

Spring 1995

The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process - A Critique of the Role of the Public Defender and a Proposal for Reform

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Recommended Citation

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**THE TRIAL AS TEXT: ALLEGORY, MYTH AND SYMBOL
IN THE ADVERSARIAL CRIMINAL PROCESS—A
CRITIQUE OF THE ROLE OF THE PUBLIC DEFENDER
AND A PROPOSAL FOR REFORM**

Kenneth B. Nunn*

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INTRODUCTION

It is a recurring image on our television screens: a young man—frequently Black¹ and poor—is hustled from police car to courthouse door. As two burly police officers grip him tightly by the arms, he tries to hide his face with his hands. His efforts are futile. He succeeds only in exposing his handcuffs to the bright television lights. In the background, a reporter's urgent voice describes the despicable act which led to the young man's capture. His anguished face, framed by gleaming handcuffs, is the garish image we remember.

When I was a public defender, I would watch episodes like this with dread. "What if," I would wonder, "that young man was to become my client at the next day's arraignment call? Could I be of any help to him? Or would I be essentially useless, since he had already been tried and convicted on television and in the hearts and minds of any potential jurors?" Certainly, I could do something. I could ameliorate the onslaught of state power by holding the government to its promises and making sure no shortcuts were taken.² Occasionally, in an exceptional case, I might even win an acquittal. But, by and large, in case after case, my presence has had little bearing on the outcome. In the vast majority of cases, the conclusion was foregone, the conviction assured, the case open and shut.³ I was a necessary, but irrelevant,⁴ player in a game with a predetermined outcome.

We Americans often speak of our criminal procedure as if it were one of the main bulwarks of democracy. We like to consider the criminal trial, with its adversarial process, as one of the great institutions of abstract justice. But the American criminal justice system is a sham. The centerpiece of the criminal justice system—the trial—is itself a sham. It is not, in the main, a

1. I use "Black" and "African-American" interchangeably throughout this Article to refer to American citizens of African descent. "Black" denotes racial and cultural identity rather than mere physical appearance and is therefore capitalized. See Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 64 n.7 (1993).

2. See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1254-1260 (1993) (describing ways that public defenders can provide "zealous advocacy" for their clients).

3. It may, of course, be argued that this is so because the defendants were guilty, but this misses my point. The fact is that as soon as we believe all defendants are guilty the trial becomes an empty ritual. We must then ask why we need a trial to validate the presumed guilt of these individuals. Is it to assuage our societal discomfort for failing to alleviate the conditions that produced their crimes?

4. I note the contradiction between the terms "necessary" and "irrelevant," but it is a real contradiction that is signified by their use. While my presence may have been necessary to provide legitimacy to the proceedings, it was irrelevant to the outcome.

mechanism for determining the truth.⁵ In the majority of criminal cases, the truth is already assumed from the start. While belief in the presumption of innocence is professed, the defendant is treated as if his guilt were assured. In reality, it is up to the defendant to prove, if possible, his innocence and to somehow show that he is an exception to the rule.

More concretely, the criminal trial is flawed because it is not adversarial (or at least not as adversarial as it should be). Instead of two evenly matched adversaries, the advantages are decidedly weighted in the prosecution's favor.⁶ The prosecution has tremendous resources at its disposal that are ordinarily not available to the defense: police investigators, government laboratories, a professional legal staff, an endless supply of expert witnesses and, most importantly, a far greater reserve of credibility.⁷ This imbalance is even greater when the defendant is represented by a public defender. This is doubly cruel because the defendants who are at greatest risk in the criminal justice process—those with the least personal resources—are the ones most likely to be represented by public defenders.

Of course, the defendant has the protections of the Fifth and Sixth Amendments—including the right to a fair trial, the right to effective assistance of counsel, the right against self-incrimination, the right to compulsory process, the right of confrontation, and the requirement of proof beyond a reasonable doubt—but these are, by and large, merely formal protections. How defendants are treated in fact is what is important, not simply abstract theory. To have any relevance, the formal protections afforded to defendants must be appraised in the cultural context which gives them meaning.

Trials take place within a culture, a culture which gives us certain ideas about the prosecution and certain opinions about the defendant. Every culture produces its own belief system. This belief system is transmitted to each member of society through such means as formal educational systems, media, authoritative pronouncements and word of mouth. A cultural belief system allows us to attach meaning to symbolic representations that appear in culturally determined contexts. Thus, the imagery of the courtroom—the “dignity” of the proceedings, the “impartiality” of the judge, the adversarial posture of the litigants—and the juxtaposition of symbols of authority—the flag, the judge's black robe, the police officer's badge—all communicate

5. I would not want to overstate my case here. Clearly, fact-finding is an attribute of a trial. It is not, however, the central attribute and, indeed, it is one that may be sacrificed for other goals. See *infra* Part V(D).

6. This article focuses on less financially endowed criminal defendants. Wealthy or white-collar defendants have a far better chance of maintaining a level playing field with the prosecution.

7. The trial has been described as “a regulated storytelling contest.” Gary Goodpaster, *On the Theory of American Adversary Criminal Law* 78 J. CRIM. L. & CRIMINOLOGY 118, 120 (1987). If this is so, then the storyteller with assured credibility will have a distinct advantage before the decision maker.

culturally determined meaning to prospective jurors. There should be no mystery as to what meaning it is that the criminal justice system communicates to the American public. Our society is one where jurors are taught repeatedly, through both obvious and subtle means, that the preferred outcome of any trial is the conviction of the accused.⁸ In an environment such as this, a requirement of proof beyond a reasonable doubt is of little value.

The image of the accused presented in criminal procedure books—that of an average citizen, who is merely “suspected” of crime, and who consequently retains his rights and social status until the state meets a heavy burden of proof—is a widespread fraud. Instead, the defendant plays the mythical role of “criminal” in a broader morality play, the well-known script of which allows the audience to boo and hiss as soon as the villain enters the scene. The defendant in a criminal case is supposed to lose, just as a villain in a Hollywood movie is also supposed to lose. More often than not, a criminal trial consists merely of two groups of actors playing their appointed parts—the prosecution in white hats, the defense in black.

The criminal trial, then, is an allegorical tale disclosing the way that society would like to discover, expose and exorcise crime. As allegory, the trial does more than merely determine the fate of the defendant standing trial, although it does that too. The trial represents something deeper. The trial expresses fundamental notions about justice and injustice, right and wrong, law-abiding and crime, good and evil. Within the confines of this allegory, the public defender’s role is essentially symbolic. The public defender demonstrates that justice is being done and that the trial is fair. Symbolically, it matters little whether the public defender can actually assist the defendant because, as a mythical “criminal,” the defendant is always guilty.

The allegorical nature of the trial is not apparent on the surface. It becomes visible only when one is aware of underlying notions of justice and attitudes about crime. Then one can trace the relationship of these notions and attitudes to the adversarial process. In this article, I use semiotic theory⁹ to explain how the adversarial criminal trial is given substance and meaning that belies its formal description. I situate the criminal justice system in its broader societal context, and then employ critical media analysis to “read” the trial and disclose its allegorical form. Semiotic analysis reveals how our perceptions of guilt and innocence, of criminals and victims, of prosecutors and defenders, are ordered to fit a profound and pre-existing structure.

8. Admittedly, popular television programs like Perry Mason and Matlock typically feature falsely accused defendants whose innocence is only proved through maneuvering by an especially able and clever defense attorney (and his staff) against staggering evidence and odds. These programs are, however, atypical, and their perceptual impact is grossly outweighed by television news and other primetime detective and police programming. See *infra* Part IV.

9. Semiotics is the science or study of signs and symbols. The term is defined and discussed extensively *infra* Part II.

I begin by describing what I call “the myth of criminal justice.” In Part I, I disclose the parameters of this myth by presenting the formal protections that the right to counsel, along with the defendant’s other trial rights, afford to those accused of crime. In Part II, I explain semiotic theory and how it can be used to determine the social construction of meaning. I point out that by placing the defendant’s trial rights in their cultural context, semiotics can reveal the functional meaning of the adversarial process. Next, in Part III, I employ semiotics to disclose how the criminal justice system is structured by a broader discourse about crime and criminals. I show how ideas about crime work to limit our conceptions of justice, so that defendants’ rights may be articulated, but not taken seriously. In Part IV, I view popular culture through the medium of television. I employ the window of television to illustrate how crime is represented in ways that separate criminals from society and define them as “bad” and undeserving of rights.

I also examine how the cultural images represented on television play out in the context of a criminal trial. In Part V, I point out how these latent cultural images privilege the prosecution and disfavor the defense. I argue that the discourse on crime skews the adversarial process and makes it difficult for defendants to receive a fair trial. In Part VI, I demonstrate how public defenders are especially handicapped in their ability to convince jurors of the innocence of their clients, since they too lack credibility in the eyes of the public. Finally, in Part VII, I suggest a way that the federal government could use its persuasive power to make the adversarial process more meaningful. I propose the establishment of a Federal Defender General in order to improve the image and effectiveness of public defenders.

I. FORMAL RIGHTS AND THE PERSISTENCE OF MYTH

The adversary system¹⁰ is a carry over from the English common law. The system is not mentioned in the Constitution. Nor is it preserved, by and large, by statute. Yet, the adversary process is the linchpin of our criminal justice system. A person charged with a crime is not just the accused, but the

10. An adversarial criminal justice system is one that relies on: (1) the presentation of evidence by the parties; (2) the use of “a highly structured forensic procedure”; and (3) a neutral and passive fact-finder. STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM* 2 (1984). See also Goodpaster, *supra* note 7 (describing adversarial trial as “a regulated storytelling contest between champions of competing, interpretive stories” before an “impartial and impassive” decision maker). An adversarial system should be contrasted with the “inquisitorial” model prevalent in European countries. In inquisitorial systems, the finder of fact takes an active role in the investigation and development of the case and the parties play a far less central part in the conduct of the trial. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 35 (2d ed. 1992) (comparing the evidentiary barriers, fact finding, precision, and fairness of inquisitorial and adversary systems); Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) (same).

defendant—someone who retains the capacity to combat and contest the government's accusations.

The adversary system receives praise from many quarters because, it is argued, the self-interest of the parties will motivate them to more thoroughly prepare their submissions to the fact finder than if a more dispassionate investigator were charged with the responsibility.¹¹ Also, it is assumed that a disinterested fact finder is less likely to show bias because he or she has no vested interest in the way that the investigation is conducted or how trial preparations are made.¹² The adversarial system works on the assumption that truth will prevail from the conflict between two opposing forces.¹³

Within the adversary system, the criminal defendant is entitled to an impressive array of rights. The most important of these, from an adversarial standpoint, is the right to counsel,¹⁴ for it is through counsel that the defendant is best able to exploit the adversarial process and champion his cause. The right to counsel originates in the Constitution. In *Gideon v. Wainwright*¹⁵ the Supreme Court read the Sixth Amendment to require that counsel be provided to indigent criminal defendants in felony cases at state expense.¹⁶ Later, the Supreme Court interpreted the indigent's right to appointed counsel to be applicable in all cases in which actual imprisonment was imposed,¹⁷ as well as to appeals as of right.¹⁸ In other cases the Court broadened the right to counsel to require state provision of expert wit-

11. LAFAVE & ISRAEL, *supra* note 10, at 36.

12. *Id.*

13. See LANDSMAN, *supra* note 10, at 2:

The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.

Thus, the adversarial process operates according to dialectical modes of reasoning. Goodpaster, *supra* note 7, at 120.

14. U.S. CONST. amend. VI. The due process clauses and the equal protection clause have also been relied on by courts as sources for the right to counsel. See *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (establishing a due process right to counsel at parole and probation revocation proceedings); *Douglas v. California*, 372 U.S. 353 (1963) (holding refusal to appoint appellate counsel without preliminary showing of merit a denial of equal protection).

15. 372 U.S. 335 (1963).

16. *Id.* at 342. Before *Gideon*, the Supreme Court held in *Powell v. Alabama*, 287 U.S. 45 (1932), that the due process clause required counsel to be appointed to state court defendants, but that ruling was held to be limited to capital cases. The Court subsequently held in *Johnson v. Zerbst*, 304 U.S. 458 (1938), that counsel was to be provided to indigent defendants in all criminal proceedings in the federal courts, but state court defendants were not granted the right to counsel in misdemeanor cases until much later. See *infra* note 17.

17. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979).

18. *Douglas v. California*, 372 U.S. 353 (1963) (decided same term as *Gideon*).

nesses,¹⁹ trial transcripts,²⁰ and other “basic tools of an adequate defense.”²¹ Finally, courts have made some effort to address the quality of legal services provided to criminal defendants.²² On the surface, then, the obligation of the

19. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

20. *Griffin v. Illinois*, 351 U.S. 12 (1956).

21. *Ake*, 470 U.S. at 77 (citing *Britt v. North Carolina*, 404 U.S. 226 (1971)). While some courts have held *Ake* to be broad enough to permit defendants to request state funds for non-expert witness assistance, such as investigators or interpreters, such requests rarely succeed, based on reasoning that the defendants have failed to show a “particularized need” for the assistance. *See, e.g.*, *State v. Hickey*, 346 S.E.2d 646 (N.C. 1986); *Castro v. State*, 844 P.2d 159 (Okla. Crim. App. 1992). However several jurisdictions have enacted statutes similar to 18 U.S.C. § 30006A(e)(1), which allows for the provision of “investigative, expert, or other services” upon a showing that the service is “necessary for an adequate defense.” This statutory standard is usually easier for defendants to meet. LAFAYE & ISRAEL, *supra* note 10, at 541 & n.44.

22. The Supreme Court has recognized that “a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.” *Evitts v. Lucy*, 469 U.S. 387, 396 (1985). While trumpeting the necessity for effective assistance of counsel, the Supreme Court has made it difficult for defendants to establish ineffectiveness. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court rejected a categorical or “per se” standard of ineffectiveness and instead held that “the proper standard for [measuring] attorney performance is that of reasonably effective assistance.” *Id.* at 687. This ill-defined standard has turned out to be highly elastic. Additionally, *Strickland* requires that there be a “reasonable probability” that the outcome of the case would have been different in the absence of counsel’s unprofessional errors. As a result, courts rarely grant any but the most egregious claims of ineffectiveness. *See, e.g.*, Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffectiveness of Counsel Claims*, 77 GEO. L. J. 413, 414 nn. 10, 11 (1988) (reporting that since *Strickland*, the Supreme Court has “rejected ineffectiveness claims in all four cases in which the issue was squarely presented” and that only 30 out of 702 claims, or 4.3%, have been successful at the circuit court level). For more in depth discussions and critiques of the *Strickland* standard, see generally, Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 85 (1991) (stating that “[t]he *Strickland* court’s concern with efficiency and the systemic impact of creating a meaningful standard for effective assistance constricted the contours of th[e] fundamental right” to counsel); Bruce A. Green, *Legal Fiction: The Meaning of Counsel in the Sixth Amendment*, 78 IOWA L. REV. 433, 499-504 (1993) (arguing that “a death row prisoner who suffered at the hands of an unqualified advocate often will be unable to satisfy the *Strickland* standard”); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L. Q. 625 (1986) (proposing that *Strickland*’s deference to attorneys and preoccupation with ends rather than means undermines the adversary system); Calhoun, *supra*, at 427 (arguing that, while “paying lip service” to the right to effective counsel, *Strickland* created a nearly insurmountable hurdle for defendants claiming ineffective assistance); Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986) (arguing that the *Strickland* test “undermines the goal of the sixth amendment—a just result achieved through a proper adversarial proceeding”); Richard P. Rhodes, Note, *Strickland v. Washington: Safeguard of the Capital Defendant’s Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L. J. 1212 (1992) (stating that *Strickland* disadvantaged defendants asserting ineffective counsel by enabling the continued application of regional standards and by increasing the burden of proof); Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461 (1987) (arguing that *Strickland*’s application to both guilt and sentencing phases of capital trials has failed to ensure the effective assistance of counsel for capital defendants).

Where attorney representation creates a conflict of interest, courts have been more protective of

state to provide legal assistance to those who are too poor to secure their own defense seems quite extensive.

There are other rights that a defendant may claim to help bolster his or her defense. A defendant has a right to be present at trial,²³ the right to confront the witnesses against him or her,²⁴ and the right to cross-examine those witnesses.²⁵ The defendant also has the right to present a defense²⁶ and the right to compulsory process in order to obtain witnesses²⁷ or evidence.²⁸ Furthermore, the defendant has a right to testify²⁹ and a right to remain silent.³⁰ Finally, the defendant has a general right to fairness in the prosecution of his or her case—i.e., the right to due process of law.³¹

defendants' rights. Ineffectiveness is presumed when an "actual conflict" has been established and, in such a case, prejudice is reviewed under the somewhat less stringent standard of whether the conflict "adversely affected [the] lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

23. *Illinois v. Allen*, 397 U.S. 337 (1970). However, the right to be present may be waived. *See id.* (holding unruly and disruptive defendant may be excluded from trial).

24. *Coy v. Iowa*, 487 U.S. 1012 (1988). However, the defendant's right to confront witnesses is not unrestricted. In *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court held that a defendant's right to confrontation must give way when a court finds that testifying in the presence of the defendant would impair an alleged child abuse victim's ability to communicate.

25. *Davis v. Alaska*, 415 U.S. 308 (1974); *Delaware v. Fensterer*, 474 U.S. 15 (1985).

26. *Washington v. Texas*, 388 U.S. 14 (1967).

27. *See, e.g., id.*

28. *See Pennsylvania v. Ritchie*, 480 U.S. 39 (1987).

29. *See Rock v. Arkansas*, 483 U.S. 44 (1987).

30. U.S. CONST. amend. V; *see Griffin v. California*, 380 U.S. 609 (1965).

31. "Due process" is a terribly broad and general idea. It has been described as "'perhaps, the least frozen concept in our law,'" one that concentrates on "'the essence of fairness rather than the familiarity of form.'" LAFAVE & ISRAEL, *supra* note 10, at 53 (quoting Justice Frankfurter). Its general function may be described as one which limits the power of government over individuals. *See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW* 664-65 (2d ed. 1988) ("due process functions . . . to curb governmental abuse, unfairness, or oppression"). Due process takes both substantive and procedural forms. Procedural due process provides for constitutional limits on the application or enforcement of governmental decisions or policy. *Id.* at 664. At the very least, procedural due process entails "the right to be heard before being condemned to suffer grievous loss of any kind." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). Substantive due process, on the other hand, imposes controls on the content or subject of governmental decisions or policy. TRIBE, *supra*, at 664 n.4.

In the criminal justice context, the procedural due process guarantees of the Fifth and Fourteenth Amendments have been found to require: (1) notice and a hearing before loss of liberty or the imposition of criminal sanctions, *Morrissey v. Brewer*, 408 U.S. 471, 481-87 (1972); (2) the provision of counsel in capital and other special cases, *see Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (the due process right to be heard "would be . . . of little avail if it did not comprehend the right to be heard by counsel"); (3) the right to present evidence, *Rock*, 483 U.S. at 51; and (4) the right to confront and cross-examine witnesses. *See, e.g., Green v. McElroy*, 360 U.S. 474, 497 (1959). While these rights may also be grounded in other constitutional provisions, some core criminal justice rights are to be found in the due process clauses alone. *See generally* LAFAVE & ISRAEL, *supra* note 10, at 71-72. Chief among these is the requirement that the government prove each and every element of a crime by proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). In addition, "[d]ue process serves as a primary grounding for the constitutional restraints imposed upon the prosecutor; the prohibition against vindictive charging, the obligation to disclose

Many of the aforementioned rights would only make sense within an adversarial process.³² For example, in a non-adversarial process a defendant would need no right to present a defense, and a right to remain silent would seem incongruous. The purpose of the defendant's trial rights is to place the defendant on an even footing with the prosecution so that he or she might be a more effective adversary to the prosecution.

The presumption of innocence and the requirement of proof beyond a reasonable doubt are also central to the notion of an adversarial system of justice and are considered to provide additional protection for the criminal defendant.³³ The presumption of innocence is implied by the accusatorial structure of the criminal justice system. It holds that the burden of proof is on the government and absent sufficient proof, the defendant must go free.³⁴ In the adversarial framework, the defendant has no obligation to produce evidence of his or her innocence.³⁵

Proof beyond a reasonable doubt is the burden the government is required to meet in order to obtain a conviction. It is a "heavy" burden of proof, the highest such standard in the criminal justice system.³⁶ The burden of proof beyond a reasonable doubt is intended to provide protection against erroneous convictions.³⁷ In principle, a burden of proof beyond a reasonable doubt moderates the adversary system and makes it more responsive to individual rights.³⁸

Taken together, the formal rights extended to criminal defendants, along with the presumption of innocence and the requirement of proof beyond a reasonable doubt, constitute a "myth" that permeates the criminal justice system and defines how the system is envisioned.³⁹ In short, the myth

material exculpatory evidence, and the bar against improper and prejudicial closing arguments all flow from due process." LAFAVE & ISRAEL, *supra* note 10, at 72.

32. See LAFAVE & ISRAEL, *supra* note 10, at 37 ("[t]he structuring of an adversary system underlies many of the guarantees of the Bill of Rights").

33. KAMISAR, LAFAVE & ISRAEL, *MODERN CRIMINAL PROCEDURE* 1358 (7th ed. 1990).

34. *Taylor v. Kentucky*, 436 U.S. 478, 483 (1978). In *Taylor*, the Court subscribed to the following definition of the presumption of innocence:

[The "presumption of innocence" is a] shorthand description of the right of the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; i.e., to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it."

Id. (citing 9 J. WIGMORE, *EVIDENCE* 407 (3d ed. 1940)).

35. Of course, the defendant may wish to produce evidence necessary to meet the government's proof of guilt.

36. *Colorado v. Connelly*, 479 U.S. 157, 186 (1986) (Brennan, J., dissenting).

37. LAFAVE & ISRAEL, *supra* note 10, at 38.

38. See LANDSMAN, *supra* note 10, at 46 (discussing the checks that the adversary system places on expanding governmental power).

39. A "myth" is a term that is frequently used and just as frequently defined. It can be used in the

proceeds along these lines: A defendant who is presumed innocent must be proven guilty beyond a reasonable doubt at an adversarial trial that is fair and at which he or she has counsel. The basic assumptions behind the myth (that is, the points that the myth seeks to validate) are: (1) the existence of formal rights adequately protects the individual from the state and (2) because these formal rights make it difficult for the state to secure convictions in an adversarial context, those convictions that do occur are “hard won” and thus more legitimate. The function of the myth, then, is to bestow peace of mind by encouraging the belief that justice is being done in the criminal justice system.

Of course, the “myth” that I have described here presumes that the parties

general sense as “a story or belief that attempts to explain a basic truth,” or even more generally as “a belief . . . whose truth is accepted uncritically.” THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (1990). Or, “myth” can be elaborated in numerous technical ways, ranging from Roland Barthes’ widely cited structuralist definition, see ROLAND BARTHES, MYTHOLOGIES 114-15 (Annette Lavers trans., 1972) (describing “myths” as widely disseminated stories investing first order representation of facts with second order, ideological significance) to Claude Levi-Strauss’ anthropological one. See CLAUDE LEVI-STRAUSS, THE JEALOUS POTTER 171-73 (1988) (depicting a “myth” as both individualizing its subscribers and orientating them toward particular forms of action). Students of myths frequently note their mutability, their role as transmitters of cultural values, and their relation to the divine or sacred as their defining characteristics. See, e.g., HANS BLUMBERG, WORK ON MYTH 34 (Robert M. Wallace trans., 1985) (“Myths are stories” with a constant narrative core and “an equally pronounced capacity for marginal variation.”); MIRCEA ELIADE, MYTH AND REALITY 10-14 (Willard Trask trans., 1963) (discussing the role of myths in the transmission of values); *id.* at 1 (describing myths as sacred traditions); ALAN WATTS, MYTH AND RITUAL IN CHRISTIANITY 7 (1953) (“Myth is to be defined as a complex of stories . . . which for various reasons, human beings regard as demonstration of the inner meaning of the universe and of human life.”). No one summarized the jurisprudential significance of myths as eloquently as the late Dwight L. Greene. He wrote:

Myths are a complex of narratives that dramatize and encapsulate the world visions and historical sense of a people or culture. These narratives reduce centuries of experience to “constellations of compelling metaphors.” These metaphors can be so strong that they provide coherence and direction in history, reducing both experience and vision to paradigms. This phenomenon is essentially nonrational and religious in nature: “[M]yth can be seen as an intellectual or artistic construct that bridges the gap between the world of the mind and the world of affairs, between dream and reality”

One function of myth is socializing, that is, to enforce a moral order and to shape individuals to the requirements of their social group. “Myth describes a process, credible to its audience, by which knowledge is transformed into power; it provides a scenario or prescription for action, defining and limiting the possibilities for human response to the universe.” “[I]t is in this moral, sociological sphere that authority and coercion come into play. . . . A mythological canon is an organization of symbols, ineffable in import, by which the energies of aspiration are evoked and gather toward a focus.” “Myth is essentially conservative, depending for its power on its ability to play on conscious and unconscious memory, to invoke and relate all the narratives (historical and personal) that we have inherited, and to reach back to the primal levels of individual and collective psychology.” The creation of new believable myths is part of the socializing power of courts.

Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 TUL. L. REV. 1979, 2016-17 (1993) (citations omitted).

are more or less evenly matched, that no external values or interests influence the fact-finder, and that the rules are enforced. It should go without question that these are pretty broad assumptions to make. And yet, most analyses of criminal procedure in general, and the right to counsel in particular, accept the formalistic posture represented by the myth.⁴⁰ In their formalistic approach, typical criminal procedure analyses reveal their commitment to positivist assumptions. Under positivism,⁴¹ rules are viewed abstractly as concrete principles with a definite meaning and effect.⁴² Thus, like numerical values, they may be ordered and reordered “scientifically.”⁴³ This type of formalism has been powerfully criticized by adherents to the legal realist school.⁴⁴ The realist critique argues that formal rules cannot be accepted

40. See, e.g., Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670 (1992); Garcia, *supra* note 22, at 105-06 (asserting that “[n]either the war on drugs nor the fight against . . . crime in American society will be won by the denudation of vital constitutional safeguards that undergird the criminal adversarial process”); James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Messiah Doctrine*, 22 U.C. DAVIS L. REV. 1 (1988) (arguing that right to counsel for statements made under indictment best justified as means of ensuring “traditional functioning of trial counsel . . . as a multi-faceted, complete assistant in the adversarial battle”); Goodpaster, *supra* note 7, at 118, 153 (noting that the adversary system is a “foundational feature of our legal system” which stems from traditional American beliefs in the oppressive nature of government decisionmaking and the ability of citizens to make wise community decisions and govern themselves); Barbara Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1982) (arguing that the “communicative function” of a trial makes the game-like, ritualistic aspects of the adversary system valuable to the community). Even those analyses that offer some criticism of the adversary system tend to accept the basic assumptions behind the myth. See, e.g., John Cratsley, *The Crime of the Courts, in WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES* 190 (Bruce Wasserstein & Mark J. Green eds., 1970) (criticizing adversarial system for not being adversarial enough).

