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## Grieving Criminal Defense Lawyers

### Cover Page Footnote

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# GRIEVING CRIMINAL DEFENSE LAWYERS

*Dennis E. Curtis & Judith Resnik\**

Deborah Rhode has challenged the legal profession to reform itself, and she has given us several blueprints for effecting systemic changes. Her book, *In the Interests of Justice*,<sup>1</sup> ably addresses complaints voiced by clients, academics, the public at large, and by lawyers themselves about the legal profession and the system of justice. We focus here on one of the causes of disquiet about lawyers and justice—the bar’s complete abdication of its obligation to provide competent legal services to indigent criminal defendants.

In this essay, our interest is the regulation of criminal defense lawyers. Our goal is also more general—to bring attention to the relationship between client markets and the regulation of attorneys. While many have addressed how the *availability* of lawyers varies with clients’ capacity to pay, few have looked at how *remedies* for incompetent or inadequate legal services also vary directly with the financial wherewithal to pay lawyers. The many sources of regulation of lawyers at the top of the legal hierarchy stands in sharp contrast to those mechanisms that exist for lawyers who serve indigent criminal defendants.

Regulating lawyers is a multi-faceted and complex enterprise. Formally, every state requires members of its bar to adhere to a system of codified ethical rules. Every state has a disciplinary system that deals with complaints of rule violation. When reading Deborah Rhode’s book, however, one is always reminded of the backdrop: a wide variety of lawyers are practicing today across a range of fields yet are subject to an ethical code of (mostly) “one size fits all” rules. The rules and their administration have yet to take into account the wide divergence in the kinds of legal work that lawyers do.

Yet the rules are not the only source of constraint for subsets of lawyers. When significant amounts of money are involved, more forms of discipline are available to reduce, if not to prevent, unethical and dishonest behavior by lawyers.<sup>2</sup> Regulation of high-end lawyers

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1. Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000).

2. See generally David B. Wilkins, *Who Should Regulate Lawyers?*, 105 Harv. L.

has relatively little to do with the grievance procedures provided for unhappy clients. Such lawyers are, of course, subject to whatever rules of professional conduct have been adopted by the jurisdictions in which those lawyers practice. But violations of these rules, and problematic practices in general by these lawyers, are more often dealt with by way of challenges directly from clients with resources and sophistication and from constraints imposed by opponents and judges. These third-party regulators rely on regimes of statutes and rules, promulgated by legislatures and courts, and on norms developed by cultures of lawyering (when sufficiently close and dense).<sup>3</sup>

Clients are a source of oversight, particularly in areas within their own knowledge, namely how much they have to pay for specific services. Billing excesses are increasingly monitored by sophisticated clients who have the information to shop for services by price, to know what services law firms can provide and at what speed. Such clients rely on in-house auditors to scan voluminous printouts to learn where lawyers are padding bills or doing unnecessary work.

Courts also deal with advocacy abuses, albeit neither comprehensively nor always effectively. Existing rules, both state and federal, provide sanctions for attorney misbehavior, specifically for impermissibly poor investigation of facts and misstatements of law in pleadings as well as for abusive discovery.<sup>4</sup> The Federal Rules of Civil Procedure are themselves increasingly laced with efforts to regulate lawyers' behavior through management of case processing and by directives on discovery practices.<sup>5</sup> In aggregate litigation, judges often do more, as they sometimes superintend fee awards and review lawyers' delivery of services.<sup>6</sup> Recently-proposed rules would go even further—such as giving judges the power to select counsel in class actions.<sup>7</sup>

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Rev. 799 (1992).

3. For discussion of the role that norms play, see Tanina Rostain, *Waking Up from Uneasy Dreams: Professional Context, Discretionary Judgment, and the Practice of Justice*, 51 Stan. L. Rev. 955 (1999); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. Cal. L. Rev. 1273 (1998); Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict between Lawyers in Litigation*, 94 Colum. L. Rev. 509 (1994). Robert Gordon is less optimistic about normative constraints. See Robert Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 Fordham L. Rev. 709 (1998).

