University of Detroit Journal of Urban Law
Volume Sixty, Issue Two, Winter 1983

Running the Gauntlet* of Criminal – Defense

*by Norman L. Lippitt***

When the author read Professor Alan Dershowitz's exposé of the American criminal justice system, he discovered that many experiences described in The Best Defense *paralleled his own. He identified with the harassment, frustrations, and disappointments encountered in the representation of unpopular criminal defendants. Convinced that our legal system will not be improved without more open discussion of its shortcomings, the author has answered Professor Dershowitz's call. Using Dershowitz's most crucial experiences and observations as a starting point, he amplifies with his own experiences in criminal defense.*

> Chief Justice Warren Burger has been a disgrace to the American judiciary. He is a hypocrite. When he talks about the inadequacies of practicing lawyers, he is talking through his robes. He looks like the embodiment of law and fairness – right out of central casting – but beneath that veneer is a narrow, not very intelligent mind with no discernible compassion or sense of judgement.[1]

If this statement had not been made by a respected Harvard Law School professor, perhaps it would not have the same devastating impact. Those of us who have spent our entire professional careers preaching for the chimer called justice applaud Professor Dershowitz. It is about time that someone with both academic and battlefield credentials has spoken out.

In his book, *The Best Defense*, Professor Dershowitz takes an exciting, passionate, and fearless look at the American criminal justice system. While the book will have special meaning for criminal defense attorneys, many judges and prosecutors will not be quite so enthusiastic. This is because much of Professor Dershowitz's criticism is directed against them. One reviewer has described the book as "exuberant, entertaining and enormously instructive,"[2] while another criticized it as a book with too many undocumented conclusions.[3] Whatever the other reviewers might say, in my opinion, a thorough reading of it is an absolute must for all involved in the criminal justice system.

Dershowitz, a graduate of Yale Law School and former clerk to both Chief Judge David Bazelon of the United States Court of Appeals for the District of Columbia and United States Supreme Court Justice Arthur Goldberg, is a professor of criminal law at Harvard Law School. He has also handled several controversial cases defending clients shunned by others as undefendable or indefensible. In his book, *The Best Defense*, he recounts his defense of: the Jewish Defense League Bombers; a man convicted of shooting and killing a corpse; Bernard Bergman, the infamous New York nursing home operator; Harry Reems of "Deep Throat" fame; Soviet dissidents in the USSR; Edmund Rosner, the most despised lawyer in New York who was entrapped by Robert Leuci, "The Prince of the City"; and F. Lee Bailey, when he was charged with mail fraud. He also describes his involvement in several non-criminal cases that presented important civil liberties issues, including: the National Park Service's closing of a nude beach on Cape Cod; Stanford University's firing of a militant professor; the CIA's suit against former agent Frank Snepp to restrain publication of his book; and a judge's commitment of a young woman to a mental hospital because she wanted to sue her psychiatrist. Throughout the book, however, he transcends a mere description of his personal involvement in these cases. Professor Dershowitz discusses the system and its participants – the police, prosecutors, defense attorneys, and judges. He reserves his greatest wrath for the latter.

In this article, I have reviewed those chapters of *The Best Defense* which I consider to be of special significance to lawyers. In addition, I have discussed personal experiences based on my own cases which make Professor Dershowitz's book of particular interest to me. Throughout the article, I comment on Professor Dershowitz's observations and identify points of disagreement.

EXPLOITATION OF INFORMANTS AND ENTRAPMENT

The Boro Park Connection

Dershowitz's first real-life experience in advocacy was the "Boro Park Connection" case, which presented a fascinating courtroom confrontation between two street boys from Borough Park, Brooklyn. In this trial, his adversary was an experienced court-wise New York City detective. The case grew out of the bombing of a mid-town Manhattan office of Columbia Artists Management, Inc. by ultra-militant Jewish Defense League members protesting the presence of Soviet performers in the United States. During the trial, Dershowitz became aware of the use of many questionable governmental tactics inherent in our criminal justice system. He discusses the use of illegal government wiretaps; exploitation of informers, including promises made to them that are so subtle that the efforts of defense counsel to expose those promises on cross-examination are often frustrated; police perjury; and the failure of prosecutors to consider their obligation to present the whole truth.

Dershowitz claims that the "Boro Park" case provided him with a superb teaching tool because it raised profound questions, both legal and moral, about the limits of government intervention in the prevention and prosecution of the most serious crime – murder. Dershowitz is particularly concerned with the use of informers and their propensity to come across with any information, however speculative or ill-founded, for the sake of giving their employer what they think he wants to hear.

Dershowitz's client in the "Boro Park" case, Siegel, was confronted with the classic dilemma: testify against his friends and be freed, or refuse to testify and be jailed. In such cases, it is my belief that the defense attorney is obliged to advise his client to cooperate for his own sake. Many attorneys do not agree. They believe there is something unholy about becoming a government "fink," not unlike the fourth grader shunned by his classmates for betraying the boy who wrote obscenities on the blackboard in the teacher's absence.

It is true that the selective use of informers is indispensable to effective law enforcement. However, it is not the practice which needs to be corrected, but the abuses associated with it. I agree with Professor Dershowitz; responsibility lies with the members of the judiciary, who often close their eyes or simply refuse to believe the abuses exist at all. In my own career, I have witnessed similar abuses of which the average American citizen is unaware. Often victims say, "I wouldn't have believed it if it hadn't happened to me." Unlike the Boro Park case, proof of broken government promises and illegal wiretaps is usually not available as a means of exoneration.

The Boro Park Connection case also vividly portrays the "intelligent, autocratic and humorless" judge known as "the Prosecutor's man."[4] Judge Bauman's response to several issues that arose in the context of the case illuminate his perception of his part in the law enforcement system. Dershowitz recounts the judge's personal attack on him after his effective cross-examination of a lying government witness.[5] The criminal defense bar has long been familiar with this segment of the judiciary. These judicial aristocrats often display insidious patterns of behavior designed to insure conviction.[6] Many come from the ranks of the prosecution, "silk stocking" law firms, and occasionally academia. They rarely come from the ranks of the criminal defense bar. Many of these judges have the bearing of generals, but lack real combat experience as foot soldiers. I have often felt the criminal defense lawyer painfully reminds them of this inadequacy. This is particularly true at the federal level, where some judges make every effort to *appear* fair, but in actuality are anything but fair. They are elitists who often view the members of the criminal defense bar as no better than the clients they represent. These judges are blind to any similarities between the immoral behavior of their former clients – bank presidents, insurance company executives, and other corporate moguls – and the clients of the criminal defense lawyers, whose misconduct may be more easily detected. They pay lip service to the Bill of Rights, but fail to apply it even-handedly, especially when a so-called "bad-guy" is on trial.[7] Deviations from legal and ethical norms are justified in the name of a higher justice.

I agree with Professor Dershowitz's admonition that these judges present the greatest danger to our system of justice because they are such highly respected members of the community. They do not inform the public that the criminal justice system can only work by preserving the Bill of Rights, perhaps at the risk of allowing a particularly heinous offender his freedom. Like Judge Bauman, they make law through facts, so that their decisions cannot be reversed, often consciously tailoring the fact-finding process to achieve the legal results they desire. They use their intelligence, cunning, and knowledge of the law to effectively stymie the appellate court. While this intellectual dishonesty is apparent, few outside the criminal defense bar voice objection. Many appellate judges go to extremes to affirm a decision, even though they know the case cries for reversal.[8]

CONFRONTATION BETWEEN FREEDOM OF THE PRESS AND THE RIGHTS OF THE ACCUSED

The Meanest Man in New York

"When the press discovers – or creates – a villain, the politicians cannot be far behind."[9] This was Dershowitz's motivation to take the appeal of the infamous New York nursing home operator, Bernard Bergman. Although Dershowitz never goes so far as to argue that Bergman was in fact a "good guy," he does argue that he was victimized by the press and a politically ambitious prosecutor. As a result, Bergman came to be viewed in the public mind as the personification of the collective evils of the nursing home industry. The case presented a classic confrontation between the first amendment freedom of the press and a defendant's sixth amendment right to effective assistance of counsel and the fifth amendment right to a fair trial. The case also raised profound questions concerning the extent of the prosecution's obligation to comply with the terms of its plea bargain.[10]

Adverse publicity almost always jeopardizes a defendant's right to a fair trial. However, few jurors or judges would acknowledge that their ability to render a fair and impartial verdict or sentence was impaired by the adverse publicity. While the public has the right to be made aware of judicial proceedings, the criminal defendant has an equally important right to be tried before a judge and jury uninfluenced by adverse publicity, especially when it is inflammatory, slanted, incomplete, or devoid of truth. In light of the recent wave of anti-crime rhetoric and the Supreme Court's conservative application of the Bill of Rights, few judges will exercise their discretion to order a change of venue in order to insure a defendant a fair trial.[11] Rarely will judges admit that they may be influenced by the pressures generated by the media.[12]

I submit that the public would be best served by a judiciary respecting both constitutional freedoms with equal vigor. Dershowitz frequently observes that defendants and their counsel win no popularity contests in the eyes of our judiciary. This should come as no surprise since the judiciary reacts to an uninformed American public which knows little about the law, but which is indoctrinated by the press. The distinguished members of the bench can break this vicious circle by standing by their principles and assuming their responsibility to train the American public to appreciate the virtues of the Constitution.[13] They are presumed to understand its wonder and beauty.

FEDERAL PROSECUTORIAL POWER

Deep Throat and the First Amendment

Herbert Streicker (alias Harry Reems), a college drop-out and would-be

actor, distinguished himself by fortuitously becoming Linda Lovelace's partner in the movie *Deep Throat*. After one day of filming and total consideration of $100,000, Harry found himself under federal indictment in Memphis, Tennessee for conspiracy to transport obscene film in interstate commerce. The indictment was the brainchild of a bible-belt fundamentalist prosecutor who orchestrated the charging of one hundred seventeen persons and corporations with a nationwide conspiracy. Oddly enough, the film had never been shown in Memphis, nor had Harry Reems been to the city. Based on the scope of the indictment, any local United States Attorney could choose the most appropriate district in which to prosecute, because the film could possibly be exhibited there. Of the one hundred seventeen defendants named in the indictment, only eighteen were actually prosecuted. The remaining ninety-nine were classified as unindicted co-conspirators.

The judge who presided at the trial was, according to Dershowitz, a cantankerous conservative who instructed Reems' attorney that "he would not hear any such nonsense as a First Amendment defense."[14] Reems and the other defendants were convicted on all the charges. Dershowitz suggests that the conviction was later set aside because of Reems' technical legal briefs and his masterful manipulation of the media to communicate his story to the public.

