

# Seattle University School of Law Digital Commons

---

Faculty Scholarship

---

1-1-2005

## In (Slightly Uncomfortable) Defense of 'Triage' by Public Defenders

John B. Mitchell

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/faculty>



Part of the [Courts Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

John B. Mitchell, In (Slightly Uncomfortable) Defense of 'Triage' by Public Defenders, 39 *VAL. U. L. REV.* 925 (2005).

<https://digitalcommons.law.seattleu.edu/faculty/434>

This Article is brought to you for free and open access by Seattle University School of Law Digital Commons. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Seattle University School of Law Digital Commons. For more information, please contact [coteconor@seattleu.edu](mailto:coteconor@seattleu.edu).

# IN (SLIGHTLY UNCOMFORTABLE) DEFENSE OF "TRIAGE" BY PUBLIC DEFENDERS

John B. Mitchell \*

Since the mid-1970's when I first read Professor Freedman's article on *The Three Hardest Questions*,<sup>1</sup> I have been a fan. Following his work from then to now, I have always appreciated how he truly understands the complex reality of the trial courts and the world of those attorneys who work in that system, that he always espouses the ethical high ground within that reality, and that he is willing to make tough, even controversial, stances regarding what he believes is right. In *An Ethical Manifesto for Public Defenders*,<sup>2</sup> I find my theory of triage<sup>3</sup> as the object of Professor Freedman's ethical disapproval.<sup>4</sup>

Given what I have already said, it should not be surprising that I agree with most of what Professor Freedman writes concerning the ills of criminal public defense. Public defense is terribly under funded,<sup>5</sup> with Public Defenders carrying staggeringly high caseloads.<sup>6</sup> I further agree that, while *Gideon v. Wainwright*<sup>7</sup> does not guarantee an attorney as talented and with as many supporting resources as the wealthiest client could retain,<sup>8</sup> *Gideon* does guarantee an attorney with both the requisite skills and sufficient time to employ those unique skills.

Finally, I agree that in *Strickland v. Washington*,<sup>9</sup> the United States Supreme Court effectively ensured that Sixth Amendment Constitutional guarantees will play no role in either enforcing basic levels of attorney competence or in even recognizing the reality of institutional defense players. Mocking *Gideon*, the *Strickland* court mixes a "presumption" of competence,<sup>10</sup> an onerous two-part test (under which you functionally

---

\* Associate Professor of Law, Seattle University School of Law, J.D. 1970, Stanford Law School.

The author wishes to thank Phyllis Brazier for her fabulous word processing under a very tight time table.

<sup>1</sup> Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

<sup>2</sup> Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911 (2005) [hereinafter Manifesto].

<sup>3</sup> See, John B. Mitchell, *Redefining the Sixth Amendment*, 67 S. CAL. L. REV. 1215 (1994).

<sup>4</sup> Freedman, *Manifesto*, *supra* note 2, at 914-18.

<sup>5</sup> Mitchell, *supra* note 3, at 1218 n.11, 1219 n.19.

<sup>6</sup> *Id.*, at 1241 n.96.

<sup>7</sup> *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

<sup>8</sup> Mitchell, *supra* note 3, at 1254, 1286 n.214.

<sup>9</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>10</sup> *Id.* at 689, 690.

have to demonstrate you would have been acquitted but for the incompetence),<sup>11</sup> a refusal to incorporate ABA standards into constitutional standards for competence,<sup>12</sup> and *de facto* the removal of anything that can be characterized as “strategic” (even if seemingly stupid) from consideration in a Sixth Amendment analysis.<sup>13</sup> The result is one that, even in the best light, can be seen as totally abdicating the responsibility for public defense attorney competence under the Sixth Amendment, and placing it on local bar associations and law schools (which, of course, cannot order county councils or state legislatures to address competence issues tied to inadequate resources). Taking a less generous view, *Strickland* insures a “cover-up” of the unjustifiable under funding of public defense.