4. See, e.g., Fed. R. Civ. P. 11, 16, and 26.

5. See Judith Resnik, *Managerial Judges*, 96 Harv. L. Rev. 374 (1982) (explaining the shift in judicial role towards oversight and the revision of federal rule regimes to inspire judges to impose yet more control).

6. See Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DePaul L. Rev. 425 (1998).

7. See, e.g., Committee on the Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of the Proposed Amendments to

Legislatures provide another source of regulation, as statutes are bases for challenges to frivolous filings. Atop these generalized rule regimes come specialized rules from regulatory agencies such as the Securities and Exchange Commission and the Office of Thrift Supervision, which place additional responsibilities upon lawyers and which offer mechanisms to monitor their behavior towards clients and law.<sup>8</sup>

Court and legislative or administrative regimes do not often come into play *sua sponte*. Rather, opponents (especially repeat players) have a variety of incentives to enlist these mechanisms to advance their own goals, thereby producing some monitoring of attorney behavior and enforcement of practice norms. Opponents have economic incentives to police attorneys when they can impose costs—strategic as well as financial. For example, conflicts questions are often posed through motions for disqualification brought for tactical purposes in litigation. Further, based on the repeated nature of their interactions, lawyers who see each other often (either in dealmaking or in litigation) have reasons to be cooperative. The increasingly mobile market of lawyers may also prompt lawyers to curb certain forms of behavior to make them more employable—holding aside the market for meanness.

All of these control mechanisms work imperfectly, with plenty of opportunity for lawyers to behave unethically and to engage in borderline practices. But whatever the shortcomings, when substantial amounts of money are involved, the combination of clients, adversaries, courts, and legislatures have provided some means of redress, at least for flagrant abuses.

Skipping down now past the bulk of everyday law practice in medium-sized and smaller firms, in cities large and small, we turn to consider baseline criminal law practice involving public defenders, assigned lawyers, and private lawyers at the low end of the earning scale. Rhode describes vividly what goes on in this segment of criminal practice.

Outside the courtroom, overburdened and under-prepared lawyers strike hasty plea bargains for indigent clients with no realistic alternatives. Missing are all the adversarial safeguards that, in other contexts, the bar presents as essential to informed decision making. The reason for this lapse in partisan protections is obvious. As a federal oversight commission candidly noted, most criminal defense

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the Federal Rules of Bankruptcy, Civil, and Criminal Procedure and the Rules of Evidence, Fed. R. Civ. Pro. 23 (g) (Class Counsel) (Aug. 2001).

8. See Dennis E. Curtis, *Old Knights and New Champions: Kaye, Scholer, the Office of Thrift Supervision, and the Pursuit of the Dollar*, 66 S. Cal. L. Rev. 985 (1993) (analyzing interpretations of lawyers' adversarial role by the Office of Thrift Supervision).

lawyers face an “inherent conflict between remaining financially solvent and providing vigorous advocacy.”<sup>9</sup>

Return then to the packet of sources for lawyer regulation—opponents, courts and legislatures, other regulatory agencies, and individual clients. A subset of poor defendants are served by public defender offices, sufficiently funded by the states or by the federal government, well-run, and complete with in-house supervision and training. But few of these offices are adequately funded, and some are poorly-funded. Here, by setting rates too low and permitting volume to be too high, legislatures and sometimes courts serve as sources of the problems rather than occasional sources of regulatory constraint on lawyers. Legislatures are notoriously unwilling to appropriate money for criminal defense, and criminal defendants have no powerful lobby at either the state or federal level. In this respect, what funds that are available come through efforts by both bench and bar, as periodically lawyers and judges valiantly co-venture in efforts to obtain funding for counsel.<sup>10</sup>

For the two-thirds of felony defendants who are poor enough to receive court-appointed counsel, prospects of finding a lawyer who will provide zealous advocacy are chancy at best. Many defender systems create perverse incentives that make zealous advocacy an extravagance that (most) lawyers cannot afford. As Rhode points out, some jurisdictions put out bids for handling cases for indigent criminal defendants, so that a law firm or consortium of defense lawyers will contract to handle all cases on a cost per case basis, or for a guaranteed total amount.<sup>11</sup> The low bidder who gets the contract will have obvious incentives to spend the minimum of time and effort in

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9. Rhode, *supra* note 1, at 61 (citation omitted).

