Michigan Law Review

Volume 91 | Issue 7

1993

Are Criminal Defenders Different?

David Luban
University of Maryland

Follow this and additional works at: <https://repository.law.umich.edu/mlr>

Part of the [Criminal Law Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993).
Available at: <https://repository.law.umich.edu/mlr/vol91/iss7/4>

This Essay is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

ARE CRIMINAL DEFENDERS DIFFERENT?

David Luban *

Rate of felony acquittal in state courts: 1%.¹

Rate of acquittal in U.S. District Courts: 2.8%.²

Many lawyers unabashedly acknowledge that they are hired guns for their clients. Their clients retain them for results, not for moral solace, and the adversary system requires zealous advocacy, which will be impossible unless advocates regard themselves as (in a phrase of Stephen Gillers) amoral agents of their clients.

No one has done more to expose the jurisprudential incoherence of this view of legal practice than William Simon. In his 1978 article, *The Ideology of Advocacy*,³ Simon demonstrated a series of internal contradictions in the most promising attempts to justify the ideology of advocacy. Subsequently, in *Ethical Discretion in Lawyering*, Simon elaborated an alternative view according to which lawyers must exercise independent judgment in both their choice of clients and their choice of means in pursuing client ends.⁴

* Morton and Sophia Macht Professor of Law, University of Maryland. B.A. 1970, University of Chicago; M.A. 1973, M.Phil. 1973, Ph.D. 1974, Yale. — Ed. I wish to thank Teresa Chandler and Maxine Grosshans for research assistance, and Richard Boldt, Marc Feldman, Michael Millemann, Alan Strudler, and especially David Wasserman for many ideas and suggestions. I was particularly fortunate to have the opportunity to discuss this reply with Bill Simon in a seminar organized by Deborah Rhode. I am grateful to both of them as well as to other participants in the seminar.

1. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 1991, at 547 tbl. 5.55 (1992) [hereinafter SOURCEBOOK] (1988 figures). The conviction rate was 72%, the remaining cases being dismissed. The statistics are based on a 14-state study involving Alabama, Alaska, California, Delaware, Kentucky, Minnesota, Missouri, Nebraska, New York, Oregon, Pennsylvania, Utah, Vermont, and Virginia. *Id.* The 1988 conviction rate was similarly high (70%) in large urban counties. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1988, at 12 tbl. 13 (1990) [hereinafter LARGE URBAN COUNTIES].

Another study of 1988 felony prosecutions in thirty jurisdictions reveals a roughly similar picture: 1 acquittal out of each 100 felony arrests brought by the police for prosecution and 2 acquittals out of each 100 felony arrests that resulted in indictment. However, the conviction rates differed from the 72% quoted above: in the latter study, the conviction rate was 54% for felony arrests brought by the police for prosecution and 82% for felony arrests that resulted in indictment. BARBARA BOLAND ET AL., U.S. DEPT. OF JUSTICE, THE PROSECUTION OF FELONY ARRESTS, 1988, at 3 (1992).

2. SOURCEBOOK, *supra* note 1, at 528 tbl. 5.36 (1601 acquittals out of 56,519 defendants in 1990). The conviction rate was 82.7% (46,725 convictions out of 56,619 defendants), the remaining cases being dismissed. *Id.*

3. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

4. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

Others, including myself, have ventured similar arguments.⁵ As Simon notes, however, those who otherwise bear little sympathy for the ideology of advocacy typically carve out an exception in the context of criminal defense. Simon, by contrast, doubts that there is anything exceptional about criminal defense, and he offers in his essay a "unified field theory" of legal ethics — a theory that is unified on the basis of ethical discretion regardless of the field of practice.⁶

In Simon's view, those who carve out the criminal defense exception have been taken in by what he calls "libertarian" rhetoric stressing the might and malice of the state as adversary. Perhaps "taken in" puts the point too innocuously, since Simon views those he criticizes as active producers rather than passive consumers of libertarian obfuscation.

My first disagreement with Simon is over his choice of terminology. What he calls "libertarian" arguments are in fact nothing but familiar liberal arguments. They share nothing of libertarian theorists' obsession with property rights, nor of libertarian practitioners' enthusiasm for camouflage suits, automatic weapons, and isolated Idaho redoubts. In what follows, therefore, I will refer to the position that Simon criticizes as the liberal position.

I. THE BOGEY OF THE STATE

Among Simon's many arguments, the most important ground for his rejection of liberal rhetoric is that the state does not, when all is said and done, differ significantly from a private adversary. According to Simon, "the image of the lonely individual facing Leviathan is misleading. . . . [T]he state has other concerns besides this defendant. . . . It is more plausible to portray the typical defendant as facing a small number of harassed, overworked bureaucrats."⁷

This argument, I take it, Simon intends to be an empirical response to an empirical claim by liberals. Or rather, it is an empirical response to several empirical claims by liberals: first, that the state possesses an enormous advantage over the defendant; second — in my own words, which Simon quotes — that "[p]ower-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention and order."⁸ If liberals are right as an empirical matter,

5. For my own, see DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988).

6. William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993).

7. *Id.* at 1707.

8. *Id.* (quoting LUBAN, *supra* note 5, at 60).

the state really is different, in that it poses a chronic threat to political freedom and civil liberty. By itself, of course, that conclusion does not establish that Simon is wrong and the liberals right about the ethics of criminal defense lawyers: the inference from social fact to individual moral obligation still needs to be scrutinized. But if the liberals' empirical claims are right, their argument is plainly a lot stronger and Simon's a lot weaker.

Given the centrality of the empirical claims, I find it surprising that Simon offers nothing more than his half-sentence "portrayal" of the state as "a small number of harassed, overworked bureaucrats." Admittedly, liberals typically offer little more than their own half-sentences to depict the menace of the state, and Simon may thus be excused for electing to fight caricature with caricature. I want to look more closely at the balance of advantages in criminal prosecutions. These fall into four general categories: the balance of *resources*, the balance of *procedural advantages*, the balance of *political and psychological advantages*, and — since the overwhelming majority of criminal prosecutions are disposed of via negotiated pleas — the balance of *bargaining power*, which is determined partly by the other three and partly by the penalties attached to the substantive criminal law.

A. *Why the State Comes Out Ahead*

1. *Resources*

Personnel. According to the Department of Justice's Bureau of Justice Statistics, in 1990 there were 2300 chief prosecutors and 20,000 assistant prosecutors in American municipalities and counties.⁹ In addition, half of the lawyers in state attorney general offices — currently about 1500 full-time equivalents (FTE) — are prosecutors (typically responding to appellate attacks on convictions),¹⁰ which brings the total of state and local prosecutors to approximately 24,000. In addition, there are currently 4300 U.S. Attorneys and Assistant U.S. Attorneys; their workload is roughly 70% criminal prosecutions, yielding about 3000 full-time equivalent federal prosecutors.¹¹ Thus,

9. *Prosecutors in State Courts, 1990*, BUREAU OF JUST. STAT. BULL. (U.S. Dept. of Justice, Wash., D.C.), Mar. 1992, at 1. This document states that in 1974 the number of assistant prosecutors was 17,000. *Id.* at 2. However, the American Bar Foundation reported that in 1980 there were only 11,400 local prosecutors. BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S*, at 18 tbl. I.4.12 (1985). I do not know what to make of this discrepancy.

10. This is a current figure: as of January 1, 1993, state attorney general offices had 1485.4 full-time equivalent (FTE) lawyers working in criminal law — these are almost entirely prosecutors — out of 3025.45 FTE attorney positions: 49% prosecutors. NATIONAL ASSN. OF ATTYS. GEN., *STATISTICS ON THE OFFICE OF ATTORNEY GENERAL* 20 tbl. III-B (1993).

11. As of January 1, 1993, there were 93 U.S. Attorneys and 4183 Assistant U.S. Attorneys.

the United States has a total of about 27,000 prosecutors.

The size of the criminal defense bar is much harder to estimate. In his landmark 1975 study of criminal defense lawyers, Paul Wice estimated — one would like to know how — that out of a bar of 400,000, about 10,000 to 20,000 lawyers accept criminal cases on a more than occasional basis, including 4000 public defenders.¹² However, Wice also found that many self-described criminal defense lawyers take criminal cases only as a fraction of their practice; in his sample, one criminal defense lawyer amounted only to .65 FTE.¹³ Excluding the public defenders, who are full time, this amounts to a 1975 FTE private criminal bar of 4000 to 8000 — a total of 8000 to 12,000 including the public defenders. Scaling up for the 87% increase in the size of the bar from 1975 to 1993, and retaining the FTE-multiplier of .65 derived from Wice's study, we get roughly 15,000 to 23,000 FTE criminal defense lawyers.¹⁴

Funding. In terms of lawyer-power, then, we find estimates rang-

These figures, together with the 70% estimate, come from a telephone conversation with Michael McDonough, Executive Office of United States Attorneys (Apr. 8, 1993). McDonough added that other branches of the federal government also conduct criminal prosecutions but estimated that U.S. Attorneys are responsible for at least 90%. *Id.*

12. PAUL B. WICE, *CRIMINAL LAWYERS: AN ENDANGERED SPECIES* 29 (1978). George F. Cole mangles Wice's estimate, writing, "Of an estimated 650,000 practicing lawyers in the United States, only between 10,000 and 20,000 accept criminal cases on a 'more than occasional' basis, and of these about 4,000 are employed as public defenders." GEORGE F. COLE, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* 342 (5th ed. 1989). Cole has failed to scale up the number of criminal defense lawyers to correspond with the expansion of the bar.

13. My calculation, based on WICE, *supra* note 12, at 95 tbl. 4.1.

14. According to the 1990 Census, 747,000 people identify themselves as lawyers. Search of 1990 Census of Population and Housing Equal Employment Opportunity File, BUREAU OF CENSUS, U.S. DEPT. OF COMMERCE (disk #CD90-EE0-1) (Jan. 1993). This represents an 87% increase over Wice's 400,000 estimate in 1975. The National Legal Aid and Defender Association estimates that there are 7500 public defenders in the United States. Telephone Interview with Mary Broderick, National Legal Aid and Defender Association (Apr. 6, 1993). This represents an 87.5% increase over Wice's 1978 estimate, a growth that corresponds with the overall growth of the bar. This provides at least some evidence that the growth of the criminal defense bar is roughly in line with the growth of the bar as a whole, since there is no reason to expect that the private criminal defense bar has grown at a rate markedly different from the public defense bar. My own impression, based on 14 years in law teaching, is that criminal defense has been going steadily downward in popularity among entry-level lawyers, so I would be surprised if the criminal defense bar were growing *faster* than the bar as a whole. Note also that from 1979 to 1990 governmental budgets for prosecution and legal services went up 55%, while budgets for public defense rose by about the same amount (58.4%). *Justice Expenditure and Employment, 1990*, BUREAU OF JUST. STAT. BULL. (U.S. Dept. of Justice, Wash., D.C.), Sept. 1992, at 4 tbl. 4 (1992) [hereinafter *Justice Expenditure, 1990*]. This suggests that the defense bar did not grow faster than the prosecution.

