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FEE SHIFTING IN CRIMINAL CASES

PAMELA S. KARLAN*

Like Moliere's M. Jourdain, who had been speaking prose for a lifetime without knowing it, the United States has adopted a fee-shifting regime for most criminal defendants without seeing it quite that way. Since Gideon, most defendants' fees have been borne by their opponent—the government—because the Constitution requires the appointment of counsel for those defendants who are unable to afford retained counsel. Estimates of the percentage of criminal defendants represented by appointed counsel (that is, defendants who benefit from this automatic fee shifting) generally hover around seventy-five to eighty percent. Unlike any other fee-shifting regime, this shift occurs regardless of the outcome of a defendant's case.

By contrast to the indigent defendant, a defendant who is economically ineligible for appointed counsel must bear the cost of his defense regardless of the outcome. Thus, we have two categorical regimes: indigent defendants are always entitled to fee shifting; nonindigent defendants (a rather elastic term) are never entitled to it.

This Article asks whether fee shifting should be extended to cases involving retained counsel. Part I begins with a simplified account of client and attorney decisions about how much to invest in a defense. This account suggests several circumstances under which defendants

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1. JEAN BAPTISTE POQUELIN MOLIERE, LE BOURGEOS GENTILHOMME, act 2, sc. 4, l. 34 (1670).
4. But cf. VA. CODE ANN. § 19.2-163 (Michie 1995) (requiring an indigent defendant who is later convicted to pay the costs of prosecution, including the cost of appointed counsel).

5. See Daniel C. Richman, Cooperating Clients, 56 OHIO ST. L.J. 69, 112-13 (1995). The one exception—government officials who are investigated but never indicted by an independent counsel—is discussed infra at text accompanying notes 59-64.
will choose not to invest additional resources in their defense. Sometimes, this decision will be both rational and socially beneficial: for example, a factually and legally guilty person with no plausible defenses to the charges against him may instruct his lawyer simply to negotiate the best possible plea; any money that he spends on attorney’s fees beyond the minimum does little more than increase the “fine” he ultimately pays for his offense. By contrast, precisely because attorney’s fees function as a fine—imposed on the basis of a prosecutorial suspicion or, if incurred after indictment, on the basis of a finding of probable cause—a defendant may sometimes spend too little on his defense if he believes such spending will change the allocation, but not the amount, of his loss.

In Part II, I identify situations in which society has a significant stake in having defendants invest in a defense: those involving claims that will vindicate important public values and those involving government misconduct. I suggest that defendants whose cases raise questions about the permissible extent of criminal sanctions and defendants whose defense costs have been inflated by the government’s culpable conduct should be entitled to recoup the costs of their defense from the government. In addition, my analysis suggests that cases involving ineffective assistance of counsel might justify refunding a defendant’s expenditures.

In Part III, I take up the question of acquitted defendants. Contrary to the intuition that acquittal at trial offers the most compelling rationale for fee shifting, I suggest that the difference between the standard for investigation and prosecution (reasonable suspicion and probable cause) and the standard for conviction (proof beyond a reasonable doubt) means that at least some portion of prosecutions that end in acquittal, perhaps even the majority, were nevertheless justifiable, and that fee shifting might in such cases disserve a constellation of interests.

I. A Theory of Defense Expenditures

The resources that will be expended in defending against a criminal prosecution depend on a series of choices made by defendants and their lawyers.\(^6\) The client’s decision involves several considerations.

\(^6\) In this account, I start with a situation in which the defendant has already been charged with a particular offense. Starting from an earlier point in the process—the time when an individual learns he is a suspect, or even the time when he is trying to decide whether to commit a crime—would complicate the analysis without, I think, changing the basic point.
First, what are the consequences of conviction? Some of these consequences—for example, the amount of a fine or forfeiture—are expressed in straightforward financial terms. Others can be quantified: for example, the amount of income foregone either during a period of imprisonment or as the result of the inferior job prospects of ex-cons. And some, such as the loss of freedom or status are, designedly, hard to quantify. Second, what is the likelihood of conviction? Third, and of most concern to us, how will the expenditure of resources on a defense affect the likelihood of conviction? These resources involve the defendant's time, effort, and emotional commitment, but they consist largely of financial expenditures on lawyers, investigators, tests, and the like.

Of course, the inquiry is complicated by a host of uncertainties. Roughly speaking, however, an individual will spend money on his defense until spending another dollar is no longer justified, either because it will not save a dollar of conviction costs or because that dollar is better spent elsewhere. For example, with regard to a regulatory offense to which no significant reputational consequences attach, a defendant might be unlikely to spend $10,000 on attorney's fees to avoid a $1,000 fine. Similarly, unless a defendant's preference for avoiding conviction overrides all other interests in his life, he may decline to spend an additional $5,000 on his defense if that money decreases the likelihood of conviction by only an infinitesimal amount but would represent a substantial drain on his family's assets.

The simplest case for understanding client decision making is the indigent defendant. The cost—to him—of mounting a defense approaches zero. The money allocated to defense expenditures is non-transferable: the government pays for a lawyer; it does not give him the money directly. Every additional dollar spent on defending an indigent defendant presumably decreases the probability of convic-

7. A defendant might choose to spend the $10,000 if he or his company feared the threat of future prosecutions: under some circumstances, it would be worthwhile to get a reputation for fighting every charge to the hilt thereby scaring off future prosecutions. In some civil contexts, for example, defendants will often "overspend" in a bellwether case precisely because it may deter other litigants. On the other hand, there are no doubt many cases in which a defendant will fight harder to avoid a $1,000 criminal fine—precisely because of the reputational consequences inherent in a criminal conviction—than he would fight to avoid a $1,000 civil penalty or damages of $1,000.

