

2003

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Gerald F. Uelmen

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Recommended Citation

Gerald F. Uelmen, *Fighting Fire with Fire: A Reflection on the Ethics of Clarence Darrow*, 71 Fordham L. Rev. 1543 (2003).

Available at: <https://ir.lawnet.fordham.edu/flr/vol71/iss4/12>

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FIGHTING FIRE WITH FIRE: A REFLECTION ON THE ETHICS OF CLARENCE DARROW

*Gerald F. Uelman**

May a lawyer resort to bribery and espionage when confronted with an adversary who regularly and brazenly engages in bribery and espionage to defeat him or her? Apparently, Clarence Darrow thought so. When placed on trial for bribing a juror in the *McNamara* trial in Los Angeles in 1912, Darrow challenged the jury hearing his case to acquit him even if they believed he *did* arrange for jurors to be bribed:

Suppose you thought that I was guilty, suppose you thought so— . . . would you dare to say by your verdict that scoundrels like [the District Attorney] should be saved from their own sins, by charging those sins to someone else? . . .

Now, gentlemen, I am going to be honest with you in this matter. The *McNamara* case was a hard fight. . . . Here was the District Attorney with his sleuths. Here was Burns with his hounds. Here was the Erectors' Association with its gold. A man could not stir out of his home or out of his office without being attacked by these men ready to commit all sorts of deeds. Besides, they had the Grand Jury, we didn't. They had the Police Force, we didn't. They had organized Government, we didn't. We had to work fast and hard. We had to work the best we could, and I would like to compare notes with them.¹

Darrow returned to this theme in discussing the testimony of Guy Biddinger, a Burns detective who testified that Darrow passed \$500 in cash to him in an elevator in exchange for information about the prosecution's investigation of the *McNamaras*:

Of course, I did not pass \$500 in the elevator, but if I had, I had just as much right to give that \$500 for that purpose as I would have to buy \$500 worth of hogs, just exactly. I was doing exactly what they were doing, what Burns admitted he was doing, what was done in all their cases, what Sam Browne says they did, when he testified that they filled our office with detectives. And here comes this wonderful man, so honest, so pure, so high, so mighty, [District

* Professor of Law, Santa Clara University School of Law.

1. Clarence Darrow, Plea of Clarence Darrow, in his own Defense to the Jury that exonerated him of the charge of bribery at Los Angeles, August, 1912, at 10-11 (1912).

Attorney] Ford, who says the State has a right to do that, who says the State has a right to put spies in the camp of the "criminal," but the "criminal" hasn't the right to put spies in their camp. Isn't that wonderful, gentlemen? Here is a contest between two parties in litigation; the prosecution has a right to load us up with spies and detectives and informers, and we cannot put anyone in their office. Now, what do you think of that? Do any of you believe it?²

Darrow's rhetorical question is still a zinger ninety years later. The jury acquitted him in the face of overwhelming evidence of guilt, strongly suggesting that they agreed with his argument that his underhanded techniques were no worse than the underhanded techniques of his opponents. Ninety years later, what do we think of a legal system that permits the prosecution to bribe witnesses, back-door judges, kidnap defendants, and engage in spying and eavesdropping on defense lawyers, but severely punishes defense lawyers who engage in the same conduct? When is it appropriate to fight fire with fire?

This essay first collects the examples of police and prosecutorial misconduct encountered by Clarence Darrow in his legal battles on behalf of organized labor, and compares them to the accusations of misconduct by Darrow himself. It then documents the recurring examples of exactly the same kind of governmental misconduct in our own time. Then, the question posed by Clarence Darrow can be fully addressed: what do we think of fighting fire with fire?

Darrow's Trials

Clarence Darrow served as lead counsel in at least four cases that have been labeled "trials of the century,"³ but the two cases that placed him in the center of ethical storms both involved charges of deadly terrorist activity by labor union leaders. In the summer of 1907, Darrow successfully defended William D. Haywood, leader of the Western Federation of Miners, on a charge of murdering the former Governor of Idaho, Frank Steunenberg, who was killed by a bomb planted at the front gate of his home.⁴ In the winter of 1911, Darrow went to Los Angeles to defend brothers James and John McNamara, labor organizers who were charged with planting a

2. *Id.* at 15.

3. Thirty-seven cases in the twentieth century gained so much public attention they were all called, at one time or another, trials of the century. They are collected in Gerald F. Uelman, *Who Is the Lawyer of the Century?*, Appendix I, 33 *Loy. L.A. L. Rev.* 613, 648-50 (2000). The four cases in which Clarence Darrow served as lead counsel for the defense were the 1907 trial of Bill Haywood, the 1911 McNamara trial and subsequent trials of Darrow himself for bribery of jurors, the 1924 trial of Loeb and Leopold for the murder of Bobby Franks, and the 1925 trial of Thomas Scopes for teaching evolution. *Id.*

4. A detailed account of the Haywood trial was published in 1997. J. Anthony Lukas, *Big Trouble* (1997).

dynamite bomb in the printing plant of the *Los Angeles Times*, a strident anti-union newspaper. The explosion on October 10, 1910 killed twenty *Times* employees. The trial ended when the defendants entered pleas of guilty shortly after Darrow's chief jury investigator was arrested while passing a bribe to a juror.⁵

Both the Haywood and McNamara cases exemplified the often bitter struggle between labor unions and employers at the turn of the last century. In both cases, the private business interests whose goal was the destruction of the labor unions involved underwrote many of the investigative and prosecution expenses. Private detectives played prominent roles in the investigation and prosecution of both cases. In both cases, the defendants were kidnapped and secretly brought within the prosecuting state without the benefit of extradition laws. In both cases, spies and informants were placed in the defense camp. In both cases, prosecution witnesses were immunized or given favorable treatment in exchange for their testimony. And in the Haywood case, ex parte communications were employed to prejudice judges against the defendants.

Private Funding of Public Prosecutions

The financing of criminal prosecutions by private interests was a common phenomenon a century ago. Often, the victim's relatives or employer retained a private lawyer to represent the prosecution. Elected public prosecutors, as often as not, were bumbling incompetents with little courtroom experience.⁶

5. The McNamara case and its aftermath are described in Geoffrey Cowan, *The People v. Clarence Darrow* (1993).

6. An amusing example is the hapless prosecutor described by Mark Twain when he served as a newspaper reporter in San Francisco. His description of a trial in the police court dated September 29, 1864 in the *San Francisco Call* concluded:

The Prosecuting Attorney may mean well enough, but meaning well and doing well are two very different things. His abilities are of the mildest description, and do not fit him for a position like the one he holds, where energy, industry, tact, shrewdness, and some little smattering of law, are indispensable to the proper fulfillment of its duties. Criminals leak through his fingers every day like water through a sieve. He does not even afford a cheerful amount of competition in business to the sharp lawyers over whose heads he was elected to be set up as an ornamental effigy in the Police Court. He affords a great deal less than no assistance to the Judge, who could convict sometimes if the District Attorney would remain silent, or if the law had not hired him at a salary of two hundred and fifty dollars a month to unearth the dark and ominous fact that the "offence was committed in the City and County of San Francisco." The man means well enough, but he don't know how; he makes of the proceedings in behalf of a sacred right and justice in the Police Court, a drivelling [sic] farce, and he ought to show his regard for the public welfare by resigning.