10. The historical records of the federal judiciary in the National Archives provide an impressive example of repeated efforts early in the century to improve criminal defense through public support for lawyers. The culmination was the enactment of the Criminal Justice Act, Pub. L. No. 88-455, 78 Stat. 552 (codified at 18 U.S.C. § 3006A (1994)). But the rates of compensation remain inadequate. See William H. Rehnquist, *1999 Year-End Report of the Federal Judiciary* (Jan. 1, 2000), available at <http://www.uscourts.gov/ttb/jan00ttb/2jan2000.html> (discussing the ongoing efforts and “major initiative” of the Judiciary to “increase the rates of pay for private ‘panel’ attorneys accepting appointments under the Criminal Justice Act (CJA)”). As he explained:

By statute, the Judiciary bears the responsibility for ensuring that defendants who cannot afford counsel in federal criminal cases receive legal representation. In 1986, Congress . . . set maximum hourly rates of up to \$75 . . . [but] funding has not been made available for its nationwide implementation, and in most judicial districts panel attorneys have been paid only \$65 for hours in court and \$45 for out-of-court time. Inadequate compensation for panel attorneys is seriously hampering the ability of courts to recruit and to retain qualified panel attorneys to provide effective representation.

*Id.*

11. Rhode, *supra* note 1, at 61.

each case. High volume, low cost defense is a recipe for inadequacy. As Rhode details, “[c]aseloads can range as high as 3500 misdemeanors and 900 felonies annually, and some attorneys haven’t taken a case to trial in years.”<sup>12</sup>

When courts assign private attorneys on a case-by-case basis, the problems are parallel. Ceilings on total compensation per case and low hourly rates mean that attorneys cannot spend adequate time on cases and make any profit. Many of these lawyers are assigned high volumes of cases. The suspicion arises that these lawyers are assigned because they are adept at moving cases by persuading their clients to plead guilty. Illustrative is a recent news article describing a lawyer who had been assigned 1600 misdemeanor cases in a single year.<sup>13</sup>

Courts are not only a source of the problem but also bear responsibility for the subsequent failures. Courts have repeatedly refused to provide oversight of criminal defense attorneys despite the fact that the relationships of these attorneys to clients are created under the auspices of the courts. From the United States Supreme Court on down, judges have declined to take responsibility for ensuring that criminal defendants receive adequate representation. Rhode uses the egregious “sleeping lawyer” cases to make this point. Judges pore over trial records and take collateral testimony to determine whether a given somnolent lawyer dozed, nodded, or slept, and if so, whether the slumber took place at a crucial part of a particular case.<sup>14</sup> Such outrages make plain the unduly low standard for what passes as “assistance of counsel.” The current standard requires not only that the lawyer

made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment . . . [but in addition] the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.<sup>15</sup>

In practice, apart from death penalty cases in which courts are disposed to look somewhat more closely at claims of ineffective assistance of counsel and other allegations of constitutional error,<sup>16</sup> almost nothing short of proof of actual innocence will merit a reversal of a conviction, however unfairly obtained. Dozing lawyers are an

12. *Id.*

13. Jane Fritsch & David Rohde, *Legal Aid’s Last Challenge From an Old Adversary, Giuliani*, N.Y. Times, Sept. 9, 2001, at 41.

14. See Rhode, *supra* note 1, at 63. One such case was reversed recently by the Fifth Circuit. See *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).

15. *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000) (quoting *Strickland v. Washington*, 466 U.S. 664, 687 (1994)).