The Memphis Deep Throat conspiracy case is illustrative of the awesome power possessed by the United States Department of Justice. Dershowitz states that a United States Attorney in Memphis obtaining an indictment against a resident of New York, who had never been to or done business in Memphis, is reminiscent of the federal government hauling black militant publishers from Harlem to Mississippi and labor organizers from Michigan to North Carolina in order to have them tried before maximally hostile jurors.[15]

Criminal defense lawyers have long believed that a federal conviction sought is guaranteed. To see this, one need only consider the Federal Criminal Code and its wealth of ammunition for ambitious and creative prosecutors under legislation like RICO;[16] the Travel Act;[17] and the Mail Fraud Act.[18] These are Justice Department favorites.[19] Under these statutes, a Michigan resident who violates a Nevada gaming regulation (not even a criminal statute) may be prosecuted in a United States District Court in Michigan and receive a three-year prison sentence. Similarly, a state arson suspect may be prosecuted for a federal crime because the insurance company's claims agent posted a letter in the United States Mail. Federal prosecutors have virtually unlimited discretionary powers. Those involved in the judicial system recognize that the grand jury is only a rubber stamp necessary to obtain an indictment. Prosecutors will patronize and persuade twenty-three naïve patriots to hand down their indictments.[20] These untrained and sometimes uneducated jurors cannot fully appreciate the carefully prepared formula designed to influence their decision in a manner favorable to the only side from whom they hear – the government.

As a member of the defense bar, I am alarmed to see a Harry Reems forced to defend himself in Memphis because a prosecutor is comfortable in expressing his view that "dirty" movies present a greater public evil than narcotics.[21] This becomes even more frightening when viewed in light of the public's meager knowledge of the criminal justice system.[22] Given the advantages on the side of the prosecution, we must vigilantly guard against the trial itself becoming nothing more than the government's grand jury proceeding. Every defendant is still entitled to a presumption of innocence.

QUESTIONABLE TACTICS OF OVERZEALOUS PROSECUTORS

It Takes One to Catch One

Dershowitz's account of the bribery conviction and unsuccessful appeal of Edmund Rosner, an "ambitious young criminal lawyer,"[23] will stir painful memories for many criminal defense attorneys. This case involved a corrupt police officer, Robert Leuci, later immortalized in the movie Prince of the City. According to Dershowitz, Rosner was the most despised criminal defense lawyer in New York. The U.S. Attorney's Office thought he was an arrogant and dirty man who won his cases by manufacturing evidence and alibis.[24]

The government's attack on Rosner began with a bargain offered to a client of his who had been convicted and sentenced for a sale of heroin in spite of the presentation of an apparently air-tight alibi. The former client was given his freedom in exchange for a statement to federal authorities that Rosner and his investigator had concocted the alibi and manufactured the evidence. Rosner and his investigator were then indicted for subornation of perjury; however, the government's case against Rosner became weak when its witness disappeared.

Undaunted, the government embarked upon a new offensive. It brought in Robert Leuci who, with the use of a fabricated story, convinced Rosner that his former client had been murdered and that he, Rosner, was about to be indicted for the murder. According to Dershowitz, the government intentionally decided against monitoring the initial conversations between the two. It was only after Leuci convinced Rosner that he had valuable information that Rosner, in a frenzy, agreed to pay for the information. Only then did the government begin to record the conversations. In this way, the government successfully avoided making any record of the entrapment.

At the time of trial, the government attorneys conveniently failed to advise the defense that Leuci was probably one of the biggest crooks in the history of the New York Police Department.[25] Rosner's experienced trial lawyer, Albert Krieger, desperately attempted to obtain Leuci's admission concerning the extent of his corrupt activities. He was unsuccessful, and the jury convicted Rosner.

Dershowitz became involved during the appeal. New hearings conducted by Dershowitz established that, as a police officer, Leuci had a long and serious history of corruption well beyond his admissions at the time of trial. It was also established that the Assistance U.S. Attorneys in charge of the case knew of Leuci's lies at the time of the trial and were, therefore, guilty of "complicity and perjury."[26]

Coincidentally this trial was presided over by the same judge Dershowitz had appeared before in the "Boro Park" case, the Honorable Arnold Bauman. In Rosner's new trial hearings, Bauman once again came to the aid of the government when Dershowitz offered proof that the U.S. Attorney's Office deliberately withheld information from the United States Supreme Court concerning Leuci's perjury at trial. The judge threatened and indeed directed the preparation of formal charges against Dershowitz

for his accusations. "Again, as in the JDL case, Judge Bauman was resorting to his favorite gambit – threatening the defense attorney in order to deflect a serious attack on the government."[27]

In spite of Judge Bauman's threats, calculated to protect the Assistant U.S. Attorney from being cross-examined, Dershowitz proved what he had offered to prove: the United States Attorney's Office intentionally withheld information from the United States Supreme Court. Ultimately, Judge Bauman withdrew his threat of disciplinary action, but only after Dershowitz voluntarily decided to rephrase his accusations in more polite terms.

In denying Rosner a new trial, Judge Bauman asserted that the jury's verdict had not depended upon Leuci's credibility as a witness, but rather on tapes of conversations Leuci had managed to record. Therefore, he concluded, the failure of the U.S. Attorney's Office to disclose the sordid background of the principal witness could not have affected the verdict.

In affirming the conviction, a member of the appellate panel distinguished the case from another recent reversal on the basis that in the earlier case, "the government was at fault in not discovering the past criminal record, a situation which *concededly* did not exist in the Rosner case."[28] According to Dershowitz, this presumed concession was an absolute fiction – the government's fault in not disclosing the witness's background was the very basis of the appeal. He stated, "this episode persuaded me that the Court of Appeals was prepared to twist the law and the facts beyond all recognition to avoid reversing Rosner's conviction."[29]

The characteristics of Edmund Rosner as a clever and successful lawyer with an opulent lifestyle, wearing stylish clothes, driving a flashy car, charging handsome fees, and suspected of manufacturing alibis, accurately portrays a few criminal defense lawyers in every large city in the United States. Very little can or need be said in their defense.[30] Because of stricter professional codes of conduct, aggressive grievance administrators, and law school curricula that include courses on ethics and professional conduct, criminal defense lawyer "bad guys" are currently being rooted from the system. Unfortunately, the same cannot be said of the prosecutors and members of the judiciary who make regular use of "cheat elite" tactics. Dershowitz correctly observes that "[r]arely is a prosecutor disciplined, or even criticized, for over-zealousness in prosecuting crime. But defense attorneys constantly place their licenses on the line... by defending their clients with too much zeal and vigor."[31]

People v. Iaconnelli,[32] otherwise known as the infamous "Tenth Precinct" narcotics trial, consumed seven months of my own professional career. In that case, my associate and I represented six police officers charged in an alleged narcotics conspiracy taking place over a five-year period. Four of my clients were found not guilty. Two were found guilty and sentenced to prison terms.

In its opinions affirming the convictions of all but one defendant, the Michigan Court of Appeals summarily responded to the claims of prosecutorial misconduct, with the statement: "We have examined the alleged misconduct carefully,"[33] For those of us who lived with the case for so many years, and with all due respect to the court, the panel's statement is not palatable.

While the defendants were charged with conspiracy to sell narcotics and conspiracy to obstruct justice, the evidence failed to disclose any real nexus between the defendants and the unindicted co-conspirators in the classic "wheel conspiracy" sense.[34] The trial was a debacle. The prosecution dragged in witness after witness, most of whom were junkies and low-level narcotics dealers. Payments to these witnesses exceeded $200,000, ostensibly for protective custody and relocation expenses, although many of them were never in protective custody.[35] Principal witnesses were paid as much as $28,000 for periods of less than a year.[36] Much of the testimony was perjured, and the defense made an effective record demonstrating the prosecution's awareness of it. Throughout the trial, the prosecution engaged in devious gamesmanship by deliberately withholding or making untimely disclosure of relevant or exculpatory information; effectively suppressing exculpatory evidence;[38] intimidating key defense witnesses;[39] improperly pressuring witnesses in order to obtain favorable testimony;[40] and by deliberately attempting to uncover defense strategy by contacting one of the defendant police officers during the preliminary examination and using him as a spy.[41] Much of the testimony had no connection with the conspiracy charged, but involved "similar acts" which were not similar at all.[42] The three assistant prosecutors, having little direction, repeatedly put witnesses on the stand without even knowing what questions they would ask.[43]

As demonstrated by virtually hundreds of separate conferences held out of the presence of the jury, neither the court, defense counsel, nor the prosecutors knew where they were going at any time in the trial, nor how the evidence they were seeking to introduce was connected to the conspiracy charged. The sprawling conspiracy produced by this approach was simply beyond the control of counsel and the court. Despite repeated objections, the trial judge often permitted irrelevant testimony to go to the jury, "sanitized" by limiting instructions which the jury could not possibly have remembered during deliberation.

There are many remarkable similarities between the Rosner case, recounted by Dershowitz, and the "Tenth Precinct" trial. Narcotics dealing is a dirty business, and so is narcotics enforcement. Sometimes it is difficult to determine whether an undercover police officer is working to uncover crime or has, himself, become a part of the criminal enterprise. In the "Tenth Precinct" narcotics case, the prosecution exploited informants, encouraged police entrapment, closed their eyes to the perjury of their cooperating witnesses, intruded upon the attorney/client confidential relationship, avoided disclosure of statements to the defense by neglecting to reduce them to writing, and engaged in other such "cheat elite" techniques.

While the trial judge in the "Tenth Precinct" case was atypical and bears no resemblance to the judge in the Rosner case, his effect upon the defendants was the same. He looks upon himself as a "people's lawyer."[44] Some say he is a Marxist.[45] Prior to his election, he was active in a variety of leftist causes and was known to be violently anti-police.[46] Since the judge's election to the bench, he has been assigned an unusually large number of cases involving police officers charged with criminal misconduct.[47] During a recent preliminary examination, a defendant responding to a police officer's testimony that he resisted and obstructed arrest took the stand and accused the officer of using excessive force. Following the defendant's completed testimony, the judge dismissed the case and curiously proceeded to demand that the prosecuting attorney

recommend a warrant against the officer. When the prosecutor refused, the judge issued the warrant without the prosecutor's recommendation.[48] The court of appeals subsequently reversed the decision and quashed the warrant.[49] Recently, this same judge found a police officer guilty of involuntary manslaughter, notwithstanding many observers' strong belief that the officer had acted properly.[50] I believe that the conviction would not have occurred had the defendant not been a police officer.

In the "Tenth Precinct" case, the trial judge had many opportunities to afford the defendants a fair trial. Early in the proceeding, when he realized that the single mass conspiracy charged in the indictment was nonexistent, he should have ordered a severance.[51] He should have granted a request for a bill of particulars in view of the indictment's lack of specificity.[52] He also should have prevented the prosecutor's unending use of leading and argumentative questions, and those which improperly called for narrative answers.[53] And he should have limited much of the similar acts testimony which, as to at least one defendant, far outweighed the prosecutor's substantive case.