Samuel Clemens, *Advice to Witnesses*, *Daily Morning Call* (San Francisco), Sept. 29, 1864, reprinted in *Clemens of the Call: Mark Twain in San Francisco*, 219, 219-20 (Edgar M. Branch ed., 1969).

In Idaho, the Mine Owners Association pledged a \$10,000 reward for information leading to the arrest of the murderer of Frank Steunenberg, and mine owners responded to Prosecutor William Borah's pleas with a \$5,000 contribution to "secure evidence" against the miners' union.⁷ When this contribution was later exposed, at the insistence of President Theodore Roosevelt, Idaho Governor Frank R. Gooding arranged for its return, and announced that "not one dollar" would be supplied by any private source or organization whatsoever.⁸

Meanwhile, the lawyer retained by the State to conduct the prosecution was busily soliciting private contributions. He explained to the contributors that the payment had to be kept secret, so the money could be used for purposes that would not be "entirely explainable" to a legislative committee. These purposes included the clandestine investigation of potential jurors.⁹ J. Anthony Lukas estimated that secret private contributions to the prosecution totaled between \$75,000 and \$100,000, or \$1.4 to \$1.8 million in today's dollars.¹⁰ The legality of private funding for public prosecutions in Idaho was an unsettled question in 1907. In 1885, the Idaho Supreme Court upheld the practice of retaining private counsel to assist the prosecution.¹¹ The Idaho legislature enacted a statute in 1900, which provided:

No prosecuting attorney must receive any fee or reward for or on behalf of any prosecutor [i.e., complainant] or other individual, for services in any prosecution, or business to which it is his official duty to attend or discharge.¹²

In 1915, this statute was construed by the Idaho Supreme Court to apply only to "regularly elected or appointed" prosecuting attorneys, and not to private attorneys retained for specific cases.¹³

In California, the practice of hiring private counsel to prosecute existed "almost since the organization of the state."¹⁴ After the dynamiting of the *L.A. Times*, the city fathers employed prominent defense lawyer Earl Rogers to direct the grand jury investigation and work with the private detectives hired to track down the perpetrators. Rogers had also served as general counsel for the Merchant and Manufacturers Association, a virulent anti-union organization of Los Angeles business leaders, which agreed to pay Rogers' fee for leading the investigation. Despite these obvious conflicts of interest, Rogers

7. Lukas, *supra* note 4, 351-52.

8. *Id.* at 368-72.

9. *Id.* at 356.

10. *Id.* at 378.

11. *People v. Biles*, 6 Pac. 120 (Idaho 1885).

12. Idaho Code § 2081 (1900).

13. *Adamson v. Bd. of County Comm'rs*, 147 P. 785, 786 (Idaho 1915).

14. *People v. Turcott*, 3 Pac. 461, 461 (Cal. 1884).

later served as defense counsel for Darrow in his first trial for jury bribery.

A reward totaling \$100,000 (\$1.8 million in today's money) for the capture and conviction of the *Times* bomber was offered by the Merchants and Manufacturer's Association and other business groups.¹⁵ The reward was claimed by William J. Burns, the private detective hired by the city to assist the investigation. Thus, Burns had much to gain personally by securing the convictions of the McNamaras. In pressing his claim to the reward, Burns was represented by Joseph Ford, the Deputy District Attorney who prosecuted Darrow.¹⁶

The National Erectors Association, an organization created by the steel industry to destroy the Bridge and Structural Iron Workers Union that John J. McNamara headed, underwrote many of the investigative expenses for the McNamara case.¹⁷

Use of Private Detectives

A century ago, more "detectives" were privately employed than were employed by public police agencies. While Boston created the first municipal detective bureau in 1846, and New York followed suit in 1857, early police scandals eroded public confidence and private detective agencies flourished after the Civil War. The nation's largest, the Pinkerton National Detective Agency, capitalized on the reputation gained by Allan Pinkerton as Chief of Intelligence for Union Commander General George B. McClellan.¹⁸

By the 1890s, the chief employer of Pinkertons were railroads and corporations concerned about attempts to unionize their workers. During the infamous "Homestead Strike" against the Carnegie Steelworks in Pennsylvania, three hundred Pinkerton "watchmen" were hired and armed to recapture a plant seized by strikers. Seven strikers and three Pinkertons were killed in the clash, and dozens were wounded. After a Congressional investigation, a House minority report warned that "private individuals in the employ of private persons or corporations" should not enforce public laws.¹⁹ Many states subsequently enacted prohibitions against armed mercenaries crossing their borders.²⁰

The thrust of private detective work then shifted to undercover activity. Samuel Gompers, President of the American Federation of Labor, complained that "never has the private detective been used to

15. Cowan, *supra* note 5, at 99.

16. *Id.* at xxv.

17. *Id.* at 77.

18. Lukas, *supra* note 4, at 77.

19. *Id.* at 82.

20. *Id.* at 82-83.

such an extent, or with such unscrupulousness," as during the first decade of the twentieth century. "They have been and are being used in the capacity of *agents provocateurs*—that is, in disguise, as union men, to provoke ill-advised action, or even violence, among workingmen."²¹

James McParland was the Pinkerton detective hired to lead the investigation into the murder of former Governor Steunenberg. McParland was actually brought into the investigation by Charles Stockslager, the Chief Justice of the Idaho Supreme Court, who apparently saw no conflict between his judicial duties and his behind-the-scenes involvement in an ongoing criminal investigation. He was the Democratic Party candidate for Governor, and wanted to dissociate his campaign from the radicals in the labor movement. At their first meeting, McParland told the Chief Justice and the Governor of Idaho that he had already come to the conclusion that Harry Orchard had planted the bomb, acting on the orders of Bill Haywood and the Western Federation of Miners. It was a classic example of "rush to judgment," and an investigation directed to sustaining that judgment.²²

Detective McParland personally conducted the interrogation that elicited confessions from Harry Orchard and Steve Adams. Adams later repudiated his confession, but Harry Orchard became the prosecution's star witness against Bill Haywood, claiming Haywood had hired him to plant the bomb that killed Steunenberg.²³

McParland and his Pinkerton detectives were well paid for their efforts in Idaho, but most of the money flowing into their coffers was secretly raised in Colorado, where the Western Federation of Miners was headquartered. The funds came from mine owners who wanted to eliminate Haywood and his union.²⁴

The lead detective in the investigation of the *L.A. Times* bombing was the celebrated William J. Burns, who rose to prominence during the San Francisco graft trials four years earlier. Burns was hired by the Mayor of Los Angeles, and at their first meeting, like McParland, Burns announced he already had a good idea who was responsible for the bombing. He found a remarkable resemblance between this explosion and the earlier destruction of a bridge by a time bomb, which he attributed to J.J. McNamara and the Structural Iron Workers Union.²⁵

When payment from the city fathers was cut off, Burns remained in the case, borrowing \$10,000 to personally finance his investigation. He was banking on collecting the \$100,000 reward when the case was

21. *Id.* at 83.

