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FRIENDLY FIRE AND CASUALTIES OF THE WAR ON CRIME

*Albert J. Krieger**

The differences between the real and the theoretical world vary according to the perceptions of the viewer. The lawyer, working in the well, sees the limitations upon vigorous representation much differently from the prosecutor, and all too frequently, the judge. As the “war against crime” has grown in political importance, and as legislators, as well as executives, have vied with each other to demonstrate unrelenting intention to rid communities of their criminals, the fallout from the rhetoric has adversely affected individual liberties directly and indirectly.

Unquestionably our society suffers from the predation of the criminal. As a result, our life-styles have markedly changed. Not too long ago, at least as anecdotal history goes, household doors were left unlocked and keys were left in the ignition of the family car. Today the burglar alarm is a necessity, be it on the car or at home, and rare is the outer door without a deadbolt or pickproof lock or both. As well, the parks in urban areas were once the retreat of those confined to the city, not a place of darkness and fear. Neighborhood streets, once a playground, are now called combat zones by the locals and much worse by others. The police officer on routine patrol wears body armor—the flak jacket. There really can be no counterargument to the thesis that the endemic of crime within all of our communities is responsible for these attitudes and these self-protective acts—and society knows it. A lawyer cannot allow self-adoration to preclude recognition of the simple fact that by representing the accused, the lawyer is deemed to have embraced those who are the cause of the disquietingly accelerated heartbeat in the law-abiding citizen. The constitutional mandate to represent the accused may satisfy those within the profession, but offers little solace to a population cowering behind barred windows and locked doors. This is not a new phenomenon, but its

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effect is being compounded nationally and internationally by the efforts of law enforcement to deal with both crime in the streets and transnational crime.

Lawmakers and prosecutors, impatient to achieve their goal of ending crime, have permitted the "war" mentality to direct them to enact and enforce laws destructive of individual freedoms and to conceive of prosecutions that disrupt valued basic freedoms. Limiting habeas corpus, as new legislation provides,¹ may restrict access to the courts, execute some sooner than otherwise, yet makes no one safer on the streets. However, it does support those who seek to appear "tough on crime." Depriving the criminal of profits has a similar acceptability and resists rational arguments to the contrary. Courts have written glibly of the Rolls-Royce lawyer,² that the accused criminal is not constitutionally entitled to such, particularly if the fees are paid with proceeds from crime. The superficial good sense of this proposition conceals the mischief that lurks in its application.

It does make sense that if a criminal is deprived of profit, he or she might feel that the whole venture is worthless. Such conclusion, if the calculus is right, should lead to the decision not to commit crimes. Unfortunately, again in real life as opposed to the theoretical, the analysis is flawed. People commit crimes for the current gratification as much as for any other reason. The proof is in the criminal living as the ultimate wastrel and spendthrift. The exceptional criminal is the saver and the planner for the future. The thrill of the crime is an end unto itself. Taking away the profit presupposes the existence of the asset at the time of the prosecution. The uncollected fines that have been levied are figures that equate with the budget appropriated for the operation of federal agencies. This does not lead inexorably to the abandonment of forfeiture or fines. Instead, it is an argument in favor of an evaluation of whether our goals to live in a peaceable and free society are being frustrated by the means used for its attainment.

The right to counsel, as an example, is being altered, warped, or limited, depending upon one's perspective. Unarguably, counsel, when called upon to represent a person accused of crime, must

1. The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 1996 U.S.C.A.N. (110 Stat.) 1214.

2. Just as a defendant cannot obtain a Rolls-Royce with the fruits of a crime, the defendant also cannot obtain the services of a Rolls-Royce attorney from the same tainted funds.

be creative, honorable, skilled, courageous, and independent. The dedication to the interests of the client must prevail against whatever powers the opposing side may possess. The lawyer must also be immune to public opprobrium for appearing on behalf of an object of general revulsion, be it the client or the crime.

The Anglo-Saxon heritage of the independent lawyer, which is a concept to treasure, was perhaps best expressed in litigation that crosses the Atlantic Ocean and interlocks England and the United States. The year was 1792 and the defendant in the case was one of the greatest voices of individual liberty that the world has ever heard, Thomas Paine.³ The lawyer who defended him was probably one of the most brilliant of barristers that England has ever produced, Thomas Erskine. When it was learned that Thomas Paine, who was charged with sedition, had sought his services, Thomas Erskine was told by his friends, by his colleagues, and by the court that he should not endanger his career by representing an individual as politically reprehensible as Thomas Paine. In Guild Hall, Thomas Erskine, in response to a question put to him by Lord Kenyon, the Lord Chief Justice, concerning why he was representing someone such as Thomas Paine,⁴ responded:

I will for ever and at all hazards assert the dignity, independence and integrity of the English Bar, without which impartial justice, the most valuable part of the English constitution, can have no existence.

