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A Penal Colony for Bad Lawyers

by Bennett L. Gershman*

Consider the following cases:

Larry Heath's court-appointed lawyer's appellate brief contained only a single page of argument, raised only a single issue, and cited only a single legal precedent. Heath was executed in 1992.¹

Herbert Lee Richardson's appellate brief failed to mention that the prosecutor argued at Richardson's sentencing hearing (without any basis in the record but with no objection by defense counsel) that Richardson should be sentenced to death because he belonged to a black Muslim organization in New York, had killed a woman in New Jersey, and had been dishonorably discharged from the military. Richardson's lawyer was later disbarred for other reasons. Richardson was executed in 1989.²

Arthur Jones was represented at trial by a court-appointed lawyer who made no opening or closing statement and offered no evidence at the penalty phase. During the post-conviction phase, he was represented by a sole practitioner just two years out of law school who had never handled a capital case. Jones was executed in 1986.³

Horace Dunkins, an intellectually disabled black man, "was represented by a lawyer so incompetent that the jury was never told that Dunkins was mentally retarded. Dunkins had an IQ of 65 and the mental age of a 10 to 12 year old child." Dunkins was executed in 1989.⁴

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1. *Confirmation Hearings on Fed. Appointments, Comm. on the Judiciary*, 102 Cong., 106, 122 (1992) (statement of Stephen B. Bright, Director, Southern Center for Human Rights).

2. *Id.*

3. *Id.* at 122-23.

4. *Id.* at 123.

"The capital trial of a battered woman was interrupted for a day when her defense counsel appeared in court so intoxicated that he was held in contempt and sent to jail for the day and night."⁵

A defense lawyer requested an adjournment between the guilt phase and penalty phase of a murder trial so that he could read the state's death penalty statute.⁶

"A lawyer's brief was sent back to him by the appellate court . . . because it did not cite a *single* case."⁷

A capital defendant was visited only once by his lawyer in eight years. In another case, the lawyer never visited his client in eight years.⁸

What should happen to these lawyers? Should they be disbarred, suspended, or retrained? I thought about these cases after I learned that "disruptive innovations" in criminal defense was going to be the topic of a panel discussion last August at the annual conference of the Southeastern Association of Law Schools (SEALS). For anyone interested in criminal procedure, it is certainly a provocative topic. It invites reflection on the quality of criminal defense lawyers, and as the examples above suggest, the consequences of seriously deficient lawyering. The examples above plainly are not run-of-the-mill mistakes or even negligent departures from conventional norms of defense lawyering. The examples—and there are numerous other similar examples—describe professional representation so egregious that imposing the most draconian sanctions on these lawyers would seem appropriate, even desirable.

The concept of "disruptive innovation" is vague. Imagining the idea of lawyer "disruption" might conjure a scene from Al Pacino's aggressive role in the 1979 film *And Justice for All*⁹ or embody the tradition of lawyers courageously representing unpopular clients, sometimes placing their lives at risk in courtrooms and on streets. But the panel, I discovered, was more interested in the concept of disruption as descriptive of radical departures from conventional lawyering and conventional discipline.

5. *Id.*

6. *Id.*

7. *Id.* (emphasis in original).

8. *Id.* at 124.

9. *AND JUSTICE FOR ALL* (Columbia Pictures 1979).

Disruption presumably can happen in numerous ways. Bruce Green, the distinguished ethicist, proposes disruption by having two lawyers defend a client instead of one.¹⁰ But, as any mathematician knows, two times zero equals zero. My proposal, I confess, is not nearly as informed as the Green proposal and indeed, may be so farfetched as to invite ridicule.

Still, I will persevere and set out what I believe is an extreme and unconventional way to discipline egregiously bad lawyers. For starters, I think it might be useful to survey briefly the kinds of lawyering conduct currently subject to disciplinary sanctions. Regulation of the conduct of defense lawyers in the U.S. is hedged by various legal and professional rules that are enforced by courts and disciplinary bodies essentially to ensure a minimum level of competent and ethical representation.¹¹ The Sixth Amendment¹² right to counsel—the so-called “sacred” right—seeks to ensure at least a reasonable degree of lawyering skill.¹³ Also, professional codes seek to ensure zealous and meaningful representation. Nevertheless, these standards are very broad, and bad lawyering often escapes sanctions or even notice.

