Step 6
A Defense Lawyer Is Selected: The Defense Role

As we saw in the previous chapter on prosecutors, the criminal court process is predicated on the assumption that justice is best achieved through the adversarial process. Yet to what extent is the adversarial ideal realized in practice? This chapter describes some aspects of the role defense counsel plays in the criminal court structure and process. As you’ll see, the defense role, like the prosecution role, is complex and sometimes contradictory.

THE DEFENSE ATTORNEY’S ROLE IN THE COURT SYSTEM

What role does defense counsel play in the court system? Some people might answer this question “To defend the defendant, of course” and think the question obvious. Yet the role of defense attorneys in courtroom proceedings is often misunderstood. Defense attorneys often face criticisms that their actions amount to condoning illegal behavior, letting guilty perpetrators go free, and stacking the justice system. Such comments reflect a lack of accurate and complete understanding of the role of defense attorneys. As Supreme Court Justice White noted, commenting on the defender’s role: “Defense counsel has no comparable obligation to ascertain or present the truth. . . . Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State’s case in the worst possible light, regardless of what he thinks or knows to be the truth” (United States v. Wade, 1967, p. 1174). A spirited defense makes sure that the defendant’s side of the story is heard. This is done despite the fact that the majority of defendants are guilty. It is only by giving this spirited advocacy that the rights of those who are not guilty can be protected. A spirited defense also helps counteract overcharging by prosecutors. Thus, the defense attorney’s role is to provide his or her client with the best defense possible, including:

- Providing legal counsel to client
- Arguing for legal innocence (not necessarily factual innocence)
• Searching out violations of the defendant’s rights
• Arguing for reduced penalties in some cases

ELEMENTS OF THE DEFENSE ROLE

Although the defendant is not required to present any defense because the prosecution has the legal burden of proving the accused’s guilt beyond a reasonable doubt, typically a defense is mounted. The defendant and his or her attorney must search out potential violations of the defendant’s legal rights and determine the best strategy for arguing on the defendant’s behalf. This includes negotiating with the prosecutor for the best possible plea bargain, and deciding whether to take the case to trial. Either side may broach the topic of a plea bargain, but they are typically initiated by the defense. In some cases, the defense role includes arguing for reduced penalties. For example, in some cases where there is incontestible evidence that the defendant committed a killing, the defense attorney may focus on getting the jury to convict on lesser charges (such as manslaughter rather than murder). There are many key legal questions for the defense attorney to consider when he or she is developing a legal strategy, depending on the circumstances of the case:

• Does the case revolve around questions about the identity of the perpetrator, or other issues? For example, in some sexual assault cases the main issue is whether the defendant is the actual perpetrator of the crime. In other such cases, the issue is whether the act that occurred constituted rape or consensual sexual relations, but the defendant’s identity is not an issue in the case.
• What evidence exists regarding the accused’s mental state at the time of the crime? Recall from Step 2 that to be defined as a crime, an act (actus reus) must have been carried out with the requisite mental state (mens rea). Thus, the defense attorney must focus on how to handle the issue of the defendant’s intent at the time of the alleged crime.
• Were there mitigating circumstances? Was the act committed in self-defense, or after extreme provocation, or in the heat of passion?
• What is the prosecutor’s strategy likely to be? The defense will try to anticipate and prepare for the state’s case to whatever degree possible.
• What would be an acceptable plea bargain? The defense attorney should be able to tell the defendant whether the prosecutor’s plea offer is favorable when compared to the probable outcome of a jury trial.
• Are there questions about the reliability of any of the evidence in the case? For example, how did the police obtain and preserve the evidence in the case?
• Can the credibility of prosecution witnesses or expert witnesses be impeached? For example, how reliable is an eyewitness in the case? Can the testimony of the prosecution’s expert witness be challenged during cross-examination?

• Should a change of venue be requested if the case seems likely to go to trial? If there is substantial pre-trial publicity, the defendant’s right to a fair trial could be hampered because jurors are likely to have heard of and formed opinions about the case before trial.

The defense attorney may also serve as a source of guidance and psychological support for the defendant. This aspect of the defense role is an important function of defense attorneys, because it involves preparing the client for what lies ahead. This is particularly applicable to criminal defense attorneys in capital cases, where the attorney may serve not only as legal advisor but as social support for the defendant and the defendant’s family as they contemplate the possibility that the accused will be convicted and possibly sentenced to death. This aspect of defense work can be particularly complex when a defendant in a capital case balks at plea bargaining, without considering the potential risks of going to trial. Although the decision about what course of action to take ultimately belongs to the defendant, whose future is at stake, the defense attorney needs to ensure that the accused’s decision is grounded in knowledge of the realities of the legal process. For example, one attorney describes the complexities of getting some capital defendants to overcome their denial of the seriousness of their situation in order to appreciate the challenges they face:

For many clients, the capital prosecution is a way to bask in societal attention. If they cannot be Bruce Willis or Michael Jordan, they will settle for being Gary Gilmore or Roger Coleman. Such romanticized, delusional thinking can kill your client. So defuse his sense of grandeur. Demonstrate that executions are already becoming old hat in many places. Talk about the paltry coverage they are given in states where people are routinely put to death. (Doyle, 1999)

This attorney goes on to describe strategies for negotiating a favorable plea bargain with the government and for convincing reluctant clients to consider the advantages of plea bargaining in order to avoid the risks of a trial and a possible capital sentence (see Box 6.1 for an example).

The American Bar Association (Monohan and Clark, 1995) notes that criminal defense work requires competence and skill at a variety of critical tasks, including but not limited to:

• Legal knowledge and skill
• Timeliness of representation
• Thoroughness and preparation
How is the role of defense attorneys best described, then? Are defense attorneys strictly “legal tools” whose main purpose is to serve the legal interests of their clients? Or, are they also—or instead—“ethical agents”? What is the nature, scope, and extent of the defense attorney’s potential as an agent of morality? Cohen (1991) uses the term “moral agent” in describing his view that an attorney must be concerned with the ultimate fairness and justice of the legal outcome, not simply the client’s wishes. Cohen (1991) and Simon (1988) discuss the distinction between an attorney who functions primarily or solely as a legal agent for his or her client and an attorney who acts as a legal agent in the context of balancing broader ethical and social justice concerns. For example, in this conception of the defense role, the attorney must balance the legal interests of the client with the interests of society as a whole, other potential clients, and the interests of justice. As Simon (1988) notes, simply because you could win a case, does this mean you should?

## BOX 6.1

### Helping Capital Clients Appreciate Risks

An experienced capital defense attorney describes one strategy he uses to persuade clients who are uninformed about the relative risks and benefits of accepting a plea bargain versus proceeding to a capital trial:

Make the client explain his position. Make him tell you why, for instance, his professed moral innocence is a reason for him not to save his life. Have him detail how he will vindicate his name from the grave and what role he can play in his kids’ lives once he is dead. Insist he tell you why he must self-destructively defy a system for which he has no respect. Identify who he is going to teach a lesson by going to the execution chamber and what he is going to prove. Let him defend his decision in light of the fact that straight murder is the best he can hope for and, under the habitual felon statute, that will mean life without parole in any event. Challenge senseless responses and then keep coming back to these questions. (Doyle, 1999)

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- Client relationship and interviewing
- Communicating with and advising the accused
- Investigation
- Trial court representation
- Sentencing
- Appellate representation
THE RIGHT TO COUNSEL: A BIT OF HISTORY

Under early English law, the accused was tried without the benefit of counsel, and therefore forced to face the awesome power of the state unaided. This increased the potential for government oppression of political dissenters tried by the Crown.