22. *Id.* at 164.

23. *Id.* at 557-59.

24. *Id.* at 377-78.

25. Cowan, *supra* note 5, at 99.

solved.²⁶ Burns succeeded in personally turning the key witness against the McNamaras. Ortie McManigal was apprehended in Detroit with a suitcase full of dynamite. Burns had him secretly transported to Chicago, where he confessed that he had been hired by J.J. McNamara to plant dynamite bombs at dozens of anti-union work sites around the country, and that the *Times* bombing was the work of J.J.'s own brother, Jim. Burns later denied that he had used the "third degree" on McManigal. He said he won McManigal over by appealing to his love of his wife and children, and by promising that the court in Los Angeles "would go easy on him if he agreed to cooperate."²⁷

Kidnapping of Defendants

The conditions for extradition of an accused criminal from one state to another are spelled out in the Constitution:

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.²⁸

In 1906, the Constitution stood as an absolute barrier to lawful extradition of the officers of the Western Federation of Miners from their homes in Colorado to stand trial in Idaho, even after the confession of Harry Orchard implicated them as conspirators. They had not been present in Idaho when the crime was committed, and had never fled from the state. In *Hyatt v. New York*,²⁹ the United States Supreme Court rejected an argument that "constructive presence" could suffice, asking, "How can a person flee from a place that he was not in?"³⁰ But *Hyatt* involved a defendant who was still in Tennessee, fighting his extradition to New York. If the defendant was brought before the prosecuting court, the Supreme Court had ruled that it didn't make much difference how he got there.³¹

With these cases in mind, Detective McParland made elaborate plans to kidnap the three miners' union officers in Colorado and transport them to Idaho on a special train. The plan required the full connivance of the Governors of both states. Extradition papers were drafted, which falsely alleged that the men had been in Idaho when the crime was committed, but McParland was betting that the papers

26. *Id.* at 107.

27. *Id.* at 109.

28. U.S. Const. art. IV, § 2.

29. *Hyatt v. People ex rel. Corkran*, 188 U.S. 691 (1903).

30. *Id.* at 713.

31. *Mahon v. Justice*, 127 U.S. 700 (1888); *Ker v. Illinois*, 119 U.S. 436 (1886).

would become irrelevant once he succeeded in kidnapping the defendants and spiriting them into Idaho.³²

The kidnap plot was well executed, and the train bearing the union officers arrived in Boise on Monday morning, February 19, 1906. The next morning, the union's lawyer appeared before the Supreme Court of Idaho to seek a writ of habeas corpus. The Court's three Justices, including Justice Stockslager—who was instrumental in the hiring of Detective McParland, the chief kidnapper—rejected the writ. The Court held that a challenge that a citizen is not a fugitive from the state can only be heard while he is beyond the jurisdiction of the state. Once he is brought within the state's jurisdiction, the circumstances that brought him there become irrelevant. If a crime was committed in abducting the accused, those responsible could be "held to answer in the proper jurisdiction," which would be Colorado.³³

A writ of habeas corpus was also sought in the federal district court in Boise, with similar results. Both rulings were then appealed to the United States Supreme Court, which affirmed the rulings in *Pettibone v. Nichols*.³⁴

The majority opinion by Justice John Marshall Harlan upheld the denial of the writ. Even if the accused had been kidnapped and illegally transported across state lines based on perjured affidavits by state officials, once the accused is physically within the state and charged with a crime against its laws, the state may try him without inquiring into the methods which brought him there. "If . . . the application of these principles may be attended by mischievous consequences," Justice Harlan concluded, "the remedy is with the lawmaking department of the Government."³⁵

A spirited dissent by Justice Joseph McKenna of California proclaimed:

Kidnapping is a crime, pure and simple. . . . All of the officers of the law are supposed to be on guard against it. . . . But how is it when the law becomes the kidnapper, when the officers of the law, using its forms, . . . become abductors?³⁶

The Idaho kidnapping became a script for replay five years later, when California authorities sought a way to bring J.J. McNamara from his office in Indiana to California for trial. His brother had already been secretly arrested in Detroit. Detective Burns organized a team of detectives to arrest J.J. at his Indianapolis offices. A search warrant was issued, and the detectives seized numerous incriminating documents and found a vault stuffed with dynamite and timing

32. Lukas, *supra* note 4, at 248-50.

33. *Id.* at 277-78; see *Ex parte Pettibone*, 85 P. 902 (Idaho 1906).

34. *Pettibone v. Nichols*, 203 U.S. 192 (1906).

35. *Id.* at 216.

36. *Id.* at 218.

devices. J.J. was taken before a judge, and extradition papers signed by the Governors of California and Indiana were presented. When J.J. asked for counsel to represent him and an opportunity to be heard, the judge cut him short and ordered him removed from the courtroom as soon as he was identified as the J.J. McNamara named in the extradition papers. He was then rushed to the railroad depot, and after several changes of trains found himself on board the Santa Fe California Limited. Unknown to J.J., both his brother and Ortie McManigal were on board the same train.³⁷

Use of Spies and Informants

During the Haywood investigation, Detective McParland succeeded in placing a Pinkerton agent in the midst of the defense camp to report on defense strategy and tactics. The Governor of Idaho was so proud of this coup that he sent five of the double agent's reports to President Theodore Roosevelt in Washington, D.C., boasting:

He has reported to me every day, and I have absolute confidence in him. His work has been of extreme value to us. He has so fully gained the confidence of the attorneys for the defense that he has been put in full charge of the work of polling the county, for the jury that will try the Heywood [sic] case next month.³⁸

The double role of the Pinkerton operative was exposed just as jury selection began, posing a real dilemma for Clarence Darrow. Could the traitor's assessments of potential jurors be relied upon, or were they designed to mislead the defense into accepting jurors who favored the prosecution? In at least one case, the operative actually reported to the prosecution that a juror who was "friendly to the prosecution" and thought the defendants were guilty had been put on the defense attorney's list as favorable to the defense.³⁹

The infiltration of the defense camp during the McNamara trial was actually a product of Darrow's own machinations. Darrow secretly enlisted a Burns detective named Guy Biddinger as a spy. Biddinger was told by a friend he could "make a fortune" by supplying information from the Burns camp to Darrow. Darrow wanted to learn the name of a man in the Iron Workers organization "who is tipping everything off to Burns."⁴⁰ Biddinger actually remained loyal to Burns, reporting all of his conversations with Darrow directly to Burns, and turning over the money Darrow paid him. He sought to sow distrust in the defense camp by falsely identifying people who were actually faithful to Darrow as Burns operatives. Biddinger later

37. Cowan, *supra* note 5, at 101-14.

38. Lukas, *supra* note 4, at 455.

39. *Id.* at 537.