Ironically, although bad defense lawyering, in my opinion, happens at least as often as bad prosecuting, the latter appears to have elicited more criticism by the media and the academic community. Why this disparate treatment of prosecutors and defense lawyers? It is a curious dichotomy, especially since bad lawyering by defense attorneys, as documented in many studies, accounts for at least as many miscarriages of justice as misconduct by prosecutors.¹⁴ To be sure, just as most prosecutors behave fairly and professionally, so do most defense lawyers represent their clients with skill and dedication. But, just as some prosecutors behave dishonorably, some defense lawyers behave incompetently. However, bad prosecutors are excoriated; bad defense lawyers are marginalized or ignored.

Recently, as I walked along the narrow cobblestoned streets of Prague—the same streets that Franz Kafka traversed while he was consumed by thoughts of law, courts, trials, and punishment—I

10. See Bruce Green, *The Right to Two Criminal Defense Lawyers*, 69 MERCER L. REV. 675 (2018).

11. See, e.g., MODEL RULES OF PROF'L CONDUCT (AM. BAR ASS'N 1983).

12. U.S. CONST. amend. XI.

13. See *Avery v. Alabama*, 308 U.S. 444, 447 (1940) (reasoning that the Constitution invests the Sixth Amendment right to counsel with a “peculiar sacredness”).

14. See James S. Liebman, Jeffrey Fagan & Valerie West, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (noting that “egregiously incompetent defense lawyering” accounted for 37% of errors in capital cases compared to a 16% error rate based on prosecutorial misconduct).

wondered how he might approach the subject of disruptive innovations in defense lawyering. Kafka's most prominent take on defense lawyering appears in his classic novel *The Trial*,¹⁵ in which Joseph K. is charged by an unspecified agency with an unspecified crime.¹⁶ The courtroom is a shabby, airless attic of a tenement.¹⁷ K.'s lawyer, obtained through his uncle, describes the so-called system of justice: guilt is assumed, the bureaucracy is vast and secretive, the rules are secret, and so are the identities of the judges.¹⁸ The lawyer advises K. of his dire situation, brags about the lawyer's connections, and explains his futile efforts to help many of his other hopeless clients.¹⁹ K. is scared about his upcoming trial, but after learning how his lawyer oppressed a former client, he decides to dismiss him and take matters into his own hands.²⁰

Kafka didn't like the lawyer.²¹ I imagine, most presumptuously for sure, that if Kafka had participated in the SEALS conference in Boca Raton, Florida, and had thought about disruptive innovations to punish bad lawyers, he might have imagined the idea of sending them to his notorious detention facility featured in his famous short story, *In the Penal Colony*²²—also the subject of a fine law review article²³ by my colleague, Michael Mushlin. Given Kafka's dark, depressing view of the justice system, and his revulsion for the defense lawyer who represents Joseph K., it is entirely possible Kafka might have employed his "torture machine" as a disruptive innovative device to deal with the miserable performance of bad lawyers generally. Indeed, the quasi-religious epiphany that condemned persons experienced in Kafka's penal colony struck me as exactly the kind of mystical renewal that Kafka might have envisaged for bad lawyers.

Thus was born the idea—borrowed loosely from Kafka—of a "Penal Colony" as a disruptive innovation to improve the quality of American lawyers and punish the bad ones.

15. FRANZ KAFKA, *THE TRIAL* (Breon Mitchell trans., 1998).

16. *See id.* at 111.

17. *Id.* at 114.

18. *Id.* at 113–18, 125.

19. *Id.* at 112, 123.

20. *Id.* at 166.

21. *See id.*

22. *See* FRANZ KAFKA, *In the Penal Colony*, in *SELECTED STORIES* 90–128 (Modern Library 1952).

23. Michael B. Mushlin, "I Am Opposed to This Procedure": How Franz Kafka's *In The Penal Colony* Illuminates the Current Debate About Solitary Confinement and Oversight of American Prisons, 93 *OR. L. REV.* 571 (2015).

I. AN EPIDEMIC OF BAD LAWYERS

Prosecutorial misconduct has been discussed and diagnosed with increasing passion and prescription. Indeed, one judge has characterized the incidence of prosecutorial misconduct, at least respecting the suppression of exculpatory evidence, as an “epidemic.”²⁴ But critics have not assailed with equal vigor the quality of defense lawyering. To be sure, the quality of defense lawyering varies widely. Institutional defenders, in my opinion, generally provide highly competent representation. Any diminution of the quality of their representation is attributable mostly to lack of funds, high volume of cases, and sometimes limited training and supervision.²⁵ By contrast, representation by the private bar, whether by retention or assignment, is often so substandard as to constitute one of the most serious malfunctions in the criminal justice system.