The American Bar Foundation gives the number of legal aid lawyers together with public defenders in 1988 at 7369. BARBARA A. CURRAN & CLARA N. CARSON, *SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988*, at 20 (1991). Since there are about 4000 legal aid lawyers who are *not* public defenders (4249 in 1991, according to the Legal Services Corporation), this would yield what seems to me a very low number of public defenders — less than 3500.

ing from a slight to a significant prosecutorial advantage: the national ratio of prosecutors to defense lawyers may be as low as just above unity or as high as 1.8:1. An examination of budgets tends to indicate rough parity between the two. In fiscal year 1990, total governmental expenditures for public defense amounted to \$1.74 billion, while total governmental expenditures for prosecution and legal services totaled \$5.5 billion.¹⁵ Prosecutors amount to only ("only"!) about 50% of government lawyers, so the ratio of prosecution expenditures to public defense expenditures is about 1.6:1.¹⁶ The defendants in three-fourths of all criminal prosecutions qualify for public defenders, and public defenders handle the cases of 90% of those who qualify,¹⁷ so that the dollar advantage possessed by prosecution amounts to this: public defense handles two-thirds of prosecuted cases with about five-eighths the budget of prosecution, a dollar advantage on the part of prosecution close enough to dead even that the difference does not matter, given the uncertainty in the other figures. (It should be noted, however, that 94% of responding public defender offices expressed the belief that the prosecution has a larger budget than public defense does for the same cases, including 69% who believe that the prosecutor's budget is significantly larger.¹⁸) In the remaining third of cases, defendants either are unrepresented or retain counsel (mostly the latter). Since retained counsel charge a significantly higher rate than the government pays for public defense, it is reasonable to conclude that in these cases defense outspends prosecution for lawyers. All in all, then, somewhat more money is probably spent on criminal defense lawyers than on prosecutors.

What follows from this? Plainly, these data provide some support for Simon's defanged-state picture, inasmuch as they show that prose-

15. *Justice Expenditure, 1990*, *supra* note 14, at 3 tbl. 2.

16. CURRAN ET AL., *supra* note 9, at 18 tbl. I.4.12, gives the total number of local prosecutors and state attorneys general at 55% of state and local government lawyers; currently, as we have seen, about half of lawyers working in the offices of state attorneys general are prosecutors.

The actual ratio, 1.58:1, is probably on the low side, because (a) public defense expenditures include state-paid representation of criminal defendants in civil matters, and (b) prosecution expenditures include not just lawyers but "various investigative agencies having full arrest powers and attached to offices of attorneys general, district attorneys, or their variously named equivalents." *Justice Expenditure and Employment, 1988*, BUREAU OF JUST. STAT. BULL. (U.S. Dept. of Justice, Wash., D.C.), July 1990, at 151.

The American Bar Association, using the same statistics, concludes that "public defense continues to get approximately \$1 for every \$3 for prosecution." AMERICAN BAR ASSOCIATION, *THE STATE OF CRIMINAL JUSTICE: AN ANNUAL REPORT 15* (1993). The discrepancy between this figure and mine is accounted for very simply: the ABA counted all, rather than half, of governmental expenditures for legal services as "prosecution."

17. Institute for Law and Justice, National Assessment Program: Survey Results for Public Defenders, 2 (Oct. 1, 1990).

18. *Id.*

cutors do not have significantly greater funds than defense lawyers, though prosecutors probably have defenders outnumbered. Moreover, the fact that a corps of 22,000 local prosecutors handles a caseload of about two million felonies annually,¹⁹ or ninety cases actually filed per prosecutor (with almost as many processed and dismissed), lends support to the "small number of harassed, overworked bureaucrats" picture of prosecutors.

The numbers paint this picture even more vividly for defense lawyers, however, and shortly I will consider the implications of this fact for Simon's argument. But first it is important to notice that these numbers do not begin to address the issue of the prosecution's advantage, even in terms of personnel and fiscal resources.

Most obviously, these numbers leave out the police. Simon does not, I take it, wish to deny that adequate advocacy requires investigation of cases, nor that investigation requires investments of effort and money. For this, the prosecution has the police, while the defense has only what it can pay for out of its own or its clients' resources. One might reply that in reality prosecutors exercise only a limited claim on overstretched police resources and probably compete with the demands of street patrolling for officers' time; but this argument overlooks the important point that about 30% of "solved" crimes are cleared by on-the-scene arrest and another 50% by victim or witness identification when the police arrive.²⁰ These "investigations" occur in the course of regular patrolling and amount to an investigative free ride for the prosecution. Needless to say, these are not necessarily cases in which the accused is guilty of a crime, and in which there is no need for defense counsel to conduct an independent investigation. The majority of prosecutors' investigative expenses, therefore, are charged against the \$31.8 billion spent annually on police protection.²¹ In addition, prosecutors — but not defense lawyers — have access to the crime lab, to state psychologists, and to the FBI fingerprint and DNA laboratories.

Given the inconvenience, expense, and time involved, it is perhaps unsurprising that defense lawyers do very little factual investigation of their cases, but we are nonetheless entitled to get depressed over just how little. A study in Phoenix showed that only about 55% of defense

19. COURT STATISTICS PROJECT, NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991, at 156 tbl. 15 (1992) (showing 1,947,167 felonies in state trial courts).

20. PETER W. GREENWOOD ET AL., *THE CRIMINAL INVESTIGATION PROCESS* 227 (1977), quoted in COLE, *supra* note 12, at 238.

21. *Justice Expenditure*, 1990, *supra* note 14, at 3 tbl. 2.

attorneys visited the crime scene before the final felony trial, and only 31% interviewed all the prosecution witnesses who testified at trial (15% interviewed none of the prosecution witnesses);²² 47% entered plea agreements without interviewing any prosecution witnesses, while 30% entered plea agreements without interviewing any defense witnesses.²³ Even more dramatic was Michael McConville and Chester Mirsky's New York City study, which found that assigned counsel in homicide cases visited the crime scene in only 12% of their cases and conducted pretrial interviews of only 21% of their witnesses and 25% of their clients.²⁴ In nonhomicide felonies, these attorneys interviewed their witnesses in only 4.2% of their cases, and their clients in only 18%.²⁵ Jonathan Casper's well-known study reports that 27% of public defenders spend less than ten minutes with their clients, while 59% spend less than half an hour.²⁶

Moreover, many indigent defendants remain incarcerated before their trials because they cannot make bail, thereby losing the opportunity to gather their own facts, assist their lawyers, or refresh their memories. There is irony here: at one point in his argument, Simon asks us to consider the "silly" hypothetical proposal to handicap police and prosecutors by requiring them to carry weights.²⁷ He intends this argument as a *reductio ad absurdum* of the liberal position that we ought to handicap the state: Who could entertain such a silly notion? Simon apparently misses the fact that indigent defendants routinely carry the weight of the entire jailhouse on their backs.²⁸

The inequality of investigative resources decisively sways the balance of resource advantage toward the prosecution. "The state" is not just a group of harassed, overworked bureaucrats in the D.A.'s office. It is a group of harassed, overworked bureaucrats, backed by the po-

22. Margaret L. Steiner, Special Project, *Adequacy of Fact Investigation in Criminal Defense Lawyers' Trial Preparation*, 1981 ARIZ. ST. L.J. 523, 534, 537; see also Gary T. Lowenthal, *Theoretical Notes on Lawyer Competency and an Overview of the Phoenix Criminal Lawyer Study*, 1981 ARIZ. ST. L.J. 451.

23. Marty Lieberman, Special Project, *Investigation of Facts in Preparation for Plea Bargaining*, 1981 ARIZ. ST. L.J. 557, 576, 579; see also Lowenthal, *supra* note 22.

24. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 759, 762 (1986-1987).

25. *Id.* at 581, 759, 762.

26. JONATHAN D. CASPER, CRIMINAL COURTS: THE DEFENDANT'S PERSPECTIVE 35, tbl. VI-5 (1978).

27. Simon, *supra* note 6, at 1708. Actually, this example makes little sense even on its own terms: why would carrying weights handicap a prosecutor?

28. I do not mean to deny that incarcerating defendants is often a legitimate response to the worries that they will intimidate or even assassinate witnesses or that they will flee. Even if there are good reasons to incarcerate defendants, the fact remains that defendant incarceration confers a large investigative advantage on the prosecution.

lice and able in many cases to immobilize their adversaries in cold concrete.

2. Procedure

Given the amount of ink spilled over the years by law-and-order conservatives anguished about the excessive rights of the accused, it is useful to consider the procedural advantages the law confers on prosecutors. In his classic 1960 article, *The State and the Accused: Balance of Advantage in Criminal Procedure*, Abraham S. Goldstein compared the official rhetoric of criminal procedure with the actual legal situation confronting defendants.²⁹ For the former, he quotes Learned Hand in *United States v. Garsson*:

Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.³⁰

The similarity between Hand's final sentence and Simon's general line of argument is an ironic confirmation that antiliberalism makes strange bedfellows. Focusing on two central points — pretrial disclosure devices and pretrial screening devices — Goldstein concludes, Hand to the contrary, that

[h]owever much he can be said to benefit from the widely publicized decisions in certain areas of constitutional law, the hypothetical "accused" can find little to please him in current developments in the criminal trial process. Those developments reflect entirely too little concern about the inherent inequality of litigating position between the expanding state and even the most resourceful individual, much less the vast majority of resourceless ones.³¹

Goldstein was writing before the due process revolution — before *Gideon*,³² *Mapp*,³³ and *Miranda*.³⁴ In fact, however, the due process revolution did little to affect the truth of Goldstein's conclusions either about pretrial disclosure or pretrial screening; and, as Bennett Gershman has argued recently, today's prosecutor continues to enjoy overwhelming procedural advantages.³⁵

29. Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

30. 291 F. 646, 649 (S.D.N.Y. 1923), quoted in Goldstein, *supra* note 29, at 1151.

31. Goldstein, *supra* note 29, at 1199.

32. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

33. *Mapp v. Ohio*, 367 U.S. 643 (1961).

34. *Miranda v. Arizona*, 384 U.S. 436 (1966).

35. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992). This article is a superb update of Goldstein's classic.

Among the most significant issues is the basic fact that, unlike parties in civil litigation, criminal defendants have virtually no discovery rights against the prosecution in most jurisdictions. True, the prosecution has an ethical obligation to disclose exculpatory material to the defendant, and *Brady v. Maryland*³⁶ established that refusal to do so constitutes reversible error. However, an unscrupulous prosecutor needs to get caught before *Brady* does the defendant any good, and it is a matter of conjecture how often the prosecution gets away with undisclosed *Brady* material. *Brady* was drastically weakened, moreover, by *United States v. Agurs*,³⁷ which held that prosecutors are not obligated to provide *Brady* material absent a specific request from the defense, and by *United States v. Bagley*,³⁸ establishing a harmless error standard for *Brady* review. The recent Supreme Court decision in *United States v. Williams*³⁹ further weakened the force of *Brady* by holding that federal trial judges cannot rectify egregious prosecutorial misconduct at the grand jury stage by dismissing a case; the Ninth Circuit subsequently held on the basis of *Williams* that a trial judge could not dismiss a case even though the prosecutor had intentionally withheld *Brady* material and lied about its existence through lengthy pretrial proceedings and even into the trial itself.⁴⁰ True, the prosecutor's misbehavior remains ground for reversal. But this counterargument misses the point, for two reasons: first, the defendant might never learn of the withheld *Brady* material, and second, the Ninth Circuit holding means that the prosecution remains at liberty to put the defendant through the rigors of trial and appeal. Part of the liberal argument that Simon criticizes is that the state may well abuse the legal system in order to "get" individuals it does not like; putting someone through a lengthy trial and appeal process, even one that ends in exoneration, is a time-honored method of persecution by prosecution.

