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Peter W. Tague


*Georgetown University Law Center*, [tague@law.georgetown.edu](mailto:tague@law.georgetown.edu)

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# Guilty Pleas and Barristers' Incentives: Lessons from England

PETER W. TAGUE\*

Criminal defense lawyers in the United States sometimes pressure clients to plead guilty. The purpose could be defensible, even laudable: to eliminate the risk that the defendant, guilty or provably so, would be sanctioned much more harshly if convicted at trial.<sup>1</sup> The purpose could also be pernicious: to advance the lawyer's interests when it would be "better" for the defendant to contest guilt.<sup>2</sup>

Barristers in England's Crown Court have been similarly accused of perfidy in pursuing their ends at the defendant's expense in counseling over the choice of plea.<sup>3</sup> They do so, it is said,<sup>4</sup> for various reasons, including the desire to maintain cordial relations with the prosecution and to avoid losing compensation if they cannot take a case to trial because of scheduling conflicts.

But these reasons misconceive the barrister's incentives. Indeed, barristers are less likely to sacrifice the defendant's interests than are American lawyers because the barrister's selfish interests are more congruent with those of the defendant than are the lawyer's.

When considering the defendant's plea, barristers, like lawyers, have two overriding, selfish interests: maximizing remuneration and avoiding sanction. The tension between defendant and defender is most acute when the defendant is indigent and the defender has been chosen to represent him. It is their relationship that is addressed in this Article.<sup>5</sup>

The goal is to align the defender's selfish interests with the defendant's need for thoughtful advice over how to plead, so that, behind the guise of apparently disinterested advice, the advocate is not pursuing his interests at the defendant's expense. By contrast to most American practice, the method of compensating barristers, together with the threat of sanction for misbehavior, actually inclines

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\* Professor of Law, Georgetown University Law Center.

1. For an anguished expression by a defense lawyer of the imperative to persuade a defendant to plead guilty who balks at doing so, see Randy Bellows, *Notes of a Public Defender*, in *THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES* 89 (Philip B. Heymann & Lance Liebman eds., 1988).

2. It can be better for the defendant to contest guilt where the likelihood of acquittal is high enough to risk the greater sanction imposed following a jury conviction than a guilty plea. Also, the defendant should not be denied the opportunity to contest guilt even if the defense lawyer thinks the decision is folly.

3. See MIKE MCCONVILLE ET AL., *STANDING ACCUSED* (1994); JOHN BALDWIN & MICHAEL MCCONVILLE, *NEGOTIATED JUSTICE: PRESSURES TO PLEAD GUILTY* (1977).

4. These misconceptions are discussed *infra* in Part II.

5. The defendant who hires a lawyer or barrister can always fire him. The public defender is paid a salary whether or not the defendant is unhappy with his representation.

barristers to prefer a trial over a guilty plea. As a result, when recommending a guilty plea, the barrister is arguably trying to protect the defendant because he acts against his self-interest in doing so.

Could American jurisdictions borrow from English practice, so that the lawyer's interests are more coextensive with the defendant's when considering the defendant's plea? The answer is in general yes, even as the specifics of English arrangements defy adoption.<sup>6</sup>

Before addressing the barrister's and lawyer's interests in Parts III and IV, this Article begins in Part I by explaining the barrister's relationship with the defendant. In doing so it uncovers the tension between the interests of each and indicates how, and how not, that tension is resolved to align their interests. Part II of this Article considers the erroneous reasons why critics believe barristers ignore the defendant's interests to pursue their own. In conclusion, Part V considers lessons the American criminal system can learn from England about how to align the lawyer's interests with those of the defendant. Alignment is possible if the lawyer has as much incentive to try the case as to end it by guilty plea.

## I. THE BARRISTER AS AGENT

In Crown Court, the English court of general jurisdiction over criminal cases, the defendant is represented by a barrister and a solicitor. The solicitor prepares the defendant's defense; the barrister, based on the information received from the solicitor, advises the defendant about his plea. If the defendant pleads not guilty, the barrister advocates for the defendant in trial.<sup>7</sup>

Tension between the barrister and defendant begins with the barrister's selection and continues throughout his work as counselor and advocate. The potential conflict between them over the defendant's choice of plea, the subject of this Article, is a manifestation of the ubiquitous problem of agency costs. The defendant is the principal, the barrister the agent. The agent can thwart the principal's goals if their interests are not coterminous. The strain in their relationship resides in the need of many defendants to rely on the barrister to learn the choices that must be made—how to plead, for example, and whether to

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6. Another feature of practice in England could be adapted by American jurisdictions to improve the representation of criminal defendants: defendants select the lawyer to represent them. For an explanation of how barristers are chosen in England, see *infra* text accompanying notes 10-12. For how American jurisdictions could modify this English practice, see Peter W. Tague, *Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons From England*, 69 U. CIN. L. REV. 273 (2000) (indigent defendants receive the right to select the lawyer, with the result that lawyers would compete to improve their performances, and thus their reputations).

7. This description holds true in practice today. Until the early 1990s barristers held a monopoly over the right to advocate in Crown Court (and the appellate courts). Solicitors may now advocate on behalf of defendants in Crown Court, but few have chosen to qualify to do so, preferring instead to continue in the role of preparing the case for the barrister.

testify if the case is tried—and the relative benefits of each. In educating the defendant, the barrister could weigh the considerations to favor his ends over those of the defendant.

As the principal, then, the defendant's problems come in choosing an able and loyal agent and in ensuring that the agent acts as expected. Few criminal defendants will know whom to choose as an advocate. Once a barrister is chosen, through the process described immediately below, defendants are in no better position to evaluate and patrol the barrister's efforts. Their contacts are few.<sup>8</sup> The defendant does not know how well the barrister has prepared, nor does the defendant attend the plea discussions held between his barrister and the barrister who prosecutes on behalf of the Crown,<sup>9</sup> to assess his advocate's loyalty and negotiating skills.

The genius of the English system, in theory, is to provide an effective way to help the defendant, whether indigent or able to hire counsel, to overcome handicaps in selecting and monitoring the barrister.<sup>10</sup> Interposed between the two is the solicitor, the defendant's primary agent, who has overall responsibility for the defense.<sup>11</sup> The defendant chooses a solicitor who in turn selects a barrister and oversees his performance. The barrister is obliged to accept the solicitor's request to represent the defendant.<sup>12</sup>

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8. See MICHAEL ZANDER & PAUL HENDERSON, *THE ROYAL COMMISSION ON CRIMINAL JUSTICE: CROWN COURT STUDY 61-62* (1993) (Barrister saw the defendant "for the first time on the morning of the trial in 55 percent of contested cases and 7 percent of cracked trial cases . . ."). A barrister is compensated by legal aid for only one conference with the defendant before the trial date. See Criminal Defence Service (Funding) Order 2001, 2001, S.I. 2001/855, sched. 4, ¶ 19 [hereinafter CDS Funding Order 2001]. For a discussion of the monetary incentives to confer with the defendant, see Peter W. Tague, *Representing Indigents in Serious Criminal Cases in England's Crown Court: The Advocates' Performance and Incentives*, 36 AM. CRIM. L. REV. 171, 208-09 (1999).

9. The barrister who prosecutes (the "prosecuting barrister") serves the same function as the prosecutor in the United States, but the institutional position of each is different. Independent contractors, barristers are hired for a particular case, to prosecute or defend. Thus, when prosecuting, they are not salaried employees of the Crown Prosecution Service ("CPS"), the entity that retains barristers to present the Crown's case and prepares the case to be presented.

10. See PETER W. TAGUE, *EFFECTIVE ADVOCACY FOR THE CRIMINAL DEFENDANT: THE BARRISTER VS. THE LAWYER* 126-28 (1996). For an introduction to the differences between the American lawyer's and English barrister's practices and mores, see *id.*

11. The defendant has two agents, the solicitor and barrister. The barrister's relationship to each is suggestive: the solicitor is his "professional client," the defendant his "lay client."

12. This obligation is called the "cab-rank rule." See THE GENERAL COUNCIL OF THE BAR, *CODE OF CONDUCT* ¶¶ 601, 602 (7th ed. 2000) [hereinafter *CODE OF CONDUCT*]. A barrister can refuse to represent a client to avoid being "professionally embarrassed" (for example, he lacks the experience needed or has a conflict). *Id.* ¶ 603(a), (e). For more, see TAGUE, *supra* note 10, at 23-26, 191-92.

Despite the cab-rank rule, barristers return a brief (explained *infra* at note 15) if busy with another one on the date of the court appearance. The solicitor must then find a replacement. Barristers return an astonishing number of briefs, thereby imperiling the benefits of the cab-rank rule and of having an experienced solicitor select the barrister. Forty-eight percent of defense briefs and sixty-six percent of Crown briefs are returned. See ZANDER & HENDERSON, *supra* note 8, at 45, 54; see also TAGUE, *supra* note 10, at 128-32 (discussing ramifications of having briefs returned).

Unlike the defendant, the solicitor will know the reputations of many barristers for adversarial skill and for working with them and defendants. Indeed, he will have a coterie of a dozen or so barristers whom he uses frequently, a group he culls if one does not perform as desired.<sup>13</sup>

Just as the solicitor has the information needed to select an able barrister, he has incentives to choose such an advocate.<sup>14</sup> The solicitor's reputation for providing value will be enhanced if the defendant is impressed with the prowess of the barrister chosen for the representation. Stoking that reputation will help the solicitor attract business from other criminal defendants. Ironically, however, briefing an able barrister also enables a solicitor to shirk his other responsibilities. If he can count on the barrister to compensate for his shortcomings, the solicitor may not investigate the case thoroughly or prepare the barrister's brief properly.<sup>15</sup> Dependent on the solicitor for business, the barrister may not reveal the solicitor's misbehavior to the defendant, and instead do the best he can with the inadequate information he receives. The defense could suffer as a result.

Turning to the solicitor's second function, the solicitor, himself an advocate in magistrates' court at least,<sup>16</sup> should know how to evaluate the barrister's performance. If disturbed by the barrister's behavior with the defendant or with his advocacy in court, the solicitor can goad the barrister to act in the defendant's best interest. This does not always occur as it should in practice. One reason is that solicitors tolerate the barrister's reluctance for financial reasons, to invest much in the defendant or his case until shortly before the point when the defendant must choose to plead guilty or go to trial. Barristers know that they will return many of their briefs—as many as fifty percent<sup>17</sup>—and do not expect to be compensated for preparing a brief they return.<sup>18</sup> Barristers also do not have much

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13. Solicitors and barristers have told me of this practice of solicitors.

14. See TAGUE, *supra* note 10, at 126-27.

15. The brief contains the court's documents, discovery received from the CPS (the national institution that organizes prosecutions), the solicitor's investigation and evaluation of the case, and the defendant's desires for structuring the defense. Apart from conversing with the defendant, the barrister derives his knowledge of the case from the brief alone. The barrister does not conduct the investigation and typically plays little role in organizing it. If before the trial witnesses should be questioned or physical evidence obtained, it is the solicitor, not the barrister, who performs this work. If the defense is not prepared, or prepared inadequately, it is the solicitor's fault, not the barrister's.

16. The magistrates' court is the equivalent of a municipal court in the United States, with jurisdiction over misdemeanors. Solicitors now can qualify to advocate in the Crown Court (the court of general jurisdiction), a right traditionally held only by barristers. I discuss, however, the more traditional arrangement where the solicitor chooses a barrister to assume control of advising the defendant over the plea, and to advocate in court if a trial occurs.

17. See TAGUE, *supra* note 10, at 128-30.

18. See Peter W. Tague, *Economic Incentives in Representing Publicly-Funded Criminal Defendants in England's Crown Court*, 23 *FORDHAM INT'L L.J.* 1128, 1150-51 (2000). In restricted circumstances barristers can be compensated for preparing a brief they return, but only, as an example, after working on it for more than eight hours. See *CDS Funding Order 2001*, *supra* note 8, schedule 4, ¶ 18. But not often will more than eight hours be required, at least if barristers do not exaggerate in claiming to prepare briefs expeditiously, often beginning work the night before the proceeding. See TAGUE, *supra* note 10, at 82-83. Moreover, the time taken

interaction with defendants, typically not conferring with them more than once before the defendant must make the momentous decision over his plea. That conference also usually occurs on the day, or only shortly before, the defendant must enter the guilty plea or go to trial.<sup>19</sup>

Solicitors also do not monitor barristers very closely because they have their own conflict in representing a defendant. Because many solicitors prefer to litigate in magistrates' court, they cede control over the defendant's litigation in Crown Court to the barrister after delivering the brief.<sup>20</sup> For financial reasons, solicitors do not attend the barrister's conference with the defendant nor accompany the two to court.<sup>21</sup> In their place solicitors send a representative who, if he knows anything about the case (if even anything about advocacy),<sup>22</sup> lacks the experience and stature to stand up to the barrister. As a result, solicitors may learn little about the barrister's performance and thus fail to protect a defendant who wants a trial from the barrister's insistence that he plead guilty instead.