Where Professor Freedman and I differ is in our approach to this shameful reality. Professor Freedman would have public defenders take the system head on, if necessary heroically going down fighting like the ancient Greeks at Thermopylae.<sup>14</sup>

In contrast, I consider myself an “optimistic realist”: I hope for a better world, while planning for the one we have. And it is this present world that my ideas about triage address.

Unlike private practice, where additional resources can be added in response to additional client funds (including adding associates, contract attorneys, and paralegals),<sup>15</sup> public defense is a zero-sum game. Whatever resources are added to one public defense client’s defense will not be available to another.<sup>16</sup> And significant additional public funds are simply not forthcoming to increase the public defense pie.<sup>17</sup> I, therefore, am back to square one; i.e., triage.<sup>18</sup>

---

<sup>11</sup> *Id.* at 695-96.

<sup>12</sup> *Id.* at 688-89.

<sup>13</sup> *Id.* at 699.

<sup>14</sup> The heroic stand of the Spartans against an overwhelming Persian Force is recounted in THE HISTORY OF HERODOTUS (translated by George Rawlinson), in GREAT BOOKS 253, ¶ 207 (1996).

<sup>15</sup> Mitchell, *supra* note 3, at 1244.

<sup>16</sup> Though, in fact, all lawyering involves some rationing. *Id.* at 1243.

<sup>17</sup> In fact, the entire criminal justice system is starved for resources. *Id.* at 1218 n.12.

<sup>18</sup> Moreover, even if additional public funds earmarked for hiring dozens of new public defenders magically appeared and, therefore, significantly reduced caseloads were a reality, public defenders would still need to ration their “credibility”. While a private practitioner can come into court every week or so extolling their particular client’s virtues, even with a dramatically reduced caseload a public defender cannot make the same claim for each of their five-to-ten clients each day, day after day. *Id.* at 1244.

Given Professor Freedman and my strong areas of congruence, I want to limit my response to the following three specific points of divergence:

- 1) It is possible that, noble intentions aside, if put into action Professor Freedman's proposal would trigger a variety of institutional responses actually harmful to existing criminal defendants.
- 2) Even if Professor Freedman's ethical mandate was implemented and successful, there would be a time of transition during which public defenders would still need to engage in triage.
- 3) Finally, my notion of "pattern representation" is far more involved and effective than represented in Professor Freedman's article.

A. *Following Professor Freedman's Course of Action, Public Defenders Could in Fact Prompt Institutional Responses Harmful to Criminal Defendant*

Played out within a system with two powerful institutional players other than the public defenders, judges and prosecutors, it is not clear that Professor Freedman's most sincere intentions will actually inure to the benefit of criminal defendants. Let me focus on Professor Freedman's stance on the overloaded public defender and plea bargaining. As we are all aware, at least 90% of cases are resolved without any trial by some form of plea bargain.<sup>19</sup> These bargains then are effectively sealed from review by the ritual of the plea litany (i.e., putting on the record that the defendant recognizes all the constitutional rights she is waiving).<sup>20</sup> This obviously is not a mechanism that judges or prosecutors want to see interfered with in any significant way.

In this plea-bargaining realm, Professor Freedman requires a public defender who believes she has too many cases to competently represent each client to convey any plea offers by the prosecution,<sup>21</sup> but to then tell the client that she cannot advise the client about the deal, because she is incompetent to do so.<sup>22</sup> If the client decides to nonetheless take the plea,

---

<sup>19</sup> Mitchell, *supra* note 3, at 1228 n.52.

<sup>20</sup> See *Boykin v. Alabama*, 395 U.S. 238 (1969) (stating the Court must inform the defendant of constitutional Rights being waived by pleading guilty and defendant must waive rights on record). See also, FED. R. CRIM. P. 11 (detailing the procedure for accepting pleas in Federal Court).

<sup>21</sup> Freedman, *Manifesto*, *supra* note 2, at 922.

