Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons From England

Peter W. Tague
Georgetown University Law Center, tague@law.georgetown.edu

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ENSURING ABLE REPRESENTATION FOR PUBLICLY-FUNDED CRIMINAL DEFENDANTS: LESSONS FROM ENGLAND

Peter W. Tague

While there are skilled private defense lawyers who enthusiastically represent indigent criminal defendants, too often defense lawyers whose income depends upon appointments provide deplorable representation. The problem is well known and pervasive. In addition to the blizzard of claims on appeal of ineffective representation, defenders' efforts have been savaged by judges and by fellow lawyers. These nagging problems persist: to induce private lawyers to represent their clients effectively by eliciting the defendant's story and managing their relationship in a way that at least does not displease the defendant; investigating his and the prosecution's positions; pressing the prosecution for discovery, for concessions and to observe the rules; and fighting at trial unless pleading guilty seems the much more advisable choice.

Efforts to solve the dual problem of choosing the right lawyer and ensuring that he behaves optimally have proven largely fruitless. One answer, not yet explored, is to adopt a voucher system: the defendant would choose the lawyer, and work out the terms of their relationship. Might a voucher scheme induce able lawyers to compete to represent indigent defendants? Might it provide a way for the defendant to

* Professor of Law, Georgetown University Law Center, Washington, D.C.
1. Former members of public defender offices will often act in this fashion, as a number of my friends do.
2. The focus is on private lawyers, not public defenders, in order to make the comparison with barristers discussed below.
4. See David L. Bazelon, The Realties of Gideon and Argersinger, 64 GEO. L.J. 811, 812-13 (1976); Warren Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 FORDHAM L. REV. 227, 234 (1973) (estimating that as many as 50% of the lawyers appearing in important cases were not qualified).
5. See Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1842 (1994). A recent report intended for international review draws similarly alarming conclusions about death-penalty defense. See AMNESTY INT'L, KILLING WITH PREJUDICE: RACE AND THE DEATH PENALTY IN THE USA (1999) ("Given the appallingly low standards of many court-appointed attorneys in numerous jurisdictions, there is an ever-present risk that minority defendants may be represented by lawyers who are not only incompetent, but also openly bigoted.").
6. A second—to tie the lawyer's compensation to some measure of success—might also reduce shirking and the lawyer's incentive to process cases by convincing defendants to plead guilty. But it would have its own problems. Lawyers might risk higher sanctions for defendants, and waste resources, by convincing defendants who should plead guilty to go to trial. As a result, such an arrangement is forbidden. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1983).
monitor the lawyer’s endeavors? The English model of choosing and overseeing barristers, the lawyer who usually is the criminal defendant’s advocate, resembles a voucher scheme, and suggests that a similar arrangement might work in the United States.

Before examining the English approach, it is useful to remember that two other methods of reform have failed. The disgracefully low fees paid to appointed defense lawyers could be enhanced considerably. Trial courts could inspect the efforts of defense lawyers; appellate courts could scrutinize claims of ineffectiveness. Both strategies have failed. Legislatures will continue to resist enhancing defenders’ fees, even though raising them could attract more able lawyers and could relieve somewhat the difficult choice lawyers must make in allocating their time as they approach the overall compensatory cap (to avoid working for free if they pierce that cap). Trial judges are reluctant to query the defense lawyer about his conduct, to learn whether he has made a choice, let alone a sagacious one, not to undertake some act usually expected. Appellate review of effectiveness claims is an inefficient and unrealistic way of approaching the problem. The appeals process is itself costly, and a reversal prompts an expensive second prosecution. Reversals are unlikely, however, not because defense lawyers perform satisfactorily, but because the defendant’s burden is so high. If the wisdom of the lawyer’s tactical decisions is not reviewed (and it would be difficult to do so), and if the defendant must prove that the outcome would have been otherwise if the lawyer had acted differently, courts will reverse convictions only for conflicts of interest or for egregious omissions.

A major problem with the current system is the absence of an economic incentive for the defense lawyer to win or even to appear interested in zealously representing the defendant. They are either paid

7. Virginia is not unusual in paying lawyers the princely maximum of $845 (up from $735 in 1997) for felonies carrying a potential prison term longer than 20 years and $305 (up from $265) for felonies where the sanction is less. In the federal system a lawyer can be paid as much as $75 per hour for time in court and $60 per hour for preparation, but in many districts the fees remain $60 and $45, respectively, with a cap in all districts of $3500. See Criminal Justice Act, 18 U.S.C. § 3006A (2000). Chief Justice Rehnquist has even urged Congress to increase the fees, arguing that “[a]dequate pay for appointed counsel is important to ensure that a defendant’s constitutional right to counsel is fulfilled,” but that current “compensation rates still do not meet many attorneys’ non-reimbursable overhead costs.” Joan Biskupic, Rehnquist’s Year-End Report, WASH. POST, Jan. 1, 2000, at A02.

8. While spending has increased over the last thirty years, increases in crime rates and in the number of defendants represented by publicly-funded lawyers appear to have reduced per-defendant expenditures. See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 YALE L.J. 1, 9-10 (1997).