To provide greater protection of individual liberties against the power of the state, the framers of the Constitution crafted the Sixth Amendment (1791) to provide several key constitutional rights, including the right to “...have the assistance of counsel for his defence.” A defendant’s right to legal counsel has undergone quite an evolution since then. Until early in the twentieth century, the right to counsel meant simply that defendants had the right to hire their own counsel; those who could not afford to do so continued to face the prosecution alone.

The right to counsel took on new meaning in 1932, when the U.S. Supreme Court held in *Powell v. Alabama* that indigent defendants accused of a capital crime who would be unable to defend themselves must have counsel provided for them (see Box 6.2). The right of indigent defendants to have counsel provided for them was extended to all defendants charged in federal courts in 1938 (*Johnson v. Zerst*).

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**BOX 6.2**

*Powell v. Alabama, 1932*

In 1931, eight young African American men were charged with raping two white women. The “Scottsboro Boys,” as they were collectively referred to, ranged in age from thirteen to nineteen years old. The defendants and their accusers had been riding boxcars, a common method of transport for poor people in those days. During the arraignment, the judge noted that “all members of the bar” would serve to represent the defendants. In practice, this meant that the defendants were represented by two attorneys described by one commentator thus: “[The two defense attorneys] were no ‘Dream Team.’ Roddy was an unpaid and unprepared Chattanooga real estate attorney who, on the first day of trial, was ‘so stewed he could hardly walk straight.’ Moody was a forgetful seventy-year-old local attorney who hadn’t tried a case in decades” (Linder, 1999, online).

The social and political climate of the deep South in the early twentieth century was characterized by deep racial tension, violence, and hostility; and no accusation was more controversial at the time than the charge that a black man had raped a white woman. Black men who were suspected of simply looking at or whistling at a white woman had very good reason to fear that angry white men, often members of the Ku Klux Klan, would retaliate violently. In such instances, the bodies of black men and boys were often found with their genitals mutilated. Newspaper accounts of the time regularly carried stories—sometimes with accompanying photos—of vigilante “justice” without benefit of ever seeing the inside of a courtroom.
The Powell and Johnson cases represented very important milestones in the right to counsel, but they did not apply to the vast majority of criminal defendants—people tried in state (versus federal) courts. Thus, most people accused of non-capital crimes still did not have the assistance of an attorney at their trial. This situation would not be changed until 1963, when as we saw in Step 3, the *Gideon v. Wainwright* decision provided indigent defendants in state felony cases with the right to have an attorney. In 1972, the right was finally extended to defendants accused of misdemeanors for which incarceration was a possible sentence (*Argersinger v. Hamlin*). Box 6.3 describes the Argersinger case in more detail.

When are defense attorneys most important? The Supreme Court has adopted a “critical stages” test, which means defendants are entitled to attorneys at every stage of prosecution “where substantial rights of the accused may be affected” (*United States v. Wade*, 1967). This includes, for example, pre-trial questioning and in-person (versus photo) line-ups in addition to the trial itself.

The history of the Sixth Amendment right to counsel is a good example of the differences that often exist between our constitutional rights in theory and in practice, and the critical role that the courts play in interpreting and implementing such rights.

This was the atmosphere in which the Scottsboro Boys, who were divided into subgroups in four separate trials, stood trial. The Scottsboro Boys might never have made it to trial, instead facing a lynch mob of townspeople, if the governor of Alabama had not ordered soldiers to keep the peace around the courthouse (Linder, 1999). At their trials, the defendants were charged and convicted of rape by all-white juries. One of the youngest defendants, tried by himself, was sentenced to life in prison after the jury deadlocked on the death penalty. The other defendants were sentenced to death (at the time, rape was punishable as a capital offense; that is no longer true).

The fate of the defendants might have gone unremarked but for the efforts of the International Labor Defense (ILD) group, a Communist Party organization dedicated to social justice. The ILD denounced the trial as an example of racism in the justice system, a claim which had rarely been publicly made before. With the assistance of volunteer attorneys, the defendants appealed; but the Alabama appellate court rejected the defendants’ contention that the lack of counsel at their trial represented a denial of their Fourteenth Amendment right to due process. After a series of appeals from each of the four trials, the U.S. Supreme Court found in their favor and their convictions were reversed (*Powell v. Alabama*, 1932). The Court cited the lack of evidence, which was especially problematic after one of the women recanted her testimony, and proclaimed that due process required that capital defendants be represented by counsel at trial. The Court noted that the circumstances surrounding the representation of the defendants meant, essentially, that “…these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation, and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself” (*Powell v. Alabama*, 1932, p. 57).

This legal victory became a milestone in the right to counsel, but it was not without a high cost for the Scottsboro Boys themselves. Although they were eventually exonerated and released, several of the defendants spent years in prison before they were freed (Linder, 1999).
Jon Argersinger’s problems started when he was charged with carrying a concealed weapon, a misdemeanor offense that could net him up to six months in jail. He opted for a bench trial (before a judge rather than a jury), was convicted, and was sentenced in a Florida lower court to ninety days in jail. Argersinger then began habeas corpus proceedings in the Florida Supreme Court because he had asked for and been denied the assistance of counsel at his trial. Had Argersinger lived in one of the nineteen states that provided counsel to indigents accused of misdemeanors, the outcome may have been very different.

In *State of Florida ex rel. Argersinger v. Hamlin* (1970), the Florida Supreme Court acknowledged that *Gideon v. Wainwright* (1963) required the courts to assign counsel to those charged with felonies, but noted that no such mandate existed for less serious charges. The panel of justices argued that even if the U.S. Supreme Court was later to extend the right to counsel to less serious charges, it would certainly be for those defendants who faced non-petty misdemeanors and could receive at least six months in jail:

> Assuming arguendo that that Court will eventually decide that Gideon should be extended to include misdemeanor trials, it is fair to presume that it would apply to the right-to-counsel rule the same principles applicable to a determination of the right to a jury trial, namely, that this right extends only to trials for non-petty offenses punishable by more than six months imprisonment. (*State of Florida ex rel. Argersinger v. Hamlin*, 1970, p. 443)

In the end, the Florida Supreme Court felt that providing counsel for all indigents, regardless of the amount of jail they face, could overextend local legal and judicial resources:

> Thus, the two classes of offenses [i.e., felonies vs. misdemeanors] are widely separated in type, kind, punishment and effect; and even though the basic and fundamental “due process” right guaranteed by the Fourteenth Amendment must be held to include the Sixth Amendment right-to-counsel in felony cases as was held in Gideon, it does not necessarily follow that this Sixth-Fourteenth tandem can reach down into the lowest echelons of petty offenders and hand out to them the free services of an elaborate and expensive public-defender system to defend them against charges of overparking or other petty offenses. In the words of Judge Mehrtens in Brinson [an earlier case in Florida], “The demands upon the bench and bar would be staggering and well-nigh impossible” (*State of Florida ex rel. Argersinger v. Hamlin*, 1970, p. 444).