8. Cf. Pamela S. Karlan, Contingent Fees and Criminal Cases, 93 Colum. L. Rev. 595, 605-06 (1993) [hereinafter Karlan, Contingent Fees] (suggesting that a defendant may prefer conserving his assets for his family to spending them on an ultimately unsuccessful defense).

9. Even under proposed voucher systems, the defendant would be unable to translate the government's payment into cash. See Stephen J. Schulhofer & David D. Friedman, Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Free-
tion; thus, an indigent defendant will demand limitless defense expenditures\textsuperscript{10} even if it is not cost-effective to spend the additional dollar. The defendant prefers this additional expenditure because otherwise the defendant will bear the conviction cost and because the government does not give the defendant the option to spend the money elsewhere.\textsuperscript{11}

Despite this preference, however, indigent defendants seldom present an exhaustive, or often even an adequate, defense.\textsuperscript{12} The primary explanation lies in the fact that the real decision makers about indigent defense expenditures are the government and appointed counsel. The government’s commitment is usually grudging, to put it charitably: most jurisdictions use counsel appointed on a case-by-case basis and impose pitifully low caps on the amount of total compensation.\textsuperscript{13} Given their huge caseloads and the economic pressures for quick turnover, appointed counsel face tremendous disincentives for thorough investigation and extensive pretrial litigation; they often survive only by pleading a huge portion of their clientele guilty as quickly as possible.\textsuperscript{14} Of course, prosecutors with huge caseloads operate under a comparable set of constraints, but they are unlikely to offer their best “discounts” for pleading guilty to defendants whose lawyers depend on high-volume practices since the likelihood of being forced to trial is so low.


10. This is not to say that every dollar spent will decrease the probability of conviction: some dollars will be wasted and some dollars may turn out after the fact to be superfluous. The defendant’s probabilistic calculus will view each dollar as worth spending unless it poses a threat of actually increasing the likelihood of conviction.

11. See, e.g., Argersinger v. Hamlin, 407 U.S. 25, 49 (1972) (Powell, J., concurring in the result) (suggesting that there are misdemeanor cases in which nonindigent defendants would decline to retain counsel); Frank H. Easterbrook, Criminal Procedure as a Market System, 12 J. LEGAL STUD. 289, 310 (1983) (arguing that “defendants who receive free counsel gain relative to other defendants” in a system of plea bargaining); cf. John C. Scully, Mandatory Pro Bono: An Attack on the Constitution, 19 Hofstra L. REV. 1229, 1235 (1991) (suggesting that “[i]f given the option, the poor might very well prefer a cash payment in lieu of legal services”).


13. See 18 U.S.C. § 3006A(d) (1994) (limiting total compensation for appointed counsel in federal cases to $3,500 with an exception in the case of “extended or complex representation”); Criminal Justice Act: Hearings on H.R. 3233 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 98th Cong., 1st Sess. 54 (1983) (statement of Theodore J. Lidz) (stating that fewer than 15% of applications for compensation beyond the cap were approved); Vreeland, supra note 12, at 627-28 (analyzing state statutes and explaining that “most states impos[e] a limitation on felony cases between $500 and $1000”).

14. See Richman, supra note 5, at 75.
The decisions of extremely affluent defendants are only a little more complicated. These defendants will presumably spend the cost-effective amount. To the extent that they have strong preferences for avoiding costs of conviction such as imprisonment or loss of reputation (and this preference may approach lexical priority), this amount will be very great indeed: one can imagine a wealthy defendant spending $10,000 to avoid even a one percent chance of spending a night in jail.¹⁵ These defendants will choose the best possible lawyer, negotiate a fee arrangement that gives her incentives to leave no stone unturned,¹⁶ and expend whatever amount is necessary on investigators, consultants, and the like. A skillful, well-paid lawyer is likely to undertake every cost-effective expenditure. Finally, defense expenditures may affect potential outcomes by influencing prosecutorial behavior: a prosecutor with limited resources may become less likely to pursue a case, or a particular charge, if the defendant signals his willingness to litigate to the hilt.¹⁷

The complicated cases involve “middling” defendants: individuals who are neither indigent enough to qualify for appointed counsel nor affluent enough for cost to be no object. Most defendants with retained counsel fall into this category. Wealth affects their choice of

15. Estimates regarding the defense costs in the Simpson and Menendez trials, as well as the reported fee opinions in cases under the Independent Counsel Act, 28 U.S.C. §§ 591-99 (1994), suggest the magnitude of attorney's fees in complex criminal cases in which money is no object. See, e.g., In re North, 59 F.3d 184, 186 (D.C. Cir. 1995) (per curiam) (awarding $272,352 for legal fees spent to avoid indictment); In re Meese, 907 F.2d 1192, 1195 (D.C. Cir. 1990) (per curiam) (awarding $460,509 for legal fees spent to avoid indictment); In re Olson, 884 F.2d 1415, 1418 (D.C. Cir. 1989) (per curiam) (awarding $861,589 for legal fees spent to avoid indictment); Elizabeth Gleick, Rich Justice, Poor Justice: Did We Need O.J. To Remind Us That Money Makes All the Difference—In the Trial and In the Verdict?, TIME, June 19, 1995, at 40, 40 (estimating Simpson's defense cost as between $5 and $6 million); Seth Mydans, Judge Turns Down Menendez Request, N.Y. TIMES, Mar. 10, 1994, at A18 (estimated $1.9 million spent by defendants at first trial); Jim Newton & Leslie Berger, U.S. Files Civil Rights Charges Against 4 Officers in King Case Indictments, L.A. TIMES, Aug. 6, 1992, at A1 (four officers charged with beating Rodney King expended over $500,000 on their first trial).