10. Here I agree with Professor Stuntz’s observations in his fine article. See Stuntz, supra note 8, at 20.
by the hour, with a cap on the total possible award, or by a pre-
determined fee for all work,\textsuperscript{11} or they receive no premium for winning
or even for exhibiting skill in defeat. And were a skilled performance to
enhance reputation, lawyers cannot capitalize on that to gain additional
appointments,\textsuperscript{12} because nowhere do indigent defendants have the
power to choose their advocate.\textsuperscript{13}

Indeed, it might even be that defense lawyers who depend on
appointments for their income have an incentive to lose. This perverse
inducement could arise whenever the scheme for selecting lawyers was
not impartial. Judges who appoint lawyers have reason to avoid
appointing litigious advocates who advance many motions, undertake
extensive factual investigations and press for trials. It is less costly and
less contentious to appoint those who can be relied upon to persuade
defendants to plead guilty. Even aggressive defense lawyers might be
tamed by prosecutorial punishment, as prosecutors, for example, refuse
to extend plea offers or delay disclosing information otherwise given
earlier to more accommodating lawyers.\textsuperscript{14}

If the claim that appointed lawyers have an incentive to lose is
exaggerated, it is true that defense lawyers' incentives do not overlap
defendants' desires. The lawyer's incentive to litigate is often less than
the defendant's. Paying nothing for the lawyer's efforts, the indigent
defendant wants unlimited help.\textsuperscript{15} Were the lawyer to follow the
defendant's desires, the lawyer would press issues when the costs and the
chance of winning did not justify the decision.\textsuperscript{16} Even the zealous
lawyer has an economic target where, once reached, he wants the case

\begin{footnotes}
\footnotetext[11]{\textit{For example, see supra note 7.}}
\footnotetext[12]{\textit{An exception might exist were a lawyer to qualify for more demanding cases, but this advance
is typically based on experience, not success. One gains experience whatever the outcome.}}
\footnotetext[13]{\textit{See Peter W. Tague, An Indigent's Right to the Attorney of His Choice, 27 STAN. L. REV. 73, 77-78
(1974).}}
\footnotetext[14]{\textit{Conversations with skilled lawyers, however, suggest instead that lax and unskilled lawyers, not
aggressive ones willing to fight at trial, are more likely to be cowed by prosecutorial pressure. A contentious
defense lawyer increases the costs of prosecution. Better for the prosecutor to provide discovery to him, my
commentators say, to avoid litigating a dispute. Lawyers who thrive by having clients plead guilty, by
contrast, earn no respect from the prosecutor, who provides them with little discovery and few
accommodations in the expectation that they will not review carefully whatever they receive, and eventually
will convince the defendant of the benefit of pleading guilty. The issue is how to encourage lawyers who
ordinarily avoid trials and pressurize their clients to plead guilty instead to press the prosecution when it
seems appropriate to do so.}}
\footnotetext[15]{\textit{Of course, the defendant may not recognize the opportunities to litigate, may be reluctant to
press the lawyer to act, or may have his efforts blunted by the lawyer's distance or indifference.}}
\footnotetext[16]{\textit{On the other hand, there is one motion—to suppress an identification—that is worthwhile even
though it will almost invariably fail in light of Supreme Court law. \textit{See United States v. Ash, 413 U.S. 300,
318-19 (1973) (Sixth Amendment test read restrictively); Manson v. Brathwaite, 432 U.S. 98, 103-05
(1977) (same with due process test). Forcing identification witnesses to testify provides valuable discovery.}}
\end{footnotes}
to end, or at least his involvement with it. That point arrives at the very moment he reaches the cap on the fees set by the jurisdiction's financial scheme. In federal courts, the cap in felony cases is $3500. In those federal districts that pay $75 per hour, a lawyer can provide forty-six hours of work before he begins to work for nothing: enough time to interview the defendant, perform the legal research, prepare the papers and litigate a motion or two, and undertake an exploratory investigation of the facts. Usually, this allows enough time to conclude that the defendant is sufficiently guilty to end the case by plea. But enough time to investigate thoroughly a potential, albeit unlikely, factual or legal defense? Enough time to conduct any but a very short trial? True, with experience, and if skilled, the lawyer becomes practiced in speedily evaluating the alternatives and in implementing his choices. True, the lawyer is less reluctant to mount a defense that threatens to pierce the cap the more sure he is that his case will qualify for special treatment. Yet, unless quite sure the cap will be ignored—but then again by how much?—the risk is so high the lawyer will be working for nothing that many must not mount the defense they would if representing a defendant paying a higher fee.

An indigent defendant's desires can thus clash with the lawyer's interests. No wonder there is tension in the relationship. No wonder so many defense lawyers are accused, on appeal, of having acted ineffectively for failing to have made a motion or investigate a point. What is especially expensive is investigating and litigating defenses on the merits. The expense is great in part because of the lack of discovery in many jurisdictions. In federal prosecutions, for example, under the

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17. Obviously, lawyers can lose interest in a case for reasons other than money. The factual issues might be uninteresting, the legal ones prosaic. The defendant might be overly demanding or uncooperative.

