.05.320(2) (1988).

278. The client's case had complexities which, ironically, made release not in her best interest. Specifically, the prosecutor announced his intention to file attempted murder charges again if she was released. If he did, one of three scenarios could have taken place, none of them very good for the client: 1) she could have been sent for another competency determination, held for six months and then either found competent, and then set for trial, or incompetent (putting her back to square one, with far more restrictive custody than she had worked her way up to by the time we were representing her); 2) if sent to trial, she could be convicted and sent to state prison for a considerable amount of time (she had no defense outside of mental ones); 3) if acquitted on

would ever let her out at this hearing because of an institutional narrative²⁷⁹ that was never mentioned at any point in the case: patient released (and prosecutor does not rearrest and recharge); kills someone; state sued for releasing someone who had eighteen months prior repeatedly stabbed her husband, partly in response to the guidance of voices; state loses millions;²⁸⁰ papers castigate judge; investigation follows. Understanding this, the students made a record for release but pushed for transfer to a halfway program which the court granted.

3. *Persistence in the Face of Opportunities*

Good attorneys always have a plan, a case theory, and an overall representational strategy.²⁸¹ However, no one can foresee each eventuality that will arise. Life and litigation are far too complex with far too many variables. In retrospect, hopefully one's strategic decisions over the course of a case make sense, but one would be truly brilliant if this entire course of strategy had been planned from the start. One must repeatedly assess and reassess.²⁸² That is part of focus. Therefore, when unexpected circumstances arise the attorney will use focus to turn this event into an opportunity, even if it initially appears negative (though some events are so decidedly negative that attorneys direct their attention to neutralizing or at worst minimizing the harm).

The students represented a client in another DWI case. The client was Korean and spoke almost no English. He had given statements and taken a breath test. According to the police reports, an

insanity grounds, she would be back in the hospital, but then placed in the mentally ill, violent offender ward.

279. For an example of the power of such an underlying institutional narrative, cf. David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2173 (1989):

The concept of transparent unconstitutionality, and the right to disobey transparently unconstitutional injunctions, is thus a linchpin of the legitimacy of American government: take it away and you must abandon the rule of law, or popular sovereignty, or the publicity of law.

The Court cannot quite bring itself to acknowledge this point, however, for a very good reason: an open acknowledgment that we are entitled to disobey transparently unconstitutional injunctions would invite us to judge constitutionality for ourselves, thereby undermining the authority of the courts. Clearly it is this possibility that the *Walker* Court is most concerned to foreclose. The political narratives underlying the authority of American courts vest ultimate power—including the ultimate power of understanding the law—not in the courts but in the citizenry, and insists that courts' authority is bounded. In *Walker*, however, the Court confronted the question of who is to determine the bounds of judicial authority.

280. See Rolando V. Del Carmen, *Civil Liabilities of Government Psychotherapists and Agencies for Release of the Mentally Ill*, 12 J. PSYCHIATRY & L. 183 (1984).

281. See *supra* note 260.

282. See Berger & Mitchell, *supra* note 228, at 832-33; *supra* note 260.

interpreter gave the *Miranda* and implied consent warnings to the client. The *Miranda* warnings were obviously a legally necessary predicate for admission of his statements (not helpful) and both warnings were necessary to admit the breathalyzer results (*really* not helpful).²⁸³ The students sought the name and qualifications of the interpreter through discovery. Weeks of persistent phone calls documented by follow-up letters followed by a formal motion to compel eventually led to a surprising result. A phone company service had reached the interpreter and neither the prosecutor nor police knew the name of the particular interpreter. In fact, the police had been aware that the particular phone company had a policy of not revealing the name.

In a case left to pattern representation, the defender would have made immediate use of this information, moving to suppress both the statements and breathalyzer.²⁸⁴ Without the interpreter present, the defender would argue that there is no way to know what the client was told and no basis for the court to find that the client understood and voluntarily waived his rights.²⁸⁵ With focus the students went further. They moved for dismissal on the grounds that the state's actions had denied the client of what reasonably might have been material evidence. The state knew about the phone company's policy, yet they chose to use that interpreter service knowing the witness would be unavailable to the defense. Moreover, this translation service was hardly the government's only choice because there was a large local

283. See *State v. Richardson*, 499 P.2d 1264 (Wash. 1972) (*Miranda* warnings must be given before a breath test is admissible); *Gonzales v. Dept. of Licensing*, 774 P.2d 1187 (Wash. 1989) (implied consent warnings must be given for breath test to be admissible).

284. This argument would be based on the principle that rights-warnings must be communicated to a defendant in "words easily understood." *State v. Prok*, 727 P.2d 652, 654 (Wash. 1986).