The data is damning. Judicial decisions are replete with instances of inexplicably bad lawyering.²⁶ What makes the deficient conduct of these lawyers even more troublesome is the extent to which courts go out of their way to minimize or marginalize lawyer incompetence so as to render claims of ineffectiveness much more difficult to sustain. Courts have been instructed to assess the reasonableness of counsel’s performance in a highly deferential manner.²⁷ We are told, given the imponderables and uncertainties of jury trial advocacy in general, courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”²⁸ To be sure, a lawyer can almost always do something different in every case and does

24. See *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013).

25. Alexa Van Brunt, *Poor People Rely on Public Defenders Who Are Too Overworked to Defend Them*, *The Guardian*, June 17, 2015, <https://www.theguardian.com/commentisfree/2015/jun/17/poor-rely-public-defenders-too-overworked>; Laurence A. Benner, *Eliminating Excessive Public Defender Workloads*, *CRIMINAL JUSTICE* (2011), https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/cjsu11_benner.authcheckdam.pdf.

26. See JOHN M. BURKOFF & NANCY BURKOFF, *INEFFECTIVE ASSISTANCE OF COUNSEL* (2017 ed.); BENNETT L. GERSHMAN, *CRIMINAL TRIAL ERROR AND CONDUCT* §§ 3-3, 3-4, 3-5 (3d ed. 2017).

27. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (“Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.”).

28. See *id.*; *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (“The truth is that it is often hard for even a good lawyer to know what to do. Trying cases is no exact science. And, as a result, we must never delude ourselves that the fair review of a trial lawyer’s judgment and performance is an activity that allows for great precision or for a categorical approach.”).

not enjoy the benefit of unlimited time, energy, or financial resources. Courts, therefore, make every effort to eliminate the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time of the trial.²⁹

Moreover, this judicial deference to arguably very bad lawyering is enhanced by the way the courts recognize and accept the role of trial strategy in counsel's decision-making. Trial lawyers indisputably make numerous strategic decisions in representing an accused. These decisions range from determining what matters to investigate; what theories to pursue; which witnesses to call; what evidence to present; what approaches to employ in challenging the prosecution's case; what approaches to use in examining and cross-examining witnesses; when to object to evidence and argument and when not to object; and what arguments to make to the jury.³⁰ Courts have been cautioned not to second-guess counsel's efforts, particularly when counsel's decision results from a strategic choice made after careful investigation and deliberation.³¹ These decisions are virtually unchallengeable.³² In fact, strategic decisions made after less-than-complete investigation are seen as reasonable to the extent that reasonable professional judgment supports the limited investigation.³³

Thus, claims of trial strategy are rarely second-guessed by appellate courts.³⁴ However, such claims may be discounted when they appear to be self-serving justifications made after the fact and are strongly contradicted by the record.³⁵ This is particularly the case when the lawyer lacks sufficient knowledge of the legal or factual basis necessary to effectively raise the claim, for example, by not understanding the obviously exculpatory potential of semen evidence in a sexual assault

29. *Strickland*, 466 U.S. at 689.

30. See Adam Liptak, *Facing the Death Penalty With a Disloyal Lawyer*, N.Y. TIMES, Oct. 9, 2017, https://www.nytimes.com/2017/10/09/us/politics/death-penalty-supreme-court-attorney.html?rref=collection%2Fsectioncollection%2Fus&action=click&contentCollection=us®ion=stream&module=stream_unit&version=latest&contentPlacement=43&pgtype=sectionfront&_r=0 (Supreme Court to review whether lawyer's concession of client's guilt of capital murder a permissible "strategic" decision).

31. *Strickland*, 466 U.S. at 690 (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable").

32. *Id.*

33. *Id.* at 690–91; see GERSHMAN, CRIMINAL TRIAL ERROR, *supra* note 26, at 276 n.137.

34. See, e.g., *Strickland*, 466 U.S. at 668; *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

35. See *Jackson v. Leonardo*, 162 F.3d 81 (2d Cir. 1998); *Berryman v. Morton*, 100 F.3d 1089 (3d Cir. 1996).

case,³⁶ or being unfamiliar with battered woman's syndrome.³⁷ Nor may an attorney ordinarily justify deficient performance by claiming that she was simply following her client's wishes,³⁸ or that her client consented to the trial strategy³⁹ without first evaluating other potential avenues and advising the client of those options that may have greater merit.

