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The Right to Two Criminal Defense Lawyers

by Bruce A. Green*

I. DISRUPTIVE INNOVATION IN CRIMINAL DEFENSE

“What can courts, legislators, or criminal defense lawyers themselves do to seriously change criminal defense practice in a manner that significantly benefits criminal defendants and promotes justice?” That question was posed to the participants in an August 2017 SEALS discussion group and Mercer University School of Law’s 2017 Symposium on “disruptive innovation in criminal defense.” The implied premise of the question is that aspects of criminal defense should be fixed or can be improved—and in radical ways.

The question of disruptive innovation provides an occasion for identifying deficiencies and weaknesses in contemporary criminal defense practice, and because defense lawyers do not work in isolation, deficiencies in the criminal process as it relates to criminal defense

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1. A disruptive innovation has been defined as “a product or service that most initially see as inferior—until successive improvements end up displacing established products or entire industries.” Joan C. Williams, Disruptive Innovation: New Models of Legal Practice, 67 Hastings L.J. 1, 4–5 (2015). A possible example in the context of the delivery of legal services is the use of machine learning technologies that can displace humans in document review or legal research to significantly lower costs. See Shannon Spangler, DISRUPTIVE INNOVATION IN THE LEGAL SERVICES MARKET: IS REAL CHANGE COMING TO THE BUSINESS OF LAW, OR WILL THE STATUS QUO REIGN? (2014) (ebook), https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2014_aba_annual/written-materials/disruptive_innovation.authcheckdam.pdf. Although the term is ordinarily applied in business contexts, some believe that the legal industry is facing imminent disruption. See, e.g., Clayton M. Christensen et al., Consulting on the Cusp of Disruption, Harv. Bus. Rev., Oct. 2013, at 12 (“The leaders of the legal services industry would once have held that the franchise of the top firms was virtually unassailable, enshrined in practice and tradition—and, in many countries, in law. And yet disruption of these firms is undeniably under way.”).
representation. The question presents a challenge to think "outside the box"—even if unrealistically, fancifully, idealistically, or hopefully.

In that spirit, this Article proposes the following innovation: Criminal defendants who have a right to appointed counsel should be assigned two defense lawyers who would interact with each other, the client, and others, but who would serve essentially different functions.

While the typical legal academic writing starts with a problem and builds up to a proposed solution, this one reverses the order. It begins in Part II by outlining the proposal to divide the criminal defense function between two lawyers. Then, Parts III and IV identify the problems addressed by, and the anticipated objections to, this innovation. Part V concludes with some thoughts about the utility of the analysis, fanciful though it may initially seem to be.

II. A PROPOSED DISRUPTIVE INNOVATION: A RIGHT TO TWO LAWYERS

This Article's proposed disruptive innovation is that indigent defendants be assigned two lawyers—each of whom would have primary responsibility for different functions. The "settlement lawyer" would take the lead outside judicial proceedings, undertaking responsibility for the counseling and negotiating roles. The "trial lawyer" would be the principal advocate. These roles correspond to the different but interconnected processes—plea bargaining and trial—by which most criminal prosecutions in the United States are resolved.

The proposal is "innovative" only to a degree. The idea that two or more lawyers would represent a client in the same matter is hardly novel. Lawyers commonly serve as co-counsel in litigation, particularly in civil litigation and white-collar criminal litigation. The criminal defense lawyers who served as co-counsel on O.J. Simpson's successful murder defense—the so-called "dream team"—prominently displayed the utility of collaboration among co-counsel.2

Particularly in the work of law firms, collaboration among lawyers is the norm, not the exception—indeed, collaboration among lawyers with different expertise (and, often, different hourly billing rates) may be a law firm's selling point.3 For example, a senior lawyer (often the "relationship partner") may assume ultimate responsibility for the representation, and for communicating with the client while delegating


much of the other work. Or a senior lawyer will take primary responsibility for certain important tasks—for example, counseling the client, settlement negotiations, and courtroom appearances—and oversee subordinate lawyers who undertake various other tasks, such as legal research, drafting, and depositions.

Co-counsel relationships among private lawyers in different firms are also common. For example, two solo practitioners may join forces on a large matter, or a lawyer conducting most of the representation independently may bring another lawyer into the matter for a discrete task, such as to draft motions or to consult on an issue where the second lawyer has particular expertise. There are many other ways in which work and responsibility can be divided among co-counsel.

Perhaps the nearest analogue to this Article’s proposal is the occasional employment of “settlement counsel” in civil litigation. However, the settlement lawyer in the criminal context would have a larger counseling function and would have greater independence. One might also analogize to the British criminal justice system, where indigent defendants are assigned both a barrister, who conducts the trial, and a solicitor, who consults with the defendant and “instructs” the solicitor.

The difference here is in how the roles would be divided. Unlike the British barrister, the U.S. trial lawyer would be responsible for pretrial investigation. In the U.S. criminal context, courts occasionally appoint a second lawyer for the purpose of advising the defendant whether to waive


the primary lawyer's conflict of interest, but this is a far more limited counseling role than contemplated here for the lawyer who is not the trial advocate.

In the proposed two-lawyer criminal-defense scheme, the settlement and trial lawyers would interact with the defendant in different ways. The settlement lawyer would interview the defendant to determine his concerns and preferences and to gather information relevant to a plea bargain or another negotiated disposition of the case. Based on information from the client, the trial lawyer, and the prosecutor, the settlement lawyer would advise the defendant about his options and negotiate with the prosecutor regarding the disposition. The trial lawyer, in the advocacy role, would interview the defendant to gather information relevant to a defense, seek discovery from the prosecutor by informal and formal means, conduct pretrial litigation and, if the case is not otherwise resolved, represent the defendant at trial.

