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Foreword: First Thing We Do, Let's Kill All the Defense Lawyers

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FOREWORD

FIRST THING WE DO,

DEFENSE

LET'S KILL ALL THE LAWYERS[†]

*Stanley A. Goldman**

“All criminal defense lawyers should be sent to prison along with any guilty defendant they’ve represented,” disdainfully lectured one middle-aged court-watcher[†] to another. I stood anonymously in the corridors of L.A.’s now famous criminal courthouse overhearing this conversation. Twenty-six, a fledgling public defender fresh out of law school and a little idealistic, I was a bit taken aback by the palpable anger my new vocation had evoked.

What standard did they expect me to use to decide if my clients were really guilty? Is proof beyond a reasonable doubt enough to deny someone counsel? That might suffice for a jury’s decision, but any possible doubt would seem to justify the presentation of a defense. How exactly did my critics believe I was going to be able to resolve all doubts? The idea that the guilty ones always confessed to their lawyers was a TV myth. Almost all claimed their innocence. Even their rare admissions came with no guarantees of guilt. Five hundred men confessed to the Black Dahlia murder.²

[†] Shakespeare as it might be edited today. Apologies to WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.

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1. Court-watchers are usually retired citizens who spend their days sitting through criminal cases to insure that the courts know that the public is watching.

2. Miles Corwin, *False Confessions and Tips Still Flow in Simpson Case*, L.A. TIMES, March 25, 1996, at A14. I’ve always doubted whether more than 200 of them were being entirely truthful.

The reality is that there is always *some* doubt; and to avoid injustices, our system provides for someone to present the defendant's side. It seemed so simple. Surely it could not be difficult to explain to these court-watchers, and those of like mind, the vital societal function served by defense lawyers. After all, two of our most precious, inalienable bulwarks against the possible overreaching of a sometimes too eager and powerful government are (1) the presumption of innocence, and (2) a competent advocate whose loyalties must lay with the accused. Would they really need to be told more than that Abe Lincoln had been a criminal defense attorney?³

Justice is in fact served even by the defense of the guilty. How else could the system be kept honest, if not for the presence of counsel for the defense? How arrogant and lazy and convinced of their own infallibility would the prosecution and court become if the defendant had no advocate? When I suggested to my supervisor that the public defender's office was obviously not doing enough public relations to explain our job to the citizenry, I was informed that the less the public knew about the job they were paying us to perform, the better off we would be. Well, the public eventually learned about us. I wasn't long in the profession before I realized that those who held my occupation in low esteem were unfortunately not limited to a couple of court-watchers with nothing better to do than concoct cabals populated by defense attorneys driven by the demonic goal of setting all murderers free to roam the streets.

When famed Charles Manson prosecutor Vincent Bugliosi turned politician and challenged L.A.'s then incumbent District Attorney John Van de Kamp,⁴ the nastiest insult he could think of hurling at his opponent was that, before Van de Kamp had become D.A., he had been a "*PUBLIC DEFENDER*." "His job," proclaimed a radio commercial, "had been to put criminals back onto our streets. Do you want a man like that as your District Attorney?"⁵ Even years later Bugliosi still continued to occasionally

3. JOHN P. FRANK, *LINCOLN AS A LAWYER* conclusion app. at 174 (1961); *People v. Armstrong*, Cass County, IL (1858) (with Lincoln as counsel for the defense).

4. John Balzar, *John Van de Kamp Pleads His Own Case*, L.A. TIMES, Jan. 14, 1990, (Magazine), at 32.

5. Radio ad on file in the recesses of my memory. I specifically remember being stopped at the light on little Santa Monica Boulevard and Wilshire Boulevard, Los Angeles County, in my 1973 Firebird—white with a blue vinyl top—when I first heard the ad.

write of defense lawyers as if they were the alien invaders of some courtroom version of *Independence Day*.⁶

While Van de Kamp may have survived this attack to be re-elected,⁷ I quickly learned that in California there is one public office few public defenders can hope to attain. The unwritten rule has become that for the position of judge only prosecutors need apply. Even liberal democratic governors rarely appoint public defenders to the bench. Republican governors are prepared to dip painfully deep into the ranks of prosecutors without ever considering the appointment of a few of the state's very finest defenders.⁸

Personally, I've never really seen need for such disparate treatment. Both sides in a trial are merely there to represent a position in what amounts to the world's largest debating society. Proscribed by statutes,⁹ cases,¹⁰ and the canons of ethics,¹¹ both the prosecution and defense are cogs in an apparatus dedicated to simultaneously uncovering as much truth as possible without abridging individual rights essential to our vision of ordered liberty.