Brady, moreover, holds only that the prosecution must turn over exculpatory material to the defense. The defense still has no right to depose prosecution witnesses or even to interview an unwilling witness,⁴¹ and in some jurisdictions the prosecution lies under no obliga-

36. 373 U.S. 83 (1963).

37. 427 U.S. 97 (1976).

38. 473 U.S. 667 (1985).

39. 112 S. Ct. 1735 (1992); cf. *United States v. Hasting*, 461 U.S. 499 (1983) (judicial supervisory power cannot be used to censure prosecutorial misconduct unless defendant was prejudiced).

40. *United States v. Isgro*, 974 F.2d 1091 (9th Cir. 1992), revg. 751 F. Supp. 846 (C.D. Cal. 1990), cert. denied, 113 S. Ct. 1581 (1993).

41. Florida is an exception: it applies rules of civil discovery to the criminal defense process,

tion even to divulge the names of its witnesses to the defense. Nor need the prosecution divulge the results of scientific tests or expert evaluations unless the prosecutor believes these to be exculpatory. Though some prosecutors maintain an "open file" policy, granting defenders access to the prosecution's case files, this is purely a policy choice on the prosecutor's part, not a legal right of defendants.

Although the principal rationale for this no-discovery procedural regime is the protection of prosecution witnesses, it appears to be justified as well by the ideal of adversary balance. After all, because of the defendant's right against self-incrimination, the prosecution has no discovery rights. Fair is fair.

But fair is not fair. *In fact*, the prosecution retains significant discovery rights. By obtaining a warrant, prosecutors and police can search the defendant's possessions. Since *Leon* and its successors, even an illegal search conducted in good faith passes constitutional muster,⁴² and empirical studies in the wake of *Mapp* yielded no persuasive evidence that the exclusionary rule deters police from engaging in the illegal searches that today's Court is so eager to ratify.⁴³ Indeed, since *Arizona v. Fulminante*, even physically coerced confessions may in some circumstances be admissible.⁴⁴ Prosecutors can plant informants in the defendant's cell. By granting immunity, the prosecution can compel one's codefendants to testify against one. Indeed, this fact casts a doubt on one of Simon's background assumptions, namely that aggressive defense, when it is successful, frustrates the prosecution of crimes. A large number of crimes have multiple defendants, and aggressive defense frequently consists in a lawyer aggressively negotiating an opportunity for her client to turn state's evidence against other defendants. In these cases, the aggressive advocate becomes, in effect, a deputy prosecutor pro tem of the codefendants and enhances rather than frustrates the successful prosecution of crimes.

Moreover, it is a grave mistake to believe that the right against self-

so that defenders can depose prosecution witnesses and impeach their testimony with the depositions. I owe this information to Richard Boldt.

42. *United States v. Leon*, 468 U.S. 897 (1984).

43. The empirical studies include Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 243 (1973); Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 NW. U. L. REV. 740 (1974). Simon himself recognizes that "[o]ne apparently widespread police and prosecutorial response to strict federal court decisions on search-and-seizure issues has been police perjury designed to circumvent the decisions." Simon, *supra* note 6, at 1711 n.15.

44. 111 S. Ct. 1246 (1991).

incrimination and *Miranda* mean that police and prosecutors cannot in fact interrogate defendants to their hearts' content. A well-known empirical study conducted shortly after *Miranda* concluded that "warnings had little impact on suspects' behavior. No support was found for the claim that warnings reduce the amount of 'talking.'"⁴⁵ In some cases, perhaps, warnings do not affect suspects' behavior because defendants want to "get it off their chests." Even apart from defendants' desire to talk, however, one should anticipate that *Miranda* would make little difference because of the well-studied phenomena of intimidation and reflex compliance that occur when one is confronted with the trappings of authority.⁴⁶ In Milgram's classic experiments on obedience to authority, subjects were ordered to administer massive electrical shocks to an innocent individual (actually a confederate of the experimenter); in one of the basic experiments, 65% of the subjects complied fully despite the "victim's" screams of pain and complaints of a heart condition.⁴⁷ Related experiments confirmed that the patina of legitimacy surrounding those in authority suffices to get subjects to do things that they say they are unwilling to do. Why should suspects be any different? Suspects who have been arrested are more often passive than rebellious;⁴⁸ they go along with what the police want them to do, including answering questions and even confessing. When this fundamental compliance phenomenon joins with the distrust many suspects feel toward a court-appointed lawyer, it is scarcely surprising that *Miranda* makes little difference in actual behavior.

Finally, it is important to note the current policy of federal prosecutors to engage in ex parte contact with represented witnesses and to subpoena defense lawyers. The latter practice violates several states' legal ethics rules, while the former practice violates all states' ethics rules; however, the Justice Department has continued to engage in these practices, asserting (in the well-known Thornburgh memorandum) that, because of the Supremacy Clause, state bar ethics rules are simply not binding on federal prosecutors.⁴⁹ In short, one of Gold-

45. Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1563 (1967) [hereinafter Project].

46. The classic source here is STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974). See also HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* (1989).

47. MILGRAM, *supra* note 46, at 55-57, 60 tbl. 3.

48. See Project, *supra* note 45, at 1554-56.

49. Memorandum to All Justice Department Litigators from Dick Thornburgh, Attorney General (June 8, 1989), quoted in *In re Doe*, 801 F. Supp. 478 (D.N.M. 1992). For discussion of these practices, see Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291

stein's fundamental points remains as valid today as thirty-three years ago: the prosecution can undertake discovery, but the defense cannot.

A second procedural advantage to the prosecution lies in the appellate and collateral review processes. Criminal appeals are marked by an extraordinary deference toward jury factfinding, as well as by frequent invocations of "harmless error" doctrines that typically impose upon appellants the nearly insuperable burden of demonstrating actual prejudice, which means proving the negative. I have heard public defenders bitterly refer to the *Strickland v. Washington*⁵⁰ test of ineffective assistance of counsel, which requires a showing of prejudice, as the "warm body" test — in all but the most egregious cases, any defense counsel still capable of fogging a mirror will be "effective." Just as *Strickland* shields defense incompetence from appellate challenge, the harmless error rule embodied in *Hasting*⁵¹ and *Bagley*⁵² effectively insulates prosecutorial misconduct. In Gershman's words:

The [harmless error] rule has developed into the most powerful judicial weapon to preserve convictions whenever an appellate tribunal, sitting as a "super-jury," concludes that the defendant is clearly guilty. The harmless error rule thus modifies prosecutorial behavior in the most pernicious fashion: it tacitly informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt.⁵³

In recent years, moreover, the Supreme Court has severely truncated habeas review with a heads-I-win-tails-you-lose argument: habeas relief is unavailable if the appellant is entering a novel claim, and a claim is novel if the state can make a nonfrivolous argument contesting it. In effect, the existence of a litigable question suffices to remove the appellant's opportunity to litigate it.⁵⁴

3. *Legitimacy*

The state's greatest advantage, however, is scarcely quantifiable and cannot be pinned to any legal doctrine. That advantage is the enormous imbalance of credibility between prosecutors and police on

(1992); Fred C. Zacharias, *A Critical Look at Rules Governing Grand Jury Subpoenas of Attorneys*, 76 MINN. L. REV. 917 (1992).

50. 466 U.S. 668 (1984).

51. *United States v. Hasting*, 461 U.S. 499 (1983).

52. *United States v. Bagley*, 473 U.S. 667 (1985).

53. Gershman, *supra* note 35, at 425.

54. See Robin L. West, *The Supreme Court, 1989 Term — Foreword: Taking Freedom Seriously*, 104 HARV. L. REV. 43, 55-58 (1990) (analyzing *Saffle v. Parks*, 494 U.S. 484 (1990), *Butler v. McKellar*, 494 U.S. 407 (1990), and *Sawyer v. Smith*, 497 U.S. 227 (1990)).

the one hand, and criminal defendants on the other. One of the first points that any criminal defense lawyer will make about her practice is that the legal burden of proof has nothing whatever to do with the actual burden of proof: the jury enters the box with an overwhelming predisposition to believe that the accused is guilty as charged.⁵⁵ When, as is very often the case, the chief prosecution witnesses are police officers, this predisposition is amplified. Perhaps the most amazing feature of the Simi Valley acquittal of Los Angeles police for beating Rodney King is the tremendous credulity of the jurors toward the claim that the police were acting properly. These predispositions can be ascribed to several, not necessarily distinct, psychological causes: the basic feeling that where there's smoke, there's fire, hence that the accused must be guilty; sympathetic responses to the police for offering physical protection from criminals that translate into sympathetic hearings of police officers' testimony; psychological phenomena that include obedience to authority and the well-known "belief in a just world,"⁵⁶ leading jurors to want the police to be telling the truth. In addition, however, we may point to two psychological processes with a political dimension:

*Legitimation through process.*⁵⁷ Though jurors probably do not know in any detail how cases are screened — whether there was a preliminary hearing, or a grand jury, or an internal screening by prosecution, or a motion to dismiss — it seems safe to assume that jurors believe that the case has been screened before getting this far. This belief, one supposes, biases them in favor of the prosecution's case. What they do not know, however, is that (a) a judge or magistrate at a preliminary hearing is under no obligation to dismiss a case even if she

55. Studies of state felony courts reveal a very high conviction rate in cases that go to trial. According to one study, 7 out of 9 cases (78%) tried in felony courts result in conviction. BOLLAND ET AL., *supra* note 1, at 1 fig. 2. Another study revealed a conviction rate of 5 out of 6 cases (83%) that went to trial in large urban counties. LARGE URBAN COUNTIES, *supra* note 1, at 12 tbl. 13. Of course, these numbers might mean that 77% or 83% of defendants who go to trial are guilty as charged; it might reflect the lawyerly folk wisdom that prosecutors hate to lose more than they like to win, so that they do not try cases unless victory is virtually certain. The rate of trial is actually higher in cases in which the state has strong evidence than it is in cases where the factual issues are in dispute: evidently, this differential occurs because in the former situation prosecutors have less incentive to make an acceptable plea offer. See LYNN M. MATHER, PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL CASE-DISPOSITION 60-63 (1979).

At one point in his article, Simon writes "that reliable convictions of guilty defendants are a critical safeguard of innocent ones," Simon, *supra* note 6, at 1711, because the prospect of guilty defendants escaping justice due to aggressive defense inflames crime-control demagoguery. How much more reliable would conviction have to be to suit Simon?