The two lawyers would interact with each other as co-counsel. In order to advise the defendant effectively about the prospects of an acquittal at trial, which would ordinarily be an important consideration in deciding whether to plead guilty, the settlement lawyer would have to learn from the trial lawyer what has transpired in the investigation, trial preparation, and pretrial phase of the case, and how the trial lawyer evaluates prospective outcomes if the case is tried. If trial counsel has to make arguments regarding pretrial release or sentencing, he may benefit from information gleaned by the settlement lawyer in the course of counseling the client. The settlement lawyer would also share other information received from the client or the prosecutor that might be relevant to the trial lawyer's investigation and advocacy. The two lawyers would be available to toss around ideas and to make suggestions to each other and, where necessary, to fill in for each other, as in other co-counsel relationships.

The two lawyers would each interact with the prosecutor, but generally in different ways. The settlement lawyer would have the principal responsibility, where authorized by the client, to solicit a plea offer and to negotiate any disposition of the case. This could include making a pitch for why mitigating factors justify leniency. Based on information from the trial lawyer, the settlement lawyer might also argue why the facts of the case, or the possibility of an acquittal at trial, justify a more favorable disposition. The settlement lawyer's relationship with the prosecutor need not be adversarial and, where advantageous, could be cooperative and cordial since leniency for the defendant could be

put forth in an appeal to the prosecutor's presumed interest in "seeking justice."

The trial lawyer, meanwhile, could maintain a more traditional adversarial relationship with the prosecution in the course of preparing and defending the case.

The two lawyers would also interact differently with the court. As noted, the trial lawyer would play the principal advocacy role. This would include making arguments about pretrial release, filing discovery and other pretrial motions, conducting the defense if the case goes to trial, and making any sentencing arguments. Insofar as the defendant opts to plead guilty, the settlement lawyer would have a responsibility to ensure that the decision is well-informed. Ordinarily, it might be unnecessary for settlement counsel to join trial counsel at guilty plea proceedings, which can be largely pro forma once the defendant has made an informed decision to plead guilty. But the settlement lawyer would appear in court when beneficial, such as when the defendant remains unresolved and needs advice in the courtroom, when necessary to raise questions about the defendant's capacity to plead guilty, or to interject other concerns, including the inadequacy of the pretrial investigation or of pretrial discovery, that impair the defendant's ability to make an adequately informed decision.

A right to two lawyers—like other disruptive innovations—would have to be established and developed over time. Initially, the concept would have to be proven. Public defenders' offices might initially experiment by pairing their own lawyers to serve in the respective roles. In jurisdictions with multiple public defenders' offices, lawyers from different offices might be paired. If the concept proves promising, these offices might expand the experiment while making changes to eliminate problems and improve the co-counsel relationship. It would make sense to begin the experiment in felony cases, and perhaps in more serious felony cases. Eventually, if proven successful, the concept could be implemented by courts with authority over indigent defense systems or by legislatures establishing laws governing indigent defense. Understandings regarding the respective lawyers' roles and responsibilities would be refined over time.

III. WHY TWO LAWYERS ARE BETTER THAN ONE

The quality of criminal defense matters. In some cases, it matters to the outcome for the defendant: the quality of the defense can influence whether the prosecutor pursues or drops criminal charges or diverts the case to a problem-solving court; whether the defendant is acquitted or convicted at trial; or the length of the defendant’s sentence or the harshness of other consequences of a conviction.\(^\text{10}\) Wholly apart from the ultimate outcome, the quality of criminal defense matters to whether criminal defendants understand what is happening to them during the criminal process, whether they perceive that they have a lawyer on their side whom they can trust, and whether they can make well-advised decisions. From the public’s perspective, the legitimacy of the criminal process turns in part on whether those accused of a crime receive competent representation.

There is voluminous literature concerning the inadequacies of indigent criminal defense representation and its consequences.\(^\text{11}\) The most frequent criticisms are that, in many or most jurisdictions, indigent criminal defense is underfunded,\(^\text{12}\) and consequently, public defenders’


11. See, e.g., Sheila Martin Berry, “Bad Lawyering”: How Defense Attorneys Help Convict the Innocent, 30 N. Ky. L. Rev. 487, 502 (2003) (“Innocent people continue to be convicted every day, and bad lawyering in every form facilitates many of these convictions.”); Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835, 1836 (1994) (“Poor people accused of capital crimes are often defended by lawyers who lack the skills, resources, and commitment to handle such serious matters . . . . It is not the facts of the crime, but the quality of legal representation, that distinguishes this case, where the death penalty was imposed, from many similar cases, where it was not.”).

12. See, e.g., Jessica Hafkin, A Lawyer’s Ethical Obligation To Refuse New Cases or To Withdraw from Existing Ones When Faced with Excessive Caseloads That Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants, 20 Geo. J. Legal Ethics 657, 658 (2007) (“[M]ost state indigent defense systems across the country are consistently operating in crisis mode, barely able to function and increasingly unable to handle the number of cases that cycle through those systems each day.”); Richard Klein, The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 Hastings Const. L.Q. 625, 658 (1986); Ronald F. Wright, Parity of Resources for Defense Counsel and the Reach of Public Choice Theory, 90 Iowa L. Rev. 219, 221 (2004) (“Year after year, in study after study, observers find
caseloads are too heavy for lawyers to give cases and clients the time they need.\textsuperscript{13} This is irrefutably a dire problem, and it risks dwarfing all others.