I, for one, would eagerly embrace a system in which advocates alternated back and forth between prosecution and defense. The beneficial consequences of such a system might not only be to improve the public perception of the profession as a whole but also to lessen the occasional abuses by overzealous advocates on both sides. It is less appealing to be unethical when you might spend the following month on the receiving end of similar misconduct. Unfortunately, such unattainable fantasies may simply reveal how far I have come from the trenches where law is practiced and have finally succumbed to the impracticalities born of perspective.

I would like, however, to humbly suggest that just because it

6. VINCENT BUGLIOSI, *OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER* (1996).

7. Balzar, *supra* note 4, at 32.

8. See Leslie Abramson, *The Appearance of Justice: Juries, Judges and the Media*, in 86 J. CRIM. L. & CRIMINOLOGY 1096, 1100 (Leigh Buchanan Blenen ed., 1996); Dan Morain, *Ruling May Force '3 Strikes' Backers to Dilute Law*, L.A. TIMES, June 26, 1996, at A14.

9. See CAL. PENAL CODE §§ 127, 132 (West 1988 & Supp. 1996) (proscribing subornation of perjury and offering false evidence, respectively).

10. See *People v. Grinnell*, 257 Cal. App. 2d 653, 65 Cal. Rptr. 86 (1968); *People v. Hooper*, 10 Cal. App. 2d 332 (1935).

11. See CAL. BUS. & PROF. CODE § 6068(d) (West 1990); CAL. RULES OF PROFESSIONAL CONDUCT Rule 5-200 (1994); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1996).

may prove difficult to resurrect, in the public's mind, the images of Daniel Webster, Clarence Darrow, or even fiction's Atticus Finch and Perry Mason, that doesn't mean we have to affirmatively worsen the perception of an already mistrusted calling. For example, I have recently observed an unfortunate trend, obviously most notable in certain high-profile cases, in which attorneys for both sides are eager to openly announce their personal opinions as to the defendant's guilt or innocence. While I decry this trend on the part of prosecutors, I must also note the harm done by defenders who choose to proclaim that their client is factually innocent. This is a far cry from simply asserting an absence of the prosecution's proof to the contrary.

Admittedly, every case must stand on its own. If a prosecutor fires the first salvo by expressing personal feelings as to the defendant's guilt, proclaiming factual innocence may be an appropriate defense response. In the absence of such prosecutorial first blood, however, the practice is highly questionable. It is potentially damaging to the profession and to other defendants whose lawyers may not be prepared to make the same claims. Additionally, when evidence, known to all, gives rise to reasonable grounds to question the sincerity of such pronouncements, the perception of all lawyers suffers. It is one thing to interpret facts in a light most favorable to a client, it is another to fabricate belief. The net result has been to even further erode the line, which many in the public already refuse to acknowledge, between "Lawyers" and "Liars."

The Symposium that follows has been penned by the some of the nation's best-known defense attorneys. Some, but not all of them, have grown wealthy in defense of the damned. Few, I believe, began their careers with that as their sole goal. In fact, for every author whose insightful comments follow herein, there are a thousand public defenders and private practitioners who will never enter the ranks of the rich and famous. These counsel, who are subjected daily to the law's delay and the insolence of office, do so at salaries below that of any respectable longshoreman. When considering today's cost of legal education, one is reminded of General Burgoyne's response to an insult in Shaw's *The Devil's Disciple*, "If you knew what my commission cost me, and what my pay is, you would think better of me."¹²

If that is not enough to change the public's opinion of defense

12. BERNARD SHAW, *THE DEVIL'S DISCIPLE* 76 (Penguin Books 1955) (1900).

counsel, it might help to envision what life would be like in a universe populated only by police, prosecutors, and judges. Even the court-watchers would soon grow bored and a little concerned.

