Loyola of Los Angeles Law Review

Volume 30
Number 1 *Symposium: Responsibilities of the Criminal Defense Attorney*

Article 10

11-1-1996

On a Level Playing Field

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This has not been all that easy, thinking back over thirty-two years of criminal practice, trying to define the role of the criminal defense lawyer in our system of justice. My initial thoughts were very traditional ones, probably not too different than what I thought coming out of law school: that in our adversary system a defense lawyer must use all his[1] energies, talents, and intellect, within the bounds of ethics, to defend his client and that neither the nature of the accusation nor the popularity of the client or his cause matters one whit. But like most things in life, that answer is too simple. For, in reality, the defense lawyer's role today, particularly in representing federal defendants, is quite different than it was twenty or thirty years ago. That role change has taken place gradually, slowly shaped by strong forces at work in our society.

The average person-in-the-street is now fed up with crime and criminals. She is not interested in hearing the reasons behind the escalation in violence. Nor does she have any tolerance for dealing with criminals other than with swift, no-nonsense justice. She simply wants to lock up the criminals for as long as possible and keep them out of her neighborhood—a simple solution to a complex problem. The politicians have listened carefully and have passed laws in response that may be long on appeal to their constituents, but are short on perspective. In doing so, they have upset the checks and balances in the criminal justice system and materially altered the roles of the prosecutor, judge, and defense attorney. From where I sit, the changes have not been healthy.

I came out of law school during a period that one legal commentator aptly called the Due Process Revolution. It was the 1960s, a heady time when blockbuster constitutional cases were

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1. In conjunction with *Loyola of Los Angeles Law Review*'s gender neutrality policy, certain genders have been assigned in this Article. The average person-in-the-street will be female, the defense attorney male, the prosecutor female, the defendant male, and the judges female. *Eds.*

being decided in rapid succession by the Warren Court. Law enforcement officers and prosecutors were being put to the test, facing obstacles never presented before. The Bill of Rights had come alive. Confessions could not be used unless the police gave a warning of constitutional rights and got a clear waiver of those rights from the defendant.[2] Lawyers were now required to be present at the defendant's shoulder rendering effective assistance at each critical stage.[3] Rigorous rules applied to search warrants and the obtaining of evidence.[4] Constitutional violations sometimes resulted in the loss of evidence.[5] Prosecutors had to disclose exculpatory evidence.[6]

In my view, this revolution introduced a much needed measure of equity and fairness to a process that is fundamentally weighted against a criminal defendant. For anyone without firsthand experience of the criminal justice system, it is hard to appreciate the full weight of governmental power and authority that is brought to bear on an individual who is charged with a crime. My first courtroom appearances were as a federal prosecutor. I remember being awestruck at the amount of power my colleagues and I, as young inexperienced lawyers, had been given. We could alter the course of a person's life in making the sometimes hairthin decision whether to file or decline to file charges and were instrumental in deciding whether release on bail was appropriate. While the sentencing decision was obviously up to the judge, the prosecutor's input was often very influential.

I soon saw and understood the trepidations felt by a defendant on being brought into the criminal system. Appearances before many judges were as pleasant as could be expected under the cir-

2. Miranda v. Arizona, 384 U.S. 436, 467-73 (1966) (holding that absent other effective measures to protect Fifth Amendment privilege against self-incrimination, a person in custody must be warned prior to interrogation that the person has certain rights, including the right to remain silent).

3. *See e.g.,* United States v. Wade, 388 U.S. 218 (1967) (stating that pre-trial identification is a critical stage of the prosecution at which the accused is as much entitled to such aid of counsel as at the trial itself).

4. Katz v. United States, 389 U.S. 347 (1967).

5. Mapp v. Ohio, 367 U.S. 643 (1961); *see also Katz*, 389 U.S. 347 (1967) (holding that evidence of accused's conversations overheard by attaching an electronic listening device to the telephone booth in which accused placed his calls was excluded because the search was conducted without a warrant); Weeks v. United States, 232 U.S. 383 (1914) (holding inadmissable letters and private documents seized during a warrantless search).

