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Resources and Rights: Towards a New Prototype of Criminal Representation

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I. INTRODUCTION

A comprehensive concern in recent criminal procedure decisions in the United States Supreme Court has been the apprehension that certain rights afforded to the accused detract from efficient law enforcement.[1] Efficiency in controlling crime and obtaining accurate verdicts is preferred over the recognition of rights which impede that process.[2] This model of the purposes of the criminal justice system has its origins in the judicial reluctance to apply the Fourth Amendment exclusionary rule as a means of excluding otherwise probative evidence simply because "the constable blundered."[3] The problems in Fourth Amendment jurisprudence are well known. As two commentators have observed, "[T]here is virtual unanimity . . . that the Court simply has made a mess of search and seizure law."[4] Unfortunately, the pressures evident or implicit in interpretation of the Fourth Amendment have spilled over into the Court's exegesis of both the Fifth[5] and Sixth[6] Amendments, despite the differences in consti-

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My thanks go to Professor Afredo Garcia for many helpful and illuminating conversations about this topic, and to all of the defense lawyers laboring alone to represent their clients, and not simply their clients' cases.

1. *See* United States v. Leon, 468 U.S. 897, 907 (1984) for a full articulation of the costs of Fourth Amendment exclusion of evidence upon efficient law enforcement when a warrant, unsupported by probable cause, was obtained in "good faith."

2. Stone v. Powell, 428 U.S. 465, 488 (1979).

3. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926) (Learned Hand Opinion).

4. Silas S. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 20 (1988).

5. The Fifth Amendment provides an exclusionary rule that is clearly grounded in its terms. U.S. CONST. amend. V states "No person . . . shall be compelled in any criminal case

tutional text[7] and in the perceived relationship to accurate factfinding. The Fourth Amendment directly addresses the collision between law enforcement techniques and the individual's "expectation of privacy"[8] and thus warrants the balancing that the Court engages in when confronted with that collision. Neither the Fifth nor the Sixth Amendments involve the same concerns, but appear to describe absolute limitations upon the power the state may exert over an individual accused of crime.[9] However, the Court has disregarded those limits when the goals of factual accuracy and law enforcement efficiency are thought to be hindered. The purpose of this Article is to identify the important tasks of the criminal defense attorney, to delineate strategies that will infuse the criminal appellate process with arguments that will support and direct accomplishment of those tasks, and to identify recent United States Supreme Court decisions that will nourish those strategies.

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to be a witness against himself." U.S. CONST. amend. V. Thus, the arguments concerning scope and remedy that infest decisions on the Fourth Amendment should have been avoided, at least by textualists, in the Fifth Amendment setting. However, the Court is nonetheless mired in the same arguments in determining the application of Miranda v. Arizona, 384 U.S. 436 (1966), concerning its constitutional or prophylactic status and the power of the Court to impose its proscriptions upon the states. *See* Oregon v. Elstad, 470 U.S. 298, 306 (1985) (concluding that *Miranda* presumption of compulsion sweeps more broadly than the Fifth Amendment itself). *See also* Arizona v. Fulminante, 111 S. Ct. 1246, 1257 (1991) (statement that is involuntary and thus in direct violation of Fifth Amendment itself may still be harmless error when admitted at trial).

6. The Sixth Amendment right to counsel clause has been limited in several ways as well, including in the definition of a criminal case and the point of attachment. *See, e.g.*, McNeil v. Wisconsin, 111 S. Ct. 2204, 2207 (1991) (holding that Sixth Amendment right is "case specific" and does not attach until formal proceedings have begun); in the definition of effectiveness of counsel. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 687 (1984).

7. The Fifth Amendment proscription against compelled self incrimination provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. The Sixth Amendment right to counsel provides "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. Both clauses establish the context in which the right is enjoyed, that is a "criminal case" and a "criminal prosecution" respectively, and are triggered by those events. In the compelled self incrimination clause of the Fifth Amendment, the remedy of exclusion from trial is embedded in the constitutional text. U.S. CONST. amend. V. *See supra* notes 5-6. *See and compare* the language of the Fourth Amendment that speaks to "[t]he right of the people to be secure in their persons, houses, papers and effects," which is not limited by the existence of a criminal case or prosecution and creates no particular remedy for a violation. U.S. CONST. amend. IV. *See also* Arnold H. Loewy, *Police Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 909-16 (1989) (distinguishing "substantive" Fourth Amendment text from "procedural" Fifth and Sixth Amendment text).

8. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

9. U.S. CONST. amends. V & VI.

II. CRITIQUE OF PREVAILING MODELS

As most participants in the criminal trial system can attest, truth-finding has little to do with effective lawyering in the courtroom; adversarialness, rather than truth-seeking, drives the system. That truth is frequently inarticulable or distorted from an adversarial point of view is not only an empirical claim. The truth, frequently unknowable, may also be ineffable in the criminal trial. The essentially rational arrangement of categories of crime and mental state have little to do with the actual conditions that precipitate criminal behavior. Thus, an important function of the defense attorney is to translate acts that may seem irrational or inaccessible to fit the dominant discourse in a criminal courtroom. Because decisions deeply affecting the lives of those who take part in the criminal trial process emerge from within such a system, engagement in the question of discovery of truth focuses upon the theoretical utility of procedural rules to accomplish that task, rather than upon direct confrontation with a system whose efficacy for the purpose of truth-seeking is limited by far more than the rights afforded the accused.[10] If the rules are followed, the theory goes, then the goals that they allegedly advance are deemed accomplished.[11] Decision by indirection is probably a necessity that permits participation in such a system at all. Questions that should center around the probability of truth surfacing become questions of proof and procedure, which sustain results distinct from what is true. However, questions of procedure are far more susceptible of clear disposition than the effort to seek and evaluate truth, especially as facts are slanted by the adversary process used in creating them, and by the liberal assumption that criminals act individually and autonomously.[12] Participants develop methods of concealing this reality even from themselves.[13]

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10. As to the actual impact of rights of the accused on the criminal justice system, see Robert Weisberg, *Criminal Law, Criminology and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 526 (1992), in which Professor Weisberg states, "There is clear consensus in the empirical studies of Warren-court reforms that the *Miranda* and *Mapp* decisions have had no serious dampening effect on police." *Id.* (citations omitted).

11. *See* GARCIA, THE SIXTH AMENDMENT IN MODERN JURISPRUDENCE: A CRITICAL PERSPECTIVE 113-14 (1992).

12. *See supra* note 10, at 558 (critiquing traditional theories upon which criminal responsibility is based as inadequate).

13. A typical but distressing example to most lay people is the fact that the verdict is incorrect is not, by itself, a cognizable issue on appeal. So long as the verdict has been achieved through proper application of procedural rules and a jury verdict intervenes, even the admission of perjury may not be sufficient to upset the result. *See, e.g.*, Taylor, *Rape and Women's Credibility: Problems of Recantation and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN'S L.J. 59, 66-67 (1987). Thus, the review of criminal cases is informed by the principle of repose as much as it is by factual accuracy.

The goals of law enforcement efficiency and crime control are also poorly served in the adjudicatory processes of the criminal justice system. Efficient law enforcement often means lawless enforcement and the utilization of an adversarial relationship between the citizen and the police officer on the street. Just as clearly, the fact that criminal adversary proceedings have begun bespeaks the failure of crime control, except prospectively. However, courts have been notoriously inept at predicting future dangerousness based upon either the type of crime for which an accused has been arrested or upon the nature of the accused's prior contacts.[14] Moreover, as Professor Weisberg insists, "[W]e have no idea how much, if at all, criminal justice administration affects the crime problem."[15]

Finally, the recent development of adversarial limits on the accused,[16] which purport to intensify factual accuracy within the whole system, suffers from two unexamined assumptions about the criminal trial process. First, the governmental position is presumed to be as committed to truth seeking as the accused party is forced to be.[17] Second, police and prosecutors are counted upon to cultivate and recognize truth from a vantage point outside of the adversary process that fuels their investigation, and of which they are an essential part.