Even the most egregious lawyering is not enough to trigger a reversal on grounds of ineffectiveness. There also must be a showing by the defendant that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.⁴⁰ This test is the same test used to determine whether a prosecutor's suppression of favorable evidence is sufficiently prejudicial to warrant a new trial.⁴¹ As with the test for prosecutorial nondisclosure, a "reasonable probability" is a probability sufficient to undermine confidence in the outcome.⁴² This need to show prejudice further explains the difficulty in remedying even the most outrageous examples of a lawyer's failure to properly represent his client. Indeed, proving prejudice may present a much more formidable challenge than proving deficient performance.⁴³ As with prosecutorial misconduct, this is typically the case when the evidence against the defendant is so strong that there is no reasonable probability that the result would have been different but for counsel's errors.⁴⁴ As a result, since it may be easier to dispose of an ineffectiveness claim for lack of prejudice than by attempting to evaluate whether counsel's performance was legally deficient, courts frequently bypass review of counsel's performance, or give it a cursory treatment, and proceed directly to the issue of

36. *Baylor v. Estelle*, 94 F.3d 1321, 1324 (9th Cir. 1996).

37. *People v. Day*, 2 Cal. Rptr. 2d 916, 920 (Cal. App. 1992).

38. *Summerlin v. Schirro*, 427 F.3d 623, 638 (9th Cir. 2005) (holding that a capital defendant's instructions to his attorney not to present mitigating evidence at the penalty phase of trial does not release counsel from its obligation to conduct an investigation into potential mitigation evidence).

39. *United States v. Holman*, 314 F.3d 837, 843 (7th Cir. 2002) (holding that the strategy under which defense counsel concedes defendant's guilt on one count of a multi-count indictment amounts to deficient performance if there is no showing that defendant consented to the strategy).

40. *Strickland*, 466 U.S. at 694; *Wiggins v. Smith*, 539 U.S. 510, 537 (2003) (holding that the prejudice prong is satisfied if "there is a reasonable probability that at least one juror would have struck a different balance").

41. See *United States v. Bagley*, 473 U.S. 667, 680 (1985).

42. *Id.* at 682.

43. See *Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

44. See *Bagley*, 473 U.S. at 667.

prejudice.⁴⁵ Counsel's deficient performance is thereby further insulated from critical review.

Even given such broad appellate indulgence over very bad lawyering, convictions are nevertheless reversed with increasing frequency based on counsel's seriously deficient performance. The most common substantive violations for reversal are the lawyer's failure to investigate potential defenses,⁴⁶ failure to present crucial evidence,⁴⁷ opening the door to damaging evidence,⁴⁸ failure to challenge the prosecutor's misconduct,⁴⁹ failure to impeach prosecution witnesses,⁵⁰ and failure to object to inadmissible evidence.⁵¹

Other violations are serious enough that courts do not even require a showing of prejudice.⁵² These cases suggest the lawyer's conduct was so egregious it totally deprived the defendant of the assistance of counsel.⁵³ Thus, convictions have been vacated because the defendant's lawyer was absent from the courtroom for significant parts of the trial,⁵⁴ was asleep during substantial portions of the trial,⁵⁵ or was so drunk or mentally impaired that he could barely function as an attorney.⁵⁶

45. See *Pryor v. Norris*, 103 F.3d 710, 713 (8th Cir. 1997); *Davis v. Exec. Dir. of Dep't of Corr.*, 100 F.3d 750, 760 (10th Cir. 1996).

46. See *Phillips v. White*, 851 F.3d 567 (6th Cir. 2017); *Hardy v. Chappell*, 849 F.3d 803 (9th Cir. 2017); *United States v. Army*, 831 F.3d 725 (6th Cir. 2016); *Blackmon v. Williams*, 823 F.3d 1088 (7th Cir. 2016); *Cooper v. United States*, 660 F. App'x 730 (11th Cir. 2016).

47. See *United States v. Nwoye*, 824 F.3d 1129 (D.C. Cir. 2016); *Reddy v. Kelly*, 657 F. App'x 531 (6th Cir. 2016); *Liao v. Junios*, 817 F.3d 678 (9th Cir. 2016).

48. See *Rivas v. Fischer*, 780 F.3d 529 (2d Cir. 2015); *Higgins v. Renico*, 470 F.3d 624 (6th Cir. 2006); *Berryman*, 100 F.3d at 1089.

49. See *Dubria v. Smith*, 197 F.3d 390 (9th Cir. 1999); *People v. Wright*, 25 N.Y.3d 769 (2015); *Cheeks v. State*, 325 Ga. App. 367, 750 S.E.2d 753 (2013).

50. See *Stouffer v. Reynolds*, 214 F.3d 1231 (10th Cir. 2000); *Steinkuehler v. Meschner*, 176 F.3d 441 (8th Cir. 1999); *Starling v. State*, 130 A.3d 316 (Del. 2015).