Wholly apart from the adequacy of funding, critics have targeted the manner in which indigent defense is funded and structured,\textsuperscript{14} the manner in which public defenders' offices allocate scarce resources,\textsuperscript{15} and the culture of public defenders' offices.\textsuperscript{16} Other perceived deficiencies, which may or may not be rooted in how indigent criminal defense is funded and structured, include that (1) some defense lawyers "burn out" remarkably poor defense lawyering that remains unchanged by this constitutional doctrine, and they point to lack of funding as the major obstacle to quality defense lawyering."

\textsuperscript{13} See generally Mary Sue Backus & Paul Marcus, \textit{The Right to Counsel in Criminal Cases, A National Crisis}, 57 HASTINGS L.J. 1031, 1035–36 (2006) (discussing examples of public defender offices which consistently provide inadequate defense, as well as entire indigent defense systems that have been "viewed as essentially incapable of preserving fundamental constitutional rights"); Peter A. Joy, \textit{Boots on the Ground: The Ethical and Professional Battles of Public Defenders: Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads}, 75 MO. L. REV. 771, 771 (2010) ("In state after state, public defenders face overwhelming caseloads that inevitably make quality legal representation for clients much more of a dream than a reality."); Deborah L. Rhode, \textit{Whatever Happened to Access to Justice?}, 42 LOY. L.A. L. REV. 869, 894 (2009) (footnote omitted) ("Annual caseloads for public defenders can range between 500 and 900 felony matters or over 2,000 misdemeanors. Such workloads vastly exceed the standards of the National Advisory Commission on Criminal Justice, which set ceilings of 150 felonies and 400 misdemeanors.").


or otherwise lack motivation, some are inadequately trained, some cannot relate to their clients or win their clients' trust, (4) some give in to pressure from the judges, legislators, or executive officials controlling their appointment, and (5) some focus almost exclusively on the penal outcome of cases (the length of prison sentences) to the exclusion of the "whole person"—such as a defendant's underlying mental health issues, a defendant's interrelated legal and social challenges, and the nonpenal implications of a conviction. Scholars and

17. See Charles J. Ogletree Jr., Beyond Justifications: Seeking Motivations to Sustain Public Defenders, 106 HARV. L. REV. 1239, 1241 (1993) ("The phenomenon of burnout is widespread and can be particularly troubling when it undermines our commitment to the representation of criminal defendants, which in our justice system is a constitutional, if not a moral, imperative. The loss of public defenders to burnout threatens the ability of the system to fulfill its commitment to these ideals."); Abbe Smith, Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender, 37 U.C. DAVIS L. REV. 1203, 1205 (2004) (describing young lawyers who left indigent defense practices because "they were burned out, worn out, emotionally spent"); Abbe Smith & William Montross, The Calling of Criminal Defense, 50 MERCER L. REV. 443, 532-33 (1999) ("Public defenders burn out for many reasons. The offices in which public defenders work can be dreary, resources for defenders can be woefully inadequate, and public defenders are paid substantially less than many of their law school classmates. Some public defenders get tired of the constant pressure to plea bargain cases, and some get tired of difficult and demanding clients. Others get 'sick of representing so many bad people.'").


20. See, e.g., Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 HARV. L. REV. 2463, 2480 (2004) ("Judges and clerks put pressure on defense counsel (especially public defenders) to be pliable in bargaining. Repeat defense counsel often must yield to this pressure in order to avoid judicial reprisals against clients and perhaps to continue to receive court appointments."); Eve Brensike Primus, Culture as a Structural Problem in Indigent Defense, 100 MINN. L. REV. 1769, 1789-91 (2016) (discussing indigent defense lawyers' lack of independence).

practitioners have proposed innovative ways (aside from increased funding) to address the problems of indigent defense, including ways of freeing up resources.

This Article does not attempt to tackle all of the problems of indigent defense, or even the most serious problems. But its proposal to divide defense representation between two lawyers, as a potential disruptive innovation, provides an occasion to consider eight problems associated with indigent defense other than underfunding and excessive caseloads. The problems addressed here are not necessarily caused only by underfunding or entirely solved by increased funding.

First, the division of roles would address one of the most frequent criticisms of indigent criminal defense—namely that defense lawyers often encourage defendants to plead guilty without first conducting the investigation and preparation necessary to ascertain the likelihood of acquittal and to preserve the possibility of a trial defense. It is assumed that competent investigation must ordinarily be undertaken before advising the defendant to plead guilty. There are exceptions where a


23. See, e.g., Roger A. Fairfax, Jr., Searching for Solutions to the Indigent Defense Crisis in the Broader Criminal Justice Reform Agenda, 122 YALE L.J. 2316 (2013) (maintaining that “smart on crime” reforms will reduce criminal defense costs); Erica J. Hashimoto, The Price of Misdemeanor Representation, 49 WM. & MARY L. REV. 461 (2017) (proposing that states conserve resources for felony defense by limiting the statutory right to counsel to misdemeanor cases where, because there is a risk of imprisonment, there is a constitutional right to counsel, and by reducing the number of misdemeanor statutes and prosecutions where imprisonment is a possibility).


quick resolution may be justified, but more often, when criminal defense lawyers encourage speedy pleas, they do so as a way of managing their caseloads, in response to outside pressure from judges or others, or for other reasons unrelated to the defendant's best interests. "Meet 'em and plead 'em" is said to be standard practice in some jurisdictions. The defendant may be disadvantaged as a result because the decision to plead guilty is not adequately informed and may be improvident, or because the defendant loses the negotiating leverage created by a credible threat to defend the case at trial.

