# CRIMINAL JUSTICE REFORM SOURCES AND NATURE OF NORMS

Michael E. TIGAR *

## Introduction

Comparisons of criminal justice systems can be both misleading and enlightening. Slogans, or undue focus on details, may make one believe that one system of criminal justice is profoundly different from another. On closer examination, the criminal justice systems of England, the United States of America, Eastern and Western Europe, and the former Soviet Union (including most of its republics) have more similarities than differences.

Indeed, the differences of procedure are largely the result of historical happenstance.[1] The announced goals of all Western systems of criminal

---

* Mr. Tigar holds the Joseph D. Jamail Centennial Chair in Law at the University of Texas School of Law, Austin, Texas. He has practiced, taught, and written about criminal law and procedure for twenty-five years. He is a former Chair of the 60,000 member American Bar Association Section of Litigation and a member of the ABA Task Force on an International Criminal Court.

[1] In this paper, I refer frequently to my own prior work and to the work of others. A list of materials principally relied on and a shortened citation form follow: M. Tigar, Law and the Rise of Capitalism (1977) (Spanish, Portuguese and Greek translations also published) [cited as Law and the Rise of Capitalism]; M. Tigar, The Right of Property and the Law of Theft, 62 Tex. L. Rev. 1443 (1984) [cited as Law of Theft]; M. Tigar, Crime Talk, Rights Talk and Double-Talk: Thoughts on Reading Encyclopedia of Crime and Justice, 65 Tex. L. Rev. 101 (1986) [cited as Crime Talk]; M. Tigar, Constitutional Rights of Criminal Tax Defendants: A Bicentennial Survey and Modest Proposal, 41 Tax Lawyer 13 (1987) [cited as Modest Proposal]; M. Tigar, Original Understanding and the Constitution, 22 Akron L. Rev. 1 (1988) [cited as Original Understanding]; M. Tigar, Voices Heard in Jury Argument: Litigation and the Law School Curriculum, 9 Rev. of Litigation 177 (1990) [cited as Voices]. The best single-volume work on American criminal procedure, cited often in this paper, is W. LaFave & J. Israel, Criminal Procedure (1985, annual supplements) [cited as LaFave & Israel]; by citing to sections of this work, the reader will have a consistent access to newly-decided cases by looking at the volume itself and the annual supplements. Material on the American federal judicial system will be cited to C. Wright, Federal Courts (4th ed. 1983) [cited as Wright]. The three volume set, International Criminal law, edited by M. Cherif Bassiouni [cited as Bassiouni, Treatise], is an invaluable reference; see also M.C. Bassiouni, The Time Has Come for an International

justice are quite similar. Consider this list taken from a leading American textbook [2]:

- Establishing an adversary system of adjudication [3]
- Establishing an accusatorial system
- Minimizing erroneous convictions
- Minimizing the burdens of accusation and litigation
- Providing lay participation
- Respecting the dignity of the individual
- Maintaining the appearance of fairness
- Achieving equality in the application of the process.

These goals are shared by all civilized criminal justice systems, at least at the level of pronouncement.

The familiar character of the list of principles should not be surprising. Western legal thought, as embodied in the legal ideologies of capitalist as well as socialist countries, rests upon a common foundation of Roman and Germanic law. The structures of legal ideology and of legal administration are quite similar across national boundaries.[4] In addition, as Professor Bassiouni and others have pointed out, there is a growing international consensus on criminal law issues. This consensus is reflected in treaties as well as in emerging customary law norms.[5]

A nation embarking upon basic reform of its legal system, including the system of criminal justice, must heed two lessons. First, it must respect the rights of all segments of the society, including minorities and

Criminal Court, 1 Indiana Int'l & Comp. L. Rev. 1 (1991) [cited as Bassiouni, International Criminal Court]. I have had the benefit of seeing a preliminary draft of Francesco Francioni's insightful paper, Costs and Benefits of EEC Membership: The Protection of Fundamental Rights [cited as Francioni], to be published. Finally, American and, to a lesser extent, comparative and international criminal law and procedure, topics are dealt with in the four-volume Encyclopedia of Crime and Justice (S. Kadish ed. 1983) [cited as Encyclopedia].

[2] La Fave & Israel § 1.6.

[3] The important thing is not the title "adversary" or "inquisitorial." Rather, the system of which the authors speak respects individual rights and provides for effective opportunities to defend.

[4] See generally Law and the Rise of Capitalism. I have defended my view of social change in, e.g., M. Tigar, Review, Law and Revolution: The Formation of the Western Legal Tradition, 17 U.C. Davis L. Rev. 1035 (1984).

[5] See Bassiouni, International Criminal Court; Bassiouni, Treatise, especially volume 2; Francioni. There is an old story about a British newspaper headline: "Fog in the Channel: Continent Isolated." The headline is often cited as a humorous comment on British attitudes towards the rest of Europe. Today, it serves to warn all of us of increasing interdependence of states and increasing universality of basic human rights norms.



outcasts. The system must honor legitimate expectations about its own performance. Second, the system must recognize that it fosters expectations as well as honors them, and it must seek legitimating principles that will command respect internally and in the rest of the civilized world. These two lessons take account of where the system has come from, and where it is headed. They express the ideal of social transition embodied in the phrase "from legality to legality."

