

GoodWork Project Report Series, Number 25

**Role changing in our adversary system:
What do lawyers, the system, and society stand to gain?**

Jennifer Reese and Paula Marshall
May 2003

The GoodWork® Project

Acknowledgements

This law research was made possible by the J. Epstein Foundation. We are also indebted to the following individuals and institutions for their support of the overall Good Work® Project: the Bauman Foundation, the Carnegie Corporation, the Nathan Cummings Foundation, the J. Epstein Foundation, the Ford Foundation, the Fetzer Institute, the William and Flora Hewlett Foundation, the Christian A. Johnson Endeavor Foundation, Thomas E. Lee, the Jesse Phillips Foundation, the Louise and Claude Rosenberg Jr. Family Foundation, the Ross Family Charitable Foundation, the Spencer Foundation, and the John Templeton Foundation.

Finally, we would like to recognize the dedicated men and women whom we interviewed.

Suppose you have just received the disturbing news that the source of your recent headaches is a brain tumor. The situation is serious, but your doctor assures you that with proper treatment, a full recovery is expected. Once the shock subsides, your thoughts immediately turn to learning more about the necessary procedure and, more important, tracking down a neurosurgeon who has successfully performed many such surgeries.

Now shift gears and suppose you are a college freshman registering for next semester's classes. You did not receive any financial aid towards your degree, and you feel particularly concerned about making every dollar count. Upperclassmen and your academic advisor have recommended several not-to-be missed courses. Of special interest is a Government course taught by a senior faculty member whose reputation as an excellent professor has grown steadily during his 20-year tenure at the university. You eye the winding registration line for this course and decide to add yourself to the hopeful queue.

Finally, suppose you are a television network executive, responsible for making location assignments when suddenly a war breaks out. Which reporters should go straight to the hotel reserved for members of the press? Which journalist gets sent out with a division of ground troops? Whom do you trust to man the newsdesk and handle minute-by-minute updates for days on end? A short list of names comes to mind: a handful of correspondents who each have war coverage experience spanning several decades, an anchorman who built his career at the network.

These three seemingly unrelated scenarios are linked by an assumption that many of us make every day: the longer one spends in a professional role, the greater her expertise and quality of work. Admittedly, this statement has its limitations. We can all think of veteran professionals whose work has become tedious or disreputable; and as much as we hate to admit it, aging can place some natural limits on the ascending years-of-commitment/skill correlation. Nevertheless, there is general agreement that time spent developing one's skills equips an individual to meet the expectations of his/her profession. In medicine, it would be absurd to suggest that a person in need of complex brain surgery be operated on by a surgical resident fresh from medical school. In the realm of collegiate education, undergraduates at large research universities are known for voicing their displeasure when attending classes taught almost exclusively by graduate students who earn nominal sums as teaching fellows. And in journalism, where traditional definitions of excellence revolve around accuracy, perspective, and lack of bias, novice reporters have much to learn about assembling well-conceived informative news articles as they experience the extreme time constraints prevalent in that business.

But does this role constancy model suit every profession? Consider criminal law and its inherently adversarial system. In most professions, including those noted above, there are clear-cut roles with the intended skills and responsibilities that individuals are expected to carry out. While one might choose from a number of specialties within a profession (e.g., anesthetist, pediatrician, obstetrician in medicine), these specialists ideally work collectively and compatibly and agree to fulfill the mission of that profession.

The adversarial system relies on the skills of different advocates to represent their party's positions to a judge or jury who then try to ascertain where the truth lays. In criminal law, the defense attorney is required to zealously advocate for her client; the prosecutor has the responsibility to scrupulously observe protocols of evidence to prove the accused guilty beyond a reasonable doubt; and the judge is required to maintain impartiality and neutrality as she listens to the evidence of the case. The effectiveness of our adversarial system depends, to a great extent, upon each lawyer's allegiance to her role and ability to carry out her duties. Frequently, individuals choose a role within the criminal justice system based on their personal preferences towards the ideological perspective of a specific role. In other words, an individual who believes that his/her responsibility and accountability is to the victims and to the laws of our society might have a difficult time defending an accused who has harmed and broken those laws. Likewise, an individual who believes that there is bias towards and injustices perpetrated against individuals of certain races, social and economic status might have a difficult time prosecuting those same accused individuals. Regardless of one's ideological position, however, it stands to reason that if the old axiom is true and practice does make perfect, prosecutors will become better prosecutors, and defense attorneys better defense attorneys if they tenaciously maintain their focus and function in the same roles throughout their careers.

We suggest that what seems intuitive may in fact not be. Given not only the partisan ethic of lawyers, which is characteristic of the adversarial system, we found that justice is also emblematic of that partisan perspective and is in subtle ways perceived differently by defense attorneys and prosecutors, and that the criminal justice system itself reinforces these contradictory views. We suggest that if the defense attorneys who see the system as inherently unfair, and the prosecutors who focus on punishment and accountability are willing to change roles, their shift in focus would add perspective to their work and both amplify their views of justice and support greater nuances of fairness within the criminal justice system.