18. The reported cases suggest judges are reluctant to exceed the cap. See Peter W. Tague, Representing Indigents in Serious Criminal Cases in England's Crown Court: The Advocates' Performance and Incentives, 36 AM. CRIM. L. REV. 171, 220 (1999). My anecdotal information, however, suggests that in certain jurisdictions, like the Northern District of California, judges routinely approve payments exceeding the cap; elsewhere, as in the local court in the District of Columbia, fee requests are closely scrutinized and payments over the cap are much rarer. A useful research undertaking would be to learn how often lawyers are paid more than the cap and, when not, whether they limit their representation.

19. Ironically, a lawyer with time left under the cap has an incentive to file motions he expects to lose, so long as his opportunity costs do not improve by attending to a different client. Moreover, one (more?) contested hearing may impress, and satisfy, the defendant.

20. In England, by contrast, discovery by the Crown is much more generous than in federal courts, see Peter W. Tague, Effective Advocacy for the Criminal Defendant: The Barrister vs. the Lawyer 196-203 (1996), even if, since 1996, the Crown is no longer automatically obligated to reveal all of the material it will not use at trial. See Criminal Procedure and Investigations Act, 1996, ch. 25, pt. 1, § 3 (Eng.). Failures to disclose useful evidence to the defense are now more possible. See Law Society Calls for Urgent Action on Disclosure Failures, CRIM. PRAC. NEWSL., July 1999. Barristers also do not need to spend their time investigating; that is the solicitor's work. Thus, the per-case compensatory caps now in place in England for paying barristers do not affect barristers as they prepare the brief supplied by the solicitor.
rules of criminal procedure the defense learns nothing about the prosecution's witnesses until they testify, and then receives their statements only at the conclusion of the direct examination. The resulting lack of information about the prosecution's case may cause the defense to undertake investigation not needed when the prosecution's evidence is revealed, to misdirect its efforts, or even to truncate an investigation that might have borne fruit even though the defendant appeared guilty enough to justify accepting a guilty plea offer.

If investigation bears fruit, the defense lawyer, concerned that further litigation will cause him to exceed the cap, confronts the difficult tactical and ethical issue of deciding whether, during plea bargaining, to disclose what he has learned in hope of settling the matter rather than of entering a trial. If the bargaining fails, the lawyer may have revealed information that risks compromising the defense at trial.

If the prospect of reform through increased remuneration or more careful appellate grading of lawyers' performance is slight, a third possibility—a voucher scheme—would draw on English experience by attempting to better align the lawyer's incentives with the defendant's, and the lawyer's with the public's desire for efficient representation that nonetheless protects the innocent. A market could be created by giving each indigent defendant a voucher to use in hiring a defense lawyer of his choice. As we shall see, a voucher scheme increases the likelihood a relatively able lawyer will represent the defendant, without necessarily improving the defendant's ability to monitor his performance.

I. CHOOSING THE LAWYER

The power to select a lawyer will not be worth much if the defendant lacks information about the experience and approach of those available. An important reason for having courts select the lawyer for the defendant is the cost of information. To help the defendant learn and assess the skills and performance of lawyers who practice criminal law, the courts, or some agency, would need to compile detailed records about the lawyers' experience, including, for example, a list of the charges filed against his former clients and the cases' outcome, the percentage of cases taken to trial or ended by plea, and the rate of victory in trial.

A system like this gives the lawyers an incentive to win and to develop a reputation for skillful and caring work, so that they will attract more

about the defendant's case. For the compensatory caps, see Legal Aid in Criminal and Care Proceedings, S.I. 1996, No.2655. See infra note 50.
clients. A system like this also creates an incentive for lawyers to use their time efficiently, since the amount of the voucher would not increase with the number of motions filed. Conversely, it could also create the temptation to do as little as possible because the lawyer would be paid the full amount no matter how many hours are worked. But offsetting that temptation is the lawyer’s worry that shirking will tarnish the lustrous reputation needed to attract clients. Lawyers worried that an aggressive fight would consume the voucher (according to an imputed hourly rate the lawyer intended to earn) might be led to discuss with the defendant the various methods of contesting the prosecution, and selecting, with the defendant, the ones that seemed most likely to succeed. Defendants might in turn be expected to write a note commenting about the lawyer’s work, which would be added to the materials future defendants would review about the lawyer.

Such a scheme is not fanciful, even if many problems in its implementation can be envisioned, as discussed below. A voucher scheme resembles the method of providing advocates to indigent defendants in England’s Crown Court, the court with general jurisdiction over serious criminal charges. As in the United States, the tension between ensuring adequate representation, but at a bearable public cost, exists in legal aid cases in Crown Court. In Crown Court, however, the structure of practice and the compensatory system are better calibrated to attract able advocates to represent indigent defendants.23 Two structural features, now unknown in the United States, are the defendant’s ability to select a barrister,24 and to replace him at will, and the barrister’s concomitant obligation to accept any brief,25 known as the cab-rank rule. Like lawyers, barristers can decline a brief if the fee is too low but, unlike lawyers, that reason does not permit a barrister to escape representing an indigent defendant. The Bar in England takes the position that legal aid compensation is sufficient. Barristers do not rebel at this position because legal aid compensation, at least in serious cases, is quite handsome,26 when