16. See generally James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000).

extreme example of conduct that has been tolerated by courts. The doctrine of harmless error as it applies to excuse criminal defense failings has been expanded to such an extent that conduct by lawyers has to be egregious to qualify for relief. Further, the availability of collateral attacks has been limited through both Supreme Court doctrine and congressional action, imposing time limits for filing habeas actions and barring successive petitions.<sup>17</sup> Because trial records do not often reveal what went on between counsel and defendant, ineffective assistance claims are rarely brought on direct appeal. Thus, limitations on habeas actions have particularly harsh effects on the use of post-conviction processes to constrain real miscarriages of justice caused by poor lawyering.

Individual clients, in turn, have little or no ability to monitor their own lawyers, and their adversaries—prosecutors—have few incentives to police the defense bar. Prosecutors who see incompetent and unethical conduct by defense lawyers are reluctant to report such conduct because disclosure might taint a conviction.<sup>18</sup> Here the adversarial structure collapses. The prosecutor, post-conviction, becomes protective of the defense counsel's performance. Other lawyers who may observe unethical conduct may also be reluctant to appear "'holier than thou' or to expose the profession's 'dirty linen' to public scrutiny."<sup>19</sup> On the other hand, as Rhode notes, the only state (Illinois) that has attempted to enforce the rule requiring lawyers to report ethical violations experienced a dramatic increase in reports following a state supreme court decision suspending a lawyer for failing to disclose unethical conduct by his client's former lawyer.<sup>20</sup> In other words, lawyer culture could be more of a source of constraint, which brings us to the question of what role the bar could play in generating a structure for criminal defense lawyers, their opponents, judges, and clients to improve the quality of legal services for indigent defendants.

The central obstacle to adequate representation of indigent criminal defendants is, of course, lack of adequate funding. Poor training, perverse incentives, and massive caseloads all stem from the lack of resources devoted to criminal defense. More judges, reasonable fees, and bar training programs would go a long way toward providing an adequate defense function. However, commentators, including Rhode, have been calling for allocation of more resources to indigent

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17. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218 (codified in part at 28 U.S.C. § 2254 (1999)).

18. See generally Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put That Lawyer's Client In Jail*, 69 *Fordham L. Rev.* 997 (2000).

19. Rhode, *supra* note 1, at 159.

20. *Id.* at 162-63.



defense for years, and conditions have improved little, if at all, as legislatures continue to ignore the problem.

But the bar, through its grievance procedures, could have some impact on the system of indigent defense. In our view, state-wide grievance procedures provide an under-utilized opportunity to address systemic problems of criminal defense inadequacies (as well as problems for less-well heeled civil clients). Grievance systems provide a form of constraint on lawyers in addition to what is gained through either malpractice or challenges based on ineffective assistance of counsel. State disciplinary systems offer a window into the daily work of lawyers, and they offer a relatively inexpensive form of oversight. Further, unlike the civil side, in the criminal context the question is no longer whether individuals have the right to legal representation; that right is firmly established.<sup>21</sup> At issue is the adequacy of those services. Thus, the bar has an obligation not only to help provide criminal defense services, the bar also has a concomitant obligation to improve the quality of the services provided. To that end, we propose expanding the use of state-based disciplinary procedures against criminal defense lawyers who provide inadequate services.

Our understanding of the potential utility stems from the work that one of us (Dennis Curtis) has for the past three years done in conjunction with the creation of a clinical course in which students provide representation to persons who file complaints about their lawyers with Connecticut's Statewide Grievance Committee. That experience has led us to see the plausibility of grievance procedures as a process that could, with attention and alteration, come to fill at least a part of the gap between ethical obligation and current practices.