To explore this in greater depth, our entry point begins with our research on "good work" in the professions. Since the inception of the GoodWork Project in 1995, we have been studying how professionals in a variety of fields including: genetics, journalism, business, theatre arts, philanthropy, higher education, and law carry out work that is high in quality and socially responsible. Interviews with leaders in these professions have revealed individuals' goals and values, the obstacles they have confronted, and the work strategies they've implemented towards doing good work.

Between September 2001 and April 2003, we interviewed over fifty exemplary legal professionals—criminal lawyers, corporate lawyers, as well as "small town" general practitioners. These individuals were nominated for participation in the study by those who are knowledgeable about the field (e.g., other lawyers and judges, law professors) who regard them as exemplary practitioners doing high-quality work. In what follows, we focus on data from our criminal law study, a study in which we interviewed twenty-

five professionals, age 38-65, in the role of defense attorneys, public defenders¹, prosecutors and judges. Seven (28%) of these professionals have been both prosecutors and defense attorneys over the course of their legal careers. We contrasted these role-changers, though few in number, with those who have functioned exclusively in one role throughout their career (non-changers). We found that the evidence from our criminal law study points to the benefits of role changing as a career move for both the practitioner and the criminal justice system as a whole.

ROLE EXCLUSIVITY

The general assumption is that the longer one is in a profession, the better he/she performs the associated work. In criminal law this would suggest that the more cases a lawyer handles, the greater the breadth and depth of her experience and knowledge from which she can draw as she defends or prosecutes each new case. Defense attorneys gain the ability to communicate, analyze, examine, and effectively defend the most difficult defendants. And prosecutors, with power over life and liberty, serve with impartiality the cause of justice, to proceed or not to proceed with a prosecution. The lawyers gain trial experience become adept and comfortable in the courtroom and learn to read judges and persuade juries.

Benefits of Role Exclusivity

1: Commitment leads to rewards

Over time, lawyers gain expertise and competence developing a rapport with law enforcement officers and other associates, establishing critical professional relationships, which may ultimately lead to more challenging work and responsibilities. Experience offers a platform from which to share insights and knowledge garnered over the course of one's career. For example, Beverly², who has been a prosecutor for 21 years, believes that society benefits when skilled, devoted individuals commit their lives to the service of a particular role:

They give you a lot of training. And then when you're really in a position where you can do some good and you can pay back the investment, people end up leaving. I started to feel along the way that victims of crimes and the citizens whose public safety is at stake deserve to have people that want to make it a career and want to be successful at it in the professional way. Not necessarily by grabbing headlines or being a famous person, but getting the personal satisfaction out of doing a job well done...[This job is] not just a stepping stone, but a place where you can grow and develop and face new challenges and do some good. You don't get the exciting, strong cases where people are really outraged until you've been around for a while and you're going to be – there's only so much excitement that can be generated by prosecuting driving offenses.

Beverly's institutional memory and practical knowledge are assets that serve her own personal interests, her office, and the victims for whom she fights. Staying in her role as prosecutor is deemed as a responsibility to the profession and to the public.

¹ For the purposes of this paper we group public defenders in the category of "defense attorneys" except where particular distinctions need to be made.

² Names have been changed in the interests of confidentiality.

2: Becoming an agent of systemic change

With maturity and experience often comes a broader perspective. In the earlier years of Glenn's defense career, he had an "us against the world" approach; similar to many lawyers, he looked forward to celebrating each case he won. Today Glenn no longer calibrates his success based on individual wins, but instead focuses on the social causes of his criminal defense work: "What I like about the work now is that I try to move from my original commitment to representing one client at one time to ensure justice, to a broader commitment of what I will call, reforming the legal system." Glenn told us that his:

goal now is to worry less about celebrating the win and [instead] trying to figure out how to do more reform so that I don't have to go and try to win a case...that's the maturity, that I understand that no matter how many cases I win, if the system is still broken, then these are hollow victories.

While winning still has a place in his life's work, he began to realize that each win did not solve the underlying social causes that were implicitly a part of his criminal defense work. Poverty, despair, depression, anxiety, neglect, abuse are rarely discussed in the context of the case. He states that, "I am trying to tell people, 'Don't just look at the result, but try to figure out how this person found themselves in this position.'" Glenn has not abandoned his role of defense lawyer; he has changed how he construes that role. At this point in his career, he is a "trustee," someone whose commitment and contributions have earned him high status and the responsibility of tending to the overall health of the profession. While this is not the case for everyone who stays in his or her role, Glenn has revitalized his work by expanding his responsibilities and, as a result, has found greater personal satisfaction while at the same time offering broader benefits to society.

3: Building blocks: confidence, reputation, and trust

Steve became a prosecutor immediately after graduating from law school. Now in his 40s, his sense of competence and self-assuredness are the products of years of devotion and hard work. As he recalls, young prosecutors struggle to do right by everyone--to impress judges, police officers, opposing attorneys, victims, and one's supervisors by preparing scrupulously for each case, following the protocols for disclosure, and preparing witnesses for trial. But Steve recalled that, "Tell[ing] a police officer... 'I'm going to turn this over to the defense attorney'" demanded that he present his insights with honesty and with self-confidence. After spending a few years in the role of prosecutor, Steve came to understand that:

once you have the comfort and the experience and the ability, personally, to withstand that type of pressure, not only are you going to gain the respect of the police, and family, and victims, and judges, and defense attorneys, but it's going to be all the more eas[y]to make that tough call down the road.