56. MELVIN J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION (1980).

57. I take this phrase from the title of NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN (1969).

is convinced that the prosecution has nothing like proof beyond a reasonable doubt; if the prosecution has any plausible evidence at all, judges are likely to let the case go to the jury, believing that it is the jury's business to determine whether the reasonable doubt standard has been met. (b) Prosecutors are under no obligation to present exculpatory evidence to a grand jury, and grand juries indict on a probable cause standard.⁵⁸ (c) Different prosecutors' offices have different policies about which cases to bring, only one of which is the policy of "trial sufficiency," where the threshold for proceeding is winnability at trial. Others use the weaker standards of "legal sufficiency" (are the minimum legal elements present?) or "system efficiency" (what charges will get a speedy disposition of the case, typically through a quick plea agreement?).⁵⁹

The result is a vicious circle: only the trial sufficiency standard requires prosecutors to ask themselves whether the state can prove its case beyond a reasonable doubt. In prosecutors' offices with other types of preliminary screening processes, that question is bumped over to the jury. But the jury may be tacitly giving the state the benefit of the doubt in its assertions precisely because jurors believe in the efficacy of the prior screening process.

Jurors are particularly likely to subscribe to this belief because, since the due process revolution, the larger public has been bombarded with an immense amount of Hand-like rhetoric about appellate decisions that have given every advantage to the criminal and "handcuffed the police." A 1989 Gallup poll revealed that 83% of Americans believe that courts do not deal harshly enough with criminals, while 79% are more worried that criminals are let off too easily than that the constitutional rights of some people accused of committing a crime are not being upheld.⁶⁰ Yet, without downplaying the significance of the due process revolution, we must nevertheless realize an important point that may well not occur to jurors: one result of the revolution has been merely to force investigative and prosecutorial abuses underground. As David Wasserman notes in his recent empirical study of the New York City appellate public defender:

[W]e have observed the double-edged character of appellate review, in exposing error but refining its concealment. The due process revolution

58. These points were among those analyzed in Goldstein, *supra* note 29.

59. Joan E. Jacoby, *The Charging Policies of Prosecutors*, in *THE PROSECUTOR* 75, 82-86 (William F. McDonald ed., 1979).

60. THE GALLUP REPORT, Rep. No. 285, at 28 (June 1989), reproduced in SOURCEBOOK, *supra* note 1, at 203 tbls. 2.35 & 2.36. In fact, the likelihood of being prosecuted in a state court after arrest for a felony ranges from 64% (motor vehicle theft) to 90% (homicide), while the overall conviction rate for felonies is 72%. SOURCEBOOK, *supra* note 1, at 547 tbls. 5.54 & 5.55.

. . . has led to more professional and restrained police conduct but also encouraged police perjury, as in the notorious "dropsy" cases; it has reduced the frequency of prosecutorial misconduct, but it also increased its subtlety. These examples suggest the dialectic of appellate review: trial-level actors are subject to stricter or more searching review; they learn, sometimes with appellate coaching, how to insulate their conduct from this heightened scrutiny⁶¹

Jurors who do not reflect upon this dialectic may give all too much credence to prosecutors and police who, they assume, habitually operate under the moral equivalent of Simon's fanciful handicaps.

Political legitimacy. More generally, the state has enormous initial credibility because citizens believe that it is democratic and legitimate. There is a nice paradox here. Liberal rhetoric often promotes the policy of aggressive defense as a safeguard against totalitarianism.⁶² An independent bar, like an independent judiciary, has typically been among the first targets of totalitarian regimes, and history is replete with cases in which heroic and independent criminal defense attorneys have protected victims against the dangers of an oppressive and illegitimate state.⁶³ Whether or not these arguments are right, critics such as Simon may argue that they are irrelevant in a nontotalitarian regime. But the paradox is that, just as a zealous advocate may be needed to counterbalance an illegitimate government precisely because of its illegitimacy, a zealous advocate may also be needed to counterbalance a legitimate one *precisely because of its legitimacy*.

To these arguments Simon has a reply: if jurors are unlikely to appreciate the significance of the burden of proof lying with the state, judges should rectify the situation by removing the decision from the hands of the jury and directing an acquittal.⁶⁴ This remedy might make sense in a particularly egregious and unusual case — in *People v. Daniels*,⁶⁵ for example, where a New York jury, ignoring the testimony of numerous respectable alibi witnesses who placed the defendant elsewhere, convicted Daniels of second-degree murder solely on the basis of an eyewitness identification by an emotionally handicapped ten year-old whose identification of Daniels was contradicted by some of his other accounts of the incident.⁶⁶ But the defendant-is-

61. DAVID T. WASSERMAN, A SWORD FOR THE CONVICTED: REPRESENTING INDIGENT DEFENDANTS ON APPEAL 245 (1990).

62. See, e.g., MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 2, 4 (1975).

63. The South African civil rights bar is a notable recent example.

64. Simon, *supra* note 6, at 1718.

65. 453 N.Y.S.2d 699 (1982).

66. Even here the trial judge did not direct a verdict, and the appellate court, though granting Daniels a new trial, obsequiously deferred to the jury's factfinding prerogatives, suggesting

probably-guilty predisposition that defense lawyers observe in jurors is seldom so blatant or so exceptional. It is present in virtually every case, a kind of cosmic background radiation of state legitimacy that pervades the factfinding process to make reasonable doubts about the state's case seem less reasonable. Not only would Simon's remedy require judges to intervene in nearly every case, but it is unclear that even so drastic a procedural step would change anything — why, after all, should judges be less susceptible than anyone else to the aura of legitimacy surrounding the state?

4. *Plea Bargaining*

Over 90% of criminal convictions in state courts are achieved through guilty pleas;⁶⁷ plea bargaining must therefore be the primary focus of attention in assessing the balance of advantage in the criminal process. All of the factors we have already examined confer valuable bargaining chips on the prosecution. But these are only the beginning of the prosecutor's bargaining advantages. Prosecutors can multiply charges or overcharge defendants in order to generate tradable items. The savagely excessive sentences that Congress and state legislatures have seen fit to impose in recent years give additional leverage. Moreover, the defendant faced with such a sentence will of necessity be highly risk averse, whereas the prosecutor has little to lose if negotiations break down — in particular, nothing prevents the prosecutor from averting trial by coming back with a better offer — and so the prosecutor can proceed in a more risk-neutral fashion. If a defendant has urgent reasons to get out of jail quickly — a job or dependents — then bail negotiation provides the prosecutor with additional leverage. Finally, let us recall that public defenders are at least as harassed and overworked as prosecutors. As a result, the plea-bargaining process as it actually occurs consists of a brief and routinized *pas de deux*, taking little or no account of the individual defendant and based on a conventional schedule, shared by all the repeat players in the criminal justice system, of what different offenses “go for” in a jurisdiction. As Thomas Schelling has shown, the existence of such conventional focal points in bargaining creates a dynamic that drives parties, even those

that Simon's proposed reform is likely to run against the judicial grain. For an illuminating discussion of this important case, which illustrates the way that appellate review can at times offer trial-level actors instructions on how to insulate their conduct from scrutiny, see WASSERMAN, *supra* note 61, at 147-49.

67. *Felony Sentences in State Courts, 1988*, BUREAU OF JUST. STAT. BULL. (U.S. Dept. of Justice, Wash., D.C.) Dec. 1990, at 6 tbl. 9.

who do not accept the convention, toward the focal point.⁶⁸ This is another advantage to the prosecutor: the "set prices" that result from widespread practices of perfunctory advocacy on the part of defenders exert enormous gravitational force by hardening the prosecutor's position, even when a defense counsel wants to do a job that is not perfunctory.

Examining the criminal process primarily from the standpoint of bargaining advantage in plea negotiations has important implications for Simon's critique of aggressive defense. A famous chess anecdote concerns a game between the high-strung early twentieth-century grandmaster Nimzovich and the cigar-smoking world champion, Emanuel Lasker. Nimzovich hated cigar smoke and requested Lasker not to smoke. Lasker held his unlit cigar clenched in his teeth, but Nimzovich nevertheless complained to the tournament director. When the latter pointed out that Lasker was not smoking his cigar, Nimzovich angrily replied, "You're a chess master — you should know that the threat is stronger than the execution!" Deceptive or otherwise "hardball" defense tactics that seem morally troublesome if they are actually used may trouble our conscience less when we realize that they are threats that are stronger than their execution. The credible threat of an aggressive defense that will not necessarily lead to acquittal — remember that only 1% of state felony prosecutions end in acquittal — may provide a bargaining chip sufficient to persuade an otherwise recalcitrant prosecutor to bargain in good faith.⁶⁹ There is an analogy on the civil side, where opponents of caps on pain-and-suffering and punitive damages frequently argue that it is only the threat of a windfall verdict that induces insurers to bargain in good faith. So even if Simon were right that aggressive defense on behalf of guilty clients is morally problematic, an understanding of the defender's role that permits aggressive defense is preferable to one that does not, because there is nothing wrong with threatening aggressive advocacy in order to make a pugnacious prosecutor bargain in good faith.

This is not, to be sure, a knockdown argument. A substantial body of philosophical literature, mostly having to do with the morality of

68. THOMAS C. SCHELLING, *Bargaining, Communication, and Limited War*, in *THE STRATEGY OF CONFLICT* 53 (rev. ed. 1980).

69. A 1989 study found "an overwhelming propensity [on the part of prosecutors] to moderate the harshness of plea bargain terms to defendants if the government had a weak case against them." 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, 257 (1989). A prosecutor's judgment of the weakness of a case is inevitably a relative judgment: if an aggressive defender has displayed a propensity to challenge evidence or has succeeded in making plausible motions to suppress, then the prosecution's case is weaker.

nuclear deterrence, has debated the question of whether it can be morally acceptable to threaten something that is morally wrong to do when the threat lowers the probability that one's bluff will be called.⁷⁰ In my view, the arguments for and against the "wrongful intentions principle," which states that it is wrong to intend, even conditionally, what it is wrong to do, are inconclusive; and from the wrongful intentions principle a *wrongful threats principle*, which states that it is wrong to threaten what it is wrong to do, seems to follow. Simon may wish to appeal to the wrongful threats principle to argue that the threat of aggressive defense is no more acceptable in plea bargaining than the actual practice is in trials.

Nevertheless, I think that the wrongful threats principle is probably wrong. The principal argument on its behalf is deontological in character and runs approximately as follows: either the threatener is bluffing and does not intend the threat, in which case the threat violates the deontological proscription on lying and deceit, or else the threatener does intend to carry out the threat if the bluff is called, in which case the threatener has corrupted herself by forming a wrongful intention. The latter point also yields a consequentialist argument on behalf of the wrongful intentions principle, to wit, that if the bluff gets called, the threatener who has actually formed the wrongful intention will respond with wrongdoing.