It is tempting to approach change as though one were free to invent and implement a new system based on thought, study, and imagination. Such an approach has been rightly and consistently condemned by Western legal scholars and innovators in all periods and many countries.[6] Philippe de Beaumanoir recognized that new rules must find roots in old doctrine. Lord Coke, in refashioning the common law, looked back as far as Magna Carta, saying "from the old fields must come the new corn."[7] In drafting and redrafting what became the Code Napoleon, the authors repeatedly found they could not simply invent a new legal order based upon their idea of what was "right."[8]

As Karl Renner has shown in his brilliant work, *The Institutions of Private Law and Their Social Functions*,[9] the forms of legal ideology are capable of receiving new content. Of course, this capacity does not prove the rightness of holding on to old forms, nor vindicate any particular new content. However, the adaptability of ideological forms should make us pause before dramatic and wholesale rejection of an allegedly outmoded ideology, lest the entire enterprise of change become discredited or warped. Even in South Africa, where social change is taking place rapidly, the transition from legality to legality means the basic juridical outlines of the old order will be filled with new content, rather than designing an entirely new schema.

The American Chief Justice, William Rehnquist, has been quoted as saying that precedent should mean little in criminal cases because a criminal defendant has no reliance interest in a particular rule of decisional law. This statement, even if literally true, entirely misses the point. The people at large have an interest in seeing that the legal forms

[6] Original Understanding; Law and the Rise of Capitalism. See also review cited in note 5. True, there have been efforts to devise new legal systems without regard to what had gone before. Such efforts have failed. See Crime Talk, 65 Tex. L. Rev. at 125-26, note 138.

[7] Law and the Rise of Capitalism, chs. 11, 17.

[8] Law and the Rise of Capitalism, ch. 18.

[9] Discussed in Law and the Rise of Capitalism, and in Original Understanding.

observed by the state when it takes action against an individual are administered according to certain rules that antedate the state's action.

Legal institutions and ideology are built upon the foundation of the social relations they protect. When those social relations change, so do the legal forms. Still, legal forms are not simply the product of invention. They require a context. This is particularly true of legal forms in the criminal justice system, which deals with the state's power over basic human freedoms.

The criminal justice system implicates basic human rights, for example, to be free from arbitrary arrest, unjust accusation, torture, and unduly harsh punishment. If one doubts this assertion, examining the docket of the European Court of Human Rights shows that most of its work has been generated by the criminal justice systems of member states.

The European Court and the European Convention are part of a global human rights movement which is articulating treaty and customary law standards. Francesco Francioni has brilliantly noted that the economic transformation of Europe in the economic community has been accomplished under a legal regime that includes no express provisions for protection of human rights. Yet, the member states and the economic community institutions themselves have been compelled to develop mechanisms for ensuring that the transformation of social relations does not undercut either existing national human rights guaranties nor retard the progress of international human rights consensus.[10]

Existing aspirational goals of a criminal justice system are the "old fields" in which drafters of new rules will till and sow. The developing human rights consensus is the new crop of principles to govern justice systems in transition.

## The Judicial Function

### *Judicial Selection*

The United States is a federal republic. Judges of the national government, federal judges, are nominated by the President, confirmed by the Senate, and have life tenure "during good behavior."[11] Federal trial judges preside in the federal district courts over trials of all serious crimes. A federal defendant has the right to a jury of twelve lay persons selected from a cross-section of the community.

[10] Francioni.

[11] See generally C. Wright, Federal Courts §§ 1 - 6 (4th ed. 1983).



In the fifty states, the territories, and the District of Columbia, there is considerable variation in the laws on judicial selection and tenure. The United States Supreme Court has held that certain fundamental guaranties contained in the federal constitution -- jury trial, counsel, confrontation, cross-examination, and so on -- must be respected by the states.[12]

The most significant judicial selection controversy is over the election of judges by universal popular vote, as opposed to a system of appointment modelled on the federal constitution. For example, in many states a hybrid system provides that judges are initially appointed by the Governor of the state from a list of qualified persons nominated by a quasi-independent commission. A judge so selected serves for a period of years -- perhaps ten -- and then is subject to reconfirmation by an electoral process in which the voters are simply asked "Should Judge X be retained?"

States, such as Texas, in which all judges are elected and serve relatively short terms of four to six years, have seen great controversy over the effect of electoral politics on judicial selection. Some of this controversy focuses upon the expense of political campaigns to select judges. In the U.S., political campaigns are funded almost entirely by private funds. Critics of judicial election say judges who must raise campaign funds from wealthy individuals and organizations will inevitably have a political bias towards their supporting constituency.

Supporters of an elected system note that all judges have a political bias of some kind. They also argue that in an elected system the biases become more apparent at the initial selection stage and there is more frequent opportunity to remove judges who do not reflect community sentiment. Evaluating this dispute requires consideration of two basic notions about judicial selection: first, to what extent judges should mirror community sentiment; and second, how one defines "the community" for these purposes.

All citizens risk harm from core criminal behavior, such as assault, or certain types of theft.[13] However, there is a risk that definitions of offenses by the legislature, or judicial construction of penal laws will infringe upon minority rights. For example, laws regulating public parading can be construed and applied to discriminate against particular views or forbid certain types of expression that have value in a free society.[14] Laws which are neutral on their face may be simply a means

[12] LaFave & Israel §§ 1.5, 2.1 - 2.9.

[13] See generally Crime Talk; Encyclopedia; Law of Theft.

[14] E.g., Gentile v. State Bar of Nevada, 111 S.Ct. 2720 (1991).

for a powerful group to harass a weaker one.[15]

Regarding criminal law procedures, community sentiment may demand swift punishment of alleged offenders without "undue" attention to formalities. The rights of criminal defendants to an orderly, measured, and fair process for bringing a charge and determining guilt or innocence are, by definition, minority rights. This is because only a minority of persons are caught up in the criminal justice system.