Confidence in one's abilities and integrity of one's actions are the first steps to developing a good reputation among one's peers. Eleven (44%) of our subjects underscored that one's reputation is influence by the work process and product. A good reputation opens doors, builds trust, and ultimately bolsters the integrity of the criminal justice system. Steve proclaimed that "when you get to a certain level, as in any field, there is a mutual respect among both sides."

Developing trust and establishing rapport takes time. Within his first few years as a prosecutor, Steve learned that “you can’t be an effective prosecutor if you don’t have the trust of the police with whom you’re working.” And of course the reverse is equally true. When the police are trusted and become a part of the prosecutor’s team and the prosecutor feels that she is part of the investigation team, a fair and effective case can be presented to a jury:

I have many close friends who are police officers and I’m sure police officers have many close friends who are prosecutors. But breaking down those institutional or traditional barriers between law enforcement officials, meaning police officers, and lawyers – there’s sort of an inherent—not distrust, but it takes time and it takes working on cases. It certainly isn’t insurmountable, but to have gotten to the position I’m in, I think I’ve, for the most part, been successful in gaining the trust and the respect of police officers. Because if you don’t, it can be incredibly problematic.

Concerns about staying in the same role

Despite these considerable benefits, there are potentially serious consequences to spending an entire career in the service of a single role in the criminal justice system. During our interviews with prosecutors and defense attorneys, grievances about the “other side” were expressed with surprising frequency. For example, a presumption that the other side received preferential treatment from a judge. While there are cases in which such grievances are valid, we suggest that when expectations of dishonesty and corruption become ubiquitous, lawyers approach their work with an eye to that deception, and their expectations within a system that has ultimate power over life and liberty can become bankrupt. Our study suggests that each role yields to a different view of justice, and one’s professional environment further reinforces these contradictory views. We suggest that the effects of staying in one role may pose a threat to the integrity of the criminal justice system.

We now focus on how attorneys reflect the limitations of exclusivity.

Concern 1: Distorted views of the other side

When asked to nominate others for the study, several defense attorneys/public defenders had an especially difficult time providing even a single name of a “good” prosecutor. Gail, a public defender for about 20 years (who referred to prosecutors as “the enemy”) laughed when we asked her to recommend a “good” prosecutor and shared her “joke” with a colleague, who was similarly unable to provide a nomination. She told us that “what I respect most in a prosecutor, and this is a very rare thing to find, is someone who is scrupulously honest and will not hide evidence or will not prevent you from finding out exculpatory evidence. But that’s very hard to find. Not many prosecutors are like that.”

Once a lawyer perceives the “other side” as unscrupulous, the ground rules threaten to shift; she might feel entitled to act less scrupulously in order to level the playing field. Even if she does not stoop to unacceptable conduct, she might at the very least become suspicious and distrust the other side and that has its own set of consequences. We were told consistently by those we interviewed that lawyers feel better about their work when the opposing attorneys are skilled and ethical. If lawyers perceive the opposition as

untrustworthy or sub-par, they focus with a jaundiced eye on a system that seems unfair and unbalanced.

Bad examples have a way of playing into the collective stereotypes of the worst of the criminal justice system. Prosecutors expect defense attorneys to conduct insensitive cross-examinations of the victim or his family, adding to the trauma they have already experienced. Defense attorneys assume that prosecutors are in cahoots with law enforcement agents, and interpret most police testimony as specious, if not out-and-out lies. One prosecutor told us about a time when:

I had a trial in which I put my case on and then they pulled out a witness that basically blew me out of the water and the jury ended up doing the right thing, but it was almost as if, “Ok. You got your Perry Mason moment.” If we had the information earlier we might have done something with it.

A defense attorney commented that:

Criminal defense lawyers are scrutinized especially closely because of the prejudice that people assume if we are representing people charged with crimes, then somehow we must be supporting the fact that they have done this crime, or we are trying to help them get away with the crime, or we are trying to thwart justice. Therefore if we are willing to do that, then bending ethical rules will be easy.

And sometimes cynicism sets in after one has been in a role for a long time:

I can’t tell you how many trials I had as a younger lawyer with everybody in the courtroom, court office, everything, [saying], “You don’t know what you’re doing. Your guy is guilty.” It’s all to get you — I’ve always believed, even though they may not be conscious about it — from doing your job. And so you learned very quickly to tune that out. The whole system is there to prevent you from doing your job.

Concern 2: Disparity in definitions of justice

In 1996, the American Bar Association issued a report stating that one of six essential characteristics of a professional lawyer is “engaging in these pursuits as a part of a common calling to promote justice and the public good.”³ Given this common calling to promote justice, we were surprised to find that defense attorneys and prosecutors define justice differently. This finding can be explained, in part, by examining the differences in the role responsibilities and analyzing the way in which the focus of each role creates a predilection for a particular view on justice.

Defense attorneys and prosecutors have distinct sets of responsibilities. As outlined by the American Bar Association, a defense attorney’s responsibility is to defend his client (the accused) zealously and seek the best possible results for that client.⁴ In accordance with this responsibility, the defense attorneys with whom we spoke related a commitment to three objectives: holding the government to its burden of proof, righting the balances of an unequal society, and advocating that the accused be considered in the context of his entire life rather than defined and condemned by his actions.

