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Who defends capital defendants? This is a brief look at the demographics of that question. The main issue, of course, is the pool of trial lawyers, but, as I will suggest, one must also look at the demographics of the appellate and habeas lawyers as well. These lawyers are, after all, the last and sometimes, best hope for the lives of the defendants, and their appellate claims often focus on the quality of representation by the trial lawyers.

On first inquiry, capital trial lawyers come from the same pool of defenders as in criminal cases generally: state-paid public defenders, private lawyers working on government appointments, and privately-retained lawyers. Even in the large variety of non- capital cases, the last of these categories is probably the smallest, and the allocation between the first and second varies tremendously by state and even county. In capital cases, the third category is even smaller. I myself have often fantasized that some day I would be asked to represent—at least on appeal—an extremely rich and extremely innocent capital defendant who hired me on retainer. I have also imagined winning the New York City Marathon.

The State virtually always pays for the defense of those whom it seeks to execute. We are so used to *Gideon v. Wainwright*'s[1] noble and largely uncontroversial ideals that we sometimes forget what a strange system we have. The State subdivides itself into prosecutor and judge, and then subdivides itself further to give the prosecutor an antagonist, paid for by the State, and paid to oppose the State. We somehow assume that this system can finesse conflicts of interest. That is not always true. Certainly there are some indigent defendants who suspect that their public defenders, who are not only government employees but also repeat players in

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1. 372 U.S. 335 (1963) (setting forth the right to counsel in criminal cases).

regular competition with prosecutors, may have more interest in sustaining good relations with their employers than in ardently attacking the government's case. I think such a concern would be utterly false, but remember that the disappointed clients here are, by definition, facing execution.

On the other hand, whenever a political official tries to attack expenditures for public defenders, she is likely to point to the absurdity of paying lawyers who are constantly attacking their employers. Sometimes these officials attempt a fine distinction: state-paid lawyers may try to prove that a particular defendant is innocent, but they may not become class-action type impact litigators who try to subvert the very basis of state legislation. Most defense lawyers will point out that such a distinction does not work—especially in death cases.

Let us look at the odd nature of this system from several other perspectives. When I teach Criminal Procedure, and the unit on ineffective assistance of counsel, I throw in the phrase "state action." That phrase, of course, is derived from general constitutional law and does not often turn up in criminal procedure. The underlying question is whether there is state action if a state-paid defense lawyer renders ineffective assistance. More oddly, is there state action when it is a private lawyer?[2] How can that be? I will leave that conundrum there, because it is just part of the odd nature of the whole system.[3] Critical Legal scholars love to probe the subtleties of the so-called public-private distinction in the law, and the way legal doctrine endlessly redraws that boundary.[4] This is a good example. But in any event, the State violates the Sixth Amendment when it denies the defendant a lawyer altogether, or when it directly places unfair constraints on the lawyer.[5] Yet, it also violates the Constitution if it, in effect, negligently hires a lawyer who does a terrible job, or even if it permits or acquiesces indirectly in the poor job done by a private lawyer.[6] Of course, in recent years, the Supreme Court has helped mitigate what might appear to be the absurdity of

2. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980).

3. *But see* Jon R. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289 (1964).

4. *See, e.g.*, MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES, 102-09 (1987).

5. *See, e.g.*, *Gideon*, 372 U.S. at 344.

6. *See, e.g.*, Strickland v. Washington, 466 U.S. 668 (1984).

this system, by lowering the standard of minimal competence to a level where the State is not requiring much of an adversary for itself—I will return to this subject later.[7]

What has been the recent history of capital representation? Let us look at two very different places: the South, and California. In the early years of post-*Furman*[8] death litigation, a not entirely unfair stereotype of a Southern scenario went thus: The defense lawyer was a local general litigator who took on a court appointment. He was paid very little, though he may not have complained much, because he did not plan to put much time into the case anyway. Even if he had wanted to rack up the hours, there was little he could do because he had little understanding of what to do in a sentence hearing, as opposed to a guilt hearing. Some defenders reported not having read the new statutes,[9] so they were unaware that there was this new-fangled legal phenomenon called a penalty phase, with witnesses and argument, etc. Others vaguely knew of this new legal procedure, but finding, interviewing, and preparing numerous possible character witnesses, and constructing a psycho-biography of their client were not part of their general activity.