In my view, neither the argument against deceit nor the argument against self-corruption is exactly a showstopper, not least because they both beg the question. After all, the problem is not "Is it wrong to deceive or to self-corrupt by forming wrongful intentions?" Properly framed, the problem is "Is it wrong to deceive or to self-corrupt by forming wrongful intentions *if that is the most plausible way to get someone else to do the right thing?*" It is hardly self-evident that the answer, even for a deontologist, is "no." On consequentialist grounds, moreover, threats to do something wrongful are morally acceptable, provided that making them drastically lowers the probability of having to carry them out while increasing the probability that others will act better in response to the threat. My own tentative view is that nuclear bluffing and nuclear deterrence are indeed morally unacceptable — but this is because of the risks they impose of an actual nuclear war, not because of the general immorality of threatening or even conditionally intending to do what is wrongful. The consequences of having one's nuclear bluff called, or of acting on the basis of a wrongful conditional intention to retaliate massively to a first strike, are so dras-

70. See, for example, Daniel M. Farrell, *Immoral Intentions*, 102 *ETHICS* 268 (1992), together with the literature cited in this article.

tic in the nuclear case that the risks outweigh the benefits. In the criminal defense context, by contrast, it seems intuitively correct to me that the prospect of aggressive defense can indeed function to take away the prosecutor's built-in bargaining advantage, and that in this remedial role it should be endorsed even by someone who is more persuaded than I am by Simon's general line of argument. After all, Simon is deeply concerned with the American tendency to mete out grotesquely harsh punishments, and it seems plain that prosecutors have little incentive to bargain fairly unless defenders reestablish the balance of bargaining power.

Notice that most of the arguments I have been making so far assume no extraordinary malice on the part of prosecutors. They assume only ordinary malice, the kind of malice that is in practice not much different from the indifference of Simon's "harassed, over-worked bureaucrats" who simply want to dispose of cases quickly. The argument becomes much stronger when we factor in greater prosecutorial arrogance and vindictiveness. The flavor of such vindictiveness is well conveyed by a speech Maurice Nadjari made to fellow prosecutors. Nadjari reminded his listeners that their "true purpose is to convict the guilty man who sits at the defense table, and to go for the jugular as viciously and rapidly as possible You must never forget that your goal is total annihilation."⁷¹ Recently the *Washington Post* ran a six-part series describing in blood curdling detail a number of dramatic abuses of prosecutorial power by U.S. Attorneys.⁷² The author of the series sums up the situation as follows:

Public pressure to combat rising crime, 12 years of conservative administrations, and a "law and order" Supreme Court majority have transformed the U.S. criminal justice system and vastly expanded the powers of federal prosecutors over the past decade.

. . . .

. . . Justice Department policies and Supreme Court rulings have given prosecutors more flexibility than ever before in pursuing convictions, and made it increasingly difficult for courts or aggrieved individu-

71. Maurice Nadjari, *Selection of the Jury (Voir Dire)*, Lecture to the National College of District Attorneys, University of Houston (Summer 1971), quoted in MARVIN E. FRANKEL, *PARTISAN JUSTICE* 32 (1980).

72. Jim McGee, *The Appearance of Justice, War on Crime Expands U.S. Prosecutors' Powers* (pt. 1), WASH. POST, Jan. 10, 1993, at A1 [hereinafter *War on Crime Expands U.S. Prosecutors' Powers*]; Jim McGee, *U.S. Crusade Against Pornography Tests the Limits of Fairness* (pt. 2), WASH. POST, Jan. 11, 1993, at A1; Jim McGee, *Grand Jury Shielded From the Facts: A Defendant's Nightmare* (pt. 3), WASH. POST, Jan. 12, 1993, at A1; Jim McGee, *Courts Losing Options in Prosecutor Misdeeds* (pt. 4), WASH. POST, Jan. 13, 1993, at A1; Jim McGee, *Between Politics and Professionalism: One Prosecutor's Tenure and Tactics* (pt. 5), WASH. POST, Jan. 14, 1993, at A1; Jim McGee, *Prosecutor Oversight Is Often Hidden From Sight* (pt. 6), WASH. POST, Jan. 15, 1993, at A1 [hereinafter *Prosecutor Oversight is Often Hidden From Sight*]; see Gershman, *supra* note 35, at 451-53 for several shocking examples of prosecutorial abuses.

als to hold federal prosecutors accountable for tactics that once were considered grounds for case dismissal or disciplinary action.

These tactics include manipulation of grand juries; failure to disclose evidence favorable to a suspect or defendant; government intrusion into the relationship between defense attorneys and clients; intimidation of witnesses; and blitzkrieg indictments or threats of indictment designed to force capitulation without the need for a trial.⁷³

The Supreme Court, in *Bank of Nova Scotia v. United States*,⁷⁴ suggests that aggrieved defendants must seek their remedy against such abuses in the Justice Department's internal disciplinary process.⁷⁵ However, one of the *Post* articles notes that, between 1985 and 1991, only twenty-two Assistant U.S. Attorneys resigned during pending internal investigations by the Justice Department's Office of Professional Responsibility (OPR), while one was fired outright, a discipline rate of well under one half of one percent.⁷⁶ After a critical General Accounting Office audit of the OPR in 1991, Representative Robert E. Wise, Jr. (D-W.Va.) commented: "Based on what we have learned, I am concerned that controlling spin, not a prosecutor's conduct, is OPR's first priority."⁷⁷

All this is deeply troubling, for it suggests that the state's advantages are too often coupled with a ruthless abusiveness — indeed, that one of the state's advantages lies precisely in an institutionalized tolerance of ruthless abusiveness. In the end, however, it may be that nothing turns on the presence of actual malice among prosecutors. Even if prosecutors are merely harassed, overworked bureaucrats, criminal defendants can expect only assembly line consideration of their cases, perfunctory bureaucratic responses, and a deaf prosecutorial ear sealed by haste and indifference rather than by anger. As Simon himself has observed in a different context, the world of Kafka's *The Trial* is hardly an option superior to the world of Dostoevsky's *Grand Inquisitor*.⁷⁸

73. McGee, *War on Crime Expands U.S. Prosecutors' Powers*, *supra* note 72, at A1.

74. 487 U.S. 250 (1988).

75. 487 U.S. at 263.

76. McGee, *War on Crime Expands U.S. Prosecutors' Powers*, *supra* note 72, at A18. The OPR is not empowered to discipline prosecutors short of firing them. *See id.*

77. McGee, *Prosecutor Oversight Is Often Hidden From Sight*, *supra* note 72, at A18 (quoting Rep. Robert E. Wise, Jr. (D-W.Va.)). This article notes that the OPR polices almost 8000 Justice Department lawyers (not only prosecutors) with a staff of six, *id.* at A1, and that it has engaged in repeated stonewalling in the face of congressional investigations. *Id.* at A18. There is, moreover, no reason to believe that the 22 assistant U.S. Attorneys who resigned were being investigated for abusive tactics rather than other misconduct.

78. *See* William H. Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198, 1199 (1983) (discussing F. KAFKA, *THE TRIAL* (Vintage ed. 1969)). On the moral problems of indifferent bureaucracies, *see* David Luban et al., *Moral Responsibility in the Age of Bureaucracy*, 90 MICH. L. REV. 2348, 2348-65 (1992).

B. *The Malice of the State*

So far, my discussion has aimed to establish the first of the liberal's empirical propositions: that the state enjoys an enormous advantage in the criminal process. The liberal claim that we need aggressive defense on the part of defense lawyers to overprotect our rights against this powerful state depends on another empirical proposition, however: that we cannot rely on the state not to abuse its power. Quoting my own language once again:

We want to handicap the state in its power even legitimately to punish us, for we believe as a matter of political theory and historical experience that if the state is not handicapped or restrained *ex ante*, our political and civil liberties are jeopardized. Power-holders are inevitably tempted to abuse the criminal justice system to persecute political opponents, and overzealous police will trample civil liberties in the name of crime prevention and order.⁷⁹

I do not suppose Simon would want to dispute the history — McCarthyism and the *Dennis* case,⁸⁰ FBI and CIA infiltration of domestic protest movements during the civil rights and Vietnam War eras, the persecution as well as the assassination of Black Panthers, Nixon's "Enemies List," in short the entire sorry history of political abuse of the police and prosecutorial power within Simon's and my own lifetime. Because Simon himself expresses consternation about the Daryl Gates regime in Los Angeles, it is hard to imagine that he doubts that "overzealous police will trample civil liberties in the name of crime prevention and order." What, then, does he mean to deny?

Perhaps Simon means to deny that the abuse of prosecutorial power to maintain "the state" is a dominant and persistent, rather than incidental and intermittent, feature of our polity. Even during the McCarthy era, most ordinary law-enforcement activity was crime-hunting, not Red-hunting, and Simon may doubt that police and prosecutorial excesses are abuses designed in the first instance to maintain "the state."

Here, however, Simon's own views are much closer to the liberal argument than he realizes. Consider Barbara Babcock's "social worker's" argument for aggressive defense that he provisionally accepts. It derives from the pervasive racism and overwhelming overpunishment of our criminal justice system, which give America the dubious distinction of having a higher percentage of our population under lock and key than any nation in the world, including the

79. LUBAN, *supra* note 5, at 60.

80. *Dennis v. United States*, 341 U.S. 494 (1951) (upholding conviction of Communists under Smith Act).

pre-Glasnost Soviet Union, post-Tiananmen Square China, and pre-de Klerk South Africa. Is this "political abuse"? I believe that it is.

There is more than one way for "the state" to use the criminal justice system in order to maintain its power. One method is overt repression of political opponents, which Simon may believe is only a slight danger in contemporary America. Another, however, consists in dividing citizens from each other and scapegoating convenient minorities.

Between 1980 and 1990 the U.S. prison population doubled, and fully one-fourth of African-American men fell under the supervision of the corrections system. Primarily, this enormous influx of prisoners arose from the extraordinary sentences, including outrageous mandatory minimum sentences, growing out of the "war on drugs," together with other increases in sentences in line with anticrime rhetoric.⁸¹ It should occur to you, faster than you can say "Willie Horton," that the repeated cry by conservative politicians for ever-more-savage criminal punishments presents a clear case of state-power-maintenance through scapegoating. In reality, the Babcock-Simon "social worker's" reason for aggressive defense is a variation on the liberal theme of protection against the malice of the state, not an alternative to it.

Simon's reply that weak states are as dangerous as strong ones is simply a red herring, since none of the liberals who defend the exceptional role of the criminal defense lawyer argue for policies that will lead to weak states. Simon reminds us that Nazi Germany and Soviet Russia emerged from states too weak to curb paramilitary terrorism,⁸² but this is a non sequitur unless he believes, falsely, that the Weimar Republic and Menshevik Russia were weakened by overzealous criminal defense or overscrupulous respect for the rights of the accused. The liberal argument is that a stronger state requires greater safeguards against abuses, just as more powerful automobiles require better safety equipment. The liberal position is no more an argument for weak states than it is for puny automobiles. For the record, I find Simon's suggestion that liberal overprotection against the abuse of

81. For a particularly egregious example, consider the mandatory sentence of life without parole meted out to a first-time offender convicted of possessing more than 650 grams of cocaine in Michigan, a sentence sustained by the Supreme Court in a chilling plurality opinion authored by Justice Scalia, in which Scalia and Rehnquist argued that a punishment must be both cruel *and* unusual, not merely cruel, to violate the Eighth Amendment. The opinion added that, as a matter of law, no punishment authorized by statute can be constitutionally "unusual." *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991).

82. Simon, *supra* note 6, at 1709.

state power invites "the dangers of anarchy"⁸³ a further example of fighting caricature with caricature.