Connecticut's grievance system is mostly peopled by volunteer lawyers and lay persons, and unlike many state systems, does not have prosecutors to carry forward the charges that lawyers have violated the state's code of professional conduct. When individuals file complaints against lawyers, the complaints are sent to the office of the Statewide Bar Counsel and its staff, all state employees.<sup>22</sup> If the charges are seen to have facial merit, the complaint is sent to local panels within each judicial district, composed of volunteers, assisted by salaried counsel for each panel. If a panel finds probable cause, the case is forwarded for a hearing before a grievance panel comprised of

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21. A few of the current justices propose, however, a cutback on equipment provided to criminal defendants. *See* *M.L.B. v. S.L.J.*, 519 U.S. 102, 129-44 (1996) (Thomas, J., dissenting) (urging a retreat from decisions mandating transcripts on appeal for indigent criminal defendants and for those charged with misdemeanors resulting in fines).

22. Connecticut General Statutes §§ 51-84 to 51-94 and the parallel rules in the Connecticut Practice Book (§§ 2-29 to 2-65) (Revision of 1998) provide the authority and the framework for Statewide Grievance Committee rules and procedures.

three members from the Statewide Grievance Committee. Grievance panels are made up of two lawyers and one nonlawyer. They can make findings of disciplinary violations based on evidence of lawyer fault sustained by clear and convincing evidence. Grievance panels are empowered to administer warnings and reprimands, but they cannot impose suspension or disbarment. If a grievance panel finds that a violation deserves more than a reprimand, the committee will forward the case to a judge of the Superior Court for "presentment." In these cases, lawyers from the Bar Counsel's staff act as prosecutors, and suspensions from practice or disbarments may follow.<sup>23</sup>

In Yale's clinical program, which seeks to augment the capacity of clients in Connecticut to grieve, the Bar Counsel's office provides all of the probable cause findings from the various local panels to the clinic's supervising attorneys, thereby enabling us to see many complaints from civil litigants and a smaller number from criminal defendants.<sup>24</sup> Typical complaints on the criminal side allege that the defense lawyer would not answer telephone calls, did not interview witnesses, did not inform the defendant about the progress of the case, and at the last minute told the defendant that a deal had been arranged and to appear in court within a day or two to plead guilty. The civil analog alleges that a lawyer accepted a fee, failed to inform the client of the progress of the suit, failed to explain the matter sufficiently to permit the client to make an informed decision, did not perform the required work, and either allowed the case to languish or failed to prevent a default judgment.

At present, the data available are not sufficient to learn the frequency with which complaints against criminal defense lawyers are either filed or result in disciplinary action. In the set reviewed thus far, local grievance panels have made a few findings of probable cause involving criminal defense lawyers, some appointed and others from the state's public defender offices. What we have seen prompts us to suggest expanding the use of the disciplinary processes to improve the quality of representation of criminal defendants.

Rhode is dubious that disciplinary authorities will act to curb inadequate representation of indigent defendants or of those

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23. See Connecticut Practice Book § 2-47.

24. Letters, drafted in compliance with Connecticut's rather strict rules about solicitation of cases, are sent to some of the complainants inquiring whether they would like to be represented by law students, supervised by faculty, at their hearings. Because Connecticut does not provide clients with representation, we then serve as volunteers to provide representation in those cases in which probable cause has been found. We organize the presentation of evidence, prepare for direct and cross examination, prepare prehearing memoranda and post-hearing briefs when necessary—all tasks that most complainants have no experience with. We also make arguments to the panels about the legal issues raised by ethics rules. Thus, we both help to streamline cases and to present a comprehensive perspective.

defendants just over the poverty line who cannot afford zealous advocacy. In her words,

In theory, inadequate representation could trigger malpractice remedies. In fact, such remedies are almost never forthcoming, because convicted criminals are unsympathetic plaintiffs and prevailing doctrine denies recovery unless they can overturn their conviction or prove their innocence. Bar disciplinary authorities do not impose sanctions for “mere” negligence against criminal defense attorneys. And only in the most egregious cases will courts reverse convictions for ineffective assistance of counsel.<sup>25</sup>

Rhode is demonstrably correct that malpractice and ineffective assistance claims depend upon a showing of injury—either of innocence or that a conviction or sentence was illegally obtained. The question is whether the disciplinary system can operate in a space between negligence, malpractice, or (legally defined) ineffective assistance and breach of a lawyer’s duty under rules of professional ethics.