Argersinger did not stop there. He filed an appeal with the U.S. Supreme Court, which ruled that counsel was important to justice in all cases where defendants face the prospect of jail:
We must conclude... that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial. (Argersinger v. Hamlin, 1972, pp. 36–37)

We reject... the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer. (Argersinger v. Hamlin, 1972, pp. 30–31)

### BOX 6.4

**Does Greater Diversity Equal More Justice?**

Many people believe that justice should be colorblind, and some believe that it is. Many others believe that the reality is far different—that justice is too often color-conscious (and class- and gender-conscious as well). But are there circumstances where justice *should* be “color-conscious”? For example, suppose for a moment that you were accused of a crime. Would you prefer to be represented by someone from your own ethnic group? Why or why not? Would it matter to you whether the prosecutor in your case came from your ethnic group?

In some areas, legal observers are calling for greater ethnic diversity in the ranks of defense attorneys and DA’s. These observers are concerned that there are few attorneys (whether prosecutors or defense counsel) from ethnic minority groups, but many minority defendants. But why should this matter? These critics of the legal system contend that attorneys and clients who share an ethnic background are better able to establish good communication, to understand cultural factors that may be important in the case, and to build trust.

“Minority defendants and victims often have cultural, social, economic and language issues that affect their cases,” said Nicole Wong, regional governor of the National Asian Pacific American Bar Association. “You really want someone in the prosecutor’s seat and in the defender’s seat who understands those issues, who understands the person coming before the judicial system.” Alameda County District Attorney Terry Wiley notes that “I’ve had many cases with African American witnesses who come in and are very intimidated with the whole criminal justice system... but upon them seeing me, I can just look in their eyes and see them become more at ease” (Richman, 1998, p. 1).

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**DEFENSE ATTORNEYS AND THE COURTROOM WORK GROUP**

In the courtroom, the interactions between defense counsel and the prosecution appear adversarial, but often these professional relationships have a different character outside the courtroom. Attorneys and other legal actors recognize the role that each plays in the courtroom “psychodrama” as part of an interdependent group.
Recall that the courtroom work group is the center of the court system, and as such each member of the group acts in the context of group norms, customs, and expectations (Nardulli et al., 1988).

The place of defense counsel in the courtroom work group can be conceptualized as a “many-hatted” or multifaceted role. The defense attorney is both advocate...

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**BOX 6.5**  
**International Association of Defense Counsel Tenets of Professionalism**

1. We will conduct ourselves before the court in a manner which demonstrates respect for the law and preserves the decorum and integrity of the judicial process.
2. We recognize that professional courtesy is consistent with zealous advocacy. We will be civil and courteous to all with whom we come in contact and will endeavor to maintain a collegial relationship with our adversaries.
3. We will cooperate with opposing counsel when scheduling conflicts arise and calendar changes become necessary. We will also agree to opposing counsel’s request for reasonable extensions of time when the legitimate interests of our clients will not be adversely affected.
4. We will keep our clients well informed and involved in making the decisions that affect their interests, while, at the same time, avoiding emotional attachment to our clients and their activities which might impair our ability to render objective and independent advice.
5. We will counsel our clients, in appropriate cases, that initiating or engaging in settlement discussions is consistent with zealous and effective representation.
6. We will attempt to resolve matters as expeditiously and economically as possible.
7. We will honor all promises or commitments, whether oral or in writing, and strive to build a reputation for dignity, honesty and integrity.
8. We will not make groundless accusations of impropriety or attribute bad motives to other attorneys without good cause.
9. We will not engage in discovery practices or any other course of conduct designed to harass the opposing party or cause needless delay.
10. We will seek sanctions against any other attorney only when fully justified by the circumstances and necessary to protect a client’s lawful interests, and never for mere tactical advantage.
11. We will not permit business concerns to undermine or corrupt our professional obligations.
12. We will strive to expand our knowledge of the law and to achieve and maintain proficiency in our areas of practice.
13. We are aware of the need to preserve the image of the legal profession in the eyes of the public and will support programs and activities that educate the public about the law and the legal system.

for the client and officer of the court; a decision-maker with great discretion to sign-
ificantly influence both the legal and ethical aspects of the case at hand and thus,
ultimately, the legal system itself; and many defense attorneys have prior expe-
rience working as prosecutors. However, the complexity and richness of the defense
attorney’s occupational heritage carries with it inherent potential for tension
between different aspects of the role. For example, in some instances the attorney’s
advocacy on behalf of a client may conflict with the expectations associated with
being an officer of the court and a member of the courtroom work group.

This is amply illustrated by the situation faced by overloaded public defend-
ers who must balance workload demands with the needs of the defendants they
represent.

DEFENSE COUNSEL: PRIVATELY RETAINED VERSUS
GOVERNMENT-PROVIDED

Although some defendants have the resources to retain private attorneys, in crim-
inal cases that is the exception. Most often, defendants are unable to pay for an
attorney and thus rely on public defenders, members of legal aid groups, or private
attorneys appointed by the court to represent them (see Table 6.1). Defendants fac-
ing homicide charges are most likely to hire their own defense attorneys, although
the majority of such defendants still rely on government-provided counsel (Har-
low, 2000, p. 7). There are two types of counsel provided by the state for defen-
dants who cannot afford to hire counsel:

1. Assigned counsel—the court appoints a private attorney from a list of
available lawyers. They are paid a flat fee for their work. Most have private
and assigned clients.

2. Public defender (PD)—attorneys who work for state; PDs have no private
clients.

Public defenders have a bad rap (“Did you have an attorney?” “No, man, I had
a public defender.”). The traditional “wisdom” concerning the relative merits of
privately retained defense attorneys and government-provided counsel, from a defen-
dant’s viewpoint, is that private attorneys are preferable. Research illustrates differ-
ences between the two types of defense counsel in experience, caseload, type of
cases/clients, and organizational constraints. For example, public defenders are often
new attorneys with relatively little experience (Levin, 1977; Nardulli, 1988). In addi-
tion, public defenders often have very high caseloads, and are more likely to have
cases of indigent defendants and those with prior criminal histories. A government
report on public defender caseloads cited the situation of a public defender who was
simultaneously handling seventy felony cases. The attorney had represented 418
defendants in a period of seven months (Spangenberg Group, 2001, p. 1). Assigned
TABLE 6.1 Defense Counsel in Criminal Cases

At felony case termination, court-appointed counsel represented 82 percent of state defendants in the seventy-five largest counties in 1996 and 66 percent of federal defendants in 1998.