40. Cowan, *supra* note 5, at 164.

became a key witness against Darrow at his trial for bribery of jurors.⁴¹

Rewarding Prosecution Witnesses

The practice of rewarding prosecution witnesses with favorable treatment has always been a potent weapon for prosecutors to reach behind-the-scenes conspirators, but always at the risk of rewarding the most culpable offenders with the most lenient punishment, while those less culpable are hammered with more severe punishment. In both the Haywood and Darrow bribery cases, this approach backfired. The inducements offered to the prosecution's star witnesses were effectively used to attack their credibility.

The murderer of former Governor Steunenberg—the man who actually planted the bomb that blew the Governor to pieces—was unquestionably Harry Orchard. And Steunenberg was just one of Orchard's many victims. Explosions for which Orchard was responsible killed at least eighteen men.⁴² His testimony for the prosecution, however, saved him from the gallows. His death sentence was commuted to life, and he spent forty years raising chickens and growing strawberries as a prison trustee. He died at the age of eighty-eight in 1954.⁴³

Bert Franklin, the defense investigator who actually passed the bribe money to a prospective juror for the McNamara trial, was promised immunity in exchange for testimony that Clarence Darrow knowingly supplied the cash for the bribe payment. The prosecution also agreed that he need not implicate anyone else connected with the defense.⁴⁴ Thus, the deal was simply, "Give us Darrow, and we'll give you your life back." Testimony was offered at Darrow's trial that Franklin told two witnesses the reason the prosecution wanted to get Darrow was because he knew something about Gompers, and if Darrow would testify against Gompers, they would also give Darrow immunity.⁴⁵ Geoffrey Cowan asserts "Darrow made a secret effort to win a lighter sentence for himself by offering to testify against Samuel Gompers."⁴⁶ The Los Angeles prosecutors would certainly have regarded Gompers as an even bigger fish than Darrow, but it is unlikely that they would have given Darrow immunity to get him, and even more unlikely that Darrow would seek such a deal.

41. *Id.* at 164-65.

42. Lukas, *supra* note 4, at 556-57.

43. *Id.* at 748.

44. Clarence Darrow, *The Story of My Life* 186 (1932).

45. Darrow, *supra* note 1, at 37.

46. Cowan, *supra* note 5, at 440.

Ex Parte Communications With Judges

Judicial ethics were loosely defined a century ago, and judges were less concerned about the appearances of propriety in avoiding conflicts of interest. United States Supreme Court Justice Stephen Field, for example, sat on numerous cases argued to the Court by his brother, David Dudley Field, and often ruled in his favor! But the ethical prohibition of *ex parte* communications with judges has always been deeply rooted in our adversary system of justice. Even a century ago, a judge who allowed a lawyer or party in the “back door” for a private meeting concerning a case before him was committing a serious ethical breach.

The Haywood case presents some egregious examples of judicial corruption, where judges allied themselves with the prosecution in inappropriate ways. The misbehavior of Chief Justice Stockslager of the Idaho Supreme Court has already been noted.⁴⁷ Even more outrageous was the conduct of Justice Luther J. Goddard of the Colorado Supreme Court. Detective McParland realized that his plans to kidnap Haywood and his fellow officers of the Western Federation of Miners would be aborted if a habeas corpus petition were filed on their behalf in Colorado. The audacious detective sought to enlist Justice Goddard as an ally in his enterprise. Goddard was already known as a strong friend of Colorado mine owners and an enemy of the unions. At a secret meeting, McParland gave Justice Goddard a full briefing on the confession extracted from Harry Orchard, including the revelation that Goddard himself had been targeted as a bombing victim. Orchard confessed that he had planted a bomb at the front gate of Justice Goddard’s home virtually identical to the bomb he used to kill former Governor Steunenberg! The bomb had failed to detonate. The Justice rushed home to confirm the revelation, and McParland’s detectives dramatically removed the still-buried dud from his front yard.⁴⁸

Justice Goddard assured Detective McParland that he had a strong case that would surely get the union officers hanged in Idaho, and promised to “see they are gotten there.” He urged that they be spirited out of Colorado as quickly as possible, to avoid a writ of habeas corpus being filed. If one had been filed, the case would surely have come before Justice Goddard.⁴⁹

The Idaho prosecutors even succeeded in finding a back door open at the United States Supreme Court. James Hawley, who argued the extradition case before the high court for the State of Idaho, later confided to Detective McParland that “he had a ‘long talk’ with

47. *See supra* note 22 and accompanying text.

48. Lukas, *supra* note 4, at 246-47, 251-52.

49. *Id.* at 252.

Justice Harlan, whom he had known for some years." He claimed he "told him some facts" that he thought would have "a good effect."⁵⁰

The Misconduct of Clarence Darrow

In a letter to U.S. Attorney General George Wickersham, the attorney in charge of a federal probe of the *L.A. Times* bombing conspiracy summed up the misconduct that the investigation of Darrow's defense on behalf of the McNamaras had turned up:

Two jurors bribed; two witnesses paid to get out of the country; two witnesses paid to testify falsely; a corrupt scheme to destroy certain physical evidence in the possession of state authorities; the corruption of practically every employee of the Los Angeles County Jail who came in contact with the McNamaras; complicity in a scheme of Tvietmoe, Johannsen and others to get Mrs. Caplan out of the state (she being the wife of one of those indicted for the *Times* murder, and still being secreted); the hiring of George Behm, uncle of Ortie McManigal, to induce the latter to repudiate his confession, on the personal guarantee of Darrow that McManigal would be made a free man; and other minor irregularities almost too numerous to mention.⁵¹

Evidence of most of these activities was offered in the course of Darrow's trials for bribing jurors. Darrow denied most of the activity, but the denials wore thin as the evidence accumulated. Darrow's defense placed increasing reliance on a theory of justification: he was fighting fire with fire.