An analogy to the game of poker is instructive here: There are substantive rules (who holds the better hand?), and procedural ones (one need not reveal one's hand unless the stakes have been raised to a point beyond which one is unwilling or unable to go). The first type of rule is

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14. However, the Court has suggested that a pretrial detention statute would not be per se a violation of the Eighth Amendment simply because of the problem of predicting future dangerousness. *See* Schall v. Martin, 467 U.S. 253 (1984). *See also* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 12.3(e) (1992).

15. *See supra* text accompanying note 10.

16. For example, the infusion of ethical considerations and the Model Code of Professional Responsibility into the constitutional determination of effective assistance of counsel is one such limit imposed only on defense counsel. *See* Nix v. Whiteside, 475 U.S. 157 (1986), in which the suspicion by defense counsel that his client would perjure himself on the witness stand and causing counsel to threaten to disclose that proposed perjurious testimony was held constitutionally effective under the Sixth Amendment. *Id.* at 171. Another example is Taylor v. Illinois, 484 U.S. 400 (1988), in which the Court upheld the exclusion of probative, relevant defense evidence for failure of counsel to comply with statutory notice requirements, based upon a judicial integrity ideology. *Id.* at 435. *See* Elkins v. United States, 364 U.S. 206 (1960), which was rejected by the Court as a basis for Fourth Amendment based complaints of police misconduct. *Id.* at 219. *See* United States v. Leon, 468 U.S. 897 (1984). The theory employed by the Court in these two examples encompasses subconstitutional conduct evaluations based upon state law considerations of appropriate behavior for defense counsel.

17. *See Nix*, 475 U.S. at 170 (in which the Court decided a Sixth Amendment claim by explicit reference to ethical standards regarding the proper handling of client perjury).

qualitative and depends almost exclusively upon luck; it is a matter of describing the cards one has been dealt. The second set of rules depends, instead, upon skill and assets; the ability to keep the quality of one's hand a secret while maintaining one's ability to remain in the game and forcing other players to reveal the caliber of their luck. Therefore, the skill of the poker player has almost nothing to do with quality or substance, and a great deal to do with bluff and resources. The object of the game is to remain in it; the player with the better hand, who lacks the means to maintain herself within it, loses.

III. AN EVALUATION OF THE ROLE OF COUNSEL

Similarly, a system propelled by procedure within an adversarial methodology frequently resembles a game rather than a qualitative evaluation of truth. The "game" or "sporting theory" of justice has been denounced since it was first identified and observed.[18] However, the observation has done little to alter the system's investment in the adversarial model, except in cases in which procedural rights threaten to exonerate factually guilty defendants. In that case, access to procedural resources is curtailed as not promoting the Fourth Amendment's paradigm of rights.[19] In the poker game of the criminal courtroom, unqualified access to resources remains limited to the prosecution. Although the right to effective counsel may be seen as a resource afforded the accused, counsel's presence alone is of little use. Counsel is instrumental to the accomplishment of other significant tasks and to the preservation of other rights, for example compulsory process,[20] cross examination,[21] and use of experts.[22] All functions may be severely limited by an indigent defendant's inability to locate exculpatory evidence or to investigate witnesses. For court-appointed counsel, a financial outlay to pursue this type of investigation often will re-

18. Roscoe Pound apparently coined the term. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. 395 (1906) (referring to the civil system). *See also* GARCIA, *supra* note 11, at 113-14, 122-23 (overview of commentators on game theory in criminal adversarial process).

19. Whether one agrees with Professor Loewy or not concerning the description of those rights, procedural or substantive, see *supra* note 7 and accompanying text, certainly access to procedural protections, such as public trial, help to determine whether an underlying substantive right has been violated. *See, e.g.*, Waller v. Georgia, 476 U.S. 39 (1984).

20. The right to call witnesses in one's own defense is guaranteed by the Sixth Amendment, and failure to do so may be a form of ineffective assistance of counsel. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 685 (1984) (failure to investigate and present mitigating evidence at penalty phase of a capital case).

21. *See* Coy v. Iowa, 487 U.S. 1012 (1985).