6. Brady v. Maryland, 373 U.S. 83, 87 (1963).

cumstances; clients were treated with respect. But that was not always the case. The trappings of some courtrooms, as well as the demeanor of the courtroom personnel, could be very off-putting; the tone was almost funereal—long faces, musty odors, dark purple wall hangings behind the judges. One elderly judge even kept the temperature at what seemed to be just above freezing; the story was that they hadn't had time to embalm him yet. It was all quite intimidating. The process itself did not lighten the experience. In fact, it did not take a whole lot—one turn around the criminal justice track was normally enough—for a defendant to appreciate how cold and one-sided the system could be.

I joined the Federal Public Defender's Office in Los Angeles when it first opened in 1971. For the first time federal prosecutors faced a steady diet of prepared adversaries who were paid for their services. Defense lawyers now had full-time investigators; it was not rare for a government witness to be impeached with a statement obtained by the defense investigator. Expert witnesses appeared more regularly for the defense as the courts held that the indigent accused was as entitled to the same help as the defendant who could hire a lawyer, whether it be a competent psychiatrist in whose selection the prosecution would have no influence,[7] a handwriting expert, an accountant, or a savvy investigator.[8] Prosecutors in turn were regularly having to face defense witnesses for the first time, getting the same opportunity to hone their cross-examination skills as defense lawyers always had. It was a healthy system that had matured to a point where there was vigorous advocacy on both sides. Defense lawyers were performing the function envisaged by the Sixth Amendment.[9]

I don't want to create the false impression here that defendants were being acquitted with regularity. That certainly wasn't the case. In fact, it was still true that as a defense lawyer you lost

7. United States v. Bass, 477 F.2d 723 (9th Cir. 1973).

8. *See, e.g.,* CAL. PENAL CODE § 987.9 (West 1985 & Supp. 1996); *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial).

9. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

most of the time. That had always been par for the course. But there was the exhilaration of having fought a hard, fair fight, knowing that you had forced the government to do things right.

Over the past twenty years, that hard, fair fight has changed dramatically. While it may be difficult to pinpoint specific causes for the change, the public mood I mentioned earlier has certainly played a major role. Across society, there has been a growing antipathy towards the poor and the disadvantaged. Recently, aliens and immigrants have become particularly disfavored, as evidenced by the passage of Proposition 187 in California and other similar attempts to keep the have-nots from entering the mainstream of American society.[10]

With respect to criminal cases, the public has increasingly perceived the system as unfairly favoring the defendant. It has become conventional wisdom in some circles that with all the rights accorded the accused by the Warren Court, defendant after defendant has been acquitted or otherwise escaped justice because of hypertechnicalities, sneaky defense lawyer tactics, or weak-kneed judges. That is a misconception. Those with experience in the system will tell you that that simply has not been the case and, if anything, the changes brought about have served to improve the system, from both defense and prosecutorial perspectives. Nevertheless, the misconception is still alive. It has, in turn, created a politics of punishment where elected officials have succumbed to the public demand for harsher laws in general, the enactment of broader criminal prohibitions, and more severe punishments.

Ironically, the clients I now represent who have found the system to be particularly one-sided are the conservative businessmen who, but for their brush with the law, would be the first to complain about how defense-oriented the courts have become. It is inconceivable to them that law enforcement officers can decide unilaterally whether an individual will be arrested and lose his liberty. Why, they ask, wasn't the defendant provided an opportunity to present exculpatory evidence to some neutral person before his freedom was taken away. They are incredulous that a single police officer is free to make an arrest and ruin a person's reputation. They conclude that law enforcement agents have become immune

10. *See e.g.*, Faye Fiore, *Welfare Reform Bolsters Prop. 187, Governor Says.*, L.A. TIMES, Sept. 11, 1996, at A3.

over time to the devastation the charge itself can cause. And even in a grand jury system where your fellow citizens ostensibly stand between the accused and a criminal charge, the defendant is normally neither entitled to present any exculpatory evidence nor have a lawyer present simply to observe the proceedings, much less address the charging body and explain the defendant's side of things.