23. The worry that the defendant will attack the advocate’s representation on appeal is no more a prod in England than in the United States, and for the same reason—the difficulty in satisfying the test. See R. v. Clinton, 2 All E.R. 998, 1005 (C.A. 1993) (seemingly relaxing earlier need to show counsel’s performance was “flagrantly incompetent,” but still requiring a showing that “all the promptings of reason and good sense point[] the other way” [i.e., to a different choice]).
24. While solicitors may now also advocate for defendants in Crown Court, few do, and this discussion thus focuses exclusively on representation by barristers.
25. The term “brief” refers to the package of instructions and documents the solicitor prepares for the barrister, as well as to the solicitor’s act of choosing the barrister (“to brief” a barrister).
26. That conclusion is based on my study of 63 cases being taxed—that is, the compensation was being chosen—in the Old Bailey, London’s celebrated Crown Court for criminal cases, in 1992. The amounts paid, even in 1992, would make lawyers envious. For example, in the five-day trial of an uncomplicated robbery, the defendant’s Queen’s Counsel received £5596, his junior £2934 and his
compared with legal aid payments in the United States. Thus, defendants are able to choose from among the most able barristers suitable for the defendant's exposure and need.

Vouchers in American courts would take one but not both of these features of English practice: the right to select the advocate, but not the accompanying expectation that the advocate will accept the request. Another feature of vouchers would parallel a third indispensable part of England's arrangement. Critical to the barrister's financial success is the ability to attract briefs. Barristers are independent contractors; even in legal aid matters they do not receive work, as private lawyers do in the United States, by being chosen by a judge or court administrator to represent an indigent defendant. Instead, they work only if chosen by a solicitor, who is the actual representative of the defendant. A barrister must therefore develop a reputation among solicitors for advocating effectively.

That is so even in less serious cases where solicitors do not always choose a specific barrister, but instead send the brief to the clerk of a barristers' chambers, authorizing the clerk to select the barrister. To keep that solicitor's business for the other members of chambers, the barrister would capture that entire amount because he does the work of the three representatives in England. See also Peter W. Tague, *Ex Post Facto Payments in Legally-Aided Criminal Cases in the Old Bailey, 28 Anglo-Am. L. Rev. 415, 417-23* (1999). The current government, however, is so alarmed at the spiraling costs of fees in legal aid cases that it has announced plans to slash the amount of payments. See Frances Gibb, *Barrister's Pay Is Cut by Pounds 50m in Assault on Legal Aid, Times* (London), Dec. 7, 1999, at 1.

Under the former compensatory scheme junior barristers received rather low fees in standard-fee cases (like burglary, unless the trial were to last more than three days). The basic fee for preparing the brief and for the trial's first day was £214; and the payment for each succeeding day in trial, £153. When compared with the payments in ex post facto cases, these payments were low. But juniors tolerated this scale for reasons without relevancy to lawyers' incentives. Life as a barrister carries prestige. It also is rather untroubled: the barrister undertakes no investigation (that is the solicitor's role), has minimal contact with the defendant, does not solicit business (that is his clerk's job, if anyone's). And by performing well, young barristers hope to attract the attention of solicitors, and eventually of Queen's Counsel and the judges who will recommend them for elevation to the rank of Queen's Counsel.

The link between the cab-rank rule and the Bar's acceptance of legal aid payments as sufficient would appear to enable every indigent defendant to compete with wealthy defendants to select the most able barrister. It does not work quite that way, however. For example, a defendant charged with a burglary could not brief a Queen's Counsel because those senior members of the Bar will be paid to appear only in prosecutions for murder or when the "case is one of [such] exceptional difficulty, gravity or complexity . . . that the interests of justice require . . . the services of two counsel." *Legal Aid in Criminal and Care Proceedings, S.I. 1989, No. 344, reg. 48(2)(a) and (b).* For a discussion, see Tague, *supra* note 18, at 177.

One could require lawyers who participate in a voucher scheme to accept cases unless too busy properly to defend a defendant who chose him or her. While including a cab-rank rule might make a voucher scheme more efficient to administer, the defendant could also be expected to list, say, three lawyers he would like. It should not prove too difficult to contact the second, or the third, choice if the others were unavailable. Hence, the cab-rank rule need not be adopted to achieve the benefits of a voucher scheme.

In less serious cases, however, solicitors sometimes send the brief to the clerk of a barristers' chambers, authorizing the clerk to the barrister. To keep the solicitor's business the clerk has an incentive to entrust the brief to an able barrister.
clerk has reason to entrust the brief to an able barrister. In turn, that barrister has reason to impress the solicitor, in hope of being selected directly by the solicitor in the future. Being briefed directly frees the young barrister from relying on the chambers' clerk to continue to direct business, increasingly more challenging and remunerative to him.

Once chosen, a barrister who displeases the solicitor or the defendant risks being fired in that case and, more disastrously, risks losing the solicitor as a source of work. At the present, by contrast, a private lawyer may continue to receive appointments, often no matter how woefully he performs. With the power of selection the defendant might better control the lawyer, just as the solicitor has the means to control the barrister.