A settlement lawyer who has no responsibility for the trial will not have the same incentive to encourage quick guilty pleas or to encourage guilty pleas at all. While this lawyer's workload may be somewhat reduced if the defendant pleads guilty, the self-interest of the settlement lawyer will be far less than the criminal defense lawyer in the current regime for whom a guilty plea avoids pretrial investigation, motion practice, and potentially a lengthy and undesired trial. Settlement counsel would be in a position to offer advice that is less self-interested, and therefore more reliable and credible, regarding whether to plead guilty or to pursue or accept a disposition other than trial. At the same time, the trial lawyer would not have an incentive to shirk while awaiting a guilty plea, because that lawyer's income would derive entirely from time spent investigating and preparing for trial or in conducting trials.

26. See Malcolm M. Feeley, The Process is the Punishment: Handling Cases in a Lower Criminal Court (1979) (observing that defendants in criminal court often plead guilty to avoid the burden of having to return to court).


28. See, e.g., Molly J. Walker Wilson, Defense Attorney Bias and the Rush to Plea, 65 Kan. L. Rev. 271, 295 (2016) ("The practice of pleading out a client quickly and with little investigation or deliberation or even communication has been dubbed, 'meet 'em and plead 'em.'").

29. See, e.g., Wilson, Defense Attorney Bias, supra note 28, at 275 (noting that even in the case of guilty defendants, "[c]riminal defendants likely underestimate the opportunity costs associated [with] plea deals—namely, giving up the right to force the prosecutor to prove her case . . . . [T]he 'discount' offered with a plea is often close to what the defendant would receive at trial anyway, in which case the defendant would fare best by going to trial.").

30. For a discussion of the potential role of self-interest in the work of criminal defense attorneys, see Tigran W. Eldred, Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases, 65 Rutgers L. Rev. 333, 351 (2013) ("[A] lawyer whose primary focus is on his or her personal self-interest in deciding how to represent clients can be expected to engage in virtually no investigation on cases.").
Second, the assignment of two lawyers would make each other more accountable. Like a British solicitor, the settlement lawyer would be able to serve as the defendant's agent or intermediary in evaluating, overseeing, and explaining the trial lawyer's work. As the client's intermediary in dealing with trial counsel, settlement counsel would have the legal sophistication to evaluate the quality of trial counsel's investigation, motion practice, and trial preparation and could intervene when trial counsel does not appear to be conducting necessary and competent work. The trial lawyer, in interacting with the settlement lawyer and forming views of whether that lawyer is diligently performing the counseling and negotiating functions, could serve a comparable function. The lawyers' respective roles would be analogous to corporate in-house counsel retaining and overseeing outside counsel to handle litigation or to the occasional role of a general outside counsel for a party retaining a litigator. In the medical profession, the role might also be analogized to that of a primary care physician interacting with a patient's surgeon.

This oversight function would fill a significant regulatory gap. Complaints about the quality of criminal defense lawyers are common. But it is difficult to make defense lawyers better, in part because of the dearth of meaningful oversight, especially for defense lawyers not receiving ongoing training and supervision in public defenders' offices. Although criminal defendants are technically the principals in the attorney-client relationship, they do not have a realistic ability to

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31. See Sieberson, Two Lawyers, supra note 4, at 31 (noting "the role of in-house counsel who monitors the work of an outside attorney" and "the client's retention of an outside firm to monitor and coordinate the efforts of other outside firms"). For another context in which one lawyer is obligated to oversee another's work, see Scott R. Larson, P.C. v. Grinnan, 2017 Colo. App. LEXIS 766, at *14–19 (June 15, 2017) (holding that as a condition of certain fee sharing arrangements among lawyers, one lawyer must assume "ethical responsibility" and malpractice liability for the other's work).

32. See, e.g., Bruce Green, Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment, 78 IOWA L. REV. 433, 491 (1993) ("In the states where assigned lawyers do not necessarily specialize in the defense of criminal cases, the assignment of unqualified attorneys appears, by virtually all accounts, to be a common occurrence."); J. Gregory Mermelstein, Ineffective Assistance of Counsel Claims: Toward a Uniform Framework for Review, 50 Mo. L. REV. 651, 651 (1985) ("Surveys indicate that judges believe at least one tenth of the lawyers in practice today are ineffective and harmful to their clients' cases.") (citing Schwarzer, Dealing with Incompetent Counsel—The Trial Judge's Role, 93 HARV. L. REV. 693, 694 n.7 (1980)).

ascertain, evaluate, and direct their lawyers’ investigative and preparatory work. For better or worse, they are at their defense lawyers’ mercy. Trial judges are also poorly situated to meaningfully oversee the quality of defense lawyers’ pretrial efforts, and they typically do not credit defendants’ complaints. Jennifer Laurin highlighted the problem of defense lawyers’ lack of accountability and has proposed accumulating and analyzing data about their work as one way to promote accountability. The proposal here—to have each lawyer oversee the other—is lower-tech and more old-fashioned. Lawyers would be in a position to critique their counterparts’ work, to encourage those who fall short to work harder or to undertake necessary study and training, and to present credible complaints to the court when those efforts are plainly deficient.

Third, the proposal would address problems caused by the isolation and insularity of criminal defense lawyers, many of whom are solo practitioners working alone on their cases. Generally, one can assume that two heads are better than one. Particularly where the trial lawyer does not otherwise discuss the case with colleagues, there is a risk of misjudging the case, overlooking problems, and missing options. The quality of defense work would be improved if a lawyer must articulate to co-counsel how the defense is proceeding and why. The consultative process would make the trial lawyer more deliberate. The settlement lawyer can serve as a sounding board while also raising relevant questions about the trial lawyer’s strategy and course of action. The trial lawyer can provide a comparable service to the settlement lawyer with respect to negotiation strategy.