The sense of one-sidedness gets even worse after the client makes his first court appearance. He will learn fast enough that, although there are always exceptions, he will find few friends in the system. It was bad enough that the FBI agent, who had first acted like his best friend, turned out to be anything but. The jailers will treat him with cold inhumanity. And some court personnel will have become so jaded by the system that they will automatically assume that he, like most everyone else charged with a crime, is guilty. Worse, it is not infrequent that a judge will abandon the independence she vowed to exercise when she took office and take the path of least resistance, bowing without serious thought to the suggestions and importunings of the prosecutor. This is especially true of some elected judges who fully appreciate both the power of prosecutors' associations and how devastating one unpopular decision reported in the local news could be at election time. The suggestion that judging civil and criminal cases is much the same experience is not necessarily true. I recall a judge telling the story of moving to a civil calendar after many years of having exclusively handled criminal cases. She asked a colleague who had recently made the same transition what to expect. He replied that the civil cases are really no different than the criminal ones except that when the parties in the civil cases introduce themselves, you don't know which one is supposed to win.

This is the context in which that traditional definition of the defense lawyer's role—the one I learned in law school—is rooted. The accused's lawyer is the one person who stands between him and the cold reality, the full force and weight, of the system. The overriding responsibility of the criminal defense attorney is to fight off the advances of those who would take advantage and to boldly assert and vigorously pursue the client's defenses.

Recently, legislatures have put significantly more power in the hands of prosecutors who, as a result, have taken on a much more prominent role than they ever have in the past. Judges, at the same time, have suffered a significant loss of power. These

changes have also drastically affected the role of the defense lawyer so that the assistance given a client today, particularly in federal court, is markedly different than when I started. Unless that imbalance is corrected, it is going to have a seriously detrimental effect on our criminal justice system well into the future.

California is a good example, both in the state and federal courts, of the extent of power now available to the prosecutor. Everyone knows about the state's new "three-strikes" law and the draconian mandatory sentences that can be imposed for relatively minor, nonviolent third strike convictions.[11] County prosecutors unilaterally decide when to pursue third strikes. The discretion exercised varies with the county. Federal prosecutors have been accorded similar discretion in deciding whether or not to lodge charges carrying mandatory sentences. That in itself is an extraordinary power when you consider that a teenager can be sentenced to a mandatory thirty year sentence in federal court for a drug offense that would have carried the possibility of a probationary sentence if it had been filed in state court. But the real power of the federal prosecutor today emanates from the federal sentencing process, which, since 1987, has been governed by the Sentencing Guidelines.[12] These Guidelines virtually rob the judge of the discretion that used to be the hallmark of the process. Some judges have protested by resigning. Many, probably most, of the rest decry the Guidelines, rightly pointing out that the critically important job of sentencing could be done as readily by a computer.

This is how the Guidelines work. Virtually every conceivable sentencing factor, negative and positive, has supposedly been contemplated, codified, and assigned a value.[13] A numerical tally then predetermines a narrow range within which the judge must pick a

11. CAL. PENAL CODE § 1170.12(a) (West Supp. 1996); *see also* Gordon Dillow, *Pizza Case Unlikely Focus of 'Three Strikes' Debate*, L.A. TIMES, Sept. 18, 1994, at B1; Eric Slater, *Man Guilty in Potential 'Three Strikes' Pizza Case*, L.A. TIMES, Jan. 21, 1995, at B1.

12. Sentencing Guidelines Act of 1986, 18 U.S.C. §§ 3551-59 (1994).

13. United States Sentencing Commission, *Guidelines Manual*, 1-10 (Nov. 1995). One particularly disturbing aspect of the process worked out by the Sentencing Commission is that the very factors, such as age, mental, emotional and physical problems, employment record, family ties and military, civic, charitable and public service, which had always been thought to be core considerations in fashioning a fair sentence, have now been declared "factors . . . not ordinarily relevant to the determination of whether a sentence should be outside the applicable guideline range." *Id.* at 304.

specific sentence.[14] The result of all this is that the defense lawyer will determine very early in the representation what the Guideline range will be if his client is convicted. All you need do is take out the Guidelines grid and your calculator. You will end up with a time period, for example, thirty-seven to forty-six months, within which the judge must select a specific period of incarceration.[15] Because parole has been abolished in the federal system, the defendant will invariably serve at least 85% of the sentence.

There is only one way out of this strait jacket—by way of Guidelines section 5K1, which gives the prosecutor the unilateral power to seek a downward departure if she decides that the defendant has earned it by cooperation, i.e., "substantial assistance in the investigation or prosecution of another person."[16] Cooperation is the only basis upon which the motion can be made. Neither the defense lawyer nor the judge, acting sua sponte, can make the motion. It is solely within the discretion of the prosecutor. A client may do everything within his or her ability to assist the government in making cases against others. By any objective standard it may be substantial; yet, the prosecutor is free to determine that it is not enough. Where that happens the defendant's only recourse is to prove that the prosecutor's refusal was made in bad faith. In most courts that is an almost insurmountable burden.