41. For a definition of positivism, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 17-22 (1978) (“[L]egal positivism holds that the truth of legal propositions consists in facts about the rules that have been adopted by specific social institutions, and in nothing else”). Works of influential positivists include: JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); H.L.A. HART, *THE CONCEPT OF LAW* (1961); and HANS KELSEN, *PURE THEORY OF LAW* (1967).

42. See KELSEN, *GENERAL THEORY OF LAW AND STATE* 58-61, 143-144 (1945) (arguing all laws are reducible to “primary norms” stipulating conditional sanctions); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, in *SOCIETY, LAW, AND MORALITY: READINGS IN SOCIAL PHILOSOPHY* 471, 496 (Frederick A. Olafson ed., 1961) [hereinafter *SOCIETY, LAW, AND MORALITY*] (critiquing Hart for arguing that even some laws may have a “core meaning”).

43. For Weber, this formal legal rationality was compelled by the demands of capitalistic enterprise. According to Weber:

“The modern capitalist concern is based inwardly above all on *calculation*. It requires for its survival a system of justice . . . whose workings can be *rationally calculated*, at least in principle, according to fixed general laws, just as the probable performance of a *machine* can be calculated.”

GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS* 96 (Rodney Livingstone trans., 1971) (quoting MAX WEBER, *GESAMMELTE POLITISCHE SCHRIFTEN* 142 (1921)).

44. The realist school was comprised of lawyers and legal scholars who came to prominence between the two world wars. See Edward A. Purcell, Jr., *American Jurisprudence Between the Wars:*

blindly and taken for granted, but rather that rules must first be situated in their appropriate context and then examined critically to determine whether they actually function as purported.

Semiotic theory provides a useful tool to determine the actual functioning of rules in context. Semiotics furthers the realist critique not only by helping to disclose whether rules “say what they mean” (do the rules function as claimed), but also by helping to discover whether rules “mean what they say” (are there hidden meanings).⁴⁵ Semiotics does this by disclosing the framework through which law takes its meaning. I am particularly interested in observing how the adversary process functions when a criminal defendant is represented by a public defender.⁴⁶ In the following sections of this article, I employ semiotics to accomplish this task.

II. SEMIOTICS AND THE CRIMINAL JUSTICE PROCESS

Semiotics is the study of signs and symbols.⁴⁷ Semiotics arose from the study of language problems and attempts to determine the structure of language.⁴⁸ These early structuralist attempts sought to expose the internal

Legal Realism and the Crisis of Democratic Theory, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 359 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988). The substance of the realist critique was described this way in a famous Harvard Law Review article by H.L.A. Hart:

If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules.

H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-08 (1958), reprinted in SOCIETY, LAW, AND MORALITY, *supra* note 42, at 451; see also Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 28 (David Kairys ed., 1982) (“[T]he realists claimed that . . . [t]here was *no such thing* as an objective legal methodology behind which judges could hide in order to evade responsibility for the social consequences of legal decisionmaking.”).

45. See BERNARD S. JACKSON, LAW, FACT AND NARRATIVE COHERENCE 180 (1988) (linking semiotics to the realist tradition).

46. Although a defendant may be disadvantaged in the adversary system because of his race or class or merely because he is already classified as a “criminal,” I do not directly address those issues here. Instead I am interested in whether public defenders can help criminal defendants exploit the supposed benefits of the adversary process, given that those defendants may be disadvantaged in important ways.

47. See Robin Paul Malloy, *A Sign of the Times—Law and Semiotics*, 65 TUL. L. REV. 211, 212 (1990) (book review) (defining semiotics as “the study of signs” and as a “method of analyzing sign systems and communicative interactions”). Semiotics, or semiology, has many permutations—it can be viewed as philosophy, theory, method, etc.—and a precise definition may not be possible. See generally Janet Woollacott, *Messages and Meanings*, in CULTURE, SOCIETY AND THE MEDIA 91, 94 (Michael Gurevitch et al. eds., 1982) (noting the many “interpretations, debates and polemics” generated by the concept).

48. Woollacott, *supra* note 47, at 94. Semiotics or semiology can be traced to the work of both Ferdinand de Saussure, a Swiss linguist, and the American philosopher Charles Sanders Pierce. J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119, 1119 (1990) (While

relationships that governed how language developed and how it was used.⁴⁹ Later, semiotics was broadened to include not only languages but any signifying system.⁵⁰ Semiotics assumes that “[a]ll communication is a process of exchange of meaningful signs.”⁵¹ Thus, it may be stated that semiotics involves the study of systems of rules underlying messages, whether those messages be contained in speech, film, literature, or the like.⁵² Semiotics makes a distinction between the signifier, or the form that the sign takes, and the signified, that is, the meaning associated with the sign.⁵³ The meaning of any sign is always relational. It is contingent upon the values agreed to by those who read the sign,⁵⁴ which are in turn dependent on the relationship of

most Europeans, following Saussure, use the term “semiology,” Pierce and his followers use “semiotics.”).

49. Woollacoft, *supra* note 47, at 94.

50. *Id.*

51. Malloy, *supra* note 47, at 212.

52. Woollacoft, *supra* note 47, at 94. This attempt to uncover “universal principles of signification” is what Eco calls “general semiotics.” UMBERTO ECO, SEMIOTICS AND THE PHILOSOPHY OF LANGUAGE 7 (1984). According to Eco, a “general semiotics” would pose the following questions: “[W]hat does it mean for human beings to say, to express meanings, to convey ideas, or to mention states of the world? By which means do people perform this task? Only by words? And, if not, what do verbal activity and other signifying or communicative activities have in common?” *Id.*

53. Woollacoft, *supra* note 47, at 94. Indeed, one of semiotic’s most basic concepts is that the relationship between the signifier and the thing signified is entirely arbitrary. Balkin, *supra* note 48, at 1121; *see also* FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 67-70 (Charles Bally and Albert Sechehaye eds. & Wade Baskin trans., 1959). In the words of Shakespeare, “a rose by any other name would smell as sweet.” WILLIAM SHAKESPEARE, THE MOST EXCELLENT AND LAMENTABLE TRAGEDY OF ROMEO AND JULIET act 2, sc. 1, ln. 85-86. *See* Balkin, *supra* note 48, at 1121 n.5 (“what we call ‘blue’ could as easily be called ‘blooff’”). Professor Balkin points out another significant aspect of the arbitrariness of signification, which he attributes to Saussure: the categories that language creates are also a matter of convention. This is true, for example, in regards to “the particular grouping of shades of color among the various concepts denoted by English words. . . . In English, light blue and dark blue are both ‘blue’; in Russian they have distinct names and are different colors.” *Id.*

54. This is an important point, for as Eco points out, the value of any activity can only be determined by reference to a particular philosophical framework.

To walk, to make love, to sleep, to refrain from doing something, to give food to someone else, to eat roast beef on Friday—each is either a physical event or the absence of a physical event, or a relation between two or more physical events. However, each becomes an instance of good, bad, or neutral behavior *within a given philosophical framework*. Outside such a framework, to eat roast beef is radically different from making love, and making love is always the same sort of activity independent of the legal status of the partners. From a given philosophical point of view, both to eat roast beef on Friday and to make love to *x* can become instances of ‘sin’, whereas both to give food to someone and to make love to can become instances of virtuous action.

ECO, *supra* note 52, at 10. This means, of course, that readers are not entirely free to interpret a text as they like. They must adhere to the philosophical framework of the communicator if there is to be any meaningful communication at all. *See* Woollacoft, *supra* note 47, at 102 (noting that even “[o]ppositional readings [of a text] are dependent upon an accurate decoding in the first place”). Foucault makes the same point. *See* MICHEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE 199 (Donald Bouchard ed. & trans. & Sherry Simon trans., 1977) (explaining how “discursive practices” restrict what can be thought and said in discourse).

the sign to other signs.⁵⁵ A sign is communicated and read within a social matrix that changes and evolves, thus the meaning of a sign changes and evolves as well.⁵⁶ Many scholars have recognized that law is itself a semiotic process, since it involves the communication of a value system through its rules, precepts, and principles.⁵⁷ For example, the doctrine of *caveat emptor* may be used to demonstrate the semiotic essence of legal concepts.

This textual phrase, *caveat emptor*, is a sign—a representation of an idea or concept—recognized and understood within the legal community. This sign can be studied historically to discover the nature and circumstances of its emergence or creation as a legal sign. . . . [I]n studying the creation, evolution, and slow demise of *caveat emptor*, one undertakes a study of the dynamic and creative dimensions of semiotics. One is called upon to evaluate the process by which new ideas (signs) are created and validated in legal discourse and practice. . . . In this sense, law is a fluid and spontaneous system for the creation of new relationships and new ideas. It is a system of evolving sign exchanges; thus, the law is a semiotic process.⁵⁸

Kevelson argues that law and semiotics involves the study of both legal discourse *and* legal practice.⁵⁹ This would suggest a broader interpretation of the parameters of semiotic inquiry than that of those who would only, or predominantly, apply semiology to investigate law's internal structure.⁶⁰ It

55. In other words, "the relation between signifier and signified is mediated by the relationship of signifiers to each other in a general system of signification." Balkin, *supra* note 48, at 1121. It should be emphasized that the attribution of meaning to signs is not a dead, mechanical process, but a dynamic one. In the words of British sociologist Stuart Hall, "things and events in the real world do not contain or propose their own, integral, single and intrinsic meaning which is then merely transferred through language. Meaning is a social production, a practice." Stuart Hall, *The Rediscovery of "Ideology": The Return of the Repressed in Media Studies*, in *CULTURE, SOCIETY AND THE MEDIA*, *supra* note 47, at 56, 67.

56. See ROBERTA KEVELSON, *THE LAW AS A SYSTEM OF SIGNS* 49-56 (1988) (describing interpretation of sign as a "map" of relationships undergoing constant change).

57. See, e.g., PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* (1987); BERNARD S. JACKSON, *SEMIOTICS AND LEGAL THEORY* (1985); JACKSON, *supra* note 45; KEVELSON, *supra* note 56; *LAW AND SEMIOTICS* (Roberta Kevelson ed., 1989); Balkin, *supra* note 48; J.M. Balkin, *The Promise of Legal Semiotics*, 69 *TEX. L. REV.* 1831 (1991); J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 *RUTGERS L. REV.* 1 (1986); J.M. Balkin, *Taking Ideology Seriously: Ronald Dworkin and the CLS Critique*, 55 *UMKC L. REV.* 392 (1987); J.M. Balkin, *Nested Oppositions*, 99 *YALE L.J.* 1669 (1990); Peter Goodrich, *Law and Language: An Historical and Critical Introduction*, 11 *J. L. & SOC'Y.* 173 (1984); Maarten Henket, *Contracts, Promises and Meaning: The Question of Intent*, 1 *INT'L J. FOR SEMIOTICS L.* 51 (1988); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 *SYRACUSE L. REV.* 75 (1991); Malloy, *supra* note 47; Jeremy Paul, *A Bedtime Story*, 74 *VA. L. REV.* 915 (1988); Jeremy Paul, *The Politics of Legal Semiotics*, 69 *TEX. L. REV.* 1779 (1991).

58. Malloy, *supra* note 47, at 214.

59. KEVELSON, *supra* note 56, at 4.

60. Unlike the Europeans, who are heavily indebted to philosophical and psychoanalytic sources, most American legal semioticians are predominately concerned with the internal structuring of the law. See Roberta Kevelson, *Introduction to the Third Round Table on Law and Semiotics: A Multifaceted*

should be obvious that semiotics is not only relevant to the investigation of law's internal structure, but also is crucial to a critical understanding of law's external context—i.e., its relationship to society. Others have also suggested that legal semiotics could be used to connect juridical statements to their place in the broader society, for example, the connection of laws to political theory or ideology.⁶¹ In my view, this connection has not been fully developed—at least, not within that legal scholarship that self-consciously identifies itself as semiotic.⁶² The majority of these efforts have stopped short of exploring law as part of a larger structure which includes ideology as one of its components—that is, viewing the law as a sign in a larger system of signification, whose texts would contain both internal (or legal) and external components.

It is precisely this sort of work that distinguishes the culturalist school of critical theory in mass communication.⁶³ Culturalist theorists borrowed

Representation of "Property" and of "Discovery" in Law, in 3 LAW AND SEMIOTICS 1, 4-5 (Roberta Kevelson ed., 1989); JACKSON, *supra* note 45, at 187-88.

61. E.g. Balkin, *supra* note 48, at 1123 (discussing the mutually self-defining nature of rights and their relationship to political and ideological thought); William E. Murnion, *An Ethical Analysis of the Relationship Between Peace and Justice*, in 3 LAW AND SEMIOTICS, *supra* note 60, at 279 (linking law to broader views of social morality through semiotic theory); Paul, *supra* note 57, at 1794 (describing the use of semiotics to link legal debates to differences in political theory).

62. There is, of course, a significant body of legal scholarship that does address the role of ideology in the formation and application of law. E.g., MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katherine T. Bartlett & Rosanne Kennedy eds., 1991); Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993); William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation As a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991). Much of this scholarship borrows freely from semiotic traditions, but traces its genealogy through critical theory and deconstruction. See JACKSON, *supra* note 45, at 186 (noting that while semiotic models are often used in critical discourse, they are not usually identified as such nor referenced to the literature of semiotics).

63. The culturalist school consists of those scholars who view media production as a form of "ideological labor and discursive practice." Simon Cottle, "Race," *Racialization and the Media: A Review and Update of Research*, in SAGE RACE RELATIONS ABSTRACTS 3, 28 (1992). The culturalist approach avoids the aimless relativism which has captured more radical treatments of poststructuralism/postmodernism, see, e.g., JEAN-FRANCOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington & Brian Massumi trans., 1984) (arguing there can be no social relationships outside of discourse and thus denying the possibility of any historical consciousness at all), by continuing to "incorporate a stress on experience as the 'authenticating' position and a humanist emphasis on the creative." James Curran et al., *The Study of the Media: Theoretical Approaches*, in CULTURE, SOCIETY AND THE MEDIA, *supra* note 47, at 11, 27; see also Tony Bennett, *Theories of the Media, Theories of Society*, in CULTURE, SOCIETY AND THE MEDIA, *supra* note 47, at 30, 53 (culturalist studies tempered the deconstructionist theories of the Frankfurt School by situating them in historical materialism). Steven Winter takes a similar position, arguing that legal concepts should be grounded in ordinary experiences to avoid skepticism and promote reconstruction. Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

For other works that embrace the anti-instrumentalism, intertextuality and anti-universalism of postmodernism, but reject the apolitical stance of its more relativist interpretations, see FREDRIC

formal semiological analysis⁶⁴ to treat media messages as structured wholes rather than as quantified fragmented parts.⁶⁵ Mass media was approached as a means of producing and articulating “messages within specific signifying systems, the rules and meanings of which we tend to take for granted.”⁶⁶ From the culturalist perspective, media messages are both created and interpreted pursuant to definable rules or codes.⁶⁷ Thus, artifacts of communication (such as films, books, letters, and speeches) are viewed as means of discourse rather than as the sum total of the communication itself.⁶⁸ As discourse, an artifact is subject to the system of rules that governs that discourse.⁶⁹

In the culturalist vein, I approach the trial itself as a text, which may be read within the context of a structure which includes ideological and cultural attributes. Thus, criminal procedures gain their meaning not solely from legal rules and juridical principles, but also from their relationship to themes or codes established through the operation of culture.⁷⁰ In other words, the matrix that gives criminal procedures their meaning is broader than that of the law. This matrix includes news reports and analysis, entertainment, common sense knowledge,⁷¹ and other communicative or educative processes.⁷² Like other artifacts of communication, the trial must be seen as

JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (1991); ANTHONY WOODIWISS, *SOCIAL THEORY AFTER POST-MODERNISM* (1990); Maureen Cain, *Foucault, Feminism, and Feeling: What Foucault Can and Cannot Contribute to Feminist Epistemology*, in *UP AGAINST FOUCAULT* (C. Ramazanoglu ed., 1993); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993); Robert J. Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811 (1990).

64. See Hall, *supra* note 55, at 66, 67 (linking the origins of the culturalist school to earlier work in linguistic anthropology, semiology, and Marxist structuralism).

65. Woollacoft, *supra* note 47, at 93.

66. *Id.* at 92.

67. *Id.*

68. *Id.* at 93.

69. *Id.* at 93-94.

70. See Hall, *supra* note 55, at 73 (describing the creation of a “cultural inventory” of basic premises and assumptions that could be drawn upon for the purpose of signifying new events).

71. According to Gramsci:

Every social stratum has its own ‘common sense’ and its own ‘good sense’, which are basically the most widespread conception of life and of men. . . . Common sense is not something rigid and immobile, but is continually transforming itself, enriching itself with scientific ideas and with philosophical opinions which have entered ordinary life. . . . Common sense creates the folklore of the future, that is as a relatively rigid phase of popular knowledge at a given place and time.

Id. at 73 (quoting Antonio Gramsci, *SELECTIONS FROM THE PRISON NOTEBOOKS* 326 (1971)).

72. Insightful commentary on the many sources of legal meaning may be gleaned from Judge Leventhal’s opinion in *United States v. Dougherty*. In support of his argument that judges were under no obligation to inform juries of their power to nullify the law, Judge Leventhal stated:

The jury gets its understanding as to the arrangements in the legal system from more

discourse,⁷³ which can be interpreted only within the latitude of those codes⁷⁴ that govern communication about crime.

I do not want to look at criminal procedure as an abstraction or a "fractured part" of the whole.⁷⁵ Instead, I envision communication about crime as a cultural production, consisting of interconnecting structured systems of which the criminal justice system and its attendant language and procedure are only part.⁷⁶ Discourse about crime, then, takes place within a single, large system of signification made up of smaller systems that operate in the areas of popular culture, media, criminology, law enforcement, jurisprudence, and politics, to name just a few. It is this larger system that I will investigate in the next section.

III. CRIME AND THE CREATION OF THE CONSENSUS

To comprehend the functioning of the criminal justice system within the interconnected matrix of culture, we must first come to terms with what it means to be a criminal defendant—a person who has been charged with committing an offense against the social order. This requires an understanding of "crime" as a social phenomenon. By investigating the meaning of crime, we can uncover the codes that also order our perceptions of the criminal trial process, the codes that in effect shape our notions of what adversarial criminal justice is.

What we have come to call "crime" serves a variety of social functions. First, as the "labelling" school of criminology has demonstrated, the concept of crime allows a community to determine its norms and "label" other

than one voice. There is the formal communication from the judge. There is the informal communication from the total culture—literature (novel, drama, film, and television); current comment (newspapers, magazines and television); conversation; and, of course, history and tradition.

United States v. Dougherty, 473 F.2d 1113, 1135 (D.C. Cir. 1972) (upholding refusal of trial court to instruct jury on its power to nullify).

73. See *id.* ("Law is a system, and it is also a language, with secondary meanings that may be unrecorded yet are part of its life.").

74. Codes do not rigidly determine how texts must be interpreted. Rather, codes provide "frameworks" or "pathways" for interpretation. In Eco's view, a code is not correlation, but a "system of inference." ECO, *supra* note 52, at 187. This "system of inference" contains "that which is already known and already organized by a culture." *Id.*

75. This is the mistake of most commentators on criminal procedure—the failure to connect their analyses to the external, "real" world. See Andrew E. Taslitz, *Exorcising Langdell's Ghost: Structuring a Criminal Procedure Casebook for How Lawyers Really Think*, 43 HASTINGS L.J. 143 (1991) (noting how criminal procedure textbooks ignore the social sciences and foster the illusion that "law is a 'science' distinct from other disciplines").

76. See KEVELSON, *supra* note 56, at 132 (describing economic, political, and legal systems as both interconnected and "constituted of an infinite number of interlocking sign systems which influence and contribute to the development of each").

conduct as deviant.⁷⁷ This labelling power is not, however, shared equally. What makes a dominant group "dominant" is its power to define a subordinate group as deviant. Once conduct is labelled "deviant," it affects the interaction of those so labelled and the majority in real, concrete ways.⁷⁸ In short, the majority has "the power to define the rules of the game to which everyone [is] required to ascribe"⁷⁹

The power to define rules has obvious consequences. It is axiomatic that describing certain conduct as criminal permits the punishment and stigmatization of those who step outside of the norm.⁸⁰ That is, "the labelling process serve[s] to mobilize moral censure and social sanction against [deviants]."⁸¹ Establishing crime as a social category thus involves the critical function of deciding who shall wield state power, against whom, and for what purposes.

Crime also serves the purpose of "reinforcing the internal solidarity of the moral community."⁸² As crime creates and excludes "them" it also creates and strengthens "us." The focus on drug abuse over the past few years has certainly enhanced the social position of those who have not used drugs.⁸³ Thus, struggles to criminalize the conduct of others can also be seen as struggles to validate one's own behavior.⁸⁴

77. RICHARD QUINNEY, *CRITIQUE OF LEGAL ORDER: CRIME CONTROL IN A CAPITALIST SOCIETY* 27 (1973); see generally HOWARD S. BECKER, *THE OUTSIDERS* 177-212 (1963) (chapter 10 entitled "Labelling Theory Reconsidered").

78. Hall, *supra* note 55, at 63.

79. *Id.*

80. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 4-5 (1968); H.L.A. Hart, *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 404 (1958); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 1-2 (1987). In fact, the substantive criminal law does not recognize conduct as "criminal" unless punishment is prescribed. See, e.g., *United States v. Evans*, 333 U.S. 483 (1948) (statute prohibiting concealment of aliens not criminal because penalty prescribed is too vague).

81. Hall, *supra* note 55, at 63; see also JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81-82 (1883) ("The criminal law thus proceeds upon the principle that it is morally right to hate criminals, and it confirms and justifies that sentiment by inflicting upon criminals punishments which express it . . .").

82. Hall, *supra* note 55, at 63.

83. In the 1960's and 1970's drug use was mainstream, fashionable behavior. Even President Clinton smoked pot at the time. But, in order to retain some legitimacy in a changed social climate, Clinton was later forced to assert that he never inhaled. See David Maraniss, *Image Questions Bewilder Clinton, Longtime Friends Allies Describe Candidate's "Constancy"*, *WASH. POST*, Apr. 12, 1992, at A1.

84. We can see this as communities struggle over noise regulations or the selling of pornography. A central part of the discourse is the desire to validate "family life" or "wholesome living" versus "single life" or "partying." Joseph Gussfield portrays the debate over Prohibition as a struggle between an increasingly Catholic, urban and immigrant working class and an "abstinent Protestant middle class." Joseph Gussfield, *On Legislating Morals: The Symbolic Process of Designating Deviancy*, 56 *CAL. L. REV.* 54, 58-59 (1968). According to Gussfield, these are examples of the symbolic status or power of the winning cultural group.

Affirmation through law and government acts expresses the public worth of one subculture's norms relative to those of others, demonstrating which cultures have legitimacy and public domination. Accordingly it enhances the social status of groups

A. *The Consensus*

This notion of crime as a creator of community is enhanced by Stuart Hall's concept of the "consensus." The "consensus" is Hall's term for the prevailing ideology subscribed to by the public at large.⁸⁵ The "consensus" consists of the accepted parameters of social conduct and the established view of the purposes and functions of the institutions of society.⁸⁶ It may be said, then, that the consensus consists of the intersection of those norms which are not deemed criminal. But the consensus so formed is not simply an agreement to accept majority rule, as it were, in the area of social order. It is a consensus to "a particular kind of social order."⁸⁷

Crime engenders consent to the moral community of those with the power to define. To the extent consensus works, then, it works in the interest of those with power.⁸⁸ Social order calls for "integration within and conformity to the rules of a very definite set of social, economic and political structures."⁸⁹ As Hall emphasizes, the social order that arises from the designation of crime "[is] articulated to that which exist[s]: to the given dispositions of class, power and authority: to the established institutions of society."⁹⁰

Hall's "consensus," then, implies domination rather than freedom. Indeed, "it is the complementary face of domination."⁹¹ This comes as no surprise because the mere existence of the law, whether criminal or otherwise, has inherently coercive implications. The law relies on the ability of the state to exercise force to exact compliance. But the law is merely "the repressive and negative aspect of the entire positive, civilizing activity undertaken by the State";⁹² that is, law is used by the state to accomplish certain

carrying the affirmed culture and degrades groups carrying that which is condemned as deviant.

Id. at 58.

85. See generally Hall, *supra* note 55, at 61-65.

86. According to Hall, the core of the consensus is "a common system of values, goals and beliefs" which unites an otherwise dispersed mass society. STUART HALL ET AL., *POLICING THE CRISIS: MUGGING, THE STATE, AND LAW AND ORDER* 215 (1978) Thus, the consensus may be described as a "consensus on values." *Id.*

87. Hall, *supra* note 55, at 63.

88. *Id.*

89. *Id.*

90. *Id.* Thurmond Arnold understood this well. In a brilliant work outside of the critical tradition that was first published over a half century ago, Arnold underscored the importance of the ritualistic aspect of government. He argued that students of governmental institutions needed to take account of more than just the surface or pragmatic aspect of their tasks. In this vein he stated: "The trouble with [most social and economic reforms] is that they violate currently important symbolism. Therefore even if the reform is accomplished it is apt to find itself twisted and warped by the contradictory ideas that are still in the background in spite of the reform." THURMOND ARNOLD, *THE SYMBOLS OF GOVERNMENT* 9-10 (1962).

91. HALL, *supra* note 86, at 216.

92. ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* 247 (1971), quoted in HALL, *supra* note 86, at 203.

ends. These ends may just as readily be achieved by noncoercive means as by force.⁹³ Coercion, then, is the flip side of consent and consent is the flip side of coercion.⁹⁴ Power relies on the consensus to govern because without consent it cannot govern efficiently.⁹⁵ But for power to govern in its own interest, the consensus must allow it to do so.⁹⁶ Thus, power seeks to shape and direct the consensus.

Unlike social contract theories, Hall's consensus does not arise spontaneously from the formation of the body politic. Consensus, like other significations, is *produced*. The production of consent must be understood as a semiotic process.⁹⁷ The reality of the consensus is the "result of a particular way of constructing reality."⁹⁸ The parameters of the consensus must be arrived at through the process of articulation, the work of selecting those values which will become part of the consensus and excluding those which will not. As Hall puts it, "[l]anguage and symbolization is the means by which meaning is produced."⁹⁹ Thus, the consensus is produced or given meaning by the discourse of those who subscribe to the consensus. Clearly, within this discourse, some themes predominate and others fall aside. This raises the question of which meanings come to be those we view as regular or accepted. Hall answers this question as follows:

Because meaning was not given but produced, it followed that different kinds of meaning could be ascribed to the same events. Thus, in order for one meaning to be regularly produced, it had to win a kind of credibility, legitimacy or taken-for-grantedness for itself. That involved marginalizing, down-grading or de-legitimizing alternative constructions.¹⁰⁰

93. HALL, *supra* note 86, at 202. In this regard "the state [has] another, and crucial aspect or role besides the legal or coercive one: the role of leadership, of direction, of education and tutelage" *Id.*

94. Recall that the consensus, broadly speaking, is located among those things that are not criminal; but if we did not adhere to the consensus of our own volition we could be forced to do so by the operation of the law.