16. Thus, a defendant with few cost constraints is much likelier to enter into a fee arrangement with a large retainer against which hourly charges are made than into a flat fee arrangement, since the latter provides less incentive for the lawyer to spend additional time on the case. One further possibility—the use of a contingent performance bonus—is prohibited by ethical rules. Model Rules of Professional Conduct Rule 1.5(d)(2) (1983); Model Code of Professional Responsibility DR 2-106(C) (1980); Karlan, Contingent Fees, supra note 8, at 597-602 (discussing the categorical ban on contingent fees in criminal cases).

counsel in two important ways: first, they may simply be unable to afford the very best criminal lawyers; second, they may wonder whether the benefits of a more expensive lawyer are worth the cost. Particularly if the cost of acquiring more funds—by borrowing them from relatives or associates or by liquidating property such as real estate, pension funds, and the like—is very high, a defendant may forego such efforts and "settle" for a lawyer who costs less, and who may accordingly invest less time and fewer resources in the case.

Moreover, the middling defendant is particularly likely to enter into the most common criminal defense fee arrangement—the flat fee. Once the client has paid the fee, his costs are fixed and sunk; thus, he has every reason to litigate his case to the hilt. In contrast, his lawyer operates under precisely the opposite incentive: once the client has paid the fee, her effective hourly rate decreases for each additional hour that she spends on the case. Thus, the lawyer is likely to view an additional hour's work as not cost-effective some time before her client would make that determination. She may thus be tempted to sell a particular plea bargain to her client as the best that can be done even if additional litigation or bargaining might result in a somewhat more favorable offer.

For the middling defendant, the critical fact to understand about defense expenditures is that they are sunk costs whatever the outcome of the case. The defense fees operate as a "fine," imposed on the basis of a finding of probable cause rather than of proof of guilt beyond a reasonable doubt. Some fine will have to be paid; only the magnitude of the fine depends on the defendant's choices, and it may depend in part on how hard he fights.

18. See Vincent W. Perini, Introduction to How to Set and Collect Attorney Fees in Criminal Cases xi, xiii (1985) [hereinafter Attorney Fees in Criminal Cases]. I use the word "wonder" deliberately. As a theoretical matter, it might well be worth using a lawyer whose fee is 20% higher if this reduces the risk of conviction by 25%, but a client is exceedingly unlikely to have reliable information on which to base such a calculation. Moreover, at the outset of the case, when a client is picking an attorney, although he will in all likelihood know whether he has committed the crimes of which he is suspected, he may be completely unaware of the strength of the prosecutor's case, and thus unable to assess the possible significance of hiring different "grades" of counsel.

19. See Karlan, Contingent Fees, supra note 8, at 599; Vincent W. Perini, Setting and Collecting Fees in Criminal Cases, in Attorney Fees in Criminal Cases, supra note 18, at 1, 4; Exploring the Labyrinth of Fee Setting, in Attorney Fees in Criminal Cases, supra note 18, at 13, 14.

20. Cf. Gary S. Becker & George J. Stigler, Law Enforcement, Malfeasance, and Compensation of Enforcers, 3 J. LEGAL STUD. 1, 2 (1974) (suggesting that defendants will be willing to spend up to the amount of the likely fine to "avoid apprehension and conviction").
Like his indigent and wealthy counterparts, a middling defendant's decision can be influenced by prosecutorial decisions. If, for example, the prosecutor offers the defendant an attractive plea bargain—say, a guilty plea with a suspended sentence or probation—the defendant may become less willing to spend money on his defense, in the form of going to trial and perhaps then appealing, since the cost of conviction has just decreased. A risk-averse defendant may prefer to pay a small fine, after incurring only relatively minor attorney's fees, to the risk of a far larger fine, particularly combined with the certainty of higher attorney's fees, win or lose. Thus, even a defendant with a potentially winning defense may decide it is simply not worth litigating his claim, particularly when his attorney advises him that the prosecutor's offer is a reasonable one. The combination of the client's and attorney's decisions about how much to spend will lead them to forego at least some efforts, even some cost-effective ones.

Finally, the middling, or even the wealthy, defendant may simply run out of money before the end of the criminal process, particularly if his first trial ends in a hung jury or if his conviction is overturned on appeal and he must be retried.\(^\text{21}\) To the extent that price reflects quality, the result may be that on retrial the defendant is more likely to be convicted because he has fewer resources to invest in his defense.\(^\text{22}\) This may also change the plea bargaining dynamic, since a defendant whose coffers have been depleted (or whose costs have risen in light of the need to mount a second defense) may be more likely to accept the prosecutor's offer, particularly in cases where the outcome of the first trial indicates a greater likelihood of conviction at a subsequent trial than the defendant had initially estimated.