Given the nature of the barrister's relationship with the defendant and the solicitor, he may thus be able to disguise instances where he pursues his personal interests without regard to those of the defendant.<sup>23</sup> But what are those interests? If a barrister did succumb to the temptation to pursue his own interests, would he prefer that the defendant plead guilty or go to trial? English critics contend that barristers benefit from guilty pleas, but as the next part of this Article contends, those critics' misconceive the barrister's selfish interests.

## II. INACCURATE ASSESSMENTS OF BARRISTERS' MOTIVES

Sections A and B of this Part examine two empirical studies that supposedly present the most telling indictments that barristers extract guilty pleas from pliant defendants to serve their own purposes. Section C explores whether popular barristers who receive many briefs would induce guilty pleas to earn a fee from legal aid<sup>24</sup> rather than return the brief to the solicitor who can then choose a different barrister. None of these criticisms is a persuasive explanation of the

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must be reasonable, and the compensation is only £33.50 per hour for a junior barrister in a case that will last no more than ten trial days.

19. See ZANDER & HENDERSON, *supra* note 8.

20. See McCONVILLE ET AL., *supra* note 3, at 63.

21. The solicitor risks not being paid by legal aid at his level of remuneration for attending conferences and court. See Peter W. Tague, *Ex Post Facto Payments in Legally-Aided Criminal Cases in the Old Bailey*, 28 ANGLO-AM. L. REV. 415, 442-43 (1999).

22. See McCONVILLE ET AL., *supra* note 3, at 242 (explaining that solicitors employ representatives who are not in training to become solicitors (so-called "non-qualified staff")).

23. Bar Counsel implicitly recognizes that barristers might be tempted to pursue their own interests in its admonition that the barrister, in promoting "the lay client's [the defendant's] best interests," should ignore "his own interests or . . . any consequences to himself . . ." CODE OF CONDUCT, *supra* note 12, ¶ 303(a).

24. The Legal Services Commission is the entity in charge of compensating defenders, but I will refer to the structure as "legal aid."

barrister's incentives.

#### A. NEGOTIATED JUSTICE

While examining a different issue, researchers in Birmingham, England, in the early 1970s stumbled across evidence that various barristers in Birmingham were bullying defendants to plead guilty.<sup>25</sup> In 23 of 151 cases defendants complained, without prompting, about being given “no alternative but to plead guilty and that their barrister had ‘instructed’ or ‘ordered’ or ‘forced’ or even, on one occasion, ‘terrorised’ them into pleading guilty.”<sup>26</sup> The researchers published these findings in a book entitled *Negotiated Justice*. Perhaps anticipating the firestorm their book would cause,<sup>27</sup> the authors refrained from excoriating the barristers and instead placed fault for the defendants’ views and barristers’ behavior in the temptation inherent in trading a guilty plea for a lower sanction—known as the “sentencing discount.”<sup>28</sup>

In their effort to explain the barristers’ conduct, the authors borrowed a celebrated thesis, which had been propounded by various American commentators, that defense lawyers in the United States strive for guilty pleas even when not advantageous to defendants, either to please the prosecutor and judge or to escape being punished by them.<sup>29</sup> However, this thesis, one that might be dubbed the “cooperation-reprisal” explanation, properly describes the incentives of lawyers only when based upon certain assumptions, and it explains the barristers’ interests even less well.

To understand the limits of this thesis, lawyers in the United States paid by the client and public defenders paid by salary are largely immune from judicial enticement or sanction.<sup>30</sup> The thesis therefore has bite only in jurisdictions where private lawyers are chosen by judges to represent indigent defendants or where those lawyers’ requests for payment must be approved by a judge. In either instance, the chosen lawyer, dependent upon appointments for income, might

25. BALDWIN & McCONVILLE, *supra* note 3.

26. *Id.* at 46.

27. The Bar refused to respond to the authors’ attempts to learn the barristers’ reaction to the defendants’ complaints (citing the lawyer-client privilege), and, disgracefully, tried to block the book’s publication. See John Baldwin, *Research on the Criminal Courts*, in *DOING RESEARCH ON CRIME AND JUSTICE* 251-52 (Roy D. King & Emma Wincup eds., 2000). The book was so controversial that the vice-chancellor of the authors’ university included a foreword indicating how he allayed his concerns about its “academic integrity.” See BALDWIN & McCONVILLE, *supra* note 3, at xv.

28. *Id.* at 106-09. The “sentencing discount” is the common term used to describe the reduction in the sentence received by a defendant who pleads guilty. See ARCHBOLD, *CRIMINAL PLEADING, EVIDENCE AND PRACTICE* §§ 5-80-82, at 578 (2006) [hereinafter ARCHBOLD].

29. BALDWIN & McCONVILLE, *supra* note 3, at 84, 111. For the most dramatic presentation of the thesis by an American author, see Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 *LAW & SOC’Y REV.* 15, 18-24 (1967).

30. Although there have been pilot programs experimenting with a public defender’s office in England, none as yet exists permanently. As a result, independent barristers are chosen to defend.

fear irritating that (or a different) judge by, for example, pressing a motion that will likely be denied or not persuading a defendant whose trial the judge thinks will surely end in conviction to plead guilty.<sup>31</sup> Barristers are immune from this sort of judicial intimidation because they are hired by solicitors without judicial participation.

More than judges, prosecutors in the United States have the power and incentive to punish defense lawyers—public defender or private lawyer, retained or appointed—who litigate aggressively. Defense lawyers are typically at a disadvantage in negotiating with prosecutors over guilty pleas.<sup>32</sup> To offset that inferior bargaining position, aggressive defense lawyers search for opportunities to magnify the prosecution's cost of resolving a case. They seek leverage by, for example, manipulating the calendar to obtain continuances, shopping for a judge noted for lenient sentences, or delaying the defendant's guilty plea until the day of trial in hope of capitalizing upon the prosecution's crushing caseload. In retaliation, prosecutors can refuse to accommodate the defense lawyer's schedule or to provide information readily given to less contentious lawyers. Prosecutors try to quell defenders' partisan behavior and to foster a culture wherein defense lawyers prefer that their clients plead guilty.

Defending barristers do not employ the range of tactics employed by American lawyers. However, this is not because the cooperation-reprisal thesis has migrated to England to explain their practices.<sup>33</sup> For example, barristers, unlike lawyers, do not make motions (known as "applications") that, while unlikely to succeed, are intended to dampen the Crown Prosecution Service's (CPS) enthusiasm to proceed by making the prosecution more costly.<sup>34</sup> The barrister cannot make a nuisance of himself in this way in Crown Court because applications to exclude evidence are heard at the trial rather than during a pretrial

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31. Guilty pleas please judges and prosecutors by removing a case from their busy calendars. Such a plea also pleases prosecutors by securing a conviction at less cost than a trial.

When judges wield this power to punish lawyers they do not simply tolerate deplorable representation but appoint those lawyers whom they expect to act deplorably. See Peter W. Tague, *An Indigent's Right to the Attorney of his Choice*, 27 STAN. L. REV. 73, 81 n.50, 82 n.52 (1974) (discussing judicial pressure on appointed lawyers not to act aggressively in political cases); Barry Tarlow, *Rico Report: Terrorism Prosecution Implodes: The Detroit 'Sleeper Cell' Case*, CHAMPION, Feb. 29, 2005, at 61.

32. This is especially so, as in federal prosecutions, where the prosecution is not required to divulge much of its evidence to the defense. See FED. R. CRIM. P. 16.

33. Barristers are not unaware of opportunities to achieve better results for the defendant. One barrister told me, for example, that he might not inform the CPS before the trial date of his intent to move to exclude evidence for fear the police would fix the evidentiary problem. (All told, I have interviewed thirty-seven barristers in connection with this study, eight Queen's Counsel, twenty-seven juniors and two pupils. I also interviewed the chief clerk of three chambers in London.)

34. The CPS is the equivalent of a prosecutor's office in the United States, with jurisdiction throughout England and Wales. Until recently, its barristers and solicitors had no right to litigate in the Crown Court. For the most part, they continue to function as solicitors do for the defendant, preparing the case, choosing a barrister to prosecute, and assisting the barrister in court.



hearing conducted weeks before the trial date.<sup>35</sup> At the trial, the CPS will absorb the cost of litigating the exclusionary issue because it is committed to resolve guilt through the trial.

Nor do barristers advise defendants to reject plea bargains proposed by the prosecution in hopes that the guilty-plea package will improve closer to trial. The dynamics of practice provide one explanation for this occurrence. The defendant and the barrister typically meet only shortly before the trial date. The defending barrister may have no counterpart with whom to negotiate because the CPS often has trouble finding a barrister to brief as prosecutor.<sup>36</sup> Most importantly, the Crown prosecutor and prosecuting barrister are forbidden from negotiating with the defense over the sanction.<sup>37</sup> A second explanation is the nature of the benefit for the defendant from pleading guilty. With the reduction in sentence now set by law,<sup>38</sup> it may be unwise to wait until the trial date because the discount drops precipitously as the trial approaches.<sup>39</sup>

The cooperation-reprisal thesis also fails to describe the nature of pleading in the English criminal system because neither the CPS nor prosecuting barristers have the power or the desire to punish defending barristers. For example, the CPS does not control the scheduling (“listing”) of cases. Its discovery obligation, generous by the standards of many jurisdictions in the United States, is set by law.<sup>40</sup> The defense learns of the Crown’s evidence; there is no system of informal discovery of use in rewarding or punishing litigious barristers.<sup>41</sup> Nor does the prosecuting barrister possess the American prosecutor’s authority over the plea process: she does not initiate an offer and she does not accept the defendant’s offer. Instead, the CPS accepts or rejects the defendant’s proposal.<sup>42</sup> The prosecuting barrister, chosen by the CPS for the single case, has no control over

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35. A hearing on an application to exclude a confession, for example, occurs immediately before the Crown offers the evidence, and is thus commonly called a “trial-within-a-trial.” See ARCHBOLD, *supra* note 28, §15-376.

36. One study found that barristers returned 66 percent of the CPS’ briefs. See ZANDER & HENDERSON, *supra* note 8, at 45.

37. The “Crown prosecutor” is a solicitor or barrister employed by the CPS to organize and oversee the prosecution. The “prosecuting barrister” is the barrister in independent practice briefed by the CPS to prosecute the particular case.

38. See Criminal Justice Act 2003, § 144. For the size of the discount, see *infra* note 39.

39. Defendants who plead guilty at the “first reasonable opportunity” receive the largest discount, as much as 33 percent. The discount drops to 25 percent if the defendant waits until after the trial date is set and then to 10 percent for a cracked trial. See Sentencing Guidelines Council, *Reduction in Sentence for a Guilty Plea, Guideline*, ¶ 4.3 (2004), available at [http://www.sentencing-guidelines.gov.uk/docs/Guilty\\_plea\\_guideline.pdf](http://www.sentencing-guidelines.gov.uk/docs/Guilty_plea_guideline.pdf) [hereinafter *Reduction in Sentence for a Guilty Plea*]. For a discussion of the current sentencing scheme and of the tactical considerations a defendant confronts in deciding whether (and when) to plead guilty or have a trial, see Peter W. Tague, *Tactical Reasons for Recommending Trials Rather than Guilty Pleas in Crown Court*, 2006 CRIM. L. REV. 23, 31-36.

40. At a minimum the CPS is expected to disclose the evidence it will offer at trial. See Criminal Justice Act 2003. For a comparison of discovery in federal court and Crown Court, see TAGUE, *supra* note 10, at 196-203.

41. *Id.*

42. Or, so I am told by barristers who defend and prosecute, and by Crown prosecutors.

the Crown's disposition of other briefs held by the defending barrister. With only one case, the prosecuting barrister has no backlog that the time needed to litigate this defendant's case, if not resolved by guilty plea, will exacerbate.<sup>43</sup> Nor would a prosecuting barrister have an interest in punishing a defending barrister even if she had the power to do so. Because the cab-rank rule forbids the barrister to reject a brief, so long as he is available, the barrister who prosecutes today could defend tomorrow. What if the barrister she aims to punish becomes her opponent in the future?