95. Gramsci argued, notes Hall, that "the capitalist state functioned best when it operated 'normally' through leadership and consent, with coercion held, so to speak, as the 'armour of consent', for then the state was free to undertake its more educative, 'ethical' and cultural roles" HALL, *supra* note 86, at 203.

96. It is Hall's view that "[t]he dominant and powerful interests are . . . 'democratic,' not because they are directly governed in any sense by the 'will of the people,' but because they, too, must ultimately refer themselves and be in some way bound by this 'consensus.'" *Id.* at 215.

97. This is where Hall's consensus differs from Gramsci's notion of hegemony. Gramsci described his hegemony as a system of political alliances between the leading class and other segments of society. See generally ROGER SIMON, GRAMSCI'S POLITICAL THOUGHT: AN INTRODUCTION (1982). To Gramsci, the establishment of hegemony was occasioned through the conscious and instrumental process of broadening and consolidating these alliances. *Id.* at 24. The consensus does not replace the notion of hegemony. The consensus is a process that operates behind and gives rise to hegemony. *Id.* at 23-24.

98. Hall, *supra* note 55, at 64.

99. *Id.* at 67.

100. *Id.*

As I explained earlier, the consensus is determined by those who have the power to define. Although the meaning of the consensus is produced “democratically” through the process of signification, a process in which all may participate, this process is controlled predominately by the state through its control of educational and cultural institutions. The state, then, plays a key role in the production of consent:

It organises ideologically, through the cultural sphere and the education system [and] . . . through the means and media of communication and the orchestration of public opinion. Increasingly, it organises the civil and social life of society—especially of the family and the poor, through the “mediated” structures of the Welfare State. Above all, it organises *through politics*, the system of political parties and political representation: through the “maintenance of order in political class conflict.”¹⁰¹

Crime represents more than simply the opposite of the consensus. The concept of crime can be enlisted by the state to aid in its production of consent. Crime plays a crucial defining role in the construction of the ideological representations of society.¹⁰² Crime lies within a structured discourse that places crime on one side and law abiding on the other.¹⁰³ Crime is part of a dialogue about right and wrong, order and disorder, violence and peace. This emotive power endows “crime as a public issue” with a tremendous mobilizing force.¹⁰⁴ The support of the community “can be rallied to a campaign against it, not by presenting it as an abstract issue, but as a tangible force which threatens” home, family and stability.¹⁰⁵ In this way, crime “allows the construction of a false unity out of . . . very different social conditions”¹⁰⁶

Hall’s concept of the consensus is useful because it exposes the cultural and political supremacy of the elites. It shows how their views of reality come to be the accepted views of reality and how accepted views of reality are connected to the instrumentalities of domination and of force. Moreover, the consensus demonstrates how the accepted view of reality itself operates as an

101. HALL, *supra* note 86, at 205-06; *see also id.* at 202-03 (describing role of the state as educator).

102. *Id.* at 150.

103. *Id.* at 149-50.

104. *Id.* at 150. The generation of meaning is most importantly a political process with concrete and material effects. Thus, the way that crime is signified is of singular importance. In other words:

[S]ignifications enter into controversial and conflicting social issues as a real and positive social force, affecting their outcomes. The signification of events is part of what has to be struggled over, for it is the means by which collective social understandings are created—and thus the means by which consent for particular outcomes can be effectively mobilized.

Hall, *supra* note 55, at 70.

105. HALL, *supra* note 86, at 150.

106. *Id.*

instrument of control, limiting (although not eliminating) the ability of the subordinated to challenge authority and power. In sum:

[W]hat the consensus really means is that a particular ruling-class alliance has managed to secure through the state such a total social authority, such decisive cultural and ideological leadership, over the subordinate classes that it shapes the whole direction of social life in its image But, because this domination has been secured by consent . . . that domination not only seems to be universal (what everybody wants) and legitimate (not won by coercive force), but its basis in exploitation actually *disappears from view*.¹⁰⁷

Furthermore, Hall's consensus makes this connection between the prevailing ideology and the domination of the ruling class without the determinism¹⁰⁸ characteristic of Marxist theories of the state or conspiratorial views of history. Hegemony is not imposed, as it were, by the authority and power of the state.¹⁰⁹ The masses are not dupes. Hegemony results from the coalescence of a consensus, produced by the semiotic process of signification—a process in which the state has distinct advantages, although no monopoly.¹¹⁰

B. *The Definition of Crime*

The commission of a crime marks one as a deviant. It places the criminal outside of the consensus and identifies him as an enemy of the state. However, because the criminal is outside the consensus, he also may be described as an enemy of the people. Thus, crime as a category helps determine the borders of the consensus and the consensus helps provide legitimacy to the state's definition of crime. In this way, crime "provides hegemonic services for the state."¹¹¹ The extent of these hegemonic services, however, is limited because the definition of crime is politically contested. Crime is not just what the state wants it to be, but what it comes to be signified as.¹¹²

While there is general agreement that criminal acts are wrong, not everyone agrees on what acts should be criminal. Traditional or mainstream

107. *Id.* at 216.

108. In his theory of the consensus, Hall tries to balance the autonomy of a system of signification with its use as an ideological instrument by the state. See Woollacoft, *supra* note 47, at 109 (describing Hall's determinism as muted by his culturalist view).

109. HALL, *supra* note 86, at 220.

110. See Woollacoft, *supra* note 47, at 109 (describing Hall's theory as one where the domination of the state was challenged through ideological struggle in the media).

111. Drew Humphries, *Report on the Conference of the European Group for the Study of Deviance and Social Control*, 1 CRIME & SOC. JUST. 11, 12 (1974).

112. Certainly, in a narrow positivistic sense, crime is exactly what the state says it is. But in the broader sense, the sense that has effect on the consciousness of men, that has an impact on society and the cultural reservoir, it is not.

views of crime tend to focus almost exclusively on acts of individuals that threaten violence to persons or property.¹¹³ This mainstream or state definition of crime is criticized by those who note that, under this view, harmful conduct of the wealthy and powerful is either not conceived of as crime or, if so, rarely prosecuted or punished.¹¹⁴ These critics would propose an alternative definition of crime, one which would define a broad range of human rights violations—e.g., racism, sexism, economic exploitation—as crime.¹¹⁵ Even within these two general camps there is wide disagreement over which specific acts ought to be criminalized. This is true because in the most fundamental respect the definition of crime is politically determined. Its definition derives from the political give and take generated as various interests compete for control of the state apparatus. The formal definition of crime, then, will vary as different interests gain power or as groups in power redefine their needs in response to changing social conditions.

Viewing crime as politically contingent only partially explains why the state definition of crime is so prevalent. It prevails because the functional definition of crime (i.e., the definition used to determine the imposition of punishment, whether from mainstream or alternative formulations) is built from deeper, more fundamental concepts of criminality. The fundamental definition of crime is not found in criminology courses or in criminal law texts. When people talk about crime, they draw on social images from “the available field of practical ideologies.”¹¹⁶ These images provide the structure for any discourse about crime.

When the journalist, or the judge, or the members of the ordinary public have to respond to, or explain, troubling events, like “mugging”, they tend to draw, often in a piecemeal and unreflexive manner, on the social images, the “ideas of society”, the sources of moral anxiety, the scattered meanings which frame their everyday experience in order to construct, out of them, social accounts which carry credibility.¹¹⁷

These fundamental images build up slowly over time, accruing from society’s total experience with crime and its ideological reaction to it. These images are the result of politically contingent, functional definitions of crime percolating in the public consciousness until they reach the level of “truism.” When definitions of crime enter into the social reservoir of ideas, they retain

113. Mark Kelman, *The Origins of Crime and Criminal Violence*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 44, at 214, 215.

114. *Id.* at 218.

115. Tony Platt, *Prospects for a Radical Criminology in the United States*, 1 *CRIME & SOC. JUST.* 2, 5-6 (1974).

116. HALL, *supra* note 86, at 166; *see also* Hall, *supra* note 55, at 73 (describing a reservoir of themes and premises accumulated from discourse over time).

117. HALL, *supra* note 86, at 165-66.

their political and ideological character.¹¹⁸ Thus, the limited range of explanatory paradigms within which we structure our thinking about crime is greatly influenced by those who inject ideas about crime into the public consciousness, or those whom Hall refers to as the “definers” of crime.

Hall distinguishes between primary and secondary definers of crime. “Primary definers” are authority figures in powerful and high status positions.¹¹⁹ They are considered to have greater expertise and to have “access to more accurate or more speciali[z]ed information on particular topics than the majority of the population.”¹²⁰ As a consequence, it is primary definers who are able to provide the primary definition or the most widely accepted “take” on crime.

“Secondary definers” are those who reproduce as secondary sources the definitions established by primary definers.¹²¹ In industrialized countries, these are primarily the media. Hall points out that the media are forced into heavy dependence on the statements of primary definers by their desire to produce an “impartial” and “objective” product under constant deadline pressure, since primary definers provide a readily accessible source of authoritative opinions.

The realities of news production, then, work to create “a systematically structured *over-accessing* to the media of those in powerful and privileged institutional positions.”¹²² This means that the opinions and viewpoints of primary definers are much more likely to be widely disseminated than those of others. They will be credited as authoritative by the media, and ultimately accepted by the majority of the public. Over time, as these opinions work themselves into the social reservoir of ideas, they will exert a greater and greater influence over all signification about crime that takes place within that culture.

I do not mean to suggest that alternative perspectives on crime cannot be expressed. Indeed, there are alternatives to the mainstream view of crime both at the functional and the fundamental level. But these alternative views generally lack credibility.¹²³ “Counter-definers,” or those who produce alter-

118. Noting first that “[i]deology is a system of coding reality and not a predetermined set of coded messages,” Hall states: “[P]articlar discursive formulations would then, be ideological, not because of their manifest bias or distortions of their surface contents, but because they were generated out of, or were transformations based on, a limited ideological matrix or set.” Hall, *supra* note 55, at 72.

119. People become primary definers because of their “institutional power and position,” or because they represent an important constituency, or because as “experts” they can claim a degree of impartiality based on their “‘disinterested’ pursuit of knowledge.” HALL, *supra* note 86, at 58.

120. *Id.*

121. *Id.*

122. *Id.*

123. See Hall, *supra* note 55, at 81 (noting difficulty of mounting counter-arguments to privileged definitions since these lack “the warrant of ‘common sense’” and “are read as ‘straying from the point’”).

native definitions of crime,¹²⁴ are severely handicapped in their ability to influence the production of meaning. It is difficult for most counter-definers to gain access to the media and thereby participate in the defining process.¹²⁵ Those that can, by reason of the fact that they have won some degree of legitimacy from the system (such as law professors or criminal defense attorneys), “must respond in terms pre-established by the primary definers and the privileged definitions, and have a better chance of securing a hearing and influencing the process precisely if they cast their case within the limits of that consensus.”¹²⁶ Counter-definers who fail to respond in the familiar framework established by the primary definers run the risk of having their opinions de-authenticated and dismissed as “radical” or “extreme.”¹²⁷

Thus, it comes as no surprise that a close inspection of the way that crime is reported reveals a heavy reliance on the statements of police, prosecutors, government officials, and other spokespersons of the established institutions of criminal justice.¹²⁸ To the extent that lay opinion is represented at all in this field, it is represented by the advocates of victims. Rarely are the opinions of those perceived as criminals solicited,¹²⁹ unless they are the views of reformed lawbreakers, employed now as consultants to crime control organizations. The alternative perspective is offered, if offered at all, by a small coterie of criminal defense attorneys and civil libertarians, whose opinions are made to seem more and more nonsensical, even though they are always careful never to challenge the fundamental assumptions of the criminal justice system.

In this section, I have shown how the meaning of crime is produced through a semiotic process of signification. Crime determines the consensus, but the consensus also determines crime. At the raw functional level, the meaning of crime is determined through a process of articulation as competing interests vie to establish their own self-interested definitions of crime. Thus, the working definition of crime is politically contingent and therefore relational.

The meaning of crime is also relational in the sense that the working, or functional, definition of crime is constructed from deeper, foundational notions that have been cloaked in the veneer of common sense. These common sense notions are themselves the result of a semiotic process at work. They are but distilled and refined versions of politically contingent,

124. HALL, *supra* note 86, at 64.

125. *Id.*

126. *Id.* (emphasis omitted). Indeed, “[c]hanging the terms of an argument is exceedingly difficult, since the dominant definition of the problem acquires by repetition, and by the weight and credibility of those who propose or subscribe it, the warrant of ‘common sense.’” Hall, *supra* note 55, at 81.

127. HALL, *supra* note 86, at 59, 64.

128. *Id.* at 68.

129. *Id.* at 69.

functional definitions of crime that have been worked and reworked through an extended process, of signification. These fundamental views of crime comprise a cultural inventory of basic assumptions that structure all discourse on crime.

In the next Part, I examine the way that crime is signified in popular culture in order to reveal the basic assumptions about crime and criminals that are at work.

IV. MAKING MEANING: THE DEPICTION OF CRIME IN POPULAR CULTURE

Investigating the way that crime is signified in popular culture can show how the image of crime is worked into the popular consciousness.¹³⁰ Exploring popular culture, then, can expose the codes that govern the way that significations about crime take their meaning, since it is from this deep level that all subsequent discourse about crime is structured. The popular culture serves as a window into the shaping of the consensus. It is the means through which the consensus expresses itself, as well as the means via which key definers can shape the consensus.

The term "popular culture" can cover a lot of ground. For my purposes, I am concerned mainly with television as a representative of popular culture. I choose television because television is the primary means through which we learn about and make sense of our world.¹³¹ Whether offered as "fact" or "fiction," representations of crime invade all aspects of television programming. For convenience, I divide my comments into (1) observations about dramatized accounts of crime and (2) non-fiction reporting of incidents of crime.

130. See Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527 (1986) (arguing that legal scholars should recognize the importance of popular culture as a field for the replication of legal thought).

131. Television's place in our culture has been summarized in this way:

People are now born into the symbolic environment of television and live with its repetitive lessons throughout life. Television cultivates from the outset the very predispositions that affect future cultural selections and uses. Transcending historic barriers of literacy and mobility, television has become the primary common source of everyday culture of an otherwise heterogeneous population.

George Gerbner et al., *Charting the Mainstream: Television's Contributions to Political Orientations* 32 J. COMM. 100, 102 (Spring 1982). The source of television's importance may be its sheer omnipresence. One student commentator has aptly described this aspect of television in the following terms: "Television has become the most influential mass medium in the United States. Its images permeate public and private spaces. Television sets are found in virtually every home and they crowd airports, bus and train stations, hospitals, lobbies, restaurants, nightclubs, and even parks and beaches." Patrick M. Fahey, *Advocacy Group Boycotting of Network Television Advertisers and its Effect on Programming Content*, 140 U. PA. L. REV. 647 (1991) (citations omitted).

A. *Crime on Prime Time Television*

Crime is a staple of prime time¹³² television. A 1985 survey revealed that more than forty percent of prime time hours during the 1985-86 television season were devoted to shows featuring police officers, detectives, private investigators or other law enforcement agents.¹³³ There is substantially more crime on the nation's television screens than on the nation's streets. The principal investigator in a two decade-long survey of prime time television claims ten times more crime is depicted on television shows than occurs in real life.¹³⁴ The average viewer watches six violent crimes during each hour of prime time viewing¹³⁵ and two-thirds of all major dramatic characters are involved in some violence,¹³⁶ typically brought about by the commission of or the consequences of a criminal act. As a result, television viewers are immersed, hour after hour, in a world where crime takes on exaggerated importance.

Not only is the amount of crime on television dramas exaggerated, but also the types of crime depicted are exaggerated. Television crime is bloodier and more violent than crime is in reality. As flawed as known indicators of crime are,¹³⁷ it is clear that the vast majority of serious crime is directed at property.¹³⁸ Yet, the type of crime most frequently depicted on television dramas is murder.¹³⁹ On television, the bulk of crime depicted is crime against the person, and the victims of crime are disproportionately white¹⁴⁰ and female.¹⁴¹

132. "Prime time" may be described as the most highly watched periods of television programming and typically refers to "those programs shown between 8:00 p.m. and 11:00 p.m. each evening, and starting at 7:00 p.m. on Sunday." Fahey, *supra* note 131, at 647-48 n.6. Approximately 56 million households, or 60% of the country's total potential television audience, watch television during prime time hours. See Erik Larson, *Watching Americans Watch TV*, ATLANTIC, Mar. 1992, at 66.

133. Chase, *supra* note 130, at 549 n.81 (citing Winston, *Prime Time's Copycat Creativity*, IN THESE TIMES, Nov. 6-12, 1985, at 16).

134. George Gerbner, *Trial by Television: Are We at the Point of No Return?*, 63 JUDICATURE 416, 419 (1980).

135. JAMES M. CARLSON, PRIME TIME LAW ENFORCEMENT: CRIME SHOW VIEWING AND ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM 48 (1985).

136. Gerbner, *supra* note 134, at 418. Carlson's figures are slightly more conservative. He found that 54% of television's leading characters were involved in violence, but also found that 70% of prime time television programs contained violence. CARLSON, *supra* note 135, at 29.

137. Most statisticians believe the main sources for information on crime vastly underestimate the incidence of crime. RAYMOND J. MICHALOWSKI, ORDER, LAW, AND CRIME: AN INTRODUCTION TO CRIMINOLOGY 268-74 (1985) (describing reliability problems with police statistics); CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR 25-36 (1993) (discussing limitations of crime statistics and highlighting inherent bias against poor and minorities).

138. MICHALOWSKI, *supra* note 137, at 296.

139. Nearly 41% of television crimes are murders. Gerbner, *supra* note 134, at 419.

140. *Id.*

141. CARLSON, *supra* note 135, at 50. In real life, victims are disproportionately Black and male. Gerbner, *supra* note 134, at 419; see also MICHALOWSKI, *supra* note 137, at 268, 296 (in 1978, Black male seven times more likely to be victim of armed robbery committed by stranger than white female).

The perpetrators of crimes are also portrayed unrealistically. Surprisingly, criminal characters on prime time shows are frequently played by white middle-class males.¹⁴² While real criminals are disproportionately poor, television criminals are often rich and greedy. Such a stereotype makes little sense, as white collar or victimless crimes are seldom the focus of television dramas.¹⁴³ Criminals are generally presented unsympathetically. Rarely are they depicted as victims of circumstance or motivated by concerns or needs, other than greed, with which the average viewer can empathize.¹⁴⁴ In the world of television crime, there are only two acceptable motivations for criminal behavior: greed and insanity.¹⁴⁵ When crime cannot be explained by these two factors, it is presented as just senseless—the consequence of an uncontrollable evil will.¹⁴⁶ In short, instead of real people with histories, personalities, and relationships that frame and explain their conduct, criminals are represented as one-dimensional demons to be feared and destroyed. Viewing crime presented in a manner that suggests that it cannot be explained discourages us from looking for its causes.¹⁴⁷

The structure of television drama does not allow for the accurate representation of criminal defense attorneys, nor does it permit an adequate explanation of their function and/or necessity. Since most crime dramas end with an arrest, “[a]rraignments, pretrial hearings, jury selection, bonding, plea bargaining, trials, sentencing, and other postarrest processes are rarely shown.”¹⁴⁸ Furthermore, since we typically see the perpetrators as they commit their crimes, television criminals are, of course, almost always guilty.¹⁴⁹ Consequently, criminal defense attorneys are either superfluous or corrupt. According to legal ethics scholar Steven Stark, “‘criminal defense lawyers are usually depicted [on crime shows] as figures of derision and betrayers of the

142. CARLSON, *supra* note 135, at 33. Carlson speculates that the reason for this is to avoid offending ethnic groups. *Id.* Notwithstanding the representation of criminals on television, a 1977 survey found that most respondents viewed crime largely as the work of young Black males or young males of other minority races. DORIS A. GRABER, *CRIME NEWS AND THE PUBLIC* 55 (1980); cf. Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503, 510-11 (1994) (arguing that white identification of crime with Blacks can be traced to sociocultural developments of 1960's).

143. Berkeley Rice, *The Unreality of Prime-Time Crime*, *PSYCHOLOGY TODAY*, Aug. 1980, at 26, reprinted in *TELEVISION AND AMERICAN CULTURE* 43 (Carl Lowe ed., 1981).

144. CARLSON, *supra* note 135, at 33.

145. Rice, *supra* note 143, at 43. Rice notes, however, that the rate of insanity among criminals is not significantly greater than the rate among the general population. *Id.*

146. For example, unemployment is connected to criminal activity in less than 5% of shows. *Id.* at 43-44.

147. *Id.* at 44; Craig Haney & John Manzolati, *Television Criminology: Network Illusions of Criminal Justice Realities*, in *READINGS ABOUT THE SOCIAL ANIMAL* 125, 128 (Elliot Aronson ed., 3d ed. 1981) (noting how television crime diverts attention away from criminogeneticism).

148. CARLSON, *supra* note 135, at 35.

149. Rice, *supra* note 143, at 44.

public trust.’ ”¹⁵⁰

Contrasting sharply with the image of the criminal and the criminal defense attorney is the image of the television “crime-fighter.” Law enforcement agents are central heroic figures in prime time crime dramas.¹⁵¹ Whether police officers, detectives, private investigators, federal agents (FBI, DEA, Treasury) or even medical examiners or attorneys,¹⁵² the common characteristic shared by crime-fighters is their archetypal role as instruments of crime detection and enforcers of the established order. Police officers are represented in particularly glamorous, but unrealistic ways. Their role as fighters of crime is exaggerated and other mundane, but more common aspects of the police officer’s role are diminished.¹⁵³ The life of a television crime-fighter is exciting.¹⁵⁴ He rarely makes mistakes, and seldom makes a false arrest.¹⁵⁵

150. David S. Machlowitz, *Lawyers on T.V.*, 74 A.B.A. J. 52, 54 (1988) (quoting Steven Stark).

There is, of course, a counterimage to the shady television lawyer, represented by the “Perry Mason” genre. See Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229 (1987) (discussing how crime-oriented television shows have impacted public’s perception of lawyers, police and the criminal justice system). But these lawyers, typified by Perry Mason and Matlock, differ so much from the usual television defense attorney as to deserve categorization in a separate genus. These lawyers are, more often than not, wealthy or upper middle-class and they rarely defend professional criminals. See *id.* at 250 (“In the world of Perry Mason, fighting crime was not only heroic, it was respectable work for the upper middle class. It apparently paid well too, though money was rarely mentioned: Mason had a secretary, drove a Cadillac, and his well-furnished offices were in downtown Los Angeles.”). Perry Mason’s client was always a wrongfully accused middle-class white person. *Id.* at 249. On those rare occasions when television’s successful defenders do represent suspects more in line with the statistical profile of the average arrestee, the criminals always lose. Gerbner, *supra* note 134, at 420.

The Perry Mason genre goes a long way toward explaining the success of attorneys such as F. Lee Bailey, Richard “Racehorse” Haynes, Alan Dershowitz or even William Kunstler. These attorneys are “gentleman lawyers,” prosperous upper middle-class heroes with much the same authority and legitimacy as Perry Mason himself. Their existence proves there is a place for the defense attorney as champion of the oppressed, the advocate of lost causes, in the popular imagination. This is the nature of the mythology that surrounds Clarence Darrow, for example. But this counter-image of the criminal defense attorney seems to be the exception, not the rule. Although there are many positives about the way that “Rosie O’Neill” was represented on television (Abbe Smith describes her as a “new age” feminist and committed public defender), in the end the show was cancelled for poor ratings. See Abbe Smith, *Rosie O’Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender*, 28 HARV. C.R.-C.L. L. REV. 1, 2 (1993).

151. One-third of the jobs on television deal with law enforcement. Chase, *supra* note 130, at 548. In addition, there are almost twice as many cops as criminals in the average week of television, and three times more cops than lawyers and judges. CARLSON, *supra* note 135, at 29.

152. Crime-fighters can take a lot of exotic forms—Quincy, Perry Mason, Charlie’s Angels, the A-Team (a rag tag collection of ex-VietNam War vets)—although most crime-fighters are white males. CARLSON, *supra* note 135, at 44.

153. Patrol officers do a lot of social work, and arrests for routine drunkenness and other victimless crimes make up about one-third of the typical officer’s total arrests. Rice, *supra* note 143, at 44.

154. *Id.*

155. *Id.*

Crime dramas rarely focus on complaints of police brutality.¹⁵⁶ When they do, the complainant is belittled and the brutality characterized as necessary.¹⁵⁷ Studies have repeatedly disclosed that the constitutional rights of those suspected of crime are routinely violated on television crime shows.¹⁵⁸ Not only are witnesses assaulted, but homes and offices are routinely broken into without warrants, highly suggestive identifications are solicited, and confessions are flagrantly coerced.¹⁵⁹

Notwithstanding the blatant illegality of fictional police conduct, the television representation of crime-fighters is generally positive¹⁶⁰ and presumably perceived as such by much of the audience. Several studies indicate that police officers are held in high regard by members of the general public.¹⁶¹ The illegal conduct of television cops is accepted, even encouraged, in large part because in the context of such shows, illegal conduct is framed as pragmatic and necessary. In the words of one researcher:

In most crime shows the audience sees the crime committed, so they *know* who committed the crime, a position the television police do not enjoy. So when the police violate the Fourth Amendment and conduct an illegal search, it seems acceptable because guilt has already been established as far as the audience is concerned.¹⁶²

Police violence and illegal conduct are presented on television as an effective, quick, and simplistic solution to society's crime problem. Constitutional guarantees are presented as obstacles to effective law enforcement, causing more harm to citizens if taken too seriously. Police officers are frequently portrayed in a highly romanticized manner as macho individualists, who are not afraid to do whatever it takes to get the job done. Since on television, the real threat to a prosperous life comes from criminals and not from a faceless government, the viewing public is encouraged to place their trust in the hands of violent, but effective, law enforcement types.¹⁶³

156. *Id.*

157. Haney & Manzolati, *supra* note 147, at 133.

158. *Id.* at 133-34 (two to three constitutional violations per hour-long program); CARLSON, *supra* note 135, at 42-43; Stephen Arons & Ethan Katsh, *How TV Cops Flout the Law*, 4 *SAT. REV.*, Mar. 19, 1974, at 11, 12-13 (15 crime shows contained 43 scenes of illegal police conduct); Rice, *supra* note 143, at 44.

159. Arons & Katsh, *supra* note 158.

160. CARLSON, *supra* note 135, at 46.

161. *Id.* at 65.

162. *Id.* at 42.

163. This tendency is best illustrated by a snippet of dialogue from the 1970's television series, "Bert D'Angelo—Superstar":

D'ANGELO: "What do I know about the law? I'm not a lawyer, I'm a cop."

INSPECTOR KELLER: "It's your job to enforce it."