³ Professionalism Committee of the ABA’s Section of Legal Education. 1996 report.

⁴ See <http://www.abanet.org/cpr/ethics/mcpr.pdf> for the American Bar Association’s complete Model Code of Professional Responsibility.

Oftentimes defense attorneys are called upon to represent offensive and unsavory characters, but zealous advocacy works far beyond the personal relationship that exists between client and attorney. As one defense attorney put it:

The trial is not about, as so many prosecutors make it, whether we approve or disapprove of rape. Of course we disapprove of rape. But the trial is, every time, a political statement between the power of the government, its enormous power to prosecute and to punish an individual, a single individual, and what stands between that...But you stand between the government and the citizen accused; give him the trial you would ask for anyone close to you, and that's what they really do...it is precisely in those cases that it's most difficult—I mean the despised defendant, the heinous crime—that it is most important that we, the defense bar, give as much as we can.

Defense attorneys often speak about *fairness* when they talk about justice. They are concerned with leveling the playing field; defending equal rights and equal access under the law. One defense attorney told us that her most important core value was, “a sense of people being treated fairly,” while another commented that:

[One of the primary beliefs that guides me is a frustration with a] system where these irrelevant factors came to bear and twisted the system and manipulated it in ways that were undemocratic and unfair...But it's also true that we have a prison system and a system of convicting people that is an utter disgrace and runs completely contrary to what we say our values are about fairness.

No matter what the accused may have done, defense attorneys acknowledge that criminal acts do not stand alone. Each person's life is subject to a unique set of forces, and appreciating these is an integral part of understanding and defending the individual. Defense attorneys often view their clients' foibles, weaknesses, and sorrows as emblematic of the larger issues of society and believe that these individuals, like everyone else, deserve a competent and zealous defense. A public defender said we should:

...look at the Boston school system. For a while there, they were graduating people that couldn't even fill out job applications. What do they expect? I am not making excuses, but I can understand why somebody might feel they have no recourse but to steal a piece of meat from Stop & Shop to feed their family.

Prosecutors are bound by a set of procedural responsibilities. There must be probable cause to prosecute an individual, and prosecutors must disclose potential exculpatory evidence.⁵ With these obligations come the implicit responsibility to protect society. Three themes emerged from prosecutors' commentary on justice: the credibility of the investigation and trial process, the authority of evidence in establishing guilt, and the necessity of retribution for victims.

The prosecutors defined justice in terms of a legal process more so than a particular outcome. If a defendant is given due process, has a “clean” trial, and is found guilty by a jury of her peers or a judge, then justice is served. To one prosecutor, this looks like:

⁵ Ibid. Canon 7.

If you simply follow the facts and follow the evidence...there is a fact pattern which, in fact, happened. And presumably when the evidence, when the facts lead to what happened, that's the truth and that's justice. And if justice or the truth is that the person who the police arrested or who I decided to charge or whose arrest I approved isn't the person, then that's the truth. And that's justice.

Justice from this perspective implies a recognition that guilt is established by a preponderance of evidence. If the accused pleads guilty or is found guilty in court, justice is served. Likewise, when the accused is exonerated, justice is served. The recurring phrases used by prosecutors are "bring people to justice," "hold them accountable." In contrast, the defense attorneys used the word "fair" less frequently and required that the search for justice take into consideration a defendant's life history.

Justice, as defined by prosecutors, carries with it a sense of retribution for victims. Beverly, a long time prosecutor, explains, "I have a lot of cases where people are hurt and I really genuinely care that what happened to them is brought to justice, the act is reviewed by the community and that justice is served for them."

Every workplace has its unique culture, which is a powerful force that can both subtly and overtly influence people's perspectives and behavior. We have evidence that the institutions in which these lawyers work further reinforce and shape their employees perspectives on justice and how they perceive the "other side." When attorneys identify too closely with a particular "team" and its mission, good lawyering can be compromised.

Edward, a judge, observed that private attorneys often do better work because they do not identify themselves with a particular group mentality. He mentioned a good lawyer who:

is hardworking, but he is not carried away by rhetoric, and he is not carried away by fanatic mission...He is doing his duty...but he is not extremely adversarial, and it does warp the system when you get people who are so adversarial that they cannot strike a balance. They cannot negotiate with the other lawyer. They cannot look for a practical outcome for their client.

Investing one's energies on a particular view of justice, places a heavier burden on the system and on society to maintain the integrity and balance of the system. One well-regarded prosecutor told us that:

If you told me that this person didn't commit the crime, if I knew he didn't do it, I could...do whatever it took to make sure they were found not guilty... If you tell me that this guy didn't sexually abuse and strangle this little girl, I could do whatever you do to get him off. But not knowing that, I'm not sure that I could divorce or separate my values to be able to do what [defense attorneys] do day in and day out. And that's just because that's the way the institution, or my job, had sort of molded me or focused me—insofar as I now genuinely believe that I'm doing the right thing going about my business the way I do.