Simon's argument employs other dubious empirical propositions as well; he claims:

- overprotection against state abuse implies underprotection against private abuse;⁸⁴
- "[i]n a world where aggressive defense is legitimate, acquittal is less a signal of probable innocence than it would be in a world without aggressive defense";⁸⁵
- aggressive defense causes prosecutors to expend greater resources on cases where guilt is not in doubt than they otherwise would, diverting resources from genuinely controversial cases and thereby harming innocent defendants.⁸⁶

The first of these claims simply restates the conservative canards that the rights of the accused (one form of overprotection) weaken the ability of police to protect us, and that aggressive criminal defense (another form of overprotection) gets dangerous criminals back on the streets. These are propositions with no empirical support. Probation and parole after conviction are the primary ways that the criminal justice system cycles criminals back onto the streets — when it does.

The second assertion ignores the fact that the "world where aggressive [criminal] defense is legitimate" is *our* world, where prosecutors secure conviction in about four trials out of every five.⁸⁷ How much more of a sign of probable innocence would acquittal be in a world without aggressive defense? Would Simon, or critics of our overlenient criminal justice system, be happier with an acquittal rate significantly *below* 1% of all cases and one out of every five trials?

As for the third proposition, one does not know where to begin. Why would aggressive defense lead prosecutors to concentrate more resources on aggressively defended cases, rather than dismissing or nolle-prossing them? Why would diverting prosecutorial resources from the innocent defendant's case harm rather than help the defendant? Why does Simon stress that prosecutors operate with limited resources while implicitly assuming that defense attorneys have the ample resources needed to give every client aggressive defense? Or, if he does not make this assumption, why should we suppose that overburdened defense attorneys will elect to put their limited aggressive defense efforts at the service of guilty clients rather than innocent

83. *Id.* at 1710.

84. *Id.*

85. *Id.* at 1711.

86. *Id.* at 1712.

87. See *supra* note 55.

ones? Perhaps he means that aggressive defense on behalf of high-society rapists, wealthy mobsters, and white-collar criminals diverts so much prosecutorial attention away from routine street crime that prosecutors are forced to press for quickie plea agreements with possibly innocent street criminals. But why does he think that is true? For that matter, why should we suppose that the same prosecutors who pursue mobsters and white-collar criminals would otherwise be handling street crime, and handling it, moreover, in a kinder, gentler fashion?⁸⁸

To sum up the argument so far: the liberal picture of the state seems much more plausible than Simon's brusque dismissals suggest.

II. VICTIMS AND RETRIBUTION

Simon thinks not only that liberals have exaggerated the danger of the state, but that they have in addition neglected the danger posed by criminals. The liberal concern for protecting the accused typically assumes that little is lost if a guilty criminal escapes his just deserts. My own writing contains a clear example of this:

No tangible harm is inflicted on anyone when a criminal evades punishment. This is not to deny that people may be legitimately outraged, or that a "moral harm" is inflicted on the community, or that there is a risk of further crime when the guilty go free. But no one's life is made materially worse off by acquittal as such.⁸⁹

Plainly, the burden of this passage is carried by the wiggle-words *tangible* in the first sentence and *materially* in the third, and plainly the passage discounts the importance of legitimate outrage and moral harm. Simon is absolutely right to interpret this passage as a sign that "victims [of crime] do not appear in the libertarian picture."⁹⁰ He insists that "informal, diffuse violence or oppression might threaten liberty,"⁹¹ that "formal institutions are not the only important threats to liberty, [and] that a wide and unspecifiable variety of social processes that are experienced as diffuse violence can do so as well."⁹² Though Simon rejects many positions of the victims' rights movement, he insists that the movement's "victim-versus-defendant" picture is "as plausible" as the liberal's "state-versus-defendant" picture.

88. Perhaps Simon thinks that if there were no aggressive defense on behalf of mobsters or white-collar criminals, money would be shifted from prosecutorial units specializing in mob or white-collar prosecutions to other units. But it seems equally likely that, in an era of straitened resources, states and municipalities would simply decrease the prosecutors' appropriation.

89. LUBAN, *supra* note 5, at 59.

90. Simon, *supra* note 6, at 1707.

91. *Id.* at 1709.

92. *Id.* at 1710.

I am now inclined to agree with this criticism of my own earlier argument, but it is worth exploring the grounds of agreement. What, exactly, is the victim's interest in a perpetrator's criminal conviction? The answer turns in part on the justification of punishment. The victim has no greater stake in general deterrence than anyone else, and in any case our current practices of criminal punishment bear no demonstrable relationship to general deterrence. Furthermore, in many cases the victim will have no stake in specific deterrence or incapacitation, because it is unlikely that the same criminal will endanger that victim. Obviously, there are many exceptions to this observation — the victim of a stalker may well fear that if he is released he will stalk her again. But such cases are the exception. The victim may desire the emotional release of vengeance, but I see no reason to cater to that desire; civilization consists in large measure of the taming of vengeance.

Of the standard justifications for criminal punishment, that leaves what Simon calls "vindication/retribution." Simon's victims' rights argument makes sense, I think, only on a retributive theory of criminal punishment: victims have a legitimate interest — a right, perhaps — to see their victimizers punished.

Retribution may sound like vengeance, but I believe it is not. Vengeance is fundamentally an emotional response, whereas retribution, rightly understood, is at bottom cognitive. I am persuaded of this proposition largely by Jean Hampton's splendid essay, *The Retributive Idea*.⁹³ Hampton argues that, when someone wrongs me, their act implicitly asserts that they are the sort of "high" person who gets to do things like that to others; or that I am the sort of "low" person that has to accept such indignities from others; or both. The wrongdoer's action has cognitive significance: it states a falsehood about the world of value and asserts an undeserved right of mastery that the wrongdoer possesses over the victim. The purpose of retributive punishment, on this analysis, is to enable the community to reassert the truth about value by inflicting a publicly visible "expressive defeat" on the wrongdoer.⁹⁴ Retribution, like wrongdoing itself, has cognitive significance and differs in this respect from vengeance. Hampton argues in addition that the motivation for deterrence derives at bottom from the same (fundamentally deontological) moral source as retribution: the

93. Jean Hampton, *The Retributive Idea*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 111 (1988).

94. Recently, Marc Galanter and I have argued that this theory of retribution lies at the heart of the institution of punitive damages. Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. (forthcoming 1993). The term "expressive defeat" comes from this paper. See also Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1687-89 (1992).

community endorses the egalitarian truth about human value not only by inflicting *ex post* expressive defeats upon wrongdoers, but also by offering *ex ante* protection to potential victims.⁹⁵ Importantly, Hampton also argues that precisely the same moral reason for engaging in retributive punishment in the first place constrains our practices of punishment: any punishment that degrades or denies the dignity of human beings undermines the cognitive and expressive purpose of retribution.⁹⁶

I am not as confident as Simon that retribution expresses *the victim's* standpoint rather than the community's. The victim no doubt has a passionate personal interest in a collective reaffirmation of her worth, but this is plainly an interest first and foremost of the community. When a derelict with no friends or family is murdered, no individual remains with a personal interest in reaffirming the victim's dignity, but that fact in no way diminishes the community's interest in finding and punishing the murderer. Quite the contrary: the fact that such murders are seldom noticed, investigated, or decried represents a moral failure on the part of the community. Retribution, unlike revenge, is the community's way of speaking the moral truth.

I have no idea whether Simon agrees with this version of retributivism. I do, however, and that is why I now regard my earlier pooh-poohing of legitimate outrage and moral harm as unjustifiably glib. Thus, I think it is only fair to acknowledge that the liberal argument for aggressive defense carries a significant moral price tag.

At the same time, I do not by any means accept that this price tag is so high that we must abandon the liberal argument. The importance of punishing the guilty — those guilty of injuring others, at any rate — is only one factor in designing the criminal defense lawyer's appropriate role. The other factor is ensuring that the perpetrator is punished only in ways — and after processes — that do not themselves express falsehoods about the world of value by diminishing his dignity. Here Simon properly focuses on the pervasive overpunishment and racism of our criminal justice system. These features should be taken together with the fact that the vast majority of criminal defendants receive no individualized scrutiny of their cases but instead are processed like carcasses at the meat-packing plant. The combination of overpunishment, racism, and perfunctory mass-processing indi-

95. Hampton, *supra* note 93, at 138-43. Summarizing the idea of retributive "punishment as vindicating value through protection," *id.* at 138, Hampton writes: "a humbling defeat which prideful wrongdoers will intensely dislike, can deter the commission of a crime against someone (or even something) having value; and the victim can come to see the value which the humbling defeat is meant to protect as symbolically expressed through the protection." *Id.* at 143.

96. *Id.* at 135-37.

cates that in the vast majority of criminal cases the moral justification of punishment — of the kind of punishment that our system is set up to impose — has evaporated. In that case, the liberal argument impels us to conclude that zealous defense is fully appropriate in most criminal cases. The tragedy is that most criminals will not get zealous defense.

III. A METAETHICAL INTERLUDE

Suppose you were assigned to rewrite the criminal defense lawyer's "moral job description" from scratch, without any preexisting moral commitments or expectations about how the defender's role should be structured, but with the knowledge that the legal system in which the role is to be enacted is ours — the state-heavy legal system I have just described. How would you do it?

Stated abstractly, the assignment is to construct an inventory of professional duties that will satisfy a short list of criteria:

1. The duties advance the social goals that justify the role of defender.
2. The duties are consistent, so far as that is possible, with the norms of common (that is, extraprofessional) morality.
3. The duties are consistent with legal requirements for the role.⁹⁷

Obviously, the defining feature of the defender's role is that defenders act on behalf of persons accused of crimes; a fact about the world in which we live is that often those persons are guilty of the crimes — sometimes heinous crimes — of which they are accused. Thus, it is inherent in the defender's role that its duties will deviate to at least some degree from common moral requirements not to assist wrongdoers or aid in frustrating legitimate social efforts to control them. The defender's morality will inevitably deviate from common morality, perhaps even conflict with common morality; the first two criteria will be in tension with each other.

In *Lawyers and Justice*,⁹⁸ I argued that role-based deviations from common morality must be justified by a four-step pattern of argument that recurs, though seldom explicitly, in most discussions of legal ethics. On that pattern, we justify an otherwise immoral *action* — impeaching an opposing witness known by the lawyer to be telling the truth, for example — by showing that it is required by a *duty* (zealous advocacy) that is central to the *role* (adversary advocate) that is inte-

97. Though, as David Wilkins has argued, the legal realists demonstrated that it is seldom straightforward or uncontroversial what "the legal requirements for the role" are, so this may not be an especially demanding constraint. David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469 (1990).

98. LUBAN, *supra* note 5.

gral to a *system of roles* (the adversary system) that fulfills important *societal goals*: in this case, the goal of law enforcement consistent with overprotecting individual rights against the state. Thus, the argument proceeds from action to duty, from duty to role, from role to system, and from system to its goal or end.⁹⁹ The last three steps of this argument — justifying a duty by reference to a role that is essential to a system of roles that is designed to advance the ends of the system — tell us how to derive duties that reconcile criteria (1) and (2). Duties that require violations of common morality belong in the moral job description of the defender's role only if the role, the system that creates it, and the ends advanced by that system outweigh the requirements of common morality.