D'ANGELO: "It's my job to protect people from the mugger, the rapist, the armed

The ideological impact of the way crime is signified on television dramas was pointed out by George Gerbner over twenty years ago, in a study prepared for the Surgeon General's Scientific Advisory Committee on Television and Social Behavior.¹⁶⁴ Gerbner's research disclosed that the vast majority of dramatic themes represented on television "revolve[d] around threats to and the preservation of the moral, social and global order."¹⁶⁵ Violence, including crime, is used in these contexts because it is an inexpensive and emotionally charged way to communicate messages about appropriate and inappropriate social behavior and the consequences of each. "The typical plot," notes Gerbner, "ends by reaching a reassuring and usually foregone conclusion about who is the better man."¹⁶⁶

Violence operates symbolically to show us how it may be used to advance our causes and to avoid being hurt. Violence demonstrates who is heroic or empowered and what values should triumph over others.¹⁶⁷ In this way, "[s]ymbolic violence is one of society's chief instruments for achieving the aims of real violence without having to commit any."¹⁶⁸

Gerbner found that "[t]he lion's share of representation went to types that dominate the social order"¹⁶⁹ Not surprisingly, "[l]ess . . . representation was allocated to those lower in the domestic and global power hierarchy"¹⁷⁰ This uneven representation of character types, combined with their placement in television's matrix of violence and crime, encourages the reproduction of dominance and rigid social order. Gerbner concluded:

The pattern [of allocation of violence] appears to project the fears, biases, privileges, and wishful thinking of dominant institutions onto a cosmic canvas. . . .

The fundamental function and social role of ritualized dramatic violence is, then, the maintenance of power. The collective lessons [taught by drama] tend to cultivate a sense of hierarchical values and forces. Their conflicts expose the danger of crossing the lines, and induce fear of subverting them.¹⁷¹

robber, and the killer. People like Joey, like my partner Mickey, did the law help them? Did the law stop that killer? All the laws in the world won't stop one man with a gun. Its going to take me or somebody like me and you know what? I'll do it any way I can."

INSPECTOR KELLER: "You're a dangerous man, Bert."

D'ANGELO: "That's right. You better be damn glad I'm on your side."

Bert D'Angelo—Superstar (ABC, 1976), cited in Arons & Katsh, *supra* note 158, at 11.

164. GEORGE GERBNER, *VIOLENCE IN TELEVISION DRAMA: A STUDY OF TRENDS AND SYMBOLIC FUNCTIONS* (1970).

165. *Id.* at 36.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 37.

170. *Id.*

171. *Id.* at 76.

B. *More Crime at Eleven: Television News and the Signification of Crime*

Because television news ostensibly deals with the portrayal of reality, one might think that the representation of crime in the news would differ significantly from that offered in the fantasy world of entertainment television. But the distinction between television news and television entertainment is not sharp. The "reality" of television news broadcasts is highly selective.¹⁷² In fact, television news "is much closer to definitions of narrative construction than unmediated experiences or conceptions of real life."¹⁷³ In this way, its reality mirrors the reality of television drama. Both real and dramatic television are significations produced by an external and active will. Both reproduce the conventional cultural pressures of the existing social order.¹⁷⁴ Consequently, both "compliment and reinforce each other as they repeat the same propositions about life and society."¹⁷⁵

Television's selective eye makes it all the more persuasive. Television has the power to concentrate its attention on one or two themes and strengthen its message through repetition. Crime reporting is a major feature of television news programs.¹⁷⁶ This constant focus on crime, its frequency and its danger, reinforces the perspective on crime generated by television crime dramas.¹⁷⁷ The news media does not create its discourse about crime from

172. Just how selective can be gathered from the following account:

The ability to cover stories depends on the availability of camera crews in certain locations. The overwhelming majority of national television network news is produced by a few dozen film crews based in half a dozen major cities. The assignment editor makes choices, the correspondent makes choices, the cameraperson and sound technician make choices, and the writer and editor make choices.

JAMES SCHWOCH ET AL., *MEDIA KNOWLEDGE: READINGS IN POPULAR CULTURE, PEDAGOGY, AND CRITICAL CITIZENSHIP* 41 (1992). Moreover, some newsmagazine shows have a film-to-air editing ratio of ten-to-one. Peter Funt, *Seeing Isn't Believing*, 7 *SAT. REV.* 30, Nov. 1980, reprinted in *TELEVISION AND AMERICAN CULTURE*, *supra* note 143, at 89, 91.

173. SCHWOCH ET AL., *supra*, note 172, at 41.

174. Gerbner, *supra* note 134, at 417. A number of studies reviewing the content of newsprograms have demonstrated how their structure results in certain definitions of reality prevailing over others. Graham Knight & Tony Dean, *Myth and the Structure of News*, 32 *J. COMM.* 144, 144-61 (Spring 1982).

175. Gerbner, *supra* note 134, at 418.

176. This is especially true of local news programs. See ELAYNE RAPPING, *THE LOOKING GLASS WORLD OF NONFICTION TV* 48-49 (1987) (local news stations prefer to report on "disasters and tragedies," including crimes, because they "allow for sympathy and a chance to show our local fire fighters and law enforcers on the job, being heroic, making our neighborhoods safe and happy"). There is strong evidence that television's audience is reached by the repeated messages about crime. Ninety-five percent of the people surveyed in a 1977 study identified the mass media as their primary source of information about crime. GRABER, *supra* note 142, at 49. By comparison, only 14% stated they had any personal involvement with crime through the victimization of self, family members, or friends. *Id.* at 49-50.

177. Consequently, the public views criminals as nonwhite, lower class people who are flawed in character, emotionally disturbed, and hooked on drugs. GRABER, *supra* note 142, at 57, 68.

whole cloth. It recycles concepts and terms already in the cultural lexicon.¹⁷⁸ Thus, while a newscast may be furnishing information cast as facts, it is also constructing a tale that either “fits” or contradicts broader and deeper concepts of crime that operate as “myths.”¹⁷⁹

Most news accounts of crime (whether reports of specific incidents of crime or more general accounts of crime statistics and trends) come from official government sources. News reporters and editors work closely with the police. Television stations routinely report bulletins, lookouts and warnings about criminal activities.¹⁸⁰ While such activities lend an aura of respectability to television newscasts, they also reinforce the credibility and authoritative-ness of the official sources upon which they rely. Media reliance on official sources, in the end, permits police officials to shape the nature of news coverage of crime.¹⁸¹ It gives government authorities input into the decision of which stories will be covered and which will not. Ultimately, the offenders and victims selected as newsworthy will tend to be those fitting established preconceptions.¹⁸²

Television news reinforces the perception that we are living in a “mean and dangerous world.”¹⁸³ A prominent place in each evening newscast is reserved for reporting some serious and violent crime—a shooting, robbery, carjacking, abduction, or rape—or the efforts of some law enforcement agency to control crime—a drug bust, increased street patrols, or a similarly newsworthy event.¹⁸⁴ Those who are arrested, accused or convicted of crime are represented as malevolent and incorrigible outcasts. Unlike the wealthy criminals depicted on prime time shows, criminals shown on the news are, more often than not, poor members of racial or ethnic minority groups

178. See Knight & Dean, *supra* note 174, at 145 (noting that news media rely on raw materials already fashioned in the wider ideology).

179. *Id.* at 146. Knight and Dean describe a myth as “a ‘second-order’ system of signification whose method for establishing meaning is suggestive and evocative rather than declarative.” *Id.* Knight and Dean emphasize that a myth is an uncritical way of knowing rather than an untrue body of knowledge. *Id.*

180. See ERICSON ET AL., REPRESENTING ORDER: CRIME, LAW AND JUSTICE IN THE NEWS MEDIA 12 (1991).

181. See *supra* Part III.

182. Gerbner, *supra* note 134, at 418. This is as much a factor of the influence of prevailing norms on the opinions of news editors as it is the result of excessive reliance on the authorities of the state. See Knight & Dean, *supra* note 174, at 145 (arguing that crime newsreporting is ideological); Hall, *supra* note 55, at 87.

183. Gerbner et al., *supra* note 131, at 107.

184. See RAPPING, *supra* note 176, at 47-49 (describing placement of crime news in format of typical local television news broadcast); see also ERICSON ET AL., *supra* note 180, at 242 (finding that 54% of all television news items related to elements of deviance and control); GRABER, *supra* note 142, at 28-32 (study concluding that “crime-related subjects ranked above average in frequency of mention” and received preferential display on some news sources).

arrested for crimes of violence.¹⁸⁵ Newsreporting can thus interact with and feed on racial stereotypes, promoting a further deterioration in already strained race relations.¹⁸⁶

The exploitation of stereotypes is even more exaggerated on so-called "reality" programming such as Fox Network's "COPS" or NBC's "Rescue 911."¹⁸⁷ These shows present a highly emotional and sensational product that is even more objectionable because the shows exploit a format that has become associated with objective reporting. Shows such as these blur the distinction between entertainment and news even further.¹⁸⁸

Television news influences society's concepts of order and normality in a manner which often goes unnoticed.¹⁸⁹ Through its coverage and presentation of crime, television news signifies that violent crime is increasingly the norm and that greater imposition of state control and police intervention are necessary to maintain some semblance of order. The end result is that television news coverage encourages the impression that we are living in a society that is under siege by the forces of crime and that it is only through the efforts of our local police forces that civilization as we know it endures. Through television news, crime works to reintegrate society, to reinforce notions of who is inside the "thin blue line" and who should be cast outside it.

Media coverage, then, provides a vehicle for communicating "the necessity for strong social control."¹⁹⁰ In this way, the news media have assumed the functions of ideological reproduction previously performed by public punish-

185. This may be true because the kinds of crime television cameras focus on tend to be the types of crime for which minority group members are most often arrested. The greater incidence of arrests and the resulting impression that minority group members—particularly Blacks and Latinos—are more prone to violent crime than whites may also be a function of racial stereotypes. See MANN, *supra* note 137, at 70 (noting that while arrest rates differ significantly between Blacks and Whites, patterns of criminal behavior are remarkably similar).

186. See Linda S. Lichter et al., *The New York News Media and the Central Park Rape* (Center for Media and Public Affairs, 1989) (monograph) (noting how exaggerated coverage of interracial crime played to pre-existing racial fears).

187. See Wendy M. Rogovin, *The Regulation of Television in the Public Interest: On Creating a Parallel Universe in Which Minorities Speak and Are Heard*, 42 CATH. U.L. REV. 51, 55 (1992) (noting that Blacks are depicted as the people who get arrested most often on police "reality" television shows).

188. Cable television's Court TV provides another medium that distorts the distinction between entertainment and news, although to a lesser extent than "reality" shows. Court TV's relatively unedited presentations of trials "present[] a more accurate and comprehensive picture of what happens at a criminal trial than does other television news and entertainment programming." David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 788 (1993). However, since the cases selected for coverage on Court TV typically contain "a larger than normal dose of weighty, topical issues, involve celebrities, lascivious detail, or grotesque or macabre trivia," Court TV still presents a distorted image of crime and the criminal justice system. *Id.*

189. Knight & Dean, *supra* note 174, at 145.

190. Gerbner, *supra* note 134, at 422.

ment.¹⁹¹ Where once public hangings were necessary to develop a sense of community and obeisance to authority,¹⁹² now nightly broadcasts of crime serve much the same role.¹⁹³

C. *The Attitudinal Effects of Television Crime*

Attempts to measure the effects of television viewing on attitudinal change have always been controversial.¹⁹⁴ Given the pervasiveness of the medium of television and the difficulty of controlling for other influences that might interact with watching scenes or shows, opinion research based on exposure to television has always been qualified.¹⁹⁵ Nonetheless, an impressive number of studies suggest that not only are the effects of television viewing measurable, but that television plays a tremendous role in the socialization process and in the formation of attitudes and opinions.¹⁹⁶

Several studies have concluded that exposure to television fosters the belief that we are living in an increasingly dangerous and violent world.¹⁹⁷ Heavy television viewers tend to believe there is a greater incidence of crime than light viewers do.¹⁹⁸ Heavy viewers are also more likely to fear victimiza-

191. Knight & Dean, *supra* note 174, at 144-45.

192. See Elizabeth D. Purdum and J. Anthony Paredes, *Rituals of Death: Capital Punishment & Human Sacrifice*, in *FACING THE DEATH PENALTY* 139 (Michael L. Radelet ed., 1989) (discussing capital punishment as a social means to assure people that society is not out of control).

193. See Gerbner, *supra* note 134, at 421 (television show trials help "reaffirm the legitimacy of contemporary values"). Television news polices the community and creates order by fragmenting social problems and focusing on their individual and personal aspects. According to one analysis:

A lot of news consists of moral-character portraits: of demon criminals, of responsible authorities, of crooked politicians and so on. The emphasis on individual morality is not only a dramatic technique for presenting news stories as serial narratives involving leading actors but also a political means of allocating responsibility for actions and attributing accountability.

ERICSON ET AL., *supra* note 180, at 8.

194. For a discussion of the controversy, see ROBERT M. LIEBERT ET AL., *THE EARLY WINDOW: EFFECTS OF TELEVISION ON CHILDREN AND YOUTH* (1982).

195. See Rice, *supra* note 143, at 44 ("variables of age, sex, education, income, or neighborhood may be as influential in shaping attitudes toward crime as is TV watching"); see also SALLY JACKSON, *MESSAGE EFFECTS RESEARCH: PRINCIPLES OF DESIGN AND ANALYSIS* 18-23 (1992) (cautioning that media messages under study may be too abstract or not representative enough for purposes of generalization); Ien Ang, *The Nature of the Audience*, in *QUESTIONING THE MEDIA: A CRITICAL INTRODUCTION* 155 (John Downing et al. eds., 1990) (noting difficulty of generalizing about media audience reactions given diversity of audiences).

196. See *PERSPECTIVES ON MEDIA EFFECTS* (Jennings Bryant & Dolf Zillman eds., 1986) (collecting 16 studies); see generally Gerbner et al., *supra* note 131, at 102 ("People are now born into the symbolic environment of television and live with its repetitive lessons throughout life . . .").

197. Gerbner, *supra* note 134, at 422; Haney & Manzolat, *supra* note 147.

198. CARLSON, *supra* note 135, at 171-80; George Gerbner et al., *TV Violence Profile No. 8: The Highlights*, 27 J. COMM. 171 (Spring 1977); Haney & Manzolat, *supra* note 147; Rice, *supra* note 143, at 44.

tion as a result of crime than are light viewers.¹⁹⁹ Consequently, heavy viewing of television contributes to the development of a sense of distrust towards others,²⁰⁰ a factor which may make it difficult for a criminal defendant to convince jurors of the sincerity of a defense.

Another disturbing consequence of television's portrayal of crime is its tendency to undermine the rights of criminal defendants. Heavy television viewers are more likely to think that a person who has been arrested of a crime is guilty of something.²⁰¹ Several studies have demonstrated that, on the whole, viewing television crime shows discourages support for civil liberties.²⁰² Carlson concluded that "[while] crime show viewing does not explain a large proportion of the variance in attitudes toward civil liberties, . . . its contribution is significant and greater than many other factors which presumably are important in the socialization of democratic values such as social status, achievement in school, and family structure."²⁰³

Findings such as these support Gerbner's conclusion that "television profoundly affects the social and political climate and the institutional setting in which courts work."²⁰⁴ While most empirical studies have focused on crime drama viewing, the viewing of news programs, "reality" shows, and televised trials can only exacerbate the effect. Because the media tends to report only the most dramatic and spectacular crimes, news (and pseudo-news) coverage of criminal trials can only "warp[] public understanding of the judicial process."²⁰⁵

Furthermore, the depiction of crime on television encourages the widespread belief that Blacks and other people of color are the source of crime.²⁰⁶ Adeno Addis makes this point about the effects of the "media's daily narrative about crime":

The media paints a picture of the black criminal threatening the innocence of white America. Indeed, "crime" has virtually become a metaphor to describe young black men. Not only does the mainstream media present news stories about African Americans that "are more often negative, focusing on crime or other negative attributes than are stories

199. CARLSON, *supra* note 135, at 171. See Gerbner et al., *Cultural Indicators: Violence Profile No. 9*, 28 J. COMM. 176, 196 (Summer 1978) (heavy viewers are more likely to fear walking alone at night).

200. CARLSON, *supra* note 135, at 172.

201. Rice, *supra* note 143, at 44-45.

202. CARLSON, *supra* note 135, at 149; Gerbner et al., *supra* note 131, at 107, 126; Haney & Manzolati, *supra* note 147.

203. CARLSON, *supra* note 135, at 149.

204. Gerbner, *supra* note 134, at 417.

205. *Id.*

206. See GRABER, *supra* note 142, at 55 (1977 survey identified Blacks or other minority races as cause of crime); Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994) (citing 1990 University of Chicago study which found that over 56% of Americans believe Blacks to be more violence prone than others).

about whites," but also quite often the media, especially television, uses the picture of young black men to illustrate a point about the pervasiveness of crime and drug abuse in the society.²⁰⁷

Television's linkage of crime with race may lessen any public concern over racial abuses in the criminal justice system,²⁰⁸ and make it more difficult for people of color to receive a fair trial.²⁰⁹

Consequently, all television's offerings having to do with crime, whether designed for purposes of entertainment or information, are both creatures and creators of the consensus. Operating through the consensus, television contributes to the "exploitation of popular prejudices and the cultivation of public support for the suppression of threats and challenges to the social order."²¹⁰ Television works, then, to extend hegemony and to create a populace that is more respectful of authority and power.²¹¹ Thus, heavy television viewers, while subject to varying ideological influences, tend to take unmistakably conservative positions on issues.²¹² Insofar as crime is concerned, television viewing "can . . . be expected to contribute to receptivity to repressive measures and to apparently simple, tough, hard-line posturings and 'solutions.'" ²¹³

207. Adeno Addis, *Recycling in Hell*, 67 TUL. L. REV. 2253, 2263 (1993) (citations omitted); see also Jane W. Gibson-Carpenter & James E. Carpenter, *Race, Poverty, and Justice: Looking Where the Streetlight Shines*, 3-SPG KAN. J.L. & PUB. POL'Y 99, 106 (1994).

208. See MELVIN P. SIKES, *THE ADMINISTRATION OF INJUSTICE* 22-23 (1975) (arguing that in the criminal justice system, and especially in the area of police community relations, the "unequal protection of minorities is . . . to be accepted and even expected"); see also ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 50, 64 (1992) (describing how white conservatives, and in more complex ways, white liberals as well, "tend to disclaim responsibility for issues and tensions associated with race"); cf. Adeno Addis, "Hell Man, They Did Invent Us": *The Mass Media, Law, and African Americans*, 41 BUFF. L. REV. 523, 554-55 (1993) (using incident of racial violence to demonstrate how "white America . . . often acts in response to the image of African Americans constructed in large measure by the media").

209. See Nunn, *supra* note 1, at 107-10 (describing ways that juror racial bias can result in unfair conviction); Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TUL. L. REV. 1739, 1760-66 (1993) (describing frequent use of blatant and subtle racial imagery in criminal cases and suggesting that such appeals to racism survive because they are often successful).

210. Gerbner, *supra* note 134, at 421; see also Michael Corbett, *Public Support for 'Law and Order': Interrelationships with System Affirmation and Attitudes Toward Minorities*, 19 CRIMINOLOGY 328, 339 (1981) (examining the relationship between system affirmation, intolerance for minorities, and advocacy of a strong role for police).

211. Based on his survey of over 600 elementary and high school students, Carlson determined that heavy crime show viewing contributed to support of the legal system and compliance to authority. CARLSON, *supra* note 135, at 134; see also Knight & Dean, *supra* note 174, at 146 ("Ideology 'works' hegemonically to legitimize and universalize as common sense the interests, perspectives, and practices of the dominant, such that alternatives challenging these dominant views tend to be expelled from normal reality as dangerous, bizarre, comical, and so on.").

212. Gerbner et al., *supra* note 131, at 126. While television does have a moderating influence on ideological extremes, on the whole, the television mainstream tends toward conservatism. *Id.* at 120-21.

213. *Id.* at 107; Gerbner, *supra* note 134, at 422.

Television draws its images from a cultural reservoir stocked by and large with images of dangerous criminals, shady defense attorneys, and virtuous prosecutors and police. What television takes from the cultural reservoir, it also replenishes through the process of signification. Thus, as television is influenced by the consensus, television also influences it. Television teaches that a particular type of social order is appropriate and normal, a social order that is conservative, dominant, racially-biased, and rigid.²¹⁴ Television represents a social order that excludes and vilifies not only criminals, but also those who are merely charged with crime. Television teaches us that these people are already guilty. They have only yet to be provided with the formality of a trial.

In the next section I discuss how the images of crime and justice represented on television, structured as they are in conservative notions of law and order, are replicated and reinforced in the criminal trial.

V. THE TRIAL AS TEXT

The trial is a highly ritualized formal narrative that is the culmination of the adversarial process. Like the image of the criminal, the trial too is socially constructed. Our ideas of what rights are fundamental, what procedures are fair, indeed the very notion of fairness itself, all spring from the same cultural reservoir as do the images that are represented on television. The consensus influences and is influenced by the trial just as it influences and is influenced by television. In a word, the trial is a "text."²¹⁵

The ostensible purpose of the trial is to determine the guilt or innocence of

214. While this conclusion vastly oversimplifies the complexity of television's messages, it is fair to say that television is conservative insofar as civil liberties and opposition to authority are concerned. See Gerbner et al., *supra* note 131, at 120-21 (noting that television's mainstream views shift political attitudes to conservatism). Of course, lessons taught are not necessarily lessons learned. This is particularly true when messages are reproduced through a semiotic process. See *supra* Part II. Although popular culture leaves room for counter-messages, the prevalence of law and order ideology would seem to suggest that the lessons taught by television are indeed being learned.

215. The text is the medium through which meaning is produced and where meaning is signified. By text, I mean more than just a document or object. The text is a *process*. "Texts generate, or are capable of generating, multiple (and ultimately infinite) readings and interpretations." Eco, *supra* note 52, at 24. According to Eco, "[a] text is not simply a communicational apparatus. It is a device which questions the previous signifying systems, often renews them, and sometimes destroys them." *Id.* at 25. This sense of the text is encapsulated in the following quotation from Hal Foster:

I use [the term] . . . "work" to suggest an aesthetic, symbolic whole sealed by an origin (i.e., the author), and an end (i.e., a represented reality or transcendent meaning), and "text" to suggest an a-aesthetic, "multidimensional space in which a variety of writings, none of them original, blend and clash." The difference between the two rests finally on this: for the work the sign is a stable unit of signifier and signified (with the referent assured or, in abstraction, bracketed), whereas the text reflects on the contemporary dissolution of the sign and on the released play of the signifiers.

HAL FOSTER, RECODINGS: ART, SPECTACLE, CULTURAL POLITICS 129 (1985) (citing Roland Barthes, *The Death of the Author*, in *IMAGE/MUSIC/TEXT* (Stephan Heath trans., 1977)).

the accused. This determination is reached by a jury made up of lay persons drawn from the community and is based on highly abstracted and formulaic presentations of evidence made by the state and the accused.²¹⁶ From these highly abstracted presentations it is the job of the jury to ascertain the facts. Indeed, there are no facts before evidence is presented to the jury; it is the job of the jury to find them.²¹⁷

The trial, and as a result the jury's verdict, function "as if *legal proof*, which is largely a matter of formal procedure, and *knowledge*, which is largely a matter of the substance of the facts, are the same thing."²¹⁸ Consequently, the verdict is treated as realistic: not as just one version of the truth, but as "the whole truth."²¹⁹ But legal proof is not knowledge and verdicts can never embrace the whole truth.²²⁰ The realism of the verdict is, at best, "belief" masquerading as "truth." "As realism, the [trial] does not embody real social relationships but cultural mythologies about those relationships."²²¹ The verdict of the trial is as constructed as the trial itself.²²²

The consensus on crime reaches its ultimate expression in the device of the trial. The trial is where society both assesses and responds to behavior it marks as deviant. The cultural mythologies that work to produce the verdict are forged in an environment that can best be described as a "metaphorical morality play."²²³ As a morality play, the trial has its own stage or setting,

216. See Goodpaster, *supra* note 7, at 120 ("The parties . . . control and manage the presentation of evidence—the materials from which 'facts' are constructed.").

217. See *United States v. White Horse*, 807 F.2d 1426, 1430 (8th Cir. 1986) (jury determines fact while role of judge is to instruct jury on law); *United States v. Johnson*, 718 F.2d 1317, 1325 (5th Cir. 1983) (same); *United States v. Berrigan*, 482 F.2d 171, 175 (3d Cir. 1973) (same).

218. ERICSON ET AL., *supra* note 180, at 10 (emphasis supplied).

219. This belief helps explain why judges often justify harsh sentences on the basis that juries have found a particular set of facts. See Comment, 66 YALE L.J. 204, 211-19 (1966).

220. See CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 173 (1983) (claiming legal facts are closely edited, socially constructed versions of reality and that laws themselves are "but part of a distinctive manner of imagining the real").

221. ERICSON ET AL., *supra* note 180, at 10.

222. See Goodpaster, *supra* note 7, at 133:

Jury verdicts are a composite of influenced "fact" determinations and associated value judgments. These determinations and judgments are mediated by the jurors' own conceptions of how the world and people operate and are filtered through the mental templates that the law imposes on the interpretation of conduct. In this sense, there is no truth regarding criminal liability *independent* of the truth determined at trial, and trials are more truth-producing than truth-finding events. In other words, trials produce what we are willing to accept as truth.

223. This term is mine. Thurman Arnold also described a trial as a morality play. In his words:

Trials are like the miracle or morality plays of ancient times. They dramatically present the conflicting moral values of a community in a way that could not be done by logical formalization. Civil trials perform this function as well as do criminal trials, but the more important emotional impact upon a society occurs in a criminal trial.

Thurman Arnold, *The Criminal Trial as a Symbol of Public Morality*, in CRIMINAL JUSTICE IN OUR TIME 143-44 (A.E. Dick Howard ed., 1965); see also ARNOLD, *supra* note 90, at 127.

players, and conventions as to how the script is to unfold.²²⁴

As in any morality play, the actors in the criminal trial play symbolic roles.²²⁵ The adversarial posture of the parties symbolizes the clash of good and evil. But in the allegory that is the trial, good is supposed to triumph over evil. The adversary nature of the criminal trial must be reexamined in this light. If good is to win over evil, good must be more powerful than evil. For the trial to play out its symbolic mission, the prosecution and defense cannot be two evenly matched adversaries. The prosecution must have the upper hand. The criminal trial can only be adversarial in the sense that the prosecution and defense oppose each other as the symbolic representatives of good and evil.

Here we have a departure from the typical notion of what the adversarial process is all about. The common view depicts the adversarial process as a contest waged between two opponents who have a roughly equal chance of convincing the fact finder that their version of events is true. While the trial does proceed in this way on its surface, at a deeper level, the notion of "trial as morality play" works at cross purposes to the "trial as fair contest" ideal.

In the remaining sections of this Part, I review those attributes of the trial that make it resemble a morality play. My analysis of the setting, participants, and staging of the trial²²⁶ reveal the working of the same ideology that pervades popular culture and that is made manifest in television's representation of crime.