With the exception of the bribery of jurors, every offense in this litany could be matched with equally offensive conduct by the prosecution. From Darrow's perspective, the prosecution even enjoyed the advantage of a rigged jury:

The judge was a member of the most elite club in the city, and no one would be allowed on the jury who did not own property and was not acceptable to the prosecution. The jurors all knew that they would be rewarded for voting to convict the McNamaras and punished if they voted for acquittal. In voting to set Darrow free, juror Golding once noted, he acted "contrary to my best interests (from a mercenary standpoint)." The forces of capital bribed jurors too, but the approach was a bit more subtle.⁵²

Perhaps Darrow's perspective was the problem. He saw the world as his clients saw it: a massive struggle by labor to cast off the chains of oppression imposed by the forces of capital. In an 1895 address he entitled "The Right of Revolution," Darrow had said:

50. *Id.* at 283.

51. Cowan, *supra* note 5, at 282.

52. *Id.* at 439.

The high motive of the revolutionists is one side, the strength of the government to protect itself is the other. . . .

. . . .

Victor Hugo, in his immortal work, *Les Miserables*, sends the kind priest to reason with the old dying revolutionist, who sat on the porch of his hermit's cottage, waiting for night and death, which were coming side by side. The priest upbraids him for the cruelty of the revolution; the old man rouses from his dying stupor and says: "You speak of the revolution—a storm had been gathering for fifteen hundred years; it burst, you blame the thunderbolt." . . .

. . . .

. . . With the land and possessions of America rapidly passing into the hands of a favored few; with great corporations taking the place of individual effort; with the small shops going down before the great factories and department stores; with thousands of men and women in idleness and want; with wages constantly tending to a lower level; with the number of women and children rapidly increasing in factory and store; with the sight of thousands of children forced into involuntary slavery at the tender age that should find them at home or in the school; with courts sending men to jail without trial for daring to refuse to work; with bribery and corruption openly charged, constantly reiterated by the press, and universally believed; and above all and more than all, with the knowledge that the servants of the people, elected to correct abuses, are bought and sold in legislative halls at the bidding of corporations and individuals: with all these notorious evils sapping the foundations of popular government and destroying personal liberty, some rude awakening must come. And if it shall come in the lightning and tornado of civil war, the same as forty years ago, when you then look abroad over the ruin and desolation, remember the long years in which the storm was rising, and do not blame the thunderbolt.⁵³

Darrow's respectable liberal friends were not surprised when he was charged with bribing jurors. They realized that Darrow believed the end could justify the means. One even wrote to him: "If by any chance you did [take a long chance for your clients], I am certain that you did nothing that any other lawyer would not have done placed in the same position in such an important case."⁵⁴ Others were not so forgiving. The poet Edgar Lee Masters, himself an idealistic young lawyer who assisted Darrow in the McNamara case, penned a devastating portrait of the moral character of Darrow in 1916:

53. Clarence Darrow, *Verdicts Out of Court* 59, 60, 64 (Arthur & Lila Weinberg eds., 1963).

54. Cowan, *supra* note 5, at 435.

You can crawl / Hungry and subtle over Eden's wall, / And shame
half grown up truth, or make a lie/Full grown as good. . . .

....

A giant as we hoped, in truth a dwarf; / A barrel of slop that shines
on Lethe's wharf, / Which seemed at first a vessel with sweet wine /
For thirsty lips. So down the swift decline / You went through
sloven spirit, craven heart / And cynic indolence. And here the art /
Of molding clay has caught you for the nonce / And made your head
our shame—your head in bronze!

....

One thing is sure, you will not long be dust / When this bronze will
be broken as a bust / And given to the junkman to re-sell. / You
know this and the thought of it is hell!⁵⁵

The most that can be said in Darrow's defense is to ask the question he himself asked the jurors who tried him: should scoundrels like the prosecutors "be saved from their own sins, by charging those sins to someone else?"⁵⁶ The detectives and lawyers who prosecuted the Haywoods and McNamaras of a century ago were also zealots. They clearly believed that the culprits they pursued were mortal enemies of society, the terrorists of their time. And they were ready to pull out all the stops to eliminate them, by fair means or foul. In this respect, little has changed in one hundred years.

Governmental Advantage in Our Time

It is highly unlikely that private funding of a prosecution could occur today to the extent it did in the Haywood trial. But it must be remembered that the private funding in the Haywood trial was concealed from public view, and public officials participated in covering it up. The "private" prosecutor is alive and well in our time. Many states still permit private attorneys to be retained to "assist" the prosecution, although they generally require that the private attorney work under the direction and control of the public prosecutor.⁵⁷ For a private attorney to be paid for his prosecutorial services by the victim or an organization allied with the victim, however, would present a conflict of interest. In *Young v. United States ex rel. Vuitton et Fils S.A.*,⁵⁸ the United States Supreme Court held that the duty of undivided loyalty to a client with a pecuniary interest in the outcome

55. Edgar Lee Masters, *On a Bust, in Songs and Satires* 98, 99-100 (1916).

56. Darrow, *supra* note 1, at 10.

57. See, e.g., *Faulder v. Johnson*, 81 F.3d 515, 517-18 (5th Cir. 1996); *Person v. Miller*, 854 F.2d 656, 663 (4th Cir. 1988); *Powers v. Hauck*, 399 F.2d 322, 325 (5th Cir. 1968); *Rutledge v. State*, 267 S.E.2d 199, 200 (Ga. 1980); *State v. Riser*, 294 S.E.2d 461 (W.Va. 1982).

58. 481 U.S. 787 (1987).

would preclude a private law firm from prosecuting a contempt proceeding on behalf of the government. Many lower courts have ruled that a prosecutor's conflict of interest can result in a violation of the defendant's right to due process of law.⁵⁹ Even public prosecutors may have a conflict of interest if the victim is financially supporting the prosecution. In *People v. Eubanks*,⁶⁰ the California Supreme Court ruled that a county prosecutor had to be disqualified because a victimized company had contributed \$13,000 to the cost of the prosecution. Defining the right to a "disinterested" prosecutor is a troublesome task for the courts, however. As noted by Judge Friendly of the U.S. Court of Appeals for the Second Circuit:

It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has, or is under the influence of others who have, an axe to grind against the defendant, as distinguished from the appropriate interest that members of society have in bringing a defendant to justice with respect to the crime with which he is charged.⁶¹

While private prosecutions are generally not permitted in the United States,⁶² several states still permit private counsel retained by the victim to assist the prosecutor in a criminal trial.⁶³ The most common use of private attorneys as prosecutors in recent times has been the appointment of "independent counsel" by federal courts to direct investigations of federal officials accused of corruption. In *Morrison v. Olson*,⁶⁴ the United States Supreme Court upheld a federal statute (which lapsed in 1999)⁶⁵ requiring the Attorney General to conduct a preliminary investigation of allegations that enumerated federal officials have committed a crime and, unless the allegations prove insubstantial, to ask a special three-judge panel to appoint an "independent counsel" to complete the investigation and conduct any prosecutions. The purpose of the statute was to avoid the obvious conflict of interest of prosecutors who owe political loyalty to the subject of their investigation.