For these reasons, judges often confront a conflict between community sentiment and their duty to define substantive and adjective law in harmony with fundamental and non-majoritarian principles. The American federal constitution was drafted by people who believed life tenure, following an appointment process involving the President and Senate, was the surest guaranty that judges would possess the political independence and strength of character necessary to protect fundamental rights.

The drafters were quickly confronted with contrary evidence.[16] The Bill of Rights was ratified on December 15, 1791. By 1798, the Federalist Party had become fearful of new ideas -- allegedly from abroad -- that had taken root in Jefferson's Republican Party. The Federalist Party therefore secured passage of the Alien Act, the Enemy Alien Act, and the Sedition Act.

The Sedition Act passed into the hands of Federalist judges, who charged grand juries on its terms with evangelic fervor. For example, Republican Congressman Matthew Lyon was jailed for writing of President John Adams' avarice and vanity. Two hapless citizens of Dedham, Massachusetts, were imprisoned for erecting a sign that said, "No Stamp Act, no Sedition, no Alien bills, no Land Tax; downfall to the Tyrants of America, peace and retirement to the President." Not a voice was raised from among the federal judges against these prosecutions, even though anyone who reflected for a moment on the history of the colonial press would see that the new Bill of Rights forbade the statute and discountenanced its enforcement.

Unfortunately, when the Republicans' turn came to wield the levers of government, they fared no better. It is true that they smarted over what Adams had done to them in his last months of power. He took every opportunity to put loyal Federalists on the bench; here, at least, the federal judges would have life tenure.

[15] E.g., Law of Theft.

[16] The following account is taken from an address I made to the Alabama Bar Association in February 1990.



Predictably, the Jeffersonians fought back. Secretary Madison withheld Judge-designate Marbury's commission as justice of the peace. Moreover, the machinery of impeachment was fired up to remove some of these Federalists from the bench. Judge Pickering, a drunk and probably insane, was removed.

The day the Senate voted Judge Pickering out, the House of Representatives returned eight articles of impeachment against Justice Samuel Chase. Seven of these charges recounted Chase's unseemly zeal in presiding over sedition and treason trials with a vigor more suited to an overreaching prosecutor than a judge. Chase had deservedly won the title "the bloody Jeffreys of America" for his ferocity on the bench. One could find in those charges a desire to discipline Chase for having paid no attention to the First Amendment. However, the eighth article proved that the young Bill of Rights still had no true friends in the councils of power; it charged Chase with making an intemperate anti-government speech. Although the offense was not cast strictly as sedition, Jefferson himself so characterized it when urging Congress to proceed against Justice Chase.

To be sure, there are some passing references to the Bill of Rights in the early decisions, but not so as to inspire confidence that the judges had taken its true meaning to heart. For example, when Attorney General Levi Lincoln appeared to argue in the Supreme Court on behalf of Secretary Madison and against Marbury's right to a mandamus, he was asked where Marbury's commission might be. Chief Justice Marshall, not entirely gratuitously, advised the Attorney General that he could invoke his privilege against self-incrimination if he wished.[17]

Then, in the trial of Aaron Burr,[18] Chief Justice Marshall, sitting as a circuit judge, reaffirmed the Sixth Amendment right of compulsory process in terms that still repay study. However, these were isolated bursts of rhetoric on an otherwise silent stage.

The history described above is familiar. Some recount with wonder that the judges did not take the Bill of Rights more seriously, and some with disappointment that they did not. Still others, such as Justice Holmes, have cited these early actions -- or inactions -- as proof that the magisterial words of those ten amendments could not have been meant as literal and indisputable commands.

All three groups are misguided. First, as eminent jurists have reminded us, the words are clear and commanding, not elastic and

[17] Marbury v. Madison, 2 L. ed. 60 (1803).

[18] United States v. Burr, 25 Fed. Cas. 49 (D.Va. 1807).

hortatory: "Congress shall make no law," "the accused shall enjoy," "no person... shall be compelled." You need not be a constitutional scholar to see this point; a less elegant metaphor will do. If you take your dog to obedience school and begin to say things like "sit," "heel," and "come," and for the first few classes your dog does not respond, this does not mean that obedience school is a failure or that your dog knows better than you how dogs should behave.

More respectfully, the Bill of Rights was written by people who knew of particular abuses and wished to make unmistakable that they should not occur again. It was written *about* judges and *for* judges, *by* lawyers and *on behalf of clients*: clients whose collective life experience showed the need for such a testament disposing and directing how the legacy of revolutionary struggle should be distributed as the patrimony of their children.

In the years since adoption of the American Constitution, there has been yet more evidence that the constitutional method of appointment is no guarantee that judges will behave properly. On the other hand, my experience in Texas has shown that the electoral process does not necessarily produce more attention to fundamental rights. For example, recent Texas election campaigns have focussed on judicial and prosecutorial willingness to seek and obtain the death penalty in an ever-larger number of cases.

In sum, achieving the goals of a criminal justice system -- repression and respect for rights -- requires attention to more than the method of selecting judges. No method yet devised is proof against arbitrary action. However, over the long haul, the federal system has historically yielded a judiciary that is better qualified, more inclined to political independence, and more conscientious about the judicial oath to dispense justice impartially. Selecting judges from among those who are qualified by training and prior experience, and requiring assent from the executive and legislative branches for any given selection, have been largely responsible for this success.

One should not, however, ignore two other features of this system. First, American judges are selected from the bar at large, not from a stratum of persons who have trained for judicial roles and pursued a judicial career from university onwards. It is true that many, if not most, federal judicial nominees have served as judges in a state court system. The American practice resembles, to some extent, the English system of choosing trial judges from among the ranks of barristers, although the American selection process recruits judges from a broader cross-section of the bar.