22. *See* Ake v. Oklahoma, 470 U.S. 68, 74 (1985) (requiring the appointment of psychiatrist "when defendant has made a preliminary showing that his sanity at the time is likely to be a significant factor at trial").

quire a motion to the trial court to justify such expenditures, and perhaps to reveal case theory to the prosecutor before counsel can be certain which theory she is pursuing.[23] Such justification is not required of the prosecutor, whose resources are already in place and not subject to judicial scrutiny.[24] The professional and frequently exclusive function of the prosecutor's office is not reflected in a demand for professionalism in those who represent the accused. Certainly, there are distinct advantages to appointing a cross section of members of the bar to represent indigent defendants. The experience exposes otherwise unsuspecting counsel to the pressures and difficulties of effective criminal representation. It also comports with the professional obligation to represent unpopular clients or causes.[25] However, these are probably not the reasons that such a system is maintained or tolerated.[26] The lack of professional defense counsel has a significant impact upon all criminal defendants.

A professional office is generally supplied with the support staff necessary to mount an effective defense. Investigators, social workers, experts, and student interns all provide access to non-legal or extra-legal functions that benefit all the criminally accused who are aided by the office. The attorneys themselves gain intimate knowledge of the peculiarities of the system within which they labor, and need not gain that knowledge over the bodies and liberty of their first few clients. The availability of experienced attorneys to supervise or question, the ability to keep current with the law as it is handed down, and the goal of improving conditions for all individuals charged with a crime are typical and tangible advantages to representation by a professional defender office. Resources can be committed swiftly and without the prior judicial approval that an individual attorney may require. For example, evidence of police brutality at arrest can be documented immediately upon appointment to a client's case, without the lapse of time that generally attends upon a court appointment. This documentation, by medical examination and photograph, may not have any specific repercussions for that particular client's criminal

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23. *Id.* at 74. While many states and Federal Rule of Criminal Procedure 17 grant subpoena power to the defense ex parte, other states require a record showing of need, thus providing early discovery of potential defense witnesses to the prosecution. Similarly, notice of alibi and insanity defenses may not be wise until defense counsel has investigated those avenues before committing herself to either defense.

24. This may even be said of the Fourth Amendment warrant requirement, whose validity is no longer determined by a recitation of probable cause, but by the good faith of the police officer obtaining it, and which determination is protected by a backed-off standard of judicial review. *See* United States v. Leon, 468 U.S. 897 (1984).

25. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-27 (1983).

26. *See* Moss, *Death, Habeas and Good Lawyers: Balancing Fairness and Finality*, 78 A.B.A. J. 83, 84 (1992) (suggesting that in states where death penalty is most frequently imposed, no state defender system exists).

case if no evidence is obtained as a result of that brutality,[27] but police officers who overreact at arrest can be identified and clients can be advised of their civil remedies. Additionally, police officers whose testimony in similar cases is suspiciously parallel may be confronted with that similarity, because the attorney has access to those files and the attorneys who tried those cases. Counsel has a sound idea of what sort of punishment a crime is worth and is familiar with both the prosecutor and judge to negotiate that result.[28] Client problems with housing, substance abuse, and financial support can be addressed and resolved. Conditions of incarceration including release dates, overcrowding, medical care, and respect for religious dietary requirements may be monitored and improved. Few, if any of these important relationships between the citizen accused of crime and law enforcement are recognized as part of effective criminal representation or are contained within the Supreme Court's definition of what constitutes a criminal "case."[29] The discrete and atomistic view of the client as a "case"[30] ignores these important societal concerns, and the circumstances under which indigent defendants confront law enforcement on a routine basis. Certainly, not all defender operations operate with all of these resources in place, but then, neither do all prosecutions. Of course, individual appointed counsel may provide many of these services, particularly if individual counsel specializes in criminal cases, but she will have to develop her own foundations and sources within a very limited framework. She will also have to worry about getting paid for the time she commits to these endeavors for her clients.