<table>
<thead>
<tr>
<th>Percent of defendants</th>
<th>Felons</th>
<th>Misdemeanants</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>75 largest counties</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public defender</td>
<td>68.3%</td>
<td>—</td>
</tr>
<tr>
<td>Assigned counsel</td>
<td>13.7</td>
<td>—</td>
</tr>
<tr>
<td>Private attorney</td>
<td>17.6</td>
<td>—</td>
</tr>
<tr>
<td>Self (pro se/other)</td>
<td>0.4</td>
<td>—</td>
</tr>
<tr>
<td><strong>U.S. district courts</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal Defender Organization</td>
<td>30.1%</td>
<td>25.5%</td>
</tr>
<tr>
<td>Panel attorney</td>
<td>36.3</td>
<td>17.4</td>
</tr>
<tr>
<td>Private attorney</td>
<td>33.4</td>
<td>18.7</td>
</tr>
<tr>
<td>Self representation</td>
<td>0.3</td>
<td>38.4</td>
</tr>
</tbody>
</table>

Note: These data reflect use of defense counsel at termination of the case. —Not available.

Defendants with publicly financed or private attorneys had the same conviction rates.

<table>
<thead>
<tr>
<th>Case disposition</th>
<th>Public counsel</th>
<th>Private counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>75 largest counties</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Guilty by plea</td>
<td>71.0%</td>
<td>72.8%</td>
</tr>
<tr>
<td>Guilty by trial</td>
<td>4.4</td>
<td>4.3</td>
</tr>
<tr>
<td>Case dismissal</td>
<td>23.0</td>
<td>21.2</td>
</tr>
<tr>
<td>Acquittal</td>
<td>1.3</td>
<td>1.6</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>U.S. district courts</th>
<th>Public counsel</th>
<th>Private counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Guilty by plea</td>
<td>87.1%</td>
<td>84.6%</td>
</tr>
<tr>
<td>Guilty by trial</td>
<td>5.2</td>
<td>6.4</td>
</tr>
<tr>
<td>Case dismissal</td>
<td>6.7</td>
<td>7.4</td>
</tr>
<tr>
<td>Acquittal</td>
<td>1.0</td>
<td>1.6</td>
</tr>
</tbody>
</table>

Except for state drug offenders, federal and state inmates received about the same sentence on average with appointed or private legal counsel.

<table>
<thead>
<tr>
<th>Offenses</th>
<th>State prison inmates</th>
<th>Federal prison inmates</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Public counsel</td>
<td>Private counsel</td>
</tr>
<tr>
<td>Total</td>
<td>155 mo</td>
<td>179 mo</td>
</tr>
<tr>
<td>Violent</td>
<td>223</td>
<td>231</td>
</tr>
<tr>
<td>Property</td>
<td>118</td>
<td>128</td>
</tr>
<tr>
<td>Drug</td>
<td>97</td>
<td>140</td>
</tr>
<tr>
<td>Public-order</td>
<td>80</td>
<td>98</td>
</tr>
</tbody>
</table>

Defense Counsel: Privately Retained Versus Government-Provided

to represent a man charged with several felonies including first-degree murder, the attorney filed a motion asserting that because of his workload and lack of resources (i.e., no investigative assistance), he would be unable to effectively represent his client (Spangenberg Group, 2001, p. 1). The case (State v. Peart, 1993) resulted in changes in Louisiana’s workload allocation and funding efforts for public defenders (Spangenberg Group, 2001). Such working conditions are cited by public defenders themselves as significant influences on their case outcomes (Lippman and Wineberg, 1990). This situation is exacerbated by organizational constraints, such as a severe lack of resources available to public defenders and private attorneys assigned by the court to represent indigent defendants; for example, funds to pay for investigators or expert witnesses, such as experts to evaluate and interpret DNA evidence (Monohan, 1996).

Such organizational impediments to effective advocacy on behalf of clients can be exacerbated by policy changes, such as increased reliance on sentencing guidelines or the implementation of mandatory sentencing policies. For example, such policy changes may require more work by government-provided attorneys at the same time that they face decreasing resources, particularly in the case of public defenders (Hall, 1999). Other research has found that the war on drugs has put significantly more strain on public defenders’ offices, because sharply increased drug caseloads have not been accompanied by commensurate increases in funding (Murphy, 1991). Legal and technological changes mean that for defense attorneys, “the complexity of criminal defense practice has increased dramatically” (Spangenberg Group, 2001, p. 3). The impact of differences in caseload and resources between government-provided and privately retained attorneys is reflected in research showing that defendants with government-provided attorneys saw them less frequently and later in their cases, compared to defendants with hired counsel (Harlow, 2000, p. 8).

Public defenders and private attorneys who work as assigned counsel also have fewer financial incentives to devote extra time to complex cases because they are not compensated for additional effort (Coyle et al., 1990). Interestingly, however, one study of attorneys appointed by the government to serve as appellate counsel found that rate and type of compensation had “no discernible influence” on the attorneys’ efforts on behalf of their clients; all put forth the same efforts (Priehs, 1999).

In contrast, because privately retained attorneys generally have more manageable numbers of clients than public defenders, they can devote more time and resources to each case. Privately retained counsel in criminal cases also have a financial incentive to devote more time, because they are compensated according to the amount of time they spend on the case.

Thus, differences on these dimensions rather than legal skill per se must be considered when comparing the merits of private versus public defenders. Given such differences, is it indeed preferable from a defendant’s perspective to have a private attorney?
Non-Capital Cases

Earlier research on non-capital cases showed that public defenders are more likely to plea bargain and more likely to lose cases and that their clients are more likely to get longer sentences (Lizotte, 1978). More recently, a government report comparing case outcomes of defendants with government-provided versus privately retained defense counsel found no differences in conviction rates (see Table 6.1), but found notable differences in sentencing (see Table 6.2). At both the federal and state levels, defendants with government-provided attorneys were more likely to receive sentences of incarceration than defendants with privately retained counsel (Harlow, 2000, p. 1). However, this difference partially reflects differences in the types of cases each type of attorney handled: government-provided attorneys were more likely to represent defendants charged with violent or drug crimes, whereas privately retained attorneys were more likely to handle white-collar offenders (Harlow, 2000, p. 3).

Comparison of the effectiveness of the two types of defense attorney in terms of the average length of sentence received by defendants sentenced to incarceration reveals further interesting differences. Although both federal and state defendants were more likely to be incarcerated if represented by government-provided attorneys, their average sentence length was shorter than that of defendants represented by privately retained counsel (Harlow, 2000, pp. 4–6).
It is possible that public defenders may be preferable in some type of cases, because they are more likely to have well-developed relationships with other members of the courtroom work group than private attorneys. Indeed, a client may be better served when the defense attorney is familiar with and comfortable with the court system’s key “players” and unwritten norms. For example, experienced public defenders often have well-established connections in the courthouse that allow them to better represent their clients.