Pursuant to this statute, Kenneth Starr was appointed to direct the investigation of President Bill Clinton related to Whitewater

59. *Granger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967); *New Jersey v. Imperiale*, 773 F. Supp. 747, 751-56 (D.N.J. 1991); *People v. Zimmer*, 414 N.E.2d 705 (N.Y. 1980); *Cantrell v. Commonwealth*, 329 S.E.2d 22 (Va. 1985).

60. 927 P.2d 310 (Cal. 1996).

61. *Wright v. United States*, 732 F.2d 1048, 1056 (2d Cir. 1984).

62. Many foreign jurisdictions do permit private criminal prosecution when the public prosecutor fails to act. Comment, *Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction*, 65 Yale L.J. 209, 233 (1955) (recommending states enact statutes to allow private prosecutions).

63. Andrew Sidman, Comment, *The Outmoded Concept of Private Prosecution*, 25 Am. U. L. Rev. 754, 755 (1976) (condemning the practice as "outdated, unnecessary, unethical and perhaps unconstitutional"); see *State v. Berg*, 694 P.2d 427 (Kan. 1985).

64. 487 U.S. 654 (1988).

65. Independent Counsel Act, 28 U.S.C. §§ 591-99 (1994).

transactions. Starr was actually appointed to replace prior Independent Counsel Robert Fiske, when criticism of Fiske's appointment was voiced because his law firm had represented International Paper Company, which had sold land to the Whitewater Development Company. Even though Fiske had resigned from his firm, the three judge panel found an "appearance of impropriety."⁶⁶ Ironically, Starr did not resign from his law firm, and even more serious allegations of conflicts of interest were raised regarding his investigation. Starr maintained close contacts with conservative political organizations and foundations that supported attacks on the Clinton administration, and accepted a deanship at Pepperdine University which received major funding from Richard Scaife, a wealthy Pittsburgh publisher who was publicly linked to payoffs to a Whitewater witness. Starr's law firm, from which he received an annual profit share averaging more than \$1 million, negotiated a favorable settlement of a complaint brought against the firm by the federal Resolution Trust Corporation ("RTC") while some of the RTC officials involved in settlement negotiations were targets of the Whitewater investigation. These conflicts were alleged in an ethics grievance filed with the federal district court in Arkansas, which was dismissed as a personal "vendetta" by the lawyer who filed it.⁶⁷ On appeal, the Eighth Circuit affirmed the dismissal on the grounds the attorney who filed the complaint lacked standing.⁶⁸ Thus, the conflicts of interest alleged against Starr were never litigated on the merits. After the Eighth Circuit decision, it was revealed that Starr had at least six conversations with the attorneys who filed a sexual harassment claim against President Clinton on behalf of Paula Jones, prior to his appointment as independent counsel. These conversations were not disclosed to the Attorney General when Starr sought authority to broaden the scope of the Whitewater investigation to include President Clinton's relationship with Monica Lewinsky.⁶⁹ Professor Deborah Rhode, after analyzing all of the allegations of conflict of interest against Kenneth Starr, concluded, "for prosecutors in general, and Independent Counsel in particular," the rules regulating conflicts of interest "are demonstrably inadequate."⁷⁰ Professor Stephen Gillers was even more emphatic in condemning

66. Deborah L. Rhode, *Conflicts of Commitment: Legal Ethics in the Impeachment Context*, 52 Stan. L. Rev. 269, 273 (2000) (citing *In re Madison Guaranty Savings & Loan Ass'n*, No. 94-1, 1994 WL 913274, at *1 (D.C. Cir. Aug. 5, 1994); Molly Ivins, *Starr's Conflicts of Interest Make Him Unfit as Whitewater Counsel*, Fresno Bee, May 15, 1996, at B5; David Johnston, *Three Judges Spurn Protest on Whitewater Prosecutor*, N.Y. Times, Aug. 19, 1994, at A16; Susan Schmidt, *Judges Replace Fiske as Whitewater Counsel: Ex-Solicitor General Starr to Take Over Probe*, Wash. Post, Aug. 6, 1994, at A1).

67. *In re Starr*, 986 F. Supp. 1159 (E.D. Ark. 1997).

68. *Starr v. Mandanici*, 152 F.3d 741 (8th Cir. 1998).

69. Rhode, *supra* note 66, at 278-79.

70. *Id.* at 280.

independent counsel who maintain their ties to their private law firms, finding it “unacceptable for a part-time prosecutor to be investigating the conduct of public officials while those same officials are pursuing serious civil charges against the prosecutor’s own law firm.”⁷¹

What of the prosecutor whose zeal is politically motivated, however? At the state level, most prosecutors are elected, and the exercise of their discretion may be strongly influenced by how their decisions will affect the next election. The “victims’ rights” movement in recent years has given birth to numerous political action groups that can strongly influence elections. This is especially evident in death penalty cases. If a defendant is facing the death penalty in a high profile case because the prosecutor is strongly influenced by public opinion and its impact on an upcoming election, is not the conflict of interest just as great as would be created by financial contributions of the victim’s family to the costs of the prosecution?

The use of private detectives is extremely rare in public prosecutions today, but frequently prosecutions are based upon evidence gathered by private police or private security agencies. The phenomenal growth in the private security industry means that only half of the crime-related security personnel in the United States work for a public law enforcement agency.⁷²

In *Burdeau v. McDowell*,⁷³ the United States Supreme Court declined to apply the exclusionary rule to suppress unlawfully obtained evidence when the evidence was obtained by private persons. Similarly, interrogation conducted by private persons need not comply with constitutional limitations such as the *Miranda* rule.⁷⁴ Thus, until the defendant is turned over to police authority, there are no constitutional limits upon evidence-gathering activity.

The kidnapping of defendants to avoid extradition protections is still a judicially approved activity for American law enforcement officers. The same precedents relied upon to justify the kidnappings in the Haywood and McNamara cases were cited and approved by the United States Supreme Court in *Frisbie v. Collins*,⁷⁵ and as recently as 1992 the Court upheld the forcible abduction and removal of a defendant from Mexico to stand trial in the United States, even though the United States has an extradition treaty with Mexico.⁷⁶

The use of spies and informants to penetrate the defense camp has come before the United States Supreme Court twice in recent history.

71. See *id.* at 285 (citing Gillers as quoted by Joe Conason & Murray Waas, *Troubled Whitewater: The Dual Roles of Kenneth W. Starr*, Nation, Mar. 18, 1996, at 13).

72. James S. Kakalik & Sorrel Wildhorn, *The Private Police: Security and Danger* 17 (1977).

73. 256 U.S. 465 (1921).

74. *Miranda v. Arizona*, 384 U.S. 436 (1966).

75. 342 U.S. 519 (1952).

76. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

In *Hoffa v. United States*,⁷⁷ a key witness for the government in its jury bribery case against labor leader Jimmy Hoffa was Edward Partin, who was released from jail while facing charges of embezzlement, kidnapping and manslaughter in order to serve as an informant during the so-called "Test Fleet trial" of Hoffa. Partin hung out at the hotel suite occupied by Hoffa during the trial and reported to the government on Hoffa's conversations. The Supreme Court majority held there was no violation of Fourth Amendment rights, since Partin "was in the suite by invitation, and every conversation which he heard was either directed to him or knowingly carried on in his presence."⁷⁸ In dissent, Chief Justice Warren almost echoed the protests of Clarence Darrow in noting what would happen if the defense hired an informant to spy on the prosecution:

[T]he Government reaches into the jailhouse to employ a man who was himself facing indictments far more serious (and later including one for perjury) than the one confronting the man against whom he offered to inform. It employed him not for the purpose of testifying to something that had already happened, but rather for the purpose of infiltration to see if crimes would in the future be committed. . . . Certainly if a criminal defendant insinuated his informer into the prosecution's camp in this manner he would be guilty of obstructing justice.⁷⁹

While Partin had not penetrated any consultations between Hoffa and his lawyers, the presence of a third person such as Partin during such consultations would ordinarily vitiate any claim of attorney-client privilege. In *Weatherford v. Bursey*,⁸⁰ a government informant who was still a codefendant attended pretrial meetings between the defendant and his attorneys. The Court accepted the informant's testimony that he had not discussed anything said at the attorney-client meetings with the prosecution, and his testimony at the defendant's trial was not related to anything that happened at attorney-client meetings. Finding no violation of the Sixth Amendment right to counsel, the Court declined to adopt a *per se* rule precluding informant participation in consultations with counsel. In dissent, Justice Thurgood Marshall noted that the defense would rarely be able to prove that an informant had disclosed privileged information:

[P]recious constitutional rights at stake here, like other constitutional rights, need "breathing space to survive" and a prophylactic prohibition on all intrusions of this sort is therefore essential. A rule that offers defendants relief only when they can prove "intent" or "disclosure" is, I fear, little better than no rule at

77. 385 U.S. 293 (1966).

78. *Id.* at 302.

79. *Id.* at 321 (Warren, C.J., dissenting).

80. 429 U.S. 545 (1977).

all. Establishing [an intent or desire to spy] will seldom be possible Proving that an informer reported to the prosecution on defense strategy will be equally difficult⁸¹

Relying specifically on *Weatherford v. Bursey*, Attorney General John Ashcroft announced a new Justice Department rule, effective October 20, 2001, allowing federal authorities to monitor mail and conversations between federal prisoners and their attorneys where the Attorney General has certified that “reasonable suspicion” exists to believe that inmates may use communications with their attorneys to facilitate acts of violence or terrorism.⁸² The rule requires a “firewall” between the monitors and federal investigators and prosecutors, with any disclosure of confidential communications to prosecutors requiring judicial approval. Defense lawyers ridiculed the notion that the “taint team” would not share information with prosecutors.⁸³

The payment or delivery of rewards to government witnesses was recently challenged under a federal statute, which provides:

Whoever . . . directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial . . . before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.⁸⁴

In *United States v. Singleton*,⁸⁵ a panel of the Tenth Circuit Court of Appeals reversed a defendant’s conviction because it was based upon testimony in violation of this federal statute. The prosecutors promised the witness that a motion for a downward departure for “substantial assistance” would be filed for his sentencing under the Federal Sentencing Guidelines.⁸⁶ In addition, the witness was promised he would not be prosecuted for any other violations stemming from his activities currently under investigation, except perjury or related offenses, that the court which sentenced him would be advised of the nature and extent of his cooperation, and that his parole board would be similarly advised of the nature and extent of his cooperation. The court concluded these promises fell within the plain language of the prohibition in the statute, and there was no exception or exemption under the statute for government witnesses. Six months later, sitting *en banc*, the Tenth Circuit rejected this ruling, and concluded that the word “whoever” in the statute does not

81. *Id.* at 565 (Marshall, J., dissenting) (citations omitted).

82. 28 C.F.R. § 501.3 (2002).

83. David E. Rovella, *Ashcroft Rule Puts Defenders in a Bind*, Nat’l L.J., Dec. 3, 2001, at A1.

84. 18 U.S.C. § 201(c)(2) (1994).

85. 144 F.3d 1343 (10th Cir. 1998).

86. U.S. Sentencing Guidelines Manual, § 5K1.1 (2002), permits a sentence below the guidelines range for a defendant who provides “substantial assistance” to government investigations of others.

include the United States acting in its sovereign capacity, and thus does not include a federal prosecutor acting as “alter ego” of the United States in offering a witness leniency in exchange for truthful testimony.⁸⁷ Thus, a double standard was explicitly approved, leaving prosecutors free to promise inducements to their witnesses, while defense lawyers remain subject to criminal penalties for engaging in the same behavior with their witnesses. As noted by the dissenting judges in the *en banc* ruling,

Once the government falls into the crucible of the trial, the government, like the defendant, must follow the generally applicable rules governing the process. The government’s argument that discontinuing the pervasive practice of buying testimony for leniency would jeopardize law enforcement is just another way of saying that the end justifies the means

. . . .

Constitutional law manifests another vital legal tradition which the government’s position undercuts—the policy of ensuring a level playing field between the government and defendant in a criminal case.⁸⁸

With carefully limited exceptions, *ex parte* communications with judges remain just as improper today as they were a century ago. But today, prosecutors need not go to elaborate lengths to conceal their back-door efforts to prejudice a judge against the defendant. The Federal Rules of Criminal Procedure provide a convenient vehicle to engage in the practice with impunity. Rule 16(d)(1) allows judges to deny, restrict or defer pretrial discovery by issuing a “protective order” upon a “sufficient showing.” The rule permits the showing for the protective order to be made “in the form of a written statement to be inspected by the judge alone.”⁸⁹ These *ex parte* communications will frequently contain extensive hearsay based on informant information, telling the judge what a menace to society the defendant represents, and claiming that no witnesses are safe while the defendant is at large. The defendant, of course, never sees the statement, and has no opportunity to challenge its factual allegations. While *ex parte* statements are frequently accepted from the prosecution, it is rare and unusual for a defendant to be permitted to file an *ex parte* statement pursuant to Rule 16.⁹⁰

Thus, nearly every advantage available to the prosecution and denied to the defense which Clarence Darrow complained about a century ago is still available to the prosecution today, and is still

87. *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (*en banc*).

88. *Id.* at 1312, 1314 (Kelly, J., dissenting).

89. Fed. R. Crim. P. 16(d)(1).

90. *See, e.g., United States v. George*, 786 F. Supp. 11 (D.C. Cir. 1991).

denied to the defense. In fact, today most of those advantages have received explicit approval from the courts, and prosecutors no longer need to conceal them.