<sup>22</sup> *Id.*

the public defender must put on the record of the plea hearing that counsel did not advise the client because she was incompetent to do so due to her caseload.<sup>23</sup>

Will judges and prosecutors feel shame at seeing such a pure display of ethical integrity<sup>24</sup> and join the public defenders in a *Gideon* love fest? Not necessarily. Prosecutors might respond with a form of brinkmanship akin to going “all-in” in a game of Texas Hold-em poker. While prosecutors depend on plea bargaining to stay on top of their own caseloads, in the short run they hold a great deal of power over individual defendants. This is particularly so when the deal on the table is dramatically better than the sentence the defendant reasonably could receive after conviction at trial, or when the crime reduction offered by the prosecutor has far less stigma than the charged crime (e.g., amend complaint to add theft, defendant pleads to theft, armed robbery dismissed). Whether or not the defendant is out of custody on bail will be another factor weighing in on the prosecutor’s power in any particular case. This is especially so when the prosecutor is ready to offer a deal of “time served,” and a plea will thus be followed by immediate release from custody.

Given this power, once the prosecutor realizes what the public defender is doing, he may simply refuse to bargain. “I’m not making any offer. There’s no point. If you refuse to advise your client, your client has not received competent representation. While reversal still may not be required under *Strickland* because your client will not be able to show prejudice, I really don’t feel like taking the chance. In fact, I think you have the obligation to tell your client that he has the choice of representing himself under *Faretta*,<sup>25</sup> and if he does, he can bargain with me face to face.”

---

<sup>23</sup> *Id.*

<sup>24</sup> At a minimum, Professor Freedman’s requirements for ethical action by public defenders can only be institutionally meaningful if the entire public defenders office stands together on the contention that their caseloads prevent representation that would satisfy the Sixth Amendment. Otherwise, the one or two public defenders who stand up will be reassigned out of criminal trial courts, put on leave, or fired. Professor Freedman recognized this, but believes that being a professional means putting your responsibilities to your client “above your own financial concerns”. *Id.* at 922 n.75. To me that seems a disproportionate price for accomplishing no more than being able to say you did the right thing. Others, on the other hand, may feel that that is all that matters.

<sup>25</sup> See *Faretta v. California*, 422 U.S. 806 (1975) (holding a criminal defendant has a constitutional right to represent himself).

What is the client to do now? The defendant has no constitutional right to a plea bargain<sup>26</sup> and, in fact, any agreement under these circumstances would appear to violate the Sixth Amendment. Of course, the defendant could waive her right to counsel and take the deal; but self-representation is as far away from the promise of *Gideon* as one can imagine. On the other hand, the defendant could force the issue and go to trial, but she would face all the risks attendant with the possibility of a conviction, as well as one additional problem. Who would defend her? If the public defender is not even competent to advise her on the plea bargain, it is hard to imagine how that same attorney suddenly could be competent to actually represent the client in a jury trial. The client could just "plead to the sheet" (i.e., plead to all charges) and rely on the mercy of the court and/or some sentencing "discount" for pleading to give a lower sentence than would be given after conviction at trial, but it is difficult to locate the promise of *Gideon* in this scenario.

Similarly, if the public defender faces down the court, putting on the record that she did not advise the client on the deal because she was incompetent to do so due to her caseload, the judge simply will refuse to accept the bargain. After all, the common form of the plea literacy is "has your attorney advised you that [court then lists rights being waived]?" If the client protests at the court's refusal to accept the plea, will the judge tell her about her right to self-representation? Or will the court bring in private attorneys from the conflicts panel, and perhaps even get some emergency funds to pay a panel of attorneys with little or no criminal defense experience, to do some perfunctory interviewing and discovery review (with investigation in an unusual case) in order to advise clients and get the plea system back on track? If that happens, all that will be accomplished is that many defendants will remain in jail<sup>27</sup>

---

<sup>26</sup> In fact, a few jurisdictions have forbidden plea bargaining in most circumstances. See, e.g., Michael L. Rubinstein & Teresa J. White, *Alaska's Ban on Plea Bargaining*, 13 LAW & SOC'Y REV. 367 (1979).