Fourth, the opportunity to consult with two lawyers who oversee each other and offer independent perspectives would, for some clients, promote client trust. Generally, making the lawyers responsible to

34. See generally Lindsay R. Goldstein, Note, A View From the Bench: Why Judges Fail to Protect Trust and Confidence in the Lawyer–Client Relationship—an Analysis and Proposal for Reform, 73 FORDHAM L. REV. 2665 (2005).
36. James M. Anderson & Paul Heaton, How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes, 122 YALE L.J. 154, 197–200 (2012) (maintaining that public defenders’ offices achieve better results than appointed counsel because they are not insular—that lawyers in a team are less error-prone and less likely to erroneously assess the strength of a case, and more likely to keep up with new strategies and changes in the law).
37. Criminal defendants’ mistrust of their assigned counsel is a recurring theme in the professional literature. See, e.g., Jones v. Barnes, 463 U.S. 745, 761 (1983) (Brennan, J., dissenting) (“It is no secret that indigent clients often mistrust the lawyers appointed to represent them.”).
oversee each other would provide some assurance to the client that they are providing diligent representation. In particular, where the trial lawyer is proceeding in a reasonable fashion, the settlement lawyer's meetings with the defendant, in which the settlement lawyer describes and explains the trial lawyer's work, would bolster the defendant's confidence in trial counsel.

Fifth, the division of responsibility would enable each lawyer to serve in one role without some of the limitations that result from the other role. In some jurisdictions, individual or institutional relationships between defense lawyers and prosecutors are mistrustful or even hostile. The lack of cooperation can undermine criminal defendants' interests, particularly in the plea bargaining context. Reducing antagonism may benefit defendants, given the powerful role of the prosecutor's office in the charging and plea bargaining process—a role that Judge Lynch has likened to that of an administrative agency. Problem-solving courts offer a model of a cooperative relationship between prosecutors and defense lawyers that is generally thought to benefit defendants but that has not been replicated in ordinary criminal courts, where the lawyers maintain adversarial roles.

The division of labor allows the respective defense lawyers to maintain different relationships with the prosecutors. As a negotiator, settlement counsel could cultivate a positive, cooperative, nonthreatening relationship with prosecutors since settlement counsel would not be in the antagonistic relationship with the prosecutor characterizing adversarial relationships in criminal cases. Over time, settlement counsel might socialize prosecutors, in the context of plea bargaining, to themselves play a less adversarial role and a more judicial one. At the same time, trial counsel—particularly those who serve exclusively in this role—would be freer to conduct adjudicative proceedings aggressively, with less fear that any resulting antagonism will disadvantage future

38. See, e.g., George E. Tragos, Prosecutors, Know Your Criminal Defense Lawyer, 29 STETSON L. REV. 199, 201–02 (1999) (“Unfortunately, a minority of prosecutors do not view defense counsel as performing an ethical, necessary, and constitutional function. For those prosecutors, the defense lawyer is the enemy—no better than the individual they defend, and certainly a co-conspirator.”).


40. Problem solving courts, such as mental health and drug courts, seek to address the problems giving rise to criminal conduct rather than to adjudicate criminal charges. See Bruce J. Winick, Therapeutic Jurisprudence and Problem Solving Courts, 30 FORDHAM URB. L.J. 1055, 1059–60 (2002). These courts typically require the cooperation of the judge, prosecutor, and defense attorney to ensure defendants' compliance with treatment or rehabilitation plans. See, e.g., Bobby Yu, The Case for Experimental Problem-Solving Courts: Rehabilitation Through Behavioral Modification Programs, 55 ARIZ. L. REV. 35, 36, 40 (2013).
clients. This is not to say that lawyers conducting plea negotiations should not be hard-hitting or that trial lawyers should be uncivil; the point is simply that each lawyer may be more effective if unshackled by expectations or perceptions derived from the other’s lawyering role.

Sixth, the division will focus lawyers individually and collectively on the importance of their respective roles and provide advantages that come with specialization. Currently, criminal defense lawyers, who simultaneously serve as advisors, as plea negotiators, and as courtroom advocates, may favor one role and give short shrift to another. Some defense lawyers, whether because of excessive caseloads or because they do not value counseling clients, fail to communicate regularly with clients, keep them updated, and answer their questions—despite an ethical obligation to do so. Others do not perceive plea bargaining as a skill and as a phase of a representation requiring planning, preparation, and creativity, even though this is how most cases are resolved. A lawyer specifically assigned to advise the client, and if the client wishes, to explore plea negotiations, would presumably place a higher value on these functions.

41. For a discussion of punch-pulling by criminal defense lawyers—for example, a reluctance to accuse prosecutors of misconduct—see ALAN M. DERSHOWITZ, THE BEST DEFENSE 390–95 (1982).

42. See Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach, 2 CLINICAL L. REV. 73, 92 (1995) (“An arrogant or unnecessarily hostile attitude is unlikely to redound to the client’s benefit. Nevertheless, defense counsel cannot allow her interest in maintaining a cordial relationship with a prosecutor to compromise her representation of a client.”).

43. See Berry, Bad Lawyering, supra note 11, at 490; Anthony Thompson, The Promise of Gideon: Providing High-Quality Public Defense in America, 31 QUINNIPIAC L. REV. 713, 721–22 (observing that in states providing counsel via contract or bidding systems, lawyers often failed to meet regularly with their clients because “it was not in the lawyer’s financial interest” to do so and, as a result, the lawyers were “ill-prepared to represent their clients”).