Briefly stated, my argument in *Lawyers and Justice* was that, in civil cases, the adversary system is not justified strongly enough to underwrite professional duties sharply dissonant with common morality; but that in criminal cases, the importance of overprotecting individual rights against the state justifies something closer to the standard picture of the adversary advocate.¹⁰⁰ Simon criticizes this distinction by denying the importance of overprotecting individual rights against the state, but I have argued that he has badly underestimated the danger posed by the state.

Simon may nevertheless wish to deny that this danger justifies a categorical norm of aggressive defense. So what if the state has the power to punish the innocent or overpunish the guilty? So what if it has the malice and motive to do so? What does that have to do with a case in which the client is guilty, the likely punishment is not disproportionate to the wrongdoing, and the state is neither directly nor indirectly persecuting anyone? To appeal to the liberal argument to justify aggressive defense in such a case seems like a non sequitur. Why not vest ethical discretion in the defense lawyer to refrain from aggressive defense in such cases, reserving aggressive defense for cases in which the liberal arguments actually apply?

The work of lawyers often requires sensitive judgment of intangibles — the proverbial “situation sense” — in complex human situations. For that reason, we should expect that many of the clauses in

99. LUBAN, *supra* note 5, at 129-33.

100. Not entirely, however: I argue, for example that, even in criminal defense, lawyers should not as a rule go along with client perjury. *Id.* at 197-201. I also argue, though Simon thinks that the argument fails, against the brutal cross-examination of rape victims. *Id.* at 150-52; David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1026-35 (1990) (discussing the issue at greater length). At the end of this paper, I indicate other respects in which my version of aggressive defense proves to be significantly tamer than the standard version. See *infra* Part IV.

our moral job description of the defender will be discretionary, perhaps even highly discretionary. To say that a norm is discretionary does not, of course, mean that it is standardless, a point that has been elegantly elaborated by both Ronald Dworkin and Robert Post.¹⁰¹ it means only that the norm indicates a range of responses to different conditions and leaves the task of determining which response is appropriate in a given situation to the actor. Simon's position can be understood in these terms as an argument that a discretionary norm, enjoining defenders to decide on a case-by-case basis how aggressive to be, is better than a blanket norm of aggressive defense.

Assuming I am right about the dangers posed by the state in criminal prosecutions, we must judge between the discretionary and blanket norms largely by asking which provides the better safeguard against those dangers. The problem with the discretionary norm is that the temptations to offer only a minimal, perfunctory defense are immense for the vast majority of the criminal bar. Recall the studies I cited earlier about how little investigation criminal defense lawyers typically put into their cases. To begin with, the pay is not good: court-appointed counsel typically get \$30 an hour for out-of-court work (\$40 an hour in court), with a maximum of \$1200 for a felony.¹⁰² Along with this low pay scale goes the natural human tendency to cut corners, especially when doing unpleasant things on behalf of unappetizing strangers whom one will probably never see again. Moreover, defense lawyers who are courthouse regulars face well-understood pressures from other regulars (judges and prosecutors) to get along by going along.¹⁰³ The probability that these temptations and pressures will warp too many defense lawyers in the direction of inadequate zeal is unacceptably high; for this reason, the discretionary norm seems plainly to be worse than the nondiscretionary alternative.

To say that zealous advocacy should be a professional norm of criminal defense lawyers is not to say that they should never deviate from it; very few moral norms are absolutes from which we must never deviate no matter what the circumstances.¹⁰⁴ Role-derived norms such as the injunction to zealous advocacy resemble rebuttable

101. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31-33 (2d ed. 1978); Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169.

102. Institute for Law and Justice, *supra* note 17, at 2-3.

103. It is customary to cite, in support of this proposition, Abraham S. Blumberg's classic article *The Practice of Law as a Confidence Game*, LAW & SOC'Y. REV., June 1967, at 15. It is regrettable that Blumberg's 25-year-old research has not been updated by more contemporary studies.

104. See David Luban, *Incommensurable Values, Rational Choice, and Moral Absolutes*, 38 CLEV. ST. L. REV. 65 (1990).

presumptions, in which the stronger the four-step argument on behalf of a norm, the harder it is to rebut. Thus the injunction to zealous advocacy is at its most demanding in the criminal defense context, where the liberal argument for overprotecting rights against the state gives added heft to the norm.

Simon, on the other hand, seems to prefer a sliding scale of presumptions, in which the defender decides in each case whether to engage in zealous advocacy by asking whether the liberals' worries — excessive punishment, racism, or inadequate processes — are actually present. He appears to be making this argument when he contrasts aggressive defense as a "categorical or wholesale" policy that "does not focus on subverting the prosecutorial and police practices that could plausibly be opposed as excessive and unjust" with his own approach, under which lawyers would decide whether to engage in aggressive defense on an "ad hoc or retail" basis.¹⁰⁵ This makes him sound like a kind of act utilitarian, critical of the whole enterprise of framing general rules of action. As Bernard Williams puts the act utilitarian objection to rule utilitarianism, "Whatever the general utility of having a certain rule, if one has actually reached the point of seeing that the utility of breaking it on a certain occasion is greater than that of following it, then surely it would be pure irrationality not to break it?"¹⁰⁶

Yet this act-focused argument, applied to the criminal defense context, means that defenders will have to refrain from zealous advocacy, or even subvert their clients' cases, whenever the social good of doing so outweighs the moral costs. It is hard to see why a lawyer with such views should be regarded as a defender.¹⁰⁷ Simon gives some reason to think that he is comfortable with this conception of criminal defense. He intimates that a defender should generally see her role as aiding the court in accurate factfinding and legal judgment,¹⁰⁸ though on occasion she can break out of this role and engage in ad hoc nullification.¹⁰⁹ Though Simon does not put it quite so bluntly, this implies that the defender's basic role in representing *guilty* clients consists in facilitating their conviction and punishment (making sure only that their procedural rights are scrupulously respected), with an occasional

105. Simon, *supra* note 6, at 1724-25.

106. BERNARD WILLIAMS, *MORALITY: AN INTRODUCTION TO ETHICS* 102 (1972).

107. I discuss and criticize the act utilitarian approach to legal ethics in some detail in David Luban, *Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers and Justice*, 49 MD. L. REV. 424, 445-52 (1990).

108. "[T]he lawyer can contribute . . . by assisting the trier of fact in making the determination [of guilt or acquittal]." Simon, *supra* note 6, at 1703.

109. *Id.* at 1725.

sabotage of the conviction or punishment machine when the harshness or racism of the system calls for impromptu nullification. Perhaps he would object to this characterization on the grounds that the client's procedural rights include the Sixth Amendment right to effective assistance of counsel, which rules out facilitating the conviction of the client — but, as the “warm bodies” test suggests, the Sixth Amendment right is hardly an entitlement to robust advocacy.¹¹⁰

IV. HOW AGGRESSIVE IS TOO AGGRESSIVE?

A large part of the problem in Simon's argument is that while he offers a definition of aggressive defense — roughly, it consists of doing everything legal to get your client off¹¹¹ — and tells us that, apart from “social worker” nullification “aggressive defense should be, at least *prima facie*, condemned,”¹¹² he never clarifies what particular aggressive tactics on behalf of guilty defendants he condemns or what kind of nonaggressive defense he favors. Thus, consider

(1) *Eloquent advocacy*: the defender pleads for the client in a rhetorically effective, but not deceptive manner.

Presumably, Simon has no objection to eloquent advocacy. However, he quotes with approval Monroe Freedman's observation that “[e]ffective trial advocacy requires that the attorney's every word, action, and attitude be consistent with the conclusion that his client is innocent.”¹¹³ This means that eloquent advocacy shades into

(2) *Play acting*: the defender acts as though she is convinced of her client's innocence — both in court and, when it would help, in dealings with the prosecutor, police, auditors, or other officials.

When the defender doubts the client's innocence, this is already a species of deception, albeit a rather innocent one. Since Simon agrees with Freedman that eloquent advocacy requires play acting, I assume that he has no objection to play acting on behalf of the guilty. Likewise, consider

(3) *Suggesting reasonable doubts*: the defender points out every doubt that can reasonably be raised about the prosecution's evidence.

Surely Simon does not object to this either. But in this example a

110. See also *Morris v. Slappy*, 461 U.S. 1 (1983) (Sixth Amendment right to counsel does not guarantee the right to a meaningful client-lawyer relationship).

In conversation, Simon has acknowledged that, in his view, a defender representing a client she knows to be guilty should do little beyond ensuring that the client's procedural rights are respected. This is not true, of course, in the cases that require *ad hoc* nullification. Conversation with William Simon (Apr. 22, 1993).

111. Simon, *supra* note 6, at 1705.

112. *Id.* at 1721.

113. *Id.* at 1717 (quoting Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1471 (1966)).

problem arises. As Thomas Kuhn argued about paradigm shifts in science, and as gestalt psychologists have confirmed, we are typically able to doubt an explanation only when we are persuaded, at least provisionally, of an alternative explanation. Thus, the effective defender cannot simply protest that the prosecution has not made its case. Rather, she must introduce and embellish plausible alternatives to the prosecutor's explanations. Merely suggesting that a prosecution witness might have been mistaken in his perception or memory is much less likely to sway a jury than suggesting that the witness may have a motive for lying, or a propensity for overreacting, or defective vision. In one sense, this amounts merely to suggesting reasonable doubts: if these alternatives are plausible, whether or not they are true, then it is logically impossible that the state has proven its case beyond a reasonable doubt. But in another sense, it involves deception, because the advocate will never get the judge or jury to accept the plausibility of an alternative without at least half-persuading them of its actuality. This means that suggesting reasonable doubts shades into

(4) *Arguing that the evidence supports a conclusion that you know is false.*

The step from here to

(5) *Impeaching a witness known to be testifying truthfully*

is very slight, as is the step from (4) to

(6) *Saying things that are literally true but drastically misleading — Simon's Norman and Steve case.*¹¹⁴

Simon wants to draw a line between the legitimate procedural objective of putting the state to its proof and deceptive defense tactics. The former are acceptable, in his view, while the latter are not. I am suggesting, however, that putting the state to its proof occasionally demands forms of deception such as (2), (4), (5), and perhaps (6). Doubts about the prosecution's case that are objectively reasonable must be made subjectively reasonable to the jury, and that task falls to the defender. The problem arises when the client is guilty and known by the defender to be guilty. For then the defender's task is to make the false appear reasonable — to make the jury draw, at least provisionally, a false inference from the evidence. That is what putting the state to its proof means, but it is also deception. Simon is not especially clear in telling us which aggressive advocacy tactics he considers proper and which off-limits; if I am right, the distinction between

114. Interestingly, the Supreme Court once reversed a conviction for perjury based on the defendant's literally-true-but-drastically misleading testimony, on the ground that such utterances are part and parcel of the adversary process. *Bronston v. United States*, 409 U.S. 352 (1973).

forceful-but-honest advocacy and deception is so artificial that it can never form the basis for drawing the magic moral line.

There is also, of course

(7) *Plain old deception*: stonewalling an investigation, subtly hinting that a client should destroy documents before the prosecutor subpoenas them, abusing the attorney-client privilege, putting on perjurious testimony, lying.

Simon plainly disapproves of these, and in any event the last three are out-and-out illegal.