Now consider this defense attorney's declaration:

I could prosecute very powerful people. I could prosecute presidents, judges, terrorists...I would find it very hard to prosecute the powerless. The one thing I am not is a bully. I love to take on people stronger, more powerful, wealthier than I am. I always fight up. I never fight down. And so being a prosecutor would be hard for me in that

respect... Taking on people who are powerless—I've never understood the virtue of that. I don't do it.

If defense attorneys chose only to defend the innocent, the criminal justice system would cease to exist. Defending people who commit crimes is integral to our system. Likewise, if prosecutors only found value in prosecuting white-collar crimes, countless everyday cases might slip by, unpunished out of prosecutors' distaste for bullying. When those sworn to uphold justice perceive their banner in disparate ways, there is reason for concern.

CHANGING ROLES

We have seen that prosecutors and defense attorneys, as shaped by their role responsibilities and professional environs, differ in many ways, particularly on their definitions of justice. These disparities are especially notable between lawyers who have never changed roles. What happens when an individual chooses to change roles and approach the law from the other side of the aisle?

Of the 25 subjects we interviewed, seven (28%) changed roles at some point in their careers. Three of these left their defense work to become prosecutors, two did the reverse, one individual was a public defender and became an assistant DA; then she returned to defense work several years later. Another individual started as an assistant Attorney General, moved to defense work, and then took a job as an assistant DA. Three are presently sitting as judges. Several interesting insights emerged after interviewing criminal defense attorneys who became prosecutors and prosecutors who became defenders of the accused. We noticed that those lawyers who changed their roles trusted the intentions of the other side and implemented new strategies that were inspired by a broader view on justice.

Although eight of our subjects became judges,⁶ judges were not counted as role changers for this paper unless the judge was both a defense attorney and prosecutor before his/her appointment to the bench. Since defense attorneys and prosecutors devote their skills to opposing sides of a case, we presumed that individuals who chose to switch between prosecution and defense might present the most compelling examples of shifting perspectives.

Why change roles?

Why would someone change sides after developing competence and skill in a particular role, especially since role changing in the criminal justice system is not the easiest of career changes? Such a switch requires taking on a new perspective and an entirely new set of obligations. This can be especially challenging for those who chose their role based on deep convictions about the relationship of the law to society.

We suggest a number of factors may play into the decision to change roles. One might be boredom; another might be the desire for a better remuneration. And others might be

⁶ Four were defense attorneys, one was a prosecutor, and the other three performed both roles before becoming a judge.

motivated by their ambition to move into judgeships or political offices, jobs in which strong candidates also boast well-rounded résumés. Helen, a superior court judge, explained:

I practiced as a prosecutor, a criminal defense attorney, a civil plaintiff's lawyer, a civil defense attorney. I've done mediation. And now I am a judge...[I] expand[ed] my trial advocacy horizons with the idea, frankly, of eventually going on this court.

Benefits of changing role

The testimony of the role changers revealed a number of advantages. For some professionals, changing roles helped to rejuvenate their energies and interest by forcing them to confront new challenges. Taking on a different role brought an appreciation of the “other side”, and with that understanding came an increased trust. Changers also reported that they developed strategies using their unique sets of skills and experiences, which enhanced their abilities to solve problems. And interestingly, lawyers who experienced both roles in the criminal justice system defined justice in a broader, more encompassing way.

1: Renewed energy

It is not uncommon for people in all lines of work to feel professionally stagnant when the work seems (or is) repetitious and initial professional goals have been reached. This is often a good time to reassess one's work life and to make changes. After spending over twenty years as a prosecutor, Patricia left her fellow assistant district attorneys to become a defense attorney.

I needed to break out, I also had done twenty-one years and virtually anything gets old...I think for me, as a prosecutor, changing jobs was important; if I had stayed in the same in the same job for a long I think I would have had trouble... you'll see prosecutors that do stay in the same office and same location for a career — it made me crazy. So a change in location, cases, perspective, responsibilities; change is important.

Although she has been doing defense work for only a few years, Patricia enjoys the challenge of taking on new perspectives and responsibilities, and reported that she has experienced the most satisfying moments of her legal career while defending the accused.

I've got one fellow in federal court on very, very serious drug charges, and the opportunity to help this man was a professional peak...I just really felt challenged and stimulated and as though I [had] an opportunity to do some extraordinary service for somebody who really badly needed it...I find that it's just a different view of the world.

2: Demystifying the “other side” and building trust

An old adage tells us that we can only understand another person's situation if we walk a mile in his shoes. One way to gain a better understanding of another person's perspective is to put oneself in his place. When criminal lawyers switch roles, they do just that. A prosecutor who complained about defense lawyers a short time ago, now may have those same lawyers as his colleagues. Defense attorneys who once thought that prosecutors have boundless financial resources find that the burden of proof is truly onerous, and that the cost of crucial expert testimony can hover out of reach.

Consider the change that Patricia underwent when, after over two decades of prosecution, she became a defense attorney. Patricia graduated from law school inspired by a goal to

help others, yet in looking for her first jobs, she never considered defense work. She did not have any interest in assisting people who were accused of breaking the law and assumed defense attorneys were mean, tough, and aggressive.