Second, the organized bar and other concerned groups have taken an active role in evaluating, supporting, and opposing nominees for federal judicial office. The American Bar Association has a special committee that looks at the judicial qualifications and temperament of every person nominated by the President to be a federal judge. This committee, though not governmental, serves a function similar to that of state Judicial Qualification Commissions. I remain convinced, however, that true judicial independence cannot be achieved without a set of judicially-enforceable legal standards by which to judge prosecutorial action, and an active and independent defense bar. These themes are covered in later sections of this paper.

It is a myth to say that judges represent no community at all, but simply administer neutral legal principles in a neutral manner. What consequences flow from recognizing this principle?

All societies in transition must figure out what to do about judges who served in the former regime. Quite often, the "old" judges profess themselves willing to administer a new legal order, although they may be tempted to do so in ways that undercut the purpose of the new laws. On the other hand, simply dismissing all the old judges risks delegitimizing the entire court system in ways that a new regime would find unacceptable. This is another example of the need to move "from legality to legality."

One ameliorative device is to remove barriers to entry into the judiciary. In many legal systems, a person cannot be a judge until he or she has achieved a certain distinction as a lawyer. Yet many who did not support the old regime never had a chance to achieve such distinction. To take a dramatic example, in South Africa, Black lawyers have only recently been admitted to the bar in any great number, and only relatively few have been admitted to the ranks of "advocates," or barristers, from which judges are chosen.

Under such circumstances, one must recognize that a young or renewed political system will have young judges, whose qualifications will consist more of proven learning and probity than of long experience. The selection process would, under such circumstances, be more rigorous, but there is no reason to believe it would not succeed.

An admittedly imperfect analogy may be found in the United States. In the late 1970's, Congressional legislation opened up hundreds of new federal judicial appointments, all of which were made by President Jimmy Carter and ratified by a Senate controlled by his party. The Democratic party was committed to expanding the number of women and people of color in the judiciary. It was necessary, therefore, to appoint as judges people with relatively less experience as state court judges or in law

practice than had been the practice in previous years. On the whole, this experience not only significantly diversified the federal judiciary, but the judges appointed have discharged their duties with distinction.

Another way of accommodating new principles with old traditions is to create and staff a court specially charged with enforcing fundamental rights in accordance with a written charter of such rights and developing international human rights principles.[19] A constitutional court is a feature of many European countries and is often effective in controlling the actions of lower courts, administrative agencies, and the procuracy.

A constitutional court would be a logical counterpart to a new or revised constitution. It would play a decisive role in bringing the country into the developing world of transnational rights jurisprudence. A detailed discussion of that movement is beyond the scope of this paper, but scholars such as Professor Francioni have addressed this issue in the context of the European Community, and Professor Bassiouni's work also provides valuable guidance.[20]

Two recent United States Supreme Court decisions,[21] and the litigation that led to them, provide insight into the importance of a judiciary that reflects the diversity of the society it serves. The federal Voting Rights Act[22] forbids state and local governments from diluting the voting power of ethnic and racial groups by the way in which electoral boundaries are drawn. For example, in Harris County, Texas -- which includes Houston -- twenty percent of the population is African American, but only three of the fifty-nine state district judges are African American. The district court is the court of general civil and criminal jurisdiction in Texas. Similar disparities, with respect to both African Americans and Hispanics, were shown to exist in many Texas counties. The plaintiffs in the Texas lawsuit showed that a judicial election method based on electoral subdistricts of modified at-large structures would remedy the disparity.

Of course, the Court's decision is based uniquely upon American law, but the underlying litigation has broader implications. The Texas system of electing judges based on a simple majority of popular vote in a given county effectively excluded Hispanic and Black ethnic minorities from

[19]Francioni.

[20]Citations in note 1.

[21]Houston Lawyers Ass'n v. Attorney General of Texas, ___ U.S. ___, 111 S.Ct. 2376 (1991) (Texas method of electing trial judges violates Voting Rights Act); Chisom v. Roemer, ___ U.S. ___, 111 S.Ct. 2371 (1991) (Louisiana method of electing appellate judges violates Voting Rights Act).

[22]Voting Rights Act of 1965, 79 Stat. 437, as amended in 1982, 42 U.S.C. § 1973.



meaningful representation in the judiciary. This underrepresentation, in turn, can contribute to a perceived delegitimation of the judicial process. A similar result, though much more dramatic and widespread, can be observed in South Africa, where Blacks have been excluded not only from the judiciary but from all areas of political life.

In sum, it is necessary to ensure that the justice system reflects the diversity of the populace for whom it is working. This goal may be achieved by political consensus at the legislative and executive levels, by redistricting where judges are elected, by some system of proportional representation, or by any means adapted to the political institutions of the particular country.

### *Lay Participation in the Criminal Process*

In the United States, a judge presides over the trial, rules on admissibility of evidence, and instructs the jurors as to the law they should apply. The factual decision of guilt or innocence is for the jury, and its decision to find the defendant not guilty may not be reviewed on appeal. However, in almost every state, the jury determines only the bare fact of guilt of specified provisions of the penal law.[23] Punishment is then assessed by the judge, within varying legislative guidelines.[24] The judge typically makes this decision based on submissions by the prosecutor and defense counsel and on reports from court personnel about the defendant's conduct and background. Rarely is there any formal trial-type factual inquiry at this stage, although such an inquiry may be required in certain circumstances.[25]

The right to a jury trial is fundamental in the Anglo-American criminal justice system, although it is administered quite differently today in the United States and the United Kingdom. The jury is said to constitute a bulwark between the citizen and the state in the criminal process. Based on twenty-five years of experience in American courtrooms, I agree with that sentiment.[26]

[23]Texas and Virginia are exceptions; the jury sets the punishment. In almost every state, however, the jury in a capital murder case determines whether the defendant should receive the death penalty. There are variations of state practice on whether the jurors' verdict is reviewed by the trial judge.