However, others argue that this situation actually runs counter to the interests of the client, because attorneys who are part of the tight-knit courtroom work group are

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<thead>
<tr>
<th>TABLE 6.2</th>
<th>Length of Prison Sentence Imposed on Felony Defendants Convicted in U.S. District Court, by Type of Counsel and Offense, Fiscal Year 1998</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offense and type of counsel</td>
<td>Number of Federal defendants</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
</tr>
<tr>
<td>Public</td>
<td>28,453</td>
</tr>
<tr>
<td>Private</td>
<td>12,563</td>
</tr>
<tr>
<td><strong>Violent offenses</strong></td>
<td></td>
</tr>
<tr>
<td>Public</td>
<td>2,266</td>
</tr>
<tr>
<td>Private</td>
<td>471</td>
</tr>
<tr>
<td><strong>Fraud offenses</strong></td>
<td></td>
</tr>
<tr>
<td>Public</td>
<td>3,413</td>
</tr>
<tr>
<td>Private</td>
<td>2,426</td>
</tr>
<tr>
<td><strong>Other property offenses</strong></td>
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<td>Public</td>
<td>862</td>
</tr>
<tr>
<td>Private</td>
<td>380</td>
</tr>
<tr>
<td><strong>Drug offenses</strong></td>
<td></td>
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<tr>
<td>Public</td>
<td>12,297</td>
</tr>
<tr>
<td>Private</td>
<td>6,753</td>
</tr>
<tr>
<td><strong>Regulatory offenses</strong></td>
<td></td>
</tr>
<tr>
<td>Public</td>
<td>261</td>
</tr>
<tr>
<td>Private</td>
<td>244</td>
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<tr>
<td><strong>Other public-order offenses</strong></td>
<td></td>
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<tr>
<td>Public</td>
<td>9,329</td>
</tr>
<tr>
<td>Private</td>
<td>2,283</td>
</tr>
</tbody>
</table>

Note: Excludes 304 inmates sentenced to life or death, 2,803 with suspended or sealed sentences, 383 with missing offense data, and 445 with data missing on counsel type.

ultimately bound by the norms, expectations and loyalties of the group (Blumberg, 1967). In this sense, the courtroom working relationships of public defenders may serve as another form of organizational constraint that may not work to the defendant’s best interests. For example, public defenders may be more concerned than privately retained attorneys with the preferences and expectations of judges in whose courtrooms they appear (Levin, 1977). In a classic essay, Blumberg observes that criminal trials represent highly stylized, ritualistic performances by attorneys, judges, and other regular legal actors in the courtroom. In particular, Blumberg argues, criminal defense attorneys engage in very deliberate, conscious strategies of impression management in order to maintain the appropriate appearance in front of their clients; other officers of the court assist defense counsel with these strategies (Blumberg, 1967). Blumberg’s characterization of criminal defense attorneys as “double agents” more interested in preserving their ties to the courtroom work group than in working for the best interests of their clients was examined in one study of court appointed attorneys in selected counties of two Midwest states (Uphoff, 1992). The research concluded that defense attorneys could better be characterized as “beleaguered dealers” coping with organizational constraints presented by large caseloads, inadequate resources, and prosecutorial demands (Uphoff, 1992).

Another study comparing the two types of attorneys concluded that public defenders and privately retained attorneys obtained similar results for their clients (Hanson and Ostrom, 1998). However, the methodology and conclusions of this study were severely criticized by the American Bar Association in a rebuttal report (Arango, 1993).

Capital Cases

The distinction between privately retained and publicly appointed defense attorneys has much more significant implications in death penalty cases. In a recent reanalysis of data from a classic study of capital punishment in Georgia in the 1970s, the results showed that defendants in capital cases who were represented by assigned defense counsel were more likely to receive a death sentence than those represented by privately retained counsel. This result held even after controlling for relevant case variables such as the defendant’s prior criminal history. However, the researchers concluded that the difference in case outcome reflected differential responses by prosecutors to cases defended by assigned counsel versus those defended by retained counsel (Beck and Shumsky, 1997). In some Southern states, recent research shows that capital defendants often are represented by the least competent defense attorneys, such as those with prior histories of professional ethics violations and those who have no experience with capital cases (Coyle et al., 1990). In a recent speech, Supreme Court Justice Sandra Day O’Connor highlighted the issue, discussing how “. . . defendants with more money received better legal defense,” and pointing out that in Texas last year those represented by court-appointed lawyers were 28 percent more likely to be convicted than those who hired their lawyers. If convicted, defendants with court-
appointed lawyers were 44 percent more likely to be sentenced to death. “Perhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used,” Ms. O’Connor said (as quoted in Whitworth, 2001, online).

DEFENDING INDIGENT CLIENTS: TOO LITTLE TIME AND MONEY

The problem is, the need for defense attorneys to represent indigent (i.e., impoverished) defendants far outpaces the supply of lawyers, and the problem has intensified in recent years as the so-called war on drugs has substantially increased the number of people facing criminal charges (Rohde, 2000). Critics charge that government resources for the defense are inadequate, citing very low fees paid to defense attorneys and slim or nonexistent budgets to pay for defense resources, such as investigators, expert witnesses, forensic tests, and the like (Blum, 1995). In 1992, Massachusetts defense attorneys appointed by the court to defend indigent clients were informed that they could not be paid because public funds had run out two months before the end of the fiscal year (Brelis, 1992). Recent government data indicates that caseloads for government-provided defense attorneys have increased but that funding allocations have not increased commensurately (Harlow, 2000, p. 2).

The problem of lack of defense resources has many roots: Tight government budgets mean that not only is there competition for scarce resources among different government sectors (healthcare, education, criminal justice), but that within the legal system different agencies compete with one another. Public demands for greater prosecution resources translate to media attention paid to the budget of the district attorney’s office, whereas there is little public pressure to fund defense attorneys. Some attorneys argue that the constitutional right to assistance of counsel has little meaning in practice because of the chronic and severe shortage of defense resources. In the words of one defense attorney, “You have a lawyer in a sense, but a lawyer who can’t work on your case. . . . There is virtually no difference between that and not having a lawyer at all” (Holdridge, quoted in Blum, 1995, p. 2). In one county that lacked an adequate supply of attorneys for indigent defendants, a man accused of murder remained in jail for five months before meeting his court-appointed attorney; several months later prosecutors determined that the man was not involved in the murder and all charges against him were dismissed (Blum, 1995). Reflecting on federal court rulings limiting the reach of the Sixth Amendment’s right to counsel and the nationwide problem of lack of funding and resources for indigent defense, one author decries the erosion of the Sixth Amendment (Monohan, 1991). Clearly, government-provided attorneys working with too many clients and too few resources may sometimes fail to provide effective assistance of counsel.

Defense attorneys confronted with too many clients, too little time and other resources, and the inexorable pressure to move cases through the system must
make hard choices. How much time can I spend with each client? Whose case requires my attention most? What, if anything, can be done to get the investigative work, expert testimony, and other resources that this case requires? Despite the efforts of the defendant’s family and friends to help the defense in its investigative efforts, there remains a pressing need for professional investigative assistance in many cases. If the attorney fails to keep up with the pace of case processing that is expected by the judge, the district attorney, and other members of the court, this has a negative impact on the court overall and on the reputation (and ultimately, the effectiveness) of the defense attorney. On the other hand, the legal and ethical requirements of the defense role often dictate that more time and resources be devoted to clients than the attorney could possibly muster. This contributes to burnout among some public defenders (Lippman and Wineberg, 1990). New York State public defenders responding to a questionnaire on work-related stressors reported frequently having too much work; having conflicts related to upset defendants and family members and disagreements with prosecutors; worrying about whether and when a client’s case might be called to trial, and if so, what defense to present; and stressors related to system constraints, such as inflexible sentences and judges who were displeased at the decision to hold out for trial rather than plea bargain (Lynch, 1997).