51. See *Gardner v. United States*, 680 F.3d 1006 (7th Cir. 2012); *Tice v. Johnson*, 647 F.3d 87 (4th Cir. 2011); *Moore v. Czerniuk*, 534 F.3d 1128 (9th Cir. 2008).

52. *United States v. Cronic*, 466 U.S. 648, 659 (1984).

53. *Id.* at 658–59 (“There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.”).

54. See *United States v. Roy*, 761 F.3d 1285, 1295 (11th Cir. 2014) (holding that counsel's absence during the direct testimony of a prosecution witness violated the defendant's right to counsel without need to show prejudice); *Green v. Arn*, 809 F.2d 1257, 1263 (6th Cir. 1987), *vacated on other grounds*, 484 U.S. 806 (1987) (noting that absence of counsel during taking of evidence is prejudicial per se).

55. See *United States v. Ragin*, 820 F.3d 609 (4th Cir. 2016); *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).

56. See *Burnett v. Collins*, 982 F.2d 922 (5th Cir. 1993); *Hernandez v. Wainwright*, 634 F. Supp. 2412 (S.D. Fla. 1986), *aff'd*, 813 F.2d 409 (11th Cir. 1987).

Just as the legal rules governing bad lawyering often insulate lawyers from being held accountable for deficient conduct, so do the ethics rules fail to address most instances of deficient courtroom advocacy. The rules contain uplifting pronouncements about a lawyer acting "with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."⁵⁷ The rules command lawyers to provide "competent representation,"⁵⁸ to act with "reasonable diligence and promptness,"⁵⁹ and avoid a broad array of conflicts.⁶⁰ But as with the prosecutor's ethical responsibility to serve justice,⁶¹ the defense lawyer's ethical charge is so vague and amorphous as to be virtually meaningless as a guide or a deterrent.

II. SENDING BAD LAWYERS TO THE PENAL COLONY

The above discussion suggests many criminal defense lawyers under our current regime sometimes get chastised by courts but apparently are allowed to continue to provide grossly incompetent representation with impunity and with no accountability. Given this unfortunate state of affairs, it struck me that the invitation to think about disruptive innovations might include departures from conventional norms of attorney discipline in order to remove very bad lawyers from the system, instill in good lawyers who have made mistakes an enhanced ethos toward representing clients with skill and integrity, and restore the public's confidence that the criminal justice system will not tolerate bad lawyers.

So, the idea of sending bad lawyers to Kafka's Penal Colony was born. At the very least, the Penal Colony would afford these lawyers a semi-mystical experience of reflection, repentance, and reform, perhaps in the form of a specialized Continuing Legal Education program for "Lawyer Renewal." It seems to me to be a disruptive innovation that might make a difference.

Nor was I put off by obvious challenges of implementation. Admittedly, the legal basis for this proposal is problematic. But legislation could be enacted (and the ethics rules amended) to articulate the procedures by which certain lawyers—most likely the worst of the worst—would be committed to the Colony; the course of study, training, and soulful enrichment required for successful completion of the program; and the planned reintegration of these lawyers back into the system with varying

57. MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 1983).

58. MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983).

59. MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 1983).

60. MODEL RULES OF PROF'L CONDUCT r. 1.7, 1.8 (AM. BAR ASS'N 1983).

61. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 1983).

degrees of structured reassimilation. There could be a probationary period of uncertain length, depending on the lawyer's performance.

Of course, there would need to be several adjustments to the kind of Penal Colony that Kafka envisaged. I probably would not press for Kafka's elaborate torture machine for the lawyers,⁶² or the carving of the words "Be Just"⁶³—or, in this case, "Be a Better Lawyer"—on their bodies. Nor would I support the execution of any lawyer, which is the actual fate of persons condemned to Kafka's facility. But with these caveats aside, I can foresee an experience for a lawyer in my imagined Penal Colony for Bad Lawyers similar to the quasi-religious epiphany experienced by condemned persons in Kafka's *Penal Colony*.

III. CONCLUSION

Disruptive innovations can take various forms. Forcing bad lawyers to serve time in a rehabilitation facility is admittedly bizarre. However, bizarre things are happening all the time. And while my proposal may be absurd—admittedly "Kafkaesque"—it is provocative. The more interesting question is why I have not proposed a similar innovation for bad prosecutors. The answer is simple. Bad defense lawyers are capable of reform and renewal into good lawyers. Bad prosecutors probably are not, and no amount of forced reflection and retraining will make a difference.

62. See KAFKA, *Penal Colony*, *supra* note 22, at 99–109.

63. *Id.* at 119.