Moreover, current United States Supreme Court decisions describe a parsimonious view concerning what constitutes a criminal case and thus triggers the Sixth Amendment right to counsel.[31] This further circumscribes the availability of the benefit of counsel for those being investigated for or suspected of criminal activity when no adversary proceedings

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27. The evidentiary product of a beating, such as a statement, rather than the beating itself, is the only basis upon which the underlying brutality is relevant to a client's separate criminal charge. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966).

28. Mandatory and guideline sentencing complicate this process, but professional defense counsel also knows to what extent discretion remains in the sentencing decision and may still achieve a reasonable outcome in plea bargaining.

29. *See supra* notes 6-10 and accompanying text.

30. For a thorough and thoughtful analysis of the problems inherent in an atomistic, case oriented view of criminal representation, see Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670 (1992).

31. *See* McNeil v. Wisconsin, 111 S. Ct. 2204, 2205 (1991) (holding that the Sixth Amendment right to counsel is "offense specific" and is not triggered by custodial interrogation on another charge).

have yet begun. Recent decisions in *McNeil v. Wisconsin*,[32] and *Moran v. Burbine*[33] demonstrate the instability that has infected the right to counsel, which right, if fully bestowed as early as possible, threatens to alter substantive outcomes and to improve the hand dealt the defendant. This awareness has explicitly informed those decisions. In the 1991-92 term, however, the Court granted relief in two important decisions under conditions that may provide fertile language for subsequent petitioners, and may indicate a new model for presenting claims in this climate.

IV. Discovering and Describing a New Model of Representation

The initial problem defense counsel must negotiate, which affects representation throughout the criminal process, is the limitation on resources, which, if made available, could alter decisionmaking at the trial level. Two observations immediately interpose themselves between the effort to revive rights discourse and its functional utility for the accused criminal. First, in a system whose efficient functioning in large part depends upon the failure of defendants to assert the panoply of rights theoretically available to them,[34] the demise of rights-based analysis may not be as catastrophic in practice as it may initially appear. Second, however, the right to have effective counsel mediate for the individual through a complicated criminal justice system stands apart from the specific rights that exist for defendants largely in their failure to demand or exercise them. The presence of counsel is required for the intelligent exercise or waiver of procedural rights, as well as for the translation of historical facts into mitigating or exonerating proof. The fate of the individual accused of crime depends upon the quality of the representation she receives. Were that representation unfettered by monetary and judicial constraints within a system in which it is estimated less than seven percent of all convictions are obtained as a result of trial by jury,[35] the quality of that representation might improve tremendously for the great majority of accused criminals who are not at a "critical stage."[36] Defense counsel

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32. *Id.* at 2207 (Justice Scalia defines the right to counsel as "offense specific" and incapable of being invoked until the initiation of adversary proceedings).

33. 475 U.S. 412, 413 (1986) (the effort of a defender appointed on one case to curtail custodial interrogation of her client in another case in the absence of her client's request for counsel was held not to offend *Miranda*, the Sixth Amendment right to counsel, or Due Process).

34. *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981).

35. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?* 97 HARV. L. REV. 1037, 1047 (1984); *see also* P. NARDULLI, J. EISENSTEIN & R. FLEMING, THE TENOR OF JUSTICE 203 (1988).

36. The term "critical stage" of the proceedings appears to have derived from Coleman v. Alabama, 399 U.S. 1, 8 (1970) (in which the preliminary hearing was held to be such a

must change the language of argument to reflect the skills and tasks that actually compose effective representation, most of which occur outside of the courtroom. This will exact significant restructuring of rights language and demands to the appellate courts. Certainly, the discourse of rights will not diminish in the courtroom, as it still provides a powerful and legitimate framework for the description of facts.

The next problem confronted by practitioners who take appeals for their criminal clients is the relentless factual detriment under which those appeals operate. Clients who are acquitted at trial do not appeal, since the state is prevented from doing so by the double jeopardy clause.[37] Therefore, the substantive issue of guilt demonstrated to appellate courts has already been resolved against the appellant, and all inferences and burdens shift completely to benefit the verdict winner below.[38] The impact of this fact of appellate life cannot be underestimated. Issues concerning rights violations of defendants have little legitimacy when the system is perceived to have dispatched its responsibility of discovering truth when the availability of procedural rights are granted to the accused at trial and are limited on appeal to those who can attach them to a genuine claim of innocence.[39] Thus, appellate courts only see criminal defendants whose guilt has been established below beyond a reasonable doubt, and the courts have little motivation to dissect the method by which that conclusion has been achieved.