Thus, defense attorneys, especially (but not exclusively) those primarily serving indigent defendants, must attempt to reconcile these competing claims on their time, attention, and loyalty. In a few jurisdictions, however, there are encouraging signs that structural reorganization of public defender programs can improve outcomes for clients. For example, evaluation of the Neighborhood Defender Service (NDS), a team-oriented approach to defending indigent clients in Harlem showed promising results: NDS clients served significantly fewer days than a matched set of clients represented under the traditional public defender system (Anderson, 1997, p. 10). The NDS program differs from traditional public defender programs in several significant ways, most notably in its attempt to take a holistic approach to clients, including focusing on their social service needs as well as their legal needs.

**DEFENSE DILEMMAS**

Defense attorneys can encounter a wide variety of legal, practical, and ethical dilemmas in the course of representing a client. For example, what if you are a defense attorney and your client adamantly disagrees with your proposed defense strategy? This was the situation faced by Theodore Kaczynski’s attorneys as they defended him against charges that he was the notorious “Unabomber.” They attempted to present an insanity defense on his behalf, but he refused to even allow them to mention the word “insanity” in court. He steadfastly rejected his attorneys’ attempts to convince him that they should be allowed to present this defense, at one point attempting
to fire his attorneys and represent himself (Gibbs and Jackson, 1998). Ultimately, the case was plea bargained and Kaczynski received a life sentence.

Douglas Allen Smith, a thirty-four-year-old man convicted of beating an elderly man to death and then stealing his car, sought the death sentence despite the fact that prosecutors had not charged him with a capital crime. The prosecutor said that Smith’s case was not among the “worst of the worst” for which the death penalty would be requested by the state. Nonetheless, Smith asked his attorneys to request the death penalty at his sentencing hearing. This apparently unprecedented request by a defendant presented an ethical challenge for Jamie McAlister, one of the defense attorneys. “It was a difficult thing for me to do. . . . but when my client makes a careful, rational legal decision, I have an obligation to be a vigorous advocate on his behalf” (Hansen, 1998, p. 2). Smith’s wish, however, was not granted; instead he was given a minimum sentence of sixty-two years (Hansen, 1998). Box 6.6 describes some of the issues that arise when a defendant chooses to represent himself or herself at trial.

**BOX 6.6**

**The Case of Colin Ferguson**

Does a defendant have the right to self-representation? Yes, if the trial judge determines that the defendant is competent, although defendants who are arguably seriously mentally ill can often meet this legal standard. In any event, people who represent themselves in court often make many mistakes. They may botch the evidence, contradict themselves, or fail to follow the proper legal procedures at trial. The stakes are quite high for defendants accused of a felony, especially if there are substantive reasons to believe that the defendant’s mental state and lack of legal experience may make efforts at self-representation more harmful than helpful.

Can the defendant, then, represent himself or herself and then claim “ineffective assistance of counsel” later? The short answer is “no.”

In 1993, Colin Ferguson was charged with murdering six people during a shooting spree on the Long Island subway. Ferguson rejected his defense attorneys’ efforts to mount an insanity defense, choosing instead to represent himself at trial. This meant that Ferguson conducted the cross-examination of victims who were injured but survived, family members of dead victims, and other eyewitnesses at trial. During questioning, Ferguson would often refer to himself in the third person, adding to the bizarre character of the courtroom proceedings. Ferguson was convicted and sentenced to life in prison (Samuel, 1995; Milton, 1995).

**ATTORNEY-CLIENT CONFIDENTIALITY ISSUES**

Communication between a lawyer and his or her client is legally “privileged,” that is, protected from disclosure to third parties (Gifis, 1984). Privilege is essential for
communication, trust, and confidentiality in the lawyer-client relationship that allows an attorney to effectively represent his client. The rationale is that if clients were not assured of the confidentiality of the information they share with their attorneys, then they would have an incentive to hide or distort facts necessary for their defense (Freedman, 1988; Pollock, 1998).

But this privilege is neither uncontroversial nor unlimited. How should an attorney respond when her client announces his intention to commit perjury when testifying in his own defense? What are an attorney’s legal and ethical responsibilities in this situation? Should she withdraw from the case? Should she warn the client of the possible legal consequences if he is caught perjuring himself, but otherwise do nothing? Should she report the client’s intention to the court, in her role as an officer of the court? Should she try to reason with the client to try and prevent him from lying, and report the perjury only if the client actually commits the crime?

The Supreme Court considered some of these questions in *Nix v. Whiteside* (1986), which addressed some of the constitutional issues raised when Whiteside’s attorney reported to the trial court judge his belief that his client intended to commit perjury while testifying in court about events leading up to the death of the victim. Whiteside was convicted of murder, and the appeal raised the question of whether he was deprived of his Sixth Amendment right to assistance of counsel. The court decided that he was not, but this case raised—but did not settle—the issue of whether the attorney should have revealed this confidential information about his client to the court.

Freedman (1988) notes that the Whiteside case raises questions about the Fifth Amendment privilege against self-incrimination. To wit, if the accused cannot be required to give information that would tend to be incriminating, how can the accused’s attorney be allowed to reveal such information?

Is this fair? Some legal commentators argued that this was a breach of the defense counsel’s duty of loyalty to his client, a violation of the requirement of confidentiality. Other observers felt that as an officer of the court, the attorney was acting ethically and appropriately in reporting the defendant’s supposed plans to lie to the court, in order to prevent the defendant from perpetuating a fraud upon the court.

Would it make a difference to your opinion on this issue if the client had already committed perjury, versus stating an intention to provide false information? What if the attorney believes his client intends to commit perjury, but the client has not yet done so? The reason defense attorneys may report perjury, despite attorney–client privilege, is to prevent perpetuation of a fraud against the court. But this raises another question: How certain must the attorney be before taking some action such as reporting the client to the court? In Whiteside, there was much discussion of what “standard of knowing” an attorney must use in making such a decision. For example, should the attorney believe beyond a reasonable doubt that the client has committed or intends to commit perjury? Or should the attorney merely be largely certain? Freedman notes that the Whiteside court did not settle these questions (1988).
What if a defendant charged with murder admits her guilt to her attorney? This is privileged information. But what if she admits to other crimes with which she has not been charged, including another murder? Her attorney is not legally obligated to disclose this, because of the confidentiality requirement. In fact, he or she is obligated not to disclose this information.

However, what if the defense counsel reasonably believes that the client intends to commit a crime? Because the issue here is a potentially avoidable future crime, confidentiality requirements change. In general, an attorney is not only legally permitted but is legally obligated to disclose this information to prevent future harm (Freedman, 1988). Of course, this raises further issues. How can an attorney distinguish between a client’s idle threats and serious intentions? Even the most sophisticated methods currently available for attempting to predict future dangerousness are often unable to do so reliably.

AN INADEQUATE DEFENSE: INCOMPETENCE AND MISCONDUCT

The role of the defense attorney carries weighty responsibilities, and the attorney’s actions have life-altering consequences for the accused. What happens when a defense attorney fails to provide the best possible defense? Allegations of ineffective assistance of counsel can be difficult to substantiate, but if proven, can result in a defendant being granted a new trial. But if a defense attorney fails to provide effective assistance of counsel and this problem is not caught and corrected, a defendant may pay the ultimate price—death.