From the moment that any advocate can be permitted to say he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise—from that moment the liberties of England are at an end.⁵

The question that the practicing criminal defense lawyer must ask is whether the independence that has been the rod and the staff of the advocate has been, and continues to be, eroded by our times, our troubles, and our fears. Enterprise-based prosecutions and new crimes such as money laundering have interfered with the traditional functioning of the defense counsel in ways inimical to historic concepts of the relationship between lawyer and client. The former prompts a hindsight review of a lawyer's activities that replaces independence with constraining caution while the latter

3. PETER HAY, *THE BOOK OF LEGAL ANECDOTES* 92 (1989).

4. *Id.*

5. *Id.*

intrudes directly upon the economic survival of the legal profession.

Money is an important component of all our lives. Criminal defense lawyers envision themselves, and justifiably so, in the words of the motto of the National Association of Criminal Defense Lawyers, as "Liberty's Last Champion." To function as such champions, lawyers need the means by which to live. In order to live, they must be paid fees. It once was that criminals, successful until arrested, could retain lawyers and pay them the fees to which they were entitled. Except for taxes, the lawyers had no accountability to the prosecution or the government. Then, those self-same lawyers could devote themselves, as opportunities offered, to defense of the indigent and to pro bono work of every type, sort, and description. That was, however, yesterday when the freedom of the professional to serve society was not limited by the war against the criminal and against crime.

The benefits derived from socially sensitive decisions such as *Gideon v. Wainwright*,⁶ *Argersinger v. Hamlin*,⁷ and resulting statutes such as the Criminal Justice Act of 1964⁸ fulfill the overriding social contract that the justice system has with the people. Neither the decisions nor the statutes should be considered as substitutes for the persona and the attributes of the practitioner. The tail wags the dog when the evaluation of the protections of the individual incorporated in the right to counsel are measured against the yardstick of a conviction already obtained. The mischief in the doctrine of harmless error then contorts high principle into pragmatic disposition. Certainly, technical error should not always stand as a barrier between the rational and just end of the process of prosecution for crime and the needs of a public to be both secure in its being and to have the means to enforce its rights. Without the lawyer, the citizen is relegated to the whims of the benevolent despot and the unaccountable bureaucrat. Therefore, the tests for counsel, as in the competency of counsel cases,⁹ views the

6. 372 U.S. 335 (1963) (holding that an indigent defendant's right to court-appointed counsel in criminal proceedings is a fundamental right guaranteed by the Fourteenth Amendment).

7. 407 U.S. 25 (1972) (holding that without a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless represented by counsel).

8. 18 U.S.C. § 3006A (Supp. 1996).

9. The leading cases are *United States v. Cronin*, 466 U.S. 648 (1984) (examining the circumstances surrounding the representation provided to determine

needs of the public through the wrong lens. The people are entitled to the preservation of their inherent rights, which should be nurtured, respected, and fostered as those conventionally expressed. Unfortunately, it seems necessary to remind our government, including our courts, that the ultimate law today is expressed in the words of the Ninth Amendment to the United States Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁰ To use what is harmless error as a guide is to set as controlling the last case dealing with the last erroneous act by the prosecution or the court. To put it another way, such decisions ratchet down our aspirations of justice as defined in our history. Freedom and liberty remain hostage to the pragmatism of an imperfect process. The role of the lawyer is one that is in constant tension with law enforcement, or such corrosively confusing concepts as "the search for the truth."

In one of the few times that the United States Supreme Court has addressed this concept, Justices Potter Stewart and John M. Harlan joined in the partial concurrence and partial dissent of Justice Byron R. White to the majority opinion in *United States v. Wade*.¹¹ They stated that law enforcement has a clear duty to make "the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime."¹² However, they were quick to point out that the defense counsel has a different agenda that is inherent in the adversary system itself.¹³

But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information

if such representation was adequate), and *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that representation is adequate if it is reasonably effective given the totality of the circumstances).

10. U.S. CONST. amend. IX.

11. 388 U.S. 218 (1967).

12. *Id.* at 256 (White, J., dissenting in part and concurring in part).

13. *Id.* (White, J., dissenting in part and concurring in part).

to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.¹⁴

The lawyer renders services that are multifaceted. "Of all [of] the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."¹⁵ No formulation of the right to counsel since the decision in *Powell v. Alabama*¹⁶ has failed to describe the right to counsel in terms of the effectiveness of counsel. To put it another way, the right to counsel should not be a paper tiger. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."¹⁷

Many who are exposed to the daily workings of the criminal justice process believe that the fangs and claws that marked the ritual combat of trial have been blunted by the perceived threat of the lawyer becoming a casualty in the war on crime. There are predators within our communities, and we need protection from them. What we do not need, however, is a resort to responses as radical and reckless as—in the words of the aged, but apt aphorism—burning down the house to get rid of the cockroaches. That

14. *Id.* at 256-58 (White, J., dissenting in part and concurring in part).

15. *United States v. Cronin*, 466 U.S. 648, 654 (1984) (quoting Walter V. Shaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

16. 287 U.S. 45 (1932) (holding that the Sixth Amendment right to counsel includes a defendant's right to effective assistance of counsel).

17. *Cronin*, 466 U.S. at 656.

is where we may be if the perception of many defense lawyers is correct.