44. See MODEL RULES OF PROF’L CONDUCT r. 1.4 (AM. BAR ASS’N 1983); see also Green, supra note 33, at 1170 (observing that many criminal defense lawyers, due to inadequate funding, fail to meet to comply their duty under Rule 1.4 to “keep clients ‘reasonably informed,’ . . . ‘comply with [their clients’] reasonable requests for information,’ . . . consult with clients about how the lawyer will pursue their objectives, and . . . explain matters to clients so that they can make ‘informed decisions’”).

45. See David E. Patton, Federal Public Defense in an Age of Inquisition, 122 YALE L.J. 2578, 2559 (2013) (“Today’s defendant is typically better served by an attorney who is a skilled counselor, negotiator, and mitigation investigator than by a great trial lawyer. Most good defense work consists of marshaling mitigation evidence to more effectively beg prosecutors for reduced charges and lower sentences, followed by effective client counseling about the resulting offer and options.”); Uphoff, The Criminal Defense Lawyer, supra note 42, at 74 (“[D]espite the obvious importance of being good negotiators, criminal defense lawyers often do not bargain effectively.”).
Moreover, effective counselors and negotiators need different skills from effective trial lawyers. There is extensive literature on trial skills, including in the criminal context. Trial skills garner more attention because of the publicly visible and formalized nature of criminal trials and the tradition of a trial as the means by which criminal cases were expected to be resolved. Comparatively little attention is devoted to studying and explicating the counseling and negotiation roles, which are largely hidden from view, and to training criminal defense lawyers to serve these functions thoughtfully and effectively. The division of functions would encourage the criminal defense bar to place equal emphasis on preparing lawyers to serve in these less visible roles.

Seventh, the division of responsibilities may lead to improvements in the procedural law and practice. Currently, the law regulating the work of would-be settlement lawyers is not well developed. Viewing counseling and negotiating as a criminal defense function worthy of equal dignity may lead the criminal defense bar to adopt more demanding guidelines for practice and to become more innovative in litigating in these areas in order to promote the development of procedural law in directions helpful to their clientele. At the very least, as the profession adopts greater expectations for criminal defense lawyers engaged in counseling and plea negotiations, courts can be expected to enforce higher standards under the Strickland test governing the Sixth Amendment right to competent representation, since the constitutional requirement of "reasonableness" depends in part on the prevailing standards of practice. Further, defense lawyers specializing in negotiations may demand more of themselves and of the prosecution in ways that influence practice, if not the law itself, thereby bringing the

46. Jenny Roberts & Ronald F. Wright, Training for Bargaining, 57 WM. & MARY L. REV. 1445, 1448 (2016) ("[P]lea bargaining is an undervalued skill, particularly given its central role in the criminal justice system."); Uphoff, The Criminal Defense Lawyer, supra note 42, at 73–74 (noting that although the vast majority of criminal cases are resolved through plea negotiations, few lawyers are formally trained to negotiate effectively).

47. See Jenny Roberts, Effective Plea Bargaining Counsel, 122 YALE L.J. 2650, 2674 (2013) ("[M]uch remains to be done to give true content to the meaning of effective plea bargaining counsel.").

48. For writings proposing stronger procedural protections in the plea bargaining context, see Joel Mallord, Putting Plea Bargaining On the Record, 162 U. PA. L. REV. 683, 685 (2014) (advocating that the criminal defense bar adopt a practice of recording the plea bargaining process in order to better protect defendants' Sixth Amendment rights).

49. Strickland, 466 U.S. at 688 ("Prevailing norms of practice . . . are guides to determining what is reasonable.").
reality closer to the ideal expressed in Judge Lynch's concept of an "administrative system of justice." ⁵⁰

Eighth, the division of labor may expand the pool of lawyers interested in criminal defense by attracting those interested in concentrating, at least for a time, on one function but not the other. Of course, criminal defense lawyers could divide their time, serving in some cases as settlement counsel and in other cases as trial counsel. But they would not have to do so. Those who have an affinity or talent for one function but not both could focus on just one aspect of criminal defense, and those who specialize would have greater opportunity to develop expertise in the chosen area.

To be sure, it is important that each lawyer in a representation have a good understanding of the other's work—that the settlement lawyer be in a position to evaluate the work of the trial lawyer and the trial lawyer understand the implications of pretrial investigation and preparation for counseling and plea bargaining. That does not necessarily mean each lawyer must perform both roles either in a particular case or in general. It also does not mean lawyers are adept in each of these roles; indeed, it seems implausible to expect many lawyers to be adept at counseling, negotiating, and advocacy, given the different skills on which these functions draw.

IV. ANTICIPATED OBJECTIONS AND CONCERNS

Of course, many will regard this Article's proposal as unrealistic if not fanciful. The constitutional right of indigent defendants to be appointed even one criminal defense lawyer took long enough to be recognized, ⁵¹ is still not applicable to all criminal proceedings, ⁵² and often is not given full effect. ⁵³ It is unrealistic to expect a court or legislature to establish a routine right to a pair of criminal defense lawyers or to expect public defenders' offices voluntarily to assign two lawyers to each client.

⁵². See Scott v. Illinois, 440 U.S. 367, 369 (1979) (ruling that indigent defendants have no Sixth Amendment right to appointed counsel in misdemeanor cases when they do not face a risk of imprisonment).
⁵³. See Stephen B. Bright & Sia M. Sanneh, Fifty Years of Defiance and Resistance After Gideon v. Wainwright, 122 YALE L.J. 2150, 2152 (2013) ("Every day in thousands of courtrooms across the nation . . . judges conduct hearings in which poor people accused of crimes and poor children charged with acts of delinquency appear without lawyers. Many plead guilty without lawyers. Others plead guilty and are sentenced after learning about plea offers from lawyers they met moments before and will never see again."); Taylor-Thompson, Turning Up Gideon's Trumpet, supra note 21 (discussing case law's failure to ensure quality defense).
The principal anticipated objections would be financial and administrative. Having two lawyers will likely cost more because the lawyers would spend more time in the aggregate on any given defendant's representation. That is precisely the objective: to motivate the lawyers to undertake necessary tasks more diligently than criminal defense lawyers customarily now do and to insulate them from pressures to give the representation short shrift.