While the cooperation-reprisal thesis still has adherents in England, Michael McConville, one of the authors of *Negotiated Justice*, has rejected it, and rightly so, for insufficient empirical support.<sup>44</sup>

## B. STANDING ACCUSED

*Standing Accused*, a more recent portrayal of defense practice,<sup>45</sup> presents the results of a study in which an undefined number of barristers were observed counseling defendants about guilty pleas. The study focused chiefly on the efforts of solicitors as they represented criminal defendants. The conclusion of this study, that barristers were "determined" that defendants plead guilty "to some or all of the charges," was no less scalding than the accusations set forth in *Negotiated Justice*.<sup>46</sup> Strangely, the authors of *Standing Accused* offered no motives to explain the barristers' behavior. They did, however, accuse solicitors of benefiting personally from the guilty pleas they were said to seek in representing defendants by themselves in magistrates' court.

A "complex of [five] variables," the authors contended, led solicitors to prefer guilty pleas rather than trials: "the[ir] career trajectory . . . ; the constraints of the legal aid system; the psychological comfort of certainty over unpredictability; the professional pride in securing a 'victory' in the face of possible defeat; and the practical constraints of managing cases in a way that guarantees a reasonable

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43. If the barrister has two briefs, both for the prosecution, or one for the defense, and the trials overlap, she must return one if the other's trial has not ended.

44. See McCONVILLE ET AL., *supra* note 3, at 186-88 (finding no evidence in magistrates' courts that "work groups" (the advocates) cooperated, or that criminal defenders were threatened with sanction for not delivering guilty pleas). Not all have foresworn it, however. See ANDREW BOON & JENNIFER LEVIN, *ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES* 224 (1999).

45. Published in 1994, the book was based on observational research conducted between 1988 and 1991. McCONVILLE ET AL., *supra* note 3, at 15.

46. *Id.* at 256 (emphasis added). The desire to secure guilty pleas to all counts seems peculiar because it is inconsistent with the idea of bargaining. After all, pleading guilty to fewer than all of the charges might lead to a lower sanction. Even if not so, defendants might be less troubled about pleading guilty if they thought they received a "bargain" by not admitting culpability to all charges. One barrister suggested to me that the tactical reason to plead guilty to all counts might be to persuade the judge that the defendant had accepted responsibility for his behavior. Also, if the CPS insisted on a guilty plea to the most serious charge, a guilty plea to the inferior ones is not likely to harm the defendant because the sentence is based, as barristers have told me, on the most serious charge.

livelihood.”<sup>47</sup> The authors failed to amplify these vague, if disturbing, explanations, each of which is seriously flawed. Regardless of the accuracy of this list in describing solicitors’ interests, as discussed below in Part III.B, maximizing income is the only explanation that applies to barristers.

Whatever is meant by the first reason, “career trajectory,” a barrister’s career soars by developing skills as an advocate. As discussed in Part III.A, the barrister’s ability to persuade jurors and judges is on sale. He wants to burnish a reputation for advocacy, not for adeptness in negotiating guilty pleas or bludgeoning defendants to plead guilty.

The meaning of the “constraints of the legal aid system,” the second reason, is unclear. Barristers recognize that their remuneration from representing criminal defendants will come almost exclusively from legal aid. They have accepted, if begrudgingly, that legal aid payments are sufficient to trigger their cab-rank obligation to represent even indigent defendants.<sup>48</sup> There is also no current confusion over which of the barrister’s conduct will be compensated. Unlike the former, so-called *ex post facto* scheme of payment, under which, in serious cases, a barrister might be denied payment by a court officer who examined the appropriateness of the barrister’s choices after his representation had ended,<sup>49</sup> the current regime—the Graduated Fee Scheme (GFS)—explicitly identifies the acts that will be compensated.<sup>50</sup>

The third reason mentioned by the authors of *Standing Accused*—the “comfort of certainty” bought, apparently, through guilty pleas—has no allure for barristers. Certainty is comforting only if unpredictability carries personal risk. At trial, a defendant forfeits the reduction in punishment for a guilty plea, thus risking a greater sanction if convicted by the jury. But the barrister who does a credible job in defending his lay client loses nothing if the jury convicts.<sup>51</sup> Solicitors, while keenly aware of barristers’ reputations for adversarial skill, keep no scorecard of convictions and acquittals, and their attempt to do so would be impeded by how solicitors organize their work. By not attending the trial, solicitors may lack information to grade the barrister’s performance. Thus,

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47. MCCONVILLE ET AL., *supra* note 3, at 188.

48. See CODE OF CONDUCT, *supra* note 12, ¶ 604(b)(iii) (“[A]ny instructions in a matter funded by the Legal Services Commission . . . shall . . . be deemed to be at a proper professional fee.”). Recently, however, barristers voted to abandon the cab-rank rule in criminal cases because of low fees. Then, in 2005 barristers threatened to strike because of the perceived inadequacy of fees. The controversy with the Department of Constitutional Affairs over the levels of compensation has not been resolved as of this writing. See *infra* note 92.

49. See Tague, *supra* note 18, at 1137; Tague, *supra* note 21, at 443.

50. Barristers now know in advance the amounts they will be paid as a basic fee, depending upon the way the case is resolved, as well as the remuneration for specific services (listening to tape recordings, for example). See CDS Funding Order 2001, *supra* note 8, sched. 4, ¶¶ 8-10, 22. However, the fees are calculated after the fact in very long cases—trials that last longer than forty days—where the fee is negotiated between the barrister and the Legal Services Commission (in charge of legal aid for criminal defendants).

51. The defendant is formally the solicitor’s client, and the solicitor who hired the barrister, the barrister’s client. The defendant is known as the barrister’s “lay client.”

barristers do not risk losing a solicitor as a source of briefs by going to trial, even if the defendant is convicted in part because of the barrister's adversarial blunders and sentenced more severely than if he had pleaded guilty.

The idea implicit in the fourth explanation—the “professional pride in securing a ‘victory’ in the face of possible defeat at trial”—seems to be that an advocate may be personally pleased by a guilty plea that produces a generous result for the defendant: one the defendant perhaps did not deserve. But this misconstrues the barrister's role. His purpose is to provide detached, non-partisan, objective advice. Barristers do not care whether the defendant accepts or rejects their advice. They steel themselves not to become emotionally involved in the defendant's decisions or in the case's outcome.<sup>52</sup> They do not feel relief or satisfaction in persuading a reluctant defendant to accept an outcome, such as a guilty plea, that seemed genuinely in the defendant's interest.<sup>53</sup>

Whether barristers “manag[e] cases in a way to guarantee[] a reasonable livelihood”—the last of solicitors' supposed incentives—deserves separate and extended discussion because it is the most important of the barristers' incentives.<sup>54</sup> It is discussed in Part III.B.

### C. DO BARRISTERS TAKE TOO MANY BRIEFS?

The last erroneous explanation of the barristers' motives in discussing guilty pleas with defendants has a modicum of truth. The claim is that barristers deliberately take too many briefs, and then resolutely seek guilty pleas to avoid returning those they cannot try.<sup>55</sup>

Barristers are paid by legal aid for resolving cases and not for preparing a case they return. To ensure receiving a basic fee, barristers sometimes “double-book”:<sup>56</sup> they accept more than one brief scheduled for the same period of time.<sup>57</sup> Thus, they accept briefs to represent two defendants in separate trials scheduled for the same day. If on Monday it appears both trials will begin on Tuesday, the barrister returns the brief of one defendant while defending the other the next day.

This practice subverts the value of the cab-rank rule because one defendant is

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52. Cf. Timothy Harper, *Bye, Bye Barrister: The End of Britain's Two-Tiered Bar*, 76 A.B.A. J. 58, 60 (1990) (barrister expressing preference for his “sheltered experience” when compared with solicitors' involvement with lay clients).

53. These are the views expressed by the barristers I have interviewed.

54. MCONVILLE ET AL., *supra* note 3, at 188.

55. Cf. ANDREW SANDERS & RICHARD YOUNG, CRIMINAL JUSTICE 311 (1994) (a barrister concedes taking briefs for the same day to insure earning money). No study has been done of the number of briefs barristers commonly carry and of how they prepare them.

56. It is arguably unfair to blame the barrister for double-booking because it is his clerk who accepts business for him. The barrister does not discuss with the solicitor whether to accept the solicitor's defendant's brief. That said, barristers could instruct the clerk not to double-book.

57. The basic fee is a set amount covering the barrister's first day in court and his imputed time to prepare. If he returns the brief, however, he may not be compensated for his preparation. See *supra* note 18. Basic fees are discussed extensively in Part III.B *infra*.

denied representation by the barrister selected to represent him<sup>58</sup> and may distrust the replacement barrister his solicitor scrambled to find. It is even more pernicious if, as critics suggest,<sup>59</sup> the barrister delays returning one defendant's brief in hope of pressuring him to plead guilty so the barrister will earn a basic fee for resolving the cases of both defendants.

Several points belie this allegation. The plethora of returned briefs suggests that if barristers employ such a strategy they are not very good at executing it.<sup>60</sup> Moreover, not all barristers could employ it. Inexperienced juniors rely on the chambers' clerk for business. Because they typically receive their work the day before a hearing, they could not strategically amass briefs for the same day. The same is true for Queen's Counsel because they usually have considerable time between briefs, a period that enables them to prepare the fewer, more complex cases that merit their attention.<sup>61</sup>

The strategy could work only for juniors of sufficient experience and reputation to attract briefs from solicitors. The solicitor notifies the barrister's chambers' clerk that he wants to brief a particular barrister.<sup>62</sup> If that barrister is popular, he will be offered briefs by other solicitors, more briefs than he has time to try. This popular barrister must return some of the briefs, unless he is able to persuade those defendants whose cases he cannot try to plead guilty.

Yet, the mechanics of a barrister's manipulation of defendants to plead guilty, to retain other briefs, are not clear. If two cases are set for trial on the same day and one defendant pleads guilty, can the barrister take the second defendant's case to trial? Because defendants are often sentenced immediately after pleading guilty,<sup>63</sup> the hearing may last so long that the judge in the second case becomes irritated with the barrister's delay in appearing. As a result, it may be imprudent

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58. The Bar chastises barristers for delay in returning a brief they expect will need to be returned, but does not explicitly forbid double-booking because, perhaps, the vagaries of litigation in general and of scheduling cases in particular result in the continuation or dismissal of many cases. The barrister might earn nothing, or very little, if neither case proceeds. Having two or more cases set for the same time provides some insurance.

59. See *supra* note 55.

60. For the number of defense briefs returned, see *supra* note 12.

61. Barristers are either Queen's Counsel or juniors. The term Queen's Counsel ("QC") is an honorific indicating that the barrister is considered a supremely good advocate. A QC is paid higher fees by legal aid because of the complexity of the cases he takes. Although the rules for becoming a QC have been reformulated, see William Blair QC and Robin Knowles QC, *The Silk Route Re-opens*, Counsel Aug. 2005, at 10, there remain informal guidelines. For example, no junior would apply to become a QC until he practiced for at least ten years. Of the barristers I know who specialize in criminal law, it has taken between fifteen and twenty years before they were elevated to the rank of QC. Every barrister who is not a QC is called a junior, no matter his age or experience. An "inexperienced" junior is one who has practiced for only two or three years.

62. Barristers practice from offices called chambers. As independent contractors—they can form no partnerships with the other barristers in chambers—they need administrative help to arrange their schedules. That service is provided by the clerk of the chambers. The clerk also negotiates with the solicitor the fee a defendant with money must pay to retain a barrister.

63. In American courts, the sentencing is typically postponed for weeks, for the preparation of a pre-sentence report by a probation officer, and sometimes of reports by the prosecutor or defense lawyer.

for the barrister to hold both cases. Moreover, if both defendants insist on a trial, the barrister's greed will cause greater inconvenience because one trial must be postponed, if only for the short time needed to find a replacement barrister. Also, that defendant's solicitor may be very upset with the barrister for not returning the brief earlier.

If the barrister is in trial representing one defendant when the date of the other trial arrives, he must escape his obligations in that courtroom to appear elsewhere to persuade the second defendant to plead guilty. This might not be possible to arrange even if the two cases are set for the same courthouse,<sup>64</sup> and it is likely impossible if the cases are scheduled for different courthouses.

If the barrister could manipulate the calendar, as lawyers sometimes can, he might succeed in representing both defendants. In the United States, various hearings can be scheduled between the defendant's initial appearance and the trial. At each phase, the defense lawyer—if bent on obtaining a guilty plea—has an opportunity to erode the defendant's resolve for a trial. If multiple defendants are prosecuted separately but in the same courthouse and they each agree to plead guilty, the lawyer will try to schedule their cases for the same day and, if possible, in front of the same judge.