<sup>27</sup> While under normal circumstances, state speedy trial rules would prevent extensive pretrial incarceration, all those rules have "safety valves" that allow extension of speedy trial timeframes if good cause reasons (out of control of the court and prosecutor) prevent getting the trial commenced in time. See, e.g., WASH. CT. R., CRLJ (d)(8) (West 2004) ("When a trial is not begun on the date set because of unavoidable or unforeseeable circumstances beyond the control of the court or the parties the court, even if the time for trial has expired, may extend the time within which the trial must be held. . ."). A sudden revolt by all public defenders would plainly constitute such good cause, at least until reasonable, alternative representation can be arranged. Of course, realistically one would expect all this to initially be preceded by an emergency meeting called by the judges with the heads of the public defenders office, where some minor concessions would have been offered and rejected.

awaiting a visit by an attorney likely far less competent than their public defender.

Finally, imagine what it would be like for a client if her attorney told her that the attorney is not competent and will not give any legal advice about the plea offer. What is the client to make of this? To begin with, clients tend not to trust public defenders anyway, thinking that they are part of the system and not competent.<sup>28</sup> Now their attorney actually confesses incompetence, and refuse to help the client. This is a parody of the worst image indigent clients have of public defenders. Appropriately, the client should respond, "Why do I even have you as an attorney if you aren't even going to help me? . . . I want another attorney. I want an attorney who will help me!" Of course, Professor Freedman's attorney will have to respond: "There is no other attorney who will do anything different. Our entire office is committed to doing the same. Let me explain why. Even though it might be against your best interest in your particular case, all of us in this office are doing this because . . ." So, if the client is at all rational and self-interested, they will insist that they go back to court with their "attorney" and seek the court's help. Assuming again a system-wide stance by the entire public defender's office, the court will have no choice but to call in the panels of experienced and inexperienced attorneys I've just discussed. In the end, the clients are unlikely to feel part of some noble struggle on behalf of the Sixth Amendment. Instead they are likely to believe that they are nothing but pawns in some "game" between the public defender, prosecution and judges, and only feel further disillusionment towards the criminal justice system.

*B. Even if Professor Freedman's Position Were Successfully Implemented, During the Inevitable Transition Public Defenders Would Still Need to Practice Triage of the Type I Have Suggested*

Let's imagine that society's legal and political institutions positively responded to an unbending phalanx of public defenders standing by the letter of their ethical code. The response could take a variety of forms that, singularly or in combination, result in substantially lower caseloads for individual public defenders. Initially, there are only two basic strategies to accomplish this end: more public defenders and/or fewer overall cases in the system. The former merely requires more public funds to hire more public defenders. The latter could be accomplished through a mix of legislative decriminalization of certain crimes, more

---

<sup>28</sup> Mitchell, *supra* note 3, at 1216, 1216 n.7, 1227-28.

robust prosecution screening of cases for filing, and even alteration of police arrest priorities on the street.

Whether this victory for the promise of *Gideon* results from legal fiat,<sup>29</sup> or the more likely avenue of institutional negotiations with the public defender's office, it is difficult to see how a sudden caseload ceiling of, e.g., no more than "X" felonies or "Y" misdemeanors could immediately go into effect. Lowering the number of cases per attorney does not change the fact that the system is already filled with criminal defendants (many who are in jail because they cannot make bail), with more entering every day. Who will represent all these defendants who formerly would have been added to some public defender's backbreaking caseload?

The courts could fill the ranks of public defenders to meet this gap in the transition by "drafting" members of the bar under a theory of *mandatory pro bono*.<sup>30</sup> Legal challenges to this action under claims of involuntary servitude and taking without compensation aside,<sup>31</sup> this dramatic action would likely suffer from two problems. First, elected state judges might hesitate to conscript transactional lawyers from large corporate law firms; while to only troll the ranks of small and solo practitioners, leaving the large firms alone, would be certain to have instant political, if not legal, ramifications. Secondly, and more importantly, most of the new attorneys thrown into the fray would know almost nothing about the criminal justice system, criminal procedure, or criminal litigation. "I know you've watched *Law & Order*, so here's a robbery case where the defendant is facing five-to-life. Go get 'em."