Strategies to offset this jaded view of the criminal process suggest themselves. The first is to determinedly maintain that the process of trial in reality has very little to do with uncovering truth,[40] and the second is to expose the manner in which the prosecution benefits from the inherent inaccuracy in any criminal trial. This second strategy requires a particularized observation concerning the prosecution's exploitation of assumptions, inferences, and uses of evidence that undermine or unbalance efficient and reliable factfinding.[41] These benefits given the prosecution may

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stage). Generally, the term refers to judicial adversary proceedings in which significant rights may be compromised without the presence of counsel.

37. *See* Karlan, *supra* note 28, at 710-11.

38. Laura Gardner Webster, *Building a Better Mousetrap: Reconstructing Federal Entrapment Theory From Sorrels To Mathews*, 32 ARIZ. L. REV. 605 (1990).

39. Federal habeas corpus review of state court convictions requires, to avoid arguments of procedural default, a genuine miscarriage of justice, or a claim of actual innocence. *See* Sawyer v. Whitley, 112 S. Ct. 2514 (1992).

40. *See supra* notes 11-17 and accompanying text.

41. *See, e.g.*, Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 411-17 (1992) (demonstrating that decisions creating enhanced admissibility of evidence and new forensic evidence almost always inhere to the benefit of the party with the burden of proof, that is, the prosecution).

be based almost entirely upon state law, including state law of discovery, evidence and disciplinary rules, and jury instructions.

The first strategy, therefore, is to preserve all independent and adequate state grounds for relief by explicitly identifying the advantages the prosecutor calls upon in bringing charges against one's client, and how an early start from an adversarial point of view, without judicial overseeing, is an overwhelming advantage. During the prosecutor's early start, facts that contradict or threaten factual guilt are not pursued, or when uncovered, are safely misinterpreted or ignored.[42] The failure of the United States Supreme Court to measure prosecutorial fairness against a federal constitutional standard[43] requires application of a state constitutional foundation and the infusion of local disciplinary rules and standards as a method of measuring and controlling prosecutorial misconduct, particularly when the Supreme Court "continues to demand the highest ethical standards from criminal defense lawyers."[44]

Also, state courts may be concerned more with their own supervisory power and the stability in the law of the jurisdiction, and therefore, less likely to conform to changing Supreme Court ideology and vacillating results, which currently afflict Supreme Court constitutional minimums in criminal procedure. Thus, while stare decisis may not move the High Court, it has continued vitality in state appellate courts.

Another strategy concerning the balancing of the defendant's rights against effective law enforcement can be identified in the decisional law emerging from within the United States Supreme Court.[45] Although no one strategy unifies the Court, classification and understanding of these methods of evaluation are crucial for the effective representation of individuals accused of crime. However, that the discourse of rights has lost the normative force it once claimed in courts that review the events which comprise legal guilt, and has been replaced by a language measuring efficiency and accuracy of result,[46] cannot be overlooked. Thus, rights-based claims, which do not appear to promote accurate factfinding, have less

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42. Of course, the prosecution has the obligation of turning over exculpatory evidence demanded by the defense, Brady v. Maryland, 373 U.S. 83, 87 (1963), but the prosecution has no obligation to develop that evidence.

43. *See, e.g.*, Darden v. Wainwright, 477 U.S. 168, 196 (1986) (the prosecutorial closing argument characterizing the defendant as an "animal" was held harmless error). *See also* Arizona v. Fulminante, 111 S. Ct. 1246 (1991) (the admission of an involuntary confession may be measured against harmless error rule) (dicta).

44. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 404 (1992).

45. Probably the best example of this balancing appears in the opinion of Justice O'Connor in Moran v. Burbine, 475 U.S. 412 (1986). However, the effect is like comparing apples and oranges, and establishing a presumptive preference for one over the other.