[24]See generally LaFave & Israel §§ 25.1 - 25.4.

[25]LaFave & Israel § 25.1.

[26]See Voices. Another point of lay participation in the criminal process is the grand jury, a group of citizens who decide whether or not a formal charge of serious crime should be laid against an accused. The ancient institution of the grand jury has been abolished in England, from whence it came, and in many American states. Grand jury action is not

numbers on the panel. The entire tribunal should decide guilt and assess punishment in every case of serious crime.

Plea bargaining should be forbidden to the extent it means elimination of formal process for determining culpability and sentence. That is, the defendant who has acknowledged guilt -- "a reconnu les faits" -- must nonetheless be tried in order to determine the precise offense involved in that set of facts and the appropriate disposition of the case.

## The Prosecution Function

In twenty-five years of law practice, I have encountered prosecutors, both state and federal, at all levels of their respective systems. While one can generalize about the prosecution function, there are important differences among prosecutorial offices. The federal character of American government creates special problems, some of which are relevant to some European countries.

### *Federal Prosecutors*

All federal prosecutors act in the name of the Department of Justice, over which the Attorney General presides. The Attorney General is the approximate equivalent of a Minister of Justice, appointed by the President after being confirmed by the Senate. The Attorney General and the Department of Justice set prosecutorial priorities and principles. For example, in today's climate, repression of the narcotics trade has become a major concern.

American history records that Attorneys General have usually been chosen from among the President's close political advisors. They have been at the center of political controversies since the early days of American independence. Most visible in recent memory, the Nixon Administration Justice Department was used by the White House to pursue and harass the administration's political enemies.[32]

The Justice Department in Washington, D.C., supervises the work of United States Attorneys in the nearly one hundred federal judicial districts. The United States Attorney in each district is also a Presidential appointee, although the Assistant United States Attorneys working under him or her are civil servants. In addition, the Justice Department has a staff of trial attorneys who are authorized to bring prosecutions directly.

[32]The best account of these years is Watergate: Chronology of a Crisis (Congressional Quarterly 1975).



The Department of Justice hierarchy thus directly reviews prosecution decisions made by its own staff, and exercises a more distant, but nonetheless important, oversight over the work of United States Attorneys.

There is an extensive informal jurisprudence of conference and review of prosecution decisions in this structure. In some areas, such as tax offenses and charges under the federal racketeering laws, the process of review is formalized by regulation. In 1981, Attorney General Benjamin R. Civiletti issued guidelines entitled "Principles of Federal Prosecution" to publicize and regulate prosecutorial practices in important matters. The principles dealt with the standard of proof prosecutors should have before seeking to bring a charge, limits on plea bargaining, use of multiple criminal charges, and many other details of exercise of prosecutorial discretion. Thomas Sullivan, who served as United States Attorney for the Northern District of Illinois, issued a memorandum on the obligation of prosecutors in his office to turn over exculpatory evidence to defense counsel. The precise content of these documents is not important, but rather the idea of ensuring the procuracy's exercise of state power is in accordance with announced norms.

One must keep in mind that federal prosecutions constitute a small percentage of all criminal cases brought in the United States -- most alleged offenses are prosecuted at the state and local levels. Even within the federal system, most prosecution decisions are made by United States Attorneys, subject only to broad policy guidance and an occasionally-exercised veto power from Washington, D.C.[33]

There is little formal regulation or judicial review of prosecutorial discretion in the federal or state system. United States Attorneys have functioned best when they have demonstrably and visibly operated in a professional, egalitarian manner. They have created distrust, adverse judicial treatment, and a lack of public confidence when they have championed a current political agenda, failed to review recommendations by interested agencies, or disregarded police misconduct.[34]

[33]An example of policy guidance, as noted above, is the emphasis on narcotics cases; another is the current effort to punish massive fraud in the American banking industry. The Department of Justice in Washington, through the Assistant Attorney General for the Criminal Division, might veto a United States Attorney's decision to prosecute a local political official, or to multiply the number of charges in a single case in a way that would unduly tax the system's resources.

[34]In this context, it is important to note that prosecutors have "clients." Of course, "the State" is their client, but this is too broad a generalization. Federal prosecutors receive recommendations from the Federal Bureau of Investigation, the Customs Service, the Immigration Service, and many other agencies. These agencies have their own political

*State Prosecutors*

Each state has an Attorney General, and each county within a state has a District Attorney or County Attorney. However, there are dramatic differences in the roles of State Attorneys General.

District Attorneys (or County Attorneys, as they are sometimes known) have the major role in conducting trials and in deciding what criminal cases to bring. The District Attorney is usually an elected official, and his or her office is staffed either by discretionary appointees or civil servants. The degree of civil service staffing may affect the extent of political influence on prosecution decisions. In some states, State Attorneys General have no role in bringing criminal charges, nor in the trial of cases. In others, the Attorney General has only a limited role.

The position of District Attorney is often a political stepping-stone to higher office.[35] Because criminal justice issues are of great public concern, prosecutorial discretion becomes a subject of political debate. The day-to-day work of District Attorney offices consists of working with the police and prosecuting ordinary criminal cases. In cases, the work of professional prosecutors hardly differs from their work in most Western legal systems.