These features of American practice do not exist in Crown Court. Except in complex or lengthy cases,<sup>65</sup> there is only one hearing between the defendant's initial appearance in Crown Court and the trial.<sup>66</sup> Called the Pleas and Case Management Hearing ("PCMH"), it is at this point that the defendant enters a plea in Crown Court. If he pleads not guilty, the trial's length is estimated, a trial date chosen, issues in dispute are identified, and so on.<sup>67</sup> No other pre-trial

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64. Barristers must not leave defendants unrepresented "at any stage of [the] trial," and can be absent only "in exceptional circumstances which [they] could not reasonably . . . foresee . . ." Even then, the barrister must obtain the consent of the solicitor and the defendant, and have a "competent deputy take[] his place." The General Council of the Bar, Standards for the Conduct of Professional Work, Attendance of Counsel at Court, ¶¶ 15.2.1, 15.2.2, *available at* <http://www.barcouncil.org.uk/document.asp?languageid=1&documentid=2817>.

65. *See* Criminal Procedure and Investigations Act 1996, 1996 Chap. 25, § 29, *available at* <http://www.opsi.gov.uk/acts/acts1996/96025—g.htm#29>. Pre-trial hearings are permitted in other cases, *id.* §§ 39, 40, but barristers tell me they normally occur shortly before the jury is sworn.

66. *See* Practice Direction (Criminal Proceedings: Consolidation), ¶ IV.41.12 [2002] 1 W.L.R. 2870 (as substituted by Practice Direction (Criminal Proceedings: Case Management [2005] 1 W.L.R. 2491).

67. At the Pleas and Directions Hearing ("PDH"), the proceeding replaced in 2005 by the Pleas and Case Management Hearing ("PCMH"), the barrister briefed for trial—assuming one had been selected by the solicitor—would usually not attend because the compensation paid by legal aid was so minimal. In his place a very inexperienced junior barrister would appear with the defendant. But that barrister would be reluctant to advise the defendant to plead guilty out of concern for upsetting the more senior barrister, and the chambers' clerk, too, if a rift developed over the fee. A conflict between the two barristers could arise because the barrister with the defendant when he pleaded guilty receives the basic fee, even though the more experienced barrister holds the brief for trial. Thus, no barrister might speak candidly with the defendant over his choice of plea until the conference(s) between the two of them (and with the solicitor or his representative) near the trial date. While too early to judge whether the barristers' incentives have changed with the PCMH, because the compensation for this hearing has not been increased beyond that for the PDH, it is likely very inexperienced barristers continue to represent defendants.

proceedings are customarily scheduled during which the defendant could plead guilty.<sup>68</sup> Thus, barristers lack the opportunities lawyers have to overcome the defendant's reluctance to plead guilty, or to schedule a number of clients to appear in the same courthouse on the same day, to plead guilty.

Thus, while barristers have an incentive to double-book, and to extract a guilty plea from one of those two defendants to keep the brief of the other, it is not obvious how a barrister could successfully implement such a strategy. Moreover, double-booking carries the risk that the solicitor of the defendant who pleads guilty will punish the barrister, by refusing to brief him in the future, if he suspects the defendant was sacrificed so that the barrister could retain the other brief.

### III. ATTRACTING WORK AND MAXIMIZING COMPENSATION

How do lawyers and barristers attract indigent defendants as clients and, once they do, how do they maximize income by the defendant's choice of plea? Lawyers are not chosen in ways that align their interests with those of the defendant; barristers are, because they are chosen by solicitors based on their reputation for advocacy. Lawyers can maximize their remuneration through guilty pleas; barristers will marginally prefer trials over guilty pleas.

#### A. ATTRACTING WORK

##### 1. LAWYERS IN THE UNITED STATES

The manner in which private lawyers are often selected to represent indigent defendants is not designed to increase the likelihood that the lawyer's particular skills match the defendant's needs. The jurisdiction that must devise a plan for appointing lawyers to represent indigent defendants may accept the lawyer's bid for a contract to represent all or a percent of those defendants. Or, the lawyer might be chosen by a judge or other court official from a list of those lawyers who have qualified for appointments by some criteria. To be selected in either way, a lawyer may need to have some experience and perhaps exhibit some minimum talent.<sup>69</sup> To become eligible to represent defendants charged with felonies, for example, a lawyer might be required to represent defendants charged with misdemeanors. But having experience does not mean that the lawyer has developed the adversarial skill to judge the merits of a case or to communicate his

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68. The barrister or solicitor could ask for a hearing called a "mention" to resolve some issue with the CPS, or to have the defendant plead guilty, but barristers told me they would never request a mention for the purpose of pressuring the defendant to change his plea to guilty.

69. In New York City, however, newly-graduated lawyers with no or scant experience can join the panel from which lawyers are selected because of a lack of interest among lawyers to represent indigent defendants. See Laura I. Appleman, *The Ethics of Indigent Criminal Representation: Has New York Failed the Promise of Gideon?*, 16 *PROF. LAW.* 2 (2005) (discussing appointed defense counsel).

judgments effectively to the defendant.<sup>70</sup> Often missing, then, from the criteria used to select lawyers is the need for the lawyer to develop a reputation for skillful advocacy among those who appoint the defenders.

The barrister, by contrast, must develop a reputation to attract briefs. He must be appealing to those with the power to hire him—namely, solicitors—in ways that the lawyer does not.

## 2. BARRISTERS

Until established as an advocate, a barrister's professional life is precarious.<sup>71</sup> He begins as an apprentice (a pupil). The barrister once earned nothing for the first six months of his pupillage, and nothing for the second six months either, unless given work by the chambers' clerk during that period.<sup>72</sup> A barrister now receives a modest monthly salary of at least £833 from the chambers in which he is a pupil.<sup>73</sup> His tutor (formerly called a pupil master, now a pupil supervisor) steers no work to him because this supervisor, as a barrister with at least five years experience, has no suitable advocacy work to share with the pupil.<sup>74</sup>

To continue practicing after his year-long pupillage, the pupil must be invited to join a chambers of barristers (a "tenancy"). Until the last decade or so, the selection criteria did not stress the pupil's nascent talent as a litigator, in part because there were only limited opportunities for him to demonstrate such talent.<sup>75</sup> The pupil learned by observing the pupil supervisor rather than by being observed by others as he litigated.<sup>76</sup> There were no opportunities within chambers to gain advocacy experience through simulated problems, in part because without a corporate identity,<sup>77</sup> a chambers had no reason to invest in a

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70. *Id.* (noting that appointed lawyers often lack knowledge of criminal procedure and local rules and lack the skill of communicating with defendants).

71. For a discussion of the steps in a barrister's professional career summarized in the text, see TAGUE, *supra* note 10, at 27-30.

72. The work might involve appearing in magistrates' court as a substitute for the solicitor, or in Crown Court at the PCMH as a substitute for the barrister who has been or will be briefed for trial.

73. See CODE OF CONDUCT, *supra* note 12, Annexe R (Pupillage Funding and Advertising Requirements 2003) ¶ 1(a).

74. See TAGUE, *supra* note 10, at 27 n.85.

75. A head of chambers, a Queen's Counsel, told me that his chambers, one noted for criminal work, was the first to initiate simulated advocacy training for its pupils (beginning in the late 1980s), to teach them but also to evaluate who would receive an invitation to join the chambers. Clinical opportunities are now provided during the year-long professional schooling barristers must today complete before becoming a pupil. Conversations with teachers at the Inns of Court School of Law, London (2004).

76. The barrister who wrote one of the first books intended to educate pupils about advocacy explained that his motivation came from his sudden realization that he had overlooked explaining so much about advocacy to his pupils and had never watched them advocate. KEITH EVANS, *ADVOCACY AT THE BAR: A BEGINNER'S GUIDE* vii-ix (1983).

77. A prospective client might select a firm of solicitors (or of lawyers) based on the firm's reputation. He might know none of the solicitors but trust that each will perform effectively. Until recently, barristers were uninterested in developing such a corporate identity because of the different structure of their practice. Now, I



pupil's progress. Barristers shared space and expenses, but did not benefit if their colleagues were themselves skilled—or, conversely, suffer if they were inadequate—advocates.<sup>78</sup>

Once a tenant, a new barrister's professional life is frenetic.<sup>79</sup> He works at the whim of the chambers' clerk, doing work received from the clerk, often the afternoon before he is to appear in court. Not surprisingly, his professional development can be haphazard. If he persuades the clerk that he can perform adequately to please solicitors (and does not irritate defendants), he will be rewarded with whatever more complicated cases the clerk receives to distribute.<sup>80</sup>

The new barrister aspires to free himself from relying on the clerk. To advance to more serious—and thus more lucrative—cases, the barrister wants to be chosen by solicitors to represent particular defendants. To do this he must establish a reputation for able advocacy.

Thus, unlike the young American lawyer who depends on court appointments to receive cases, the barrister must develop a reputation as an effective litigator to attract briefs from solicitors. The barrister, unlike the lawyer, cannot toady to a judge to receive appointments or receive them automatically via membership in a rota kept by the judge or by the court. His ability to advertise is restricted.<sup>81</sup> He cannot talk with solicitors to persuade them to hire him. Any negotiation over a barrister's selection occurs between the solicitor and the barrister's clerk. Because of the cab-rank rule, all barristers—every junior and, in serious cases, every Queen's Counsel<sup>82</sup>—are available to the solicitor. By contrast, because of meager compensation and the lack of criteria to ensure lawyers are skilled

am told by barristers, they try to develop a reputation for their chambers, so that solicitors who know little about the different barristers will trust that the chambers' clerk will select an able one.

78. Indeed, because barristers compete with each other for briefs, a barrister might benefit if the others in his chambers were not his equal as an advocate. Nonetheless, barristers now tell me they try to develop an identity for their chambers. At the very least they advertise when a Queen's Counsel leaves one chambers to join theirs and list the areas of law in which chambers' members will advocate. For illustrations of this point see any recent copy of the Bar's magazine, *Bar News*.

79. For a still accurate summary of a young barrister's daily practice, see ELIZABETH USHER & MARTIN EDWARDS, *CAREERS IN THE LAW* 49-51 (4th ed. 1989).

80. Clerks have their own incentives to keep barristers busy. When their compensation was a share of the gross earnings of the barristers in chambers, they obviously wanted every barrister to work continuously. Although many are now paid by salary, clerks remain interested in attracting briefs from solicitors as a way of proving their worth to the barristers by keeping them busy.

81. See CODE OF CONDUCT, *supra* note 12, ¶¶ 710.1, 710.2. Of the approved methods of advertising the only one that might reveal anything about the barrister's skill is "information about any case in which the barrister has appeared . . . where such information has . . . become publicly available," or, when not public, with the written permission of the lay client. *Id.* ¶ 710.1(d).

82. See Criminal Defence Service (General) (No. 2) Regulations 2001, 2001 (S.I. 2001/1437), pt. IV, ¶¶ 14.2, 14.3(a), (b) [hereinafter CDS General Regs. 2001] (explaining that a Queen's Counsel can be appointed if the case "involves substantial novel or complex issues of law or fact which could not be adequately presented except by a Queen's Counsel" and the CPS has briefed a Queen's Counsel or the case is "exceptional compared with the generality of cases involving similar offences").

advocates, private lawyers selected to represent indigents in American jurisdictions are too often inexperienced, cynical, or incompetent.<sup>83</sup>

Moreover as noted above, the solicitor protects his reputation for providing appropriate assistance to defendants—and thus increases the likelihood of being chosen by them—by briefing the best barrister available, or, at a minimum, an able one whose method of advocacy matches the needs of the defendant. In selecting a barrister, the solicitor relies on various sources of information, including his own observations of barristers or the observations of his representative in court,<sup>84</sup> the barrister's reputation, or the barrister's clerk's assurance that the barrister, though inexperienced and not known by the solicitor, will perform effectively.

The junior barrister's financial stability is uncertain until he establishes a reputation for effective advocacy. Only juniors with the prowess to develop new adversarial skills will be promoted to Queen's Counsel. As a Queen's Counsel, the barrister appears only in the most complicated or serious cases.<sup>85</sup> He will not be briefed in the more mundane cases on which he thrived as a junior. Instead, he will have a new role of "leading" a junior in cases so difficult that two barristers are considered necessary to defend adequately.<sup>86</sup> The promoted barrister's new role therefore resembles that of a partner engaged in civil litigation in an American law firm. He oversees case preparation by the junior and the solicitor, but typically becomes actively involved in the case only near the trial date. However, a Queen's Counsel who flourished as a junior barrister and attracted many briefs may flounder in his new role. As when he began his career as a barrister, the new Queen's Counsel, to attract briefs, must develop a reputation among solicitors as a leader.<sup>87</sup>

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83. Cf. Appleman, *supra* note 69.