285. Had the prosecution brought focus, they may have created a number of counter-moves, even if the phone company would not release the name. The prosecution could have brought in an executive from the company who could testify about the regular practice of the business in selecting qualified interpreters, the standard procedure for giving warnings and ensuring understanding. See FED. R. EVID. 406 (allowing admission of evidence of the habit or routine practice of an organization). This may have sufficed for the *Miranda* and implied consent warnings foundations, and thereby gained admission of the breath test results. This of course would not lead to admission of the statements themselves, since they were communicated in English from the interpreter to the officer and would therefore be hearsay from the officer; unless the prosecution convinced the court to follow the rule in some jurisdictions that an interpreter is considered, not a separate person, but the alter ego of the defendant. See, e.g., *State v. Robles*, 458 N.W.2d 818, 821 (Wis. 1990). See generally MICHAEL GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 392 (2d ed. rev. 1989) ("evidence of a routine practice (sometimes referred to as custom) of an organization is admissible when tending to prove the practice was followed on the occasion in question").

Korean community. From the defendant's perspective, on the other hand, this witness' significance went far beyond the suppression motion. This witness was the only person who could speak to the client in a language the client could understand, and the only person who could understand the client. As such, the interpreter could potentially provide exculpatory evidence in the sense of raising inferences negating the supposed intoxication that formed the basis of the substantive charge; for example, that the defendant's speech was clear and not slurred, that his comprehension and thinking processes were good, or that his sentence construction and articulation were good.²⁸⁶

After the judge suppressed the breathalyzer and statements, the judge called a recess prior to considering the motion to dismiss. During that recess, the prosecutor made an offer the defendant couldn't refuse.

C. A QUICK OVERVIEW OF THE EFFECTS OF "FOCUS"

Focus affects both negotiation and litigation. Allocation of the scarce resource of focus to a case will generally improve the quality of any deal for two reasons. Bargaining narratives that either change the retributive category ("it's really more trespass than burglary") or meaningfully distinguish the client from others in the same category will be both better-elaborated and supported. Focus also brings pressure onto the prosecutor in terms of additional work, constant risk from the fact that the defender is scrutinizing every action or inaction for possible tactical advantage, and a significantly greater chance of eventually losing. All this begets good deals.²⁸⁷ Focus also increases

286. This situation bears an analogy to the one where the government in a criminal case releases alien witnesses, who then flee the country. *See* *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982). In order to gain a dismissal, a defendant must explain how the lost witnesses would have been "both material and favorable." *Id.*

287. "A colorable defense, moreover, even when it does not lead to a dismissal or acquittal, commonly becomes a 'pry pole' in bargaining." Alschuler, *supra* note 12, at 1267; *see also* HEUMANN, *supra* note 25, at 90-91 ("Sometimes he will have a hearing on a motion or go to trial on a case simply to retain his credibility in the plea bargaining negotiations; the threats of motions and trial are potent weapons in his arsenal, and it is occasionally necessary for him to prove that he is capable of using them."). Alschuler brings an interesting perspective to this when he suggests,

Either the attorney can be good—and win concessions because prosecutors fear defeat at trial—or he can be nice—and win concessions because prosecutors are willing to accommodate him in an atmosphere of reciprocity. These two approaches can be combined, but only at the cost of sacrificing some of the benefits of each.

Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 79 (1968).

the likelihood of acquittal, or dismissal at trial, or a dispositive motion.

CONCLUSION

Our Sixth Amendment lore posits a single attorney in a small office with a single client. There they are: Gregory Peck or Jimmy Stewart pacing back and forth in their small town offices spending months of their lives agonizing over a single case. *Presumed Innocent* and other novels that exploit the current vogue of the courtroom drama are the same.²⁸⁸ We hold onto this story because we're unwilling to face the consequences of letting go. Our ethical rules set standards that are unrealistic for institutional advocates and rarely followed in practice. Our Supreme Court deals with this deficiency by going into complete denial and setting up an all but rebuttable presumption that every attorney is competent,²⁸⁹ contending that equating constitutionally satisfactory defense performance with any performance standards will interfere with the attorney's flexibility.²⁹⁰ In the wider culture, no one wants to read books or see movies about attorneys who pick up dozens of new clients they've never seen before in a single day and work in crowded, small offices for state agencies. These people do not fit into our criminal defense attorney narratives—not of our culture, our courts, or our professional associations. Yet these attorneys do almost all of the defending.

Until we look squarely at what it means to be a public defender in the lower courts and begin to develop and apply a coherent ethic of resource allocation, our legal and ethical descriptions of these attorneys and the Sixth Amendment regime within which they work will be as ungrounded in reality as our pop novels and electronic mass-media. We may be able to tolerate that our mass-culture takes the form of diversion and make-believe. However, I do not believe that we wish to have the Sixth Amendment of the Constitution occupy the same position. So long as it does, our lower criminal courts will never work.

288. See generally David Wescott, *The Defense Attorney—Media, Culture, and Reality* (1992) (manuscript on file with author).

289. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). *Strickland* also brings us back full circle to the lack of resources. By all but deleting the right to competent counsel from the constitution, the case bears serious implications for funding. In other words, if everything already is competent representation, there is no legal necessity to reduce caseloads (and therefore, by necessity, increase resources) to meet a competence standard.

290. *Id.* at 688-89.