In theory the English system is so much better than the American: a professional (the solicitor) selects and supervises a professional advocate (the barrister), who must agree to accept the brief; each has an expertise in defense, the solicitor in preparing, and the barrister in presenting. The barrister does not reject the brief because the compensation is acceptable. Another feature, also unknown in the United States, and not part of a voucher scheme, is the solicitor's role of monitoring the barrister to ensure that he provides the expected service. Indeed, the solicitor or his representative attends the barrister in court, to help as needed, to act as a liaison between the two, and, supposedly, to grade the barrister's performance for use in deciding whether to brief him in the future.

If the solicitor is skilled in selecting the barrister, how does the defendant select a solicitor? The indigent defendant in Crown Court may be no more schooled in making this choice than is his American counterpart were he to choose a lawyer. Do the advantages of the English process diminish if the defendant selects an incompetent solicitor? The English system seems to work, however, in part because

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31. The solicitor interviews the defendant, obtains the official papers and the discovery provided by the Crown, may seek advice from the barrister about witnesses to subpoena and any investigation to pursue, undertakes that investigation, and writes the brief indicating the defendant's position on the facts and his desired outcome, and, if the brief is done well, identifying the legal and factual issues and offering ideas on research, cross-examination and final argument. For an example of how helpful an excellent brief can be, see Tague, supra note 20, at 44 n.144.

32. The Lord Chancellor's Department and Legal Aid Board are in the process of establishing a scheme to contract with solicitors' firms to provide all services in publicly-funded criminal cases. See Criminal Defence Services, Introducing Contracts for Criminal Defence Services with Lawyers in Private Practice (Aug. 1999) (on file with author); Lord Chancellor's Department, Modernising Justice 10-11 (1998) (on file with author). While this form of franchising will limit the defendant’s choice of a solicitor to those with a contract, it should increase the likelihood the solicitor will perform as expected. The process of obtaining a contract will involve monitoring by the Government to ensure the delivery by the solicitor of skilled representation. Thus, this innovation, while limiting the defendant’s previously unfettered ability to choose any solicitor, should reduce the information problem a defendant now has that might lead him to select an incompetent solicitor.
the solicitor's work is more circumscribed than the lawyer's, and, more importantly, because the solicitor has a hefty incentive to select an able barrister. If the solicitor can find a barrister whose temperament and skills fit the defendant's personal and legal needs, the barrister can make the efforts of a plodding or harried solicitor look better.

The English scheme, then, far better aligns the barrister's incentives with the defendant's than is true in American jurisdictions. In practice, however, these salutary features often fail to work, but not for reasons germane to a voucher system. All too frequently the barrister, often on the eve of trial, withdraws, thus forcing the solicitor to scramble to find a replacement. The origin of the problem of the returned brief lies in two assumptions: barristers, as skilled advocates, need scant time to prepare, so long as the brief has been assembled appropriately; and trial judges must continuously be overseeing a trial. The effect of these assumptions is to schedule cases for trial without much regard for the barrister's calendar or the defendant's desire to have a particular barrister represent him. If the barrister is unavailable when the trial is scheduled, often on very short notice, the barrister returns the brief, and a replacement must be found. Because of the first assumption, barristers are regarded as fungible. The defendant loses the barrister whom he came to trust and respect, but the replacement is in theory no less talented and is also subject to the same incentive to perform well.

Nonetheless, problems could arise. Because so many briefs are returned, barristers, at least in the less serious cases, may delay

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33. The solicitor's need to investigate is less than the lawyer's, for example, because the Crown's obligation to disclose its evidence is wider. See Tague, supra note 20, at 196-203. Extensive discovery is an advantage because solicitors are reluctant to interview the Crown's witnesses for fear of being charged with obstruction. See id. at 137 (noting that lawyers would be disturbed at this possible failure to prepare the defense thoroughly).

34. One worry is that the barrister will protect a floundering solicitor to avoid antagonizing a future source of work.

35. This is called "returning the brief." Defense briefs are returned 50% of the time. See General Council of the Bar, Study of Remuneration of Barristers Carrying Out Criminal Legal Aid, Annex B, Table B5, at B7 (1985) (on file with author). The rate remains the same in this decade. See Royal Commission on Criminal Procedure, Crown Court Study, 1993, Cmd. 2263, at 54 (48% of defense briefs returned). For a discussion of the returned brief, see Tague, supra note 20, at 128-36; Tague, supra note 18, at 205.

36. The returned brief is not a problem in the United States; lawyers are usually able to obtain a continuance if occupied elsewhere or not ready to proceed.

37. On the other hand, because briefs are returned so frequently, barristers invest little effort in many cases. Thus, defendants often meet the barrister for the first time on the day of, or immediately before, the trial, at least in the less serious cases that do not receive a fixed date for trial. See Royal Commission on Criminal Procedure, Crown Court Study, 1993, Cmd. 2263 (in over half the contested cases the first meeting did not occur until the day of trial, when the defendant decided to plead guilty on that day, the figure rose to 70%). In another study defendants who met the barrister before trial usually did so only once, for 10 to 60 minutes, but frequently a different barrister, whom they had not met, would appear at trial. See Justice, Miscarriages of Justice: A Defendant's View 2 (June 1993).
preparing until very near the trial date. Because they are not compensated, at least in the less serious cases, for preparation when the brief is returned, barristers are inclined not to prepare unless sure they will be able to appear in the case. 38 By delaying his preparation, the barrister does not participate in the solicitor's preparation of the defense, and something may thereby be overlooked. Or, the replacement, with little time to prepare, could overlook something, or might evaluate the defense very differently, advising the defendant that a tactic the first barrister thought was promising is fruitless. In that case he might even gloomily urge the defendant who expected to fight to plead guilty instead. The defendant, unsure about the skill of the replacement whom the solicitor might not know, 39 and confused by the inconsistent advice, must then make the stressful decision to plead or to press an unenthusiastic barrister for a trial.