84. The solicitor especially wants information about barristers whom he does not know. The representative he assigns to assist the barrister in court may be a useful judge of the briefed barrister's or of other barrister's abilities. Not always do solicitors select someone with no qualifications to assist the barrister. See *supra* note 22. Indeed, the solicitor has an incentive to send junior solicitors from his office, for them to obtain experience, and to receive compensation to pay their salaries. For the payments to solicitors under the GFS, see Tague, *supra* note 21.

85. See *supra* note 82.

86. See CDS General Regs. 2001, *supra* note 82, ¶ 14(4) (listing conditions for the appearance of two barristers, one of which is the same as that for the appointment of a Queen's Counsel alone, i.e., the case's complexity). It is, however, no longer mandatory for a Queen's Counsel to have a junior. *Id.* ¶ 14(2)(a). But a Queen's Counsel can insist on being assisted by a junior. See CODE OF CONDUCT, *supra* note 12, ¶ 605(b). The barristers interviewed said Queen's Counsel invariably ask for a junior. Moreover, a Queen's Counsel can now appear in less complex cases, but he would be paid at a junior's rate. Barristers told me that no Queen's Counsel other than one who could not attract work would make such a mortifying choice.

87. As a junior, the barrister may have begun this process because experienced juniors may lead other juniors in defending or prosecuting.

## B. MAXIMIZING INCOME

### 1. LAWYERS IN THE UNITED STATES

The three prevalent ways of compensating private lawyers for representing indigent defendants are, in descending order of insidiousness, 1) by contract for a certain number of cases, 2) by flat fee per case,<sup>88</sup> or 3) by an hourly rate with a cap on the total compensation regardless of the time spent on the matter.<sup>89</sup> Once awarded a contract to represent all or a percent of indigent defendants in the jurisdiction, the lawyer is paid for resolving the cases, without regard to the nature of disposition (dismissal, guilty plea, or trial).<sup>90</sup> The same incentive to end the case quickly exists if a private lawyer were paid a flat fee to represent a single defendant. Lawyers in both financial arrangements face an inverse relationship between the number of hours they expend and their effective hourly rate. They are therefore seduced to obtain a guilty plea as early in the litigation as possible. This is especially so for the lawyer who has contracted to represent all of the jurisdiction's indigents if his contract payment does not increase when more defendants are prosecuted than initially anticipated. Under such a system, the conflict between the lawyer's interest for a speedy resolution, and that of those defendants who want a trial, is obvious and acute.

In contrast, the lawyer who is paid by the hour has a very different incentive, at least initially. An hourly payment scheme lacks the seductiveness of the early guilty plea; unless the lawyer has a surfeit of appointments (and is pressured by judges to dispose of some of them), he wants to milk each one for as long as financially remunerative. In Maryland, for example, the current cap of \$5,200 enables the lawyer to be paid, at \$90 per hour,<sup>91</sup> for fifty-seven hours of work. This is enough time for an efficient lawyer to prepare a defense: to confer with the defendant several times, to review whatever discovery the prosecution provides, to undertake a cursory investigation of the prosecution's and the defendant's competing stories, to write a motion to exclude evidence, and to participate in the hearing on the issue. But the lawyer could not also fit a trial into the time that remains before he pierces the payment. Once he pierces the cap, he earns nothing. As he approaches the cap, then, his incentive to end the case by guilty plea mounts.

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88. In Virginia the payment with felonies punishable by twenty or fewer years in prison is capped at \$445; for felonies punishable more harshly, the cap is \$1,235. See VA. CODE ANN. § 19.2-163 (2005). The judge has the authority to select the amount of payments and could thus award a lesser amount.

89. Such a scheme is used in Maryland, as explained in the next paragraph in the text.

90. A finding that public defenders refused to let their defendants plead guilty at the initial appearance but contract lawyers encouraged their defendants to do so supports the inference that contract lawyers want to end cases as quickly as possible. See Meredith Anne Nelson, Comment, *Quality Control for Indigent Defense Contracts*, 76 CAL. L. REV. 1147, 1152 (1988).

91. MD. CODE REGS. ¶ 14.06.02.06 (2005). On July 1, 2007 Maryland will adopt the federal hourly rate for indigent criminal defense representation and cap for a corresponding federal panel attorney. *Id.*

## 2. BARRISTERS

The schemes for compensating appointed American lawyers can create the perverse incentive that they prefer to end the case by guilty plea as quickly as possible if they ignore the defendant's interests. Does the system of paying barristers, called the Graduated Fee Scheme ("GFS"), similarly entice them to prefer guilty pleas over trials?<sup>92</sup> Under the GFS, the barrister's "basic fee" covers the time to prepare (regardless of the time spent) and the first day of the hearing or trial.<sup>93</sup> The basic fee also differs depending upon the crime, with all crimes assigned to one of nine categories.<sup>94</sup> Before 2005, that fee was least for a guilty plea, higher for a trial, and highest for a "cracked trial" (a guilty plea entered by a defendant who was expected to contest guilt at trial, but who changed his plea on the day of trial or shortly before).<sup>95</sup> Amendments to the GFS in 2005 leveled the fees for trials and cracked trials. To illustrate, for an unarmed robbery, a class C offense, a junior barrister's basic fee is now £188 if the defendant pleads guilty at the Pleas and Case Management Hearing, and £250 if the case is tried or cracked.<sup>96</sup>

If the case goes to trial, the barrister receives four more fees: two for each day of trial after the first (a "refresher" and a "trial uplift"),<sup>97</sup> another for each page of

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92. Barristers have vociferously complained about the level of fees. Responding to the barristers' complaint that fees under the GFS had not increased since the scheme's inception in 1997, the Department of Constitutional Affairs ("DCA") began a comprehensive review of payments for barristers and solicitors in 2005. Headed by Lord Carter of Coles, the review team published its initial report in early 2006. See *PROCUREMENT OF CRIMINAL DEFENCE SERVICES: MARKET-BASED REFORM (2006)* [hereinafter *PROCUREMENT OF CRIMINAL DEFENCE SERVICES*]. Except perhaps in one instance, discussed *infra* at note 97, the proposed changes in calculating barristers' fees do not appear to affect the argument in this article. There is the promise that payments will increase, but the proposed amounts have not been decided. Any increases will maintain the current scheme's relationship between the payments for guilty pleas, cracked trials, and trials, and thus the barrister's preference for trials. Conversation with a Member of the DCA (July 2005).

93. See ARCHBOLD, *CRIMINAL PLEADING, EVIDENCE AND PRACTICE* ¶ G-81 (Supp. 2006) [hereinafter ARCHBOLD 2006 Supp.]. It should be noted that data in this Article concerning fees can be found in ARCHBOLD, *supra* note 28, and in ARCHBOLD 2006 Supp., *supra*.

94. *Id.* ¶ G-49.

95. For a junior briefed in a class G offense (forgery over £30,000, for example), the basic fee for a guilty plea was £355, for a trial £370, and for a cracked trial £467.50. The junior's fees for a class C offense (possession of a firearm, for example) were, respectively, £170, £250 and £251.50. See CDS Funding Order 2001, *supra* note 8, Sch. 4, Pt. 2, Tables following ¶ 8.

96. See Criminal Defence Service (Funding) (Amendment) Order 2005 (S.I. 2005 No. 2621) [hereinafter CDS Funding Order 2005], in ARCHBOLD 2006 Supp., *supra* note 93, ¶ 6-247. As amended, a junior's fees for a class G offense, as mentioned *supra* note 95, are now £278 for a guilty plea and £370 for a trial, and cracked trial. *Id.* To illustrate the higher fees for Queen's Counsel, under current law, with a class C offense, the fees would be £639.63 for a guilty plea and £853.13 for a trial or cracked trial. *Id.*

97. The recent review of legal aid payments suggests eliminating the separate payments for the second and perhaps for the third trial day, and including them in the basic fee. See *PROCUREMENT OF CRIMINAL DEFENCE SERVICES*, *supra* note 92, ¶ 183. Depending upon the relationship of any new payments for cracked trials and trials, this proposal could undermine the current GFS' laudable incentives, and instead tempt barristers to prefer guilty pleas over trials. The proposal's purpose, apparently, is to encourage early preparation of the case, but that

the Crown's evidence, and a fourth for each witness the Crown calls.<sup>98</sup> With guilty pleas and cracked trials, the barrister also receives a fee for each page of the Crown's evidence. Although potentially important, the fees for the Crown's evidence (pages and witnesses) are usually ignored in the calculations that follow.<sup>99</sup>

Except for very long cases,<sup>100</sup> the GFS is inflexible. The barrister's basic fee does not increase if the case's complexity requires more time to prepare than ordinary; nor is it reduced if he prepares efficiently or even skimps on preparation.<sup>101</sup> The absence of any *ex post* adjustments means that a barrister can compute the compensation under the GFS accurately, in light of the different ways of resolving the case.

With this introduction to the relevant aspects of the GFS, we are now in a position to compare the barrister's incentives with those of the lawyer as each contemplates his economic benefit from a guilty plea or trial. To repeat, this analysis assumes that the barrister ignores the interests of the defendant, and selfishly thinks only of himself. Of course, that assumption distorts the barrister's view of his responsibility—or, at least one hopes that this is so.

Actively beginning to represent the defendant only shortly before the date of trial, the barrister must quickly decide whether he prefers for the defendant to plead guilty or to contest guilt at trial.<sup>102</sup> As illustrated below, the payments for

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goal ignores the multitude of returned briefs, and thus cases where early preparation is impossible. See Graham Lodge, *Carter disaster*, SOLIC. J. GUIDE TO THE BAR, Spring 2006, at 20, 20-21.

98. For the formula, see CDS Funding Order 2001, *supra* note 8, sched. 4, ¶¶ 7, 8 (Table of Fees and Uplifts). The Crown's evidence includes every page of the statements of its witnesses, together with documentary evidence, photographs and notes of interviews with the defendant. See ARCHBOLD 2006 Supp., *supra* note 93, ¶ G-35a.

99. Because of the complexity of their calculations, these separate fees are generally ignored, except to illustrate the effect of them on a Queen's Counsel's payments, discussed later in the text. To illustrate, before the 2005 amendments there was no payment for the first 10 pages or those over 400 if the case ended by guilty plea or cracked trial, and the payments, no matter how the case was resolved, differed in amount by category of crime. Now, the calculation is somewhat simpler, but not sufficiently germane for our purposes. That said, because the Crown must ordinarily disclose all its evidence to the defense, the defending barrister could calculate the total amount he expected to receive depending on the case's resolution. And because the amounts for pages and witnesses vary so markedly, a barrister might conclude that he would earn considerably more if the case were cracked rather than tried, or the reverse.

100. In very long cases the fee is negotiated between the Legal Services Commission and the barrister.

101. By contrast, under the *ex post facto* method of compensating barristers, the payment could be increased if the barrister shortened the trial (by stipulating to the admission of evidence, for example, or abbreviating a cross-examination). See Tague, *supra* note 8, at 211-12.

102. Ignored here is the barrister's interest when the defendant tells his solicitor he will plead guilty at the first opportunity in Crown Court. Typically, a defendant will meet a barrister for the first time at the PCMH. If in his brief the barrister learns the defendant intends to plead guilty, he will negotiate a guilty plea to be entered at that hearing. He then earns the lowest fee (£158 for a class E offense, the category used in the text). If instead the defendant delayed pleading guilty until the day of trial, the barrister would receive the higher basic fee for a cracked trial (£210). But for the barrister to persuade the defendant to delay creates a major conflict between his interest and the defendant's because the sentencing discount received in exchange for a guilty plea would drop from 25 percent to 10 percent from the early to the later stage. See *Reduction in Sentence for a Guilty Plea*,

either outcome induce the barrister to prefer a trial over a guilty plea. This preference was reinforced by the 2005 amendments to the GFS which reduced the basic fees paid for cracked trials to the same fee paid for trials.

The incentives of an inexperienced junior will be considered first, then those of an experienced junior, followed by a Queen's Counsel's.

### 3. THE INCENTIVES OF AN INEXPERIENCED JUNIOR

In considering the incentives of an inexperienced junior in the hypothetical settings discussed below, two assumptions should be kept in mind. First, because such a barrister typically receives work only from his clerk, we can assume the clerk will give him simple and short cases as he develops his advocacy skills. Second, those simple cases will involve crimes falling into the two classes of crimes that are paid the least.<sup>103</sup> Consider two examples.