There may also be inefficiencies. The lawyers will have to communicate information to each other that, at present, a lawyer conducting the representation alone would know. The lawyers may occasionally appear together in court. They may engage in duplicative conversations with the defendant (although the benefits of giving defendants the opportunity to communicate with counsel more frequently, to receive different legal perspectives on the case, and to receive explanations in a different manner, might compensate for any duplication). Further, it would take more time for courts or other entities to administer a system in which each indigent defendant is assigned two different lawyers, preferably from different law offices.

Given the routine nature of co-counsel relationships in other contexts, one might be skeptical of whether appointing two lawyers is necessarily inefficient rather than just more expensive. As discussed above in Part III, any additional expense may go to purchasing better advice, negotiation, and trial work. Even so, one would have to assess whether the presumed benefits to the criminal defendant and to the public would justify the greater cost.

Even if two lawyers would substantially and demonstrably improve the quality of criminal defense, making the criminal process fairer and more reliable, states would predictably resist because they do not value this objective. In many states and localities, quality defense is not a priority worthy of any higher cost; the objective seems to be to spend as little money as the courts let them.54 In some jurisdictions, defendants in death-penalty cases are currently assigned two lawyers because of the high stakes and the heightened need for a fair and reliable outcome.55

54. Bright & Sanneh, Fifty Years of Defiance, supra note 53, at 2153 ("[M]ost states, counties, and municipalities—responsible for over ninety-five percent of all criminal prosecutions—have refused to provide funding necessary for counsel and equal justice, despite repeated reports of deficient representation and gross miscarriages of justice. There is no public support for such funding, and governments have no incentive to provide competent representation, which could frustrate their efforts to convict, fine, imprison, and execute poor defendants.").

55. Some state laws expressly provide for the appointment of two lawyers in death penalty cases, one of whom will serve as lead counsel, and in other states, although not expressly required, the appointment of two lawyers appears to be the general practice. See
but other jurisdictions balk even at that.\textsuperscript{56} It would be hard to convince any public official or agency that the greater expense of two lawyers is justified in garden-variety criminal cases.

Even apart from the drain on resources, some might question whether the division of labor between two appointed lawyers would improve indigent criminal defense. One might worry, for example, that in place of one unmotivated, overworked lawyer who spends inadequate time on the representation, the defendant will be assigned \textit{two} unmotivated, overworked lawyers who in the aggregate spend as little time on each representation and who individually spend proportionately less time on the representation. That would replicate the problem inherent in some public defenders' offices where different lawyers represent the defendant at different stages or in different courtrooms with the result that it is even harder than usual to develop a relationship of trust with assigned counsel.\textsuperscript{57} If so—if the collegiality, accountability, and other potential advantages of the proposed two-lawyer system do not improve the quality of indigent defense—it will be time to move onto another innovation.

There may also be difficulties of coordination between the two lawyers that would reduce the overall quality of the defense. Tasks might fall through the cracks as each lawyer expects the other to perform them. Information might not be communicated effectively, or a lawyer may be hampered by having received information second-hand. Of course, these concerns might appear to be makeweight since, as noted earlier, lawyers commonly work collaboratively in litigation. But the ordinary model is probably one where a single lawyer is in charge and others answer to that lawyer. A division of responsibility between co-equals may pose challenges that lawyers lack experience resolving. As a system of dual lawyers is institutionalized, the criminal defense bar may become more practiced in addressing some of these challenges, but perhaps some will prove too difficult to resolve.

The ability to achieve some presumed benefits of bifurcation might also be jeopardized by the possibility of cooption. The lawyers may care more about each other than about the defendant. The relationship

\textsuperscript{56} See, e.g., ALA. CODE § 13A-5-54 (2000).

\textsuperscript{57} See, e.g., Suzanne E. Mounts, \textit{Public Defender Programs, Professional Responsibility, and Competent Representation}, 1982 WIS. L. REV. 473, 484–85 (identifying "stage representation," in which defendants have different lawyers at different stages of a criminal prosecution, as an impediment to developing client trust).
between settlement and trial lawyers may be strong, since they are members of the same profession, may serve as co-counsel on a regular basis, and may have a mutual interest in overlooking each other's failings. To the extent that the lawyers are expected to oversee each other, collegiality may present a strong disincentive to doing so. This may or may not be outweighed by the lawyers' concern for the client, sense of professionalism, reputational self-interest, or personal pride in the quality of their own and the collective representation.

Further, one might worry that instead of attracting more lawyers to criminal defense, specialization will discourage interest in this line of work. While some criminal defense lawyers may prefer to specialize in either trial work or in counseling and negotiation, other (and maybe more) lawyers may see combining functions in each representation as important to their conception of criminal defense. They may find it unappealing to serve only one role at a time or, even more so, to have to monitor their co-counsel and have their co-counsel looking over their shoulder. Moreover, dividing these functions, as an admitted response to current deficiencies in criminal defense representation, may lower the status of indigent criminal defense lawyers, who historically have not enjoyed a high status in the bar to begin with.58

One can equally speculate that lawyers will appreciate working with co-counsel rather than alone, seeing how others perform their work, and receiving encouragement and feedback intended to improve their performance. If co-counsel develop strong working relationships, as they have an interest in doing, the distinctions between their roles may become more fluid—allowing the settlement lawyer to take a role in investigation and advocacy, and calling on the trial lawyer to participate in counseling and negotiating—in ways that enhance the overall quality of the defense. Particularly for inexperienced lawyers, the opportunity for collaboration and for a more narrowly defined role may make criminal defense less daunting, and therefore more appealing.