A. The Setting

Trials typically take place in buildings with imposing architectural designs. It is not uncommon for courthouses to evoke associations with glorious empires of the past.²²⁷ The courthouse is represented as a place where justice

224. Goodpaster makes this observation as well. Goodpaster, *supra* note 7, at 148. He compares the courtroom to a church, and goes on to examine what he calls the "agonic resonances" of a trial, or those features that most closely resemble drama or spectacle and that can be used to invoke a trial's ritualistic functions. *Id.* at 146-52. While Goodpaster makes some of the same observations I do here, his ultimate view of the criminal trial is laudatory. In his view, "American beliefs and attitudes . . . are structurally and symbolically realized in criminal trials through the defendant's trial rights." Goodpaster accepts these trial rights uncritically. *Id.* at 153; see also Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theatre*, 28 STAN. L. REV. 81 (1975) (describing theatrical and ritualistic nature of trial as a positive aspect of the legal system).

225. Ball notes that "the *dramatis personae* of morality plays were symbols or personified abstractions like Everyman, Goods, Fellowship, and Beauty." Ball, *supra* note 224, at 98. However, Ball rejects any comparison of trials to morality plays as such, because he believes that trials, unlike morality plays, do not always reach the same conclusion and are not primarily didactic in purpose. *Id.*

226. Much of the following description of the trial behavior, perceptions, demeanor, dress, etc. of judges, prosecutors, and public defenders is based on my experience as a trial attorney over a five year period in two separate jurisdictions.

227. See CHARLES T. GOODSSELL, *THE SOCIAL MEANING OF CIVIC SPACE: STUDYING POLITICAL*

in the philosophical sense is done. To underscore this projection, quotations from great moralists, esteemed jurists, or classical works of morality or law are frequently inscribed on courthouse walls.

The courtroom, where the trial actually takes place, is a familiar venue to most as a result of its frequent appearance on screen and description in print. A courtroom is formal space. Stately and ceremonial, the design of a courtroom is intended to provide a dignified setting for the trial. Adding to the courtroom's sense of decorum are emblems and symbols of state authority and power.²²⁸ Through items such as these, the courtroom and all that occurs in it are stamped with the mark of officialdom, evoking all the prestige and supremacy of the state.²²⁹

The typical courtroom shares much in common with a playhouse, further accentuating the trial's relationship to theater. The well of the courtroom serves as the stage. On this stage are the props around which the drama will revolve: tables and chairs for the prosecution and defense and, often, a podium.

In many courtrooms, the table closest to the jury is reserved for the prosecution.²³⁰ The judge sits on a podium overlooking the well of the court, as if to direct the drama that is to unfold on the stage below. The immediate audience for the story is the jury, which is seated in a bleacher-like jury box to the side of the well of the court. More removed is an area of auditorium-style seating for the general public. These seats are normally separated from the rest of the courtroom by a barrier or "bar," which emphasizes to those that sit behind it that they are spectators, not participants.

The setting of the trial not only suggests the presence of theater, but it also sets up a commanding "environmental resonance," or atmosphere, of authority and power.²³¹ Within this space the state is on home turf. All others are

AUTHORITY THROUGH ARCHITECTURE 20-24 (1988) (noting how American public buildings were consciously patterned after classical or European grand styles).

228. These include items such as the state and national flags, the court or state seal, and the judge's gavel. See Peter Gabel & Paul Harris, *Building Power & Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 372 (1982-83) (describing symbols of ritual and authoritarianism).

229. See *id.* (arguing that "[w]hen disseminated throughout the culture (through, for example, the schools and the media), these symbols help to generate a belief not only in the authority of the law, but in authority in general").

230. This arrangement, often justified as a matter of security, can be interpreted to enhance the image of the prosecution at the expense of the defense. See Jeffrey S. Wolfe, *The Effect of Location in Courtroom on Jury Perception of Lawyer Performance*, 21 PEPPERDINE L. REV. 731, 769-71 (1994) (study finding jurors consistently rated attorneys who were located in greater proximity to the jury higher on such factors as ability to communicate and rapport with jury). It gives the jury the opportunity to become more intimate with the prosecution and underscores the perception of the defendant as outcast. On the other hand, it may be to the defendant's benefit that the jury not scrutinize him too closely.

231. See Ball, *supra* note 224, at 83 (noting that the "design and appointment of the courtroom . . . create a dramatic aura").

made to feel uncomfortable and out of place. The defendant is not the beneficiary of the courtroom's formality and sterility. Instead, the defendant stands out as an object to be regarded and examined. The very structure and design of the courtroom works to legitimate the prosecution and delegitimize the defense.²³²

B. *The Players*

There are many participants in a trial.²³³ However, the defining characters in any criminal trial are the judge, the prosecutor, and the defense attorney or public defender.²³⁴ They are the ones who will ultimately determine how the story is told.

1. *The Judge*

The judge is the representative of the state's judicial power. The judge serves as the ultimate legal authority, decisionmaker, and referee over the adversarial contest that takes place during the trial.²³⁵ During the course of the trial, the judge is responsible for governing the conduct of the trial. In this sense she is like the director of a play.²³⁶ At the conclusion of the trial, the

232. See RICHEY MANN, *supra* note 137, at 215 (discussing how the ecology of the courtroom works against the defense). Referring to a 1979 study of trial court structure, Richey Mann points out five ways that the arrangement of the courtroom "weights in favor of the prosecution" and suggests that "the adversarial process may be contaminated from the start by the physical structure and social organization of the courtroom." *Id.* (citing W.T. Austin, *Portrait of a Courtroom: Social and Ecological Impressions of the Adversary Process* (1979) (paper presented at the American Society of Criminologists annual meeting)). The five critical areas are:

- (1) advantageous proximity to the jury; (2) location in a favorable direction of information flow; (3) greater strength in the number of assisting persons, including police officers and other criminal justice agents; (4) more "familiarity with the turf"; and (5) more opportunity to prompt or exert control over witnesses.

Id. (footnote omitted).

233. Bailiffs, clerks, stenographers, and interpreters are just some of the bureaucratic functionaries that may have some role to play in a trial. In addition, anywhere from a few to hundreds of witnesses may appear to testify in a given trial.

234. I omit here the defendant. Though the defendant is an important character (in many ways *the* central character), as a practical matter, the defendant has little input into how his story is presented to the jury. Even if the defendant testifies, his testimony will usually be crafted by the defense attorney.

235. The judge resolves evidentiary issues and points of substantive law and determines how the jury will ultimately be instructed. The judge may serve as the finder of fact. Even in cases that are tried before a jury, the judge may serve as fact finder for a variety of collateral and preliminary matters such as motions to suppress evidence, motions in limine, and discovery claims. It is the judge that determines the relevancy of testimony and in this vein determines who testifies and the subject of their testimony.

236. Thus, the judge controls how long each witness testifies and the manner in which witnesses testify. The judge also polices the courtroom to make sure that each witness, litigant, and litigator complies with accepted standards of decorum and repose.

judge instructs the jury as to the law they should apply during their deliberations.²³⁷

The judge is treated with utmost dignity and respect.²³⁸ Her demeanor is authoritarian and aristocratic.²³⁹ Like any other autocrat, the judge commands an entourage of aides and assistants.²⁴⁰ Indeed, the judge personifies hierarchical power.²⁴¹ The judge's authority comes from a number of ancient and well-entrenched sources:²⁴² the prestige and prominence of the clan leader (from whom the role of the judge evolved);²⁴³ the special authority traditionally afforded to the landed gentry and/or aristocracy in European cultures;²⁴⁴ the might and supremacy of the state; and the stature and distinction of the judge's age and social status. The judge carries all of this elite-based power and privilege into the courtroom to aid her in her functions. Of the trial's three key participants, the judge is by far the most

237. This gives the judge tremendous power to sway the outcome of a verdict, as does the judge's attitude and demeanor toward the litigants. See ANNE STRICK, *INJUSTICE FOR ALL: HOW OUR ADVERSARY SYSTEM OF LAW VICTIMIZES US AND SUBVERTS JUSTICE* 196 (1978) (describing how judge may subtly influence a jury through instructions, comments and general attitude); JAMES LERAY LEGRANDE & BARBARA LEGRAND, *THE BASIC PROCESSES OF CRIMINAL JUSTICE* 161 (2d ed. 1984) (pointing out how judge may influence jury by "general conduct, facial expressions, and the inflections and deflection of voice").

238. See STRICK, *supra* note 237, at 152 (noting obsequious behavior shown to the bench, such as requesting permission to approach); Gresham M. Sikes, *Cases, Courts, and Congestion*, in *LAW IN CULTURE AND SOCIETY* 331-32 (Laura Nader ed., 1969) (describing judges as "lord[s] of [a] quasi-feudal system," whose prestige places them "near the top of the occupational hierarchy").

239. One judicial observer described the judge's courtroom presence in the following terms:

The judge is clearly the most imposing and intimidating figure in the courtroom, particularly in his relationship to the other members of his workgroup [prosecutors, defenders, clerks and staff]. The style of judicial interaction can take various forms from aloofness to extreme gregariousness, but the judge is clearly the one who sets the tone of the relationship.

PAUL B. WICE, *CHAOS IN THE COURTHOUSE: THE INNER WORKINGS OF THE URBAN CRIMINAL COURTS* 49 (1985); see also JOHN PAUL RYAN ET AL., *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE* 211 (1980) (describing Los Angeles trial judges as an aloof, elite group who see themselves as "separate from—and perhaps better than—the world of practicing lawyers").

240. A trial judge's staff typically includes a law clerk to aid with legal research, a court clerk to handle bureaucratic matters, a secretary for clerical support, and a bailiff or sheriff's deputy for security. See RYAN ET AL., *supra* note 239, at 102.

241. See WICE, *supra* note 239, at 49 ("Each judge resembles the patriarchal head of the village or ruling family, possessing virtually dictatorial powers over all who enter his domain. . . . Regardless of the status or prominence of any visitor to the courtroom, once within the judge's domain, unquestioned obedience is demanded.").

242. See generally STRICK, *supra* note 237, at 141-45, 151-52 (describing authority of judge as deriving from divine law); cf. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (1969) (reporting that early English lawsuits were decided by reference to supernatural forces).

243. Cf. Henry Spelman, *Of the Ancient Government of England*, in *THE ENGLISH WORKS OF SIR HENRY SPELMAN* 74 (1723) (noting that in ancient times Britons "judged all Controversies by their Priests the Druides [sic]").

244. See generally ROBERT S. LOPEZ, *THE BIRTH OF EUROPE* 161 (1967) (portraying the dispensing of "low and high justice" as one of the rights and responsibilities of the feudal lord).

prestigious.²⁴⁵

The judge can use her power and prestige to influence the course of the adversarial process.²⁴⁶ Akin to a sports umpire, the judge is in a position to ensure a fair contest or throw the game in favor of one party or another.²⁴⁷ As creatures of the consensus, judges are more likely than not to favor the prosecution.²⁴⁸ Although the trial is itself weighted in favor of the prosecution, the judge polices this imbalance and works to insure that the outcome of the trial comports with commonsense notions of justice—i.e., that the symbolic function of the morality play is realized.

2. *The Prosecutor*

The prosecutor represents the state as a legal entity before the court and is the proponent of the state's case against the defendant. Prior to trial, the prosecutor decides what charges to bring and what penalties to seek. The prosecutor's power in this regard is enormous; although the decision to charge is subject to review in most states by grand jury or preliminary hearing, the meaningfulness of this review is limited since "a prosecutor seldom has

245. See JAMES EISENSTEIN ET AL., *THE CONTOURS OF JUSTICE: COMMUNITIES AND THEIR COURTS* 37 (1988) ("Judges clearly rank at the top of the hierarchy of status in court communities.").

246. Judges cannot determine the outcome of cases at will, but the statements of judges are bound to receive greater weight from the jury than are statements made by any other person in the courtroom.

247. See *supra* note 237.

248. One defendant, when asked to define the job of the judge, responded: "The judge's job is to sit on his ass and do what the prosecutor tells him to do." GEORGE F. COLE, *THE AMERICAN SYSTEM OF CRIMINAL JUSTICE* 421 (5th ed. 1989) (quoting unidentified prisoner). While this comment may be more notable for its cynicism than for its accuracy, it does contain a grain of truth. The author of a nationwide survey of trial level courts concluded that "most . . . judges within the criminal courts have prosecutorial inclinations" and may be criticized for being too "hard" on defendants. WICE, *supra* note 239, at 20.

The judiciary's pro-prosecution bias is not surprising. As I discuss below, the prosecution represents the very state that the judge is pledged to uphold. In addition, it is likely that the judge shares the same notions of order that are central to the consensus. Otherwise, the judge would not have successfully negotiated the political process that is necessary to become a judge. (By "political process" I mean forging the right connections and projecting the appropriate image that would allow one to be perceived as judicial material, not just the confirmation process.) See JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS* 111 (1977) (discussing how judicial recruitment process "produced few maverick judges" and how judicial attitudes were "conventional and probably on the conservative side"). Finally, it should be noted that far more former prosecutors are appointed to the bench than are former public defenders. Wice reports that "[t]he most common legal experience among judges [surveyed in his 15 city study], aside from the general category of working in a law firm, was a former position with the local district attorney's office." WICE, *supra* note 239, at 96. According to Wice, 25% of the trial court judges he surveyed entered the bench directly from the prosecutor's office and almost one-third had some prior training as a prosecutor. *Id.* In Philadelphia, 50% of the sample had prior experience as prosecutors and only 15% had served as public defenders. *Id.* at 110. Those judges that do not come from the prosecutorial ranks typically come from other generally conservative areas of legal practice, such as large downtown law firms. *Id.* at 97.

any difficulty in making a prima facie case against a defendant.”²⁴⁹ When trial commences, the prosecutor is responsible for presenting the government’s case-in-chief. That is, the prosecutor tells a story that he urges the jury to accept as the preferred version of the facts.²⁵⁰

After judges, prosecutors are the most important state government officials in the criminal justice system.²⁵¹ Prosecutors have prestige not only because they are attorneys but also because they are representatives of the state. Prosecutors trade on the authority of the state. They are cautioned in trial manuals not to refer to themselves as “the prosecution” but rather as “the state,” “the government,” or, in the most extreme version of this practice, “the people.”²⁵² Thus, to the eyes and ears of the jury, it is “the state” that rests, “the government” that alleges, or “the people” that object. The prosecutor, then, is not just some employee of the government; the prosecutor is the alter ego of the state—the government personified. To the extent that the state engenders authority, power, and respect, so too then does the prosecutor.

Prosecutors consciously position themselves in the mainstream. On the whole, prosecutors are cleancut and wholesome, representing the image of efficiency and professionalism.²⁵³ The image and appearance of the prosecutor is not happenstance. It is partially a function of seeking to reflect majoritarianism and to avoid identification with any “special interest group.” But the prosecutor’s grooming, dress, and demeanor are also intended to demonstrate an identification with generally conservative (or “moderate”)

249. PRESIDENT’S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 11 (1967). In fact, as the Commission points out:

The prosecutor wields almost undisputed sway over the pretrial progress of most cases. He decides whether to press a case or to drop it. He determines the specific charge against a defendant. When the charge is reduced, as it is in as many as two-thirds of all cases in some cities, the prosecutor is usually the official who reduces it.

Id.

250. The prosecutor weaves this tale from the testimony of witnesses, the presentation of physical evidence, and argument to the jury about the significance of the evidence. The prosecutor also works to defend the integrity of his version of events by vigorously cross examining defense witnesses. This is done to undermine defense witnesses’ credibility by showing inconsistencies in their testimonies or simply by demonstrating the prosecutor’s disdain for them.

251. The prosecutor also shapes the contours of the government’s case through the legal arguments that he or she raises on the state’s behalf. In a large prosecution office, these arguments may be determined by superior officials or by established office policy, but the individual skill and expertise of the trial prosecutor will have significant impact on the way that legal rulings are ultimately made by the court. In this way, combined with the prosecution’s ability to determine who and when to prosecute, the prosecutor perhaps has more impact on how laws are interpreted than any other government official.

252. *E.g.*, IRVING GOLDSTEIN & FRED LANE, 1 *GOLDSTEIN TRIAL TECHNIQUE* § 10.59 (2d ed. 1969).

253. Most prosecuting attorneys groom and dress conservatively. Male prosecutors do not adorn themselves in flashy ties and ponytails. Female prosecutors likewise dress in business-like suits and dresses. Personal observations of the Author.

political ideology. The image that the prosecutor projects embraces and endorses the mainstream, and thereby, embraces and endorses hierarchy and power.

As the judge can use the authority and prestige of her office to influence the conduct and outcome of a trial, so too can the prosecutor. By determining whom to charge with crime, prosecutors engage in the labelling function that crime in its social role permits. More importantly, prosecutors draw on the moral superiority that is theirs as representatives of the consensus. Their role as definers of crime allows them to speak to the jury as one in a shared community. This permits a prosecutor to position himself and the jury as “us” and the defendant and his attorney as “them.”

3. *The Public Defender*

The public defender is most often a state or county employee retained or appointed for the purpose of providing free legal assistance to criminally charged indigents. Public defenders act as ombudsmen for their clients as they confront a hostile criminal justice system. Public defenders must employ a variety of skills to advance their clients' interests, including negotiation, bureaucratic maneuvering, and legal challenge. Although it is the most visible, representing his clients at trial is only one aspect of the public defender's job.²⁵⁴ It is, however, the most important in terms of the allegorical nature of the criminal justice process.

At trial, the public defender directly opposes the prosecutor. The public defender works to counter the government's case by offering the jury an alternative story, one that may conflict with the government's version of events, or one that may agree with the state's account but raises an affirmative defense. But, no matter which approach the public defender takes, the public defender is hampered by the restrictive discourse regarding crime that is produced by the consensus.

While public defenders have the prestige of being members of the bar—they are respected to that degree by court officials, witnesses, and laypeople—that prestige is tempered by two factors: they represent “criminals,” and they are the opponents of the state.²⁵⁵ All defense attorneys oppose the state and thus oppose, in the minds of the public, all that the state stands for—security,

254. In addition to providing representation at trial, public defenders can assist their clients in a variety of other ways. Prior to trial, the public defender may intervene on the defendant's behalf to obtain bail, reduce charges, or have charges dropped. *See generally* CRIMINAL PRACTICE INSTITUTE, 1 TRIAL MANUAL (1992) The public defender also provides representation at any pretrial proceedings that may be involved in the case. *Id.* He or she may negotiate with either the prosecution or the court to reach a plea bargain agreement, and, in the event of a plea, the public defender works to ensure that as light a sentence as possible is imposed. *Id.*

255. I discuss these factors in greater detail in the next section. *See infra* Part VI.

order, justice, and consensus. Retained attorneys may compensate for this negative identification by the positive force of their own public image or that of their comparatively well-to-do clients. The public defender cannot. Furthermore, the public defender's clients are the epitome of the class of individuals that the public is convinced is the cause of crime. Public defender clients are uniformly poor, mostly Black, and routinely perceived as social outcasts.

Unlike the case with prosecutors, it is not unusual to find flamboyant and eccentric personalities among the ranks of public defenders. Many take pride in maintaining an appearance that is out of the ordinary and a little risky.²⁵⁶ Rather than embrace the status quo, the public defender purports to stand somewhere outside of the mainstream. The public defender projects the image of the anti-establishmentarian rebel more so than that of the efficient and professional public servant.

C. Staging the Trial

The trial begins, appropriately enough, with opening statements from the prosecution and the defense. In these, the parties outline their respective cases to the jury by summarizing what they expect the evidence to be. Through their opening statements, the attorneys inform the jury of their theory of the case and explain how they expect to prove it. Although it is important that the jury receive a "roadmap" of what to expect when the evidentiary portion of the trial commences, it is equally, if not more, important for the attorneys to use this opportunity to establish rapport with the jurors.

"First impressions," so the saying goes, "are lasting impressions." As a result, it is significant that the prosecution gives its opening statement first. The prosecution gets the first opportunity to make a lasting impression in the minds of the jurors. The prosecution's theory of the case and "take" on the evidence will be the yardstick against which all others' will be measured. After all, the government can make a compelling case. The prosecutor represents the state—the state that we all expect to protect us from crime. And it is the state that accuses the defendant, the state that tells us all of its resources have identified this defendant as the perpetrator, and the state that tells us, in its disciplined and professional way, how it will prove the defendant's guilt. From the very beginning of the trial, the government is able to bring into play all of the myths and symbolism that the jurors have already learned about crime. The defendant, especially, appears dangerous and antisocial. Thus, the government's accusations seem reasonable, even com-

256. While public defenders wear dresses or suits and ties in the courtroom, their attire tends to be a little bit nattier, funkier, or trendier than that worn by their prosecution counterparts. Personal observation of the Author.

mon-sensical.²⁵⁷

The prosecution starts with much more legitimacy and credibility than does the defense.²⁵⁸ To the jury, every word the prosecution utters is suspended in a web of meaning that has been spun and re-spun every day of their lives. Every teacher's mention of "Officer Friendly," every parent's caution not to trust strangers, every book, every television show, every newspaper report of crime, collectively work to suggest a guilty defendant and an earnest prosecutor committed to justice.²⁵⁹

The prosecution draws on its credibility to strengthen and mobilize the consensus. The jury can be addressed as a community of law-abiding citizens who share, along with the prosecution, a common interest in eradicating crime. This legitimates the prosecution's narrative and invests it with a persuasive power that the defense cannot muster. As a consequence, "guilt" and "innocence" are determined more by the definitional work of the consensus than by the arguments of either the prosecution or the defense.²⁶⁰

The public defender has a tremendous hurdle to overcome, even before he or she utters a word about the defense's case to the jury. The public defender must work to overcome the jurors' natural biases and suspicions against his client, which have just been reinforced by the prosecutor's opening remarks. Somehow, the public defender must counter the prosecution's advantage and establish a rapport with the jurors. The first task of the public defender is to quickly raise some doubt in the minds of the jurors about the tightness of the government's case. Then, the public defender must go further and attack the jury's tendency to stereotype his or her client as a "criminal." The public defender must personalize the defendant, establish him or her as a human being, separate him from the demonic image that the jurors carry ready-made in their heads. This can be done, and it often is, but it is a decidedly

257. This is especially true if the defendant is Black or of some other non-white racial group. In such cases the prosecutor not only represents the state but also white privilege and power. It does not matter if the prosecutor is herself a member of a non-white racial group. Before a predominately white jury, the prosecutor is seen as the one who will use the resources of the state to protect the status quo of racial hierarchy (us) from those who need to be controlled or prevented from getting revenge (them).

258. David Luban points out that the prosecution's case gains legitimacy from two sources: (1) the inherent legitimacy of the state; and (2) the procedural legitimacy the case acquires as it works its way through succeeding layers of review. David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1740-43 (1993). As to procedural legitimacy, or what Luban calls "legitimation through process," Luban argues that trial jurors will assume there must be some substance to the government's case or it would not have made it as far along in the process as it did. *Id.* at 1741.

259. Although the image of the unjustly accused person is also part of the cultural lexicon, it is overshadowed by the ideological force of the signification of crime and the constant parade of guilty defendants represented in the popular media. *See supra* Part III.A.

260. *See* Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39, 49-51 (1994) (arguing that criminal cases must follow tried and true "schemata" and "scripts" in order to make sense to jurors).

uphill battle. Despite the supposed level playing field, it is the government that claims the jurors' allegiance and has every opportunity to keep it.

After the opening statements, the trial proceeds to the presentation of evidence stage. As with opening statements, the prosecutor goes first. The prosecutor is not content to just let his or her witnesses tell their stories. Like any trial attorney, the prosecutor meticulously prepares the witnesses he or she intends to call. What is recounted at trial is not "reality," but rather a rigidly structured narrative, the telling of which is accomplished through question and answer.

By the time a witness testifies at trial, every question and every answer has been crafted and practiced to bring the utmost advantage to the prosecution. The skillful prosecutor uses this opportunity to rework each witness's testimony so it "fits" the expectations created by the consensus. For the prosecution this is a relatively easy task. The fit is natural because jurors have already been educated to place each element of the trial, whether symbolic or real, into its proper place.

Not only is the content of a witness's testimony scrutinized, but much energy is expended on its presentation as well. Witnesses are primed to look good and to be believable. It is important that witnesses appear sensible and sympathetic. Attorneys intuitively know that aesthetic factors such as these greatly influence a juror's decisions at trial.²⁶¹ Prosecution witnesses are generally respectable police officers, doctors, ballistic and forensic experts, and average citizens.²⁶² A defense attorney attempting to cross examine witnesses such as these may find it difficult to undermine their credibility with the jury. This is especially true when the attorney is an anti-establishmentarian public defender, who lacks the authority of the prosecutor and represents a suspected criminal.

261. Several research surveys support this view. See, e.g., Francis C. Dane & Lawrence S. Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts*, in *THE PSYCHOLOGY OF THE COURTROOM* 83, 84-111 (Norbert L. Kerr & Robert M. Bray eds., 1982). It has been noted that:

[T]he jury often fails to give the benefit of the doubt in close cases, if it does not like the behavior of the defendant—such as use of offensive language or style of dress in court. These "little things" can and do make a difference. In the 1983 federal Brink's conspiracy case (not to be confused with New York State's Brink's cases tried the same year for armed robbery and murder), courtroom watchers believe that the behavior of one defendant in court—in particular, her falling asleep during the trial and badgering witnesses as they testified—helped the jury convict her.

PAULA DiPERNA, *JURIES ON TRIAL: FACES OF AMERICAN JUSTICE* 59 (1984). Results such as these are, in the words of jury researchers Valerie Hans and Neil Vidmar, "consistent with psychological research on interpersonal attraction which has demonstrated that we are attracted to people who are beautiful or who hold attitudes and beliefs that are similar to our own; and we are sometimes repelled by people who are ugly or dissimilar." VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 133 (1986).

262. A prosecutor does not want to call drug dealers and prostitutes as witnesses, and, when a prosecutor does, it is not uncommon for him or her to apologize to the jury for the quality of the prosecution's witnesses.

Notwithstanding the fact that the state has brought the charges and bears the burden of persuasion, permitting the prosecution to present its case first, like permitting the prosecution to deliver its opening statement first, allows the government to establish its story as *the* story. Within the context of the adversarial trial, the prosecution determines which account becomes the preferred version of events, a version which, once accepted as the status quo, can shape the remainder of the jury's deliberations and limit the way in which the defense can respond.²⁶³ If the jurors were to have any doubts about the importance of the evidence to be relied on by the state, the fact that it is presented by the prosecutor organizes it in a way that makes it more believable.

The prosecution's story is invariably conservative.²⁶⁴ In its telling, the prosecutor focuses on the "facts," which are presented as "objective" and "immutable."²⁶⁵ By so doing, the prosecutor shifts the contest from the courtroom to the consensus where the prosecution is more apt to win out. This strategy can be observed in the prosecution's constant appeal to the "common-sense" of the jurors.²⁶⁶ By asking the jurors to trust their common-sense, the prosecutor is telling them to rely on that which they already have accepted as true via the operation of the consensus.