However, after working as a defense attorney for a short period of time, Patricia understands in ways she never could have before the complexities and nuances of the system. It used to be that when it was time for an exchange of discovery, she felt frustrated with defense attorneys who shared little by claiming that the rules did not apply to particular documents. She stated that this contributed to her perceptions that, “defense attorneys will do anything to save their guy. They’ll put their ticket on the line...all to defend some criminal.” Because prosecutors bring cases forward only if they believe the evidence supports the defendant’s guilt, the defense attorneys’ attempts to prevent this conclusion was seen as obscuring the truth. Patricia now finds herself thinking:

Gee, I know that I got a piece of paper that’s says “I saw your client do it and I got a videotape of that.” Am I going to turn that over to the prosecution? I am going to have to think about whether I am going to do that or not. Whether I’m really obligated and there is some reason why that rule doesn’t apply to that piece of paper.

Suddenly the rules about discovery do not seem as clear-cut; she has a new appreciation for the strategies that defense attorneys use.

Changing roles may also increase the trust a lawyer feels for his courtroom opponents. Upon becoming a prosecutor after having been a defense attorney, Patrick found that he was more open to defense counsel arguments than most other prosecutors. A number of years after his return to defense work, he made a comment about prosecutors that was informed by his time at the district attorney’s office—“I know many terrific prosecutors who are guided by a sense of fairness and justice.” This stands in sharp contrast to the longtime public defender’s opinion that good prosecutors are “rare.”

3: New strategies and a broader view on justice.

Participating in both sides seems not only to enhance trust between the sides, but also to give lawyers more experiences from which to draw. Staying in one role for a long time facilitates the development of a strong skill set, yet changing roles offers a different kind of opportunity. What role changers gain in breadth of experiences and an expanded knowledge base, they may lose in depth of experience. But the new strategies that role changers employ often bring a broader understanding of justice to their new roles.

Part of Patrick’s definition of justice involves being fair and affording people equal opportunities. Although originally a defense attorney, he became an assistant district attorney when a peer was elected to that post. When Patrick became a prosecutor, his definition of justice did not simply switch to a victim-oriented perspective. Instead, he brought with him his core notions about justice and fairness and used these to inform his work as a prosecutor. For example, in the criminal justice system, the sentence that is offered to the accused as a plea bargain is often less severe than the sentence she will face if she chooses to go to trial. Patrick, however, does not think that people should be punished for exercising their right to trial (by facing higher sentences than they would if they plea bargained). As a result, he made it his practice as a prosecutor to offer only one

recommendation for sentencing, regardless of whether it was for a plea bargain or a decision by the defendant to go to trial.

Role changing also provides an excellent preparation for judges. Judges, as overseers of a fair and unbiased system, benefit from thinking beyond a narrow perspective, and the public benefits when their actions are informed by this broader understanding. Janine started out as a prosecutor, moved to defense work, and later became a judge. Her experience as a prosecutor led her to side with victims and to feel sympathy for their pain and frustration. In those days, she saw the defendant not as a whole person, but as the perpetrator of a violent, isolated act. A sentence was only a number; she did not contemplate the actual time in years when a human being was sent to jail. Once Janine started working as a defense attorney, she became sympathetic to her clients' plights. As her experience grew, so did her knowledge of the prison system; she began to see prison time as dead time, if not outwardly destructive to the person's sense of his/her own humanity. Now that she is a judge, Janine still embodies the prosecutor's drive to hold people accountable for their actions, but also takes into account the defendant's life and the repercussions of jail time when recommending sentences.⁷

Even those attorneys who have thrived in one role for decades can change sides, have a rewarding experience, and come to see justice in a different light. Take Patricia who, as her prosecutorial career progressed, increasingly adopted a "tough on crime" attitude. This woman, once named Prosecutor of the Year by a state DA association, recently became a defense attorney and has since undergone a notable paradigm shift. She still feels very close to her prosecutor experience, but notices that her punitive inclinations are changing, albeit slowly, as she spends more time as a defense attorney. She imagines that if she were to return to prosecuting, she would take with her the ability to consider the defendant as an individual and to look at the whole life, rather than a single event, in contemplating her approach to a case.

As Patricia later discovered, a change in roles had a surprising effect on her political views. In response to the post-September 11 attorney/client regulations: the recommendation that conversations between defense attorneys and certain defendants be monitored if there was any suspicion that the defendant could be using those conversations to communicate with terrorists, was unsatisfactory. What she once might have understood as a reasonable measure, she now questioned as an infringement of individuals' rights:

That, when I was a prosecutor, would have made perfect sense to me, I am sure, because there is sort of an intuitive appeal to it. But when you are talking to a client in a federal lock-up where you just know you are being video taped and you're not really sure you're not being not taped anyway...you're kind of like, "Boy this would be incredibly inhibiting if you knew that your conversations with your client were being monitored because it was the Richard Reid case or some other terrorist type of defendant." It would be very hard to have a whole hearted open communication with a client; you'd find yourself speaking in code. So it really helped me to register my very strong views that it

⁷ Due to mandatory minimum sentencing guidelines, she often exercises these views by recommending the lower end of a mandatory sentence.

was a bad policy... That's the kind of situation where I find my own thinking evolving based on my direct experience.