These problems in England form impediments to effective defense advocacy. The returned brief subverts the defendant's right to select the barrister. The barrister's performance may be hindered, too, by incomplete information and inadequate time for preparation. Yet these are problems indigenous to the English court and professional structure, unknown in American courts. They would not accompany the English system of selecting the defendant's representative, were it to be adapted to American conditions in the form of a voucher.

II. MONITORING PERFORMANCE

Even if the power to select an agent improves the likelihood an able lawyer will represent the defendant, the problem of monitoring his performance remains. The defendant may not know what to expect from the lawyer, nor how to evaluate what the lawyer does do. A voucher scheme does not necessarily address this problem.

The purported solution in England again involves the solicitor. As the solicitor is supposedly able to choose a barrister whose demonstrated skills match the defendant's needs, so by continuing to intercede between defendant and barrister (for the barrister's client is technically the solicitor, who retains him) the solicitor can oversee the barrister's performance. The threat of termination in the case and loss of briefs in

38. For a discussion, see TAGUE, supra note 20, at 131-32.
39. This would occur if the clerk of the chambers of the withdrawing barrister found the replacement for the solicitor. And the defendant may not be helped by the solicitor, who could press the replacement for an explanation of his different position. As discussed immediately below, the solicitor may not attend the conference where the replacement meets the defendant, sending instead a representative who may not know much about the case, if even about the law.
the future, as discussed in Part I, provide a powerful incentive for the barrister to perform appropriately.

With no solicitor to help monitor the lawyer, the defendant in the United States is on his own. Help might come by providing the defendant (and the lawyer) with a list of the various steps a thoughtful and skilled defense lawyer would consider taking in every case.\(^{40}\) motions to suppress evidence or to sever counts or defendants, for example, or types of investigation. In conference, the defendant and lawyer could discuss why the lawyer had elected not to pursue some potentially fruitful and relevant procedural step. For instance, the lawyer might explain that he had not sought a separate trial for the defendant because fingering the co-defendant as the sole or principal culprit would be easier if they were tried together.

Apart from a checklist, a voucher might itself provide some leverage for the defendant in monitoring performance. Aware that his grade would turn, in part, on how he counseled the defendant, the lawyer has reason to negotiate the allocation of authority between him and the defendant.\(^{41}\) The lawyer who believes it is better for him to make the decisions (over whether to call a witness, or advance a defense, for example) would need to justify this to the client; the lawyer who was equivocal about ceding authority to the defendant would have reason to do so. Whether the lawyer's performance would improve is unclear; that the defendant would feel better about the representation is almost certain.\(^{42}\)

Educating the defendant about the tactical decisions that must be made is not as effective a review of the advocate’s performance as one undertaken by a second trained advocate (the solicitor).\(^{43}\) In practice, however, solicitors usually do not monitor as expected. They bow to the barrister's supposedly vaunted adversarial prowess, and let him make all the decisions, without protecting the defendant from the barrister's insistence that the defendant plead guilty, or without protesting when, at trial, the barrister ignores the defendant's desires in making a tactical decision.\(^{44}\) And at trial barristers are often not overseen, and rarely

\(^{40}\) For an example of such a list, see Peter W. Tague, The Attempt to Improve Criminal Defense Representation, 15 AM. CRIM. L. REV. 109, 164 & n.285 (1977).

\(^{41}\) See Rodney J. Uphoff, Strategic Decisions in the Criminal Case: Who's Really Calling the Shots?, CRIM. JUSTICE, Fall 1999, at 4, 5 (discussing lawyer’s response to the two approaches in the text).

\(^{42}\) See Jonathan D. Caspar, Criminal Courts: The Defendant’s Perspective 30-38 (1978) [hereinafter CRIMINAL COURTS]; Jonathan D. Caspar; American Criminal Justice: The Defendant’s Perspective 100-25 (1972) [hereinafter CRIMINAL JUSTICE].

\(^{43}\) Solicitors' advocacy experience has been in the magistrates' court, prosecuting and defending crimes that might loosely be termed misdemeanors in American courts. There are no jury trials in magistrates' court. Until the last decade barristers had a monopoly over appearing as advocates in the Crown Court. Solicitors now have that right, too.

\(^{44}\) See, e.g., R. v. Ensor, 2 All E.R. 586 (C.A. 1989) (Queen's Counsel chose not to apply to sever
helped, by the solicitor's observation or advice. Because not paid at their rate of compensation for attending trial, solicitors send as a substitute a much more junior person, indeed sometimes someone not schooled in the law at all. When such a person attends the barrister, the advocate is effectively on his own, with that person of use to the barrister only to communicate with the solicitor in case a need for assistance arises.