In high visibility cases, however, there is a serious risk that decisions are affected by the District Attorney's perceived political advantage. Examples are legion. In states with capital punishment, such as Texas, the District Attorney will generally invite press coverage of the decision to charge a suspect with capital murder and seek the death penalty. Also, there have been celebrated instances of District Attorneys seeking criminal charges against their political opponents.[36] The United States Supreme Court has held that all lawyers in the criminal process are subject to limits

constituencies, in both the executive and legislative branches. A United States Attorney sometimes feels pressure to bring charges in a case pressed by one of these client agencies. Yielding to such pressure, against general principles and standards, is almost always an error. This "client pressure" occurs in all prosecutorial systems, and the final part of this section contains suggestions on mediating it.

[35]Clarence Darrow, perhaps the greatest American advocate of this century, wrote in his autobiography, "A prosecutor hopes and expects to be judge, and after that he will aspire to be governor, then senator, and President, in their regular turn. To accomplish this noble ambition he must in each position give the people what they want, and more; and there are no rungs in the ladder of fame upon which lawyers can plant their feet like the dead bodies of their victims." C. Darrow, The Story of My Life 352 (1932).

[36]For example, the District Attorney of Travis County, Texas, brought bribery charges against the incumbent Attorney General on a particularly tenuous legal theory. The case generated a lot of publicity, and the Attorney General was acquitted.



on press comment likely to prejudice a pending judicial proceeding,[37] but such prohibitions are notoriously ineffective.[38]

*Review of Prosecutorial Decisions*

Until a charge is formally made and the accused arraigned, there is little effective check on prosecutorial activity. The federal courts will not interfere with the state court criminal process, even when federal rights are manifestly being endangered.[39] Although witnesses summoned by a grand jury or other inquisitorial agency have protections against revelation of privileged or irrelevant information, their rights are limited to protection of themselves against unlawful inquiry. With narrow exceptions, they may not challenge the legality of the underlying proceedings.[40] The victim of an unlawful search or seizure may, however, bring an action for return of seized property and for money damages.[41]

The most powerful inducement for legality in pre-charge proceedings is the prospect of post-charge judicial review. The nature and scope of review varies among jurisdictions. In some states, notably California and New York, the defendant can obtain a judicial determination of whether the evidence presented to the charging body -- usually the grand jury -- was sufficient to constitute probable cause to believe the accused committed the offense.[42] In addition, some states require that only admissible evidence may be received by the grand jury. Some states require the prosecutor to present all available exculpatory evidence to the grand jury.[43]

These procedural protections are not available in the federal courts. The trial judge reviews the indictment to determine if its allegations constitute an offense, but does not weigh the evidence taken before the grand jury.[44]

[37]Gentile v. State Bar of Nevada, 111 S. Ct. 2720 (1991).

[38]See materials cited in the majority opinion in Gentile.

[39]See C. Wright, Federal Courts § 52A (4th ed. 1983).

[40]See LaFave & Israel §§ 15.4 - 15.5.

[41]See LaFave & Israel §§ 3.1 - 3.10, 10.1 - 10.6.

[42]The methods of reviewing the decision to prosecute are covered in LaFave & Israel, chs. 13, 14 & 15.

[43]See LaFave & Israel § 15.4.

[44]See Federal Rule of Criminal Procedure 12. See also the discussion in LaFave & Israel, chapters 13 - 15.

Federal prosecutors and police agencies, and those in many states, operate under written regulations. One way to enforce fairness in the investigative and prosecutorial phases would be to permit judicial review and enforcement of these regulations. The general rule would be that the police and prosecutors must follow their own regulations.[45]

All American jurisdictions require the prosecution to make available to the accused broad categories of evidence collected by the police. The United States Supreme Court has held that prosecutors are obligated, based on the Constitution, to disclose exculpatory evidence on proper request.[46] American law also provides limited control of prosecutorial discretion over aspects of the charge and trial process. Prosecution decisions based on impermissible criteria, such as race or political ideology, may be set aside.[47] In the trial process, prosecutors may not challenge prospective jurors on racial grounds.[48]

The most controversial means of controlling police and prosecutorial conduct is the "exclusionary rule," under which evidence seized in violation of constitutional rights may not be offered at trial. The rule has many exceptions, and a detailed discussion of it is beyond the scope of this paper. The rule is a valuable deterrent to official illegality.

As shown by the above description, it is impossible to describe a unitary "American method" of ensuring that police and prosecutorial agencies obey the law. The lawyer seeking to draw comparative lessons will also appreciate the procedural differences between the American system and his or her own system. However, some basic principles emerge.

First, it is indispensable that prosecutors exercise control over the police. They do this by refusing to bring charges in cases where the evidence was discovered by police misconduct, or where the police overlooked exculpatory evidence in their eagerness to make an arrest. These controls may attach during the police investigation itself, as is common in some countries in the "instruction" phase. Alternatively, as in the United States, prosecutors may impose these controls indirectly because they know that without the prosecutors, any charge that is brought may be dismissed.

Second, the prosecution function must be insulated from political pressures. This can occur only if prosecutorial duties are governed by

[45]See Modest Proposal.

[46]LaFave & Israel § 19.5.

[47]See LaFave & Israel §§ 13.2, 13.4, 13.6.

[48]LaFave & Israel §§ 2.9, 21.3.



criminal procedure law or regulations and there is meaningful judicial review of compliance. Such review has been wanting in the United States, with untoward result.[49] Standards can also be developed by such conferences as this, and by the bar. International gatherings are a useful source of standards from both a comparative and an international perspective.