Ironically, defense attorneys provided for indigent defendants in death-penalty cases are typically given few resources, if any, to assist in preparing for the

BOX 6.7
With a Defense Like This, Who Needs the Prosecutor?

“I decided that Mr. Tucker deserved to die and I would not do anything to prevent his execution.” These are the words of David B. Smith, one of the defense attorneys assigned to represent Russell Tucker at his trial for murdering a K-Mart security guard who had questioned him in the store parking lot. According to Smith, he decided after reading the trial transcript and meeting his client that “Mr. Tucker should be executed for his crimes.” Smith thus decided to sabotage the case by allowing his co-counsel to unknowingly miss the critical deadline for filing an appeal. Smith, a former prosecutor who had switched to defense work, decided to come forward after the deadline passed and Tucker was scheduled for execution. Expressing remorse, Smith said he had to “tell the truth” and “disclose that I had failed him” (Nowell, 2000, p. A14).

Source: Reprinted with permission of The Associated Press.
case. Capital defense attorneys are often paid a flat fee per case, and courts rarely provide funds for defense investigators, expert witnesses, or other resources to assist in defense preparation. The problem appears to have grown worse in recent years (Dieter, 1999). Given this situation, even the most experienced, diligent, and motivated attorney would have difficulty providing a capital defendant with an adequate defense. However, the situation is complicated even further by the fact that many attorneys appointed by the court to defend individuals accused of a capital crime are inexperienced, overloaded with cases, and inadequately compensated. In Illinois, a judge appointed a tax attorney who had never tried a case to represent a defendant in a capital case; in another case, the lawyer appointed to represent a capital defendant had just been reinstated after being suspended for incompetence and dishonesty (Armstrong and Mills, 1999). But where should the line be drawn between incompetence due to inexperience with capital cases and misconduct? Consider the following examples of representation provided to defendants in death penalty cases:

- Death row inmate Leroy Orange won a new sentencing hearing after evidence showed his attorney failed to investigate his claims that his confession was coerced and failed to present any evidence or witnesses at his sentencing hearing. (Armstrong and Mills, 1999)
- Bernon Howery was sentenced to die by lethal injection, but won a new sentencing hearing after evidence showed his attorney failed to appear at some court dates, failed to investigate leads on other potential suspects, and failed to present evidence of mitigating factors at Howery’s sentencing hearing. (Armstrong and Mills, 1999)
- In Illinois, an attorney with almost eighty disciplinary complaints on his record represented a defendant in a capital case; after his client was sentenced to death, the attorney was later disbarred. (Armstrong and Mills, 1999)
- Another attorney who was ultimately disbarred on two separate occasions represented four defendants in separate capital cases. All four received the death penalty. (Armstrong and Mills, 1999)
- A public defender who failed to present witnesses who could have helped the defendant’s case gave a closing argument that a judge later noted “. . . may have actually strengthened the jury’s resolve to impose the death sentence” (Armstrong and Mills, 1999, p. 5).
- A county public defender with more than 100 assigned cases was appointed to represent a capital defendant even though the lawyer had never tried a murder case (Bright, 2000).
- A defense attorney appointed by a Texas court to represent a gay defendant accused of capital murder repeatedly dozed off during his trial, and referred to his client and other gay men as “queers, fairies, and tush hogs” (Bright, 2000).
• In Texas, the state appellate court has refused to review the cases of defendants convicted and sentenced to death while their attorneys slept through parts of their trials (Shapiro, 1997)(see Box 6.8).

HOW CAN YOU DEFEND THAT “MONSTER”?:
PUBLIC PERCEPTIONS OF DEFENSE ATTORNEYS

“You fight against any impulse of being repulsed by the crime itself,” said Chuck Sevilla, defense attorney for Robert Alton Harris, who killed two boys (Dolan, 1994, p. 4). Defense attorney Christie Warren found herself defending men accused of child molestation while she was expecting her own child. “You just have a little more baggage to get beyond,” said Warren (Dolan, 1994, p. 5). One of the flash points of negative public opinion about defense attorneys, both public and private, is the idea that defense attorneys defend guilty clients and help them avoid justice. This idea is built upon several assumptions that bear questioning. First, it assumes that most defendants are guilty, glossing over the fact that an existing but unknowable percentage are not guilty of the instant crime. Second, it assumes that a guilty person does not need a defense, yet due process demands that everyone accused of

BOX 6.8
Lawyering in One’s Sleep

Seated beside his client . . . defense attorney John Benn spent much of Thursday afternoon’s trial in apparent deep sleep.

His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the . . . arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial.

“It’s boring,” the seventy-two-year-old longtime Houston lawyer explained.

Court observers said Benn seems to have slept his way through virtually the entire trial.

“I customarily take a short nap in the afternoon,” was his only explanation.

The co-counsel for the defense later said he thought Benn’s sleeping might make the jury “feel sorry for us.”

What was the judge’s reaction? “The Constitution says that everyone’s entitled to an attorney of their choice. But the Constitution does not say that the lawyer has to be awake.”

a crime, whether guilty or not, receive a fair trial and if guilty, a fair sentence (Pollock, 1998). Third, the belief that defense attorneys merely “shield” wrongdoers from justice ignores the critical function played by defense counsel in our legal system. Focusing on the instances in which a legally guilty person may be acquitted, without examining this in context, overlooks the need for defense counsel to assist innocent people accused of a crime. As one scholar notes, “[D]ue process protects us all by making the criminal justice system prove wrongdoing fairly; the person who makes sure no shortcuts are taken is the defense attorney” (Pollock, 1998, p. 220).

Public perceptions of defense attorneys may reflect societal attitudes toward people accused of a crime, especially if the crime alleged is particularly heinous (see Box 6.9). And although the defense attorney’s function is an indispensable part of due process, attorneys may disagree in how they interpret their role. For example, attorneys may vary greatly in their attitudes and willingness to defend certain types of cases—or clients.

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**BOX 6.9**

**“Guilt by Association”**

While criminal defendants often face public suspicion that they “must have” done something wrong simply because they have been charged with a crime, even when the arrest results in a dismissal or a trial and acquittal (Willis, 1992), defense attorneys also may be tarnished in the eyes of the public because of their association with accused persons. Imagine the last time you saw a TV news byte featuring the defense attorney for someone accused of a violent crime, such as murder or rape, especially if the victim was a child. What did you think of the attorney?

Albert J. Krieger, an attorney who has represented some notorious defendants, described how he works hard to consciously combat suspicion, distrust, and distaste, especially on the part of jurors. His strategies include taking care to appear very professional in court (avoiding argumentativeness, for example), reminding jurors of his legal role as a defense attorney, using a proactive strategy of focusing on weaknesses in the prosecution’s case, and raising doubts about the credibility of prosecution witnesses (Krieger, 1997).