The method of payment—an hourly rate or a flat fee for all aspects of representation—introduces a different problem of monitoring, one of more interest to the jurisdiction that must compensate the defender than to the defendant. Time spent in court can be monitored; time taken to prepare out of court cannot be. Payment by the hour does not encourage shirking but instead unneeded preparation (or prevarication about the time taken to prepare). An alternative is to pay a predetermined, bulk amount no matter what the defender does or does not do. This arrangement encourages shirking. The defender prepares less than appropriate, seeking to maximize per-hour return.

The English have tried both approaches, and their experience reveals the problems with each. The conversion from an hourly rate to a flat fee in magistrates' court led, as one would predict, to under-preparation by solicitors, and thus possibly to a less-than-appropriate defense. In Crown Court, per-case rather than per-hour fees are one reason briefs are returned so frequently. Without no payment for preparation in less serious cases, barristers delay preparing and thus invest little if anything in keeping the case. On a given day they take the brief that conforms to their schedule, not to the defendant's needs or expectations. In serious cases, where fees were calculated after the fact, in light of the case's seriousness and difficulties, barristers were presumed to pad the time they said they took to prepare. Fee requests in these cases were slashed, on the assumption the case could have been prepared more efficiently.

counts even though defendant specifically requested that such a motion be made). Exnur limited to its facts an earlier case where the Court of Appeal had reversed a conviction when the barrister, without consulting with the defendant, did not call two alibi witnesses he had called at the first trial. See R. v. Irwin, 2 All E.R. 1085, 1085 (C.A. 1987).

45. For a discussion, see Tague, supra note 18, at 193, 216-17.


47. See id. (To the extent that inputs [less preparation] can be linked to the quality of output [performance], something we cannot confirm, it is possible that an inferior product was supplied as a result of standard fees.).

What the English experience portends for a voucher scheme is unclear. This is another feature of the scheme that poses problems in implementation. The most that can be said here is that a jurisdiction would need to choose between the different problematic incentives created by the different approaches, as the English now have.

Selecting the method of payment is not the only problem posed by a voucher scheme. We turn to others in the next section.

III. PROBLEMS IN IMPLEMENTING A VOUCHER SCHEME

Apart from the nature of the payment—per-hour or per-case—there is the issue of appropriate compensation. Assume a per-case payment were adopted. It might be necessary to adopt the English approach, in the graduated fee scheme, whereby varying amounts are paid to reflect differences in the likely difficulties of cases. Nonetheless, the defense, on the facts of a given misdemeanor, could demand more effort and more skill than that of a particular felony. But making such a refined estimate would be extremely difficult without an evaluation of the facts. And the prosecution, in a jurisdiction that has stingy discovery rules, would be unenthusiastic about disclosing its evidence to help with such a calculation. Moreover, who would make such a judgment of each case? Perhaps only someone skilled, like a judge, could be entrusted to make the assessment, but judges would not tolerate such mundane work. As a result, as in England, the different amounts might need to be pegged to a standard, like the potential sanction, that would be roughly appropriate in most cases. Murder cases, then, might merit a voucher of ten thousand dollars, armed robberies five thousand dollars, and misdemeanors one thousand dollars.

But such a scale might work on its own, without a voucher system, to attract more able lawyers, for differentiation of this sort depends on increasing the fees for certain categories of cases. And legislatures would be less inclined to such a change even if it would promise better

49. The current English approach is to pay a pre-determined amount for preparation and the trial's first day (the basic fee), with the amount varying depending on which of nine categories the seriousness of the offense fits into. See Legal Aid in Criminal and Care Proceedings, S.I. 1996, No. 2655. Calculating the fee ex post facto is now limited to cases longer than 10 days, soon to be extended to 25. The Lord Chancellor has chosen to ignore the risk that barristers will shirk in order to correlate the overall costs of legal aid in criminal cases. The reason was the extraordinary size of certain ex post facto payments, with 1% of the cases consuming 40% of legal aid spending in Crown Court criminal matters. See Criminal Defence Services, Ensuring Quality and Controlling Cost in Very High Cost Criminal Cases para. 2.0 (Aug. 1999) (on file with author).

50. Under the graduated fee scheme, for example, the basic fee for robbery, a class C offense, is £240 and for aggravated burglary, a class B offense, £311. For examples of the payments in different cases, see The Lord Chancellor's Dept., Guidance to Determining Officers on the Graduated Fee Scheme for Advocates in the Crown Court and Example Fee Calculations (Mar. 1997) (on file with author).
representation, and more inclined to simply increasing the hourly rates and compensatory caps that currently exist. Perhaps differentiation would work if the overall cost did not increase. This would be so because less-serious felonies, with fees lower than what is now possible, in a jurisdiction with a current cap of three thousand dollars, would outnumber murder cases. But, then, will popular lawyers refuse to represent those defendants whose voucher is for only two thousand dollars, leaving them with the same lawyers now imposed upon them? To put that point differently, a voucher scheme, without attendant increases in the levels of fees, might simply reshuffle the allocation of work among the lawyers currently toiling in publicly-funded cases. It would not entice more able lawyers who have found better opportunities for their talents in better paid, private work, criminal or other. Hence, the pool of available lawyers will not necessarily improve with a voucher scheme.51 If so, the advantage of such a scheme would come down to improving the control the defendant would have over the lawyer's work, and thus increasing his satisfaction with the process.52

Another problem would be the time needed for defendants to select a lawyer.53 In a large jurisdiction with many lawyers, it would take time for a defendant to review information about the lawyers, and to arrange his choices in order (in case his first or subsequent picks were not available). Delay might arise in setting release conditions for an incarcerated defendant, or even in scheduling an arraignment when the lawyer could be available. And it would prove frustrating for defendants who needed to approach a second, then a third, even a fourth lawyer, in the absence of a cab-rank rule, to find a lawyer willing to appear.