The fees were infamously low. The second capital appeal I worked on was a case where the defense lawyer was paid $150 for the entire case, and believe me, he earned every penny of it. He only interviewed his client once, as he was arranging a plea bargain for the guilt phase. He did not identify or reach out to any of the several, excellent mitigation witnesses—teachers, coaches, ministers, or whatever—who were only a few hours' drive away. The reason for the omission, he said, was that he thought the case hopeless. He never attacked the confession in the case, even though, as it later became obvious, the defendant was left alone in the interrogation room with an off-duty police officer who was a cousin of the victim, and who threatened the defendant with

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7. *Id.*

8. Furman v. Georgia, 408 U.S. 238 (1972) (holding that death penalty as then administered constituted cruel and unusual punishment in violation of the Eighth Amendment).

9. Gregg v. Georgia, 428 U.S. 153 (1976) (holding that new statutes which require balancing of aggravating and mitigating factors satisfy Eighth Amendment).

a gun. He did not try to interview the officer, because he did not like the man.[10]

Moreover, however pitiful the lawyer's fees, even more pitiful were the investigative fees—a crucial point for sentencing hearings. So even those lawyers who understood the theory of a penalty phase were helpless to do the necessary preparation. What happened in those cases? Though almost 200 Southern inmates have been executed in the last decade or so, the vast majority of inmates have survived—if only in a lingering state on death row. Some have won on appeal—occasionally reversals of their convictions, but far more often reversals of their death sentences. Others have never exactly won in any court, but they have not wholly lost either: Their claims have been tied up in the complex procedures of the state and federal habeas courts, and so they somehow stay alive, with their cases perpetually unresolved.

Who has lawyered these appeals, and where? A few were won by local lawyers in the state appellate courts. The most dramatic victories, however, were in the federal courts on habeas; and the appellate lawyers were the best in the country—dedicated, brilliantly trained lawyers from nonprofit organizations in the South, but most from the NAACP Legal Defense and Educational Fund, Inc. ("Inc. Fund"),[11] including such great lawyers as Anthony Amsterdam, Jack Boger, and James Liebman. Why were they able to win? First, because they were superb lawyers. Second, because by historical accident there were so many kinks to be worked out in the Southern death penalty statutes that they often had large, dramatic constitutional issues to litigate, especially in federal court. Third, sometimes they won because they were able to prove ineffective assistance among local trial lawyers, at a time when many Southern federal judges were open to the notion of capital appeals as essentially broad civil rights actions. That notion is what motivated the Inc. Fund to pursue those cases, and its lawyers to work endless, grueling hours at minimal salaries.

What has happened in the South now? There has probably been a marginal improvement in the quality of trial litigation. Some of the trials are done by well-trained public defenders or appointed lawyers, and fees have probably gone up

10. Mitchell v. Kemp, 762 F.2d 886 (11th 1985).
11. Hereinafter the "Inc. Fund."

modestly. Other civil rights or death penalty organizations have emerged in the South to do the local work that the Inc. Fund could not possibly absorb.[12] There are some Southern trial lawyers who share some of the dedication and idealism of the Inc. Fund appellate lawyers, though, as I will suggest, by this time such idealism seems even more futile. The outcomes, however, may still turn on the vagaries of the jury's attitude and potential empathy for the defendant. And then, if they lose, there is little chance to win on appeal, because most of those great constitutional issues, or even mid-level appellate issues concerning the application or constitutionality of various aggravating circumstances or statutory procedures, have disappeared.[13] In other words, the kinks have been worked out to the satisfaction of the federal courts. Thus, the Inc. Fund no longer has many great cases to bring. In any event, as cases have proliferated and become less susceptible to aggregation under broad themes, there are too many cases for a central organization to handle. The cause has become splintered and diffuse.

When a case does come up on appeal, the problem is more likely to be with highly peculiar, fact-specific problems of evidence-gathering, admission or preclusion, or quality of argument. All too often, an appellate court will turn down an issue because the lawyer waived it and it was harmless error anyway.[14] What is left on appeal? Both the waiver and harmless error issues are very difficult to finesse, but a habeas lawyer will try to get over these difficult hurdles. As the difficulty increases, the temptation is to go in the other direction: to concede that the lawyer was incompetent and to make that the basis of the appeal. The waiver issue magically disappears, but the appellate lawyer is left arguing the lawyer's incompetence under the minimal standards of

12. A notable example is the Southern Poverty Law Center.

13. Perhaps the last great defense bar victory was Lockett v. Ohio, 438 U.S. 586 (1978) (Eighth Amendment requires that capital defendant be able to proffer any mitigating facts bearing on his character or record or offense, regardless of statutory restrictions).