I am convinced that, like Judge Bauman, the trial judge in the "Tenth Precinct" case was fully aware of the lengths to which appellate courts will go to affirm criminal convictions. He did not quarrel with defense counsel over the law because he knew that any legal error would be reviewable by the court of appeals. Instead, he resolved most of the critical factual issues against the defense. Acutely aware of his power to make law through facts, he consciously tailored the fact-finding process to achieve the legal result desired, thus effectively limiting the scope of appellate review. The opinion of the state appellate court affirming the convictions is a tribute to the trial judge.[54] As recognized by Professor Dershowitz, even when appellate courts concede violation of a defendant's rights, they often call it harmless error;[55] defer to the trial judge's strained and implausible findings of fact as a proper "exercise of discretion";[56] simply find it inappropriate to deal with the allegations in detail;[57] justify the violation because defendants "failed to object"; or because "adequate curative instructions were given."[58]

I do not think the defendants in the "Tenth Precinct" case received a fair trial.[59] One of my clients, a police officer, was given a sentence of thirteen years and four months to twenty years, plus a ten thousand dollar fine. He was one of the defendants most severely prejudiced by the prosecutor's misconduct throughout the trial. There is no doubt in my mind that the trial judge would have been far more demanding of the prosecutor and far more lenient in his sentence if the defendant had not been a police officer.

I also find it difficult to believe that every member of the appellate court panel read the voluminous one hundred two volume record of almost twenty thousand pages which documented testimony and pleadings spanning a period of seven months.[60] it is equally implausible to me to assume that the court fully appreciated my client's dilemma. His conviction was obtained by questionable testimony, prosecutorial misconduct, and judicial dishonesty.[61]

To the untrained observer, the judge's conduct in the "Tenth Precinct" case was above reproach; I obviously do not agree. Although I personally respect this judge for his superior intelligence and other personal attributes, I believe he presents an even greater danger to our justice system than Dershowitz's Judge Bauman. He uses his superior intelligence to work within a system with which he does not agree to accomplish results he perceives to be in the best interest of the community. His mission is based on his personal view of justice, and his community does not include police officers.

Whether the presiding judge is a "prosecutor's man" as portrayed by Deshowitz, or a "people's lawyer" like the judge in the "Tenth Precinct" case, their rulings and decisions are greatly influenced by personal predilections and philosophies. These judges are incapable of setting aside their own political and social philosophies in order to administer justice in a neutral, even-handed manner.

PROSECUTION OF DEFENSE ATTORNEYS

Defending the Defenders

"England and the United States treat their criminal lawyers quite differently: In England they are apt to be knighted; in the United States they are apt to be *indicted*."[62] In his chapter entitled "Defending the Defenders," Dershowitz attributes this aphorism to F. Lee Bailey. After serving as Glenn Turner's lawyer for more than a year, Bailey was indicted, along with his client, for mail fraud in what the government described as a pyramid scheme popularly known as "Dare to be Great." The case raised profound issues concerning the attorney-client privilege; therefore, Bailey moved almost immediately for severance. Dershowitz was retained by Bailey to represent him before the trial court. He argued that trying Bailey and Turner together would set precedent, creating irreconcilable conflict between attorneys and their clients, and that it would encourage prosecutors to indict attorneys along with clients, which would have a chilling effect upon the willingness of attorneys to represent unpopular clients and upon the willingness of clients to confide in their attorneys.

During Bailey's representation of Turner, there had been many confidential communications between the attorney and his client. Bailey did not feel free to disclose those conversations to Dershowitz since both recognized the dilemma of a lawyer being tried jointly with his former client – that if he disclosed the conversation, he helped himself but hurt his client; if he withheld the conversation, he helped his client but hurt himself. The only tenable solution to adequately protect the rights of both parties was a severance; however, the trial judge did not grant Bailey's motion for severance until the conclusion of the twenty-nine week trial. Ultimately, all charges against Bailey were dismissed, but according to Dershowitz, Bailey suffered both financially and professionally from the stigma of the indictment.

Dershowitz discusses another case in which a young lawyer, working for a small, but well-known, Boston law firm, was held in contempt of court for refusing to identify the source of his fees before a federal grand jury. The young lawyer had arranged a plea bargain for two alleged "mules"[63] who were part of a marijuana ring. The government reasoned that, if they were able to determine who paid the mules' fees to the lawyer, they would learn the name of the "boss."

In his brief, submitted to the United States Court of Appeals for the Ninth Circuit, Dershowitz argued:

> A young lawyer of the highest integrity and standing has been

> held in contempt of court and confined to custody because he has refused to disclose information about his client(s) that he sincerely believes – and has been advised by experts and his attorneys – he is not permitted to disclose because of his ethical and legal obligations as an attorney. The attorney now faced an impossible dilemma: He cannot in good conscience disclose the information… and he faced imprisonment unless he makes the disclosure. He respectfully petitions this court to aid him in complying with his ethical and legal obligations as an attorney.[64]

The court of appeals reversed the contempt order, holding that the attorney had a just reason to assert his attorney-client privilege since the names of his undisclosed clients, and fee arrangements involving other conspirators, would implicate those persons in the past conspiracy.

The quote attributed to F. Lee Bailey should not be taken lightly by any attorney who chooses to practice criminal defense, particularly those who regularly represent drug offenders or persons allegedly involved in organized crime. Several years ago, I represented a young attorney who, like the young Boston attorney Dershowitz represented, had developed a reputation for aggressively defending persons accused of marijuana offenses. This young lawyer, however, made a serious mistake: he represented both the "boss" and the "mule" who together smuggled in a large quantity of marijuana from Mexico. They stored it in the false ceiling of a recreational vehicle which they drove to the mule's farm in Ohio. Shortly thereafter, the marijuana was discovered and the mule was arrested. In his zeal to represent the boss, who had not yet been discovered, the attorney, who agreed to represent the mule, made several promises of financial assistance upon instructions from his other client. When the promises were not kept, the attorney was indicted for obstruction of justice[65] and subsequently convicted.

A few years later, I represented another young lawyer who was suspected of being involved in a large-scale cocaine-smuggling operation with a client. Although the client was involved in the importation of cocaine, the attorney had done nothing more than handle two real estate closings for him.[66] The government obtained a search warrant and raided the attorney's office. They discovered a partially smoked marijuana cigarette in one of the secretary's desk drawers. Before leaving, the federal agents also served the secretaries with subpoenas to appear before a federal grand jury. The young attorney panicked. He knew that smoking marijuana in the office was a regular occurrence. He advised his secretaries to invoke their fifth amendment privilege when they appeared before the grand jury. As a result of this advice, the attorney was also indicted for obstruction of justice.[67] The indictment was later dismissed, but only after the attorney agreed to resign from the Bar.

Recently, I received attention from a federal grand jury investigating embezzlement of union funds. A client of mine, the Local's former president, asked me to represent one of his business agents who had been subpoenaed to testify. Initially, I agreed to represent him. However, I withdrew when I discovered that my client was the target of the investigation and had also been subpoenaed. I explained by position to the business agent, who asked that I recommend another lawyer. I referred him to a former associate. As often happens in such cases, several other business agents were also subpoenaed. By word of mouth they learned of the attorney I had recommended to the first agent and also engaged his services. Several months later on the eve of the trial, the grand jury testimony of the agents was disclosed to me under the provisions of the Jencks Act.[68] I made the rather sobering discovery that a considerable amount of time had been devoted to asking the witnesses questions obviously designed to learn of the relationships between myself, my former associate, and the president of the Local – all because I had recommended a lawyer with whom I was familiar.

The distressing point of these stories is that very little is sacred between prosecutors and defense attorneys. Although some attorneys may "fail to draw a line between representing a client and becoming his associate,"[69] prosecutors, particularly government strike force lawyers, take great pleasure in going after the zealous defense lawyer. They see themselves as "defending the public against unscrupulous defense attorneys who invoke legal technicalities to free guilty defendants."[70]

CRIMINAL DEFENSE IS FRAUGHT WITH PERIL

> Attorneys who defend the guilty and the despised will never have a secure, comfortable place in any society. Their motives will be misunderstood; they will be suspected of placing loyalty to clients above loyalty to society; and they will be associated in the public mind with the misdeeds of their clients. They will be seen as troublemakers and gadflies. The best of them will always be on the firing line, with their licenses exposed to attack.[71]

The judge in the following case, like Judge Bauman, consciously tailored his fact-finding to achieve the legal result he desired. He used his knowledge of law and his intelligence to bind the hands of the appellate court. His target, however, was not the criminal defendant, but the defense attorney.

The saga began in January 1979, when another attorney who perceived a conflict of interest[72] referred a case to my office. At this time, the defendant was serving a sentence for the interstate transportation of a stolen motor vehicle. His conviction was based largely upon the testimony of a witness who was later murdered. The defendant was charged with conspiracy to commit murder upon the theory that subsequent to his conviction, but prior to sentencing, he held a meeting where he conspired with others to have the witness murdered.[73]

In my initial interview of the defendant, although he conceded that there had been a meeting at his home, he maintained its purpose was to plan an automobile theft. He identified the others present at the meeting. He also advised me that the murdered witness was involved in narcotics and other illegal enterprises, and there were several people who might want him dead. One person that was casually mentioned as having a possible connection happened to be a former client of mine. I immediately brought this to the attention of the defendant and his family in compliance with the Code of Professional Responsibility.[74] I agreed to represent him only after obtaining his consent following full disclosure.

Shortly after being retained, I engaged the services of a licensed private investigator. Early in the investigation we discovered that the prosecution's chief witness, already in protective custody, told two former cellmates that he was hoodwinking the government about the defendant having hired the killers. Both former cellmates were immediately

interviewed and were advised they would be called at trial.[75] I advised the investigator of several potential witnesses that should be located, including the three witnesses present when the alleged conspiracy took place. I considered these three witnesses crucial to my client's defense because they were the only ones who could repudiate the testimony of the prosecution's chief witness. We also discussed other possible suspects including my former client.

At a progress conference a month later, the investigator and I discussed the tasks remaining. We agreed that the matter of primary importance was locating the three witnesses present at the alleged conspiratorial meeting. Because my investigator had not been able to locate any witness providing any link to my former client as a possible suspect,[76] I advised him to dismiss my former client as the primary objective of the investigation and to proceed with other matters I considered more crucial to my client's defense.[77]

During the next several months, my investigator interviewed more than forty witnesses. He found, interviewed, and obtained the cooperation of the three crucial witnesses who had been present in the defendant's home at the time the conspiracy was alleged to have been planned.[78]

A motion to endorse all three as res gestae witnesses was granted on July 10, 1979.[79] Shortly thereafter, the prosecution went to work. One witness was threatened with prosecution for conspiracy and perjury unless he changed his testimony. The second witness was charged with first degree murder and conspiracy to commit murder. The third witness was arrested and charged with first degree murder and conspiracy to commit murder.[80] The second and third witnesses were offered a plea bargain in exchange for testifying on behalf of the prosecution. The first witness was never charged. Although the second witness went to preliminary examination, the case against him was dismissed for lack of evidence. The third witness agreed to testify on behalf of the prosecution in exchange for an opportunity to plead guilty to a lesser offense.