Current prosecutions have focused, at least in part, on the appearance of representation as equating with conclusions of complicity with the client in crime. In a case currently awaiting trial, a lawyer is accused of conspiring with members of a criminal enterprise by seeking bail for a newly retained client. According to the indictment, the lawyer was carrying out a plan for that client to abscond. In another case a lawyer was accused of money laundering when he forwarded some of the moneys that he had received from the client to the client's new lawyer. The first lawyer withdrew from representation because of a concern about an appearance of conflicted representation. Still yet another case holds a lawyer to an amorphous test to determine the source of funds used to pay the fee to avoid fee forfeiture, if not money laundering charges.¹⁸

In a situation which could well be occurring in many offices now, a potential client seeks to hire a lawyer. The counsel requests a retainer and receives \$15,000 in cash delivered by an individual who supplies identification sufficient for the lawyer to file a completed Form 8300 pursuant to section 6050I of the Internal Revenue Code. The lawyer realizes that there is an impediment and hazard in accepting moneys that are the proceeds of criminal activity. Nevertheless, there are no guidelines in existence that tell the lawyer the nature, the scope, or the intensity of the inquiry required as to the source of the money. The lawyer has no power to compel testimony or to direct the production of records. Experience teaches that the more pressing the inquiry, the more damage to the attorney-client relationship. The client will find it difficult to trust the lawyer who is unwilling to accept the client's assertion that the money comes from untainted sources. Indications of disbelief will send the client, at the very least, looking for a lawyer more accepting, less suspicious, or even unsophisticated. In this hypothesis the lawyer may be greeted with the simple denial of wrongdoing and an assertion that the fee comes from family funds. For the lawyer to respond that affirmative proof is necessary to demonstrate that the money is not crime-generated transmits a disbelief and mistrust of the client. This creates an unleapable hurdle to the interchange of confidences that is the working core

18. There are more than subtle differences between 18 U.S.C. § 1956 and 18 U.S.C. § 1957. See 18 U.S.C. §§ 1956-57 (1994).

of the attorney-client relationship. If, by some happenstance, the relationship survives, the lawyer is haunted by the ghost of a probable investigation that will drift through the unchartable backwaters of what someone else thinks the lawyer should have known.

Another problem may arise when the lawyer passes on information to which the client is nominally entitled and is charged with obstruction of justice, or worse. The lawyer, who identifies a witness, or who publicly pursues information gathering about a witness, may be viewed as placing that person in harm's way and knowingly and willfully committing such an act. Doubly damned is the lawyer if the prosecution views the client as "dangerous." The conclusion, then, is inescapable. The government may well feel that such a lawyer has aided and abetted the interests of the criminal enterprise, and, by definition, has participated in the affairs of the enterprise, to and for the benefit of the enterprise—a criminal act.¹⁹ These examples may appear extreme, but they are not hallucinatory.

Knowledge is power, pundits have said. Knowledge is also a key element of the criminal lexicon. However, what a lawyer "knows" means different things to different people. The defense lawyer is disciplined to match knowledge with close to incontrovertible fact; the prosecution, viewing the same evidentiary landscape, sees mountains where the defense lawyer sees hills. Neither may be right, but are not wrong. It all goes back to the perceptions of the viewer. However, it is the lawyer representing the defendant who is at risk, for the power wielded by the prosecution can destroy. No one wants to be the subject of an investigation, certainly not a defendant in a criminal case. Judge Learned Hand allegedly said that he feared being a defendant more than death or a disabling disease. In order to avoid being answerable in a world of increasing inquiry, criminal defense attorneys will reasonably search for a smoother path and less troubled waters. Thus, lawyers, in general, are refusing criminal cases, and specialists within the field are looking for greener pastures. The societal effect is astronomically greater than merely the economic livelihood of the bar. The winds of this change are eroding the practitioner's courage and independence. Whether the lawyer feels the purse strings tugged by a court faced with budget constraints, or the impatience

19. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (1994).

of a prosecutor, or the fear of misunderstanding of motive, ethics, or intent, the result is the same. As Justice White said, the lawyer's defense of the client may well have "little, if any, relation to the search for truth."²⁰ This very defense requires courage and dedication and perseverance regardless of the appearance of disregard for the truth. This is precisely the kind of situation that prosecutors of good intention and judges of temperate reaction may misunderstand in the heat of litigation, and again, the power to hurt is in the court and the prosecutor. Therefore, reason lures the lawyer into thinking that the fight is not worth the candle, and that last bit of effort, that driving desire to win, is not given to the client. The criminal justice system does not care because the calendar has moved, and the quality of representation exceeded the low water marks of either *Cronic* or *Strickland*, but some unfortunates have been betrayed—by all of us.

There is more to fear from a government that quiets the voices of those who have made it accountable in the only place where the average citizen participates in the ongoing affairs of its society, the courtroom, than from the periodic depredations of street thugs, though both can make life miserable for the law-abiding. The loss of the advocate, for whatever reason, is a loss of individual liberty.

20. *United States v. Wade*, 388 U.S. 218, 258 (1967) (White, J., dissenting in part and concurring in part).