14. *See* John W. Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California*, 23 U.C. DAVIS L. REV. 157, 306-13 (1990).

Strickland—and facing the harmless error problem anyway.[15]

Thus, appellate lawyers, who like to argue broad dramatic constitutional themes, end up re-trying facts, arguing that little mistakes in particular factual contexts might have shifted the perception of the overall factual context. Moreover, the appellate lawyer then has to put the trial lawyer on trial. To do so, she must not only attack what he did, but also conceive what he should have done, which is to say that we get a kind of shadow, imaginary trial envisioned by the defense appellate lawyer—the witnesses the trial lawyer should have found, the testimony they would have given, the summary arguments the lawyer would have made.

The picture looks just a little different in California. Let us go back to the 1970's, when new death penalty laws were passed. The trial lawyers appear much better than they did in the South. They were better. Though it is risky to draw stereotypes, if the Southern trial lawyer was a local yokel member of the congenial private bar, in California, the trial lawyer was an ardently liberal, very-smart Boalt graduate working in the Alameda county public defender's office. They did not win all their cases—maybe about half of the capital defendants got death sentences—but they did fairly well, and if they lost, they had the assurance of an excellent appellate defense bar which would make the appellate claims look broad and dramatic.

Who were the appellate lawyers? They were not from the Inc. Fund, which concentrated its efforts in the South, and which, frankly, was not needed much in California. Most importantly, they were staff attorneys at the State Public Defender's Office[16], and they were terrific and won many victories. All too famously, or infamously, they won sixty-four reversals out of the sixty-eight cases heard during the years that Chief Justice Rose Bird sat on the California Supreme Court.[17] In fact, there is no easy 1970's California analogy to

15. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (the "prejudice" test).

16. For an early history, see George Yuhas, Note, *Statewide Public Defender Organizations: An Appealing Alternative*, 29 STAN. L. REV. 157 (1976).

17. For the subsequent history of capital appeals in California, see Poulos, *supra* note 14; John Poulos, *The Lucas Court and Capital Punishment: The Original Understanding of the Special Circumstances*, 30 SANTA CLARA L. REV. 333 (1990).

all those federal habeas corpus cases in the South, because the cases never got to the federal courts. By the way, many of the appellate lawyers were individual appointees from the private bar, from academia, or even large law firms. The latter quickly learned that taking on an appointment for a statutory fee was tantamount to taking on a case pro bono. A major San Francisco or Los Angeles law firm loses a lot of money when its lawyers bill at $60 or $75 an hour.

Let me note one irony concerning the public-private distinction in California. When George Deukmejian became Governor in 1983, he set out to slash the budget of the Office of the State Public Defender. He thought that death appeals were the duty of the private bar, and he induced the creation of the California Appellate Project ("CAP"), an arm of the nominally private State Bar of California.[18] CAP was to do many of the appeals itself and supervise private appointed lawyers in others. So, who ended up working for CAP? It was Michael Millman, the lead death penalty lawyer from the State Public Defender's Office, and some of his best staffers, who crossed the street, got better offices and slightly better pay in their now nominally private jobs. A perfect compromise: Deukmejian won his symbolic victory and CAP still had plenty of state money. For a while, CAP continued to win big appellate victories.

After a while, however, any dramatic victories on major issues under federal constitutional law were reversed by the United States Supreme Court.[19] Further, more local victories under the state constitution or state statutes were reversed by the post-Bird Court, which quickly decreased the reversal rate, comparing two five-year periods, from 95 percent to about 20 percent.[20] This is where California is now. There are too many cases for CAP to handle.[21] There are still bril-

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18. For a brief review of the history of the California Appellate Project (CAP), see Philip Carrizosa, *High Court Will Pick Death Row Counsel*, S.F. DAILY J., Mar. 25, 1992, at 1.

19. *E.g.*, California v. Ramos, 463 U.S. 992 (1983) (reversing Bird Court decision which had held that statutory instruction informing jury that life sentence without parole could be commuted, but not mentioning possible commutation of death sentence was unconstitutional).

20. *See* Philip Carrizosa, *Death Case Law Weathers a Sea Change*, S.F. DAILY J., Apr. 6, 1992, at 1.