Fighting Fire With Fire

The justification of “fighting fire with fire” may seem more appropriate to the battleground than to the courtroom, but in both settings the participants are expected to play by the rules. Even in war, the use of weapons like poison gas cannot be justified by the fact that one’s opponent used poison gas first.⁹¹ Both sides would be guilty of a war crime, although it is ordinarily the one who loses the war who is held accountable for his war crimes.

One of the ironies of Clarence Darrow’s early career is that the shady dealings in which he engaged in Los Angeles were probably no different than the way he conducted himself in prior cases. Even before the Los Angeles events, there was widespread suspicion that jurors in the Haywood trial had been bribed.⁹² Darrow played to win, knowing that the risks of being held accountable for breaking the rules were much higher for losers. Darrow’s reputation for pushing the ethical envelope certainly had a lot to do with the heightened scrutiny that police and prosecutors applied to his defense team in the McNamara trial.

This immediately identifies a serious problem with “fighting fire with fire.” Over an extended period of time, everyone forgets who set the first fire. The Los Angeles prosecutors probably justified their use of spies and informants in the defense camp because they were sure Darrow would deploy spies and informants against them. From this perspective, *they* were the ones who were fighting fire with fire. Thus, fighting fire with fire invites a constantly escalating conflagration with diminishing ability to sift through the ashes and determine who started it.

The phenomenon of “loser pays” can also provide us with some insights. An ongoing trial resembles a war in many important respects, but one crucial similarity is the need to suspend any serious investigation of rule breaking until the shooting has stopped. While charges and counter-charges of unethical behavior are frequently exchanged in the midst of high profile trials, an immediate investigation of these charges would seriously impede the ongoing trial process. The temptation is greatest to engage in conduct that crosses ethical lines when that conduct is perceived as sealing a

91. Protocol: Geneva Convention Against Use of Gas and Bacterial Warfare, 94 League of Nations Treaty Series 65 (June 6, 1925). The charge of the use of poison gas against Kurds by Iran, however, may be defended by the claim that Iraq used poison gas first.

92. Lukas, *supra* note 4, at 442-43.

victory. Then, a winner can deflect a subsequent investigation as “sour grapes,” or retribution on the part of a sore loser. This phenomenon is frequently observed during election contests, where charges and countercharges of unethical campaign conduct cannot be resolved prior to the election, and often disappear when the election is over.

Going beyond our battlefield and electioneering analogies, the role of a courtroom advocate carries the unique obligation of unswerving loyalty to the client. This duty requires a lawyer to withdraw when he or she has conflicting loyalties to other clients, or to one’s own self interest. One of the gravest risks of fighting fire with fire is the potential for the lawyer himself to become an accused, with a need to defend himself that may conflict with his duty of loyalty to his client. Darrow faced this problem when his chief jury investigator was arrested at the outset of the McNamara trial. It is generally believed that the quick and surprising change of plea by the McNamaras was engineered to provide Darrow with a defense to the charges of jury bribing.⁹³ What need would there be to bribe jurors, if the McNamaras were going to plead guilty? Darrow contended that the decision to change the plea preceded the arrest of his investigator. If the change of plea was motivated by Darrow’s need for a defense, the McNamaras were denied the effective assistance of counsel. Their lawyer had an irreconcilable conflict of interest between his own interests and the interests of his clients.

The unfair advantages that the prosecution enjoyed in Darrow’s trials were already the object of scrutiny and criticism in Darrow’s time. Private funding of the prosecution was concealed from public view precisely because it was widely perceived as unfair and unethical. The use of private detectives was the object of frequent criticism and was beginning to receive legislative attention. The most effective way to bring about reform would have been to expose these practices whenever possible. One seriously undercuts his ability to function as a “reformer,” however, when he engages in the very same practices himself. Thus, another drawback of fighting fire with fire is that the prospects for meaningful reform are diminished.

Except that it might enhance your chances of winning, fighting fire with fire has little to recommend it. But for some, winning is everything, and the end justifies the means. Sadly, it appears Clarence Darrow in 1911 was one of those for whom winning was everything. He did not seek victory just to gratify his own ego, however. He strongly identified with his clients and the cause of labor. Is fighting fire with fire justifiable when the success of a higher cause is at stake? What if the cause is perceived as the greatest cause imaginable, the cause of survival of one’s highest values? That question must be

93. Cowan, *supra* note 5, at 264-65.

answered by returning to the limited role cast for advocates in our adversary system. An advocate who is a zealot for a “higher cause” is rarely competent to function as a lawyer. He or she simply lacks the independent perspective that is essential to exercise good judgment on behalf of a client. The lawyer who fights fire with fire to serve a higher cause is not serving that cause well, but lacks the perspective to even recognize the harm he is doing to his client. Ultimately, the cause itself will be ill served by fighting fire with fire. Short of a successful revolution, a cause that is advanced by corruption simply will not gain the public support essential to success in a democracy.

This reflection on the ethics of Clarence Darrow has led me to an unanticipated conclusion. My personal hero, the man who inspired my own ambition to become a lawyer, turns out to have been not just unethical, but a lousy lawyer to boot. By fighting fire with fire, he ended up not only burning himself, but he seriously damaged the cause of labor as well. If Clarence Darrow’s career had ended in 1911, he would surely be consigned to the hell of ignominy portrayed by the poetry of Edgar Lee Masters. But Darrow lived for another 26 years, and during that period he pursued a very different direction in his legal career. He never represented the cause of labor again, but the causes he took up were just as important. He truly redeemed himself and gained his place as an inspirational role model for future generations of lawyers. Even Edgar Lee Masters recognized this, and authored another later poem about Clarence Darrow:

There were tears for human suffering, or for a glance / Into the vast
futility of life, / Which he had seen from the first, being old / When
he was born . . . / This is Darrow, / Inadequately scrawled, with his
young, old heart, / And his drawl, and his infinite paradox, / And his
sadness, and kindness, / And his artist sense that drives him to shape
his life / To something harmonious, even against the schemes of
God.⁹⁴

When we emulate the ideals of Clarence Darrow, it should not be by fighting fire with fire. It should be by directing a steady stream of water on the fires that still smolder today, replicating the injustices of a century ago. The “well-meaning men of zeal” who are ready to burn up our constitutional liberties in order to enhance our security are with us today, just as they were a hundred years ago. The way to defeat them is by the kind of advocacy that Darrow demonstrated in the courtrooms of Dayton, Tennessee and Chicago, Illinois: advocacy that turned the hearts and minds of an entire generation. Not by fighting fire with fire, but by fighting ignorance and hate with wisdom and love.

94. Edgar Lee Masters, *Clarence Darrow*, *The New Republic*, May 27, 1957, at 16.

Notes & Observations