This was a hectic and disconcerting time. The prosecution was using tactics described by Dershowitz as "cheat elite" – intimidating witnesses and obstructing the defense in the presentation of exculpatory evidence – and generally acting in a manner violative of the defendant's due process rights under the fourteenth amendment to the United States Constitution. We proceeded by preparing and filing a motion to dismiss the information on grounds of prosecutorial misconduct.[81] The motion was denied after an evidentiary hearing before the trial judge. The trial commenced shortly thereafter. The defendant was tried jointly with one of the two people the prosecution charged with carrying out the actual killing. The prosecution did not claim that my client knew his co-defendant, but that he was hired by a middleman.[82]

On the first day of trial, the judge advised that he was leaving town on a certain date and intended to complete the trial before he left. We were consequently forced to work from 9 a.m. to 5 p.m. each day with only very brief recesses in the morning and afternoon. The judge often limited lunch recess to thirty minutes. I later learned of the jurors' dissatisfaction with these working conditions.[83] Otherwise, the early part of the trial progressed as expected. Many of the court's evidentiary rulings went in my favor.

Although such rulings are usually helpful, I later learned that the judge's discourteous rebukes actually created jury sympathy for the prosecutor. [84] In my cross-examination of the prosecution's chief witness, I thoroughly explored his motivation to testify and every apparent inconsistency in his testimony. In an effort to impeach his credibility, I questioned him at length about the statements he made to his two former cellmates.[85] I thoroughly questioned the witness about a possible connection with my former client.[86] He denied making the statements and denied knowing my former client. I called the two former cellmates to complete the impeachment process.[87]

In the middle of the trial, the prosecution dropped its bombshell; the already convicted killer had been persuaded to testify against my client.[88] Although we protested vigorously, the court permitted his testimony. He testified that the principal co-conspirator hired him to do the killing and told him that my client was paying for it.[89] This was, of course, the low point in the trial, but upon completion of cross-examination we still felt acquittal was within our grasp.

I spent a great deal of time preparing for closing argument, which I feel is of crucial importance in a criminal trial before a jury. My statement was carefully planned. I estimated that it would take about three hours to deliver. Just before we were scheduled to begin, the judge advised us that closing arguments would be limited to ninety minutes. I will never doubt that, given the nature of the case and the seriousness of the charges, this ruling was unfair. I felt handicapped because I was unable to make the kind of delivery such a case requires. The judge left on his vacation during deliberations, and the guilty verdict was taken by his alternate.

It is difficult to express my feelings about losing this capital case. In short, I was devastated.[90] Pressure throughout the trial had been particularly acute because of the working conditions imposed by the judge. I felt the prosecution had used under-handed methods in dealing with potential defense witnesses. I also believed that the jury's contempt for the judge and sympathetic attitude toward the prosecutor may have adversely prejudiced my client. Finally, I sincerely believed that my client was innocent.

Although I had no contractual obligation to attempt to obtain post-conviction relief, I felt a continuing obligation to my client and immediately began work on a motion for a new trial. By November 28th I had prepared and filed a comprehensive motion for a new trial accompanied by an extensive supporting brief.

In mid-November I had received a confusing letter from the defendant in which he alluded to my former client.[91] I immediately advised him that I did not understand the letter and could not tell if he was trying to tell me something. The defendant never responded to my letter but he had acknowledged in his letter that there was much concerning the victim and my former client that I would not understand. He was right.

Shortly after the first of the year, but before oral argument on our motion for new trial, I was advised by the attorney who had originally referred the matter to my office that he was re-entering the case on behalf of the defendant.[92] I was fully cooperative and gave him complete access to my file. Shortly thereafter he moved to permit an amendment to the motion

already filed.[93] I must confess that by this time I was somewhat relieved that new counsel was entering the case. I think it is wise to obtain a fresh perspective, although this need not be the rule in every case, particularly when the error is apparent.

Usually, a new attorney entering a case prepares a stipulation and order of substitution to be signed by the former attorney.[94] While I did not receive one in this instance, I assumed that I had been replaced. The trial judge was well aware of the substitution since the new attorney had already appeared and argued a motion before the court.[95]

I received no further communication in the case for the next six months; then, in June, shortly before I was scheduled to depart on a long-planned family vacation, I received a copy of the defendant's amended motion for new trial which included a claim of ineffective assistance of counsel.[96] The motion was accompanied by a letter of apology from the defendant's new attorney in which he stated that he was only doing his duty.[97] I also received a copy of a letter sent to the defendant's new attorney by the trial judge stating that hearings on the motion would be conducted between July 9 and July 25.[98] I did not believe I would be permitted to testify at these hearings because the defendant's new attorney stated that he was expressly reserving the attorney/client privilege with respect to my work product and communications with the defendant.[99] During the same week, the assistant prosecutor met informally with the judge and discussed the motion. The prosecutor had the impression that the judge intended to grant the new trial on grounds alleged in my initial motion because the judge had some misgivings about the sufficiency of the evidence against the defendant.[100]

Taking everything into consideration and thinking that my presence would not be required at the hearing, I decided to proceed with my vacation as planned. The hearings commenced in July as scheduled.[101] When the defendant took the stand and offered perjurious testimony about my defense that only I could repudiate, it became apparent to the prosecution that my testimony would be necessary. The prosecution immediately sought a continuance so I could be contacted and advised of the situation. The trial judge denied the continuance.[102] About this time, I was disembarking from a four day houseboat trip. As soon as I could reach a telephone, I called my office and was told the prosecutor was desperately trying to locate me. I was given a telephone number which I called immediately, not realizing at the time that it was the number of the judge's chambers. Both the prosecutor and the defense counsel were on the phone. I listened in horror as the assistant prosecutor related the events during the hearing. They included my former client's lies under oath and the judge's expression of anger over his inability to locate me. The prosecutor informed me that the judge had suggested I be located, arrested, and brought back as a fugitive, presumably in irons.[103] I became outraged and defensive. I was incredulous that the judge had denied the prosecution's request for a continuance so that I could be present. I vented my frustration and anger, never believing that the defense attorney would use this situation against me by proceeding directly into the courtroom and repeating my vindictives to the judge verbatim.[104]

After checking into a hotel so that I could be reached by telephone, I called my office and received another shock. Armed with the statements conveyed to him by the defense attorney, the judge had granted the defendant's motion for new trial on the grounds of ineffective assistance of counsel. The opinion was rendered from the bench.[105]
There were no words to describe my feelings. During the years I have practiced law, like Dershowitz, I have witnessed corruption, incompetence, bias, laziness, meanness of spirit, and plain stupidity in the judiciary.[106] But never had I been exposed to such a vengeful, vindictive, personal attack.[107] During all my years of practice, I have felt, if nothing else, that I enjoyed a good reputation. Now, this judge, indeed a highly intelligent man, was attempting to destroy it. My first response was a letter to the judge dictated over the telephone.[108]

Upon my return to the city a short time later, the prosecutor's office provided me with a copy of the court's opinion and excerpts of my former client's testimony. The prosecutor had already filed an Application for Leave to Appeal which was denied on July 31, 1980.[109] The prosecutor also filed an Emergency Motion for Reconsideration accompanied by my affidavit.[110] On August 27, 1980, the appellate court granted the motion and remanded the cause to the trial court in order to take my testimony as well as any other testimony deemed necessary on the issue of ineffective assistance of counsel.[111]

On September 9, 1980, prior to the hearing ordered by the appellate court, the prosecuting attorney moved to have the trial judge disqualify himself on the grounds that he was personally biased and prejudiced against me.[112] The motion was denied, and the hearing commenced.

Approximately two weeks after completion of the second hearing, I received a copy of court's opinion. It was eighty pages long and half of it dealt with me. In his second opinion, the judge not only reasserted everything he said about me in his first opinion, but expanded upon it. In each and every instance except one,[113] he decided that the defendant's version of our relationship and what transpired between us was correct, while my own testimony, as well as that of my investigator and associate, was not. Those who have read the opinion have been overwhelmed by its magnitude and ferocity.[114] Throughout the opinion, the judge stated that I failed to show that the "phantom" alternate suspect was a real live person in the form of my former client. In other words, he repeatedly accused me of presenting a "feeble alternate suspect defense." However, near the end of his opinion, while making a different point, he contradicted himself by stating, "for this defense (alternate suspect) it is not particularly material who the alternate suspect is or what his name may be."[115]

The opinion contained many inaccuracies and unfair characterizations. None, however, were so outrageous as those in which he accused me of perpetrating a "cover-up" within my own office to protect my former client. He believed there was a cover-up for three reasons: my associate knew nothing about my former client, my notes failed to reveal his name, and the detectives in charge of the case could not locate their own memoranda of an interview they had with my former client prior to the defendant's arrest. The judge, therefore, concluded that I had removed all reference to my former client from my office files, including my personal notes and the police memoranda.

I saw this charge as utterly absurd. My associate testified that he had spoken to the defendant on several occasions in preparation for the trial. Although the defendant testified that my former client was foremost

in his mind as an alternate suspect, he had never mentioned him to my associate. My investigator's August 11 memoranda of his phone conference with the defendant, during which the defendant discussed my former client, *was* a part of the file. In addition, the trial transcript revealed repeated references I made to my former client by name. Finally, the suggestion that the police department had delivered an original memorandum of an interview to my office, which I later removed or destroyed, was incredible. Who has ever heard of a police agency giving original records to a defense attorney?