263. On the other hand, the defendant would be at an even greater disadvantage if he or she were required to defend charges without knowing the nature of the government's allegations. Perhaps the way to resolve this dilemma would be to permit the defense to open first, thus allowing the defense to establish credibility with the jury, but then still require the prosecution to present its case first, allowing the defense to respond. Or, the defense could be given the choice of proceeding first with a defense, then getting rebuttal, or waiting to see what the government's case is, then responding. In any event, even if there is no other logical way to proceed with the trial, it should be acknowledged that the defendant is systematically disadvantaged when the prosecution is allowed to present its case first.

264. See generally Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992/1993) (reviewing the different narrative and rhetorical strategies employed by the prosecution and defense in a criminal trial). Professors Amsterdam and Hertz show how the prosecution tends to rely on a conventional, unimaginative narrative. *Id.* at 75-76. This type of story line allows the prosecution to trade on its authority as the presenter of "the facts" and prevents the construction of new versions of the truth from those facts. *Id.*

265. Richard Sherwin explains this preference for the "straightforward, logic-driven" story as a matter of pragmatics. As he states:

Prosecutors in criminal cases can be quite fond of the logico-scientific story form. It comports nicely with their burden of proof, namely to demonstrate guilt beyond a reasonable doubt. And it carries a solid psychological insight. Cast into a world of objective truth, where deductive and inductive knowledge dictates concrete results, jurors may more readily accept their fate: to confirm what has already occurred, and to apply the rules that govern legal outcomes in such situations. Passivity before truth and law, letting the judgment that must come come, is a classic (although by no means exclusive) formula for prosecutorial success.

Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 689 (1994) (footnote omitted).

266. Amsterdam & Hertz, *supra* note 264, at 88 & n.87; see also *id.* at 81 & n.67 (discussing how "prosecution defines the jury's role as bringing common sense to the task of judging evidence").

At the close of the prosecution's case the defense has two choices: the defense may present evidence of its own, or the defense may present no evidence and argue that the government failed to meet its burden of proof beyond a reasonable doubt.²⁶⁷ Typically, the defense will present evidence at the close of the prosecution's case. The defense can cast doubt on the government's case-in-chief by seeking to undermine the credibility of the government's witnesses or by attacking the prosecution's logic. On the other hand, the defense may bypass a direct assault on the validity of the government's version of events and, instead, attempt to establish an affirmative defense.²⁶⁸ Whatever course the defense chooses, it is of equal importance that the defense construct its case in a manner that will humanize, as well as generate sympathy for, the defendant.²⁶⁹ Given the way the defendant is constructed in popular culture, this is not an easy task.

Like the prosecution's case, the defense's case is also a highly stylized and structured narrative.²⁷⁰ Witnesses for the defense are also carefully selected, and their testimonies are painstakingly rehearsed. But this preparation does not endow defense witnesses with the kind of credibility that prosecution witnesses have by virtue of association. Instead of working with the consensus, the defense must work against it. While public defenders would like to present attractive and sympathetic witnesses, this rarely occurs. Public defenders are constrained by the class position of their clients.²⁷¹

Furthermore, police officials will not ordinarily be available to testify in favor of a criminal defendant, or they will be reluctant to do so. Rarely will

267. Deciding to present no evidence is always a risky decision. In the absence of a defense case, the jury is allowed to retire with a fresh and uncontested view of the government's highly selective evidence of guilt. In addition, the government, merely because it is the government, can create a powerful presumption of guilt in the minds of most jurors. The defense may concede this presumption of guilt by failing to present a case. Sometimes the defense chooses to present no evidence and argues reasonable doubt because they have no evidence to present. Juries often believe this is the case whether it is true or not. Consequently, deciding to rely on the government's failure to reach the standard of proof can actually enhance the credibility of the government's evidence rather than encourage the jury to question it.

268. An affirmative defense is one where the defendant offers new evidence and has the burden of proof. See MCCORMICK ON EVIDENCE 987-88 (Edward W. Cleary ed., 3d ed. 1984).

269. See F. LEE BAILEY & HENRY B. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS 460-63 (2d ed. 1985) (describing importance of and listing techniques for humanizing defendant).

270. In contrast to the prosecution's story, the defense narrative welcomes uncertainty. See Sherwin, *supra* note 265, at 689 (defense attorneys want jurors to "enter a world of possibility and openness"). Instead of "facts," the defense emphasizes contingencies or "reasonable doubts." The defense attorney must convince the jury that they have "an active role to play in the creation of fact." Amsterdam & Hertz, *supra* note 264, at 76. The rhetorical strategy of the public defender, then, is to "draw the jurors into an imaginative dialogue" without opening himself to the charge that he is asking the jury to speculate. *Id.*

271. See HANS & VIDMAR, *supra* note 261, at 134 (citing some studies finding socio-economic position of defendant affected jury verdict). However, Hans and Vidmar caution against overestimating the degree to which juries may be swayed by nonevidentiary factors, noting defendants are the victims of extralegal bias in only a small percentage of cases. *Id.* at 134, 136-37.

witnesses with equivalent high status, such as professionals and members of the clergy, be among a criminal defendant's social contacts. It is more likely that the defendant's witnesses will be like the defendant—poor people, working class people, racial minorities, or members of the defendant's family. If the defendant is involved in criminal activity (which is often the case in criminal trials), or has been so in the past, then the defendant's witnesses will more often than not be tainted with a criminal past. This makes it all the easier for the prosecutor to impeach their testimonies.

The most unattractive witness in the defendant's case may be the defendant himself. Of course, the defendant need not testify, but that is a course that is itself fraught with danger.²⁷² Jurors frequently wish to hear the defendant testify, if only to hear the defendant's denial of the charges from his own mouth. But whether the defendant testifies or not, the jury will silently evaluate his demeanor and appearance. The defendant, the jurors will often be reminded, looks the way they would expect a criminal to look. It is the congruence of the defendant's image with the socially constructed image of the criminal that ultimately convicts.²⁷³ If the defendant is a "criminal," then, so the reasoning goes, he cannot be trusted,²⁷⁴ his defense is merely a scheme to evade justice, and he is certainly capable of all that which the prosecution accuses him. Thus, as the defense presents its evidence, it must attend to the double duty of both contradicting the established, official story of the prosecution and lessening the negative socially constructed conceptions that jurors may already have of the defendant or of defendants in general.

At the close of the defendant's case the prosecution has an opportunity for rebuttal.²⁷⁵ Thus, the prosecution has the opportunity for the last word at the presentation of evidence stage, as it does when opening statements are delivered to the jury. While the opportunity for surrebuttal is available to the defense, as a practical matter it is rarely invoked.²⁷⁶

272. See *id.* at 144 ("many laypersons infer guilt when a defendant remains silent").

273. Cf. DiPERNA, *supra* note 261, at 59 (discussing influences on jurors' verdicts).

274. Cf. HANS & VIDMAR, *supra* note 261, at 143-44 (discussing perceptions of defendants' trustworthiness).

275. That is, the prosecution may introduce evidence at this stage to contradict new issues raised by the defense which went unaddressed in the prosecution's case-in-chief. The purpose of rebuttal is to prevent the defense from "sandbagging" the government by failing to raise an issue until it is too late for the government to respond. The defense is also given an opportunity to rebut the government's rebuttal case (this is called surrebuttal), and this alternating presentation of evidence can theoretically continue until no new issues are raised by either side. See generally Donald P. Lay, *Mapping the Trial-Order of Proof*, in 5 AM. JUR. TRIALS 505, 527 (1966) (distinguishing rebuttal from surrebuttal).

276. Only infrequently will prosecutors raise issues that are truly new during their rebuttal case, and, if they do, judges tend to resist defense efforts to present additional evidence on the ground that this would unnecessarily extend the length of the trial. A judge may rightly conclude that the defense had its opportunity to contradict the government's case during the main defense case.

The prosecution also gets the last word at the argument stage of the trial. At argument, the parties may give their opinions of the evidence and attempt to persuade the jury as to how it should vote. The usual procedure at closing is for the prosecution to go first, followed by the defense, leaving the prosecution an opportunity for rebuttal.²⁷⁷

Closing arguments are critical to the outcome of the trial. Often, at the conclusion of a trial, jurors are left with a mass of conflicting testimony and confusing instructions from the judge. Closing arguments can help the jury place this evidence in perspective and can supply common sense interpretations of arcane legal rules. A good closing argument should tell a jury why it should vote a particular way and how it can do so. While a closing argument is not likely to persuade a jury to convict or acquit in the face of overwhelming evidence to the contrary, a closing argument may provide the margin of victory in a close case.²⁷⁸

In a close case the prosecution has a distinct advantage. If confronted with two equally plausible stories, the jury will naturally gravitate toward the prosecution's version of events.²⁷⁹ The prosecution has the upper hand

277. Surrebuttal by the defense is even rarer at this stage.

278. Amsterdam & Hertz, *supra* note 264, at 57; cf. DiPERNA, *supra* note 261, at 58 (“[W]hen there was doubt about the facts in the jurors’ minds, they made room for sentiment to enter into the resolution of the dispute. Strong sentiment might even stimulate a juror to look for weaknesses in the facts or perhaps even oppose the law.”).

279. Most claims that juries are overly lenient toward defendants are based on the landmark 1966 study by Harry Kalven, Jr. and Hans Zeisel, which found that “[t]he jury acquits in 33 per cent, the judge in only 17 per cent of all trials.” HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 59 n.5 (1966). This interpretation of their findings is unwarranted because Kalven and Zeisel only compared jury verdicts to those that would have been reached by even more conservative judges. See DiPERNA, *supra* note 261, at 58. In fact, Kalven and Zeisel concluded that juries are likely to be more biased in favor of defendants than judges in only 4% of cases. HANS & VIDMAR, *supra* note 261, at 135. Juror disagreement with the preferences of judges in these 4% of cases can be based on a variety of factors. *Id.* at 118. Noting that defendants who believe their cases are more likely to result in acquittal from a judge waive their right to a jury trial, two scholars of the jury process conclude “the leniency Kalven and Zeisel discovered may be more a function of the types of cases brought before juries rather than the jury’s greatheartedness.” *Id.*

Jury bias, to the extent that it can be credibly ascertained, appears to weigh against the defendant instead of in the defendant’s favor. See DiPERNA, *supra* note 261, at 59 (jury more susceptible than judge of being swayed by a strong prosecutorial case). Two British researchers found that in 5-10% of the cases they reviewed, juries returned verdicts of guilt that judges found questionable. JOHN BALDWIN & MICHAEL MCCONVILLE, *JURY TRIALS* 50 (1979). This finding led them to conclude “that the questionable conviction of those charged with serious offenses, resulting in devastating social consequences for the defendant and his family, in circumstances which effectively pre-empt any review, is sufficient to raise doubts about the very basis of trial by jury.” *Id.* at 87.

Of course, the role of the consensus in shaping the consciousness of the typical juror cannot be ignored. One would expect that most members of jury panels would have absorbed the dominant viewpoints of society with respect to crime. Thus, the truth of the following observation: “Given its power, what keeps the jury from being a ‘wildcat’ operation . . . is the legal system itself. As Kalven and Zeisel noted, there is little gap between what the law prescribes and what the average juror believes.” DiPERNA, *supra* note 261, at 60.

because its version is the one stamped with the authority of the state, and the jury has simply heard the prosecution's story earlier and with greater frequency than it has heard the point of view of the defense. The closing argument is *opinion*, and the prosecutor's opinion is apt to have greater weight with the jury than the defense's opinion. To a jury, the prosecutor's argument is likely to appear more attractive. It implies that the system works, that the right suspect is in custody, and that the government is taking steps to reduce the threat that crime poses to the community at large. The defense, on the other hand, must rely on the discomfiting contention that the system cannot be trusted to do anything about crime, and that, in this case, the government has arrested and prosecuted the wrong person.

Following closing arguments, the court instructs the jury on its deliberations about the case.²⁸⁰ The instructions tend to be worded in a technical and archaic prose that is hard for the uninitiated to comprehend or understand.²⁸¹ Because jurors do not understand the very instructions that are supposed to guide them in carrying out their responsibilities, it is difficult for a defendant to receive the theoretical benefits of a trial by jury. Instead, jurors are more likely to fall back on common sense notions of crime—common sense notions that unavoidably favor the state.

Even when jurors do understand them, instructions are often slanted in favor of the prosecution. Sometimes this bias results from the legal rule or element that is addressed by the instruction which may itself favor the prosecution.²⁸² On other occasions, however, bias occurs as a matter of emphasis—either in the words chosen to express the legal principle or how those words are delivered by the judge.²⁸³ As representatives of state authority, judges are more likely to sympathize with the prosecution, and their instructions to the jury are apt to reflect their pro-prosecution orientation. Rarely are judges pro-defense.²⁸⁴

280. The instructions are of two kinds: (1) general instructions about the jury's role in the case and how it should deliberate and (2) specific instructions concerning the crimes and defenses at issue in the case. Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate* 67 N.C. L. REV. 77 (1988). Which instructions will be given in a particular case is usually determined in advance by the judge and attorneys in conference. The attorneys may request particular instructions, but the final decision as to which instructions will ultimately be given and how they should be worded is, of course, up to the judge. The court may draft its own instructions or adopt all or part of the instructions submitted by one of the parties. More frequently, however, the court will select its instructions from a collection of pre-approved, "pattern" jury instructions. See LAFAYE & ISRAEL, *supra* note 10, § 23.6.

281. See HANS & VIDMAR, *supra* note 261, at 121-23 (discussing research studies of juror comprehension of pattern or standard instructions).

282. For example, the instruction that intent may be inferred from the logical consequences of one's act arguably favors the prosecution.

283. See *supra* note 237.

284. See *supra* note 248; cf. ANTHONY G. AMSTERDAM, AM. LAW INST.—AM. BAR ASS'N, 3 TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES 9 (5th ed. 1989) (discussing the reputation of judges as unsympathetic to some defense evidence as a factor influencing election or waiver of jury trial).

The requirement that the state prove its case beyond a reasonable doubt is often viewed as a heavy burden for the state to meet and a rigorous line of defense for the accused. In reality, it is neither. First of all, it is notoriously difficult to arrive at a precise definition of what proof beyond a reasonable doubt is.²⁸⁵ Absent any meaningful direction from the court, jurors are at liberty to apply their own idiosyncratic views of the matter, which are likely to be at variance with the defendant's expectations.²⁸⁶ Moreover, no matter how the standard of proof might be interpreted, a number of evidentiary presumptions help the prosecution meet its burden of proof.²⁸⁷ Finally, and most importantly, jurors are generally reluctant to acquit defendants whom they believe to be guilty, although the state's evidence may be insufficient to erase all reasonable doubts.²⁸⁸

Thus, from the beginning to the end of the trial, the advantages lie

285. See *Victor v. Nebraska*, 114 S. Ct. 1239, 1242 (1994) (“[a]lthough [the reasonable doubt] standard is an ancient and honored aspect of our criminal justice system, it defies easy explication”). The reasonable doubt instruction given in *Sandoval v. California*, a case joined for decision with *Victor*, is typical of the type of guidance that state courts have given juries on the meaning of “reasonable doubt”:

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

Id. at 1244. While the Court criticized the use of the archaic term “moral certainty,” it approved the instruction nonetheless, holding that “the Constitution does not require that any particular form of words be used in advising the jury of the government’s burden of proof.” *Id.* at 1243, 1247.

Some lower federal courts, fearing confusion, refuse to instruct juries on the definition of reasonable doubt at all. See, e.g., *United States v. Adkins*, 937 F.2d 947, 950 (4th Cir. 1991) (“This circuit has repeatedly warned against giving the jury definitions of reasonable doubt, because definitions tend to impermissibly lessen the burden of proof. . . . The only exception to our categorical disdain for definition is when the jury specifically requests it.”); *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988) (upholding district court’s refusal to provide definition, although requested by jury, because “at best, definitions of reasonable doubt are unhelpful to a jury An attempt to define reasonable doubt presents a risk without any real benefit.”).

286. See Henry A. Diamond, *Reasonable Doubt: To Define or Not to Define*, 90 COLUM. L. REV. 1716, 1723 (1990) (citing study showing 23% of jurors believed defendant should be found guilty when weight of circumstantial evidence was equally balanced between guilt or innocence).

287. Most presumptions run in favor of the government. See 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE: EVIDENCE* § 5144, at 717-18 (1977) (noting that “presumptions that favor the accused have rarely been created by statute”).

288. The Reginald Denny case (in which black rioters were prosecuted, based on eyewitness video evidence, with assaulting a white man in the aftermath of the Rodney King verdict and acquitted of the more serious charges), for all its publicity, was a rarity. Mostly, it is only when police officers or other attractive defendants are on trial that juries are willing to acquit the defendant based on a reasonable doubt. See HANS & VIDMAR, *supra* note 261, at 143 (discussing instances where juror anti-defendant sympathies due to unattractive or immoral character of defendant led to harsher conviction than judge would have rendered). Consequently, it is dangerous for a defendant to rely on reasonable doubt for his defense.

decidedly in favor of the prosecution. The jurors come to the courthouse already biased in favor of the government. The prosecution gets the first opportunity to confront the jurors with its "official" view of reality. Throughout the trial, the defense must labor to contradict this established version of events, a version cloaked with the credibility of the state. The prosecution has better resources at its disposal—more thorough investigation, more attractive witnesses, greater respect and deference from the judge. The trial even takes place in a venue that reinforces the state's prestige at the expense of the defendant.²⁸⁹ In the face of such concrete inequities, physical as well as psychological, the advantages supposedly conferred on the defendant by a mostly theoretical presumption of innocence and a seemingly high, but ephemeral, burden of proof are quickly overwhelmed.

D. *The Trial in (Con)text*

The adversarial criminal trial, when examined in isolation, presents a majestic facade. Justice is served, it appears, because the state's accusation of crime is not taken for granted. The government is first required to prove its case beyond a reasonable doubt before a jury of the defendant's peers. The defendant is given an opportunity to contest the government's charges and is provided with an attorney, if he cannot afford his own, to help make his case. In addition, the defendant is provided with a panoply of rights that regulate the trial process in a fair manner and protect the defendant from government overreaching.²⁹⁰

But it is misleading to analyze the trial as a free-standing institution. A more revealing way to approach the trial is as it actually functions in its social context. That is, the trial must be viewed as the result of a semiotic process—a text—a medium through which the reader can signify, drawing on a long chain of significations that reach deep into the recesses of culture.²⁹¹ As text, the trial is the property of no one. All are free to signify through it.²⁹²

289. Other disadvantages could be added to the ones I have listed. Legal ethics professor David Luban points out that prosecutors generally have access to more expansive discovery options than does the defense. Luban, *supra* note 258, at 1737-38. More significantly, Luban argues that one of the most important disadvantages to the defense lies in "an institutionalized tolerance of ruthless abusiveness." Luban bases this conclusion on the apparent willingness of more and more prosecutors to resort to improper conduct (such as manipulation of grand juries, intimidation of witnesses, and failures to disclose evidence) and the reluctance of judges to sanction them when they get caught. *Id.* at 1747-48.

290. See *supra* Part I.

291. See *supra* note 215 and accompanying text.

292. This is in fact what the jury does. The jury signifies about crime through the medium of the trial. The jury determines the meaning of the defendant's conduct, assigns blame, and determines guilt or innocence. The jury makes meaning out of the evidence that is produced at trial. However, that evidence is highly ordered and filtered through the consensus, which makes some aspects of it relevant and others invisible.

But all significations, all attempts to make meaning manifest, are constrained by the significations that have been produced before.²⁹³ Thus, the genealogy of significations—of things, ideas, and institutions—can be traced.

The criminal trial cannot stand apart from the images of crime that are at work in the popular culture.²⁹⁴ The very same process of signification that produces these images also produces the notions of justice, conceptions of rights, and patterns of rituals that make up the criminal trial. That is, the trial is linked to a specific system of signification that is governed by particular themes and codes.²⁹⁵ These themes and codes structure all discourse, including the adversarial criminal trial, in ways that make some interpretations of meaning appear more appropriate and others less so.²⁹⁶ A general ideology or “consensus” arises from this interplay of structured meaning.²⁹⁷ Since the process of signification is dominated by powerful elites who can give their articulations wider circulation, a consensus is produced that vilifies the defendant while it glorifies social order.²⁹⁸

The adversarial criminal trial is a social construction and, like any other social construction, it is made out of bits and pieces produced through the consensus. The consensus on crime structures the trial in ways that favor the prosecution. No matter what formal rights the defendant may have, in practice, procedures are adopted, rights interpreted, judgments made, and meaning determined in ways that disadvantage the defendant in the criminal trial. Consequently, both judge and jury perceive the defendant negatively; jury instructions and court procedures are biased in the prosecution’s favor; the legitimacy of the prosecution’s case is reinforced by the authority of the state; and the prosecution’s case is strengthened through repetition and strategic positioning at the beginning and end of the presentation of both argument and evidence. Through the working of the consensus, these disadvantages, and others, are made to seem “fair.”

Consequently, the trial as “text” follows a tried and true formula. Upon reading the text, one can see that the criminal trial is not constructed in such a way as to match its formal signification as an institution of even-handed justice. The “rights” of the criminal defendant are not fully enforced, and as a result, the adversarial system is not all that adversarial. More importantly, no matter how secure a defendant’s rights may be, the entire criminal justice system is permeated by an ideology that frustrates their realization. Within the structure that culture provides and the consensus shapes, the moral of the

293. *See supra* Part III.B.

294. *See id.*

295. *See id.*

296. *See id.*

297. *See supra* Part III.A.

298. *See supra* Part III.B.

story told in the criminal courtroom—and the meaning of the allegory of the trial—is that the defendant is guilty and deserves to be punished.

The foregoing is not meant to suggest that the defendant is never capable of winning at trial. Instead, it is offered as a realistic assessment of the obstacles that stand in the way of acquittal and that create imbalance in the adversarial process. The possibility exists, of course, that an especially competent defense attorney may be able to overcome these obstacles, or that an inept prosecutor may fritter away the advantages that flow from representing the state. That defendants are disadvantaged by the adversarial trial process would be of little significance if their attorneys were in a position to reasonably compensate for the imbalance.

In the next section, I ask whether public defenders are prepared to handle the extra burdens that the ideology of crime places on them in the adversarial process.

VI. PUBLIC DEFENDERS: CREATURES OF THE CONSENSUS

The myth of criminal justice suggests that the state acts as a civilizing influence on the expression of public outrage about crime. It is assumed that the state, through its ordered system of criminal justice, prevents vigilante behavior and mass tyranny. Justice is supposedly above culture and popular sentiments. Although culture may influence the criminal justice system, the state compensates for this by providing counsel and a protective regime of rights. Thus, whether the myth of criminal justice is truly a myth depends to a large extent on the effectiveness of counsel. Good legal representation may be able to help ameliorate the influence of negative cultural attitudes toward the defendant.

In this section, I concentrate my analysis on the type of representation that the state provides to criminally charged indigents: public defenders. I focus on public defenders for a variety of reasons. First, they serve a vast majority of the nation's population.²⁹⁹ Second, in most cases they are professionals, devoting full-time service to indigent defense. Finally, as governmental agencies, public defender offices may be readily compared to prosecutor's offices.

Public defender agencies are a relatively recent addition to the criminal justice system. A public defender system may be defined as an organization "in which salaried lawyers devote all or a substantial part of their time to the specialized practice of representing indigent defendants."³⁰⁰ The first pub-

299. See *infra* note 307.

300. LEE SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS* 39 (1965). Technically, a public defender organization differs from a "private defender" agency, in that a public defender is created by statute or local ordinance and financed by public funds. A private defender, on the other hand, is normally established by a non-profit organization and supported by private donations. These differences are not significant for the purposes of this article and much of

licly supported, indigent defense program was established by the city of Los Angeles in 1914.³⁰¹ Public defenders did not become commonplace, however, until several decades later, in the 1940's and 1950's.³⁰²

There is a great deal of diversity in the way that public defender offices are organized and structured. Most are organized at the local level and depend on local finances.³⁰³ In 1982, only 13 states operated public defender systems organized exclusively at the state level.³⁰⁴ Several states provide some support to local budgets, but the vast majority of public defender offices in the country are either part of county government or are organized by local trial courts.³⁰⁵

Public defender systems should be distinguished from the two other major means of providing for the defense of indigents: assigned counsel systems and contract systems. Assigned counsel systems utilize private counsel, who are appointed as needed from a list of available attorneys.³⁰⁶ Assigned counsel programs are the most widely used form of indigent defense services.³⁰⁷ Contract systems rely on one or more private attorneys to provide indigent defense services, but these attorneys are not appointed on a case-by-case basis by the court. Instead, they provide representation pursuant to contractual arrangements with the appropriate state or local governmental entity.³⁰⁸

Many public defenders are hard-working professionals who are committed to their work and concerned about their clients. This is not to say, however, that the typical public defender agency is sufficiently equipped to carry out its formal role as worthy adversary of the prosecution. Indeed, most public defender offices are vastly outgunned by the prosecution, in terms of both the tangible and intangible resources at their disposal.

what I say about public defenders will apply to private defenders as well. For the sake of convenience, I will use the term "public defender" here to refer to both types of indigent defense organizations.

301. *Id.* at 41.

302. *Id.* One study reasoned that the 1929 depression may have led to the institutionalization of public defender systems. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, EQUAL JUSTICE FOR THE ACCUSED 46 (1959) ("The fear of violent social change may have reinforced the humane desire to see that justice is done to all.").

303. Roy B. Flemming, *If You Pay the Piper, Do You Call the Tune? Public Defenders in America's Criminal Courts*, 14 LAW & SOC. INQUIRY, 393, 395 (1989) (book review).

304. ROBERT L. SPANGENBERG ET AL., NATIONAL CRIMINAL DEFENSE SYSTEMS STUDY: FINAL REPORT 9 (U.S. Dep't of Justice, Bureau of Justice Statistics, 1986). This study includes the most recent data reported by the Department of Justice on provision of public defender services.

305. Flemming, *supra* note 303, at 395.

306. SILVERSTEIN, *supra* note 300, at 39.

307. More jurisdictions use this type of defense arrangement, most in combination with other delivery services, see SPANGENBERG ET AL., *supra* note 304, at 10-11, but more cases are handled by public defender programs. See *id.* at 14 (figure 1, showing approximately 70% of national population in areas served by public defender agencies).

308. Contract systems are far less common. *Id.* at 13. However, in an era of growing budgetary concerns, this type of delivery system has been growing in popularity.

A. Material Disparities

In comparison with other governmental expenditures, very little is spent on criminal justice programs, whether for prosecution, defense, police protection or the courts. No matter how inadequate support for criminal justice programs may be generally, funding for indigent defense is abysmally low.³⁰⁹ There is a great disparity between the level of support provided for indigent defense and that provided for the prosecution of crimes. In 1990, only slightly more than two percent of all criminal justice expenditures nationwide was spent on indigent defense.³¹⁰ By comparison, prosecution agencies received more than three times this amount.³¹¹ Virtually every public defender office in the country is vastly underfunded.³¹² Numerous studies have concluded that the level of support for indigent defense is entirely too low.³¹³

This low level of financial support translates into lower salaries, higher caseloads, and less secretarial and other basic support for public defenders than their prosecutorial counterparts receive. Because of low funding, public defenders may not be able to adequately prepare their cases for trial due to nonexistent or overburdened investigative services, inadequate libraries or insufficient office space. Dean Norman Lefstein spoke to the importance of the funding issue in a 1982 study he conducted for the American Bar

309. *See id.* at 1 ("many believe the defense function is the most overlooked and underfunded of all the components of the criminal justice system"); SILVERSTEIN, *supra* note 300, at 149 ("far too many defender offices are treated like stepchildren").

310. BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993 at 2 (table 1.2) (Kathleen Maguire et al. eds., 20th Ann. ed. 1994) [hereinafter 1993 SOURCEBOOK].

311. *Id.* The disparity in funding is particularly appalling at the state and local level, where most criminal justice activities are financed. In 1990, local governments spent, on average, two percent of their total criminal justice expenditures on criminal defense, while spending 6.8% on prosecution, 11.6% on courts and 58.4% on police. *Id.* In some states the situation was substantially worse. Louisiana, for example, only spent 11 cents per citizen on defense services, but spent almost \$12 on prosecution and over \$90 on the police. *Id.* at 5 (table 1.5). In 1990, state governments spent \$111.17 per citizen on police, \$31.18 on courts, \$16.01 on prosecution of crimes, and only \$5.37 on criminal defense. *Id.*

312. One early study reported that "half or more of the defender offices lack adequate financing or need additional staff members." SILVERSTEIN, *supra* note 300, at 43.

313. *See, e.g.,* SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, A.B.A. CRIMINAL JUSTICE SECTION, CRIMINAL JUSTICE IN CRISIS: A REPORT TO THE AMERICAN PEOPLE AND THE AMERICAN BAR ON CRIMINAL JUSTICE IN THE UNITED STATES: SOME MYTHS, SOME REALITIES, AND SOME QUESTIONS FOR THE FUTURE (1988) (a.k.a. the Dash Committee Report) [hereinafter DASH COMM. REPORT]; A.B.A. & NAT'L. LEGAL AID & DEF. ASS'N., GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING (J. Morgan ed., 1983); L. BENNER AND B. LYNCH-NEARY, THE OTHER FACE OF JUSTICE: A REPORT OF THE NATIONAL DEFENDER SURVEY (Nat'l. Legal Aid and Def. Ass'n., 1973); NORMAN LEFSTEIN, CRIMINAL DEFENSE SERVICES FOR THE POOR (A.B.A. Standing Committee on Legal Aid and Indigent Defendants, 1982); SILVERSTEIN, *supra* note 300; SPANGENBERG ET AL., *supra* note 304; NEW YORK CITY BAR ASS'N. & NAT'L LEGAL AID & DEF. ASS'N., EQUAL JUSTICE FOR THE ACCUSED (1959); George Yuhas, Note, *Statewide Public Defender Organizations: An Appealing Alternative*, 29 STAN. L. REV. 157 (1976).

Association. As Dean Lefstein succinctly put it:

[C]riminal defense services for the poor must be adequately funded in order for comprehensive and effective representation to be provided. Experience teaches that when funding is insufficient, some defendants are not represented at all, despite having a constitutional right to counsel. If representation is by public defenders, their numbers must be adequate to avoid excessive caseloads, and they must be paid salaries that are competitive with those earned by prosecutors and by lawyers in private practice.³¹⁴

Unfortunately, few jurisdictions have heeded Dean Lefstein's admonition. Salaries remain low, caseloads remain high, and, consequently, many clients of public defenders continue to receive less than adequate representation.

Generally, there is a considerable gap between the typical public defender's salary and that of the average prosecutor.³¹⁵ For example, in Gainesville, Florida, the entry level salary for public defenders is \$23,000.³¹⁶ Entry level prosecutors earn \$25,000.³¹⁷ Prosecutorial duties in the District of Columbia are the responsibility of the U.S. Attorney for the District of Columbia. The starting salaries for beginning Assistant U.S. Attorneys is \$47,670.³¹⁸ By comparison, attorneys at the Washington D.C. Public Defender Service with comparable experience earn only \$39,048.³¹⁹ Why these differences? Is the rationale that prosecuting is that much harder than defending, or that there is a need to attract better talent to prosecution offices, or that the market for prosecutors demands that they be paid more? These assumptions can be justified only if one thinks that defense work is somehow less important than prosecutorial work.

There is little reason why public defender salaries should be so much lower than prosecutors'. The responsibilities of the individual line prosecutor are

314. LEFSTEIN, *supra* note 313, at 11 (footnote omitted).

315. See SPANGENBERG ET AL., *supra* note 304, at 15-16 (noting that most chief public defenders earn less than most chief prosecutors); *cf.* ABA STANDARDS FOR CRIMINAL JUSTICE—PROVIDING DEFENSE SERVICES 5-4.1 (3d. ed. 1992) (defender salaries should be comparable to prosecution counterpart); ARIZ. REV. STAT. ANN. § 11-582 (1964) (only requiring salary of public defenders to be at least 70% of that of prosecutors).

316. Telephone interview with Rick Parker, Public Defender for the Eighth Judicial Circuit, Gainesville, Florida (July 28, 1994). By comparison, the national average salary for entry level police officers is \$25,128. 1993 SOURCEBOOK, *supra* note 310, at 61.

317. Telephone interview with Personnel Office, State Attorney for the Eighth Judicial Circuit, Gainesville, Florida (July 28, 1994).

318. The U.S. Attorney's Office typically requires two years' prior legal experience for entry-level hires. Telephone interview with Larry Davidson, Executive Office for U.S. Attorneys, Washington, D.C. (July 28, 1994).

319. Telephone interview with Frieda Carr, Personnel Officer, Public Defender Service, Washington, D.C. (July 28, 1994).

not substantially different from those of trial attorneys employed by public defender offices. For every investigative, research, or litigation task performed by prosecutors there is a substantially parallel task that must be performed by public defenders. The practical effect of the salary disparity between these positions is that it becomes more difficult for defender programs to attract talent. Thus, indigent defense is left to those who cannot find other employment or to those ideologically committed individuals who can afford to forego the economic considerations of maintaining a middle-class lifestyle or supporting a family.³²⁰ It is not uncommon for many students who are interested in criminal litigation to choose to begin their careers at the state or district attorney's office rather than the public defender's office because the salaries offered by the public defender are too low.³²¹

Another problem with low salaries is that they make it difficult for the public defender to retain employees for the period of time necessary to develop expertise. Consequently:

[w]here the salary is low the staff attorney is likely to be a young lawyer who will leave for a better job within two or three years, for example to join the staff of the prosecuting attorney. Like any other lawyer, the defender will usually do a better job of representation as he gains experience. But if the experienced lawyer is replaced by a beginner within a fairly short time, the quality of representation afforded the indigent is bound to be different from one year to the next.³²²

After reviewing the low salaries present in the mid 1960's at the time of his report, Silverstein concluded that a large proportion of the reported salaries

320. Public defender agencies often rely on the ideological commitment of their candidates as a recruiting tool. Many public defenders will readily admit that they do not do the job for the money, but rather because of the importance they attach to the task of providing effective defense for indigent citizens accused of crime. LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 83-86 (1987). However, it seems unlikely that there are enough ideologically motivated attorneys to staff the needs of every public defender office in the country.

321. It could be argued that the ideological commitment of these candidates is tenuous, but that is exactly the point. In the absence of the ideological factor, the public defender would be hard-pressed to find good lawyers. Why should this be so? Do we rely on the ideological factor to such a degree to insure sufficient staffing for our prosecution offices, police departments, or medical facilities? After all, as Dean Lefstein points out, "[l]awyers . . . are human, and many respond in very human ways, with a keen awareness of the economics of law practice. Studies conducted in other areas of employment support the proposition that performance and productivity are directly related to the adequacy of compensation." LEFSTEIN, *supra* note 313, at 20; *see also* EDWARD E. LAWLER, III, *PAY AND ORGANIZATIONAL EFFECTIVENESS* 124 (1971) (finding financial compensation most important variable for determining increases in productivity); EDWARD E. LAWLER, III, *PAY AND ORGANIZATIONAL DEVELOPMENT* 3-4 (1981) (greater productivity increases found to result from pay increases than from other incentives); Richard M. Fenker, *The Incentive Structure of a University*, 48 *J. HIGHER EDUC.* 453 (1977) (showing monetary incentives such as promotions and salary increases outweigh importance of nonmonetary incentives to university faculty).

322. SILVERSTEIN, *supra* note 300, at 44.

were not “career” salaries, “[e]ven if one allows for differences in the cost of living and in a lawyer’s income in communities of different sizes”³²³

If an insufficient number of attorneys is hired, then those present in the office will naturally have to labor under heavy caseloads. An excessive caseload is a frequently cited problem for public defenders; nonetheless, it remains pandemic in the defense of indigents.³²⁴

Low funding also restricts the number of cases that receive pretrial investigation and the degree of investigation provided to those cases that are lucky enough to receive any investigation at all. Misdemeanor cases suffer especially, but felony cases are also vulnerable, particularly if other, more complex or more serious cases are being tried at or around the same time. Inadequate investigation is a common occurrence for criminal trials.³²⁵ It is at this level that defenders and their clients are most at a disadvantage in comparison with the prosecution. The prosecution is usually able to avail itself of the comparatively well-funded and extensive investigative resources of the police.³²⁶

Poor funding can also be made manifest in other, less dramatic ways. Often, public defenders are unable to obtain decent secretarial support. This means that, instead of concentrating on providing legal assistance to their clients, many public defenders must spend their time typing motions or handling other clerical duties. As a general rule, this of course means that the unsupported public defender will ultimately file fewer motions and less vigorously represent his or her client. In many offices, it is not uncommon for public defenders to have to furnish their own office supplies. Frequently, public defenders are forced to work in cramped, run-down quarters that make it difficult to interview clients in privacy or store files or other needed materials.³²⁷

323. *Id.* at 45; see also LEFSTEIN, *supra* note 313, at 12. In many jurisdictions this same conclusion would be reasonable today.

324. See e.g., *State v. Peart*, 621 So. 2d 780 (La. 1993) (finding New Orleans public defender caseloads excessive). In *Peart*, the defendant’s attorney was forced to represent 418 defendants during an eight-month period and it was not uncommon for incarcerated defendants to have to wait as long as 70 days before meeting with their assigned public defender. While stopping short of declaring the entire New Orleans public defender program unconstitutional, the Louisiana Supreme Court did conclude that “because of the excessive caseloads and the insufficient support with which attorneys must work, indigent defendants in [New Orleans] are generally not provided with the effective assistance of counsel the constitution requires.” *Id.* at 790.

325. A 1980 study found that the San Francisco Public Defender had only two investigators available to work approximately 350-400 pending felony cases. LEFSTEIN, *supra* note 313, at 37; see also *id.* at 41, 48 (detailing inadequate investigative services in Macon County, Alabama and Prince Georges County, Maryland). More recently, the New Orleans public defender office attempted to cover over 7,000 cases a year with just three investigators. See *Peart*, 621 So. 2d at 784.

326. Police agencies receive the largest slice of the criminal justice dollar. See *supra* note 311.

327. See LEFSTEIN, *supra* note 313, at 33 (describing the then-quarters of San Francisco Public Defender as “inadequate and appalling”).

B. Systemic Disparities

To the extent public defenders lack independent and adequate funding, they remain subject to the whims of the funding sources they do have: typically county governments and courts of general jurisdiction. One of the most frequently raised critiques of public defender programs, from their proponents and detractors alike, is their lack of autonomy. This lack of autonomy can manifest itself in two ways. First, lack of funding independence can have a chilling effect on the public defender agency's interest in providing vigorous representation. Public defenders may be reluctant to undertake unpopular forms of representation that might jeopardize funding sources.³²⁸ After studying the operation of public defender offices in three jurisdictions, sociologists James Eisenstein and Herbert Jacob concluded:

Public defenders become adept at modifying office policy in anticipation of possible consequences and reactions of their governing boards. . . . They cannot forget that actions which disrupt the felony disposition process may generate opposition from the governing board and appropriating agencies. A public defender office that demands jury trials in all of its cases is likely to experience swift budget cuts and attacks on its personnel.³²⁹

Second, outside funding sources may acquire direct or indirect control over a public defender's practices or policies by virtue of their control over finances. For example, if the court oversees the public defender's expert witness funds, then the court can exert influence over litigation strategy and policies by simply agreeing or not agreeing to allow expert witnesses to be used in certain cases.³³⁰ In a case that addressed whether public defenders

328. See SILVERSTEIN, *supra* note 300, at 50 (noting criticism that public defender cannot be independent if he must seek funds from court or county more sympathetic to the prosecution); DASH COMM. REPORT, *supra* note 313, at 42 (citing judge's observation that public defender did not cap number of cases the office would undertake or ask for more attorneys for "political reasons").

States Attorney's Offices are subject to this type of control as well. According to criminal justice scholars Nardulli, Eisenstein and Flemming, criminal courts and their constituent agencies are foremost political institutions—both because they allocate resources and values and because they are subject to outside political influence. PETER F. NARDULLI ET AL., *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* 18-20 (1988). On the one hand, nothing can be as political in the criminal justice system as the decision to prosecute or not to prosecute. But the effect of outside influences is not as problematic in the prosecutorial context because, as a general rule, the proper functioning of the prosecutor's office is not at odds with prevailing political norms.

329. EISENSTEIN & JACOB, *supra* note 248, at 49. *But see* MCINTYRE, *supra* note 320, at 55-61 (using personal struggle between chief public defender and judge as example of autonomy of office).

330. This is in fact what happened in San Francisco during the early 1980's. Although applicable case law established a defendant's right to funds for expert witnesses upon a showing of necessity, such requests were frequently denied. Often, the controlling factor in considering whether an application was granted or denied was not the defendant's need, but "the court's budgetary situation." LEFSTEIN, *supra* note 313, at 37-38.

acted “under color of law” for purposes of permitting suit under 42 U.S.C. § 1983, Justice Blackmun noted:

The county’s control over the size of and funding for the public defender’s office, as well as over the number of potential clients, effectively dictates the size of an individual attorney’s caseload and influences substantially the amount of time the attorney is able to devote to each case. The public defender’s discretion in handling individual cases—and therefore his ability to provide effective assistance to his clients—is circumscribed . . .³³¹

The lack of autonomy observed in the operation of most public defender offices implies a lack of adversariness or a failure on the part of the public defender agency to vigorously advance the interests of its clients. The more extreme version of this theory would condemn the public defender as a “police state” tactic simply because it is not believed possible for the state to both prosecute and purport to defend the accused at the same time.³³²

A more widely held belief is that the institution of the public defender is a poor method for insuring the vigorous representation of the rights of indigents because the public defender’s office cannot help but settle into a form of institutional entropy with the prosecuting agency that is its regular opponent.³³³ Because of the close cooperation between prosecutor’s offices and public defender agencies, the reasoning goes, public defenders are conditioned to not make an issue of the morality of the police, the criminal justice process, or the courts.³³⁴ In exchange, the defendant’s guilt is treated in a matter-of-fact fashion.³³⁵ What results is a criminal justice system that does not operate along ideological lines—such as due process ideals or retributionism—but instead functions as “a system of ‘bureaucratic justice’—a system in which discretionary actions are governed by fairly rigid adherence to informal means and procedures designed to pigeonhole defendants into a few rough groupings with as few exceptions as possible.”³³⁶

Many observers have noted this tendency,³³⁷ but whether the alleged nonadversariness of public defenders actually harms their clients is a point of

331. *Polk County v. Dodson*, 454 U.S. 312, 333 (1981) (Blackmun, J., dissenting).

332. SILVERSTEIN, *supra* note 300, at 50 (citing Dimock, *The PD: A Step Toward A Police State?*, 42 A.B.A. J. 219 (1956)).

333. *See id.* (analogizing regular public defender and prosecutor offices to two professional wrestlers who wish to be combative enough to put on a show, but have no desire to harm their fellow showman); *see generally* Flemming, *supra* note 303, at 397-400 (reviewing various co-optation theories).

334. David Sudnow makes this claim in, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255, 273 (1965).

335. *Id.*

336. NARDULLI ET AL., *supra* note 328, at 377-78.

337. *See, e.g.*, Abraham S. Blumberg, *The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession* 1 L. & SOC’Y REV. 15, 22 (1967) (describing criminal process as a “depersonalized, instrumental, bureaucratic version of due process of law, . . . [which pays but] perfunctory obeisance to the ideology of due process”).

view that has been challenged.³³⁸ Most of the researchers who have studied the problem have failed to find any relationship between the fact that a defendant was represented by a public defender and the ultimate outcome of the case.³³⁹ But this could very well result from the fact that excellence in the provision of defense services is hard to quantify and that case outcomes may not provide the best measure of the quality of representation.³⁴⁰

These findings may also be skewed by the fact that public defenders, by virtue of the numbers of cases they handle, may "lock in" all other practitioners. As Peter Nardulli described it, public defenders and other courtroom regulars (or "insiders") act "as creators and protectors of the *status quo*. In this view . . . insiders play a crucial role in the formulation and evaluation of norms which govern particular types of cases. Once established they affect cases involving both insiders and outsiders on a routine and systematic basis."³⁴¹ The sad fact may be that—except for that rare criminal attorney who brings outside clout—the type of representation provided by the public defender, although deficient, may be typical.³⁴²

Finally, although much insight may be gained from quantitative analyses of criminal justice processes, one should not expect too much from statistical depictions of reality. The limits of quantitative inquiry have been widely

338. According to a survey of judges, prosecutors, and public defenders, "it seems fair to conclude that there is nothing inherent in the public defender system to impair the independence and the zealotry of the defender. At most it can be said that a few individual defenders lack this quality." SILVERSTEIN, *supra* note 300, at 52. In the course of his research, Jerome Skolnick found that some public defenders were combative and adversarial, as were some private lawyers. Jerome Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 60 (1967). Skolnick questioned whether this adversarial posture was necessarily effective, noting that while these attorneys won cases that others would not try, they also had more losses. *Id.*; see also MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 89-90 (1977) (finding cooperation a reasonable approach for representing a client's interest); MCINTYRE, *supra* note 320, at 88 (public defender remarking in interview that "if I'm taking myself too seriously, I've got a client who is going to suffer").

339. See generally DASH COMM. REPORT, *supra* note 313, at 37; MCINTYRE, *supra* note 320, at 46-47 (citing studies that "failed to find any evidence that clients represented in court by public defenders fared worse (at least in terms of case outcomes) than defendants who had private lawyers"); Flemming, *supra* note 303, at 403 ("The absence of systematic disparities, of course, is not an indication of effective counsel, nor for that matter of ineffective counsel."). For citations to both qualitative and quantitative studies comparing the performances of public and private criminal defense attorneys, see *id.* at 404-05 (Table 1 and accompanying notes).

340. After reviewing virtually every quantitatively oriented study of the differences between public defenders and other attorneys, Flemming concluded that "[t]he literature offers no clear operational criteria of performance." Flemming, *supra* note 303, at 403.

341. Peter F. Nardulli, "Insider's" Justice: Defense Attorneys and the Handling of Felony Cases, 77 J. CRIM. L. & CRIMINOLOGY 379, 415 (1986).

342. Even if public defenders do not act as the creators of the status quo in the way envisioned by Nardulli, the same result is possible. The provision of defense services is notoriously uneven. While the average public defender might be as good as the average private defense counsel, this may be so because the efforts of a few highly competent private attorneys are diluted by the behavior of a greater number of marginally competent ones.

debated in the social sciences.³⁴³ Particularly in the case of criminal court research, one should be wary of focusing on case outcomes.³⁴⁴ Researchers, such as McIntyre,³⁴⁵ who conclude that social science research has discredited the claim that public defender clients receive less effective representation greatly overstate their case. The burdens that the typical public defender must labor under do have an effect, although one that may not be easily quantified.³⁴⁶ They would do well to remember that:

discussions with criminal court veterans who have watched these changes unfold over the years reveal the salience of environmental factors for courthouse communities. Students of criminal courts who ignore them because they fail to have a "statistically significant effect" upon case outcomes do so at great peril and at great cost.³⁴⁷

When we look at the criminal trial process in its larger context, the fact that there are glaring disparities between the public defender and the prosecution is inescapable. There are disparities in funding, salaries, resources, training, and physical facilities. These disparities cause or contribute to the way that public defender clients are disadvantaged vis-a-vis other criminal defendants and the state. While statistical evidence suggests that the claim that public defenders lack adversariness and autonomy is false, at best these data simply show that public defender clients do not fare any worse than do criminal defendants generally. Comparisons of case outcomes alone, then, cannot measure the ways that criminal defendants as a class are handicapped in their ability to contest the state's accusation of guilt.

C. *The Symbolic Importance of Material and Systemic Disparities*

To expose the way that defendants in general—and public defender clients in particular—are poorly equipped to compete for the hearts and minds of

343. See FRED INGLIS, *MEDIA THEORY: AN INTRODUCTION* 44-50 (1990); see also Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 *NW. U. L. REV.* 995, 1034-39 (1994) (discussing the limitations of empirical science and reviewing the difficulties that the adoption of social science research poses for evidence scholarship).

344. As one group of researchers put it, one "[n]eeds to cast a broader net in the study of these courts," since "limiting research on criminal courts to case outcomes is like limiting research on Congress to votes." NARDULLI ET AL., *supra* note 328, at 368.

345. MCINTYRE, *supra* note 320, at 46-47.

346. One sees this problem in the difficulty courts have in defining attorney ineffectiveness. Although the Supreme Court has held that counsel must provide "reasonably effective assistance" to their clients, the Court discouraged quantification of its standard by refusing to adopt specific guidelines to determine whether conduct of counsel was reasonable or not. The Court rejected any "checklist" approach to judicial evaluation of attorney performance, mainly because of the majority's view that "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

347. NARDULLI ET AL., *supra* note 328, at 369.

jurors in the adversarial arena of the criminal trial, it is helpful to consider how the material and systemic disparities discussed above work symbolically. What cultural values are implicit in the ways that criminal defendants are treated and what meaning can be extracted from the way that the role of the public defender is constructed?

Money takes on a central importance in this culture. It is not simply a matter of "getting what you pay for" (which presumes a sellers market),³⁴⁸ but it is also a matter of "paying what one thinks things are worth." When public defenders are offered salaries that are thirty percent less³⁴⁹ than those offered to state's attorneys, obviously this signifies a belief that the services of public defenders are worth less than those provided by prosecutors. According to a commission charged by President Johnson to investigate the administration of justice in the nation's courts, low wages

unavoidably impose a stigma of inferiority on the defense of the accused. If the status of the defense bar is to be upgraded and if able lawyers are to be attracted to criminal practice, it is undesirable to perpetuate a system in which representation for the poor seems to be obtained at a discount.³⁵⁰

The lessened importance that the public attaches to providing defense services to indigents can be measured by the fact that over three times as much is spent to support prosecution agencies than is spent on all forms of indigent defense.³⁵¹ If the prosecution and the defense were truly seen as evenly matched counterparts of one another, then the nation would not be spending a fraction of what it spends to prosecute crimes on the defense of crimes.

Nothing underscores this point more than the disparity in facilities and physical plant that is often a feature of public defender offices. The objective needs of the prosecution and the defense are pretty similar in respect to facilities. They both need offices with sufficient space for filing and support services to allow the attorneys to ply their trade with a sufficient amount of dignity. There is no particular reason why prosecutors would need larger or more modern offices or facilities that are more pleasing to the eye. Yet, in virtually every jurisdiction, there are readily observable differences in the quality of the work spaces afforded the prosecution and those afforded the defense.³⁵² The commentary to the A.B.A. Standards for Criminal Justice

348. See McINTYRE, *supra* note 320, at 65.

349. See, e.g., ARIZ. REV. STAT. ANN. § 11-582(B) (1964) (only requiring salary of public defenders to be at least 70% of that of prosecutors).

350. TASK FORCE ON THE ADMINISTRATION OF JUSTICE, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 61 (1967), *cited in* LEFSTEIN, *supra* note 313, at 18.

351. See *supra* note 311 and accompanying text.

352. In Washington, D.C. the prosecutor occupies a gleaming new office building, while the public defender is housed in the basement of a 19th century building, in space that ironically was once the

points out why this discrepancy is harmful:

It is essential to the efficient operation of the defender program that facilities be provided in which clients can be interviewed in privacy. Without offices and facilities befitting the nature of a lawyer's professional calling, the accused may very well lack confidence in the defender and, ultimately in the system of justice itself. Appropriate facilities are also necessary to attract and retain career personnel.³⁵³

Where appropriate facilities are not provided, is this not an indication that society does not view public defenders as entitled to display "the dignity of the legal profession"?³⁵⁴ The fact that public defender offices are almost uniformly less desirable than prosecution buildings and workspaces may be taken as clear evidence of the public defender's lower prestige and authority.

The differences in salaries and work facilities that exist between defenders and prosecutors cannot be explained by differences in either the market conditions³⁵⁵ or the required functions of each job. Instead, these disparities are clearly representative of the opinion that the majority of society holds about the type of work that is done by public defenders and prosecutors. Whether public defenders can be conclusively shown to be less effective than other attorneys or not, "it is clear that those that represent the poor are not generally held in high esteem, either within the legal profession or outside of it."³⁵⁶ It is a commonplace observation that "a lack of respect and influence is a common characteristic of public defenders. Within the courthouse, public defenders are at the end of the pecking order."³⁵⁷ The truth of this observa-

District jail. In Alachua County, Florida, the public defender literally operates out of a storefront. See LEFSTEIN, *supra* note 313, at 33 (finding facilities at one public defender office "so inadequate and appalling that probably no significant improvement in the overall quality of the program is possible").

353. A.B.A. STANDARDS FOR CRIMINAL JUSTICE—PROVIDING DEFENSE SERVICES 59 (3d. ed. 1992) (commentary to Standard 5-4.3).

354. *Id.*

355. If anything, market conditions would militate toward paying public defenders *more* since the job is held in such low esteem.

356. DASH COMM. REPORT, *supra* note 313, at 37; see also Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, 1 YALE REV. L. & SOC. ACTION 4 (1971) (majority of criminal defendants interviewed did not believe public defender provided adequate defense nor that public defender was on their side); Flemming, *supra* note 303, at 408-09 ("Public defenders are not 'real' lawyers in the eyes of their clients and others."); Michael McConville, *Dilemmas in New Models for Indigent Defense*, 14 N.Y.U. REV. L. & SOC. CHANGE 179, 181 (1986) ("Lawyers for the poor are generally held in low esteem. They are regarded as poor lawyers, and it is believed that their ineptness is exacerbated by the institution of plea bargaining."); Joyce C. Sterling, *Retained Counsel Versus the Public Defender: The Impact of Type of Counsel on Charge Bargaining*, in THE DEFENSE COUNSEL 151, 166 (W. McDonald ed., 1983) ("The general suspicion is that equal justice is not available to rich and poor alike. Rather, it is believed that indigents receive a lower quality of legal service, which results in their being more likely to suffer harsh penalties than similarly situated defendants who can afford to buy good legal talent.").