II. Guarding the Guardians: Criminal Defendants As Private Attorneys General

Fee shifting has become an increasingly prevalent feature of the American civil litigation system. Two standard justifications for fee shifting center on influencing attorney behavior. First, the idea of the

21. The $14 million Menendez estate was depleted by creditors and the large legal fees paid at the first Menendez brothers' trial. Thus, Leslie Abramson, who represented Eric Menendez at the first trial, will be paid a maximum of $125,000 as court-appointed counsel for her client at the second trial. Lawyer Reaches Deal With Judges on Menendez Retrial, THE LEGAL INTELLIGENCE, Apr. 7, 1994, at 5; Mydans, supra note 15, at A18.

22. In cases where an element of surprise was part of the original defense, this effect may be heightened. Conversely, there may be cases where, even with depleted resources, the defendant is better off on retrial because the prosecution has now revealed its entire case and strategy, witnesses have disappeared, or evidence has grown stale.
“private attorney general” recognizes that certain important rights will be underenforced unless lawyers are given an economic incentive to litigate.23 Second, concern with attorney misbehavior has led to fee awards that compensate the innocent party for expenses he has incurred as a result of an opponent’s culpable conduct.24 In addition to these behavior-centered reasons, another justification for fee shifting focuses on the rights of injured parties and the need for make-whole relief: if the cost of enforcing his rights is left to lie on an injured person, then an award equal to the damages he suffered will provide only a partial remedy.

Surprisingly, the various trends toward fee shifting in the civil context seem not to have touched criminal proceedings. Perhaps the presence of a “real” attorney general in the form of a prosecutor has obscured the very real similarities between certain kinds of criminal litigation and the sorts of civil cases in which fee shifting has become common. In this section, I suggest that each of the reasons for fee shifting in the civil arena has its analogue in the criminal context. I identify four sorts of cases in which defendants are especially likely to vindicate important societal interests or to suffer unjustifiable injuries as a result of the operations of the criminal justice system. I then suggest that fee shifting may respond to the tendency for defendants to underlitigate or for prosecutors to overreach. Indeed, the reasons for fee shifting may be even more compelling in criminal cases because, unlike their civil counterparts, they virtually never generate a new source of funds for the successful litigant. Successful civil litigants often receive damages awards that they may use to compensate their lawyers;25 the inclusion of money over and above the plaintiffs’ economic loss—for pain and suffering or emotional distress or for puni-


24. The Federal Rules of Civil Procedure provide several examples of this type of fee shifting. See, e.g., FED. R. CIV. P. 11(c)(2) (providing that the sanction for filing a frivolous or groundless pleading may include “an order directing payment to the [opposing party] of some or all of the reasonable attorneys’ fees and other expenses incurred as a direct result of the violation”); FED. R. CIV. P. 37(c)(2) (permitting a court to award the costs of proving a matter that the other side wrongly refused to admit under Rule 36).

25. See Karlan, Discrete and Relational Representation, supra note 17, at 715-16.
tive damages—may reflect a de facto recognition of the need for attorney fee reimbursement. Successful criminal defendants, by contrast, receive neither explicit nor implicit fee awards.

A. Constitutional Challenges to Criminal Statutes

Perhaps the closest analogy to the civil private attorney general cases are cases in which defendants challenge the constitutionality of the statute under which they have been charged. Defendants are especially likely to vindicate important societal interests when they raise challenges to the very power of the state to criminalize certain conduct. Many of the most important equal protection and substantive due process cases have involved the assertion of a constitutional right as the defense to a criminal prosecution. The Supreme Court first announced the presumptive rule against racial classifications that has informed all of modern equal protection doctrine in McLaughlin v. Florida and Loving v. Virginia, which overturned convictions under state laws that prohibited interracial cohabitation and marriage. Similarly, both Griswold v. Connecticut, which recognized a fundamental right to use contraceptives, and People v. Onofre, which recognized fundamental privacy and equality interests in private consensual sexual activity, arose in response to criminal prosecutions. A significant portion of First Amendment doctrine has also been developed as a result of criminal proceedings. Cases such as Kolender v. Lawson may protect individual liberties more generally, by restricting governmental discretion. Finally, although they do not protect individual rights directly, cases such as last Term's United States v. Lopez, which held that Congress had exceeded its power under the

28. 388 U.S. 1, 11-12 (1967).
32. 461 U.S. 352, 353-54, 358-61 (1983) (striking down a California statute requiring individuals to provide credible and reliable identification to police as violative of the Due Process Clause because it vested too much discretion in the police).
Commerce Clause, may be seen as vindicating the constitutional allocation of power.

Litigation of these sorts of defenses represents the equivalent of a section 1983 or Bivens action. Were an individual successfully to challenge the constitutionality of a state or federal statute in a declaratory judgment action, he would likely recover a reasonable attorney’s fee—and that fee would be calculated using principles that would normally result in an award far in excess of the statutory cap imposed in a criminal proceeding. Nevertheless, an individual might prefer to await a criminal proceeding rather than to bring an affirmative challenge for a variety of reasons: he might not want to alert the government to the underlying conduct; he might be relying on a general policy of nonenforcement; or he might even be unaware that the conduct has been criminalized until after he has been charged. It is hard to see why the timing of his decision should affect whether he must bear the cost of raising a constitutional challenge when the benefit to society as a whole is the same in either case.