The contribution to be made here is to generate such a space, to expand on the concept that ethical violations need not be equated with either malpractice or—by extension—ineffective assistance of counsel. This premise is constitutive of many state grievance processes. For example, Connecticut’s Rules of Professional Conduct specifies that violations of disciplinary rules are not to be taken as evidence that malpractice has occurred.<sup>26</sup> The opposite side of this coin, we can assume, is that violations short of malpractice or ineffective assistance are worthy of sanctions when the evidence is there. On the civil side, at least in Connecticut, sanctions are often imposed when actual malpractice has not been charged or proven. And whatever the distance is on the civil side between malpractice and sanctionable failings by lawyers, on the criminal side the chasm is enormous.

Departing from Rhode’s assessment,<sup>27</sup> and focusing on the array of sanctions that disciplinary processes impose, we think that use of the grievance system has potential. Appearing before a grievance panel is

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25. Rhode, *supra* note 1, at 62.

26. Connecticut’s Rules of Professional Conduct contain six sections—Preface, Preamble, Scope, Terminology, Rules and Commentary, and Code of Judicial Conduct. *See* Connecticut Practice Book. The first four sections are individually set forth. Commentary for each Rule follows the Rule. Under “Scope” appears the following:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide... a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

Connecticut Practice Book 3.

27. Rhode, *supra* note 1, at 160 (“Rarely do disciplinary committees or courts that review committee findings want to withdraw attorneys’ means of livelihood or to antagonize the local bar.”).

a daunting experience for lawyers. Reactions vary from resentful, aggrieved protestations of innocence to abject confessions and apologies, with everything in between. Responding to a finding of probable cause that one has engaged in unethical conduct plainly prompts some lawyers to reflect, and sometimes, to change. The activity of seeking sanctions can help to generate a culture in which criminal defense is taken as a serious sector of the practice of law, in which norms of good conduct are developed, and in which groups of lawyers and lay persons come to understand more of the failings of contemporary criminal defense. Using the disciplinary system could be responsive to the challenges faced by those lawyers described by Rhode who do not willingly or consciously compromise their clients' interests, but are "caught within a structure that fails to provide the necessary resources, standards, or oversight to ensure effective representation."<sup>28</sup> If, as we hope, disciplinary systems come into the picture in a sustained fashion, those lawyers might come to see their work as a valued aspect of legal practice—worthy of scrutiny by other lawyers not involved in criminal law practice and by lay overseers.

To alter institutional norms and practices would require the filing of numerous complaints, followed by investigations and decisions. For a lawyer disciplinary system to have impact on the quality of criminal defense services, one would have to encourage clients and judges to bring grievances, as well as to persuade disciplinary committees to take on this admittedly difficult and unpopular task and to do so repeatedly. Although disappointed criminal defendants are often dissatisfied with their lawyers, in Connecticut at least, they rarely file state ethics grievances but more often pursue claims in court aimed at overturning their convictions or shortening prison or supervisory time. A few of the grievances that do get filed appear aimed at eliciting testimony or other evidence that would be helpful in collateral proceedings.

One question is what might prompt criminal defendants to protest low quality legal services when such protests do not result in either shortened time or monetary relief. As to motivation, a good deal of social science literature on litigants, including criminal defendants, indicates that people value process as well as outcome.<sup>29</sup> As to

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28. *Id.* at 63.

29. A study in the 1980s directly addressed the concerns of felony defendants and concluded that their evaluations of their treatment did not depend solely on outcome; rather, "their sense of fairness—in terms of both procedural and distributive justice—appears to have substantially influenced their evaluations." See Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 *Law & Soc'y Rev.* 483, 503 (1988). See generally Paul G. Chevigny, *Fairness and Participation*, 64 *N.Y.U. L. Rev.* 1211 (1989) (reviewing E. Allen Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (1988)); see also John Jackson, Rosemary Kilpatrick & Clare Harvey, *Called to Court: A Public Review of Criminal Justice in Northern Ireland*, 138-42 (1991) (describing a small sample of criminal defendants, as well as

knowledge, many defendants are (unfortunately) repeat players, experienced in the criminal justice system, with some sophistication as to the legal requirements, and with clear expectations.<sup>30</sup> Further, we know first hand that prisoners value being treated as persons deserving of respect. Therefore, we believe that some defendants would welcome an opportunity to bring complaints of unjust or insufficient delivery of legal services.