Finally, experience raises further doubt about the utility of having two lawyers, given contemporary practice outside indigent defense: clients do

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58. See, e.g., Gabriel J. Chin & Scott C. Wells, Can a Reasonable Doubt Have an Unreasonable Price? Limitations on Attorneys' Fees in Criminal Cases, 41 B.C. L. REV. 1, 51 n.254 (1999); see also Charles J. Ogletree, Jr., An Essay on the New Public Defender for the 21st Century, 58 L. & CONTEMP. PROBS. 86, 94 (1995) ("Public defenders are often viewed by the public as either incompetent at what they do or immoral for doing it."); Thompson, The Promise of Gideon, supra note 43, at 729 ("In considering what makes an excellent indigent defense system, the first step is to dispel myths about who chooses to engage in the work. Contrary to popular views, the average public defender is not someone who ends up representing indigent clients because she 'could not get a better job in the private sector.'").
not routinely retain lawyers to serve the separate settlement and trial functions in litigation even when they can afford to do so. To be sure, as previously noted, clients often do retain multiple lawyers to work on their cases, sometimes within a single law firm but sometimes from different firms or offices. And, to a large extent, co-counsel often serve different functions or contribute different types of expertise to the overall representation. But it is certainly not the prevailing practice, where lawyers are privately retained, to divide the settlement and negotiation function from the trial function.59 One might question whether the problems of indigent criminal defense are so different that the bifurcation of legal functions should be the norm in this context when it is not widely employed in other contexts.

The answer, this Article argues, is that the problems of indigent criminal defense are so different. As discussed in Part III, this Article's proposed division of labor between two lawyers in the indigent defense context addresses a host of problems generally nonexistent in other representational contexts. The proposal, if pursued, may ultimately prove to be a failure. But the accumulated problems, which many perceive to add up to a "crisis" in criminal defense, means that something different is needed.

V. CONCLUSION: WHAT'S THE POINT OF IMAGINING?

The right to two lawyers will not be recognized by courts or legislators any time soon. But private foundations could fund defenders' offices to adopt the idea on an experimental basis and to study it. Do co-counsel serving different functions lead to better outcomes or greater client (or lawyer) satisfaction or improve on current criminal defense practices by some other measure, or are they no better or even worse than the status quo? Does structuring criminal defense in this way cost significantly more, and if so, are the costs reasonable in relationship to whatever benefits are derived? These questions can be studied and answered.

To the extent the proposal is not taken seriously as an avenue of immediate reform, it should at least be considered as a construct—a lens through which to examine indigent criminal defense. At the very least, the idea might encourage participants in, and commentators on, the

59. In civil litigation, the relatively infrequent use of settlement counsel may be explained in part by litigants' concern that opposing parties will perceive the retention of separate settlement counsel as an expression of weakness—an implied concession that the party is afraid to go to trial. That would not be a problem in indigent criminal cases, however, both because criminal cases are not expected to go to trial and because the institutionalization of settlement counsel would not reflect any judgment on the defendant's part.
criminal defense process to look differently at the challenges of indigent criminal defense and to think differently about the possible responses. It might also serve as a reminder of the gap—indeed chasm—between our constitutional aspirations and the present-day reality of indigent defense in many jurisdictions. And the idea of two lawyers might offer individual criminal defense lawyers a different way of thinking about their work, its challenges, and, particularly, the importance of serving all of their functions—counseling, negotiating, and advocacy—with devotion and consideration.

There is a tendency to think that the root of all indigent criminal defense problems is underfunding and that money will solve all problems. But that may be overstated. Better funding would surely be a big help, but some problems of criminal defense might be addressed in other ways. Some could not be solved by money alone. Wholly apart from resources, some defense lawyers are uncommitted or burnt out, poorly trained, inattentive, or simply incapable. While it is presumed that many clients, especially sophisticated clients, can regulate their lawyers’ work, indigent criminal defendants ordinarily cannot do so and, in any event, cannot choose or replace their lawyers. And other regulatory mechanisms are almost equally inadequate to ensure the quality of criminal defense.

Moreover, some problems may be caused by tensions in criminal defense practice that are structural and unrelated to resources. For example, criminal defense lawyers, driven by adversarial zeal, may disserve their clients by failing to develop cooperative relationships with prosecutors in the plea bargaining context; conversely, they may pull their punches in the trial context out of concern for future relationships with a prosecutor’s office with which they will plea bargain most cases. Criminal defense lawyers may ignore the challenges of counseling and negotiating, and fail to develop their skills in these areas out of a traditional preference for trial work; conversely, they may give inadequate attention to trial work either because they know that most cases will “plead out” or because of their self-interest in resolving cases by guilty plea.

These are problems with how some defense lawyers think about and structure their work; with where they choose to direct their energy and how they prioritize their time; with how they respond to incentives,


preferences, and even unconscious motivations; and with how they relate to prosecutors, clients, or others in the criminal process. Starting one’s analysis with a proposed solution, however unrealistic—in this case, a right to two lawyers—may provide a new way to think about problems such as these. And perhaps one day, new thinking may lead to changes that realistically can be implemented to “disrupt” the indigent defense process for the better.