21. The State Supreme Court, apparently thinking CAP was too slow and selective in picking appellate attorneys, has now relieved CAP of the function of arranging appellate counsel. *See* Carrizosa, *supra* note 20.

liant trial lawyers, but they have fewer issues to work with and they are stretched thinner. The rates of capital charging went down for a time when prosecutors were discouraged by Bird court opinions, but now, at least for prosecutors, things are on the upswing. The trial lawyers still win their share of life verdicts at trial, but that is where the good news for them ends. No one wins on direct appeal in the California Supreme Court anymore. There are no big issues, and where you can manage to fashion an appellate issue, the court will find it harmless error. What, then, is the point of appealing? It has become largely an empty exercise to exhaust your remedies in order to get to habeas.

And what does that mean? To some extent, it means using the federal district courts as mini-Supreme Courts to review questions of constitutional law, and, in effect, to reverse the legal decisions of the state supreme court. But recall, there are precious few of those issues. What remains is habeas, and let us put that in perspective.

The other, and currently more important, purpose of habeas corpus is to generate new issues that were not appealable earlier because they are based on so-called extra-record evidence not generated at trial. These issues are not limited to claims of ineffectiveness, but ineffectiveness represents the largest share. You go through this very odd procedure called state habeas, not because there is great hope that you can win there—though you see the occasional victory—but because the odd nature of that proceeding permits you to perform the extra-record evidentiary review that you cannot do on direct appeal. Perhaps you win there, but at least you develop a far better record to argue when you lose and proceed to federal court. If the federal court orders an evidentiary hearing, you may get a chance to do further investigation, but, regardless, you will have a better basis in the state habeas evidence. There is only one major problem with this: it is very expensive, and though the California Supreme Court has arguably made some reasonable effort to maintain a living wage in terms of attorneys' fees, it has been brutal in slashing the fees available for investigation—usually allowing no more than $3,000 in a case.[22]

22. Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court, CAL. R. OF CT., Compensation Standard 2-2-1 (West, State Ed., revised 1993).

Defense lawyers understandably denounce this as outrageous and unfair; nevertheless, let us take a somewhat different perspective. This is indeed an insane system. Our main method of protecting the rights of a condemned inmate is to conduct an extremely expensive para-trial, the trial that should have taken place, arguing the claims that should have been argued, hypothesizing the evidence that should have brought forth, and then trying to convince a judge that this scenario was plausible and would have led to a different outcome. Perhaps, from this perspective, we can understand why politicians find it easible to attack this sort of thing as obstructing the will of the people.

What sorts of issues get raised on habeas? Examples are: the state suppressed or failed to disclose exculpatory evidence; the defense has just discovered new evidence; the state used false evidence; the jurors misconducted themselves in the jury room—they took drugs, fell asleep, read forbidden papers, etc.; the informers were paid to lie, etc.[23]

What, then, are the new pressures on defense lawyers? Their professional lives tend to be more full of exhausting existential battles than spirited civil rights campaigns. Of course, many feel that the death penalty is racist and cruel, but they find little or no encouragement in any political debate on the subject—the civil rights spirit seems very old history. Many remain deeply motivated anyway—their hatred for capital charges is almost visceral—, and tend to view any individual case as Armageddon, even if not part of a progressive political movement. They are paid very little: try finding some profit after you have paid the overhead out of $75 or $100 per hour, plus a few thousand for expenses. As a public defender, you make a half-decent civil service wage, but that seems small when you divide by the number of hours, and even smaller when you compare this figure to the private firm salaries that many of the these fine lawyers could easily command. They get lots of psychic income, though. I call them the ADMs—the aggressively downwardly mobile.

Even in California, but more particularly in the South, some are still incompetent, maliciously so, or just overwhelmed. Thus, the appellate lawyers have put more and more effort into a desperate bid for later habeas relief—by

23. I have seen proposals for habeas investigations to check the country club affiliations of the prosecutors to prove their racial bias.

generating lots of issues for evidentiary hearings in habeas. At the same time, the trial lawyers get the message that they have to be absurdly thorough in lawyering the original case. They cannot afford to lose an issue because of waiver, so they paper the trial judge to death with motions, and go to extreme lengths to tilt the evidence in their direction, even in hopeless cases, because they know they will face the harmless error problem even if they have a good appellate claim. Moreover, they must implicitly cooperate in the understanding that they may be attacked as incompetent.