Shortly after publication of the opinion, the Michigan State Bar Grievance Administrator served me with a Request for Investigation. It took several months to prepare and file my eighty-seven page response in which I denied each and every allegation made against me. During the time I was preparing my answer to the state bar, the prosecutor filed an appeal[116] and, on the basis of the trial court's opinion, the defendant sued me for malpractice.[117] I have recently received a letter of complete exoneration from the Michigan State Bar Grievance Administrator.[118]

In May 1982, in a two-to-one decision, the Michigan Court of Appeals upheld the trial court's decision stating:

> On this record, we are convinced that the trial court was correct in finding that a conflict of interest *may* have prejudiced the defendant's trial and that no valid waiver has occurred.
> ....
> We conclude, therefore, that the trial judge did not abuse his discretion in granting the defendant a new trial based on the ineffective assistance of counsel. The trial judge in the lengthy involvement was on the firing line, observed the witnesses, and was in a better position to weigh the proofs and consider the credibility.[119]

In *The Best Defense*, Professor Dershowitz repeatedly charges that trial judges make law through facts, consciously tailoring their fact finding to achieve the legal results they desire, and use their knowledge of the law and their intelligence to effectively bind the hands of the appellate courts. Appellate courts accomplish the same results in a somewhat different manner. Sometimes they twist the law while on other occasions, rather than review the findings head on, they call the error harmless or simply say that an abuse of discretion has not been shown. In this case, I feel that the majority committed two of these three errors. Rather than embarrassing the trial judge, they simply said he did not abuse his discretion. They also misapplied the law as did the trial judge in his first opinion.[120] Only the dissenting judge applied the correct rules of law.[121] She was the only member of the panel who reviewed the trial judge's factual findings and conclusions concerning my relationship with my former client. She was the only member who reviewed the testimony of my investigator. The fact is that there was absolutely no evidence indicating that I had acquired any information while representing my former client which may have been favorable to the defendant, but which I was precluded from using at trial because of conflicting obligation. After reviewing the record, the dissenting judge stated, "I find no basis for concluding that a conflict was established."[122]

After denial of the prosecutor's Application for Rehearing, an Application for Leave to Appeal was denied by the Michigan Supreme Court.[123]

If the mere unsupported conjecture of a conflict of interest that may have existed can be upheld as a basis for a claim of ineffective assistance of counsel, the effect upon our criminal justice system will be resounding. A hindsight determination that another defense might have been more effective could be made by virtually every unsuccessful defendant.[124] Members of the bench and bar must be ever mindful that judges do not become gods when they don their robes. They must be more willing to concede that on occasion judges are subject to the same egotism, anger, and frustrations as those who come before them. They must also have the intellectual honesty to admit to such human frailties rather than to use those occasions to make bad law or to twist facts in order to uphold a decision. Only then will they be truly able to dispense justice with true humanity.

Like me, Dershowitz is more disappointed in judges than in any other participants in the criminal justice system. My own experiences parallel his and those of many other members of the criminal defense bar. It is well known that the present selection of judges, both election and appointment, needs vast improvement. Incompetence, through either lack of experience, or as Dershowitz states, plain stupidity, is anything but rare. The kindest thing that can be said about at least a simple majority of our judges is that they are mediocre. Few ever earn the respect of their peers as litigators, and those who did were in most cases prosecutors who graduated into the judiciary by political appointment. Few of these ex-prosecutors have any real understanding of defense counsels' role in the criminal justice process. Because of their lack of a well-rounded education, they lack objectivity.

I could spend hundreds of pages outlining my experience before the incompetent, the lazy, the angry, and the plain stupid, but alas, it would only be academic. Most attorneys know these characteristics are "endemic" among the judiciary.[125]

Dershowitz believes that a conspiracy of silence shrouds the American justice system. He states that:

> Most insiders – lawyers and judges – won't talk. Most outsiders – law professors and journalists – don't really know. Few of those who are outside the club ever get close enough to the day-to-day operations of the system to appreciate how it really works.
>
> Some insiders won't talk because they have a stake in not exposing the dark underside of the legal profession. Others are afraid of reprisals. Indeed, the formal rules governing the legal profession discourage lawyers from publicly criticizing their 'professional brethren,' and encourage them to promote 'public confidence in our courts' and in 'the honor of our profession.' Equally important is the informal understanding among insiders that they should criticize only within the club and not in public.
>
> This dichotomy between insiders who know but won't say and outsiders who will say but don't know has deprived the public of a realistic assessment of the American justice system.[126]

I agree that the American public doesn't really understand our criminal justice system. I also believe that law professors and journalists lack insight into its mechanisms. I do not share Dershowitz's belief in the existence of a conspiracy of silence, nor do I believe in the existence of a club. The police

want convictions and jail terms. The prosecutors, except in extraordinary cases, take little personal interest in their cases; most regard their job as a stepping stone to a better paying position in politics or private practice.[127] Many defense lawyers, as Dershowitz suggests, can be subdivided into various categories[128] and, for one reason or another, suffer from mediocrity. These mediocre lawyers are not as concerned with winning as they are closing files through the plea bargaining process and getting paid.[129] The remainder of the defense bar, including the handful who have been referred to as "outstanding,"[130] do speak out from time to time, but their cause is generally unpopular in the eyes of the American public.[131]

Finally, there are the judges. I also agree with Dershowitz's statement that "most judges have little interest in justice."[132] They are concerned with the efficiency of the system, moving the docket, and making certain there are no backlogs or traffic jams in the courts. Some, but not all, see themselves as part of the system of law enforcement. A majority, particularly the distinguished elite, will go to great lengths to protect against reversal of "their" convictions.[133]

It is my experience that between these four divergent special interest groups, there is very little communication directed towards improving the system itself. Most prosecutors have little understanding of what is required to be a good defense lawyer, although it is not unusual for good defense attorneys to have once served as prosecutors. Most policemen distrust lawyers. Few judges, especially federal judges, have any real experience on the defense side of the bar.

According to Dershowitz, the American public has been deprived of a realistic assessment of their system of justice. Nonetheless, I believe that we cannot expect the public to understand and assess the system when we who serve it cannot agree among ourselves about how it should be.

Dershowitz contends that, despite the constitutional presumption of innocence, the vast majority of criminal defendants are guilty of the crimes with which they are charged. He states that any criminal lawyer who tells you that most of his clients are not guilty is either bluffing or deliberately limiting his practice to a few innocent defendants.

Dershowitz is only partially correct. A majority of people accused of criminal misconduct have violated the law in some fashion, and many are in fact scoundrels.[134] In spite of this, I believe that in a substantial number of cases defendants are charged with crimes far more serious than their conduct warrants. For example, the defendant may have had a gun in his pocket at the time of his arrest. He may have even displayed the weapon. However, it would not be unusual for a police officer to testify under oath that the gun was pointed in his direction, thus constituting assault with a deadly weapon, when, in fact, the defendant never pointed the gun. The defendant would only have been guilty of carrying a concealed weapon. There are countless other examples which would illustrate the point. Occasionally, prosecutors will overcharge when they know the defendant is guilty of only a lesser included offense. In some cases, although the facts are not in dispute, the significance attached to the facts is disputed. Decisions about the seriousness of the offense and the degree of the defendant's culpability often involve complex and highly subjective judgements about factors such as premeditation, intent, force, credibility, negligence, threat, recklessness, and harm. What if being adjudicated is not guilt or innocence, but the appropriateness of the charge and the punishment deserved.[135]

I am not suggesting that most of my clients are innocent, but I can say with a clear conscience that on rare occasions I have witnessed innocent people convicted and seen many people convicted of crimes far more serious than those of which they may be guilty. More importantly, like Dershowitz, I have seen defendants convicted by dishonest means.

Dershowitz contends that nobody really wants justice; winning is the only objective for most participants in the criminal justice system. The concern prosecutors and defense attorneys have over their win-loss ratio explains why plea bargaining is so widespread. Plea bargaining, according to Dershowitz, is one of the most destructive and least justifiable institutions in the American criminal justice system.

Americans are known to be the most competitive people on the face of the earth. Why then should an American who happens to be an attorney be any different? Unfortunately, our law schools have failed to train us to serve a higher cause. What can be said about losing when it is viewed in practical terms? Winning is advancement, notoriety, prosperity, and above all a path to self-esteem. This is particularly true in an environment where prosecutors, defense attorneys, judges, and police officers – who have been trained to understand and manipulate the law – have not been trained to appreciate its beauty nor to appreciate the sheer joy of participating in the process of dispensing justice. They have not been trained to act collectively as a legal ombudsman for society, working together in a civilized manner with the spirit of the Constitution and the Bill of Rights in mind.

Dershowitz may be correct when he says that nobody really wants justice. I disagree with his claim that plea bargaining is one of the most "destructive and least justifiable institutions in the American justice system."[136] I understand that in Japan, with a population in excess of 100,000,000 people, there are only 10,000 lawyers. This is because most disputes are resolved through agreement or mediation. The Japanese consider it dishonorable when they cannot resolve their disputes outside the courts. Plea bargaining, in principle, is nothing more than two lawyers agreeing to resolve a dispute without having to litigate. I believe that the concept of negotiated settlement is not only proper, but absolutely necessary if the wheels of justice are to be kept moving. The process becomes corrupted only when high standards are not maintained, for example, when a prosecutor agrees to permit a defendant with a bad record to plead guilty to a misdemeanor in the face of overwhelming evidence that he committed a violent felony and, conversely, when a defense attorney, having failed to consider every possible legal defense, cajoles his client into pleading guilty in consideration of a reduced sentence. Judges are not without fault, especially when they make it known that they have no intention of presiding over a lengthy trial.

Contrary to popular belief, plea bargaining is not a recent innovation nor a product of heavy caseloads; it has been the dominant means of settling criminal cases for the last century.[137] Plea bargaining comes about for a variety of valid reasons – the prosecutor may lack the evidence necessary to prove guilt; victims may refuse to cooperate; key witnesses may lack the requisite credibility; and in cases where the evidence of guilt is

overwhelming and the case involves a "bad guy" who has committed a serious crime, prosecutors may prefer to settle the case through a guilty plea to a lesser crime to avoid the risk of acquittal.[138]

In any event, I disagree with Dershowitz's statement that attorneys' statistics influence their desire and amenability to plea bargain. Most attorneys involved in the criminal justice process spend a great deal of their time representing indigents, and they are principally interested in economic survival. In the vast majority of cases – prosecutors have no incentive to litigate. In general, prosecutors care less about winning than about not losing; a significant number of lost cases weakens their sense of self-esteem and undermines their credibility in the courtroom and in the large community.[139] The judges, as previously noted, have an entirely different perspective, but in most cases they are primarily interested in expeditiously moving the docket.

Does the American system of criminal justice "generally produce accurate results"?[140] Do we enjoy a "modicum of rough justice"[141] despite the corruption and unfairness in our adversary process? Professor Dershowitz and Charles Silberman both answer these questions in the affirmative.[142] And I reluctantly agree. Even when viewed against other systems, ours is one of the best. Nonetheless, there is substantial room for improvement – not so much in the rules, but in the caliber of the people who enforce and defend them.

One final note. Dershowitz claims that since he earns his livelihood as a law professor he can be selective about the cases he takes. Also, he says that he tries to pick the most challenging, the most difficult, and the most precedent-setting cases. What he doesn't tell us is how many of them were pro bono. Come now, Professor, didn't you know your not-so-distinguished colleagues would be reading your book?

Footnotes

(*) A former military punishment in which the offender was made to run between two rows of men who struck him with switches or weapons as he passed; the term has come to be used when one must undergo attack from two or all sides, or suffer trying conditions, severe criticism, or tribulation. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 587 (1st ed. 1966.).

(**) LL.B., Detroit College of Law; partner Lippitt, Lyons & Whitefield, Southfield, Michigan; former Wayne County Ass't Prosecuting Att'y; arbitrator, Mich. Att'y Grievance Comm'n; member, Nat'l Ass'n of Crim. Defense Lawyers, and California Attorneys For Crim. Justice.