46. *See* Ross v. Moffitt, 417 U.S. 600 (1974), in which Chief Justice Rehnquist observes that "[d]espite the tendency of all rights 'to declare themselves to their logical extreme,' "

significance after the trial has occurred. In the United States Supreme Court, this mechanism has been forged by the infusion of a Fourth Amendment analytical model into Fifth and Sixth Amendment claims.[47] The structure in which questions about procedural rights are to be framed, and the ultimate success of a particular claim will require responsiveness to the techniques of the Court in refashioning the substance of the rights once conceded as fundamental to the criminally accused.

The possibility of a positive response of the Court in extending additional consideration to an accused has recently occurred when the accused could demonstrate that the prosecution already enjoys that consideration. The notion of parity or symmetry moves the Court in cases in which rights challenges do not. This trend, apparent in the earlier cases of *Ake v. Oklahoma*[48] and *Taylor v. Illinois*,[49] is as likely to grant symmetrical relief to the prosecutor as to the defense. In *Ake* the Court held the denial of a demand for a defense psychiatric expert to counter the state's expert violated due process.[50] In *Taylor*, conversely, the Court held the failure of defense counsel to comply with state statutory discovery requirements, which resulted in the suppression of a defense witness, did not violate the Sixth Amendment Compulsory Process Clause.[51]

A review of the 1991-92 term of the United States Supreme Court in the field of criminal law and procedure revealed additional concern and response to a symmetrical approach to the granting of relief. The Court decided two important cases based upon this model of the criminal process. The first case, *Morgan v. Illinois*,[52] established the defense right to "reverse-*Witherspoon*"[53] challenges for cause in capital jury selection. *Witherspoon* itself has come to stand for the proposition that the state may exclude from a death qualified jury any panel member whose conscientious opposition to the death penalty would cause that person to automatically reject capital punishment. *Morgan* establishes that the defense may similarly exclude all panel members who would automatically impose the death penalty upon a finding of guilt.[54] The right explicated by Jus-

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(quoting, I think, Cardozo, but the citation is omitted in the original), "there are obviously limits" to which all rights extend. *Id.* at 611-12.

47. It has long been observed that Fourth Amendment litigation utterly lacks a controlling vision. *See* text accompanying *supra* notes 5-7.

48. 470 U.S. 68 (1985).

49. 484 U.S. 400 (1988).

50. 470 U.S. at 69.

51. 484 U.S. at 401. U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." *Id.*

52. 112 S. Ct. 2222 (1992).

53. Witherspoon v. Illinois, 391 U.S. 510 (1968).

54. 112 S. Ct. at 2224.

tice White is the requirement of jury impartiality flowing from the Due Process Clause, but the underpinning of the opinion is to grant to the defense the converse of the prosecution's *Witherspoon* exclusion.[55]

The second case concerns the imposition of an obligation upon defense counsel that had been imposed upon the prosecution in *Batson v. Kentucky*.[56] In *Batson* the Court required prosecutors to use peremptory challenges in jury selection in a racially neutral manner.[57] Also, in *Georgia v. McCollum*[58] the court decided that criminal defense attorneys, who were found to be state actors in this context, are required to employ peremptory challenges in a non-discriminatory way.[59]

Both of these cases signify the principles of parity and symmetry in evaluating rights and responsibilities in the area of constitutional criminal procedure. Given the animosity the Court has displayed lately towards rights discourse, defense counsel would be well advised to note the discourse that in fact moves the Court and to address rights issues within that framework.

It is impossible to predict the productivity that symmetrical claims may induce in the United States Supreme Court. Given that prosecutors and defense attorneys have utterly different roles and responsibilities, the attempt to place them on the same footing is somewhat devious. However, with a Court unwilling to confront the severe detriment under which all criminally accused persons struggle, the identifiable haven of symmetrical resources, along with a revivified approach based upon state law may help to reduce that detriment. Until the Court becomes resensitized to the reality of the adversary system, this may be the best that can be achieved.

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55. *Id.*
56. 476 U.S. 79 (1986).
57. *Id.* at 80.
58. 112 S. Ct. 2348 (1992).
59. *Id.* at 2357.