These prosecutorial weapons achieve results that do not advance legitimate criminal justice goals. First, they seriously neutralize the sentencing function of the judge in fitting the punishment to the individual defendant. In the past we trusted the ultimate decision as to the defendant's fate to the hands of an objective arbiter after a full review of all the facts. While it was true that that system did produce disparate results at times, those were not nearly as draconian as what has been produced by the Sentencing Guidelines. Consistency is certainly a goal to be strived for, but a fair sentence must be tailored to the particular circumstances of each defendant.

Now the ultimate arbiter turns out to be the prosecutor, the one who selects the charges. In general, these are decent, bright young lawyers, but they are often times fairly recent law school graduates with a minimum of legal experience, rarely in my experience any criminal defense experience, and, more significantly,

14. *Id.* at 11.
15. *Id.*
16. *Id.* at 309.

seriously lacking in life experience. Many are very well-intentioned but even the most right-minded cannot help but be significantly affected by this awesome power. God help you if you're unlucky and you happen to draw a mean-spirited prosecutor who is not too bright. The checks and balances assumed to be inherent in the system soon fade because there is really little "check" on the prosecutor's wielding of power. In many cases, the prosecutor, more than the judge, can determine the defendant's fate.

The most insidious feature of the Guidelines is that they emasculate the legitimate function of the defense lawyer in engaging in the hard, fair fight that is the essence of the adversary system. In many situations where, in the past, the prosecutor and defense lawyer would have fought out factual disputes in the courtroom as two vigorous advocates, now the defense lawyer cannot take the risk. Let me give you recent examples where charges carried such potentially severe sentences that defense counsel were forced to abandon arguably meritorious defenses. One classic situation involved a woman charged in a drug case where conviction carried a mandatory minimum sentence of ten years. The most incriminating piece of evidence was her statement to undercover agents that she needed a "hand"—an ambiguous enough expression interpreted by the agents to be a reference to five kilos of drugs. Pre-Guidelines, the prosecutor and defense attorney would have litigated the defendant's state of mind in front of a jury. But that turned out not to be a realistic option. For despite her protestations of innocence, her lawyer counseled her to stipulate to a factual basis for a finding of guilt and to plead guilty to a count leaving open the possibility of probation. She decided to enter the plea because she could not risk conviction and the certain consequence of leaving her children for a guaranteed minimum period of incarceration of eight and a half years.

In another case a man was sentenced to twenty-four years after conviction of a drug offense. After the defendant had served over two years of the sentence, the conviction was reversed when the Ninth Circuit found that he had been denied a fair trial on several grounds including the trial court's refusal to let him testify with the aid of an interpreter as well as the introduction of improper "other crimes" evidence. On remand, the prosecutor, unable to introduce the "other crimes" evidence as proof of the original charges, added them as substantive counts, upping the

ante to the extent that conviction would now carry a mandatory life sentence. The defendant adamantly protested his innocence of any wrongdoing. His lawyer, notwithstanding his own belief in his client's innocence, was prepared to counsel the client to accept a government offer to plead guilty to a significantly reduced charge carrying a maximum sentence of three years—most of which he had already served—simply because of the risk of the mandatory life sentence upon conviction. Fortunately, and to the great credit of the United States Attorney's Office, that choice never had to be made because all the charges were dismissed after all the facts were presented to that office. But had that unusual presentation of evidence not been made to the prosecutor pre-trial, a grotesque miscarriage of justice could well have occurred.

The 5K1 "cooperation" safety valve puts another unhealthy spin on the Guidelines. In a multidefendant case, where the prosecution needs the assistance of others for a successful prosecution, or even where, in a single defendant case, the client has inculpatory information about others, the first decision the defense lawyer must make revolves around cooperation. No longer does the lawyer spend his initial efforts in carefully examining the indictment for infirmities and then exploring possible motions, defenses, and evidentiary shortcomings in the government's case. Now, the first concerns must be the ultimate Guidelines range and the risks of going to trial. If the risks are too great, the lawyer must make a beeline to the prosecutor's door to offer his client up as a cooperator. For in a multidefendant case, the prosecutor may only need one cooperator. If you are beaten to the prosecutor's door by other defense counsel, your client may lose the opportunity to win a 5K1 downward departure.