## The Defense Function

### *Self-Regulation and Independence of the Bar*

The American bar has historically been self-regulating and relatively independent of the state. These two qualities are key to its role in the criminal justice system. Lawyers are licensed by organs of the state and subject to controls imposed by it. However, when representing an accused, their primary duty is to the accused, in order to prevent the state from imposing its will unless and until it has fulfilled every procedural guaranty and met the governing standard of proof in a fair trial.

Lord Brougham, in his celebrated defense of Queen Caroline, stated the duty in these terms:

> I once before took leave to remind Your Lordships -- which was unnecessary, but there are many whom it may be needful to remind -- that an advocate by the sacred duty which he owes his client knows, in the discharge of that office, but one person in the world, that client and none other. To save that client by all expedient means, to protect that client at all hazards and all costs to all others, and among others to himself, is the highest and most unquestioned of his duties.... May, separating the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his part it should unhappily be to involve his country in confusion for his client's protection.[50]

There is an extensive American literature on the obligation of lawyers to take up the causes of the despised and dispossessed.[51] Moreover, while lawyers who have represented unpopular clients have themselves incurred censure, obloquy, and even punishment, such episodes have only

[49]Modest Proposal.

[50]From the trial of Queen Caroline, quoted in Voices, at 196.

[51]See, e.g., Edward Bennett Williams, One Man's Freedom (1961).

later served as a basis for renewal of the ideal of an independent defense bar.[52]

Self-regulation has not, however, been an entire success. In recent years, some American lawyers have elided the notions of self-regulation and market ideology. They have claimed freedom from regulation as an independent profession, while also claiming freedom from compulsion to act like a profession by making a commitment to public service.

The tension between professionalism and greed has been ably stated by Supreme Court Justice Sandra Day O'Connor:

> One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced by legal fiat or through the discipline of the market.... Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms.[53]

In the United States, each state has its own procedures and standards for licensing lawyers. A lawyer licensed in one state may practice freely in the local, state, and federal courts of that state. To practice before a court in a different state, the lawyer must gain special and limited admission -- "pro hac vice" -- for a particular case. The licensing systems in the states vary greatly with respect to the degree of control over bar admission by the courts and legislature, as opposed to control by the bar itself. The trend is towards more control by public agencies and less bar autonomy.

Active membership in a bar association and involvement in its agenda of professional programs is largely voluntary. A lawyer is entitled to simply become a member of the bar by examination, pay dues to support the core functions of the bar, and refrain from involvement in broader issues affecting the legal system and the profession. Nonetheless, bar associations remain active in the drive to maintain and enhance professional standards. The entirely voluntary American Bar Association has more than 500,000 members and is a leader in upholding the

[52]See Gideon v. Wainwright, 372 U.S. 335 (1963).

[53]Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 488-89 (1988) (dissenting opinion).



independence of the bar and the right of each person to a defense in the criminal justice system.

### *The Lawyer and the State*

The American system does not recognize a distinction between "solicitors" and "barristers," or between lawyers who give advice and those who litigate in court. In a popular phrase, all lawyers are "officers of the court." They owe certain obligations of candor and ethical conduct to the tribunal before which they appear and, more broadly, to the licensing authority of their state.

Yet, the lawyer as advocate owes allegiance to the client's cause. The resolution of this tension has been the subject of intense debate in the American legal profession. Much of the debate focuses on lawyers who allegedly advance their clients' interest in civil cases by dilatory tactics, incivility, and presentation of meritless positions. However, this controversy is beyond the scope of this paper.[54]

In the criminal justice field, the debate over lawyers' roles has centered on punishment of vigorous advocacy, restraint on lawyer speech, and identification of lawyers with their clients. By chilling independent judgment and action, these three trends threaten the ability of lawyers to discharge their duty of defending the client.

Punishment of vigorous advocacy has been a feature of celebrated political criminal trials. American appellate courts have generally upheld lawyer claims that their words and conduct were no more strident than necessary to plead the client's cause.

Lawyer speech was the subject of a recent Supreme Court decision, *Gentile v. State Bar of Nevada*.[55] Dominic Gentile is an accomplished and well-respected criminal lawyer. After his client was charged with a crime after a year-long series of newspaper reports fueled by the police and prosecution, Gentile held a press conference to dispute the official version of the facts and proclaim his client's innocence. The client was later acquitted.

Following the acquittal, Gentile was disciplined by the State Bar for holding the press conference. The discipline was based on the ground that the conference might have had a prejudicial impact on the pending criminal case. The United States Supreme Court reversed by a 5-4 vote, holding that the disciplinary rule under which Gentile was cited was

[54]See generally Voices.

[55]111 S.Ct. 2720 (1991).

unduly vague. However, five members of the Court also said that in future cases, lawyer speech about pending criminal cases could be restricted under a less demanding standard than would be applied to nonlawyers, such as newspaper reporters. The theory behind this assertion is that lawyers have a special status conferred by the state and consequently may be held to have surrendered some personal freedom to speak out on issues of public concern.

The Court's view remains to be tested in practice, but one can easily see the dangers of taking the principle too far. In American history, like that of many other countries, lawyers have been articulate and influential speakers against injustice. Often the injustice has consisted of prosecuting dissidents. Many authors of the Declaration of Independence, Constitution, and Bill of Rights were lawyers who had represented those opposed to British rule. Some of them, like John Hancock, had been defendants.

The third area of concern has been the public hostility of some American political leaders towards the criminal defense bar. During the past decade, Attorneys General of the United States have maligned defense lawyers and their work as impediments to effective criminal justice. They have also publicly identified lawyers with their clients.