B. Challenges to the Prosecution’s Statutory Interpretation

A second category of cases that vindicate important social interests beyond the protection of individual defendants involves prosecutions where the government is proceeding under a statute that, although not unconstitutional, simply does not reach the defendant’s alleged behavior. These “statutory construction” cases ensure that only those acts that the legislature intends to reach will subject individuals to the tremendous costs of a criminal proceeding. In McNally v. United States, for example, the Supreme Court reversed several convictions under the federal mail fraud statute because it held that the provision did not reach deprivations of “intangible” rights.


35. If the prosecution has already begun, Younger abstention would prevent a federal court from adjudicating the individual’s claims. See Younger v. Harris, 401 U.S. 37, 53-54 (1971); cf. Steffel v. Thompson, 415 U.S. 452, 475 (1974) (permitting a declaratory judgment action in the absence of a pending criminal prosecution).

36. The practice of release-dismissal agreements cuts down on the number of defendants who will bring fee-generating section 1983 lawsuits once their criminal cases are resolved. See Town of Newton v. Rumery, 480 U.S. 386, 397-98 (1987).


38. See, e.g., United States v. Gordon, 836 F.2d 1312, 1313 (11th Cir.) (per curiam) (reversing a mail fraud conviction involving alleged absentee ballot improprieties on the ground that
Dowling v. United States, the Court held that the National Stolen Property Act did not reach interstate transportation of bootleg records. Likewise, in Chiarella v. United States, the Court reversed a defendant's conviction for insider trading under the securities laws because it rejected the government's theory that all participants in stock market transactions are under a general duty to forego actions based on material, nonpublic information. This category of successful defenses may disproportionately involve cases in which defendants have retained counsel, since many of the government's most aggressive prosecutions involve white-collar and economic rather than street crimes, and these defendants are less likely to be indigent.

Both the constitutional and statutory construction cases can fairly be characterized as prosecutions that rest on legal errors. Only legal errors—by the prosecutor and, in cases where a defendant must challenge his conviction, by the courts as well—forced the defendant to mount a defense. It is difficult to see why defendants whose situation is purely a product of legal error—and whose ultimate vindication directly safeguards the rights of many other individuals—should be forced to bear the entire cost of this effort.

C. Cases Involving Governmental Misbehavior

Beyond cases in which defendants directly vindicate important legal propositions, there are also cases where certain defense costs are fairly traceable to governmental misconduct. Occasionally, governmental misconduct may be the but-for cause of all the defendant's expenditures. In a selective prosecution, but for the government's reliance on an impermissible factor—like race or the exercise of free speech rights—the defendant would not have been prosecuted at all. Selective prosecution is both difficult and costly to prove. But precisely because victims of selective prosecution may actually have com-


41. Cf. Karlan, Discrete and Relational Representation, supra note 17, at 680, 720 (suggesting that many businesses have ongoing relationships with counsel to advise them about the legality of contemplated conduct).
42. See Wayte v. United States, 470 U.S. 598, 607-10 (1985). For an example of a successful selective prosecution claim, see United States v. Gordon, 817 F.2d 1538, 1539-41 (11th Cir. 1987) (vacating and remanding the defendant's conviction for further hearings on his claim that he was singled out on the basis of race), cert. dismissed, 487 U.S. 1265 (1988).
mitted the offense with which they have been charged, they are especially likely to be dissuaded from investigating and litigating their claims by the offer of a favorable plea bargain. Thus, the government may not be adequately deterred from pursuing selective prosecutions, since it can induce many potentially successful claimants to plead guilty. And even a victim who does manage successfully to litigate his claim is hardly left whole—especially if he succeeds only after trial and appeal.43

More often, though, governmental misconduct affects only the amount, and not the existence, of the defendant’s costs. Whenever governmental misconduct results in a conviction that is overturned on appeal, the defendant’s expenditures on the first trial are at least partially wasted.44 A defendant who has strained his budget to pay for his first trial will be unable to afford the same level of defense at his second trial. If he goes to trial a second time, he may be more likely to be convicted both because the quality of defense he can afford has dropped and because he has lost the element of surprise. Because plea bargaining takes place in the shadow of expected trial outcomes, the prosecutor may actually try to drive a harder bargain than he would have sought prior to the first trial. Thus, reversal of a conviction can leave the defendant significantly worse off than he was before the conviction was wrongfully obtained.

*Brady* violations—where the government improperly suppresses exculpatory evidence45—offer a good example of government misconduct that unfairly escalates defense costs. The standard for determining whether a conviction must be set aside is whether there is a reasonable probability that, but for the government’s wrongful failure to disclose, the defendant would have been acquitted.46 The remedy for a *Brady* violation, however, is not to order an acquittal, but rather

43. An individual may be able to recover criminal defense costs as part of the damages in a malicious prosecution proceeding, see, e.g., Borunda v. Richmond, 885 F.2d 1384, 1389-90 (9th Cir. 1988); Kerr v. City of Chicago, 424 F.2d 1134, 1141 (7th Cir.), cert. denied, 400 U.S. 833 (1970), or in a section 1983 lawsuit against government malefactors, see, e.g., Sherwin Manor Nursing Ctr., Inc. v. McAuliffe, 37 F.3d 1216, 1222 (7th Cir. 1994), but both the difficulty of proving each of the elements of a malicious prosecution claim and the need to bring a separate lawsuit (and find a lawyer willing to prosecute it) may make this an illusory option.