A second question concerns the flip side: would defendants bring too many grievances? Currently, the popular view of prisoners is that they complain too much. Congress has codified many new obstacles to prisoner litigation on that premise.<sup>31</sup> Our view, in contrast, is that defendants with genuine grievances against lawyers often do not use an avenue that we would like to make more accessible. Given that the remedies in a state grievance system do not flow directly to complainants, we are prepared to turn to this route without undue worry of its overuse. Moreover, in light of some survey data on criminal defendants and the filing rates of prisoners seeking habeas corpus relief, we believe a majority would not seek relief either because, like other potential grievants, they would (in the language of the anthropology of dispute resolution) "lump it," or because a significant proportion would conclude that their lawyers did a reasonable job.<sup>32</sup>

Assuming as we do that a small subset of defendants would, if given an opportunity, record their concerns, education would also be needed about how to access a grievance system and about what counts as a problem within its parameters. We turn then to who within the

jurors, and witnesses, and finding defendants who cared about treatment as well as outcomes).

30. In addition to the studies about criminal defendants' concerns about process, cited *supra* note 29, a survey of criminal justice participants in England, including a small number of defendants, supports the view that defendants have knowledge sufficient to be useful sources of information about proper attorney behavior. See Michael Zander & Paul Henderson, *The Royal Commission on Criminal Justice: Crown Court Study xv*, 262 (1993) (noting that while the response rate was low, the results to questionnaires from 793 defendants were sufficiently representative as to be reported). That study also suggests the utility of a comparable research project in the United States to thicken the understanding of how services are delivered and to clarify the marginal utility of greater or lesser fees and/or supervision on the quality of representation. For example, the Zander and Henderson study asked details of the timing of meetings between defendants and lawyers in terms of when meetings occurred in relationship to hearings, the length of the interviews, and turnover of lawyers. *Id.* at 62-67.

31. See Prison Litigation Reform Act of 1996, Pub. L. No. 104-40, 110 Stat. 1327 (codified in various parts of the U.S. Code, including 18 U.S.C. § 3626).

32. See Zander & Henderson, *supra* note 30, at 67 (reporting that, defendants were on the whole "very positive about what had been done for them by the lawyers," referring to the barristers). They found a relatively high satisfaction rate with solicitors as well. *Id.* at 68-69. Satisfaction rates did vary with outcome, with ninety-two percent of those acquitted and sixty-nine percent of those convicted describing a solicitor's work as either "very good" or "good." *Id.* at 69.

system could be the source of education for litigants. Judges already have that role; they routinely inform criminal defendants of rights to have counsel and to stand trial. Judges could likewise inform them of rights to protest poorly-prepared counsel and guide them on what degree of discontent would suffice as grounds. Were judges to take on the task, they might also serve to shape expectations of what minimally adequate services entail. A kind of “best practices” list could be developed to focus both counsel and defendant on what “assistance of counsel” requires. Further, through such explanation, judges would enact one of law’s goals—to treat individual defendants with dignity.

While we are confident that judges could readily articulate minimum acceptable practices, we think it unwise to assume that judges also know the ins and outs of a grievance system. Given the low visibility of attorney grievance systems, many practicing lawyers and judges—aside from those charged and those administering the system—have no contact with and no reason to become familiar with the details of how to grieve. Therefore, in addition to teaching defendants, judges would also need to be educated on the availability of a complaint process. As to judges’ incentives, the difference between the standard for undoing a conviction and the many failures of lawyering short of ineffective assistance should provide comfort. Judges could turn to discipline as a means of improving the quality of practice without necessarily fearing that convictions would be overturned. Asking judges to reflect on the quality of legal services and providing a means by which to express concern could help to raise expectations about the kind of services that ought to be provided. Were better lawyering to become a standard artifact of criminal proceedings, judges in turn might find the assignment to that segment of the docket less arduous.