The liberals probably sense the absurdity of this scheme, but defend it as, often, the defense's only hope. The conservatives tend not to be so fastidious. They see the defense bar as using litigation to subvert the fabled will of the people, turning the real trial into a mere first round or side show, and then contriving endless habeas maneuvers to delay disaster, if not achieve victory.[24] Of course, the structure of federal habeas corpus is determined by Congress, and in each of the recent efforts to create a federal crime bill, there have been proposals to change habeas. The gist of these proposals goes back to Justice Powell's report from some years back where he proposed what appeared to many a sensible new scheme, in which federal habeas would be regulated as an efficient, quick, but serious form of appeal.[25] Defense lawyers would face strict time lines, and, except in the most extraordinary circumstances, would be allowed only one chance in the federal courts. Recognizing that part of the cause of lengthy and repetitive appeals was the incompetence of trial lawyers, Justice Powell, the great balancer, sensibly suggested a trade-off: states would have to "qualify" for these new habeas rules by ensuring better—and better paid—trial lawyers in capital cases.[26]

The Powell report never became law. To some extent, it failed simply because it was stuck in the mish-mash of other elements of federal crime bills—capital murder laws protecting federal poultry inspectors, etc. To some extent, it failed

24. Wainwright v. Sykes, 433 U.S. 72, 89 (1977) (noting danger of "sandbagging" by defense lawyer).

25. *See* Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report on Habeas Corpus in Capital Cases, 45 CRIM. L. REP. (BNA) 3239 (1989); *see also* Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990).

26. *See* Ad Hoc Committee, *supra* note 25.

because of its own controversial extra baggage: the federal bills added very Draconian restrictions on the sorts of substantive issues one could raise on habeas. In 1994, for better or for worse, President Clinton did get his "smorgasbord" crime bill through Congress,[27] but habeas "reform" is not part of of the bill. Even a Congress that could finesse the arguments over the assault weapons ban[28] could not reach any consensus on habeas. Thus, we are back to the situation where Supreme Court interpretations of the federal statute have been brutal in rejecting claims based on waiver, exhaustion, and harmless error grounds, along with the new *Teague* rules.[29] Yet somehow, some way, many lawyers manage to get some sort of stay or evidentiary hearing in some court long enough to get their clients into the typical death row state of suspended animation. Ironically, the new risk of incompetent representation is at the federal habeas stage. The practitioner manuals on litigating habeas claims are not rocket science. They are much harder than rocket science. The requirements for weaving your claim through and around the obstacles to federal review are medieval and theological in subtlety.[30]

To conclude, trial lawyers in death penalty cases have miserable jobs which they somehow find exhilarating. When done competently, the cases are not campaigns; they are ordeals. The lawyers must assume no hope for victory on appeal, so the sole focus is an acquittal or a life verdict. The lawyer's personal life is likely to become wholly intertwined with her client's, in part because she has to present a sympathetic mitigating portrait to have any hope of saving his life, in part because that just tends to happen in such intense cases. On the other hand, equally desperate efforts will be

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27. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Sept. 13, 1994.

28. *Id.* at tit. XIA.

29. *See* Teague v. Lane, 489 U.S. 288 (1989) (no right of federal habeas corpus relief where claim is for "new rule" of federal constitutional law); *see also* Weisberg, *supra* note 25.

30. The best way to get a sense of this subtlety and complexity is to read the works of our leading scholar of federal habeas corpus, Professor James Liebman. *See, e.g.*, James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997 (1992); James S. Liebman, *More than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91).

made on appeal to do all the things the trial lawyer did not do, and sometimes to prove how awful he was for not doing them. Meanwhile, this is all very expensive. In today's demagogic climate, you rarely hear any practical cost-benefit analysis about criminal justice. Ironically, you occasionally hear it coming from the halls of county or local government, where officials recognize that to bring a capital charge will break the county budget.[31]

Who will defend capital defendants in the future? I do not foresee any dramatic changes for a long time. The state of the art in capital defense and the demographics of the defense bar are ultimately, if indirectly, related to the political structure of capital punishment in the United States, which now is a very stable structure. All politicians favor capital punishment; many call for more of it, although many do so cynically, because they know it is largely a symbolic issue; and the people are satisfied if an occasional execution reminds them that the art form is still alive. Since the death penalty is here to stay, dramatic change would only occur if political rhetoric translated into reality, and we had, for instance, the prospect of a thousand executions a year. More lawyers might be pressed into service. As the pressure increased, so might the morale, ironically enough, because it might become a progressive cause again. But none of this is likely. The existential ordeal of the lonely capital defense lawyer will continue for a long time.

31. *See, e.g., A California County's Bankruptcy Delays a Murder Trial*, N.Y. TIMES, Jan. 22, 1995, at 14 (explaining how the bankruptcy of Orange County obstructs the start of the capital murder trial of Charles Ng, whose serial murder case was transferred because of venue change).