First, on Friday, the junior receives a brief to represent a defendant charged with domestic burglary, a class E crime, one drawing the lowest basic fee. The case is set for trial on Monday and is expected to last two days. Looking at the GFS, the barrister learns he will earn £443 if the case is tried,<sup>104</sup> and £210 if the case cracks. If the defendant pleads guilty on Monday, the barrister will return to chambers to ask his clerk for work on Tuesday. If the junior barrister then receives a brief for another two-day trial of a class E offense, set to begin on Tuesday, he knows that if Tuesday's trial also cracks, he will earn less for two guilty pleas than for a trial (£210 x 2 = £420 v. £443). Before 2005, this junior barrister would have earned more for two guilty pleas (£262 x 2 = £524).<sup>105</sup> But even before the amendments reversed his initial preference for cracked trials, the junior's problem was the nature of work he would receive on Tuesday. If instead of receiving a brief for a second trial, he were told to appear on behalf of a defendant at a sentencing hearing (£120), or a PCMH (£100), he would have earned more if Monday's case were tried (£443 v. £382 or £362 (before 2005)).

The junior barrister, uncertain about the availability and type of work he will

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*supra* note 39, ¶ 4.3. Here, however, the barrister's selfish interest dovetails with the defendant's, because it is not likely he would collect the higher fee for a cracked trial. The inexperienced barristers who appear at PCMHs typically carry the brief only for that hearing. The more experienced barrister briefed by the solicitor for the trial would instead collect the higher fee if the case cracked. Thus, if the defendant does not plead guilty at the PCMH, the barrister earns a fee of £188 for representing him at this hearing and nothing on the later occasion when the defendant does plead guilty. See CDS Funding Order 2001, *supra* note 8, sched. 4, ¶ 11 and table following ¶ 22.

103. The lowest fees are for class E and F crimes. An example of the former is discussed in the text; an example of the latter is theft of property worth less than £30,000. See ARCHBOLD 2006 Supp., *supra* note 93, ¶ G-49.

104. The basic fee is £210; the fees for the second day (refresher and trial uplift) are £233. See CDS Funding Order 2005, *supra* note 96. If we were to add payments for witnesses (four, say) and the Crown's documentary evidence (thirty pages, say), the additional payments for a trial and cracked trial would not affect the barrister's incentives (£56.70 and £55.80, respectively).

105. See CDS Funding Order 2001, *supra* note 8, sched. 4, pt. 2, and tables following ¶ 8.

receive for Tuesday, is likely to prefer to try Monday's case for two reasons apart from the fees. More importantly, the junior barrister desires to wean himself from dependence on his clerk for briefs. If their relationship were to sour, the clerk may deny him briefs. If not reconciled, the rift could force the barrister to leave practice. The junior barrister thus needs trial experience in order to develop a reputation for adversarial prowess that will lead solicitors to ask for him to represent their clients (the defendants). The second reason the junior will prefer to try Monday's case is more mundane: a trial will keep him in one place until completed, while two briefs may force him to travel to different courthouses in London or his circuit.<sup>106</sup>

In a second example, assume that the case remains simple, but the potential fees are higher. A week before the trial date, an improving junior receives an ambitious brief from the clerk as a reward for good work or for not complaining about doing financially unrewarding work. The brief is for a two-day trial of a class G offense (e.g., counterfeiting) beginning the following Wednesday. The total fee for the trial would be £726; for a cracked trial, £370.<sup>107</sup> On Friday, two days after receiving the brief, the clerk offers the junior a two-day trial of a class C offense scheduled for Monday. The junior doubts the clerk's assurance that Monday's trial will end in time to begin Wednesday's trial.<sup>108</sup>

What are the junior's considerations in deciding how to proceed? If Monday's trial runs into Wednesday, the junior will be forced to return Wednesday's brief. It is very unlikely that he or his clerk could obtain a continuance of Wednesday's case. Even if that effort succeeded, there is no reason to suppose the junior would keep the brief (briefs are returned to the solicitor when a new trial date is chosen), or be available for the rescheduled date. All is not lost if Monday's case runs three days. The junior would earn a total of £808 for the basic fee and two refreshers and trial uplifts for Tuesday and Wednesday. But the junior does have a considerable incentive to persuade Monday's defendant to plead guilty. If that occurred, the barrister would earn a fee for cracking Monday's trial (£250), plus the fee for Wednesday's trial (£726), with Tuesday free to prepare for the next day's trial. If Monday's defendant refused to plead guilty, and his trial carried into Wednesday, the junior, let us suppose, would receive another £100 for appearing with a different defendant at his PCMH on Thursday. For four days of work, then, the monetary comparison is this: £908 if Monday's trial takes three days and £976 if Monday's trial cracks and Wednesday's brief is tried.

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106. Barristers are assigned to one of the Crown Court's circuits in England and Wales. Barristers in London are usually members of the Southeast Circuit. As such, the junior might find himself traveling to a Crown Court miles away from his chambers located in, or near, one of the Inns of Court in London.

107. Before 2005 this fee was £467.50, thus illustrating how the amendments to the GFS reduced a barrister's interest in cracked trials.

108. If the junior trusted the clerk's prediction, but the case did not end until Wednesday, he could expect to receive other well-paying trial briefs from the clerk because of the consequence (the loss of Wednesday's brief) of the latter's predictive error.

If confident of persuading Monday's defendant to plead guilty, the junior might feel comfortable accepting Monday's brief. It would not be surprising for even a novice barrister to succeed in obtaining a guilty plea. Defendants, often frightened or apprehensive, can be manipulated, and barristers know the methods of manipulation.<sup>109</sup> There are two more reasons why defendants may accept the barrister's gloomy prediction about the feigned risk of a trial and benefit of a guilty plea. First, the solicitor, who in counseling the defendant on various occasions as the case progressed toward a trial, will have touted the barrister's acumen. Second, the idiosyncratic, antediluvian uniform (wig, gown, unusual tie) worn by all barristers will give even the young barrister an air of undeserved authority.

Nonetheless, this junior might assess his monetary alternatives differently. He does not want to poison his relationship with any solicitor. If Monday's solicitor suspected that the junior's motive in persuading his defendant to plead guilty was to keep Wednesday's brief, the solicitor would not be pleased. It therefore may have been wiser for the junior to decline Monday's brief, and instead to appear on behalf of defendants at PCMHs on Monday and Tuesday. Had he done this, he would have earned £926 (£726 + 2(£100)), nearly as much as if Monday's trial cracked, with no risk of reprisal by the solicitor and with time to prepare for trial on Wednesday.

#### 4. THE INCENTIVES OF THE EXPERIENCED JUNIOR

Turning from the novice junior, let us now consider the experienced junior who has developed a reputation for skillful advocacy. Solicitors will ask for this barrister to represent defendants when speaking with his clerk about his schedule. The briefs he attracts will involve serious crimes, with trials that last a week or longer. Because of his popularity, solicitors will also try to brief him, perhaps a month or more before the trial date in hope he is available. Conversely, this junior's clerk will try to book his schedule so that he is occupied with briefs as often as he desires.

Assume, then, that an experienced junior is briefed to appear in a five-day trial of a class D offense (e.g., rape). With cases in this category drawing the second highest amounts,<sup>110</sup> the basic fee for a trial or cracked trial is £390. For each of the last four days of the trial, the barrister would also receive £366 as a refresher and uplift, for a total fee of £1,854.

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109. See McCONVILLE ET AL., *supra* note 3, at 257-61 (describing how barristers predict conviction at trial, exaggerate the value of the guilty plea, engender fear of the trial's outcome and instill trust in the barrister's judgment). Barristers have no monopoly on this knowledge; lawyers use these methods as well. The barrister's and lawyer's purpose, however, might be paternalistic rather than selfish, a point ignored by McConville and his co-authors.

110. Class A offenses (e.g., murder) draw the highest fees (with the basic fee for a trial or cracked trial at £740).



An interpolation that applies to every barrister is useful before examining this barrister's selfish considerations. Cracked trials are reviled.<sup>111</sup> While a belated guilty plea conserves considerable resources by eliminating the need for a trial, there are other costs—such as requiring the CPS and police to prepare for a trial—that could have been avoided if the defendant had changed his plea earlier. Moreover, defendants and defending barristers in cracked trials are suspected of manipulating the process.<sup>112</sup> For example, guilty defendants may calculate that it is more advantageous to delay pleading guilty until near the trial in hope of obtaining a favorable plea bargain from the CPS because it has too many other cases to try or because its once formidable case against the defendant is deteriorating. For their part, defending barristers supposedly encourage defendants not to announce the intent to plead guilty until the trial so as to earn the higher fee for a cracked trial than a guilty plea.<sup>113</sup>

The 2005 amendments to the GFS have the effect, probably by design, of shifting the barrister's incentives against cracked trials by equalizing the basic fee for trials and cracked trials. With the fee for a cracked trial now paid for guilty pleas entered after the PCMH, rather than only on or immediately before the day of trial, the barrister has an incentive to induce an early guilty plea.

Before the GFS was amended, there were cogent reasons to explain why every barrister's basic fee for a cracked trial exceeded that fee for a trial in all nine classes of crimes. For one, if paid less for a cracked trial, barristers might have tried to persuade defendants who decided to plead guilty to have a trial instead. Cracked trials do, after all, save resources, and a reduction in their number would increase the overall cost of resolving cases by requiring more trials. Moreover, if the defendant accepts responsibility for committing the crime, it is senseless to require him to endure the inconvenience and humiliation of a public display of the evidence at trial. Even if the barrister anticipated that the defendant would change his plea at the last moment, he is assumed to have prepared for trial. In doing so, the barrister ought not to have accepted any brief, the hearing or trial of which was listed to occur during the period of the defendant's trial. Thus, if a trial set to begin on Monday was expected to last three days, the barrister would have no brief for Tuesday or Wednesday.<sup>114</sup> The higher basic fee for the cracked trial

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111. See THE ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT ch. 7, ¶ 13 (1993).

112. See, e.g., AUDIT COMMISSION, ROAD TO JUSTICE: IMPROVING THE PATHWAY OF OFFENDERS THROUGH THE CRIMINAL JUSTICE SYSTEM (June 27, 2002), available at <http://www.audit-commission.gov.uk/reports/NATIONAL-REPORT.asp?CategoryID=&ProdID=99EDE976-8893-44b3-8D1A-631B36174EE9>; see also Editorial, *Audit Commission Report—“Route to Justice,”* NEW L.J., June 2002, at 938 (response to allegations defense lawyers are spinning out cases for money).

113. See Tague, *supra* note 18, at 1146.

114. The serious problems with the phenomenon of the returned brief occur if the barrister keeps a brief set for trial on Tuesday that he must return on Monday when Monday's defendant refuses to plead guilty, and his trial begins. The solicitor, or the barrister's clerk, must find a replacement. The replacement will have part of a single day (Monday) to prepare, and the defendant may be upset to learn on Tuesday that a new barrister is representing him.

was designed to offset the loss of refreshers and other payments when Monday's trial cracks. But the offset was only partial because, as explained below, the barrister was assumed to have other, but less lucrative, work to do during the lost trial days.

Now return to our experienced junior with the five-day trial. In mulling over whether to crack Monday's trial, this barrister wonders how he can earn £1,464, the extra amount he would receive for the last four days of a trial, should he avoid trial altogether. The prospects of doing so are not favorable. Clerks report that it is very difficult to find returned briefs in cases with high fees.<sup>115</sup> After all, just as this barrister's clerk built his schedule on the assumption the case would be tried—and tried for five days—so the clerk builds the schedules of other comparably talented barristers. Thus, if returned briefs are available, they will likely involve classes of crimes with much lower fees. These are also the types of briefs that the clerk prefers to distribute to the less experienced barristers in chambers. Nor is the barrister likely to have other especially remunerative work. Preparation of a future case draws no specific payment; it is part of that case's basic fee.<sup>116</sup> The experienced junior could confer with a defendant in an impending case to try to make up lost fees, but he is limited to one such conference and the hourly fee is only £33.50.<sup>117</sup> This barrister could also complete any advices on evidence that solicitors have requested, but this too earns a small fee of only £33.50 per hour.<sup>118</sup> As a consequence, unless this experienced junior wants to do something other than legal work (take a short vacation, perhaps?), he prefers that Monday's case be tried rather than ended by guilty plea.