The popularity of certain lawyers might cause problems. England can clear the docket of cases by refusing to grant continuances. The lack of availability of the barrister chosen by the defendant is not a reason to postpone the trial. One barrister is as good as another. Cases proceed to trial, or to plea on the day scheduled for trial, with a different

51. This explains the hesitation expressed earlier that a voucher scheme might enable a defendant to choose only a relatively able lawyer—relative to the others in the shallow pool.
52. See CRIMINAL COURTS, supra note 42, at 30-38; CRIMINAL JUSTICE, supra note 42, at 100-23.
53. A refinement might limit choice but decrease the chance the defendant would err in selecting a lawyer with inadequate skill or experience. Similar to the franchising scheme about to be implemented in England, see supra note 32, the jurisdiction could grade lawyers, and place them in categories, so that fewer lawyers would be able to be chosen, say, in murder cases than in burglaries. Such an effort, of course, would improve the current methods of selecting lawyers. This feature is not needed in England. The solicitor would not choose a barrister who lacked experience or skill. And if the clerk of the barrister's chambers received the authority from the solicitor to select a different barrister in chambers, he would refrain from selecting an inadequate replacement for fear the solicitor would direct no more business to the chambers. That said, the clerk may choose a replacement with a little less experience than the barrister chosen by the solicitor, in hope of convincing the solicitor that this second barrister, if he performs appropriately, is another person for the solicitor to brief.
barrister, whether prepared or not. A voucher scheme rejects the assumption that lawyers are interchangeable. And American courts give continuances to lawyers who are busy elsewhere. If a small number of lawyers were disproportionately popular, dockets would lengthen, as they sought continuances. Denying continuances would create the English system of returned briefs, were the lawyer to hand the case to another, a person whom the defendant had not chosen. Or, facing the threat of a denial of a continuance, popular lawyers, to retain the voucher, would find themselves pressured to urge defendants to plead guilty, or not to prepare as thoroughly as they might. Over time, a voucher scheme might therefore slowly begin to resemble the present arrangements. If a voucher scheme's incentives worked as expected, however, this problem of too few popular lawyers would not arise. Enough lawyers would have developed a reputation for appropriate representation to spread the work widely among the local bar.

Yet, even if one or more of these problems were to occur, they are not likely to prove overwhelming. In jurisdictions with public defender officers, for example, private lawyers are typically appointed only when the public defender must withdraw because of a conflict. Private lawyers are not appointed, as a result, all that frequently. If, say, private lawyers appeared in only one in five cases, the delay might not be protracted as defendants studied the resumes of the lawyers, and court personnel notified the lawyer chosen. Moreover, if enough lawyers presented a convincing dossier of their abilities, the problem of a skewed distribution of appointments, with the accompanying pressures on the docket, could also be avoided.

CONCLUSION

The voucher system would bring benefits. Lawyers would escape the thumb of judges or court personnel upon whom they relied for appointments. They would have an incentive to improve their skills, to litigate more aggressively, and perhaps to plea bargain less frequently. If they did urge a guilty plea, they would be more inclined to explain in detail to the defendant its justification. Even if lawyers' performances did not markedly improve, defendants would be happier with the process; those who choose their lawyers are more pleased with the lawyer's performance, no matter whether that assessment is objectively justified. And under a voucher scheme, the control that indigent defendants feel they now lack would be likely to continue beyond the moment of selecting the lawyer. Monitoring might thereby improve.

A voucher scheme is not without difficulties. Of the various possible problems, the most important is the size of the payment. If payments
were not raised, the pool of lawyers might not change. Yet, raising the levels might obviate the need for a voucher scheme, although the defendant's ability to monitor the lawyer's performance might improve because defendants would have reason to score the lawyer's performance for future selection (even were lawyers selected by the judiciary). On balance, a voucher scheme might provide the most promising way to improve representation for indigent defendants represented by private lawyers.\footnote{To test whether this was so, another feature of the English approach could be borrowed, the pilot project. The Lord Chancellor's Department (LCD) commonly tests innovations in a few jurisdictions, to see whether they provide the expected benefits. At the moment the LCD envisions pilot projects for contracts with solicitors' firms to provide the range of services in criminal cases and for public defender offices. Conversations with members of the LCD and of the Legal Aid Board. Hence, in a large urban jurisdiction in the United States a voucher scheme could be tried in one or more of the trial courts with jurisdiction over part but not all of the population. In Alameda County, California, for example, the scheme could be tried in the courts in Hayward and Fremont, but not in Oakland. Or, in New York City, test it first in Staten Island before implementing it in Manhattan.}