44. Some of the investment in investigation and trial preparation is usable and the defendant may also benefit in the second trial from the revelation of the government’s evidence and strategy during the first trial.


to vacate the conviction and remand the case for a new trial.\textsuperscript{47} At the new trial, the defendant of course will have access to the improperly withheld evidence, which by hypothesis improves his trial prospects, but his resources will have been drastically diminished. Indeed, in many cases where the defendant invested virtually all that he had in the first trial, he will be forced to accept appointed counsel with all the quality limitations that entails.

Moreover, precisely because \textit{Brady} violations involve concealment, they are hard to detect. Fee shifting may help to combat the underenforcement of \textit{Brady} obligations by creating an incentive for attorneys to investigate and litigate \textit{Brady} claims.\textsuperscript{48} This might be especially true if defense counsel develop a two-tier fee structure in which they charge their client a fixed-fee retainer with the understanding that if the client prevails and is entitled to a fee award, that award—calculated using a lodestar—may exceed the amount of the retainer.

Perhaps \textit{Batson} claims—which involve the government's improper use of peremptory challenges to remove jurors based on race or sex\textsuperscript{49}—offer the purest "private attorney general" rationale for fee shifting in the criminal context. Much of what a defendant does in challenging the prosecutor's use of her peremptory strikes champions the equal rights of third parties—venire members.\textsuperscript{50} Of course the defendant's standing to assert these rights comes from his interest in having his conviction overturned if he prevails,\textsuperscript{51} but again, it is hard to see why the defendant should not be entitled to the reasonable costs of establishing a \textit{Batson} violation when presumably a juror who litigated the same exclusion under section 1983\textsuperscript{52} would be entitled to the costs of vindicating her claim.

\textsuperscript{47} See United States v. Boyd, 833 F. Supp. 1277, 1280-81 (N.D. Ill. 1993), aff'd, 55 F.3d 239 (7th Cir. 1995). In \textit{Boyd}, this would mean repeating a four-month trial. \textit{Boyd}, 55 F.3d at 241.

\textsuperscript{48} A similar dynamic might occur in \textit{Strickland} ineffectiveness claims as well where the incentives created by fee shifting might combat the customary reluctance to challenge another attorney's competence. See \textit{Strickland} v. Washington, 446 U.S. 668, 691-96 (1984).


\textsuperscript{51} \textit{Powers}, 499 U.S. at 414.

D. Ineffective Assistance of Counsel Cases

Finally, a defendant who has been denied constitutionally adequate representation also will be forced to overspend on his defense. The reversal of his conviction on Sixth Amendment grounds does not return him to the status quo ante: the money he spent on his first, ineffective, attorney is unavailable for his second trial. Theoretically, of course, a defendant who successfully appeals his conviction on ineffective assistance grounds could sue his attorney for return of the fee paid in a malpractice action. This theoretical possibility is overshadowed, however, by several practical considerations. First, it is often difficult to find lawyers to prosecute legal malpractice lawsuits, particularly for newly destitute clients. Second, many jurisdictions require a malpractice plaintiff to show not only that he was denied effective assistance, but also to prove that he was actually innocent of the crimes charged. Thus, defendants who were essentially forced to pay for litigation leading to two convictions when the proper number was one are out of luck. Finally, even if a defendant can bring, and win, a malpractice suit, the funds it generates will surely not be available in time for his retrial. That the defendant with retained counsel selected his attorney, and even that he may have "settled" for a cheaper lawyer with some level of awareness that this might reduce his chances of prevailing, does not mean that he knowingly and intelligently waived his right to competent assistance. The Supreme Court's holding in Cuyler v. Sullivan that defendants with retained counsel can bring ineffective assistance of counsel claims because ultimately the state is responsible for the conviction resonates in the fee area as well: the state is also responsible for the fact that the defendant, innocent or guilty, paid for a constitutionally flawed proceeding.

Defendants vindicate important public interests by obtaining dismissal of all charges on constitutional or statutory grounds or by successfully challenging their convictions on grounds of prosecutorial misconduct or the breakdown of a meaningful adversarial process. They are not, however, completely restored to the position they would have occupied but for governmental overreaching or unfairness when
they have paid a heavy financial price for their victory. The same arguments that are used in the civil context to support fee shifting apply to the criminal process as well. A defendant is more likely to invest in litigating these important issues if his success does not become a Pyrrhic victory.

Moreover, lawyers may be more willing to undertake vigorous defenses if there is the possibility of fee shifting in the end. The fee arrangement in In re Olson\(^{59}\) illustrates this point. Under the Independent Counsel Act, an individual who is subject to an investigation but who is not ultimately indicted can recover reasonable attorneys’ fees that would not have been incurred “but for” the Act, that is, in cases where the ordinary prosecutorial process would not have pursued the investigation.\(^{60}\) Theodore Olson, who incurred more than $1 million in legal fees in staving off an indictment, entered into a fee arrangement with Jenner & Block under which he agreed to pay the firm a retainer against an hourly rate; in return, the firm agreed to accept any fee award made under the Act “as complete and full satisfaction” of Olson’s obligations.\(^{61}\) Given Olson’s financial condition, Jenner & Block was gambling that they would succeed in avoiding an indictment; otherwise, they were likely to be unable to recover the full amount of their fees from their client. Without the fee-shifting provision of the Act, a firm would have to treat a case like Olson’s as a pro bono matter.