(1) Jennes, *Interview with Professor Dershowitz*, PEOPLE WEEKLY, July 19, 1982. at 69-70.

(2) Hughes, Book Review, N.Y. REV., June 24, 1982, at 27 (reviewing A. DERSHOWITZ, THE BEST DEFENSE (1982)).

(3) Goldstein Book Review, N.Y. TIMES BOOK REVIEW, June 13, 1982, at 13, 1982, at BR12 (reviewing A. DERSHOWITZ, THE BEST DEFENSE (1982)).

(4) A. DERSHOWITZ, THE BEST DEFENSE 18 (1982) [hereinafter cited as THE BEST DEFENSE]. The case was tried before Judge Arthur Bauman shortly after his appointment by President Nixon to the United States District Court for the Southern District of New York. Judge Bauman began in the New York District Attorney's office and later served in the U.S. Attorney's Office as chief of its criminal division. He constantly reminded defense attorneys of the 'high regard' in which he was held by his former colleagues and their successors in the U.S. Attorney's Office. *Id.*

(5) The examination revealed police promises made to Dershowitz's client that had previously been denied, illegal government wiretaps, and perjury of the witness. The exculpatory testimony was obtained by the use of leading questions that appeared to have been formulated from a transcript of a tape recording of the conversation. When the judge found that the conversations revealed had not actually been recorded, he attacked Dershowitz's conduct as unprofessional, threatened formal charges, and refused to hear or respond to any argument defending the propriety of the technique. In addition, he struck the crucial testimony from the record and completely ignored the evidence that the officer had been lying in his final opinion. *Id.* at 62-67.

(6) *Id.* at xvii. Dershowitz describes this and other inherent dishonesty or distortion by powerful and respected members of the profession as "cheat elite." *Id.* at xx-xxi.

(7) This characterization is generally applied to defendants charged with drug dealing or offenses connected in some way with organized crime.

(8) *See* THE BEST DEFENSE, *supra* note 4, at 374-75.

(9) *Id.* at 120.

(10) The leading case on this issue at Santobello v. New York, 404 U.S. 257 (1971). In Santobello, the Supreme Court held that "when a plea rests... on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* at 262. The Court found the bargain broken where the prosecutor recommended a maximum sentence of one year, unaware of his predecessor's promise not to make a sentence recommendation.

In the Bergman case, the guilty plea had been induced on the basis of a promise to recommend concurrent state and federal sentences; however, the state prosecutor made an inflammatory press statement criticizing the leniency of the federal sentence prior to his recommendation to the state sentencing judge.

(11) In Michigan change of venue has been rendered virtually impossible since People v. Collins, 43 Mich. App. 259, 204 N. W.2d 290 (1972), lv. denied, 391 Mich. 798, 216 N. W.2d 419, cert. denied, 419 U.S. 886 (1974). In Collins, the court held that MICH. COMP. LAWS 762.7 (1979), governing change of venue, is discretionary. The exercise of that discretion is reviewable, but there must be a definite clear showing of abuse of discretion for an appellate court to overturn the action of the trial court. 43 Mich. App. at 262, 204 N.W.2d at 292. The court also stated: "Since People v. Swift, 172 Mich. 473, 138 N.W. 662 (1912), it has been the rule that is proper for a trial court to defer determination on a request for a change of venue until an attempt has been made to select a jury in the county where the crime occurred." *Id.*

(12) In the Bergman case, the judge before whom the case was pending later admitted under cross-examination that he kept a collection of newspaper clippings related to the case. THE BEST DEFENSE, *supra* note , at 145.

(13) "The spirit of liberty, the principles of the Bill of Rights, are part of the daily fabric of our lives to a much greater extent than most of us recognize." W.O. DOUGLAS, A LIVING BILL OF RIGHTS 65 (1961).
The challenge to our liberties comes frequently not from those who consciously seek to destroy our system of government, but from men of good will – good men who allow their proper concerns to blind them to the fact that what they propose to accomplish involves an impairment of liberty. Examples are the prosecutor who is so intent on convicting an evil man that he rides roughshod over basic procedural safeguards; the military commander, who, zealous to defend our country, extends military law into civil domains; the police officer

whose concern with preserving order leads him to deprive men of their right to speak in public. The motives of these men are often commendable. What we must remember, however, is that preservation of liberties does not depend on motives. A suppression of liberty has the same effect whether the suppressor be a reformer or an outlaw. The only protection against misguided zeal is a constant alertness to infractions of the guarantees of liberty contained in our Constitution. Each surrender of liberty to the demands of the moment makes easier another, larger, surrender. The battle over the Bill of Rights in a never ending one.

(14) THE BEST DEFENSE, *supra* note 4, at 158.

(15) *Id.* at 159.

(16) 18 U.S.C. §§ 1961-68 (1976) (Racketeer Influenced and Corrupt Organizations).

(17) 18 U.S.C. § 1952 (1975) (Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises).

(18) 18 U.S.C. § 1341 (1976) (Frauds and Swindles).

(19) *See* e.g., 18 U.S.C.A. §§ 1341, 1352; 1961-68 annots. (West 1966, 1970 & Supp. 1981).

(20) FED. R. CRIM. P. 6(a) provides:
The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

(21) The prosecutor told a reporter: "'I'd rather see dope on the streets than these movies' explaining that drugs could be cleansed from the body but pornography's damage was 'permanent.'" THE BEST DEFENSE, *supra* note 4, at 158.

(22) *See* C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE ix (1978).

(23) THE BEST DEFENSE, *supra* note 4, at 321.

(24) *Id.* at 322.

(25) Another practice labelled by Dershowitz as "cheat elite," *See supra* note 6 and accompanying text.

(26) THE BEST DEFENSE, *supra* note 4, at 340-341.

(27) *Id.* at 363.

(28) *Id.* at 374 (quoting Judge Murray Gurfein of the United States Court of Appeals for the Second Circuit).

(29) *Id.* at 374-375.

(30) In Michigan, it is well known that the Attorney Grievance Commission has recently become more aggressive in prosecuting such lawyers for professional misconduct.

(31) THE BEST DEFENSE, *supra* note 4, at 356.

(32) 112 Mich. App. 725, 317 N.W.2d 540, rev'd in part on reh'g, 116 Mich. App. 176, 321 N.W.2d 684 (1982).

(33) *Id.* at 737, 317 N.W.2d at 545.

(34) *See* Kotteakos v. United States, 328 U.S. 750 (1946).

(35) *See* Brief in Support of Delayed Application for Leave to Appeal at 63-77, People v. Mitchell, No. 69916 (Mich. Sup. Ct. filed Aug. 2, 1982).

(36) *Id.*

(37) *Id.* at 35-47.

(38) *Id.* at 48-62.

(39) *Id.* at 77-90.

(40) *Id.* at 97.

(41) *Id.* at 16. *See* United States v. Morrison, 449 U.S. 361 (1981), and Weatherford v. Bursey, 429 U.S. 545 (1977), for the U.S. Supreme Court's position on this tactic.

(42) MICH. COMP. LAWS §768.27 (1979) provides:
In any criminal case where the defendant's motive, intent, the absence of mistake of accident on his part, the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence or mistake or accident on his part, the defendant's scheme, plan or system in doing the act, in question, may be proof, whether they are contemporaneous with or prior or subsequent thereto; not-withstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

(43) In this manner, testimony was elicited evidencing only a general recollection of seeing one of the police officer defendants give an unknown quantity of narcotics to a person, whose last name the witness could not recall, on a day or evening during a year about which the witness could not be precise.

(44) *See* The Detroit Free Press, Editorial, July, 1974 at 12A, col. 1; The Detroit Free Press, June 22, 1974 at 3A, col. 1, 12A, col. 1.

(45) The Detroit Free Press, June 22, 1974 at 3A, col. 1.

(46) *Id.*

(47) The Recorder's Court for the City of Detroit operates under a blind draw system. However the Detroit Police Officers Association has long suspected that it has been abused in cases where one of their members has been accused of criminal misconduct.

(48) People v. Joker, 63 Mich. App. 421, 234 N.W.2d 550, 554 (facts set forth in dissent).

(49) *Id.*

(50) People v. Tabaczynski, No. 81-03 101 (Recorder's Ct. for City of Detroit sentenced June 17, 1982).

(51) *See* Kotteakos v. United States, 328 U.S. 750 (1946).

(52) *See* MICH. COMP. LAWS § 767.44 (1979); People v. Missouri, 100 Mich. App. 310, 299 N.W.2d 346 (1980), lv. denied, 402 Mich. 822 (1977); People v. Tenerowicz, 266 Mich. 276, 287-88, 253 N.W. 296 (1934).

(53) MICH. R. EVID. 611(a); People v. Williams, 39 Mich. App. 458, 462-63, 197 N.W.2d 858, 861 (1972); People v. Lloyd, 5 Mich. App. 717, 723, 147 N.W.2d 740, 743 (1967). *See* also, B. GEORGE, A PRACTICAL ANALYSIS OF MICHIGAN EVIDENCE LAW 15.05-3 (1980); ef. People v. Hall, 391 Mich. 175, 180 n.1, 215 N.W.2d 166, 169 n.1 (1974); Clark v. Field, 42 Mich. 342, 344, 4 N.W. 19, 20 (1880).

(54) People v. Iaconnelli, 112 Mich. App. 725, 317 N.W.2d 540, rev'd in part on reh'g sub nom. People v. Herold, 116 Mich. App. 176, 321 N.W.2d. 684 (1982).

(55. 112 Mich. App. at 777, 317 N.W.2d at 562.

(56) *Id.* at 750, 775, 317 N.W.2d at 551, 561.

(57) *Id.* at 742, 743, 317 N.W.2d at 548

(58) *Id.* at 743, 317 N.W.2d at 548.

(59) It is my belief that the appellate court disregarded the errors because it did not want to deal with the prospect of having the case retried. This placed considerations such as the length, complexity, and cost of trial above protection of the defendant's rights. This belief is supported by statements in the courts opinion: "This issue, in the context of lengthy trial presents a difficult task for the appellate reviewer..." *Id.* at 737, 317 N.W.2d at 545. "Regarding the cumulative effect of individual errors, we find any such effect not to be serious enough to mandate a new trial." *Id.* at 745, 317 N.W.2d at 549. "Considering the length and complexity of this trial . . . . we do not find that defendants were denied a fair trial. . . ." *Id.*

(60) Dershowitz recounts a story about a highly regarded federal appellate judge, who in affirming a conviction, included a statement that he had read the entire transcript and was satisfied that there was more than enough evidence to support the jury's verdict. Another judge, who had the only copy of the transcript locked in his file drawer, drafted and circulated a second memorandum which stated this fact; afterwards the first judge "caught in the act" withdrew the statement, but not the opinion. THE BEST DEFENSE, *supra* note 4, at xx.