Concerns associated with changing roles

Changing roles is not for everyone, and even people who do feel ready for a change may face difficulties associated with the transition. A role change not only means learning a different skill set, establishing new professional relationships, taking on new role responsibilities, but also may require a paradigm shift in one's social or political philosophies.

1: Expertise diluted

If someone is doing an excellent job as a defense attorney, why move to the DA's office? As Beverly commented, many attorneys burn out or decide to make a career change just when they reach a particularly valuable level of expertise. Changing roles in mid-career would certainly broaden one's skills, but it also might dilute institutional proficiency by diminishing the time spent in a particular arena.

2: Wherever you go, there you are

Many of the defense attorney and the prosecutors reported that they would not be morally comfortable in the opposite role. Brian, a prosecutor, told us that he would not be comfortable being a defense attorney because he finds it difficult to say something he doesn't believe in. He recognizes the importance and critical component of a zealous advocacy, but could not muster up a "fight for the underdog" mentality. The passion of one's belief system helps a lawyer to engage in such a battle. Both Brian and the system might be better off if he stayed true to his moral compass and continued to work as a prosecutor.

Elizabeth spent many years as a defense attorney and now sits as a judge. She briefly considered becoming a prosecutor, but concluded that she would have difficulty reconciling her prosecutorial responsibilities and her personal beliefs:

I think the drug laws are crazy. I tell my kids up and down the line I don't want them to experiment... But I also believe that we create the problem by criminalizing them to this degree. We've made it financially rational for poor kids to do all sort of things. So I mean what would happen? Could I get on television to talk about the war on drugs? I mean I would feel like an idiot. I couldn't do that. So to some degree, the lynchpins of prosecuting I couldn't do. If I could restrict my prosecuting to certain issues that I was interested in would be one thing, but not—the criminal justice policy has become so much about symbolism and not reality that I just couldn't play those games.

Paul, a judge and former prosecutor, had similar qualms, although representing the flip side. He told us that he had a lot of respect for defense attorneys and their place in the adversarial system, but he never wanted to be one himself. His explanation was that, "I guess at a sort of elemental level, I had the sense that there are the good guys and the bad guys... [and] at that point, preferred to represent the good guys." Paul later took a job with the Justice Department and:

having got in there and been on the prosecutorial side and, particularly, seeing that it made a huge difference who has the power to exercise public authority and how important good judgment and proper priorities were. That's a power that can be

employed for very good purposes; it's a power that can easily be abused...I trust me more than I trust many other people. I trust people I would hire and associate with rather than others. So there is a certain attraction to trying to see the powers of a prosecutor...exercised properly and to have the opportunity to do that.

3: Passion diluted

Many of our subjects expressed great passion for their work. Such commitment should not be underestimated. A person with a driving curiosity about the existence and structure of far off galaxies might make a better astronomer than someone who rarely looks to the sky; a person who is politically in tune to social injustices and finds inherent satisfaction in aiding the poor might make a better public defender or defense attorney than someone who feels that individuals are accountable for their actions, regardless of their circumstances. Society benefits from having workers who believe that what they are doing is interesting and important.

Many of the lawyers with whom we spoke stated that an important goal for them was to serve and to help others. It's not surprising that a lawyer could choose either prosecution or defense roles given that they both serve society and indeed "help others". Yet some attorneys' because of their unique family influences and life experiences, had more particularized goals to help those being abused by the system. For example, Andrew was "exposed to a lot of inequities" when he was growing up. When his family came to the United States, he faced difficulties because he did not speak English. He lived in the south for a few years in the early '60s and felt the sting of racial discrimination, which "was terrible to witness and stuck with [him]." Years later, Andrew was in Washington, D.C. during the Vietnam War protests, and he began to see inequities fostered by the government. Also, in D.C. he worked with a community of his own cultural background, and learned first-hand the daily injustices they faced. The echoes of these and other events "slowly evolved into a sense of, "This is awful...There are many wonderful things about the United States, and there are also some awful things about the United States...I want to do something about them." When asked if he had ever considered working as a prosecutor, he told us that

I just don't have it in me on a personal level to prosecute people, many of whom end up being poor, being people of color...[They] deserve to be prosecuted because many people before me have committed very serious violent crimes, but I just personally didn't have it...We need good prosecutors in any society. But not me; I am going to let somebody else do it.

Lisa is an African American woman who grew up in the '50s in the deep South and decided that she "had to be a part of making things different." Lisa believes that social inequality is pervasive and she is "committed to the dignity of the human being in every which way." Her passion for doing "justice work" is so strong that she stated, "if I couldn't be here or somewhere else doing work that addresses the conditions that oppress the human spirit, I couldn't exist." As Lisa conceptualized her career early on, defense work, rather than prosecution, was where she thought she could best work to alleviate the oppression of others. She later became a judge because that seemed to offer an even more effective platform for her mission of fighting for equality.