Ultimately, the court awarded Olson and Jenner & Block $861,589 of the roughly $1 million sought.\(^{62}\) In deciding the reasonable fee, the court used the Blum v. Stenson\(^{63}\) analysis employed in civil rights cases; it multiplied the number of hours reasonably expended on the case by a reasonable hourly rate to arrive at an appropriate award.\(^{64}\)

\(^{59}\) 884 F.2d 1415 (D.C. Cir. 1989) (per curiam).


\(^{61}\) Olson, 884 F.2d at 1424.

\(^{62}\) Id. at 1418, 1430.


\(^{64}\) See Olson, 884 F.2d at 1423-29. The Conference Report accompanying the 1994 reauthorization of the independent counsel expressed concern at the high hourly rates used by the D.C. Circuit and suggested the court use a rate within the range set by other fee statutes such as the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (1994) (normally $75 per hour) and the Criminal Justice Act, 18 U.S.C. § 3006A(d)(1) (1994) (between $40 and $75 per hour). Even at these lower rates, Olson’s award would have totaled well into six figures.
Independent Counsel Act proceedings are not a perfect analogy for the problem of conventional criminal defendants. First, the magnitude of the fees incurred by targets may in part be the product of the lack of the customary constraints on *prosecutorial* overzealousness: special prosecutors do not face the overwhelming caseloads and budgetary limitations that may lead regular prosecutors to forego dubious investigations. Second, reimbursement in Independent Counsel Act cases depends on the target's not being indicted in the first place, and my concern in this section has been with formally charged defendants. Nonetheless, some facets of the special prosecutor context provide at least a partial illustration of the operation of a reimbursement system. In particular, defendants who advance the sorts of claims identified in this part—constitutional and statutory interpretation challenges; challenges to governmental misconduct; and ineffectiveness claims—have every bit as much of a "but for" claim as targets of the special prosecutor. In their cases, but for critical failures in the criminal justice process, they would not have been forced to spend significant portions of their assets to defend themselves. Finally, the possibility of near-market level fee awards might encourage better lawyers to enter criminal defense work.  

Such a proposal might, however, replace a current disparity—indigent defendants receive counsel while middling defendants must fend for themselves (sometimes no doubt thereby getting worse counsel, especially in jurisdictions with skilled public defender services)—with the converse disparity: the "reasonable fee" available to successful litigants with retained counsel would substantially exceed the state's noncontingent payment for appointed counsel, given the absurdly low compensation caps. Harmonizing these two systems is beyond the scope of this Article; suffice it to say at this point that a huge disparity between a "reasonable fee" calculated in the customary manner and the amount the government is willing to spend on defending indigents provides powerful support for the proposition that indigent defendants are currently receiving inadequate assistance of counsel.

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65. See Karlan, *Contingent Fees*, supra note 8, at 636.
66. See Vreeland, *supra* note 12, at 628 n.23 (compensation caps range from a low of $350 for a felony case in Arkansas to $3,000 for a felony case in Hawaii and from a low of $500 for capital cases in Oklahoma to a high of $6,000 for a capital case in Nevada).
III. What's Goodness Got to Do With It?: The Acquitted Defendant

Should fee shifting extend to defendants who are actually acquitted at trial? On the surface, they seem particularly appealing candidates for reimbursement. "Actual innocence" frequently serves as a justification for avoiding the otherwise harsh consequences of criminal procedure. Moreover, innocent defendants were charged only because the prosecutor lacked perfect information: had she realized the defendant's innocence at the outset, prosecution would have been unethical as well as wasteful.

But to say that a defendant was acquitted is not to say that he should never have been tried in the first place. Even aside from cases of lawless or nullifying juries that acquit in disregard of or against the weight of the evidence, the standard of proof required at trial—guilt beyond a reasonable doubt—means that a substantial number of defendants who in fact committed the crimes with which they were charged may nonetheless escape conviction. To the extent that they are beneficiaries of the systemic bias in favor of false negatives, their claim for reimbursement becomes less persuasive. Moreover, the standard for deciding to bring a defendant to trial is probable cause, not certainty beyond a reasonable doubt. Thus, unlike defendants with meritorious constitutional challenges, for example, acquitted defendants cannot necessarily claim that the prosecutor erred. The decision to permit prosecution on the basis of probable cause means that our society has accepted the fact that innocent people will have to defend themselves in a way that society has not accepted the possibility of government overreaching or misconduct. It might be that acquitted criminal defendants are analogous to civil plaintiffs in cases subject to fee shifting under the Equal Access to Justice Act. Those plaintiffs are entitled to awards from the federal government only when the government's position was not "substantially justified" on the law and the facts. A prosecutor's good-faith decision to pursue a case against a defendant may be substantially justified even when the prosecution ultimately fails if there was probable cause to believe he violated a valid criminal statute and the prosecutor believed she could prove guilt beyond a reasonable doubt.


Thus, to my mind, acquittal alone is not necessarily a sufficient justification for fee shifting, particularly when we take into account the possible side effects of fee shifting for acquittals. To the extent that such a world would resemble a contingent-fee regime, it might create a conflict of interest in that attorneys whose recovery of a higher fee depended on governmental reimbursement might gamble on acquittals at trial rather than recommending plea bargains to their clients. Of course, to the extent that defense attorneys continue to adhere to their practice of taking their fee up front this danger is minimized: the attorney is paid the same amount regardless of outcome; the only question is whether, at the end of the case, the client receives reimbursement for money already spent. Indeed, the increase in client pressure to go to trial that this regime might produce could combat the excessive incentive under current rules for attorneys to recommend plea bargains. Still, the possibility of a two-tier fee agreement does raise a problem.