(61) An Application for Leave to Appeal to the Michigan Supreme Court has been filed. Application for Leave to Appeal, People v. Mitchell, No. 69916 (Mich. Sup. Ct. filed Aug. 2, 1982), sub nom. People v. Herold, 116 Mich. App. 176, 321 N.W.2d 684, rev'd in part People v. Iaconelli, 112 Mich. App. 725, 317 N.W.2d 540 (1982). Hopefully the highest court will have the integrity to recognize the substantial injustice which has been done.

(62) THE BEST DEFENSE, *supra* note 4, at 384.

(63) Dershowitz explains that drug rings generally operate in a hierarchical structure with the boss at the top and the drug carriers or "mules" at the bottom. They generally take the greatest risk because they are the ones most often arrested. They generally do not have funds to retain able lawyers. It is often part of the deal that, if they are caught, the boss will provide lawyers for them. Providing lawyers, who are often quite expensive, is hardly a demonstration of altruism on the part of the bosses. The bosses have an interest in assuring that their own lawyers – lawyers they are paying – are representing mules. The last thing the boss wants is an independent lawyer – or worse, a lawyer friendly to the prosecutors – to encourage the mules to buy their freedom in exchange for turning in the boss. Part of the mule's job is to be a stand up guy to take the heat and do his time without informing on the boss. *Id.* at 398.

(64) *Id.* at 397-98.

(65) 18 U.S.C. § 1510 (1976)(Obstruction of Criminal Investigations).

(66) This was later conceded by the government.

(67) 18 U.S.C. § 1503 (1976)(Influencing or Injuring Officer, Juror or Witness Generally). *See* also United States v. Fayer, 523 F .2d 661 (2d Cir. 1975).

(68) 18 U.S.C. § 3500 (1976)(Demands for Production of Statements and Reports of Witnesses).

(69) THE BEST DEFENSE, *supra* note 4, at 385

(70) *Id.* at 382.

(71) *Id.* at 417

(72) The attorney had previously represented the co-conspirator in the case and believed he was going to be called as a witness. The Code of Professional Responsibility, DR 5-105, adopted by the Michigan Supreme Court, October 4, 1971, provides as follows:
- (A) A lawyer shall decline proferred employment if the exercise of his independent professional judgement in behalf of a client will be or is likely to be adversely affected by the acceptance of the proferred employment, except to the extent permitted under DR 5-105 (C).
- (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgement in behalf of a client will be or is likely to be adversely affected by his representation of another client except to the extent permitted under DR 5-105 (C).
- (C) In the situations covered by DR 5-105 (A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgement on behalf of each.

(73) The defendant allegedly hired his principle co-conspirator, who in turn hired two others to carry out the murder, at this meeting. The alleged principal co-conspirator was the prosecution's chief witness.

(74) *See supra* note 72 for the relevant code provision.

(75) In my cross-examination at the trial, I asked the prosecution's principal witness about the statements naming my former client and describing his place of business. The witness denied making the statements and failed to acknowledge any connection. I also called the two former cellmates and asked them the same questions. They denied hearing my former client's name from the prosecution's witness. I did not attempt to make a further connection with my former client for several reasons. First, the witness I was trying to impeach failed to acknowledge that he knew my former client. Second, neither of the cellmates had specifically mentioned my former client by name. Third, my principal concern was impeaching the credibility of the prosecution's chief witness. I wanted to establish that he had previously told two cellmates that my client was not behind the killing and that someone else hired the killers. It was not necessarily important who that someone else was so long as the jury recognized the possible lie and the possibility of an alternate suspect.

(76) One witness we thought might provide some connection could not be located by the investigator or the police department.

(77) I could not have known that this simple instruction, given to provide my investigator with direction, would later cause more personal grief than I could imagine.
When my investigator testified at the second post-trial hearing to determine if I had rendered effective assistance of counsel, he stated that the main purpose of the investigation was to destroy the principal co-conspirator's testimony because he had given so many conflicting stories and to find out exactly what had transpired at defendant's home. With respect to my former client, the investigator testified that I never told him he could not investigate my former client, and simply gave him direction as to what would not be profitable. My instructions were not highly restrictive. For example, he testified:

Q. Did you interpret that statement as an attempt to shield X?
A. No, sir. I interpreted it as a guideline.
Q. If during the course of your investigation, through your many interviews, you came across a link as you have defined it between X and a homicide, would you have continued to investigate?
A. Yes, sir.
Q. Would you have presented that information to Norman L. Lippitt?
A. Yes, sir.
Q. Did you find any such evidence?
A. No, sir.

(78) During this period, both my investigator and an associate in my office maintained regular contact with the defendant, who had limited phone privileges even though he was incarcerated. Not once during this period did the defendant inquire about or suggest further efforts to find a connection between the murder and my former client.

(79) MICH. COMP. LAWS § 767.40 (1970) requires the prosecuting attorney to endorse upon the information the names of all witnesses known to him upon filing it. Additional witnesses may be endorsed before or during the trial by leave of the court and upon such conditions as the court shall determine.

(80) *See* Motion to Dismiss or in the Alternative for Various Other Relief as a Result of the Pattern of Prosecutorial Misconduct, People v. Gallagher, No. 79-911862 FM (Wayne County Cir. Ct. filed Sept. 18, 1979).

(81) *Id.* The preparation, which included interviewing witnesses and acquiring affidavits, occupied much of our time through the months of August and September. This work took on additional importance when I was accused of failing to pursue certain leads regarding alternate suspects whose names were given to my investigator by the defendant during a telephone conversation of August 11, 1979. According to my investigator's synopsis of that phone call, the defendant for the first time alleged that my former client had told him about the victim's death and that he thought the victim had incriminating evidence about him. Other than my client's bald assertion that he had a telephone conversation with a possible alternate suspect, my former client, there was nothing in my investigator's synopsis providing an additional lead or link to my former client or anyone else.

As I remember my reaction to the August 11 memorandum, I felt my client was getting nervous as the trial approached, and just as he had done in the past, was attempting to explore every possible defense when talking to my staff over the telephone. Neither prior to, nor during, the trial did the defendant (a) instruct me to conduct any investigation regarding my former client, (b) express the fact that he knew of important evidence leading to my former client, (c) provide me personally with any meaningful leads, or (d) express any dissatisfaction with my failure to pursue leads regarding my former client. On May 31, 1979, I had written the defendant a letter which included almost everything I had in my file. I advised him of our motions for discovery, to quash the information, and to endorse additional witnesses. I explained to him that over five thousand dollars had been spent on investigation, and I concluded by saying, "After reading the materials I have provided, I would appreciate it if you would advise me of any errors and/or omissions, or additional information you wish to bring to my attention." My first hint that the defendant wasn't satisfied about the pursuit of an alternate suspect, my former client, or any other matter, came in a letter to me well after the trial. *See* infra note 91 and accompanying text.

(82) This alleged middleman or "principal co-conspirator" was the prosecution's chief witness.

(83) Interview of jurors at conclusion of trial by Norman L. Lippitt and John McCloskey, Assistant Wayne County Prosecuting Attorney (November 8, 1979).

(84) *Id.* The jurors found the judge rude and discourteous, and resented his attitude toward them and his unfair treatment of the assistant prosecutor. *Id.* Most experienced trial lawyers recognize that jurors tend to have considerable respect for the judge. Repeated rebukes from the bench will usually prejudice counsel adversely in the eyes of the jury. This was the first case I had been associated with where the rebukes created jury sympathy. I believe this also influenced the verdict.

(85) *See supra* note 75 and accompanying text for discussion of the statements and cross-examination.

(86) I described my former client and his place of business. I used the description and name given by the former cellmates and his correct name. *See* also *supra* note 75.

(87) *See supra* note 75 and accompanying text for discussion of the statements and testimony of the former cellmate.

(88) One of the actual killers had been arrested, tried, and convicted of second degree murder several months before my client's arrest. His conviction was based largely upon evidence of his fingerprints found at the scene of the crime. According to our information, he had an appeal pending and would not be a witness against my client. However, contrary to prior representations, the prosecutor announced after the trial had commenced that he would testify.

(89) This testimony was admissible under MICH. R. EVID. 801(d) which provides that: "A statement is not hearsay if... [t]he statement is offered against a party and is... a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy." *See* also People v. Trilck, 374 Mich. 118, 132 N.W.2d 134 (1965).

(90) As my associates, my office staff, and my dear wife can attest, I was difficult to live with in the months that followed. I even talked about finding new work, or at least something other than criminal defense.

(91) In one paragraph of the letter he had written:
[A]lot of the conversation you might not understand, mainly the victim was [X]'s cocaine connection and everyone downriver knew this. I only know that the victim could have ended [X] permanently if he ever testified against him. I have now learned that [X] is very happy over this conviction and that his name was never mentioned in trial . . . . I have really been under a lot of pressure and I never felt that you had anything but my best interests in mind.

Letter from Raymond Gallagher to Norman L. Lippitt (received November 16, 1979). "X" has been used here in place of the name of my former client; contrary to the letter, his name was mentioned repeatedly during my cross-examination of the principal co-conspirator at defendant's trial.

(92) I have often wondered what changes occurred in the intervening months sufficient to do away with his former conflict.

(93) The defendant's new attorney appeared at the February hearing, advised the judge that he would be representing the defendant, and made an oral motion to amend the motion after he had more opportunity to review the files and records. *See* infra note 95.

(94) *See* WAYNE COUNTY CIR. CT. R. 6.5 (1970).

(95) At a later hearing the court also stated: "The defendant's initial motion for a new trial was argued by Mr. Lippitt sometime in February of 1980. At this time Mr. Lippitt made the announcement that this was the last time he would be representing the defendant; that he was being replaced for all future proceedings by Robert Roether." Transcript of Hearing at 20, People v. Gallagher, No. 79-911862 FM (Wanye County Cir. Ct. filed June 6, 1980).

(96) Defendants Amended Motion for New Trial, People v. Gallagher, No. 79-911862 FM (Wanye County Cir. Ct. filed June 6, 1980).

(97) Letter from Robert H. Roether to Norman L. Lippitt (June 10, 1980).

(98) Letter from Judge Victor Baum to Robert H. Roether (June 9, 1980).

(99) Letter from Robert H. Roether to Norman L. Lippitt (June 10, 1980). The defendant's new attorney had advised me: "At this juncture, you will note that the motion and brief do not present this issue so as to create a waiver of the attorney/client privilege. Further, at this juncture, defendant requests that this privilege remain in effect as to your work product should the plaintiff contact you."

(100) Interview with John McCloskey, Assistant Wayne County Prosecuting Attorney (Nov. 19, 1980).

(101) Hearings were conducted on July 10, 11, 14, and 15 of 1980.

(102) *See* Motion to Disqualify the Trial Judge Because of Prejudice, Bias, and Pre-judgment under GCR 1963 913, People v. Gallagher, No. 79-911862 FM (Wayne County Cir. Ct. heard Sept. 19, 22, 1980).