For judges as well as clients to consider using grievance processes requires that disciplinary committees, in turn, be willing to find violations and to punish lawyers, including those who work under admittedly difficult conditions. The reluctance to look too closely when violations exist stems from an unwillingness of many in the bar to do such work themselves. Entailed would be a shift in the bar’s posture, from quiet acceptance of often inadequate lawyering to shouldering its burden of monitoring the supply of adequate criminal defense counsel. An incentive comes from lawyers’ shared stake in reputation and in control of their own profession. Criminal justice horror stories are regularly features of the press. Sleeping lawyers are a ready source of jokes about lawyers, and popular culture is unlikely to draw fine distinctions between the kinds of practices that generate the examples of lawyer misconduct.

Moreover, as Rhode observes, “[l]awyers retain far more control over their own oversight than any other occupation.”<sup>33</sup> Despite her justified concern that “[s]uch freedom from external accountability too often serves the profession at the expense of the public,”<sup>34</sup> the bar has assumed and fought for the responsibility to protect the public from unethical practices by lawyers. And in the current criminal justice system, the bar stands almost alone as a constraint on unethical practices by criminal defense lawyers. The bar may argue that it has little, if any, duty to provide civil legal services to all that need them, because such shortcomings reflect general societal problems. That argument does not work in the criminal defense context. Lawyers are required for a large portion of criminal cases; states create public defender systems and pay for them, whether adequately or not. Lawyers staff these systems. Given the bar’s jurisdiction over the sanctioning process for unethical conduct and its interest in preserving that jurisdiction, it ought not duck its duty to criminal defendants and to the public.

The grievance process could serve at least three functions. First, by taking complaints against criminal defense lawyers seriously, grievance committees can pass judgment on some lawyers in some cases. Second, more of the stories of ordinary malfeasance could become part of general knowledge. Bar grievance committees are required to provide reports to courts and to the public. At present in Connecticut, data about disciplinary proceedings is presented in summary fashion, generally consisting of numbers of complaints filed, dismissals, findings of probable cause, presentments to Superior Court, and sanctions. Disciplinary reports would be much more useful were they to include both data and narratives about the instances in which lawyer conduct falls below the standard demanded by the ethical rules. If these reports were more informative about the kinds of violations and the resulting sanctions, especially in the criminal defense area, the bar would have a sense of the kinds of inadequacies that occur. This knowledge might motivate lawyers to take concerted action in remediation, including lobbying for increased funding of public defender services, implementation of training programs for criminal defense lawyers, and organizing volunteer programs to provide direct representation to clients or assistance to those who come into the grievance process based on experiences with either civil or criminal attorneys. Third, and returning to our point at the outset of the “one size fits all” ethical rules, as the grievance committees obtain a greater understanding of the particular challenges of criminal defense work, they may also reflect on the

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33. Rhode, *supra* note 1, at 143.

34. *Id.* (footnote omitted).

desirability of generating rules more specific to the context of criminal defense rather than relying on transsubstantive rules of ethics.

Given the bleak landscape of criminal defense, we are in no way starry-eyed. But it is the very bleak and grievously impoverished landscape that prompts us to look for alternatives, and thus to believe that state-based grievance processes are surely worth a try. The disciplinary system offers not only another option in a world that seems to have too few but also something else: it provides concrete examples to the bar of specific instances of unsatisfactory practice by a diverse set of lawyers at the less profitable end of legal practices. From such sources could come new insights into the problems that would in turn prompt refinement of rules and norms. Poor provision of criminal defense services is a grievous injury not only for clients but for the legal profession and the public. Public grievance processes are one way to mark the fact of such injury and to begin to piece together responses.