357. Flemming, *supra* note 303, at 413.

tion may be emphasized by the following comments made by a public defender in Chicago:

We are the gophers [sic], we run for things. Whenever there's something the judge needs done, if there is not a clerk available, the judge gives it to the public defender and has him do it. They would *never* think of having a state's attorney do it. But public defenders have to do this *silly* stuff.³⁵⁸

The problem runs deeper than is demonstrated by the treatment public defenders may receive at the hands of autocratic judges. Public defenders are not perceived as "real" lawyers by the public, their peers, or by their clients.³⁵⁹ The professional life of public defenders is characterized by their attempts to cope with the deep stigma attached to the work that they do.³⁶⁰ Yet, the stigma is hard to escape. Even in Washington, D.C., which is serviced by what is arguably the country's best public defender organization, defendants often pass up representation by the public defender in favor of less-experienced and much more costly private defense lawyers.³⁶¹ Trained professionals, who ought to know better, offer no greater support for public defender organizations. As the A.B.A. Special Committee on Criminal Justice in a Free Society concluded in its 1988 report, "[t]he criminal justice system is shunned by the mainstream bar, and it will never be able to attract funds and public support if it cannot even garner the respect and support of the bar."³⁶²

Considerations such as these have led many to conclude that "the pivotal concern" that led to the establishment of the public defender was not justice, but "judicial economy," or "[e]fficiency, particularly as it affected the smooth flow of guilty pleas"³⁶³ Also, as Lisa McIntyre has pointed out, public defenders increase judicial legitimacy by encouraging public confidence in the administration of justice.³⁶⁴ Yet, neither of these rationales for the establishment of defender programs necessarily calls for a viable, well-functioning and adversarial enterprise. All that is needed to account for

358. MCINTYRE, *supra* note 320, at 88 (emphasis in original).

359. Flemming, *supra* note 303, at 408.

360. McIntyre argues that in reaction to the stigma attached to their jobs, public defenders develop a sense of "daring-do," seeing themselves as mavericks who thrive with little training or supervision. MCINTYRE, *supra* note 320, at 121.

361. See DASH COMM. REPORT, *supra* note 313, at 7-8 (noting "status of the practice of criminal law suffers" from absence of private, "influential lawyers"); MCINTYRE, *supra* note 320, at 63 (arguing that "stigma of ineptitude" attached to public defenders is undeserved); NARDULLI ET AL., *supra* note 328, at 193 (noting stigma attached to public defenders as opposed to private counsel).

362. DASH COMM. REPORT, *supra* note 313, at 37.

363. Flemming, *supra* note 303, at 408.

364. MCINTYRE, *supra* note 320, at 49-53; see also *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that right of indigent defendants in criminal trials to assistance of counsel is fundamental and essential to fair trial).

judicial economy and legitimacy is a public defender who appears competent, no matter how rough an appearance it may be. If the motivation for the creation of a public defender organization is anything less than supplying equal justice under law for its own sake, then a “paper tiger” public defender may be just as good as the real thing.

It is certainly true that if public defenders were more successful and “won consistently and often, their successes would undermine the legitimacy of the courts and ultimately jeopardize support for them.”³⁶⁵ Indeed, the entire criminal justice system is premised on the expectation that defendants will be proven guilty and locked away. There is no room for the proposition that an adequately functioning criminal justice system might result in the release, without sanction, of a majority of those who have been charged with crime.³⁶⁶ Of course, such a state of affairs might suggest that something is terribly wrong with the criminal justice system, something overlooked in the midst of the commonly heard anti-crime rhetoric. Such a situation might demonstrate that the state is intervening in the lives of too many of its citizens via unjustifiable arrests and prosecutions. However, this possibility is never seriously considered. It is easier, both politically and economically, to simply validate what the police and courts are doing by gutting the ability of the public defender to defend his or her client. In a society that excludes “criminals” from the consensus, and that, in fact, uses crime to shape the consensus, the inadequacies of public defenders appear normal.

VII. OF RIGHTS AND REMEDIES: A PROPOSAL FOR A FEDERAL DEFENDER GENERAL

A. Rights, Remedies and the Importance of Reform

I have attempted to demonstrate that the mere identification of formal rights for criminal defendants does little to ensure a fair trial. Instead, as I have explained, the difficulty is external to the legal system and lies, rather, in the way that the community at large seeks to define crime and the type of justice to which criminal defendants are entitled. Because the disparity in the criminal justice system is culturally based, one could argue that it presents an unsolvable problem.³⁶⁷ The difficulty is that any attempts at reform are likely to be subverted by the very cultural processes that led to the imbalance in the adversary system in the first place. But this is a point of view that can lead to paralysis. Notwithstanding my broad critique of the criminal justice system, I

365. Flemming, *supra* note 303, at 408.

366. Thus, the truth in Lisa McIntyre's claim that public defenders are “social anomalies.” MCINTYRE, *supra* note 320, at 1.

367. If not unsolvable, then it is the type of problem not subject to correction in the absence of broad and radical social change, a transformation that is unlikely in the present political climate.

feel compelled to offer something in the way of a concrete and pragmatic solution.³⁶⁸

A factor favoring reform is that the process of signification is, in a sense, democratic; that is, the state or dominant social groups cannot monopolize the production of meaning. There is always room for alternative interpretations and resistant readings and recodings of texts. It is possible that, through disciplined and rigorous cultural work and the raising of consciousness, the allegorical meaning of the criminal trial could be changed, or at least contested.³⁶⁹

Admittedly, the ostracism of the criminal (and the subsequent failure to take the rights of criminal defendants seriously) is a deep and pervasive problem that is not subject to easy, instrumental solutions.³⁷⁰ However, the government can still be expected to do what it can to improve the adversarial process and, at the very least, prevented from taking actions that aggravate the situation. If the state were to take the role that the public defender plays in the adversarial process seriously, then perhaps the public would too. The first step, then, to improve the adversarial criminal trial process is to infuse the criminal defendant's right to counsel with new meaning.

Having argued that the problem lies outside of the formal legal structure and its collection of rights, it would seem to make little sense to retreat into the rhetoric of rights in order to resolve it. Yet, that is what I propose to do here. While the designation of something as a "right" does not necessarily ensure justice,³⁷¹ greater importance can be attached to how a "right" is

368. Cf. ARNOLD, *supra* note 90, at 6 (criticizing realists for handwringing and "merely making the world look unpleasant"); Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) (criticizing critical legal studies for leading to nihilism).

369. In some trials, in fact, public defenders and other defense counsel are able to cast their clients in the role of ordinary citizens who have been unjustly accused of crimes. But this happens all too rarely. Ideally, the trial should become a neutral ground of contention where the counternarrative of the defendant could be argued and heard as readily as is the "law and order" narrative of the state.

370. See *supra* Part II.

371. Proponents of critical legal studies ("CLS") advocate the abandonment of the rhetoric of rights because the rights model is excessively individualistic and "allows for the manipulation of legal rules to perpetuate and legitimate existing inequitable distributions of power and opportunity." Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 HARV. C.R.-C.L. L. REV. 263, 290 (1993). For examples of works espousing this view, see MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO MANGABIERA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 36-40 (1986); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1982); Critical Legal Studies Symposium, 36 STAN. L. REV. 1 (1984); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Peter Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). The "strong" version of the CLS rights critique argues that "the long-term ideological consequences of winning victories in courts are almost certainly going to be adverse to progressive social change." Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 26 (1993).

This strong articulation of the CLS rights critique has been vigorously attacked by several scholars identified with Critical Race Theory and feminist legal scholarship. While differing in their ap-

interpreted, both by courts and by the broader culture. The creation of rights and their subsequent treatment by the state can play a significant role in the shaping of the consensus,³⁷² and this in turn can play a role in constructing the meaning that is attached to rights.

B. Beyond Asymmetry: Acknowledging the State's Dual Role in the Quest for Criminal Justice

As I see it, the core of the problem with the adversarial system is the current imbalance in the degree of attention the government pays to the act of prosecution as opposed to its obligation to provide for the defense of citizens whom it accuses of crime. While it cannot be argued that prosecuting crime is one of the central concerns of government, there is no legitimate reason for the current excessive focus on prosecution at the expense of individual rights (other than illegitimate reasons of social control).³⁷³ If there is to be balance in the adversarial process, there must be balance in the role that the state plays within that system.³⁷⁴

proaches, these scholars invariably point out that the disempowered, lacking the ability to impose limits on the powerful, might just as well take advantage of the limits that the powerful have imposed on themselves through the granting of rights. See, e.g., Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Evans, *supra*; Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7 (1989); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.L.-C.R. L. REV. 323 (1987); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

Probably in response to this intense, but generally friendly criticism, at least one CLS writer, Mark Tushnet, has proposed a "weak" version of the rights critique. The "weak" version acknowledges that there are contexts where rights rhetoric may be helpful and merely cautions that "there is no necessary connection between winning legal victories and advancing political goals." Tushnet, *supra*, at 23. To the extent that the CLS rights critique is interpreted to mean that rights imply complicated ideological consequences and that by invoking rights discourse one may endanger as well as advance one's political program, I concur.

372. See Tushnet, *supra* note 371, at 23 (describing how Supreme Court's treatment of right to abortion can be enlisted to advance political goals of both pro-choice and anti-abortion advocates).

373. The Constitution does not support this governmental orientation. In fact, the Constitution would seem to support just the opposite—a regime of tough safeguards aimed at protecting individual rights at the expense of the ability of the government to control crime. See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983) ("inevitable result" of the Fourth Amendment's guarantees "is that police officers who obey its strictures will catch fewer criminals"). Perhaps the Framers knew that crime would never be as great a threat to freedom as it would be an excuse for state usurpation of the rights of the people.

374. This double aspect of the state's role in the criminal justice process is what motivates the right to counsel cases, see, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (indigent defendants in

The state's commitment to prosecution is institutionalized in the office of the attorney general. At both the federal and state level, the attorney general is a high government official responsible for supervising the state apparatus for the prosecution of crimes, in addition to rendering formal legal opinions and advising government agencies.³⁷⁵ The attorney general also has an important political role and may have significant input in the formation of national or state policy.³⁷⁶ The federal Attorney General, often referred to as "the nation's chief law enforcement officer,"³⁷⁷ has the greatest symbolic importance. The Attorney General for the United States heads the Department of Justice and is the fourth ranking member of the President's Cabinet.³⁷⁸ The U.S. Attorney General provides legal advice to the President and the various executive and military departments of the U.S. government. Moreover, the Attorney General "has overall responsibility . . . for representing the United States in all state and federal courts."³⁷⁹ The duties of the Attorney General include the "supervision of United States Attorneys and other government counsel"³⁸⁰ in, *inter alia*, the investigation and prosecution of crimes against the United States.³⁸¹ In addition to these criminal litigation functions, the U.S. Attorney General is also charged with investigative authority, chiefly through the Federal Bureau of Investigation and the Drug Enforcement Administration.³⁸²

criminal trials have fundamental right to assistance of counsel, because poor defendant would otherwise not be assured fair trial, in light of government's large expenditures for prosecution); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (right to counsel for criminal defendants in capital cases), and those cases that forbid prosecutorial vindictiveness. *See, e.g., Blackledge v. Perry*, 417 U.S. 21, 28 (1974) (misdemeanant "entitled to pursue . . . statutory right to a trial *de novo* without apprehension that the State will retaliate . . ."). This vision of the state's dual responsibility is made especially clear in Justice Sutherland's well known opinion in *Berger v. United States*:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

295 U.S. 78, 88 (1935) (emphasis added).

375. NAT'L ASS'N OF STATE ATTORNEYS GENERAL, POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL (1977).

376. *Id.*

377. *See, e.g., Paul Anderson, Under Fire, Reno Takes Heat With Skill*, DET. FREE PRESS, Apr. 21, 1993, at 8A.

378. Luther A. Huston, *History of the Office of Attorney General*, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 1, 7 (1968).

379. DANIEL J. MEADOR, THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE 15 (1980).

380. *Id.*

381. 28 U.S.C. § 533 (1), (3) (1988).

382. MEADOR, *supra* note 379, at 21-24.

While the commitment to the act of prosecution is institutionalized, the commitment to defense is haphazard. There is no defense counterpart to the Attorney General. Perhaps there should be. In addition to prosecuting crimes, the government also has an overriding duty to provide for the general public welfare.³⁸³ In theory, this duty would require the government to expend as much effort on preventing erroneous convictions as it does on obtaining justified ones. Certainly, the governmental undercommitment to the defense function has deep symbolic import. What the public sees stamped with the authority of the state is the act of prosecution—this is what has allegorical power, and this is what skews the defendant's ability to obtain a fair trial in an adversarial context.

C. Conceptualizing a Federal Defender General

In order to balance the government's symbolic relationship to the criminal justice system, I would propose the creation of a "Defender General" at the federal level. Like the Attorney General, the federal Defender General would also be a high government official, although not necessarily a member of the President's Cabinet.³⁸⁴ However, there are many differences in the way that cases are prosecuted and the way they are defended that would call for the Defender General's Office to be structured somewhat differently from that of the Attorney General. First, there is no uniform system for the provision of defense services comparable to the network of U.S. Attorneys and local state prosecutors.³⁸⁵ Secondly, although assuring that criminal

383. Jacques-Pierre Brissot, an early disciple of Beccaria's, believed that the defense of the accused was based on "expectations stemming from the social contract." Leonore Loft, *Toward a More Just Criminal Code in Pre-Revolutionary France: J.-P. Brissot (1754-1793)*, 20 J. CRIM. JUSTICE 121, 124 (1992). For more modern and more general theories supporting fundamental minimal entitlements, see generally Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973); William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1 (1985).

384. While Cabinet level officials clearly have greater prestige, the Defender General may be subject to an excessive degree of political influence if he or she were to be a member of the President's Cabinet. See MEADOR, *supra* note 379, at 48 (describing Cabinet membership as problematic for Attorney General as it "contributes to the appearance . . . that he is simply another political appointee"); Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy* 56 LAW & CONTEMP. PROBS. 63, 76 (1993) (describing "built-in tension" between Attorney General's political and quasi-judicial functions).

385. It should be noted, however, that there is much diversity among prosecuting agencies, LAFAVE & ISRAEL, *supra* note 10, at 6, and that, on the whole, U.S. Attorneys exercise considerable independence from the Attorney General. Arthur Selwyn Miller, *The Attorney General As the President's Lawyer*, in ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES 41, 66 (1968). However, prosecuting agencies are not nearly as varied as the providers of defense services. See LAFAVE & ISRAEL, *supra* note 10, at 7; SPANGENBERG ET AL., *supra* note 304, at 9-11 (survey of types and characteristics of indigent defense systems).

defendant's receive the effective assistance of counsel is a governmental concern, the actual representation of criminal defendants is not primarily accomplished through the state's employees.³⁸⁶ Third, and most important, while all prosecutors theoretically represent the state, each defense counsel represents the unique interests of his or her own client.³⁸⁷

Perhaps the Surgeon General³⁸⁸ would provide a better model for a Defender General than would the Attorney General as that office is presently conceived. The delivery of medical services is, quite possibly, even more fragmented and diversified than is the delivery of defense services.³⁸⁹ Although the Surgeon General does provide some direct medical care through the Public Health Service and its Commissioned Corps of doctors,³⁹⁰ most Americans receive their medical treatment from private physicians.³⁹¹ And, while government plays a substantial role in paying for the health care of many people, doctors, like defense lawyers, consider their primary duty to be to their patients, not the government.³⁹²

Prior to the reorganization of the Executive Branch in 1966,³⁹³ the Surgeon

386. Defense services may be provided by privately retained counsel and court appointed private counsel, as well as by public or private defenders. SPANGENBERG ET AL., *supra* note 304, at 9-10.

387. See A.B.A. STANDARDS FOR CRIMINAL JUSTICE—THE DEFENSE FUNCTION Standard 4-1.6 (1979) (client interests paramount); A.B.A. CANONS OF PROFESSIONAL ETHICS Canon 15 (1967) (attorney must be devoted to interest of the client); see also *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (“[A] public defender works under canons of professional responsibility that mandate his exercise of independent judgment on the behalf of the client.”); see generally *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1292-1315 (1981) (describing ethical obligations of attorney engaging in simultaneous representation of more than one client).

388. The term “Surgeon General” refers to the Surgeon General of the Public Health Service and is not to be confused with the Surgeon General of either the Army, Navy or Air Force, who is the chief ranking medical officer of his or her respective military service.

389. See CLEMENT BEZOLD ET AL., *THE FUTURE OF WORK AND HEALTH* (1986) (discussing diversification of health care systems).

390. For a concise description of the Public Health Service and its role, see Robert G. Carey, *Public Health Service*, in 7 *THE GREENWOOD ENCYCLOPEDIA OF AMERICAN INSTITUTIONS: GOVERNMENT AGENCIES* 450-58 (Donald R. Whitnah ed., 1986). A more comprehensive, if somewhat dated history may be found in RALPH CHESTER WILLIAMS, *THE UNITED STATES PUBLIC HEALTH SERVICE, 1798-1950* (1951).

391. See BEZOLD ET AL., *supra* note 389.

392. The “Physician’s Oath” adopted by the World Medical Association requires doctors to pledge that “the health of my patient will be my first consideration” and that “I will not permit considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient.” *The World Medical Association Declaration of Geneva*, reprinted in TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 330-31 (2d ed. 1983); see also *American Medical Association Principles of Medical Ethics*, reprinted in BEAUCHAMP & CHILDRESS, *supra*, at 331 (physician should provide “medical service with compassion and respect for human dignity” and “seek changes in [those laws] which are contrary to the best interests of the patient”); BEAUCHAMP & CHILDRESS, *supra*, at 241 (“physicians have a primary responsibility to the patient, even if a third party establishes initial contact” or is responsible for payment); PAUL RAMSEY, *THE PATIENT AS PERSON: EXPLORATIONS IN MEDICAL ETHICS* 1-40 (1970) (describing the ethics of informed consent as “a canon of loyalty”).

393. Pursuant to Reorganization Plan No. 3 of 1966, all functions of the Surgeon General were transferred to the Secretary of Health, Education and Welfare. Reorg. Plan No. 3 of 1966, 3 C.F.R.

General was responsible for the administration of the Public Health Service³⁹⁴ and the promulgation of “regulations necessary to the administration of the Service.”³⁹⁵ In addition, the Surgeon General was required by statute to “encourage, cooperate with, and render assistance to other appropriate public authorities, scientific institutions, and scientists in the conduct of, . . . research, . . . and studies relating to the causes, diagnosis, treatment, control, and prevention of physical and mental diseases”³⁹⁶

In carrying out this responsibility, the Surgeon General was given broad authority, including the ability to issue publications, provide research facilities, maintain research fellowships, and “[m]ake grants in aid to universities, hospitals, laboratories, and other public or private institutions.”³⁹⁷ Even though the Surgeon General no longer exercises the same authority, he is still recognized as the symbolic leader of the medical profession and, when it comes to health matters, continues to exert great influence.³⁹⁸

A Defender General patterned after the Surgeon General (as the office was originally envisioned in the Public Health Act) could serve as the symbolic leader of the criminal defense bar and enable criminal defense lawyers to claim more prestige vis-a-vis the prosecution. The Defender General could also serve as a source for necessary training and as a catalyst for improving the delivery of defense services. By committing its resources to the establishment of a viable and vital Defender General Office, the government would be signaling the importance and significance of the right to counsel. By improving the ability of criminal defendants to compete for the hearts and minds of jurors, the government would increase the chances that those accused of crime would receive a fair trial.

191 (1966), *reprinted in* 42 U.S.C.S. § 202 (Law. Co-op. 1978). The Public Health Service became part of the Department of Health Education and Welfare in 1953. Reorg. Plan No. 1 of 1953, 3 C.F.R. 131 (1953), *reprinted in* 42 U.S.C.S. § 202 (Law. Co-op. 1978). In 1979, the Department of Health, Education and Welfare was reorganized as the Department of Health and Human Services. Department of Education Organization Act of 1979, Pub. L. No. 96-88, § 509, 93 Stat. 668, 695 (1979) (codified at 20 U.S.C. § 3508 (1991)). The functions formerly performed by the Surgeon General are now performed by the Secretary of Health and Human Services. *See* Exec. Order No. 11,140, 29 Fed. Reg. 1637 (1964), *as amended by* Exec. Order No. 12,608, 3 C.F.R. 245 (1987), *reprinted in* 42 U.S.C.S. § 202 (Law. Co-op. Supp. 1994). The principal advisor on health matters to the Secretary of Health and Human Services is the Assistant Secretary for Health, who also now directs the Public Health Service. PUBLIC HEALTH SERVICE, THE PUBLIC HEALTH SERVICE TODAY I (Pamphlet, PHS Fact Sheet, 1988). According to a government publication, “[t]he Assistant Secretary is assisted in the planning and administration of PHS programs and activities by the Surgeon General of the Public Health Service” *Id.*

394. Public Health Service Act of 1944, Pub. L. No. 78-410, § 201, 58 Stat. 682, 683 (1944).

395. *Id.* § 215 (b).

396. *Id.* § 301.

397. *Id.* §§ 301(a)-301(d).

398. *See* C. Everett Koop and Harold M. Ginzburg, *The Revitalization of the Public Health Service Commissioned Corps*, 104 PUB. HEALTH REP. 105, 109-10 (1989) (describing changes made by Surgeon General to revitalize Corps program).

Thus, the federal Defender General I propose would have the following responsibilities: (1) give leadership and direction to the nation's criminal defense programs and practitioners; (2) contribute to the advancement of criminal defense techniques through research and clinical programs; (3) disseminate that knowledge to legal professionals and the general public; (4) assure the adequate training and personnel development of criminal defense practitioners; and (5) improve the organization and delivery of defense services in the communities.³⁹⁹ In order to carry out these responsibilities, the Defender General would be empowered to make grants in aid to public defender organizations, law schools, universities and other public or private institutions; offer fellowships to promising or renowned defense attorneys; offer scholarships to deserving students in exchange for a commitment to practice criminal defense for an appropriate time; retain experts, scholars and consultants; issue publications; and provide technical advice and assistance to appropriate public and other nonprofit organizations and institutions.⁴⁰⁰

Obviously, many details remain to be worked out before a federal Defender General could ever become a reality—such as whether the Defender General should be a part of the Justice Department, the Department of Health and Human Services, or an independent agency in the judicial branch.⁴⁰¹ But what is important about the concept of the Defender General is the idea of committing the state to the provision of defense services in a way that parallels the government's commitment to the act of prosecution.⁴⁰²

399. Cf. Carey, *supra* note 390, at 451 (describing duties of Public Health Service).

400. Cf. 42 U.S.C. § 241(a) (describing public health related powers of the Secretary of Health and Human Services).

401. Advantages and disadvantages attend each option. The Department of Justice is that part of the executive with the greatest responsibility and expertise for addressing criminal justice issues. However, the Department of Justice has a long institutional commitment to investigating and prosecuting crime. It would be very difficult for the Attorney General to adequately serve two masters. Were the Justice Department to become responsible for both prosecuting crimes and defending citizens accused of crime, it is very likely that the defense would continue to receive the short end of the political and financial stick. Because the provision of defense services can be characterized as a type of welfare, the Department of Health and Human Services must be considered as a potential home for a proposed Defender General. Placing the Defender General in the Department of Health and Human Services, instead of the Justice Department, might insulate the Defender General from becoming an institutional stepchild. On the other hand, a Defender General located in the Department of Health and Human Services might be seen as less prestigious than the Attorney General because the Defender General would not be a cabinet level officer and the Department of Health and Human Services does not otherwise deal with judicial matters. A Defender General organized as an independent agency in the judicial branch would eliminate the status problems that would be created if the office was placed in the Department of Health and Human Services, but it might not resolve the autonomy issues that placing the Defender General under the Attorney General would raise. This is because the federal judiciary may also display a bias in favor of the prosecution. See *supra* note 248 and accompanying text.

402. One proposal to encourage a greater governmental commitment to the idea of indigent

By committing the government to the defense of accused persons in such a concrete and substantial way, the Defender General would make an important symbolic statement. It would teach respect for individual rights and infuse the presumption of innocence with real meaning. A Defender General would help make the right to a fair trial and the right to adequate counsel more than just empty promises. As a result, this country would go a long way toward making the myth of criminal justice a reality.

CONCLUSION

The functioning of the adversarial criminal trial cannot be determined solely by reference to the ideals that are set forth in the Constitution, the mandates found in statutes, or the guarantees that are promised in court opinions. The adversarial trial takes its real meaning from the culture from which it springs, after it has been worked and reworked by the play of semiotic processes. The adversary system has been socially constructed so that its requirements may be easily met by the provision of an overburdened and undertrained public defender, who has a scant chance of providing his or

defense has already been put forward. In 1992, an ad hoc committee, appointed by Chief Justice Rehnquist to review the Criminal Justice Act (known as the "Prado Committee"), proposed the creation of an independent "Center for Federal Criminal Defense Services." Judicial Conference of the United States, Committee to Review the Criminal Justice Act, *Interim Report* (July 28, 1992), reprinted in 51 CRIM. L. REP. 2335, 2342 (August 19, 1992). As proposed, "[t]he Center would be located within the judicial branch as an independent body, endowed with a broad mandate to lead, administer and speak for defender services in the federal criminal justice system." *Id.*

The Prado Committee's recommendation was opposed for two reasons: (1) it was thought that the centralization of defense services would create an unnecessary bureaucracy; and (2) many judges and defenders felt that an independent appropriation for a center pledged to indigent defense would be more politically vulnerable than monies obtained through the current method, as part of the judiciary's appropriation request. Judicial Conference of the United States, *Report on the Federal Defender Program* (Mar. 1993), reprinted in 63 CRIM. L. REP. 2003, 2010 (Apr. 14, 1993). Ultimately, the Judicial Conference refused to adopt the recommendation of the Prado Committee for the establishment of a defense services center. *Id.* at 2011.

The proposal I present here differs from the Prado Committee recommendation in three important respects. First, the Defender General I propose is not limited in its authority to federal public defenders organized under the Criminal Justice Act. See Judicial Conference of the United States, *Report of the Committee to Review the Criminal Justice Act* (Jan. 29, 1993), reprinted in 52 CRIM. L. REP. 2265, 2299-300 (Mar. 10, 1993). Second, the Defender General would not create the type of centralized bureaucracy that was envisioned under the Prado Committee proposal. *Id.* (Center would be appointing authority for federal public defenders and be responsible for the processing of vouchers, payroll, space acquisition, personnel and accounting). Third, the main mission of the federal Defender General I contemplate would be to provide education, training and support for existing defender agencies and private defense counsel.

As an independent agency, the Defender General I propose would also be vulnerable to funding cuts. If the Defender General is weak and underfunded, however, then it cannot serve to balance the government's commitment to the adversarial process and its existence can have no effect on societal attitudes toward public defenders and their clients. There is no way to avoid this issue. Either the government takes public defense seriously or it does not.

her client with a fair trial. If the trial is to be made more than a simple way station on the road to a sure conviction, then public defenders must be given the ability to contest the government's case from a position of equality. To facilitate the task of re-envisioning and reconstructing the allegory of the criminal trial, the state must afford the defense the same dignity and resources that it affords the prosecution.