Danny Davis defended Raymond Buckey, who was accused of sexually molesting preschoolers at his mother’s daycare center in the notorious McMartin Preschool case. Raymond Buckey was ultimately acquitted of most of the charges against him. However, the jury deadlocked on twelve of the molestation charges against him, and he was retried on those charges. The second jury also deadlocked on those charges, resulting in a mistrial. During the trial, which lasted six years and was followed closely by the media, Davis learned just how strongly some members of the public felt about his role in the case. “Two of Davis’ homes were firebombed, and men attacked him physically in the parking lot of the courthouse. ‘I learned how to roll under my car, in my suit,’ he said. ‘That is the best defense’” (Dolan, 1994, p. A1).
Attorney David Baugh took on the challenge of defending Barry Black, an Imperial Wizard of the Ku Klux Klan (KKK) accused of violating state law when he held a Klan meeting that featured a cross-burning. The case raised First Amendment free speech issues, and Mr. Baugh volunteered to defend Mr. Black free of charge. Mr. Baugh has no illusions about the nature of the KKK, but he says the issue is freedom of speech. Mr. Baugh apparently believes that taking the case is a way of challenging perceptions of defense attorneys. Public reactions to his decision to represent this particular client have been strong, but few would doubt that Baugh dislikes the KKK and its beliefs: Mr. Baugh is African American. Boxes 6.9 and 6.10 illustrate some additional defense attorney experiences defending difficult cases.

Whether the public appreciates the role of defense counsel is questionable in the minds of some attorneys. As one defense attorney put it, “[T]alking to civilians about criminal defense work is like pushing an oyster into the coin slot of a parking meter. It can’t be done, and it makes a mess” (Holding, 1999, p. 5). Nonetheless, in the courtroom itself the defense attorney must try to neutralize or reverse potentially negative impressions of the defense role in the eyes of the jury. Defense attorneys may attempt to establish credibility by discussing the role of the defense during jury questioning, by demonstrating professionalism and courteousness during court proceedings, and even by using humor to try to establish a sense of connection with the jury (Krieger, 1997).

BOX 6.10
A Defense Attorney’s Nightmare

Criminal defense attorney Cristina Arguedas was representing a black man charged with raping a white woman. The police had picked him up as a registered sex offender—he previously served prison time for three rapes—and the victim tentatively identified him in a lineup. During the trial, Arguedas attacked the victim’s identification of her client as not only weak but racist. She won an acquittal.

Four months later, she picked up her telephone and heard a public defender say that the man had just been arrested again for rape. “I went through this whole reflective, guilty thing that I had used my skills to injure another woman,” she said. It was the ultimate criminal defense attorney’s nightmare. For Arguedas, the nightmare proved short-lived. After a week of torment, the public defender called her back. Her former client had been in a bank at the time of rape and could not possibly have done it.

THE DECISION TO BECOME A DEFENDER

Despite the low pay, lack of resources, and low status associated with working as a criminal defense attorney, many criminal lawyers find deep satisfaction in their work. The commitment to social justice through legal action that draws many attorneys to defense work is apparent in the historical record of African American defense attorneys (see Box 6.12). The work is intriguing and intense, and one defense attorney speaking to colleagues at a conference described its attraction in these terms: “We will probably never persuade a majority of Americans that defending criminal defendants is heroic, and I don’t even want to try. I know it is, you know it is, our clients and their families know it is. For us, that is enough” (Holding, 1999, p. 5).

It is not uncommon for an attorney to have work experience both as a prosecutor and as a defense attorney. Some attorneys adapt well to a switch from one side to the other; a former prosecutor turned defense attorney notes that: “That’s what our roles are. . . . the best attorneys can [advocate for] either side.” Another D.A. now doing defense work put it this way: “Most people who leave [prosecuting work] don’t view defense as a force for evil. . . . they view it as a constitutional function testing the [government’s] case. If, despite our best efforts, we lose, then the [government] has done its job” (Cohen, 2001, p. 1; reprinted by permission © 2001 NLPIP Company). In other cases, the switch is difficult. David Smith, the defense attorney who sabotaged his client’s case (see Box 6.7), was a former prosecutor. Some attorneys who switch to defense work find they must work hard to reconcile their self-image with the fact of defending people accused of gruesome crimes, such as murders or sex crimes involving children. Psychiatrist Steven Ager describes the emotional turmoil that some attorneys who switched to the defense role experience:

BOX 6.11
The Ungrateful Client

In 1998, twenty-year-old Jeremy Strohmeyer pled guilty to raping and murdering seven-year-old Sherrice Iverson in a Nevada casino. In exchange for his plea of guilty, Strohmeyer received a life sentence, avoiding the possibility of capital punishment if he had been tried and found guilty. The evidence in the case included Strohmeyer’s confession, casino security videotape showing him following the girl into the restroom, and incriminating information provided by a friend of Strohmeyer’s who saw him holding the little girl in the bathroom stall.

In 1999, Strohmeyer asked the court to throw out his guilty plea and allow him to stand trial. Strohmeyer claimed that his attorney, Leslie Abramson, coerced him into making the plea bargain so that she could reduce the time she spent on his case (A bid to withdraw plea, 1999).
Conclusion

Sometimes we do the right thing for the wrong reason. And when you're a DA, you're one of the “good guys” putting the “bad guys” in jail. There's very little conflict. But when you switch to defending all of a sudden, you have to deal with the bad part of yourself you are in denial about. You go from this Roy Rogers–Tom Mix life to defending people you don’t want to admit you are anything like. You don’t have the same sense of accomplishment. These attorneys become more and more unhappy doing defense. (Cohen, 2001, p. 1)

Overall, defense attorneys, whether private or government appointed, show pride and satisfaction in their work. In contrast to negative public perceptions of criminal defense work, criminal defenders view their contributions to the legal system as important and meaningful (Kittel, 1990).

CONCLUSION

Defense attorneys have many and varied functions in their role as client advocate and court officer. Their interactions with clients and other legal actors in the courtroom reflect legal requirements, ethical norms, courtroom work group expectations, and practical demands on their time and resources. Now that you have a
A Defense Lawyer Is Selected: The Defense Role

Better understanding of the prosecutor and defense attorney, it’s time to look at the judge’s role in the courtroom. In the next chapter, you'll see how the judge serves to guide the courtroom proceedings and “referee” the contest between the state and the defense.

Discussion Questions

1. Why is the role of the defense attorney an indispensable part of our criminal justice process? For example, how do defense attorneys help preserve constitutional rights?

2. What are the major legal cases on the right to counsel? What were the issues in each case, and how was the case decided? How did these cases affect the right to counsel?

3. Compare the role of defense counsel with that of the prosecutor, which we learned about in the preceding chapter. In what ways are the defense and prosecution roles comparable, and in what ways are they significantly different?
4. In what ways is the defense role that of a “legal tool,” and in what ways is a defense attorney a “moral agent”? How do these two conceptions of the defense role compare? Are these mutually exclusive perspectives on the defense role, or are they compatible visions?

5. What are some of the skills and abilities that a defense attorney needs to be effective in his or her work? Why are these qualities important?

6. How do organizational factors, such as resource limitations, influence the ability of attorneys handling the cases of indigent defenders?

7. What are some of the ethical dilemmas that defense attorneys may face in the course of their work?

8. According to research on indigent defense in capital cases, what are some of the main problems with providing quality defense representation for defendants facing capital charges? What could or should be done to deal with these problems?

9. What are some of the reasons that members of the public often have inaccurate or distorted perceptions of the role that defense attorneys play in the criminal justice system? What might help improve the accuracy of public perceptions of defense work?

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