---

<sup>29</sup> Unless relying on independent state constitutional grounds, courts are not likely to find automatic violations of the Sixth Amendment based solely on caseloads. The *Strickland* analysis requires a showing of actual prejudice, a determination that must be made on a case-by-case basis. *Strickland v. Washington*, 466 U.S. 668 (1984). While Professor Freedman characterizes the caseload problem as one of a "conflict of interest," and true conflict of interest brought to the trial court's attention does constitute per se incompetence, it is difficult to imagine a court making this determination by relying *solely* on some bright line numeric quantum of cases. Freedman, *Manifesto*, *supra* note 2, at 920; see *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978). Such a caseload, when added to concrete testimony by an individual public defender might, on the other hand, be sufficient for a legal ruling of incompetence in a *particular* case.

<sup>30</sup> See Patrick Harris, *Let's Make Lawyers Happy: Advocating Mandatory Pro Bono*, N. ILL. U.L. REV. 287 (1999) (providing a good outline of the grounds justifying mandatory pro bono).

<sup>31</sup> See Jennifer Murray, *Lawyers Do It for Free?: An Examination of Mandatory Pro Bono*, 29, TEX. TECH L. REV. 1141, 1157-63 (1998) (offering a discussion of the constitutional claims against mandatory pro bono).



Even if the court decided not to pursue the path of mandatory *pro bono*, instead obtaining emergency funds from state or local government to offer money to members of the bar to “take on a few clients,” this problem of competent representation would not be solved, and might in fact even be exacerbated. For the attorneys who would be drawn to what would like be relatively small fees would largely be comprised of beginning attorneys trying to get some experience and volume practices that carefully calculate time spent to remuneration.

Alternatively, the court and prosecutor could decide that they will deal with the gap between the number of existing defendants, and available public defenders (given the new caseload caps), by dismissing “without prejudice” a sufficient number of “less serious” cases. Incoming cases could similarly be controlled by not filing the less serious cases. (The prosecutor would then have the term of the Statute of Limitations to subsequently file or refile.) But that’s still a great number of fairly serious criminal cases not being processed. Would police then stop arresting for a significant number of crimes because they know that they will not be charged? Will word then get out on the streets that you can commit certain crimes with impunity? Also, if we are not willing to give a permanent free pass from prosecution to all the legitimate cases that either were not filled or were dismissed “without prejudice,” these cases represent a large backlog of cases. Even when the public defender’s resources are finally at a level that Professor Freedman would find properly reflective of *Gideon*, this as yet uncharged backlog would threaten to again swap the system.

Therefore, one would expect that any mandatory to cap on public defender caseloads, whether as the result of legal decision or institutional negotiation, will take the form of a target that is achieved at the end of set of checkpoints in a staged timetable. That means that for a significant period of time (at least months) public defender caseloads will not be likely to dramatically change. That means triage—focus and “pattern representation”.

## C. A Careful Look at "Pattern Representation" as Competent Representation

In my system of triage for the lower criminal courts,<sup>32</sup> public defenders would allocate their limited resources between those cases on which they would *focus*<sup>33</sup> and those that would be provided *pattern representation*.<sup>34</sup> While I equate focus with the work of good attorneys with reasonable caseloads, it is not a quantifiable resource. It is rather a commitment of mental resources that, depending on how the actual case unfolds, may be employed every step of the way through trial or may never even be called upon (such as when the prosecutor chooses to dismiss early in the process). It is my contention that "pattern representation" for those cases not chosen for focus nevertheless can constitute basic, competent representation under the Sixth Amendment. It is that contention that is the target of Professor Freedman's strong disagreement with my theory of triage.