The case for changing roles

The practice of criminal law is not perfect, but all those we interviewed agreed, for the most part, that our adversarial system of justice provides the best framework within which to work. In his book, *Lawyers and Justice*, David Luban works through a number of the pros and cons of the adversarial system and at the close of this discussion does not extol its virtues, but makes the pragmatic argument that:

first, the adversary system, despite its imperfections, irrationalities, loopholes, and perversities, seems to do as good a job as any at finding truth and protecting legal rights. None of its existing rivals...are demonstrably better, and some...are demonstrably worse...If a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have.⁸

Like all other legal system models, the adversarial model has its problems, yet it continues to provide a structure in which quality work can result. And from what we learned from 28 exemplary criminal law professionals, it seems that, through an openness to role changing, small changes for the better are not so far out of reach.

Changing a legal system is no small task, and we do not mean to suggest that mandated role changing would resolve all of the criminal justice system's ills. Changing roles calls for a major paradigm shift that is not for everyone, and forcing lawyers to do so could be very costly to the criminal justice system. A handful of lawyers with whom we spoke would sooner eat their shelves of law books than participate in the system from the other side. As we mentioned, there are strong sociological and ideological predilections associated with each role. A defense attorney who believes in fighting for the downtrodden and oppressed would have a difficult time if he had to prosecute some of the most disadvantaged members of his community. The prosecutor who deeply believes in the values of personal accountability and vindication for the victim would struggle to look herself in the mirror after defending someone she believes to be guilty. Changing one's role within the system is a matter of choice. We are lucky to live and work in a society that allows such professional freedoms; it would be senseless to infringe on this.

Certain individuals, however, are quite willing to change roles. Neither deserters nor fickle practitioners, these individuals stand to enrich their own understanding of the system, its participants, and themselves. Role changing can be beneficial for those who would like to become judges, although it is in no way a requisite for excellent judging. Many non-changers make excellent judges, but changing roles may offer an opportunity to expand and enhance one's perspectives before coming to the bench. Lawyers who want to see systemic change may find ways to work towards this goal regardless of which role they choose. If a defense lawyer has the impression that the other side is corrupt, perhaps joining a DA's office and working in accordance with her highest standards may serve to alleviate some of the perceived corruption, or at the very least, to reassure herself and others with similar concerns that corruption is more rumor than reality.

⁸ Luban, D. *Lawyers and Justice: An Ethical Study*. Princeton, NJ: Princeton University Press, 1988, p 92.

Role changing can be a temporary job change. One need not even enjoy the new role to benefit from trying it out. Some lawyers start out in one role, make a switch, and then find themselves in their original roles a short time later. Even if a role change is not permanent, the time spent in the service of different responsibilities can lend a greater appreciation for the opposition's challenges and responsibilities. In the adversary system, there will always be an “us” against “them,” but role changing can mitigate some of the distrust that accumulates between sides.

Consider the English system, in which barristers routinely switch between representing victims and defending the accused. No matter which party he is representing, a barrister's standards for advocacy are the same: he has an overriding duty to the Court to assist in the administration of justice, and must ardently promote and protect the client's interests. There are several benefits to this distribution of services. As an autonomous agent, he “must not permit his absolute independence, integrity, and freedom from external pressures to be compromised.”⁹ He is independent of the central prosecuting authority and does not rely on that entity for his livelihood, thus he is under less pressure to push for a conviction at all costs. When representing the accused, a barrister benefits from his prosecution experience by being able to critique his case and build a stronger case that anticipates a prosecuting barrister's strategies. Barristers are comfortable that their experience prosecuting and defending does not compromise their integrity or create conflicts of interest. In the United States, the practice of medicine has an analogous responsibility to uphold its professional ideal. An emergency room physician, regardless of his/her ideological perspective, strives to save lives even when a patient has done something illegal or morally reprehensible. The practice of law in the criminal justice system has a similarly broad responsibility to its professional ideal to maintain a fair and equitable system of law.

For individuals interested in developing new professional skills, enriching their understanding of the criminal justice system, and broadening their perspectives on justice, role changing offers enticing professional opportunities. Yet the benefits of role changing go well beyond the individual. Role changing can enhance the functioning of the criminal justice system as a whole by providing a necessary balance to the system. Balance, the hallmark of our justice system, can be corrupted by *over*-zealousness and blind partisanship. Zealous defenders straddle a fine line. In representing the interests of a client who may have committed the crime in question, a skillful lawyer is not searching for “the truth.” Ideally she wants to hold the government to its burden of proof and to achieve a result that is best for her client, such as an acquittal, rehab assignment, or probation. Truth and justice can become subverted in this quest if one's focus is too narrow. Prosecutors, too, risk compromising the system when vindication becomes more important than seeking the truth. When criminal lawyers, no matter how disparate their responsibilities, fail to see eye to eye on the fundamental principles of the legal system, the interests of every member of society, law-abiding or not, are jeopardized.

The balanced perspective and broadened understanding of justice that role changers reported offers encouragement to other lawyers who might consider spending part of their

⁹ See <http://www.barcouncil.org.uk> for the Bar Council's Barrister Code of Conduct

careers litigating from the “other side.” The more lawyers and judges who can agree on a higher ideal for which to strive, the better the legal process and product. Our adversary system, functional but far from ideal, could benefit from renewed efforts towards protecting, preserving, and pursuing a common justice for all.

Works Cited:

Luban, D. *Lawyers and Justice: An Ethical Study*. Princeton, NJ: Princeton University Press, 1988.