(103) *See* MICH. COMP. LAWS § 767.93 (1979) which provides:
If a person in a state, which by law provides for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(104) The attorney had dutifully walked into the courtroom and told the judge that I said to tell him "to stick it."

(105) He stated that I managed and shaped the defense to shield my former client; I failed to pursue information, and acted to suppress and deflect it; I lulled my client into a lack of concern over a possible conflict of interest; many leads came to me which I failed to follow; there was a suppression and deflection of evidence; I advised a former cellmate witness to give another name to my former client; I discouraged my investigator from pursuing leads pointing to my former client, and encouraged others to cover up his identity; I knew well in advance when the hearing was scheduled, and chose to absent myself regardless of the charges that would be against me for the unethical departure from standard professional practice – perhaps even of criminal conduct. However, after all this the judge concluded that a new trial was warranted because he had misgivings about the guilt of defendant. The evidence against him was not as strong as the evidence against his co-defendant. *See* People v. Gallagher, No. 79-911862 FM (Wayne County Cir. Ct. Oct. 31, 1980).

(106) THE BEST DEFENSE, *supra* note 4, at xviii.

(107) I have always believed, even before his condemnation of me, that I had some insight into this judge's motivations and frustrations. His background and academic credentials are impeccable. Prior to this appointment to the bench he graduated with honors from Harvard Law School and was a lawyer for the Ford Motor Company. Although considered a great scholar and both respected and feared by colleagues, I suspect that his twenty-five years of dedicated service as a trial judge had not been properly recognized by appointment to a higher judicial position. He has recently announced his retirement from the bench and intends to enter private practice with a large local law firm. *See* The Detroit Free Press, Oct. 14, 1982, at 14B, col.1-2. This judge has always insisted upon the utmost respect from attorneys who practice before him and I have always conducted myself respectfully before the court; however, I could never overcome the hostility created by disparaging and admittedly disrespectful remarks repeated in his court room, which he viewed as a challenge to his superiority and authority.

(108) Sir:
As a result of your recent decision and opinion granting a new trial in the above matter, I find myself in the difficult position of having to defend myself although I endorse the validity of granting a new trial. I wish to state that this response is based on verbal representations given me telephonically, because as I understand it, your decision has not yet been transcribed. Therefore, if I am in error I assure you it is an honest error. Nevertheless, under the circumstances I have a higher obligation not only to myself, but to my family and all associated with me in the practice of law to respond to what I believe to be a vicious attack on my integrity, honesty, and credibility. Surely, you must be aware of my professional and personal reputation in the community, and having seen me practice before you, you know that I am always vigilant and vigorous in the defense of my clients.

I was astounded to hear that you stated that I failed to represent my client properly because of loyalty to a former client. I assure you that the awesome responsibility associated with defending another human being who is charged with murder weighs heavily upon my mind and forces me to pursue the defense of all such cases with utmost intensity, consistent with the Canons of Ethics. I cannot imagine that the record before you, even if replete with inaccuracies and perjuries, justified your conclusion about me. You have slandered me on the record and possible irreparably damaged my reputation. This undeserved taint will probably undoubtedly also result in injury to my firm and its members, most, if not all of whom, are held in the highest professional and personal regard, and many of whom have practiced before you with distinction. Those close to me know how hard I fought for . . . . and at the appropriate time I can and will defend myself and clear my name. I do not know what motivated you in willfully seeking to damage the reputation of one who has done you no harm and who you must know would not, under any circumstances, stoop to perjury or compromise the defense of his client. You could not possibly believe the things you say about me in your opinion; either that or you are not thinking clearly. I want you to know that I sincerely believe in the innocence of . . . . I further believe that he is entitled to a new trial, but for reasons other than those expressed in your opinion. Quite frankly, I do not believe, under the circumstances, that your opinion is consistent with your own view of your reputation and intellectual ability. You can take no pride in what you have done.

It has also been brought to my attention that you have suggested my arrest during my vacation as if I was a common criminal avoiding processes. As you are well aware from your attitude expressed during the trial, we have a right to take a vacation. The pressures upon criminal defense counsel are immense and in spite of my license to practice law I do believe that I have a right to a private life. I cherish that life and do not believe that your suggestion was either prudent or appropriate. Lest you had any doubt, I had no intention of abandoning my practice or my clients. A continuance to secure my testimony in this matter would have been the judicially temperate course of action. You did not choose that course, however, preferring instead to draw hasty conclusions upon partial evidence. If I haven't made it clear by now, I emphatically deny the allegations in your verbal opinion. I demand an immediate retraction before further harm is done.

Norman L. Lippitt
NLL/pam

Letter from Norman L. Lippett to Judge Victor Baum (July 18, 1979).

(109) Application for Leave to Appeal, People v. Gallagher, No. 54497, appeal denied, (Mich. Ct. App. July 31, 1980).

(110) Emergency Motion for Reconsideration or Rehearing, People v. Gallagher, No. 54497 (Mich. Ct. App. filed Aug. 6, 1980).

(111) People v. Gallagher, No. 54497 (Mich. Ct. App. Aug. 29, 1980) (order remanding for a rehearing).

(112) *See* MICH. GEN. CT. R. 1963 912. In his motion, the prosecutor argued that the trial judge read and received numerous letters and petitions on behalf of defendant, suggested that I be arrested, was advised by new defense counsel that I told him to "stick it," was visibly upset by my remark, repeatedly denied the prosecutor's requests for a continuance, and while granting defendant's motion for a new trial read from handwritten notes covering all the issues immediately after the prosecutor concluded his argument. Motion to Disqualify the Trial Judge Because of Prejudice, Bias, and Prejudgment under GCR 1963 913, People v. Gallagher, No. 79-911862 FM (Wayne County Cir. Ct. heard Sept. 19, 22, 1980). Dershowitz states

that disqualification of a judge because of showing of partisanship at trial "is a badge of dishonor for a judge, especially when it is demanded by counsel." THE BEST DEFENSE, *supra* note 4, at 65.

(113) The judge repudiated his former finding concerning the allegation that I advised the former cellmate to give another name to my former client. People v. Gallagher, No. 79-911862 FM, slip op. at 50 (Wayne County Cir. Ct. Oct. 31, 1980).

(114) At one point in his opinion, the judge stated, "Indeed, Mr. Lippitt's self confidence borders on arrogant belief in his own invincibility." *Id.* at 43 n.11.

(115) *Id.* at 41.

(116) *See* People v. Gallagher, 116 Mich. App. 283, 323 N.W.2d 366 (1982).

(117) Gallagher v. Lippitt, No. 81-120413 NM (Wayne County Cir. Ct. filed March 21, 1981).

(118) Letter from Michael A. Schwartz, Grievance Administration, to Norman Lippitt (Dec. 29, 1982).

(119) People v. Gallagher, 116 Mich. App. 283, 295, 323 N.W.2d 366, 371 (1982).

(120) The correct standard has been succinctly and cogently set forth by the United States Supreme Court in Cuyler v. Sullivan, 446 U.S. 335 (1980). The Court stated that "a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected the lawyer's performance." *Id.* at 348. (emphasis added). "[U]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Id.* at 350. "[T]he possibility of conflict is insufficient to impugn a criminal conviction." *Id.* (emphasis added). The Michigan Supreme Court provides as its standard:

> A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim . . . . [I]t is incumbent on him to make a testimonial record at the trial court level... which eventually supports his claim and which excludes hypothesis consistent with the view that his trial lawyer represented him adequately.
>
> People v. Gunther, 390 Mich. 436, 442-43, 212 N.W.2d 922, 925 (1973). (emphasis added).

(121) People v. Gallagher, 116 Mich. App. 299, 323 N.W.2d 373 (Gage, J., dissenting in part).

(122) *Id.* At 300, 323 N.W.3d at 373.

(123) Application for Leave to Appeal, People v. Gallagher, No. 69858, appeal denied, (Mich. Sup. Ct. Oct. 18, 1982). Certiorari has also been denied by the United States Supreme Court. Michigan v. Gallagher, cert. denied, 51 U.S.L.W. 3611 (Feb. 22, 1983).

(124) *See* People V. Gallagher, 116 Mich. App. At 298-99, 323 N.W.2d at 373 (Gage, J., dissenting in part).

(125) THE BEST DEFENSE, *supra* note 4, at xvii. I wish to point out that there are many well qualified judges serving in federal and state courts before whom I have had the pleasure of practicing. The problem is that these judges represent the minority.

(126) THE BEST DEFENSE, *supra* note 4, at xiii.

(127) C. SILBERMAN, *supra* note 22, at 277.

(128) The categories suggested by Dershowitz are: the prosecutor in defense attorney's clothing; the 'Perry Mason' lawyers; the integrity lawyer; the defense attorney who places causes before clients; and the overzealous and underzealous defense lawyer. THE BEST DEFENSE, *supra* note 4, at 400-15.

(129) The economics of private practice tend to militate against real concern for any but affluent clients. Few run of the mill offenders can afford to pay large fees, and the fees paid court appointed attorneys usually are modest. Most lawyers in private practice try to offset low fees through large volume; 'successful wholesalers,' as they are called, may handle five to ten cases a day, for fees ranging any where from $50.00 per case to $200.00, $300.00, or even $500.00 per case. The only way to handle that kind of volume is to plead everyone guilty; as one lawyer puts it, 'a guilty plea is a quick buck.'

(130) The California Attorneys for Criminal Justice (CACJ) has sponsored and published a National Directory of Criminal Lawyers which resulted from three years of intensive polling, evaluation of data, and correlating information gathered from over 25,000 inquiries sent to criminal defense lawyers throughout the country. Lawyers included in the publication were determined to have developed an outstanding reputation, were regarded as able and willing to deliver highly competent legal representation and the lawyers polled felt they would retain these attorneys in the event someone close to them was involved in a serious criminal problem.

(131) *See supra* note 61 and accompanying text.

(132) THE BEST DEFENSE, *supra* note 4, at xvii.

(133) *Id.*

(134) Dershowitz quotes H.L. Mencken poignantly: "The trouble about fighting for human freedom is that you have to spend much of your life defending sons of bitches; for oppressive laws are always aimed at them originally, and oppression must be stopped in the beginning if it is to be stopped at all." THE BEST DEFENSE, *supra* note 4, at 416.

(135) *See* C. Silberman, *supra* note 22, at 281.

(136) THE BEST DEFENSE, *supra* note 4, at vii.

(137) *See* C. SILBERMAN, *supra* note 22, at 255. The reason plea bargaining has not been discussed in earlier cases is that its legitimacy was not explicitly recognized until 1971 in Santobello v. New York, 404 U.S. 257 (1971).

(138) *See* C. SILBERMAN, *supra* note 22. at 272.

(139) *Id.*

(140) THE BEST DEFENSE, *supra* note 4, at xix.

(141) *Id.*

(142) *See Id. See* also C. SILBERMAN, *supra* note 22, at 255.