There is also the very interesting tactic of

(8) *Hear no evil*: ensuring that the client and witnesses never tell the defender inconvenient facts — facts the knowledge of which would turn useful things a defender might say to the prosecutor into lies.

In his fascinating portrait of the white-collar defense bar, Kenneth Mann demonstrates in considerable detail how important hearing no evil is to the lawyers he studied.¹¹⁵ Hearing no evil facilitates deception because it enables the defender to treat what would otherwise be a case of plain old unlawful deception as a case of

(9) *If it has some factual basis, and I don't know it's false, I can treat it as true*: offering convenient arguments or assertions, occasionally hedged with "might" or "could" or "possibly" or "probably," that are not lies because the defender does not actually know that they are false, though she has reason to suspect that they are.

Mann offers several telling examples of this tactic. Simon describes hearing no evil as "ethically unattractive,"¹¹⁶ but it is unclear whether he finds it ethically unacceptable.

In a different category altogether are tactics like obtaining continuances in the hope of witnesses forgetting (or, to borrow a dramatic *L.A. Law* plot, obtaining continuances until a terminally ill witness dies), forum shopping, greymail, digging up dirt on the prosecutor,¹¹⁷ appealing to a jury's racism, or the legendary Clarence Darrow tactic: smoking a cigar with a wire running through it lengthwise, so that during the prosecutor's closing argument the jury would become fascinated and distracted by Darrow's ever-lengthening cigar ash. These come under the general heading of

(10) *Dirty tricks*: tactics that help the client but that have no connection with either the merits of the case or the client's procedural rights.

115. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 104-11 (1985). I discuss this tactic in a review of Mann's book: David Luban, *A Fierce Blindness*, CRIM. JUST. ETHICS, Winter/Spring 1986, at 69, 73 (book review).

116. Simon, *supra* note 6, at 1720.

117. The prosecutor in a headline-grabbing high-society rape case telephoned the law school at which I teach, and from which she graduated, to request that no information be given out to the private investigators that defense counsel had retained to scrutinize her private life.

Simon appears to accept (1) and (3) in all cases, and his nullification approach means that, in cases where conviction of the client would violate the "*substantive justice strains*"¹¹⁸ of our legal culture, he will accept all the tactics. But, in cases where conviction of the guilty client would not violate substantive justice norms, I am honestly baffled about whether Simon would accept any of these tactics beyond (1) and (3) — or how he might reconcile accepting (1) and (3) with rejecting, say, (2) and (4).

For my part, I have little difficulty in rejecting dirty tricks and plain old deception. I also reject the use of statements that are literally true but highly misleading (tactic (6)), or arguing through the use of assertions the falsehood of which I have deliberately hidden from myself (tactics (8) and (9)). Both of these I regard as morally and even semantically indistinguishable from lies. I am ambivalent about the propriety of arguing that the evidence supports conclusions that I know are false and even more ambivalent about impeaching truthful witnesses, particularly in ways calculated to damage or humiliate them; in my view, this is perhaps the most difficult of all the dilemmas of advocacy. Play acting, on the other hand, seems morally unproblematic. But this is surely not the occasion to offer full arguments for these propositions.

V. THE TWO WORLDS OF CRIMINAL DEFENSE

How could Simon and I disagree so thoroughly? It may seem to the reader as though we are writing about different worlds — and so we are. Simon writes as though aggressive defense is a norm among criminal defense lawyers; as though aggressive defense ties prosecutors in knots and has a significant impact on law enforcement and conviction rates; as though aggressive defense tangibly diminishes public safety and inflicts moral harms on substantial numbers of crime victims; as though defense lawyers would typically be reluctant to forego aggressive defense and the advantages it confers on them and their clients.

I, on the other hand, have portrayed a world of lawyers for whom no defense at all, rather than aggressive defense or even desultory defense, is the norm; a world of minuscule acquittal rates; a world where advocacy is rare and defense investigation virtually nonexistent; a world where lawyers spend minutes, rather than hours, with their clients; a world in which individualized scrutiny is replaced by the indifferent mass-processing of interchangeable defendants.

118. Simon, *supra* note 6, at 1724.

We are both right, for there are in reality two criminal justice systems, two criminal populations, and two criminal defense bars. Wice's study of the criminal defense bar showed a "Bactrian camel" distribution of lawyer incomes, with most of the defenders in the large hump of the camel, clustered at the low-income end of the bar, while a small minority inhabit the small hump, clustered near the high-income end.¹¹⁹ The former are the public defenders and panel attorneys working for \$40 an hour; the latter are Mann's white-collar defense lawyers, the mob lawyers, the Miami drug bar. Let us remember that three-fourths of criminal defendants qualify for public defense; presumably a substantial number of those who do not are nevertheless persons of modest means. The typical client is poor, and the typical defender is not paid enough to engage in individualized advocacy, let alone zealous advocacy.

Simon's argument is plainly directed toward the small minority of defenders who have the means, requiring well-to-do clients, to engage in aggressive defense. Once we realize this, the presuppositions of his argument are less implausible. For this portion of the bar, the balance of advantages sometimes favors the defense, and aggressive advocacy might make a big difference to case outcomes.

Where Simon's picture blurs, I think, is in his victims'-rights rhetoric, where he relies on stereotypes of "diffuse violence"¹²⁰ that public opinion typically associates with street crime in order to argue against the kind of aggressive advocacy that is virtually never an issue when impoverished street criminals are the defendants. Even here, Simon's focus on victims has some point. After completing his study of corporate crime in the pharmaceuticals industry, John Braithwaite concluded:

[W]hile poor people get long prison sentences for minor property crimes, company executives can fix prices, defraud consumers of millions, and kill and maim workers with impunity. . . . Certainly if the law were enforced equitably, there would be more white-collar criminals in prison than there would be of the blue-collar variety.¹²¹

Add to these white-collar victimizers the mobsters and druglords, and we can paint a picture very much like Simon's: aggressive defenders frustrating justice and turning the wealthy loose to kill again.¹²²

119. WICE, *supra* note 12, at 109 tbl. 4.5.

120. Simon, *supra* note 6, at 1710.

121. JOHN BRAITHWAITE, *CORPORATE CRIME IN THE PHARMACEUTICAL INDUSTRY* 305 (1984). The study, which includes detailed interviews with scores of industry executives, explores numerous instances of deliberate corner cutting in quality control and of deception in avoiding regulation that resulted in deaths, illnesses, and deformities in thousands of people.

122. Partly for this reason, Marc Galanter and I have suggested that the appropriate mode

This explanation suggests that Simon's approach to the ethics of criminal defense lawyers is at least partly right about that small fraction of criminal representations involving wealthy clients and top-shelf defenders. Though the state retains fundamental procedural advantages and its balance-of-credibility advantage if the case reaches a jury, the balance of resources may shift toward the defense. These include not only investigative resources but, as Mann's study stresses, information-control and deception resources that frequently allow aggressive defense to prevail in the pre-indictment phase and prevent the filing of charges.¹²³ At the same time, however, Mann stresses that the indictment itself, even if it is subsequently dismissed or leads to acquittal, can have extraordinarily serious consequences to white-collar defendants, frequently costing them their jobs.

Let us distinguish between *capable defense* and *aggressive defense*; the latter, following Simon's usage, means doing everything that is legal to get the client off, while the former means going only to the lengths required by reasonably high standards of competency. By capable defense, therefore, I mean something considerably better than the minimum "warm body" constitutional test. I also mean something better than a malpractice standard or a discipline-avoidance standard. I mean something more like a "mirror standard" — the defender can look at herself proudly in the mirror while reflecting on how she is handling her clients' cases. But this is considerably less demanding than a standard that countenances deception or dirty tricks.

Simon may well agree with me that every defense lawyer is morally required to offer capable defense in every case. (Though perhaps he disagrees even with this, if capable defense leads to substantive injustice.) If so, he will agree with me that defenders such as the panel attorneys studied by McConville and Mirsky who do not interview their clients err on the side of insufficient rather than excessive zeal.¹²⁴ Simon also agrees with me that lawyers are sometimes permitted to engage in aggressive defense, including dirty tricks, in cases where the substantive injustice of conviction and punishment is great. And I agree with Simon that defenders are not ethically required to offer aggressive defense in every case. More importantly, I concur with Simon that in some cases it would be morally improper to offer aggressive, rather than merely capable, defense. In a case where the lawyer is

for punishing corporate offenders is not criminal sanction but punitive civil damages. Galanter & Luban, *supra* note 94.

123. See generally MANN, *supra* note 115.

124. See *supra* text accompanying note 24.

convinced that the client is guilty and deserving of retribution, where the crime has had real victims, and where the dangers of racism, severe overpunishment, and assembly line conviction are minimal, a lawyer who employs dirty tricks to win acquittal deserves moral censure.

Where we disagree, I think, is in the implications of these views. Consider first the typical, overburdened defender of the indigent. For such a lawyer, Simon's implicit question — "Is it ethically proper to engage in aggressive defense in every case?" — is wholly beside the point. Her caseload and resources make it impossible for this lawyer to offer aggressive defense in every case; it may be impossible for her to offer capable defense in every case. At the same time, however, her clients are most likely to be threatened with the evils of overpunishment, racism, and assembly line justice that Simon and I agree would make aggressive defense permissible. Thus, her dilemma of aggressive defense is a problem of desperate triage; her moral question is not "May I engage in aggressive defense?" but "Given that many of my clients deserve aggressive defense, how do I choose whom to provide with aggressive defense?" My own view is that she should utilize her scarce resources on behalf of those clients who are in greater jeopardy and who are less dangerous, rather than the other way around; probably Simon would agree. However, for reasons I explained earlier, I think that a blanket permission or even encouragement for indigent defenders to engage in aggressive advocacy is better than an injunction to assess each candidate for aggressive defense on its merits, because the latter rule would lead to too many wrong decisions to curtail zeal.

By contrast, the question "Is it ethically proper to engage in aggressive defense in every case, rather than settling for capable but nonaggressive defense in some cases?" is relevant only to a tiny fraction of the bar — the high-priced hired guns — in some of their cases — those where the menace of the state does not outweigh the legitimate demands of retributive justice. For this subsection of the bar, Simon's injunction to assess each candidate for aggressive defense on its merits, with a slight presumption against aggressive rather than merely capable defense, may be a better rule than blanket permission to engage in aggressive defense.

Of course, the latter is precisely that part of the bar that is handsomely paid for just one thing: its ingenuity and willingness to engage in aggressive defense. I reach the perverse conclusion that the liberal argument for aggressive defense applies to precisely that part of the criminal defense bar (the larger part) that is least likely to engage in it, while Simon's critique of aggressive defense — more specifically, of the

blanket permission to engage in aggressive defense in all cases — applies to precisely that (smaller) part of the bar that is least likely to take the argument seriously.

Obviously, there are substantial objections to a double standard in legal ethics, including the obvious objection that practitioners may disagree about which standard applies to them. In that case, my conclusion is that, if the standard is to be single, it should be the single standard of permitting aggressive defense in every case, rather than Simon's single standard of presuming that aggressive defense is improper except when the threats of overpunishment, racism, or assembly line justice are imminent. After all, since these are the most typical cases, the exception threatens in any event to swallow up the presumption.