There are a number of aspects of my concept of pattern representation that I now see I must make clearer, and I take full responsibility for any misunderstandings by others reading my previous work. I believe that pattern representation, if done correctly, can satisfy the constitution; but not because it would satisfy the *Strickland* standard. Of course it would satisfy *Strickland*, since it seems possible that consulting an Ouija-board for strategic decisions could pass constitutional muster under that case. Rather, pattern representation satisfies *Gideon* because it is not "perfunctory",<sup>35</sup> a matter of just going through a ritualized set of motions. Nor is it a "hasty label and bargaining without investigation and research."<sup>36</sup> Pattern representation does not mean a glance through the police report, then a plea.

Pattern representation does begin with the police report because, while often not providing an accurate account of the defendant's story,

---

<sup>32</sup> When I wrote my triage article, my specific concern was with the lower misdemeanor courts, and the fact that these courts did not work. I only focused on public defenders as one "piece" of that system (in addition to prosecutors with their charging and plea bargaining power, and judges). Mitchell, *supra* note 3, at 1215, 1222-23. I therefore did not consider the superior courts and felony cases. In contrast to most misdemeanors, all felonies are "serious" and tend to be factually more complex than misdemeanors (in the sense that, except for DUI cases, forensic expert witnesses are rare in the lower courts, and that there generally is far more police investigation and, correspondingly, often more witnesses). If applied to felonies, my concept of "pattern representation" must be adjusted accordingly, which I have not yet endeavored to do.

<sup>33</sup> *Id.* at 1302-18.

<sup>34</sup> *Id.* at 1293-02.

<sup>35</sup> Freedman, *Manifesto*, *supra* note 2, at 914.

<sup>36</sup> *Id.* at 918.

the police report does provide a generally decent view of the prosecution's case. So a "pattern" view of the police report allows a competent advocate to quickly see potential case theories and spot potential legal issue for possible motions. From this, the public defender can quickly construct the contours (including a "list" of significant factual variables that must be determined) of a "reasonable doubt" case; i.e., case focused on the prosecution's case and its high burden of proof.

Professor Freedman mistakenly equates my notion of pattern representation with the tendency of judges in the inquisitorial system to jump to early judgments, which then tend to lead the judges to discount subsequent information inconsistent with their initial view of the case.<sup>37</sup> While there may be some cognitive relationship between this process and my notion of pattern representation, they are very different. The cognitive phenomenon Professor Freedman is discussing concerning judges in the inquisitorial system would be familiar to any of those who analyze the decision making processes of fact finders under the lens of narrative<sup>38</sup> or schema theory.<sup>39</sup> Under these theories, jurors make sense of trial testimony by placing it into cognitive structures (schema theory) that we call "stories" (narrative theory).<sup>40</sup> From the moment when the jurors arrive at their chosen story as to what happened, jurors select subsequent information consistent with their story, and ignore or discount subsequent information that is inconsistent.<sup>41</sup> This is precisely what was happening with the inquisitorial judges Professor Freedman discusses.

Unlike this cognitive process of fact finders at trial, when engaging in pattern representation I am not making judgments about "what happened." I am retrieving what are in effect checklists stored in my expert schema for the particular type of case (although the items on the "checklist" are likely to take the form of factual scenarios that I "see," rather than some two-dimensional list.) Admittedly, the patterns I see will limit the checklist(s) I retrieve, and the content of each checklist in turn will be limited by my prior experience, education, imagination, discussions with colleagues, and such; yet these patterns are nonetheless

---

<sup>37</sup> *Id.* at 915.

<sup>38</sup> See, e.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1043 (1991); Mitchell, *supra* note 3, at 1305 n.253.

<sup>39</sup> See, e.g., Albert J. Moore, *Trial by Schema: Cognitive Filters in the Courtroom*, 37 UCLA L. REV. 273 (1989).

<sup>40</sup> Lance Bennett & Martha Feldman, *RECONSTRUCTING REALITY IN THE COURTROOM* (1981).