Second, one could imagine limiting fee shifting to defendants who not only obtain acquittals but who prove their actual innocence by a preponderance of the evidence. This could be accomplished either through a post-trial proceeding or by reinstructing a jury that has delivered an acquittal. Having found that the prosecutor has failed to meet her burden of proving guilt beyond a reasonable doubt, the jury could then be sent back to determine whether the defendant has shown actual innocence by a preponderance of the evidence. The Norwegian Criminal Procedure Act, for example, provides something akin to this option: “If a person charged is acquitted or the prosecution against him is discontinued, he may claim compensation from the State for any damage that he has suffered through the prosecution if it is shown to be probable that he did not commit the act that formed the basis for the charge.” Similarly, successful plaintiffs in malicious prosecution actions may recover the costs of their criminal defense.

Given the American system, however, post-trial reimbursement proceedings run the risk of producing significant “satellite” litigation, and consuming prosecutorial and judicial resources. On the other hand, folding the reimbursement determination into the proceedings

69. See Karlan, Discrete and Relational Representation, supra note 17, at 713; Karlan, Contingent Fees, supra note 8, at 611-12.
70. Obviously, the jury should not be instructed on this issue prior to reaching its verdict on the criminal charges.
72. See supra note 43.
on the merits might actually distort the trial, since a defendant who knows that he must ultimately prove an affirmative case might litigate differently and less efficiently from the perspective of a traditional guilt or innocence determination.73

The process of determining the actual fee award poses additional problems. For example, what should be done with defendants acquitted on the top count but convicted of lesser included offenses or defendants convicted of some counts but not others? In the civil arena, litigants may recover fees only on their successful claims—a principle that has sometimes proved difficult to apply.74 In the criminal context, though, it might be less justifiable to award fees for partial success. For example, if a defendant is convicted of manslaughter rather than murder, should he be entitled to recover nonetheless for the time his attorney spent preparing and litigating the issue of specific versus general intent? It would seem incongruous to award fees for general success when the defendant is nonetheless found guilty. On a more mundane level, the prevalent flat fee arrangement between defendants and their counsel does not generate the kind of time records or the sort of fee structure necessary for precise fee litigation. Thus, in a number of ways, the factually innocent individual’s claim for reimbursement will turn out to be knottier than the claims of some other categories of defendants.

One approach might be to leave the question whether to award fees to the discretion of trial judges who, having heard the evidence, are in a relatively good position to determine whether the defendant was factually innocent, was the beneficiary of favorable evidentiary and burden-of-proof standards, or had a sympathetic or nullifying jury. For example, a federal judge who grants a Rule 29 motion for judgment of acquittal prior to sending the case to the jury75 may have implicitly concluded that the prosecutor’s case is so weak that it should never have been pressed in the first place. Another approach, which would have the virtue of easy administrability, if not of full compensation to the defendant, would award defendants who are acquitted of all charges an amount equal to the statutory fee paid in

73. The potential for perverse incentives is even clearer in cases dropped before trial. If defendants were to be entitled to attorneys’ fees whenever an indictment was not brought or dropped, prosecutors might face pressure to continue prosecuting, at least to the point at which fees would no longer be awarded. See Schultz, supra note 60, at 1341 (suggesting a similar incentive under the Independent Counsel Act).


75. FED. R. CRIM. P. 29(a).
appointed-counsel cases. While this would overcompensate "lucky" defendants who were properly charged and should have been convicted and undercompensate truly innocent defendants who almost inevitably will have spent more on their defense, it would at least give successful nonindigent defendants a governmental contribution equivalent to what their indigent counterparts receive.

I confess I do not have an entirely satisfactory resolution to the fee-shifting question for acquitted defendants, precisely because acquittal—unlike a finding of unconstitutionality or of government misconduct—communicates a somewhat ambiguous message. It seems worthwhile, however, to begin asking whether, and how, the general arguments for fee shifting can be adapted to the criminal context.

**Conclusion**

Most of the attention paid to questions of criminal defense costs focuses, and deservedly so, on the incentives created for adequate representation of the vast majority of defendants who must rely on appointed counsel. For the most part, when courts or commentators turn to questions regarding retained defense counsel, they focus on a narrow range of criminal law ethical or tactical issues. In this Article, I have suggested that some thought should be given to how, and by whom, retained counsel should be paid and that fee-shifting regimes in civil litigation may provide some insight into these questions.

F. Lee Bailey once observed that he had "knowingly defended a number of guilty men. But the guilty never escape unscathed. My fees are sufficient punishment for anyone." Thus, saddling guilty defendants with the costs of their defense may actually contribute to the deterrent and punitive functions of the criminal law. But we surely should hesitate before concluding that defendants who are subjected to the criminal process solely on the basis of legal errors or government misconduct also deserve to be "punished" by being forced to bear the costs of their defense. Just as society generally pays the costs of the public attorney general who brings prosecutions because the criminal law vindicates more than simply the victim's interest in punishment, perhaps we should also pay the costs of the private attorney generals who vindicate more than simply the defendant's interest in a fair adversarial process.