##### 5. THE INCENTIVES OF A QUEEN'S COUNSEL

Like junior barristers, a Queen's Counsel also prefers trials over guilty pleas. A Queen's Counsel will appear only in the most serious cases<sup>119</sup> and thus is not apt to be litigating continuously.<sup>120</sup> There may be a week or more between the trial

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115. Of three senior clerks in London whom I interviewed, only one said his chambers attracted enough briefs to keep such a barrister busy, even if only with briefs that earned less.

116. See ARCHBOLD 2006 Supp., *supra* note 93, ¶ G-81.

117. See CDS Funding Order 2001, *supra* note 8, sched. 4, ¶ 19(1)(a) (trials lasting fewer than ten days), and table following ¶ 22 (fees).

118. *Id.* ¶ 29(1). For example, solicitors seek an "advice on evidence" (the term of art) about the people to subpoena as witnesses, the investigation to undertake, and the experts to retain. The barrister's fee for such advice is paid, apparently, only if the barrister is briefed for the sole purpose of providing written advice. If briefed for a trial, the barrister is expected to provide this advice as part of his preparation, and thus is included in his basic fee.

119. See *supra* note 82.

120. My source is anecdotal conversations with many barristers. I know of no study examining the average number of briefs a Queen's Counsel might have, or how often they are in court.

To remain busy, a Queen's Counsel might do what Queen's Counsel were forbidden to do until recently: compete with juniors for briefs by accepting the lower payments received by them. But the ignominy of doing

dates of the briefs he receives. Because there are far fewer cases available that call for his experience and skills, his clerk will have even more difficulty finding replacement work for him than for an experienced junior should one of his cases—which could require a trial of ten days or longer—end early in a guilty plea.

The fees paid to Queen's Counsel reveal why they prefer trials over cracked trials. Assume the crime is murder, a class A offense that draws the highest compensation. Seven days have been allocated for the trial. If the case is tried, the barrister earns £8,449;<sup>121</sup> if the trial cracks, he earns only £1,618.75. The latter fee is handsome,<sup>122</sup> but the former princely. Nonetheless, the gaping difference between the fees can be shrunk somewhat by including the payment for reviewing the Crown's documentary evidence.<sup>123</sup> If the Crown had 300 pages of evidence, a Queen's Counsel would receive an extra £435 for a trial and £1,308 for a cracked trial for reviewing those materials. The page fee thus reduces the difference in fees for a trial or cracked trial to £5,957.25 (£8,884 for a trial,<sup>124</sup> £2,926.75 for a cracked trial<sup>125</sup>), hardly enough to lead the Queen's Counsel to prefer a guilty plea. Moreover, a Queen's Counsel is unlikely to have other work to make up the difference between the two fees.

A core assumption underlying the comparison of fees for cracked trials and trials for each of the three levels of barristers is that barristers at each level take the same time to prepare no matter how, or whether, the defendant eventually pleads. However, if the barrister were confident of extracting a guilty plea from the defendant, he could abbreviate his preparation time, thus increasing his effective hourly rate for a cracked trial. For example, assume that the Queen's Counsel in the murder case knew that on average it took him fifteen hours to prepare such a case. If after a cursory reading of the brief (five hours, say), he thought the trial would crack, he would stop preparing the case. In this way, if the defendant does in fact plead guilty, the Queen's Counsel's effective hourly rate

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this would impede any Queen's Counsel who was not desperate for work. No barrister of those interviewed had heard of a Queen's Counsel accepting the lower fee, and could not imagine its occurrence.

121. The basic fee is £1,618.75. For every trial day after the first, the fee is £1,138.38 (a combination of the refresher and trial uplift). Before the 2005 amendments, the fees would have been £1,694.50, and £1,301, respectively, for a total of £9,656. The amendments reduced the fees for Queen's Counsel.

122. At a conversion rate of \$1.90 per £1, the fee is over \$3,000, more than lawyers in Virginia can earn and more than lawyers in Maryland could earn before 2007. See *supra* notes 88-91 and accompanying text. But the Queen's Counsel would work much less to earn this amount than would Maryland lawyers. If preparation took ten hours, the Queen's Counsel's effective hourly rate would be £162. The Queen's Counsel can take so little time to prepare because he relies on the solicitor's brief, and on the efforts of his junior. (In turn, the junior, when appearing alone, also takes little time to prepare so long as the brief has been prepared properly.)

123. See ARCHBOLD 2006 Supp., *supra* note 93, ¶ 6-247. For a category A offense the evidence uplift for a trial is £1.45 per page (£1.45 x 300 = £435); for a cracked trial, £4.36 (x 300 = £1,308).

124. There is one more fee for a trial—that for the Crown's witnesses. If the Crown called ten witnesses, the Queen's Counsel would earn an extra £143.70.

125. The 2005 amendments slashed the Queen's Counsel's fee for pages. Before 2005 the fee for 300 pages was £3,732.80.

jumps from £107 per hour to £324.<sup>126</sup>

By contrast to the Queen's Counsel, the inexperienced barrister might be reluctant to skimp on preparing the case for fear of fumbling the defense if the defendant refused to plead guilty. A public display of inadequate preparation could harm the inexperienced junior's quest to build a reputation for effective advocacy. On the other hand, the Queen's Counsel and experienced junior could probably hide a lack of preparation behind whatever formula for examination and argument they had developed.

Last, even if barristers can maximize their effective hourly rate by skimping on preparation in anticipation of persuading a defendant to plead guilty, they will be reluctant to do this, and prefer trials instead, if they have no other work that will pay as handsomely as the fees for each trial day after the first.

This study of barristers' incentives benefited from interviews with thirty-seven barristers over the last few years concerning their purposes in recommending a guilty plea or trial. Surprisingly, not all were aware of the monetary considerations discussed in this Part. Many were, with several revealing that they did calculate the fees depending on the plea. But others thought it was unseemly to do so, intent instead to counsel the defendant as they thought best for him, without regard to their personal (monetary) interests. Ignorant of the fees accorded depending on the course chosen, these barristers would not be tempted to think of themselves. Even if the anticipated compensation did not play a vivid role in every barrister's advice, another consideration did: many barristers I spoke with expressed concern over being sanctioned if they were suspected of recommending a guilty plea to advance their interests. The topic of sanctions is discussed in the next Part.

#### IV. SANCTIONS

Barristers and lawyers alike are not deterred from self-interested behavior by challenges from disgruntled defendants in the form of lawsuits alleging malpractice or appeals against conviction alleging the defender's negligence or betrayal. But defendants in Crown Court have ways of sanctioning barristers that are not available to their counterparts in the United States. As a result, while there are lessons to learn from the English method of compensating barristers, as explored below in Part V, there is not one with sanctions.

In both countries formidable legal process renders the threat of malpractice almost meaningless. In most American jurisdictions a defendant must win an exoneration before suing.<sup>127</sup> How does a defendant who has pleaded guilty establish his factual innocence? Before 2000 barristers could not even be sued for

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126. £1,618.75 (the basic fee for a trial)/15 = £107; £1,618.75 (the basic fee for a cracked trial)/5 = £324.

127. See *Glaze v. Larsen*, 83 P.3d 26 (Ariz. 2004). Not all require exoneration, however. See *Ereth v. Cascade County*, 81 P.3d 463 (Mont. 2003).

errors made while litigating (counseling defendants over guilty pleas counted as litigation). Even though barristers have been stripped of immunity,<sup>128</sup> defendants almost surely must also obtain a reversal of their conviction as a condition of suing. Yet, with no automatic right of appeal,<sup>129</sup> a convicted defendant might never get his challenge to his conviction reviewed. If any barrister has been sued since the loss of immunity, the case did not make a sufficient splash to be reported broadly.

A judicial rebuke of a defender's behavior in the course of reversing a defendant's conviction on appeal might seem to hold more promise of deterring self-interested conduct by defenders. But this remedy is as impotent as a malpractice lawsuit in both countries. Defendants in the United States who plead guilty can challenge their lawyer's representation by claiming he acted ineffectively in counseling a guilty plea.<sup>130</sup> But establishing that the lawyer's advice sank far below the norm and that the defendant accordingly was harmed is very difficult.<sup>131</sup> After all, the lawyer could always disguise his pursuit of his interests by contending that the balance of risk and reward between a trial and guilty plea favored the latter.

In England, the effect of such a challenge on barristers is even more uncertain. It is not clear that defendants in Crown Court have this same avenue to attack their guilty plea. Defendants have been permitted to withdraw guilty pleas when the plea was pressured by the judge.<sup>132</sup> One would imagine, then, that the same pressure from a different source (the barrister) also ought to be cognizable. Yet, there seems to be no reported case of such a challenge, let alone one that has prevailed. If the claim were made, the defendant in Crown Court would encounter a more imposing burden of proof than must be met by a defendant in the United States who makes such a claim under the Sixth Amendment.<sup>133</sup>

Even if barristers and lawyers may be insulated from a public, judicial challenge to their counsel over guilty pleas, barristers are exposed to discipline in ways lawyers are not where misconduct is suspected. Unlike their counterparts in

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128. See *Hall & Co. v. Simons* [2001] 1 A.C. 615 (H.L.).

129. The trial judge or the Court of Appeal must grant leave to appeal. See ROSEMARY PATTENDEN, *ENGLISH CRIMINAL APPEALS 1844-1994*, at 92-103 (1996). Even if the impediments in the text are overcome, a malpractice suit might be dismissed as a collateral challenge to the guilty plea in the criminal action. See *Somasundaram v. M. Julius Melchior & Co.*, [1988] 1 W.L.R. 1394 (Eng.) (civil law suit against solicitors for allegedly pressuring defendant to plead guilty was dismissed as a collateral attack on criminal conviction).

130. See *Hill v. Lockhart*, 474 U.S. 52 (1985).

131. The small likelihood of success does not always dissuade defendants from trying. Ineffectiveness claims have been launched against lawyers for not trying to dissuade a defendant from pleading guilty, see *Trahan v. Estelle*, 544 F.2d 1305, 1307 (5th Cir. 1977), and, conversely, for failing in the effort to do so. See *Williams v. Chrans*, 945 F.2d 926, 932 (7th Cir. 1991), *cert. denied*, 505 U.S. 1208 (1992).

132. See *R v. Turner*, (1970) 54 Cr. App. R. 352.

133. See Peter W. Tague, *Faulty Adversarial Performance by Criminal Defenders* 12 KING'S C. L.J. 137, 138 (2001) (barrister's representation must be flagrantly incompetent).

American courts,<sup>134</sup> defendants on legal aid in Crown Court can readily change barristers.<sup>135</sup> Barristers recognize therefore that they can be fired if the defendant is displeased with the barrister's refusal to support his desire for trial. In such a case, the defendant may prefer to have an unprepared barrister take on his returned brief than be represented by an advocate who does not seem to believe in the defense when appearing before the jury.<sup>136</sup> The barristers' concern over being fired explains why when defending they try to learn whether the CPS will accept a plea bargain before asking the defendant if he will plead guilty. There is no reason to risk upsetting a defendant determined to contest guilt by suggesting that he consider a guilty plea unless the CPS will accept the outcome the barrister considers beneficial.

In counseling over the choice of plea, barristers worry about two types of defendants. One is the timid defendant who does not reveal his discontent with the barrister's counsel to plead guilty; the other is the mendacious defendant who falsely blames the barrister for overriding his desire for trial. The importance of identifying these troubling clients is magnified when the barrister speaks with the defendant in the absence of the solicitor,<sup>137</sup> or in the presence of the solicitor's representative who meekly defers to the barrister without interceding to clarify the defendant's desire. Barristers fear these defendants will complain to the solicitor only after pleading guilty, a point at which the barrister has ended his work on the case.

The solicitor may not blame the barrister for the defendant's distress over pleading guilty. If the solicitor ceded control of the case to the barrister, as discussed in Part I, the solicitor may conclude that it was his own fault for choosing a barrister whose approach to defending the case did not match the defendant's needs and views; or, the solicitor might forgive the barrister for exaggerating the risk of trial to frighten the defendant into pleading guilty if the

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134. With no right to choose the lawyer appointed, *see* Tague, *supra* note 31, the defendant's request for a replacement will be denied without very good cause (the lawyer has a conflict of interest or their ability to communicate has collapsed), even if the change would not delay the case. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 590 (4th ed. 2004).

135. *See* CDS General Regs. 2001, *supra* note 82, ¶ 16. While that regulation requires judicial approval to switch barristers, barristers and solicitors assure me the approval is always given. The other assertions in this section are also based on my conversations with barristers and solicitors.