<sup>41</sup> See Nancy Pennington and Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 521, 525 (1991).

the tools of an expert advocate, not the judgmental process of a fact finder.

Thus, for example, if a young public defender tells me that she has her first case involving a car, passengers, and constructive possession of a baggie of marijuana found in the car, I quickly "see" a range of options, issues, lines of questioning and arguments that she will struggle to construct absent a great deal of preparation. It's not that I'm so smart; I just have a great deal of information stored, organized, and retrievable from my expert schema that is triggered by recognizing the patterns raised by this scenario.<sup>42</sup> And employing these patterns, I will do motions, discovery, and investigation; albeit pin-pointed and limited by the particular pattern.

- Why did the police stop the car? How did they eventually find the drugs? [I might be able to bring a suppression motion for a Fourth Amendment violation.]
- Whose car was it? To whom is it registered? Who was driving? [If my client is a passenger, the prosecution's case is more vulnerable; if he's a hitchhiker, even better.]
- Where were the drugs found? Console? Glove box? Trunk? Under a seat? In the open? [This is relevant to my client's knowledge, access and control.]
- Does anything tie my client to the drugs beside mere proximity? Fingerprints on baggie? Drugs on his person? Paraphernalia, rolling papers, etc. on his person? Client appears under influence of drugs? Smell of drugs in car? [Absence of these "ties" weakens prosecution's case for dominion and control; presence of any of these makes case less triable.]
- How did the client behave with the police? Cooperative? Uncooperative? "Furtive" as police approached? [Circumstantial evidence adding to the guilt or innocence side of the scale.]

---

<sup>42</sup> While this is difficult for inexperienced new attorneys, as the result of Clinics, Externships, and bar rules permitting actual practice by supervised law students, new attorneys are entering the practice with far more real world experience than their predecessors. As such, they have amassed a growing repertoire of patterns.

- Any obvious problems with the forensic lab, or required certifications in the lab reports? [You never know.]
- Has your client or anyone else in the car made a statement? [If your client has made a harmful statement, are there Fourth Amendment or *Miranda*<sup>43</sup> lines of attack available? If a co-defendant is turning on your client, is there a “deal” and/or criminal history you can use to impeach the witness?]

Using this approach, a competent attorney can give a decent defense.<sup>44</sup> Most of the answers to the factual variables (e.g., where the drugs were found) can be found by reviewing the police report and attached statements, through information obtained by a discovery motion created on computer form or provided in “open file” discovery, and/or from a telephone conversation with the police (they often have very weird hours). If the officer adds incriminating information not in the report (e.g., she smelled marijuana in the car), I can impeach based on this serious “omission” from the original report.

Pattern representation cannot make “winners” out of “losers.” You need focus to do that. But, again, I believe it is competent. In fact, it is precisely because of these patterns in a public defender’s repertoire, which then are used in conjunction with their knowledge of the local system, their awareness of the likely range of deals in particular types of case situations, and their personal experience with individual prosecutors and judges, that public defenders tend to do *at least* as well for their clients as private defense attorneys.<sup>45</sup>

#### D. Conclusion

Everyday when I skim through the paper it’s the same. The states have no money to build new public schools, no money for teachers, no money for graduate schools, no money for social services, no money for repairing worn-out infrastructure, no money for police, no money for homeland security. Defense of the indigent criminally accused surely falls far, far below any of these areas on the list of community concerns. Even if public defender after public defender poured gasoline on themselves and lighted themselves on fire in open court in dramatic

---

<sup>43</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>44</sup> Interestingly, prosecutors often have detailed manuals laying out a pattern-like approach to litigating particular types of cases, including common legal issues, witnesses to call, and a list of questions to ask the witnesses on direct examination.

<sup>45</sup> Mitchell, *supra* note 3, at 57.

protest, I do not believe that substantial resources would be forthcoming. That means triage. The only question is whether it will be conducted haphazardly, or according to some set of rational principles based on ethical theory.