Here is an example. In a recent multimillion dollar fraud case, the defendant was faced with these options:

> (a) Go to trial and face a minimum eighteen year sentence under the Guidelines upon conviction;
>
> (b) Plead guilty to lesser offenses, stipulate to the application of relevant Guidelines factors, and face a minimum eight year sentence; or
>
> (c) Plead guilty to the same charges as in (b) and, in addition, cooperate by testifying against other defendants, thereby creating the possibility, if the prosecutor concluded by the time of sentencing that the cooperation was "significant," of a sentence under the Guidelines range,

including straight probation.

One option not available to the defendant was to go to trial, pursue what might be meritorious defenses, and if convicted, argue as he would have before the Guidelines were enacted, that the circumstances peculiar to his case called for a sentence well below the Guidelines range.

In this context, the defense lawyer has become a facilitator for the prosecution rather than a zealous advocate for his client. It is not surprising then that young defense lawyers have become frustrated and demeaned. Many come into the system soon after law school with the spirit, resolve, and determination so necessary to insure that our government not be able to take away a person's liberty unless that person's lawyer has had the opportunity to put vigorously the prosecution to the test of proof beyond a reasonable doubt. But the young lawyers learn after a short while that, for many clients, there is little they can do to achieve results that seem to be objectively rational and fair. The sense of hopelessness can become overwhelming to the point that it compromises the lawyer's dignity. Becoming frustrated is one thing. It comes with the territory and can be dealt with. But a process which demeans is inexcusable and must be changed.

This is not a time to become dispirited, but rather a time to dig in with determination to get the system back on track. While it may be a slow process, it has been happening for years now. The lawyers leading the way are the public defenders and private defense attorneys who struggle daily with resolve, grit, and good humor. They hammer away at inequities by proselytizing judges, prosecutors, and probation officers, especially those who have recently come into the criminal justice system. The imagination and resourcefulness of these lawyers have slowly borne fruit, eventually creating the "hooks" on which courts have been able to maneuver around the rules that would otherwise prevent them from fairly resolving criminal cases.

I turn to the words of retired Supreme Court Justice William J. Brennan, Jr. He has consistently, and with great eloquence, argued against the imposition of the death penalty as a violation of basic human dignity.[17] He played a major role in 1972 in declaring it unconstitutional.[18] He wrote passionately in dissent just four

17. *See e.g.,* cases cited *infra* notes 19-20.

18. Furman v. Georgia, 408 U.S. 238, 257 (1972) (Brennan, J., concurring).

years later as a newly composed Court found it constitutional.[19] He continued his fierce opposition, filing dissents in over 1500 capital cases, until his retirement in 1990.[20] In the face of the public and official fervor to broaden the scope and accelerate the pace of death row executions, he has never wavered in his belief that unltimately they will be declared unconstitutional. As recently as this past April, on the celebration of his ninetieth birthday, he focused again on the basic inhumanity of the death penalty, reminding us that the pendulum will surely swing back again and that ultimately reason will prevail.[21] I trust that, in due course, the same will also be said of the imbalance that now exists in our system of criminal justice.

This may be a rough period of time in which to be a criminal defense lawyer. More than ever there is a need for lawyers with a strong resolve to take on the challenge to fight to better the system. Justice Brennan said many years ago that there is nothing more honorable that a lawyer can do than take on the representation of a criminal accused too poor to hire his own lawyer. It may be more difficult these days to carry out that mission than it was in the past, but it is no less honorable an undertaking. It will simply take the collective commitment of criminal lawyers to continue to zealously represent those accused of crime and to struggle to win back a level playing field.

19. Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J. dissenting).

20. *See e.g.*, Lowenfield v. Butler, 485 U.S. 995, 995 (1988) (Brennan, J. dissenting); McClesky v. Kemp, 481 U.S. 279, 320 (1987) (Brennan, J. dissenting); Tison v. Arizona, 481 U.S. 137, 159 (1987) (Brennan, J. dissenting).

21. Lauren Neergaard, *Brennan Slams Death Penalty at 90*, CHARLESTON SUNDAY GAZETTE MAIL, Apr. 26, 1996, at 2C.