136. Because it is not likely the case will be postponed for the replacement to prepare, the risk for the defendant is that the new barrister will be inadequately prepared.

137. Because the barrister is hired by the solicitor, and the solicitor by the defendant, the barrister historically was forbidden to speak with the defendant in the solicitor's absence. That is no longer the case. Indeed, barristers can now interview the defendant and conduct the case in court in the solicitor's absence, as long as the barrister is satisfied "that the interests of the lay client and the interests of justice will not be prejudiced." CODE OF CONDUCT, *supra* note 12, ¶ 706. Barristers have told me, however, that they are disquieted if the solicitor (or his representative) is not present during their conference(s) with the defendant, or in court to help them during a trial. In trial, for example, the barrister can rely on the solicitor to take notes of the barrister's cross-examination, thus freeing the barrister to concentrate exclusively on the witness' answers and method of answering.

solicitor thinks the guilty plea was the wiser choice.<sup>138</sup> Solicitors also recognize that barristers, especially those with a returned brief, may speak bluntly about the choice of plea because they lack time to prepare the defendant gradually to make the momentous decision to plead guilty.<sup>139</sup>

Nonetheless, the solicitor trusted the barrister not to upset the defendant. Solicitors do not want the burden of assuaging a defendant disgruntled by the barrister's advice to plead guilty. The solicitor's reputation for providing effective help might itself be imperiled by an unhappy defendant. Therefore, a defendant's complaint could cause the solicitor, even if unsure of the accuracy of the complaint, to cull the barrister from the relatively small number of barristers whom the solicitor briefs.<sup>140</sup> Moreover, the solicitor might himself prefer that the defendant's case be tried as he would earn a fee for the representative he sent to assist the barrister during trial.<sup>141</sup> The solicitor might also be embarrassed if, by recommending a guilty plea, the barrister in effect dismissed the solicitor's more optimistic prediction of a trial's outcome.<sup>142</sup>

If blamed by the solicitor for the defendant's distress, barristers thus risk more than the loss of the single brief: they risk losing the solicitor as a source of business. In the competitive London market, the barristers interviewed said they were inclined to go to trial if the defendant offered any resistance to their comments about pleading guilty. Reinforcing that attitude was the barristers' common experience that defendants convicted at trial were often pleased by the fight even while recognizing, *ex post*, that a guilty plea, as predicted by the barrister, would have been the wiser choice.<sup>143</sup>

Perhaps more than upsetting the solicitor, barristers who counsel defendants over guilty pleas worry that a disgruntled defendant might complain to the disciplinary committee of Bar Council, the organization to which all barristers belong and that oversees their practice.<sup>144</sup> The likelihood of sanction is very

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138. The barrister reasons that it is better to exaggerate the likely sentence following conviction to ensure that the defendant is not surprised by the severity of the sentence imposed.

139. See MCONVILLE ET AL., *supra* note 3, at 254 (during a conference at Crown Court on the trial date "[t]he atmosphere is marked by severe tension in which decisions can no longer be deferred but are required immediately.").

140. Solicitors tell me they try to develop a cadre of ten to fifteen juniors and two or three Queen's Counsel from whom they select a barrister, any one of whom they will drop if he does not perform as desired.

141. There are three grades of solicitors (senior solicitor, solicitor, and trainee). A senior solicitor earns £42.25 per hour for assisting a barrister in trial, but probably would not be authorized to attend any but the most serious cases. The trainee—the level most likely to help the barrister—earns £20.50 per hour. See CDS Funding Order 2001, *supra* note 8, at sched. 2. In the future it appears solicitors will no longer be paid an hourly rate but rather a flat amount, as barristers are under the GFS, if Lord Carter's proposals are adopted. See PROCUREMENT OF CRIMINAL DEFENCE SERVICES, *supra* note 92, ¶ 97.

142. If the solicitor thought a trial would end in conviction, he should recommend a guilty plea at an early stage of the proceedings, so that the defendant will receive the highest sentencing discount.

143. For other tactical advantages of a trial over a guilty plea see Tague, *supra* note 39.

144. Bar Council's website includes materials about its disciplinary process. See <http://www.barcouncil.org.uk> (last visited Mar. 6, 2007).

low,<sup>145</sup> but barristers want to avoid the embarrassment of an inquiry, and are concerned that their reputations for advocacy and probity might be sullied if the complaint becomes known among solicitors. These risks could be eliminated by the barrister who decides not to encourage a defendant to change his plea from not guilty to guilty.

While defendants in the United States could similarly complain to the jurisdiction's bar in which the lawyer is licensed, there seems to be no evidence that they do this. The key difference between the two countries, then, is the existence of the solicitor who, better than the defendant, may be able to detect self-interested behavior by the barrister and knows how to sanction such a barrister.

## V. LESSONS

An attempt to borrow from the barrister's incentives illustrates the difficulty of finding instructive ways to cure one's domestic problems by scouring foreign practices. Direct comparison is difficult because certain aspects of the barrister's practice are very different from the lawyer's. There are many features of a barrister's practice that American jurisdictions would not want to emulate—the returned brief and the encouragement to delay guilty pleas (the cracked trial) are obvious examples. Others, even though beneficial, would not be adopted. The obvious example is having the barrister selected by a solicitor. What jurisdiction will multiply the cost of indigent defense by authorizing two lawyers to defend one defendant?

Even if the specifics of English practice are undesirable or their adoption unlikely, however, there are general lessons we can learn from the English system. The analysis presented above suggests that aligning the barrister's interests with those of the defendant is a function of the way barristers are selected and compensated. In the absence of having a second lawyer (the solicitor) select the defendant's chief advocate, it may be enough for a jurisdiction to vet lawyers—using experience and skill—to qualify them to appear in cases depending on their seriousness. While the defendant would not choose the lawyer himself, he could expect that the lawyer's experience and skill are more or less fungible with other lawyers qualified to appear in a case like his. Such an outcome may not be too different from the defendant's experience in England. Despite the solicitor's incentive to choose an able advocate and the barrister's obligation to accept the brief, briefs are returned so frequently that the defendant may end up with the solicitor's second or even third choice, or with a barrister selected by the clerk whom the solicitor does not know.

Nonetheless, because the lawyer is not likely to lose his eligibility for

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145. Conversation with a member of Bar Council who once organized the disciplinary process. An inquiry by Bar Council is not made public unless the barrister is found to have violated the Code of Conduct.



appointments by upsetting the defendant, another feature of English practice could be adapted. To please defendants—if only by having the lawyer explain thoroughly why the guilty plea is surely the smarter choice—lawyers could be made to compete more directly for appointments. This would occur if defendants selected the lawyers. Certain defendants would not choose wisely and the information defendants would need to compare lawyers could prove difficult to amass, but the problems are not insurmountable.<sup>146</sup>

Turning to the issue of compensation, English practice illustrates the obvious fact that the lawyer must have a monetary incentive to try the case. Contracts and capped payments tempt the lawyer to consider his interests and to economize his time. Is he frugal in preparing, in case a trial cannot be avoided, or does he concentrate on preparation, in expectation of persuading the defendant and prosecutor to accept a guilty plea he will convince himself is in the defendant's interest?

Lawyers ought not to be faced with those choices. If the goal is to align the lawyer's interests with the defendant's, financial disincentives to avoid trial should be eliminated. One compensatory scheme in the United States does this even better than the GFS. Los Angeles County's decision to pay private lawyers a generous hourly fee, with no cap, should induce lawyers to prefer trials over guilty pleas.<sup>147</sup> The fee of a lawyer selected can be princely under that county's Indigent Criminal Defense Appointments Program (ICDAP),<sup>148</sup> and the program's overall cost therefore very high. The total is controlled by the limits on when such a lawyer is chosen. The County has two public defenders' offices and both must refuse to represent a defendant (because of a conflict) before a private lawyer is chosen.

Ironically, the generous fees paid by Los Angeles County, like the fees paid for each trial day after the first by the GFS, create an unexpected problem: with no limits on the fees a lawyer can collect for representation, lawyers bent on satisfying their own financial interests might urge a trial when a guilty plea would

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146. For a proposal, see Tague, *supra* note 6.

147. The current version of the Indigent Criminal Defense Appointments Program (ICDAP), operated by the Los Angeles County Bar Association, came into effect in 1994. By 2005 there were approximately 360 lawyers eligible to receive appointments when the public defender and alternative public defender were unavailable. In 2001, ICDAP lawyers represented about 20,000 defendants. Depending on experience and ostensible skill, lawyers are assigned to one of six grades. When a lawyer applies for a promotion to try more serious cases, the ICDAP talks with judges and prosecutors to assess how the lawyer has represented clients. To illustrate the generosity of the fees, with no cap on the total amount paid, a lawyer receives \$80 per hour for Grade III cases (crimes carrying a maximum sentence of fifteen years) and \$91 per hour for Grade IV cases (sentences of fifteen years to life). Judges do scrutinize the lawyer's bill, however, and can reduce it. Conversation with Carl Henry, ICDAP's director (April 21, 2006), who was the source for all information in the text. The program's website is <http://www.lacba.org/showpage.cfm?pageid=24>.

148. In one Class IV case, Carl Henry, ICDAP's director, told me he received \$35,000 for representing a defendant who pleaded guilty. While there are no data on the average amount earned by lawyers of each grade, Mr. Henry thought it was not uncommon for Grade IV lawyers to receive as much as \$145,000 per year. Such a lawyer could expect to have his work audited to ensure he was not padding his time.

be better for the defendant, once the expected benefits and risks of each are compared. The GFS, by paying a separate fee for each trial day after the first, also induces barristers who have no court work for several days to prefer trials. Among barristers, reputation impedes such opportunistic behavior. The barristers interviewed said a colleague's reputation would sink if he were suspected of inappropriately encouraging trials. Similarly, in Los Angeles County, if judges complain to the ICDAP that it was not wise for a lawyer's defendant to contest guilt, the program's administrator investigates to learn the reason for the defendant's choice of trial. If the defendant obdurately refused to plead guilty, or had some understandable reason to reject the ostensibly favorable plea bargain, the lawyer suffers no repercussion. Conversely, if the lawyer is found to have sacrificed a defendant to reap a larger fee through a trial, the lawyer will be purged from the list.

The GFS illustrates that the level of compensation is not as important as an incentive to go to trial. The basic fees for juniors under the GFS are modest for most categories of crimes.<sup>149</sup> For a trial day of five hours with three hours of preparation, for example, the basic fee of £250 for a class B offense (e.g., kidnapping) converts to £31 per hour, or \$59 (at an exchange rate of \$1.90=£1), an amount less than the hourly rate in Maryland.<sup>150</sup> Nonetheless, these comparatively paltry fees do not deter barristers from recommending trials because the alternative fees for cracked trials or guilty pleas are no better or worse.

Moreover, like American lawyers specializing in criminal defense, barristers concentrating in criminal cases have no readily available alternative. The barrister's specialty in advocacy masks a lack of knowledge about the substance of other fields. He could carry his knowledge of evidence and of persuasion into the fields of bankruptcy, government contracts, or banking, but he would need to learn new areas of substantive law. Even if he did this, he might not be able to market his new learning. If his chambers specializes in criminal and common law actions, the barrister and his clerk will probably not know solicitors who themselves specialize in lucrative fields other than crime. The trial, then, is the obvious choice to earn fees.

## VI. CONCLUSION

Criminal defendants need advice from the lawyer or barrister about the advantages and disadvantages of pleading guilty or contesting guilt at trial. One concern is that the defender will bend his advice to favor his goals at the

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149. The nominal levels are low in part because, ignoring some tinkering, they have not been increased since the GFS's inception in 1997, a fact that incited protest, and nearly a strike, by barristers in 2005. *See supra* note 92.

150. *See supra* note 91 and accompanying text.

defendant's expense. In particular, he may try to persuade the defendant to plead guilty when such a plea furthers his interests but not those of the defendant.

Certain defenders—whether in the United States or England—will altruistically ignore their interests in counseling over the plea. Compensation is nevertheless an elephantine temptation as the defender considers what advice to give the criminal defendant. The method of remunerating barristers in England is structured in such a way as to encourage barristers to recommend trials or support the defendant's desire for one. By contrast, the common methods of remunerating private lawyers in American jurisdictions—by contract, flat fee, or hourly rate with a cap on total compensation—lure lawyers to prefer guilty pleas over trials.

The point of this analysis is not to ape the English approach, but rather to recognize the importance of trying to make the lawyer's interests coterminous with the defendant's such that the lawyer does not find himself struggling to ignore selfish interests that entice him to recommend a guilty plea when he recognizes that a trial would be a better choice for the defendant.