These three dangers -- punishment of advocacy, restraint on lawyer speech, and attacks on the legitimacy of the defense function -- are being resisted by the American bar. The struggle over these issues illustrates the need for institutional protection of the bar's independence and reaffirmation of the lawyers' duty to defend his or her client, even when the defense embarrasses the state.

### *Access to Counsel*

Nothing delegitimizes a legal ideology so quickly as the sense that it is irrelevant to what is actually happening. The American Bill of Rights, in the Sixth Amendment, guarantees counsel in all cases of felony. In a 1963 decision, the Supreme Court extended this guaranty to criminal prosecutions in state court.[56]

The American guaranty of counsel was a deliberate extension of that right as it existed in England at the time the Constitution was adopted. The English denial of counsel in serious cases was premised upon the belief that the judge would ensure that the accused's rights were

[56]Gideon v. Wainwright, 372 U.S. 335 (1963).



protected. This belief was demonstrably false, as one can see from scanning the records of English political trials.

Recognition of the right to counsel is a reaffirmation and extension of the adversary idea of criminal justice litigation. The notion that the accused should have a champion, learned in the law and with undivided loyalty to the cause, is an integral part of the complex of rights that include trial by jury, trial where the alleged offense occurred, the right to summon witnesses in one's defense, and the all-important right to cross-examine the witnesses for the state. The text of the Sixth Amendment groups these rights together. Thus, in American practice, all persons charged with a serious crime have the right to counsel. Counsel is appointed for those who cannot afford to pay.[57]

In practice, however, the right to counsel is undercut in several important ways. First, appointed counsel are often underpaid and relatively unqualified. In such circumstances, appointed counsel have an undue motive to make a plea bargain as opposed to vigorously asserting their client's rights in litigation.

Second, funds for appointed counsel are inadequate. Studies of counsel's performance in the most serious cases, those in which the death penalty is imposed, reveal that appointed counsel are compensated at less than five percent of the market rate for legal services, and the performance of such lawyers is often scandalously inadequate.[58]

Despite the evidence that accused persons need better representation, the Supreme Court has loosened the constitutional standard testing the adequacy of counsel's representation. Moreover, by restricting judicial review of state criminal cases by federal courts, the Supreme Court has also shut off a procedural avenue to review claims of inadequate representation.[59]

After extensive comparative study and twenty-five years of practice, writing, and teaching, I am convinced that a criminal justice system will never seem legitimate unless the right to skilled, independent counsel is extended to all cases of serious crime, and the procedural system requires

[57]For those able to pay, the arrangement between counsel and the defendant is a matter of contract, unregulated by the state except: (a) when the financial terms are so onerous as to amount to contractual overreaching; (b) when the attorney seeks to represent conflicting interests, in which case the court may disqualify him or her from representing one or more defendants; and (c) when the attorney's fee comes from funds that the government has a right to seize as fruits or instrumentalities of crime.

[58]See generally Tigar, Habeas Corpus and the Penalty of Death, 90 Colum. L. Rev. 255 (1990), and authorities there cited.

[59]Ibid.

all such cases to be given a public hearing.[60]

This proposal is not simply a matter of making a commitment that the legal system will respect the core rights protected by all civilized countries. Nor is it only a recognition that the right to counsel is probably embedded in customary international law. There is a broader reason for insisting that good lawyers participate in the criminal justice system. It is part of the same reason good lawyers ought to give their time to represent indigent persons in civil matters.

The justice system, as it acts on the lives of poor people, cannot be made invisible forever. It is tempting to appoint lawyers to handle cases for the poor and in the criminal courts, and let the rest of the bar and the government go on to other tasks. The courts and the legal system will suffer greatly from such inattention. Hence, the reputation of law and lawyers will suffer.[61]

## Conclusion

The American jurist Jerome Frank reminded us that a criminal justice system is what it does, not what it says. He was saying that judges must insist that all participants in the system uphold basic principles of fairness.[62] His observations summarize the position asserted in this paper.

In a celebrated political case, United States v. Coplon, Learned Hand said:[63] "All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers are galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused, and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism."

[60]The African National Congress Draft Bill of Rights does not contain an express guaranty of counsel in all cases of serious crime. This year, I met with the ANC Constitutional Committee, and I believe that the next draft will contain such a provision.

[61]For proof that this is so, one can look at any collection of Daumier drawings about the judicial system.

[62]Cited in Voices, at 187, from United States v. Antonelli Fireworks, 155 F.2d 631, 662 (2d Cir. 1946) (dissenting opinion).

[63]185 F.2d 629, 638 (2d Cir. 1950).




## Résumé

*Au départ de l'idée que la comparaison des systèmes de justice pénale peuvent tout autant éclairer qu'induire en erreur, l'auteur aborde la question de la réforme du droit pénal dans la perspective du respect des principes fondamentaux ainsi que des droits de l'homme.*

*Il observe, tout d'abord, que les systèmes de justice pénale d'Angleterre, des Etats-Unis, des pays d'Europe de l'Est et de l'Ouest ainsi que l'ancienne Union Soviétique ont davantage de similitudes que de différences. Il examine ensuite, successivement, la fonction judiciaire (nomination des juges, participation des laïques au processus pénal), le rôle de l'accusation et du ministère public (aussi bien au niveau fédéral qu'au niveau des Etats) ainsi que la nature des décisions de poursuite, l'organisation de la défense (indépendance et auto-organisation du barreau, relation entre les avocats et l'Etat, accès à la défense en justice).*

*En terme de conclusion, l'auteur rappelle qu'un système de justice pénale doit être apprécié pour ce qu'il est, et non pas pour ce qu'il dit qu'il est.*